

BETWEEN:

Kari Simpson

AND:

Rafe Mair and WIC Radio

MOTION BOOK FOR LEAVE TO APPEAL AND/OR MOTION BOOK FOR STAY OF PROCEEDINGS/EXECUTION

Part 1 – Brief Statement of Facts This is a motion pursuant to Rules of the British Columbia Court of Appeal and Section 24 of the Canadian Charter of Rights and Freedoms by the Applicant/Appellant, Kari Simpson, that: · her protected and Constitutional right to a fair trial by an impartial tribunal has been provably violated · if needed, Leave to Appeal the February 3, 2009 decision of Justice Marvyn Koenigsberg · the honourable court provide directions.

On February 3, 2009 Justice Koenigsberg ruled herself functus in an application made by the Applicant/Appellant pursuant to Rule 2 of the Supreme Court of BC Rules to have heard a partial re-hearing of her case. This matter arose from the June 4, 2004 decision of Madam Justice Koenigsberg in Simpson v. Mair and WIC Radio Ltd. The trial judge’s decision was fraught with errors of fact and deceptive mischaracterizations about me and the relevant events. She ruled that the defence of fair comment applied and found in favour of Mr. Mair & WIC Radio. The case involved Mr. Mair’s religious intolerance, hate against an identifiable group, vilification, libel and defamation.

It was unknown to the Applicant/Appellant at the time of her trial (Tab 2 (a) comparative timeline) or at the time of the February 3, 2009 application that:

Justice Koenigsberg’s spouse, namely “Lubomyr Prytulak,” was embroiled in two defamation lawsuits. (Tab 2 (b)(c))

Justice Koenigsberg’s spouse was being sued for in-excess of one million dollars for conducts similar in-fact to that of the Defendants Rafe Mair & WIC Radio Ltd., that being: hatred, religious intolerance, libel. (Tab 2 (d))

Justice Koenigsberg’s spouse was being charged by the Canadian Human Rights Commission for inciting hatred against an identifiable group. (Tab 2 (e))

Justice Koenigsberg financially supported and underwrote the published works of her spouse, Lubomyr Prytulak; works that have been proven in a Court of law to be religiously intolerant, defamatory and hateful. (Tab 2 (f))

At no time did Justice Koenigsberg advise the Applicant/Appellant or her counsel during the trial of her personal involvement in her family’s defamation case or her family’s intolerances for religious beliefs and willingness to defame others under the guise of “free speech.”

At no time did Justice Koenigsberg advise the Applicant/Appellant or her counsel that there was at the very least, the potential of the “appearance of bias” or possible “conflict of interest.”

Justice Koenigsberg has both a “financial interest” and a “cause related interest” in the outcome of this case.

Further, it was unknown to me at the time that Justice Koenigsberg herself was involved in committing the offense of “Fraudulent Conveyance.” Approximately one month after the party who had been defamed by Lubomyr Prytulak successfully obtained a default judgement against him, Justice Koenigsberg transferred title of a home she jointly owned with Prytulak into her name solely. This transaction took place just two months before she delivered the decision in Simpson v. Mair and WIC Radio Ltd. (Tab 2 (g) (h))

The Applicant/Appellant, Kari Simpson appealed the decision of Justice Koenigsberg to the B.C. Court of Appeal and on June 13, 2006 the Court of Appeal unanimously overturned the trial judge’s decision.

The Defendants then appealed to the Supreme Court of Canada. In their decision of June 27, 2008 the Supreme Court of Canada “modified” the law, in fact they “moved the goal posts” and restored the trial judgement.

On August 22, 2008 the Applicant/Appellant filed a motion pursuant to Rule 76 of the Supreme Court of Canada for a re-hearing on the grounds that her right to a fair hearing had been violated, specifically: (Orange Binder Tab 3(2))

At this time the Applicant/Appellant was still unaware of the underlying facts of the defamation case involving Justice Koenigsberg or her culpability involving the fraudulent conveyance of her assets. These facts were not before the Supreme Court of Canada. The motion was dismissed.

On December 12, 2008 the Applicant/Appellant requested a hearing before Justice Koenigsberg pursuant to Rule 2, of the BC Supreme Court Rules.

On February 3, 2009, after hearing submissions, Justice Koenigsberg ruled she was “functus.” In her reasons she acknowledged that if there had been a fraud committed upon the court she would have the authority to re-open the case. At no time during the hearing on February 3, 2009 did Justice Koenigsberg canvass the parties as to her appropriateness to preside. (Orange Binder)

PART II – Issues

Does a presiding trial judge’s failure to disclose a conflict of interest, a perceived conflict, bias or a reasonable appearance of bias constitute a fraud being committed upon the court? If so, is leave necessary to appeal?

Does a trial judge’s failure to recuse or disqualify herself or simply disclose bias, a potentially perceived bias, conflict or a possible appearance of conflict of interests bring the administration of justice into disrepute? If so, does such judicial conduct constitute a violation of a person’s right to a fair and impartial hearing thus requiring the Applicant/Appellant leave to appeal?

Can a judge be “functus” if she is deemed to have been unqualified to preside over the trial in the first place? If so, is leave needed to appeal?

If the judge's appropriateness to preside on this case is deemed acceptable, was she truly functus? Rule 41(24) of the BC Supreme Court provides her with the lawful authority to "amend an order for any matter which should have been but was not adjudicated upon." It would have been impossible for the Judge Koenigsberg to have lawfully "adjudicated the case" without knowing the test of the "modified law" as set out by the Supreme Court of Canada in *WIC Radio Ltd v. Simpson*, 2008 SCC 40, 293 D.L.R. (4th) 513.

Did Justice Koenigsberg have a financial interest and/or cause related interest in the outcome of this case? If so, is leave to appeal required to void the trial?

Does a judge, allegedly involved in actively participating in a serious offence designed to obstruct justice, have the right to preside over a trial and make judgement on matters involving the law?

Is leave required or does the Section 24 of the Charter guarantee a hearing before a court of competent jurisdiction, in this case the Court of Appeal, where prima facie evidence convincingly demonstrates that a Plaintiff's right to a fair and impartial hearing has been grossly violated?

PART III – ARGUMENT

The Applicant/Appellant asserts that the unique and distressing circumstances of this case are inextricably linked to the issue of fundamental justice and call upon this Court to make decision on questions of considerable importance that will decidedly convince "the public" as to whether or not their confidence in the administration of justice and the integrity of the court is justified.

There appears to be two critical matters that will have to be determined. Firstly, should Justice Koenigsberg have presided over this case? The Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259 stated:

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. A judge's impartiality is presumed and a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified. The criterion of disqualification is the reasonable apprehension of bias. 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. Would he think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly?

The Supreme Court of Canada goes on to say:

With respect to the notion of automatic disqualification, English case law suggests that automatic disqualification is justified in cases where a judge has an interest in the outcome of a proceeding.

Justice Koenigsberg had personal interests in the outcome of this case. This crucial issue is explored and determined before the Royal Courts of Justice in *LOCABAIL (UK) LTD v. Bayfield Properties Ltd et al.* The Supreme Court of Judicature Court of Appeal, beginning at paragraph 3, stated:

Any judge (for convenience, we shall in this judgment use the term "judge" to embrace every judicial decision-maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and

violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgment given. Such objections and applications based on what, in the case law, is called "actual bias" are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

There is, however, one situation in which, on proof of the requisite facts, the existence of bias is effectively presumed, and in such cases it gives rise to what has been called automatic disqualification. That is where the judge is shown to have an interest in the outcome of the case which he is to decide or has decided.

Further, in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, Cory J. writing on behalf of The Supreme Court of Canada states:

The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

Cory J. continues in his analysis by identifying The Consequences of a Finding of Bias, he says:

Everyone appearing before administrative boards is entitled to be treated fairly. It is an independent and unqualified right. As I have stated, it is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established. If there has been a denial of a right to a fair hearing it cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. Procedural fairness is an essential aspect of any hearing before a tribunal. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void.

In *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985), the court stated:

Fraud upon the court is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. ... It is where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function --- thus where the impartial functions of the court have been directly corrupted.

Adherence to the Rule of Law is the cornerstone to our civil society. Public confidence in the administration of justice is paramount to maintaining our democracy and trust in the judicial process. Judicial integrity is fundamental to preserving these tenets. The Appearance of Bias or Bias, Procedural Fairness and equality under the Law are the established and essential elements to the administration of Justice.

The trial judge knew or should have known, at the very least, to demonstrate some tangible regard for the integrity of the court and the “judicial machinery” itself by informing the parties of the potential appearances of bias and/or conflict of interest.

The Supreme Court of Canada clearly illustrates and recognizes the sound, judicial judgement of Madam Justice Abella in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 91, 2005 SCC 39. The court addressing this issue of bias or perceived bias states at paragraph 8:

Within days of her appointment, upon reading the list of cases scheduled to be heard in December 2004, Abella J. recused herself of her own accord on September 16, 2004. Her husband, as chair of the War Crimes Committee of the Canadian Jewish Congress, a party to these proceedings, had conveyed representations about this case to the then Minister of Citizenship and Immigration, the Honourable Denis Coderre. The Registrar of this Court immediately informed the parties that Abella J. would not be taking part in this appeal.

Mr. Justice Fraser in the matter of *Liszkay v. Robinson* 2004 BCCA 608 provides yet another excellent example of what a judge is supposed to do when there a possibility that a judge could be perceived as being bias or having a conflict of interest.

In the publication produced by the Canadian Judicial Council; “Ethical Principles for Judges” chapter three addresses “Integrity” as it pertains to Judges. The Statement asserts: Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary.

Chapter “3” further asserts these two “Principles”:

Judges should make every effort to endure that their conduct is above reproach in the view of reasonable, fair minded and informed persons

Judges, in addition to observing this high standard personally, should encourage and support its observance by their judicial colleagues.

Not surprisingly the poll commissioned by the Applicant/Appellant convincingly illustrates what should be obvious. When asked a question about the appropriate conduct of a sitting judge in a matter similar in fact to Justice Koenigsberg in *Simpson v. Mair & WIC Radio Ltd.*, . The overwhelming majority of those polled (400 residents residing in the lower mainland of British Columbia) said that the judge would be bias (31.27%) or could be perceived as being bias (48.11%).

Justice Koenigsberg should have recused herself immediately upon learning the nature of the *Simpson v. Mair & WIC Radio Ltd.* trial. Bias, even the appearance of bias, demands that the integrity of the Court and the public’s trust in the integrity of the Administration of Justice be paramount. Justice Koenigsberg’s involvement in the fraudulent conveyance of her assets should demand, at the very least, the question: Why is she still sitting as a judge? Failing some investigation that I am unaware of, the fact that Justice Koenigsberg is still sitting as a judge, compromises the integrity of every truly honourable judge and brings the administration of justice into disrepute and justifies the Applicant/Appellant’s claim that her rights have been violated.

The Applicant/Appellant further says that there is the secondary matter that this Court must deal with that are separate and apart from the issues related to the determination of whether or not the trial judge should have been disqualified or recused herself, that being the issue of determining whether or not the trial judge was in fact “functus.”

The Applicant/Appellant believes that there are important issues at law in this matter and if there should be a finding that the Applicant/Appellant’s rights were violated by Justice Koenigsberg’s assignment to this case that the issues involving the high court “modifying” the law and the right of the Applicant/Appellant to present evidence or fresh evidence pertinent to and previously unconsidered in the adjudication process should still be heard. Did this “moving of the goal posts” by the Supreme Court of Canada violate the Applicant/Appellant’s right to a fair hearing? Did the “modifying of the law” violate the Applicant/Appellant’s right to know the test and the thresholds she was required to meet? The Applicant/Appellant says yes and the test for a re-opening or a partial re-hearing before a trial judge should not only be allowed in matters involving fraud but also when it can be proven that the law was changed or “modified” and a party denied the right to have matters adjudicated within the newly prescribed perimeters of the new test.

The BC Court of Appeal recently dealt with this very issue in *Creative Salmon Company Ltd. V. Staniford*, 2009 BCCA 61. The Honourable Mr. Justice Tysoe in writing the unanimous decision held that:

In her reasons for judgment, indexed as 2007 BCSC 62, the trial judge found that the press releases defamed Creative Salmon and the defence of fair comment was not available to Mr. Staniford. Since the release of the reasons for judgment, the Supreme Court of Canada has modified the test for the defence of fair comment in its decision in the case of *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, 293 D.L.R. (4th) 513 (sub. nom. *Simpson v. Mair*, 2006 BCCA 287, 55 B.C.L.R. (4th) 30).

For the reasons that follow, I would allow the appeal and order a new trial.

Further, the Applicant/Appellant says that the discussion, reasoning and findings of this honourable court in *Creative Salmon v. Staniford* was the right decision and plainly supports my position - that being my right to a fair hearing has not only been violated but my right to know the legal test was non-existent.

The matters and issues involved in this case go to the very core values of justice in a free and democratic society. The Applicant/Appellant respectfully submits that it is in the interest of justice and the public’s confidence in the administration of justice that Leave, if needed be granted if necessary.

PART IV – NATURE OF THE ORDER SOUGHT

The Appellant/Applicant respectfully seeks an order staying all matters relating to costs in this case.

That leave be granted if necessary

That a hearing be set before the Court of Appeal with direction pursuant to Section 24 of the Canadian Charter of Rights and Freedom;

That an order directing the Chief Justice of the Supreme Court of B.C. to answer the questions asked by the Applicant/Appellant in her correspondence to him dated February 20, 2009

That a hearing before the Court of Appeal be expedited;

That an order directing Lianne Potter (the Applicant's previous legal counsel) to produce and provide to the Applicant/Appellant her entire file, including all original documents;

That cost for this hearing is awarded to the Applicant/Appellant;

Any further orders or directions the honourable court deems appropriate;