Supreme Court of Yukon

Citation: *Commission Scolaire Francophone du Yukon No. 23 v. Attorney General of the Yukon Territory*, 2011 YKSC 01

Date: 2011-01-07
Docket: S.C. No. 08-A0162
Registry: Whitehorse

Between:

COMMISSION SCOLAIRE FRANCOPHONE DU YUKON NO. 23

Plaintiff

and

ATTORNEY GENERAL OF THE YUKON TERRITORY

Defendant

Reasons for Decision
On the Application for Recusal of the
Honourable Mr. Justice V.O. Ouellette

I Introduction

[1] On October 20, 2010, the Attorney General of the Yukon Territory (″YG″) filed an application for recusal on the ground that certain comments and decisions of the Court give rise to an apprehension of bias. On December 9, 2010, the YG filed a memorandum alleging as an additional ground the judge's personal involvement in the francophone community.

[2] If the Court dismisses the application, the YG requests an adjournment of the proceedings pending the outcome of an appeal of the temporary injunction granted by this Court following phase one of the trial. According to the YG, that appeal raises, *inter alia*, the question of bias.

[3] The Commission Scolaire Francophone du Yukon No. 23 (″CSFY″) alleges that an appearance of bias has not been established on an objective and reasonable assessment of the evidence.

II Cases cited by the parties

[4] ***Wewaykum Indian Band v. Canada*** , 2003 SCC 45, [2003] 2. S.C.R. 259; ***Taylor Ventures Ltd. (Trustee of) v. Taylor***, 2005 BCCA 350, 214 B.C.A.C. 7; ***Benedict v. Ontario*** (2000), 51 O.R. (3d) 147, [2000] O.J. No. 3760 (C.A.); ***Arsenault-Cameron v. Prince Edward Island***, [1999] 3 R.C.S. 851, [1999] A.C.S. no 75; ***Authorson (Litigation guardian of) v. Canada (Attorney General)*** (2002), 161 O.A.C.1, [2002] O.J. No. 2050 (Div. Ct.); ***Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)***, 2008 FC 802, [2009] 2 F.C.R. 417; ***R. v. Parker***, [1998] O.J. No. 469 (C.A.); ***R. v. Novak*** (1995), 59 B.C.A.C. 152, [1995] B.C.J. No. 1127 (C.A.); ***R. v. James***, 2000 BCCA 616, 147 B.C.A.C. 153; ***R. v. Khelawon***, 2006 SCC 57, [2006] 2 S.C.R. 787; D. Paciocco, L. Stuesser, *The Law of Evidence*, 5th ed. (Toronto: Irwin Law, c2008); *Evidence Act*, R.S.Y. 2002, c. 78, s. 23; ***R. v. Khan***, [1990] 2 S.C.R. 531; ***R. v. W. (R.)***, [1992] 2 S.C.R. 122; *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1; ***Hay v. University of Alberta Hospital***, [1990] 5 W.W.R. 78, [1990] A.J. No. 333 (Q.B.); ***Cook v. Ip and al.*** (1985), 11 O.A.C. 171, [1985] O.J. No. 2653 (C.A.); ***Shoppers Mortgage & Loan Corp. v. Health First Wellington Square Ltd.*** (1995) 80 O.A.C. 346, [1995] O.J. No. 1268 (C.A.); ***Innisfil (Township) v. Vespra (Township)***, [1981] 2 S.C.R. 145, [1981] A.C.S. no 73; ***Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*** (2000), 51 O.R. (3d) 97, [2000] O.J. No. 4428 (C.A.); ***Sidoroff v. Joe*** (1992), 21 B.C.A.C. 192, [1992] B.C.J. No. 2776; ***D.M.M. v. T.B.M.***, 2005 YKSC 63; ***Khimji v. Dhanani and al.*** (2004), 69 O.R. (3d) 790, [2004] O.J. No. 320 (C.A); ***R. v. Gaudaur***, 2007 BCPC 376; ***R. v. R.D.S.***, [1997] 3 S.C.R. 484, [1997] A.C.S. no. 84; ***Miglin v. Miglin,*** [2003] 1. S.C.R. 303, 2003 SCC 24.

III Brief Judicial History

[5] This trial started on May 17, 2010. Before the trial commenced, the YG requested an adjournment due to the unavailability of a witness who had fallen ill in the previous weeks. The YG submitted that the witness in question was to testify on the issue of property management.

[6] The Court decided to proceed in two separate phases, with phase one taking place within the scheduled trial dates and addressing all issues except the extent of property management. Phase two, scheduled for three weeks in January and February, 2011, would pertain to property management.

[7] Phase one lasted two weeks longer than scheduled, taking a total of six weeks in May and June, 2010. The parties called twenty witnesses and filed more than five hundred exhibits regarding the number of rights holders, financial management, personnel management, program management, the extent of obligations under the *Languages Act* of the Yukon, and the issue of fiduciary obligation.

[8] On June 10, 2010, the Court informed the parties that it would decide all of the issues in dispute after the evidence was complete in order to weigh witness credibility in light of all of the evidence.

[9] On June 11, 2010, during cross-examination of the last witness called by the CSFY on the above issues, the YG requested that the presentation of its case on those issues be adjourned to January 2011. The Court dismissed that application with reasons.

[10] At the end of phase one on June 23, 2010, the Court encouraged the parties to undertake discussions with a view to settling the case.

[11] Given the deferral of a decision on the merits regarding the issues addressed in phase one, the Court granted the CSFY's motion for an interlocutory injunction to ensure the funding required in order to hire three full time teachers and to prevent any future budget reduction.

IV YG's Position

[12] The YG filed an affidavit sworn by Ann MacDonald, Director of Policy with the Yukon Department of Education, summarizing certain aspects of the trial:

- the Court dismissed the request for an adjournment at the outset of the trial
- the Court decided half-way through to render only one decision after hearing all of the evidence
- the Court invited the CSFY to apply for an interlocutory injunction
- the injunction issue was raised half-way through and therefore the YG did not have the opportunity to cross-examine witnesses on the irreparable harm test
- the Court did not require that the CSFY give notice of the motion for an injunction, nor that it produce any supporting evidence; rather, it required only a summary after the evidence was already in
- without giving the YG the opportunity to be heard on the subject, the Court referred to the YG's provision to its counsel of confidential information from a student's record as being illegal and reprehensible
- while encouraging the parties to undertake discussions, the Court stated that it had already determined that there was a fiduciary obligation between the parties and that the YG had not only breached its fiduciary obligation but had also wilfully misled the CSFY
- the Court often decided admissibility issues in favour of the CSFY
- the Court admitted hearsay evidence presented by the CSFY
- the Court did not allow two witnesses proposed by the YG as experts to testify in that capacity
- the Court held that the YG could not call a witness during phase two of the trial to testify on phase one issues
- the Court mocked counsel for the YG, grimaced during the YG's argument, and laughed together with the CSFY's counsel; in particular, the Court winced during cross-examination of Mr. André Bourcier.

[13] The affidavit sworn by Cyndy DeKuysscher addresses for the most part my personal involvement in the francophone community. The YG submits that my involvement in the Fondation franco-albertaine, the Société des parents pour l'éducation en français de St. Paul, my role in the claim for and creation of École du Sommet, as president of the Centre-est school board and member of the Association canadienne française de l'Alberta's executive, and my

participation in the Comité consultatif sur la gouvernance des écoles francophones in Alberta give rise to an apprehension that I am a "committed francophone advocate" and not likely to be able to put aside the ideas and notions I developed over the years in order to examine, with an open mind, the various viewpoints presented in this case.

[14] Regarding the request for an adjournment should the application for recusal be dismissed, the YG explains that the appeal of the interlocutory injunction is based on three main grounds:

- the Court erred in allowing the CSFY to proceed with its application for an injunction without filing the notice required under the *Rules of procedure*, and in denying the YG the right to present evidence to address the factual questions arising on such an application

- the Court erred in law and in fact in granting the interlocutory injunction

- the judge's conduct and comments throughout phase one of the trial and particularly his statement that he had already decided one of the issues before the end of the trial raise for the YG a reasonable apprehension of bias.

[15] The YG explained that it is not anticipated that the Court of Appeal will render a decision before January 17 due to the delays inherent to the appeal process. The YG argues that an adjournment is necessary in the circumstances because if the appeal is allowed on the issue of bias, the appropriate remedy will be a new trial.

V CSFY's Position

[16] The CSFY submits that the relevant case law does not support a finding that recusal or an adjournment of the trial is appropriate. The whole of the evidence, particularly viewed against the backdrop of this vigorously contested and grueling litigation, does not justify a recusal. As for the judge's history, the YG refers to aspects of his life experience prior to 2002 and his appointment to judicial office. That information was in the public domain when the judge was assigned to hear this trial.

VI Test

[17] The Supreme Court of Canada, in ***Wewaykum Indian Band v. Canada***, 2003 SCC 45, [2003] 2. S.C.R. 259 commented on the importance of judicial impartiality:

> 57 ... Simply put, public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.
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> 58 The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined as

> ...In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction…
>
> 59 Viewed in this light, "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles for Judges* (1998), at p. 30). It is the key to our judicial process, and must be presumed … the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

[18] Thus, the threshold for a successful allegation of perceived judicial bias is high, given the presumption that judges will carry out their oath of office: ***R. v. S. (R.D.)***, [1997] 3 S.C.R. 484, at para. 117.

[19] Court decisions concerning recusal are largely fact driven. However, the principles are well established. In ***Miglin v. Miglin***, [2003] 1. S.C.R. 303, 2003 SCC 24, the Supreme Court noted:

> 26 The appropriate test for reasonable apprehension of bias is well established. The test ...is whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias ...A finding of real or perceived bias requires more than the allegation. The onus rests with the person who is alleging its existence ...the assessment is difficult and requires a careful and thorough examination of the proceeding. The record must be considered in its entirety to determine the cumulative effect of any transgressions or improprieties...

[20] The 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: ***Committee for Justice and Liberty v. National EnerYG Board***, [1978] 1 S.C.R. 369. The test to be applied in this case is "what would a well 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"?

[21] The Court of Appeal of British Columbia in ***Taylor Ventures Ltd. (Trustee of) v. Taylor***, 2005 BCCA 350, 214 B.C.A.C. 7 summarized the principles set out in the case law:

> 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;

(iii) the criterion of disqualification is the reasonable apprehension of bias;

(iv) the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;

(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.

[22] This being a question of law, opinion evidence is not admissible. It is not relevant that the party before the tribunal honestly believes there is bias or an appearance of bias: ***Robertson v. Edmonton (City) Police Service***, 2004 ABQB 519, 362 A.R. 44 at para. 53; ***CEP (Local 707) v. Alberta (Labour Relations Board)***, 2004 ABQB 63, at para. 235. Therefore, there is no reference in this decision to Ms. MacDonald's impression as stated in her affidavit, and this decision does not purport to comment on her personal opinions. The CSFY filed affidavits by Sylvie Painchaud, André Bourcier and Denis Magnan. For the same reason, I will not refer to the personal opinions expressed in those affidavits.

VII Analysis

(i) *Proceedings*

[23] Many of the acts complained of are procedural decisions rendered by the Court during the trial.

[24] The Court dismissed the motion for an adjournment at the beginning of the trial (2010 YKSC 46). Later, the Court informed the parties of its intention to render only one decision once all the evidence had been heard. The YG submits that the Court invited a motion by the CSFY for an interlocutory injunction. The YG argues that these decisions demonstrate a lack of objectivity.

[25] It is important to note that this set of facts is the subject of an appeal. It is for the Court of Appeal to decide whether or not the injunction was justified. The relevant question here is whether a reasonable and right-minded person, considering the issue and obtaining the required information, would have a reasonable apprehension of bias.

[26] This fictitious person would know, for example, that under Rule 36(7) of the *Rules of Court for the Supreme Court of Yukon*, the case management judge may preside at the trial or hearing, which indicates that procedural decisions do not, in and of themselves, create an apprehension of bias. That person would also know that the courts have inherent jurisdiction to deal with proceedings before them, and among the many challenges in this regard is determining whether an adjournment should be granted. This is a discretionary decision which must be made fairly in light of all of the circumstances. There is always a risk that a large trial will drag on indefinitely. Furthermore, the Supreme Court has noted that government inaction or delay can easily undermine the rights guaranteed under s. 23 of the *Canadian Charter of Rights and Freedoms* because resulting cultural erosion will eventually allow governments to avoid the duties imposed upon them.

[27] Rule 41(18) provides that the court may order that one or more questions of fact or law arising in an action be tried and determined before the others. Therefore, such order cannot, in and of itself, create a reasonable apprehension of bias. It should be noted that the idea of proceeding in two phases was not new as the YG, during the first case management conference on April 7, 2009, took the position that the case was too large. On June 17, 2009, the YG filed a motion to sever the issues in dispute. The parties presented their arguments on July 15, 2009. At that point in time, the YG submitted that the Court should sever the trial into four parts.

[28] The reasoned decision on the motion for an adjournment (2010 YKSC 46) lists the factors considered by the Court in exercising its discretion. It demonstrates that the manner of proceeding is, in fact, a compromise between the parties' respective positions.

[29] Similarly, the decision to reserve judgment on the issues addressed during phase one is neutral in itself, the effect being to ensure that all the evidence is properly presented before the Court renders its final decision. However, the CSFY had submitted that a delay could adversely affect the interests of the rights holders, which led to the question of an injunction. In fact, the CSFY had raised this issue on May 17 and 18 prior to the trial, arguing that an injunction would be necessary if the Court did not render a decision before the start of the upcoming school year. Discussions on this issue during trial occurred before the YG had called its first witness. The Court requested that the CSFY file a detailed written argument. The last witness was heard on June 18, 2010. The parties presented their submissions on the injunction on June 23, 2010. The YG's memorandum, at paras. 239 to 278, addresses all of the relevant factors.

[30] An interim injunction is a temporary measure. The applicant must first establish that there is a "serious issue to be tried". This branch of the test does not require a final decision on the merits of the case. The YG did not argue otherwise. Further, courts often make preliminary findings before the end of the trial, for example in *voire dires* in the criminal context. As for the

procedure followed, Rule 51 imposes little formality with regard to an application for an interim injunction.

[31] The YG submits that it did not have the opportunity to cross-examine the witnesses regarding irreparable harm. In this case, by the time the Court ordered the injunction, it had heard around twenty witnesses and read hundreds of exhibits on the number of rights holders, financial management, personnel management, program management and the issue of the YG's duties. One of the vital issues in this trial is the alleged precariousness of the Yukon's francophone school system and the possibility of cultural erosion, described by the Supreme Court as an irreparable harm. The experienced counsel for the YG had the opportunity to effectively cross-examine on this matter. The issue of irreparable harm does not concern liability but rather the nature of the prejudice.

[32] The injunction decision (2010 YKSC 34) explains the Court's reasoning. In my view, neither the refusal of an adjournment nor the circumstances surrounding the injunction give rise to a reasonable apprehension of bias.

[33] On June 1, 2010, the YG applied to the Court for a publication ban on the names of a witness, a child about whom the witness was going to testify, and the child's parents. During the YG's cross-examination of the witness, discussions ensued (in the absence of the witness) and the YG presented its arguments. The YG claims that the Court showed bias when it characterized as illegal and reprehensible the fact that the YG provided to its counsel, without consent, confidential information from the student's record. The YG alleges that it did not have the opportunity to present its arguments on this matter before the Court rendered its decision on June 2, 2010. However, the YG argued the matter on June 1, 2010. Whether or not the decision on admissibility or confidentiality was well founded, it remains that the YG had the opportunity to argue the matter, and the record in question was not essential to the cross-examination. In my opinion, a reasonable and right-minded person would not find that the Court, in so doing, unduly restricted the ability of the experienced lawyer for the YG to adduce evidence favoring the YG's position.

[34] The Court admitted hearsay evidence put forward by the CSFY. Once again, this is a discretionary decision in a civil context. One of the Court's concerns, when considering admissibility, is society's interest in the truth-seeking function of the judicial process. The broader spectrum of interests encompassed in trial fairness is reflected in the twin principles of necessity and reliability, but the trial judge has the discretion to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect: ***R. v. Khelawon***, 2006 SCC 57 at para. 49. In my view, a reasonable, right-minded and well informed person would not have any apprehension of bias due to the admission of such evidence in the case at hand. In any event, the YG did not lack opportunities both to cross-examine the witnesses and to comment on the weight to be attributed to the evidence in question.

[35] The Court declined to recognize as experts two witnesses proposed by the YG, namely Dr. McAskill and Ms. Judith Anderson. With all due respect, I find nothing in the reasons

concerning Dr. McAskill (2010 YKTC 43) that could reasonably suggest the least bias. As for Ms. Anderson, the YG gave notice of her evidence only three weeks before trial. Under Rule 34, a period of 60 days is required unless the court otherwise orders. The YG withdrew its application regarding Ms. Anderson's legal opinion. Ms. Anderson did not testify with regard to her legal opinion but she did testify at length as a lay witness on the history of the *Education Act*, and the Court admitted into evidence a large portion of her "expert" report.

[36] The CSFY concluded its evidence on June 11. During the YG's presentation of its case, the YG requested an adjournment in order to call Mr. Gilbert Lamarche as a witness. Mr. Lamarche authored a letter filed as part of the documentary record. It should be noted that 320 documents, including this letter, were part of a notice to admit filed by the CSFY under Rule 31. Following a discussion, the CSFY and the YG agreed that all 320 documents would be filed as individual exhibits, including the deemed admissions of the YG. However, the YG could request to withdraw the deemed admissions in due course, with leave of the court. If such a request was made, the Court would have to determine whether or not the admissions could be withdrawn. Among the 320 documents is the letter dated January 30, 2006 (Exhibit 37) sent by Gilbert Lamarche to Heritage Canada, which relates directly to the issue of fiduciary duty.

[37] The YG had not summoned Mr. Lamarche to appear. However, the YG advised the Court that it had decided, during the presentation of evidence by one of the plaintiff's witnesses, that it would be necessary to call Mr. Lamarche, without specifying why this was necessary. The Court gave the YG until June 23 to contact Mr. Lamarche. The YG was not able to locate Mr. Lamarche before that date. The Court held that the YG would not be entitled to call this witness in the second phase of the trial to testify on issues addressed in the first phase. That decision was in line with the previous decision that all of the evidence and arguments of both the CSFY and the YG on all issues, except property management, would be presented during phase one of the trial.

[38] The Court encouraged the parties to settle. The YG claims that while the Court was encouraging the parties to engage in discussions with a view to settlement, the Court indicated that it had already determined that there was a fiduciary obligation between the parties, and that the YG had not only breached its fiduciary duty but also wilfully misled CSFY.

[39] However it should be noted that all of the evidence, arguments and memoranda of both parties on all issues except property management were before the Court at the time the comments in issue were made. I noted that both parties, at that stage, were in a better position to assess the strengths and weaknesses of their respective cases. I discussed the evidence on one issue in particular, namely the circumstances surrounding a transfer of funds. I emphasized that the evidence on that issue is very distinct from the evidence on the other issues. I commented very briefly on case law and principles of law regarding fiduciary obligations. I then stated (at p. 1496, 1.23, p. 1497, 1.18):

> Now, as I've said, the evidence is all in in this case. Right now, unless I'm mistaken on the evidence and that's why I'm not making the decision right now

because I need to review everything again. But I don't recall there being any evidence whatsoever that the Commission scolaire consented to this transfer or was consulted regarding this transfer. In fact, the evidence was to the contrary and if it's believed, regarding those witnesses, that's where there [sic] will be ending up.

The letter of January 30, 2006 [...] exhibit [...] 37 [...] The difficult issue with that and the Court will be struggling with is that the letter has what are called CC's, saying that certain people were sent copies of this. We've heard from those witnesses, two of whom of the three CC's, who have said that they never got those CC's. If the Court were to make a ruling that in fact, that is accepted, then that would appear that there is an attempt at not a cover-up but clearly, as a deception. The Court will be required, no matter what happens in this case, to deal with this area and make findings based on the evidence and that those findings will clearly involve the conduct of the parties, which of course, will become public and in writing.

But having said the obvious, what also seems to be obvious to me [...] is how we can get ourselves into these situations. But that is the follow-up letter on February 6, 2006. Now, this is the letter from Heritage Canada [...] back to Mr. Lamarche, and I'm only going to read to you at the bottom, where they said they approved the transfers of the money, $1,954,228 for the following upcoming four years. And then I'll just read what I think is relevant to this whole area, in that regard (as read in):

> I understand that discussions have been held between you and representatives of the official language support programs branch about evaluating the relevancy of compensating for these transfers of additional funds before the conclusion of this agreement so as to restore balance among investments in the linguistic objectives of the Canada Action Plan.

I think that letter says it all. At the end of the day, it would appear that there was a clear expectation at least, on the part of the people who are paying the money to the people who are receiving the money that they're going to be restored. So we can argue until we're blue in the face about this case, about that issue but that seems to be clearly what the trust or the money was sent on that basis and what was expected...

[40] In essence, I summarized some of the evidence presented, underlining a gap in the YG's evidence. The YG does not take the position that I was mistaken in this regard. I then noted that an unfavorable decision on this matter could reflect poorly on the YG, which is obvious. This is not a comment on the main issue in the case, namely the application of s. 23, but rather an observation on the state of the evidence.

[41] Do these comments give rise to an apprehension of bias? As stated by the Supreme Court in ***R. v. R.D.S.***, [1997] 3. S.C.R. 484:

> 59 ...Her comments were based entirely on the case before her, were made after a consideration of the conflicting testimony of the two witnesses and in response to the Crown's submissions, and were entirely supported by the evidence. In alerting herself to the racial dynamic in the case, she was simply engaging in the process of contextualized judging which, in our view, was entirely proper and conducive to a fair and just resolution of the case before her.

[42] Bias is not established by the mere fact that a tribunal has summarized evidence already disclosed. The above passage does not constitute a comment on anyone's credibility but is rather an observation that there is a gap in the body of the YG's evidence with regard to the transfer in question. Phase two of the trial deals only with the issue of property management. Neither party will have the opportunity to cover off gaps in their evidence on the other issues. In my view, a reasonable, right-minded and well informed person would not have any apprehension of bias based on my observations.

[43] Finally, the YG alleges that I mocked the YG, grimaced during the YG's presentation of arguments, and laughed together with the CSFY's counsel. It is important that judges be reserved, calm and moderate. However, they cannot be expected to remain completely impassive, particularly during long trials. It should be noted in this respect that phase one of the trial lasted six weeks. Both counsel before the Court are very experienced. They advance their cases with passion and are very familiar with the adversarial system.

[44] In short, it is essential to read the entire transcript to fully appreciate the context of the entire proceeding. As well, oral reasons in their entirety must be taken into account.

[45] Once again, the threshold for a successful allegation of perceived judicial bias is high. Having carefully considered the YG's arguments, I find that a reasonable, right-minded and well informed person would not have an apprehension of bias on the part of the Court.

(ii) Judge's Involvement within the Francophone Community

[46] The YG argues apprehension of bias due to my work within the francophone community, including my involvement in the field of French-language education for the francophone minority in Alberta. This information is in the public domain.

[47] Counsel for the YG appeared before me in ***Association des parents ayants droit de Yellowknife c. Territoires du Nord-Ouest (Procureur général)***, in which I ordered an interim injunction under ss. 23 and 24 of the *Charter* (2005 NWTSC 58). Despite my personal background, he raised no concerns then or on appeal, nor when I was assigned in March 2009 to

hear this case. My background was never mentioned during the proceedings. It seems to me to be somewhat late in the game to do so now that the Court has heard all of the evidence on almost all of the issues to be determined.

[48] Nevertheless, I am obliged to examine whether my past involvement, alone or in conjunction with the acts complained of, gives rise to an apprehension of bias.

[49] The Supreme Court in ***Arsenault-Cameron v. Prince Edward Island***, [2000] 1 S.C.R. 3, 2000 SCC 1, emphasized the importance of having a good understanding of issues associated with language rights:

> 27 ...It is … important to understand the historical and social context of the situation to be redressed, including the reasons why the system of education was not responsive to the actual needs of the official language minority in 1982 and why it may still not be responsive today. It is clearly necessary to take into account the importance of language and culture in the context of instruction as well as the importance of official language minority schools to the development of the official language community when examining the actions of the government in dealing with the request for services...

[50] In ***R. v. R.D.S.***, the Court commented on the role played by a judge's experience in the judicial process:

> 119 The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial
>
> > does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
> >
> > True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge

> nevertheless be free to entertain and act upon different points of view with an open mind.
>
> (Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991), at p. 12.)
>
> It is obvious that good judges will have a wealth of personal and professional experience that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging...

[51] I am the product of my social experience, my education, and the contact I have had with those around me. When I became judge, I swore an oath of office not to forget all of this experience, but rather to carry out my duties in a loyal and honest manner and to the best of my abilities. In my view, a reasonable and right-minded person would find that my community involvement enables me to "take into account the importance of language and culture in the context of instruction as well as the importance of official language minority schools to the development of the official language community". Given that the Supreme Court itself has set this objective, I do not find that this ground, by itself or combined with the others, gives rise to a reasonable apprehension of bias.

(iii) Motion for an adjournment

[52] The YG applied for an adjournment of the trial pending the Court of Appeal's decision on the appeal of the interim injunction. The YG advises that one of the issues raised on appeal is bias.

[53] The Court has considerable discretion in deciding whether to adjourn. That discretion must nevertheless be exercised judiciously, taking into account the parties' interests, as well as the interests of justice. Gower J. in ***D.M.M. v. T.B.M.***, 2005 YKSC 63 described the applicable principles:

> 5 The law in this area gives me a significant amount of discretion. I have reviewed the case of, ***Cal-Wood Door, a division of Timberland Industries Inc. v. Olma***, [1984] B.C.J. No. 1953, a decision of the British Columbia Court of Appeal where Hutcheon J.A. said at para. 13 about this discretion:
>
> > "... The paramount consideration that must be maintained in the exercise of that discretion is to ensure that there will remain a fair trial on the merits of the action ...."

> 6 The British Columbia Court of Appeal also dealt with adjournments in the decision of ***Sidoroff v. Joe***, [1992] B.C.J. No. 2776, [1992] CanLII No. 1815. At paragraph 8 of that decision, Lambert J.A. talked about the discretion in granting an adjournment and said:
>
> > "... it is a discretion that has to be exercised in accordance with settled principle. The settled principle is that the interests of justice must govern whether to grant an adjournment. The interests of justice always require a balancing of the interests of the plaintiff and the defendant."

[54] In ***R. v. Gaudaur***, 2007 BCPC 376, the tribunal commented on an appeal as a ground for adjournment:

> 35 In "Disqualifying Judges for Bias and Reasonable Apprehension of Bias: Some Problems of Practice and Procedure" (2001), 24 Advocates Quarterly 326 at 327, Geoffrey S. Lester wrote "Plainly, actual bias and suspicion of bias strike at the heart of the administration of justice and undermine public confidence in the impartiality and integrity of the judiciary. Equally, allegations of bias or suspicion of bias can be used for forum shopping, as an excuse for delay, or in an attempt to ensure that a decision is not reached." Counsel seeking to adjourn a trial to permit an appeal to be heard must act with dispatch to ensure that the appeal process delays the trial as little as possible...

[55] The YG claims that delay is inevitable in this case. However, there is no certainty as to the how the appeal will unfold. In my opinion, granting an adjournment would be contrary to the interests of justice. The YG asked this Court to rule on the issue of bias. I have found that there is no apprehension of bias. As well, the YG advises that the Court of Appeal will not issue a decision before the beginning of phase two of the trial. It seems illogical for the YG to argue that the CSFY will benefit from the injunction, which preserves the *status quo*, until the end of the trial. Whatever the outcome of the trial, it may well be that the interim injunction will become a moot issue sooner if the trial simply continues. Therefore, judicial economy and the interests of both parties favor dismissal of the application for an adjournment.

VIII Conclusion

[56] For all of the foregoing reasons, the YG's applications for recusal and an adjournment are dismissed.

Heard on the 17th day of December, 2010
Dated at Whitehorse this 7th day of January, 2011.

V.O. Ouellette
J.S.C.Y.

Appearances:

Counsel for Defendant: François Baril

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Counsel of record:

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