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Wayne K. Gorman
Provincial Court of Newfoundland and Labrador, wgorman@provincial.court.nl.ca

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On Recusal Standards:

The *Yukon Francophone School Board* Case

Wayne K. Gorman

Over the last number of years, a significant number of Canadian judges have joined the American Judges Association (Judge Russell Otter of the Ontario Court of Justice is the current AJA vice president). This has resulted in these Canadian judges receiving copies of *Court Review*. This has provided Canadian judges with an excellent source of information concerning the law as it exists and unfolds in the United States of America. Though there are substantial differences between the constitutions and legal systems of our two countries, there are also great similarities. Thus, *Court Review* provides Canadian judges with information that is useful and relevant to their consideration and application of Canadian law in the daily fulfillment of their judicial duties.

But no similar Canadian publication provides information on Canadian law to American judges, though such information might be of interest or use to American judges.

The purpose of this column in *Court Review* is to provide such information concerning the Canadian legal system to American judges. Thus, the editors willing and the readers being interested, for each issue of *Court Review* I will write a brief column on a development in Canadian law that, because of its universal nature, might be of interest to an American judge.

The Canadian cases I refer to may be at any level of court, but because this edition of *Court Review* includes the first of two articles reviewing the past Term of the Unites States Supreme Court, I have chosen to review a recent decision of the Supreme Court of Canada that I believe might be of interest and of use to American judges.

YUKON FRANCOPHONE SCHOOL BOARD V. YUKON (ATTORNEY GENERAL)

The test for recusal based upon an allegation of reasonable apprehension of bias is essentially the same in Canada, England, and the United States: it is an objective test, which asks whether a reasonable person would conclude that the presiding judge was unable to carry out his or her function impartially.[1] In *Yukon Francophone School Board v. Yukon (Attorney General)*,[2] the Supreme Court of Canada had a recent opportunity to consider when a judge should recuse himself or herself. One of the interesting things about this decision is that it considers the issue from the perspective of intervention in the trial process by the trial judge and in relation to the trial judge's involvement with an association with similar goals as one of the litigants.[3]

The Background:

In *Yukon Francophone School Board v. Yukon (Attorney General)*, the Yukon Francophone School Board sued the Yukon government "for what it claimed were deficiencies in the provision of minority language education. The trial judge ruled in the Board's favour on most issues." On appeal to the Yukon Court of Appeal, a new hearing was ordered. The Court of Appeal concluded that there was a reasonable apprehension of bias on the part of the trial judge based upon a number of incidents during the trial as well as the trial judge's involvement as a governor of a philanthropic Francophone community organization in Alberta. An appeal was taken to the Supreme Court of Canada.

The Supreme Court agreed, in part, with the Court of Appeal's conclusion that the trial judge's actions during the hearing raised a reasonable apprehension of bias.

The Trial Judge's Behavior During the Trial:

During the course of the trial, the trial judge acted in an unfortunate manner. The Supreme Court of Canada referred to the trial judge's behavior as being "troubling and problematic" (at paragraph 44). This included not providing counsel for the Attorney General an opportunity to be heard; suggesting, without evidence, that counsel's request for an adjournment was a delay tactic; and treating counsel with a general lack of respect (such as making disparaging remarks).

The Test:

The Supreme Court of Canada indicated that the test for determining whether a reasonable apprehension of bias has arisen is an objective one: "what would a reasonable, informed person think." The Court noted, at paragraph 22, that the "objective of the test is to ensure not only the reality, but the *appearance* of a fair adjudicative process. The issue of bias is thus inextricably linked to the need for impartiality." However, the Supreme Court also indicated that this does not mean that

Footnotes

1. *See* Wewaykum Indian Band v. Canada, [2003] S.C.R. 259 (Can.); Caperton v. A.T. Massey Coal Co., 566 U.S. 868 (2009); and Locabail (U.K.) Ltd. v. Bayfield Properties Ltd., [2000] Q.B. 451 (A.C. 1999) (U.K.). For cases in the United Kingdom involving an actual conflict of interest, courts have referred to these as "automatic disqualification cases." *See* Locabail (U.K.) Ltd., [2000] Q.B. 451, 463-64 (U.K.).
2. 2015 S.C.C. 25 (Can.).
3. Matthew Groves suggests that the "facts raised in support of a claim of bias will always depend upon the wider context of the case in which they are raised but [in] most cases may be located within what Deane J described in *Webb v The Queen* as the 'four distinct, though sometimes overlapping main categories' of bias. Those categories are interest, conduct, association and extraneous information." Matthew Groves, *Empathy, Experience & the Rule Against Bias in Criminal Trials*, 36 CRIM. L. J. (Aus.) 84 (2012).

a judge can have "no prior conceptions [or] opinions" (at paragraphs 33 and 34):

> Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge's identity and experiences not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and empty one.
>
> A judge's identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Justice is the aspirational application of law to life. Judges should be encouraged to experience, learn and understand "life" — their own and those whose lives reflect different realities.

The Trial Judge's Interventions:

The Supreme Court of Canada agreed with the Court of Appeal that the trial judge's conduct during the application raised a reasonable apprehension of bias. The Supreme Court concluded that though appellate courts "are rightfully reluctant to intervene on the grounds that a trial judge's conduct crossed the line from permissibly managing the trial to improperly interfering with the case" (at paragraph 54), the "fine balance" was "inappropriately tipped in this case" (at paragraph 55):

> While the threshold for a reasonable apprehension of bias is high, in my respectful view, the "fine balance" was inappropriately tipped in this case. The trial judge's actions in relation to the confidentiality of student files, the request to have Mr. DeBruyn testify by affidavit, the disparaging remarks, and the unusual costs award and procedure, taken together and viewed in their context, would lead a reasonable and informed person to see the trial judge's conduct as giving rise to a reasonable apprehension of bias.

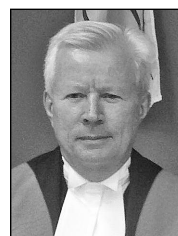
The Trial Judge's Involvement with a Francophone Association:

The Supreme Court of Canada disagreed with the Court of Appeal's conclusion that the trial judge's involvement in a Francophone organization raised a reasonable apprehension of bias. The Supreme Court held that the mere involvement of the trial judge in an organization similar to one of the litigants was insufficient to establish a reasonable apprehension of bias (at paragraph 62):

> In this case, the Court of Appeal found that the trial judge's involvement as a governor of the Fondation franco-albertaine was problematic. There is, however, little in the record about the organization. In particular, it is difficult to see how, based on the evidence, one could conclude that its vision "would clearly align" with certain positions taken by the Board in this case or that the trial judge's involvement in the organization foreclosed his ability to approach this case with an open mind. Standing alone, vague statements about the organization's mission and vision do not displace the presumption of impartiality. While I agree that consideration of the trial judge's current role as a governor of the organization was a valid part of the contextual bias inquiry in this case, I am not persuaded that his involvement with an organization whose functions are largely undefined on the evidence, can be said to rise to the level of a contributing factor such that the judge, as the Court of Appeal said, "should not have sat on [this case]" (at para. 200).

CONCLUSION

Normally we can avoid applications for recusal, suggesting that a reasonable apprehension of bias exists, before they are raised by declining to hear a particular case. However, once the case commences, excessive intervention will invariably lead to such an argument being raised. We do not have adopt a "sphinx-like" demeanor,[4] but the Alberta Court of Appeal has suggested that there will be few "occasions during a trial where the accused is represented by counsel that a judge may question a witness without creating the impression that he or she is entering the fray and leaving judicial impartiality behind."[5] Similarly, the Ontario Court of Appeal has indicated that trial judges "are, at bottom, listeners" and thus, it "is counsel's job, not the trial judge's, to explore inconsistencies in a witness' testimony."[6] Thus, although excessive intervention is one potential basis for someone to claim a reasonable apprehension of judicial bias, it is a basis that we can easily avoid.



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (Keeping Up is Hard to Do: A Trial Judge's Reading Blog) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (Of Particular Interest to Provincial Court Judges) for the Canadian Provincial Judges' Journal. *Judge Gorman's work has been widely published. His latest article is Ours is to Reason Why: The Law of Rendering Judgment, 62* Criminal Law Quarterly *301 (2015). Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca. For United States judges who may want to read in full one of the Canadian decisions referred to here, you can contact Judge Gorman and he will forward a copy to you by email.*

4. *See* R. v. McGrath, [2014] 2014 NLCA 40, 2014 CarswellNfld 317, Nfld. & P.E.I.R. 252, ¶ 27 (Can. Nfld.).
5. R. v. Crawford, [2015] 2015 ABCA 175, 2015 CarswellAlta 879, ¶ 7 (Can. Alta.).
6. R. v. Huang, [2013] 2013 ONCA 240, 2013 CarswellOnt 4225, 115 O.R. (3d) 596, ¶ 33 (Can. Ont.). A distinction, however, has been made between comments or questions to a witness and "statements made by a judge during a colloquy," *see* R. v. Elliott, [2015] 2015 BCCA 295, 2015 CarswellBC 1957, ¶ 21 (Can. BC.). The following comment by the trial judge to the accused during the accused's testimony in *Huang* led to the Court of Appeal concluding that a reasonable apprehension of bias had been established: "I'm going to have you stop right there for a minute. Do you understand what perjury is, Sir? Do you want to take a minute with your counsel and she will instruct you what perjury is and that usually it incorporates about a year in custody." 2013 ONCA 240, ¶ 10.