SUPREME COURT OF YUKON

Citation: *KS v JF*,
2025 YKSC 68

Date: 20251017
S.C. No. 22-B0061
Registry: Whitehorse

BETWEEN:

K.S.

PETITIONER

AND

J.F.

RESPONDENT

Before Justice K. Wenckebach

Appearing on her own behalf — K.S.

Counsel for the Respondent — Paul Di Libero

REASONS FOR DECISION

Overview

[1] The plaintiff in this family law matter is K.S. and the defendant is J.F. I have been the case management judge on this file since the beginning of the proceedings. I have also presided in another family law matter involving K.S., *BCS v KS*, 2023 YKSC 71. K.S. has brought a recusal application, citing a reasonable apprehension of bias arising from the manner in which I conducted both cases.

[2] K.S. also seeks that the case management judge be a different judge than the trial judge.

[3] For the reasons provided below, I dismiss K.S.' application.

Introduction

[4] As K.S.' application arises out of allegations about my conduct in two matters, I will provide a summary of both actions.

BCS v KS

[5] In *BCS v KS*, K.S.' mother brought an action seeking to have access with B.C.S.' grandchildren (K.S.' children). The father of the children, D.S., was not named as a party. K.S. was represented at the hearing. I granted B.C.S. access. Afterward, the matter was brought back for clarification and enforcement of the order. At that point, K.S. was no longer represented. During the clarification and enforcement hearings K.S. sought to have D.S. named as a party. I summarily denied her request.

KS v JF

[6] The plaintiff's claim against J.F., filed December 7, 2022 (amended February 22, 2023), involves claims about property and child support. Pertinent to this application, K.S. alleges that J.F. should pay child support because he stood in the place of a parent to K.S.' two children.

[7] K.S. was represented by counsel on the issue of child support, but only for a time. She has been self-represented on the property issue since the beginning of the action, although, again for a period of time, she received assistance from counsel.

[8] I have conducted numerous case management conferences ("CMCs") in which disclosure, pre-trial applications, judicial settlement conferences, and other matters were discussed. I have also decided that the matter should proceed by way of summary trial. K.S. has also sought accommodations for her disability.

[9] As well as stating that my conduct of the proceedings in *BCS v KS* and the current proceedings raise a reasonable apprehension of bias, K.S. states that my previous involvement as counsel in a separate proceeding involving D.S. and failure to disclose that involvement during the *BCS v KS* proceedings raises a reasonable apprehension of bias.

Issues

A. Do my decisions and conduct in *BCS v KS* raise a reasonable apprehension of bias?

B. Is there a reasonable apprehension of bias because of my involvement as counsel in another matter involving D.S.?

C. Do my decisions and conduct in the current proceedings raise a reasonable apprehension of bias?

D. Do my actions cumulatively raise a reasonable apprehension of bias?

E. Should the CMC judge be different than the trial judge?

Law

[10] A party seeking that a judge recuse themselves need not establish that the judge is actually biased; rather, the party must show that there is a "reasonable apprehension of bias" (*Wewaykum Indian Band v Canada*, 2003 SCC 45 ("*Wewaykum"*) at para. 60).

[11] A reasonable apprehension of bias: "must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information." The question that may be posed is: "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that

[the decision-maker], whether consciously or unconsciously, would not decide fairly."

(*Wewaykum* at para. 60 quoting *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 394).

[12] The principles on reasonable apprehension of bias were summarized in *Taylor Ventures Ltd. (Trustee of) v Taylor*, 2005 BCCA 350 at para. 7:

> (i) a judge's impartiality is presumed;
>
> (ii) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;
>
> …
>
> (v) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;
>
> (vi) the test requires demonstration of serious grounds on which to base the apprehension;
>
> (vii) each case must be examined contextually and the inquiry is fact-specific. [emphasis in the original]

Analysis

A. Do my decisions and conduct in *BCS v KS* raise a reasonable apprehension of bias?

[13] K.S. states that the following examples lead to the conclusion that there is a reasonable apprehension of bias: I did not permit the appointment of a Child Lawyer nor did I give K.S. the opportunity to file an additional affidavit; I stated the facts incorrectly; I published the decision after delivering it orally; I made incorrect procedural decisions and findings of fact; I made negative credibility findings against K.S.; and I was exposed to statements and allegations about K.S. that tarnish her reputation and positioned

B.C.S. as standing in the place of a parent. In addition, I have considered whether the knowledge I acquired through *BCS v KS* makes it such that I cannot continue to preside over the current proceedings.

[14] I conclude that neither my conduct in presiding over *BCS v KS* nor the knowledge I acquired in those proceedings raise a reasonable apprehension of bias.

Facts

[15] On June 13, 2023, at the first appearance on the matter, I recommended the appointment of a Child Lawyer for the children.

[16] At the next appearance, September 29, 2023, I confirmed with K.S.' counsel that he would forward the Order of June 13, 2023, to the Public Guardian and Trustee (the "PGT") for her consideration of my recommendation that a Child Lawyer be appointed. The filing of further affidavits was also discussed. I stated that if K.S. wanted to file further materials, then B.C.S.' consent should be sought. If B.C.S. did not consent, the matter could be brought back to a CMC for a decision.

[17] Ultimately, a Child Lawyer was not appointed for the children. In an email dated October 26, 2023, the PGT contacted K.S.' and B.C.S.' counsel, advising them that there were numerous conflicts with the roster of Child Lawyers. It then stated that there was one lawyer who might be able to act on behalf of the children. He had had previous email correspondence with K.S. but nothing had been disclosed nor was he retained by her. The lawyer stated that he would be willing to act as Child Lawyer if the parties agreed. K.S. did not agree, stating she may still want to retain him. As a result, the PGT advised counsel the office was unable to appoint a Child Lawyer for the children. This was then filed in evidence at Court.

[18] K.S. was represented by counsel at the hearing. He did not seek an adjournment to further explore whether a Child Lawyer should be appointed. He also stated K.S. agreed that it was in the children's best interests to have contact with B.C.S. The true issues in the hearing were whether K.S. had acted reasonably and in the children's best interests about B.C.S.' contact with the children; and whether B.C.S. should have specified or non-specified access with the children.

[19] I ordered that B.C.S. have semi-specified access with the children. In coming to this conclusion, I recited the facts. I stated that K.S. was arrested after having broken a window at J.F.'s home. This was incorrect. K.S. broke a window at the home and she was arrested, but these were two different occurrences. I also determined that K.S.' evidence on some issues was unreliable.

[20] Subsequent to my decision, there were other appearances to clarify the order and for enforcement of the order. During these appearances, as well as seeking to name D.S. as a party to the proceedings, K.S. sought to revisit the appointment of a Child Lawyer for the children and whether supervised access should be ordered. I did not re-open the proceedings to re-examine the substantive issues.

Analysis

Appointment of Child Lawyer and Filing Further Affidavits

[21] Contrary to K.S.' submissions, I did not refuse to recommend the appointment of a child lawyer. There was no Child Lawyer available. Additionally, I did not state that K.S. could not file more affidavits; rather, I required that B.C.S. consent or that there be a further order from the court.

Error in Facts

[22] Regarding the error in my recitation of the facts, in oral submissions K.S. pointed to my error when I stated that K.S. was arrested for breaking a window at J.F.'s house. She submits my error raises the concern that I have been listening to rumours about her. What occurred, however, was that, having read that K.S. broke a window at the home and also that she was arrested, I conflated the two incidents into one. It was a mistake and nothing more.

Decision to Publish

[23] K.S. notes that even though I issued an oral decision I also had it published. She submits I published the decision to embarrass her by making it public. I will first clarify that the decision to publish is based on whether the judge believes it can assist parties and lawyers in other cases; it is not based on whether a judgment is delivered orally or in writing. In this case, I decided to publish the decision because the person seeking access was not a parent. There is not a great deal of case law on this issue in the Yukon and the decision included a discussion of the legal principles. I therefore considered that it could help to advance the law in the Yukon.

Findings and Procedural Decisions

[24] K.S. submits that I made numerous factual findings and procedural decisions that should not have been made. K.S. disagrees with many of my findings of fact. While I do not believe that I made errors in my findings of fact, even if I had, this does not, by itself, raise a reasonable apprehension of bias. Similarly, disagreement about procedural decisions, such as whether to grant an adjournment, does not, without more, raise a reasonable apprehension of bias.

Findings on Credibility

[25] K.S. also argues that a reasonable apprehension of bias arises because I found her not reliable. A reasonable apprehension of bias does not arise simply because a court has made an adverse credibility finding of a party or witness, however. Even in the same proceeding a judge may find a witness or party credible on one issue but not another. Something more, in addition to a negative finding of credibility, is required to create a reasonable apprehension of bias (*R v Novak*, 1995 CanLII 2024 at para. 7 (BCCA)).

Exposure to Negative Allegations and Arguments about K.S.

[26] K.S. also submits that B.C.S. brought her application to insinuate she was standing in the place of a parent with regard to the children. She states this was done to help bolster J.F.'s argument, in the current proceedings, that he was not standing in the place of a parent to them. K.S. concludes that having knowledge of B.C.S.' evidence, I will then be less likely to find that J.F. stood in the place of a parent for the children.

[27] The difficulty with K.S.' argument is that in my decision I did not treat B.C.S. as though she were standing in the place of a parent. My decision was about the access that a non-parent should have with the children. My determination on B.C.S.' access has no effect on any determination I may make about whether J.F. stands in the place of a parent.

[28] Finally, K.S. argues that B.C.S.' evidence contains allegations that would influence how I feel about K.S., such as a letter from her brother that B.C.S. attached to her affidavit. There is case law that speaks to this point. The Court of Appeal for Ontario has stated: "The mere prior involvement of the authorizing justice in an earlier

proceeding does not, without convincing evidence to the contrary, displace the presumption of judicial integrity and impartiality." (*R v Perciballi*, 2001 CanLII 13394 (ONCA) at para. 21). Judges routinely hear evidence that they must disregard, for any number of reasons. Hearing prejudicial evidence about a party, and then presiding over another matter involving that party, does not give rise to a reasonable apprehension of bias.

Acquisition of Knowledge

[29] While a judge's prior involvement in an earlier proceeding does not, by itself, create a reasonable apprehension of bias, there are circumstances in which the facts or allegations of one case overlap so extensively with that of another, that there would be a reasonable apprehension of bias for one judge to hear both cases. A reasonable apprehension of bias will arise when the judge's knowledge has "... such a negative effect on judicial impartiality as to cause a real likelihood or probability to exist in the mind of a reasonable and well-informed person that the judge in question could not put it aside and decide the issues of the case fairly on the merits." (*MacKinnon v MacKinnon,* 2001 PESCAD 20 at para. 7).

[30] I have considered whether my knowledge generally in *BCS v KS* puts me in the position where I should no longer preside over this case. In the end, although both cases are family law cases, and have one party in common, they are quite different. In *BCS v KS*, B.C.S. sought access with her grandchildren. Here, K.S. seeks property division and child support from J.F. Thus, the issues are different. B.C.S. has provided an affidavit in favour of J.F. in this matter and may continue to play a role in the proceedings. However, the evidence given in the two matters is largely different. If there

is cross-over between the two matters, it is tangential. I conclude that the knowledge I have gained form *BCS v KS* does not preclude me from hearing this matter.

B. Is there a reasonable apprehension of bias because of my involvement as counsel in another matter involving D.S.?

[31] K.S. submits that there is a reasonable apprehension of bias because I did not disclose that, before I was appointed as a judge, I acted as counsel in a matter against D.S. Furthermore, I did not mention my involvement in the matter during the *BCS v KS* proceedings. This creates the impression I was attempting to hide my involvement in the case and raises a reasonable apprehension of bias.

[32] I conclude that there is no reasonable apprehension of bias raised by my involvement in the case with D.S.

[33] Involvement as a lawyer in a different matter, or even the same matter, that then comes before the individual when they are a judge does not invariably raise a reasonable apprehension of bias (*Wewaykum* at para. 81). The determination of reasonable apprehension of bias is, rather, fact specific. Here, I represented a party against D.S. in proceedings completely unrelated to this matter. The area of law addressed was not family law. The proceedings also took place six years ago. Despite the lapse in time, I remember the proceedings, some of the information I obtained in my role as a lawyer and the evidence filed for the hearing. That information and evidence was relevant to the issues in that dispute, and irrelevant to whether B.C.S. should have access with the children when she sought it in 2023. No reasonable apprehension of bias arises from my involvement in the proceedings.

[34] As to my alleged failure to disclose my involvement in D.S.' proceedings, a judge may inform the parties where there is a possibility of a reasonable apprehension of bias *(Korf v Canadian Mortgage Servicing Corp*., 2024 SKCA 28 at para. 14). In this case, there was no possible reasonable apprehension of bias. There was therefore no need to disclose my involvement in the other proceedings with D.S.

C. Do my decisions and conduct in the currently proceedings raise a reasonable apprehension of bias?

[35] In the current proceedings, K.S. submits I have not accommodated her, provided her with the assistance she is entitled to as a self-represented litigant, and have made substantive and procedural rulings that are incorrect or unfair, all of which raise a reasonable apprehension of bias. I conclude, however, that there is no reasonable apprehension of bias.

Accommodation

[36] K.S. submits that she requires accommodation due to disability; and I have failed to provide it to her. It is my understanding that the accommodation she seeks is the appointment of a lawyer to assist her.

[37] K.S. has provided limited evidence about her need for accommodation and her inability to hire counsel. No formal application has been made for the appointment of a lawyer. This request has, instead, been made orally during the court proceedings and through written communications with the Trial Coordinator's Office.

[38] Appointment of counsel to represent a litigant is not simply a procedural matter. Possibly, the court has no ability to appoint counsel to be paid by the government for family law claims (*British Columbia (Minister of Forests) v Okanagan Indian Band*, 2001

BCCA 647 at paras. 27-28). The court does have the jurisdiction to appoint *amicus curiae.* However, a court may appoint *amicus* only where it is essential for the judge in discharging their judicial functions; and the authority should be exercised: "sparingly and with caution, in response to specific and exceptional circumstances." (*Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para. 47). Moreover, *amici* do not represent litigants but are "friends of the court". Their role is to the assist the court, not the litigant (at para. 118). An applicant seeking that the court appoint someone in a family law matter has, therefore, to address several legal and evidentiary issues.

[39] I say this not to prejudge any application K.S. may bring before me to appoint a lawyer in this matter. However, there must be sufficient evidence upon which I can decide such an issue, and there must be a proper legal foundation to do so[1]. When K.S. made her statement and I provided my response, no formal application had been made, I had no evidence before me, and I made no legal ruling[2]. It does not raise a reasonable apprehension of bias that I did not order legal representation for K.S.

[40] K.S. also takes exception to a statement I made, I believe, about her ability to represent herself. The statement was along the lines that it appeared to me that K.S. was able to represent herself, which I said in response to K.S.' statement that she could not. In saying this, I did not mean to dismiss her disability or the challenges and difficulties she faces in representing herself. I said this because in my experience, K.S. has filed coherent affidavits, displayed some knowledge of legal principles, and provided some legal analysis when making submissions. These are factors the court

[1] K.S. has pointed out that by requiring her to file applications, she is being forced to do what she cannot: represent herself. A CMC can be arranged to discuss how to simplify the process for her.
[2] Statements made during a hearing are not evidence unless they are given under oath.

uses in assessing a self-represented litigant's ability to represent themself. There may be a factor that I have not taken into account or of which I am unaware that affects K.S.' ability to represent herself. It does not, however, raise a reasonable apprehension of bias.

[41] Finally, K.S. states that she sought accommodation in accordance with the Practice Direction General-21, Accommodation in the Courtroom (the "Practice Direction") but was denied or ignored by the Court. The Practice Direction is for requests for accommodation from counsel, rather than parties. As K.S. is self-represented, it is understandable she may believe it applies to her. The Trial Coordinator's Office believed it applied to her as well. However, the considerations in accommodating counsel can be different than the considerations for accommodating a party, even if the party is self-represented. As a result, the Practice Direction does not apply in these circumstances.

[42] K.S. has not filed her communications with the Trial Coordinator on this issue, I presume to protect her privacy. I will seek to respect her privacy as well, though this means that the response on this issue will be more limited. To be able to respond effectively to K.S.' concern I have reviewed the communications that are on the file about K.S.' communications with the Trial Coordinator's Office, recognizing that they may not be complete.

[43] K.S. did make a general request for accommodations in October 2024. At the time, there was no pending court appearance on this file; and there was another active matter involving K.S. with a court appearance scheduled before Justice Campbell. K.S.

cancelled the appearance, as the parties agreed to proceed through mediation. Nothing further resulted.

[44] In December, following further correspondence from K.S., Justice Campbell clarified that a request for accommodation could not proceed informally but that K.S. could set down a CMC if she wanted to have directions from the Court on the issue. She also stated that K.S. would be required to state in advance the reason for the request of court time, with notice to the opposing party provided.

[45] K.S. did follow up in December to seek a Family Law Case Conference to discuss accommodation. K.S. had concerns that I should not preside because she was also seeking that I recuse myself, and I had stated that I would not be ruling on other issues before deciding the recusal application. K.S. was advised that the application was to go before the presiding judge in whichever matter she was seeking accommodation. She was directed to raise the issue of accommodation at the next hearing that was scheduled, which was her application before me for my recusal. The application was not heard, but the scheduled time was converted into a CMC. K.S. did not raise the issue of accommodation. K.S.' requests for accommodation through the Trial Coordinator's Office, and the responses, does not give rise to a reasonable apprehension of bias.

Court Assistance to K.S.

[46] K.S. also submits that I have failed to provide her with assistance, which creates a reasonable apprehension of bias.

[47] A trial judge has the obligation to provide assistance to a self-represented litigant. This may include providing self-represented litigants the information necessary to

understand the proceedings, assert their rights and provide arguments to the court. The judge must not, however, become a party's lawyer. They must also not provide so much assistance as to create the perception that they are favouring the self-represented litigant (*AD v AD*, 2018 NBCA 83 at para. 13). As well, the self-represented litigant is expected to "familiarize themselves with the legal practices and procedures relevant to their case… " and "… to prepare their own case" (*R v Lundrigan*, 2020 ABCA 281 at para. 118).

[48] In these proceedings, I have granted extended timelines and adjournments to permit K.S. time to file materials and consult with lawyers, explained the procedure as best I could, and given K.S. leeway in the presentation of argument. K.S. may disagree with my assessment of the assistance I have given her or believe that I should provide her with different assistance. Once again, disagreement about whether decisions were correct does not amount to a reasonable apprehension of bias.

Substantive and Procedural Decisions

[49] K.S. submits that I have made decisions that have favoured J.F. I will not go through each of K.S.' claims, however, I will address some.

[50] K.S. states I "fast-tracked" these proceedings, before the close of pleadings and when she was uniformed and unknowledgeable about them. K.S. filed her Statement of Claim on December 7, 2022. J.F. filed a Statement of Defence and Counterclaim on December 23, 2022. A CMC was held on February 22, 2023, at which disclosure orders were made. On that date, as well, K.S. amended her Statement of Claim. At the following CMC, held on March 13, 2023, on the agreement of the parties, the proceeding was set down for a summary trial, to be heard April 28, 2023. A further CMC

was held on April 4, 2023. During the C.M.C., K.S. stated she did not want to proceed with a summary trial, so I vacated the date for the summary trial. J.F. filed an application for the matter to proceed as a summary trial, which I heard on July 11, 2023, and on July 13, 2023, I concluded it should. The summary trial was set down for hearing, but was adjourned several times, and has not yet taken place.

[51] When I initially set the matter down for summary trial, it was because the parties consented to proceeding in that manner. When K.S. no longer consented, the proceedings did not move particularly quickly. I am not entirely clear what K.S. means by stating that I "fast-tracked" the proceedings.

[52] K.S. also states that I should not have ordered costs against her and did not provide reasons for doing so. I ordered costs for the application for summary judgment. I did provide reasons for ordering costs in court on November 9, 2023, stating that delay was the primary factor in awarding costs.

[53] Here, again, K.S. disagrees with my rulings as this matter has progressed. Even if I am wrong in the way I have conducted the proceedings and the rulings I have made, however, this does not raise a reasonable apprehension of bias.

D. Do my actions cumulatively raise a reasonable apprehension of bias?

[54] There are circumstances in which the judge's actions, taken individually, do not raise a reasonable apprehension of bias but cumulatively they do. In this case, K.S. disagrees vehemently with the way I have proceeded as case management judge, and in the way I conducted the proceedings in *BCS v KS*. However, a judge may rule against a party consistently, both procedurally and substantively, without raising a

reasonable apprehension of bias. Reviewing the way I conducted both matters, my conduct does not raise a reasonable apprehension of bias.

E. Should the CMC judge be different than the trial judge?

[55] K.S. did not explore this aspect of the application during the oral hearing. It would seem that the request to have a different trial judge would stem from the belief that a new judge would bring fresh eyes to the issues brought by the parties. In this case, I conclude that it is best for me, as case management judge, to preside at the trial.

[56] A case management judge makes procedural decisions. In CMCs, the court ensures the case moves forward in a timely fashion by overseeing and giving directions on the different steps of litigation and determining, clarifying, and streamlining the process for the trial (*Rules of Court* of the Supreme Court of Yukon, Rule 36). In the Yukon, a case management judge may preside at trial (Rule 36(7)). A case management judge will not preside at trial, except with the consent of the parties, if they have been substantively involved in settlement discussions with the parties, such as presiding at a judicial settlement conference or binding judicial settlement conference (Rule 37(8)). Otherwise, the determination of whether a case management judge will be the trial judge is discretionary and may be made by the case management judge or the Chief Justice.

[57] A case management judge may be best placed to hear the trial on the merits in cases where the pre-trial process has been complex or the case management judge has otherwise developed familiarity with the issues. This is such a case here. I made several pre-trial determinations and know what the issues are in these proceedings.

This allows me to move the matter forward more expeditiously than if another judge were appointed to conduct the trial itself. Given this, I will conduct the trial.

Conclusion

[58] I dismiss K.S.' application that I recuse myself and that the trial judge be different than the case management judge.

_____
WENCKEBACH J.