CITATION: R. v. Hill, 2011 ONSC 3935
COURT FILE NO.: 10794
DATE: 2011-06-23

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: R. v. KRYSTAL LEE HILL

BEFORE: THE HONOURABLE MR. JUSTICE JOHN C. KENNEDY

COUNSEL: David Rows, counsel for the Crown

David North, counsel for the Applicant

HEARD: May 19, 2011

ENDORSEMENT

[1] The applicant seeks a writ of prohibition against the trial judge prohibiting him from continuing with the trial against the applicant, who is charged with refusing to provide a breath sample, contrary to the provisions of the Criminal Code of Canada.

[2] The trial was interrupted before the matter was completed so that the applicant could bring this application on the issue of bias.

[3] The applicant's position is that the actions, decisions and words of the learned trial judge collectively amount to a reasonable apprehension of bias and a prohibition order should therefore follow.

[4] I agree with the submissions of the applicant and an order will go granting the application in its entirety.

[5] The accused's serious complaints relate to three aspects of the trial proceedings:

(i) Failure to grant an adjournment.
(ii) Refusal to hear a *Charter* application.
(iii) The trial judge's comments to defence counsel.

[6] The principles that relate to a finding of bias and helpful direction are found in the Supreme Court of Canada decision *R. v. R.D.S.*, [1997] 3 S.C.R. 484. I read from the decision of Cory, J. commencing at page 527:

> 103. It may be helpful to begin by articulating what is meant by impartiality. In deciding whether bias arises in a particular case, it is relatively rare for courts to explore the definition of bias. In this appeal, however, this task is essential, if the Crown's allegation against Judge Sparks is to be properly understood and addressed. See Prof. Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S." (1995), 18 *Dalhousie L.J.* 408, at pp. 438-39.
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> 104. In *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685, Le Dain J. held that the concept of impartiality describes "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case". He added that "[t]he

word ‘impartial’ . . . connotes absence of bias, actual or perceived”. See also *R. v. Genereux*, [1992] 1 S.C.R. 259, at p. 283. In a more positive sense, impartiality can be described – perhaps somewhat inexactly – as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.

105. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. A helpful explanation of this concept was provided by Scalia J. in *Liteky v. U.S.*, 114 S.Ct. 1147 (1994), at p. 1155:

> The words [bias or prejudice] connote a favourable or unfavourable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to posses (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant’s prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant’s prior criminal activities that he will vote guilty regardless of the facts). [Emphasis in original.]

Scalia J. was careful to stress that not every favourable or unfavourable disposition attracts the label of bias or prejudice. For example, it cannot be said that those who condemn Hitler are biased or prejudiced. This unfavourable disposition is objectively justifiable – in other words, it is not “wrongful or inappropriate”: *Liteky*, *supra*, at p. 1155.

106. A similar statement of these principles is found in *R. v. Bertram*, [1989] O.J. No. 2123 (H.C.), in which Watt J. noted at pp. 51-52:

> In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. 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. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

See also *R. v. Stark*, [1994] O.J. No. 406 (Gen. Div.), at para. 64; *Gushman*, *supra*, at para. 29.

107. Doherty J.A. in *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), leave to appeal denied, [1994] 1 S.C.R. x, held that partiality and bias are in fact not the same thing. In addressing the question of potential partiality or bias of jurors, he noted at p. 336 that:

> Partiality has both an attitudinal and behavioural component. It refers to one who has certain preconceived biases, and who will allow those biases to affect his or her verdict despite the trial safeguards designed to prevent reliance on those biases.

In demonstrating partiality, it is therefore not enough to show that a particular juror has certain beliefs, opinions or even biases. It must be demonstrated that those beliefs, opinions and biases prevent the juror (or, I would add, any other decision-maker) from setting aside any preconceptions and coming to a decision on the basis of the evidence: *Parks*, *supra*, at pp. 336-37.

[7] And further at p. 530,

111. The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:

> [T]he 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] test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. . . ."

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram*, *supra*, at pp. 54-55; *Gushman*, *supra*, at para 31. Further the reasonable person must be an <u>informed</u> person, with knowledge of all of the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark*, *supra*, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

112. The appellant submitted that the test requires a demonstration of "real likelihood" of bias, in the sense that bias is probable, rather than a "mere suspicion". This submission appears to be unnecessary in light of the sound observations of de Grandpré J. in *Committee for Justice and Liberty, supra*, at pp. 394-95:

> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. <u>The grounds for this apprehension must, however, be substantial</u> and I entirely agree with the Federal Court of Appeal which

refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added.]

Nonetheless the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough. See *R. v. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850 (Q.B.D.); *Metropolitan Properties Co. v. Lannon*, [1969] 1 Q.B. 577 (C.A.); *R. v. Gough*, [1993] 2 W.L.R. 883 (H.L.): *Bertram*, *supra*, at p. 53; *Stark*, *supra*, at para. 74; *Gushman*, *supra*, at para. 30.

113. Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark*, *supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

114. The onus of demonstrating bias lies with the person who is alleging its existence: *Bertram*, *supra*, at p. 28; *Lin*, *supra*, at para. 30. Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.

115. Finally, in the context of the current appeal, it is vital to bear in mind that the test for reasonable apprehension of bias applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic. A judge who happens to be black is no more likely to be biased in dealing with black litigants, than a white judge is likely to be biased in favour of white litigants. All judges of every race, colour, religion, or national background are entitled to the same presumption of judicial integrity and the same high threshold for a finding of bias. Similarly, all judges are subject to the same fundamental duties to be and to appear to be impartial.

Ruling on the Request for an Adjournment

[8] On her trial date, November 16, 2010, the applicant sought an adjournment due to an inability to properly prepare for the trial. The trial judge refused this request in the following ruling:

This is a request for an adjournment by the Applicant, Krystal Hill. Miss Hill is 26 years of age and is undergoing one of the most devastating experiences I can imagine anybody undergoing, particularly at 26 years of age, and she is battling Hodgkin's Lymphoma. The cancer was discovered in February of 2010. She's been undergoing chemotherapy in June, July and August, radiation in August and September and the radiation finishing in early October. She's now four weeks clear of treatment. I am familiar with the consequences of this extremely invasive treatment, as well as the shattered psyche it leaves people with as they're forced to confront their mortality.

I have no doubt and I believe Miss Hill when she says that on her list of priorities the defence of this particular drinking/driving allegation is at the low end of her priorities and I understand that. When you're struggling with your mortality on a day-to-day basis, the loss of your driver's licence and some consequent penalty is rather small potatoes. She indicates that she's somewhat unfocused and really hasn't turned her mind towards this matter and I agree with her.

On the other hand, I have been reviewing the Charter Application and the nature of this charge is an allegation that she refused to provide a sample into a roadside screening device. I was provided, as part of the Charter Application, with an outline of the prosecution case and I have to think that the evidence in this matter is extremely narrow and extremely limited.

The timing of this request for an adjournment is most inopportune. I can't speak for the courts elsewhere in the Province of Ontario, but in London the courts are in a crisis. Myself, in the last 15 working days, which I have had one or two-day trials scheduled, eight have not proceeded, today would mean the ninth. For the most part I return to my office, do paperwork, but people who are waiting for trial dates are now getting their trial dates in May.

I want to be quite clear, in the event this decision is reviewed in another forum, there are no short adjournments or early trial dates. Right now the next available date for an all day trial is in mid-May 2011. I have no doubt that there will be days available next week, tomorrow and the day after, but unfortunately we're not aware of those until the morning of. Scheduling a trial date would involve coordination with police witnesses and defence counsel and my schedule, as I am now seized of this matter. I have read and reviewed and researched the allegations contained in the Charter Application. I am seized with this matter, so there is no short adjournments [*sic*].

This is an offence that happened in April, April 26th, 2009. The earliest trial date will be two years from the offence date and as we're aware in the decision of Askov there's a societal interest. Not just the interest of the accused that matters proceed on a timely basis, there's a deterioration of evidence. Both prosecution and Crown witnesses, it's their memories that will be at stake. This exceeds all acceptable guidelines and certainly the defence could waive any concerns under s. 11(b) of the *Charter* with a speedy trial, an offer that's not been made yet, but the fact is is [*sic*] the quality of the evidence is lessened. This is the eleventh time this matter has been before the Court.

[9] The position of the accused was quite concise and she spoke at trial as follows:

> Q. Okay. All right, I was going to ask you about how your treatment – how your diagnosis and your treatment have affected your life in terms of your ability work and . . .?
> A. Yeah, well, I mean I'm 26, so it's I was 25 when I got – I was 24 when I had heart surgery. Now I'm 25 I had cancer. Now I'm 26 waiting to see if I am cured or not. So, it's been challenging and it's been hard to concentrate on anything else. Um, it's still hard. It's been a month since I've been finished and it's almost harder now waiting then it was, you know. At least then I was doing things. Now I'm just sitting around waiting to see what they're going to say.
> Q. All right. How has that effected – how was your diagnosis, treatment, illness and – how has that effected your ability to deal with this particular case?
> A. I haven't even thought about this case. I – it's honestly the last thing on my mind. I, I, I mean it's always there of course and I now it's, I know it's there, but I can't focus on anything else right now, so.
> Q. I'm not going to ask you to tell the Court what we've talked about, but have you and I had constant communication or much communication about this case?
> A. No. We've talked to each other probably three times in the past ten months.
> Q. All right. And can you tell . . .
> A. One of them being yesterday.
> Q. Can you tell the Court why that is?
> A. Because I haven't been able to communicate with anybody.

[10] At trial, Crown counsel indicated that he was content to adjourn the trial at the time of the pre-trial in September, if some medical documentation had been presented. The learned trial judge failed to consider that the accused had indicated in the months preceding the trial date that she would be requesting an adjournment.

[11] The defence also requested an adjournment because one of the important Crown witnesses was not present at the trial and was not available for cross-examination that day. He will be available, however, if the matter is allowed to continue. This issue is addressed below.

***Charter* Application**

[12] Thirteen days in advance of the trial the applicant filed a *Charter* application alleging infringements of sections 8, 9, and 10(b). This notice was two days late. Nevertheless, Crown counsel provided a response to this application.

The Facts Relating to the Refusal to Hear a *Charter* Application

[13] After the adjournment request was denied, the Court questioned counsel about the timing and content of the *Charter* application. Defence counsel twice offered to explain or inform the Court about the *Charter* application:

> The Court: ... I'm going to get into the screening function I'm entitled to engage in under *Kutynec* and I'm going to embody that into a consideration whether this goes forward.
>
> Paragraph two, the grounds for the Application is; the police attended on the scene and will likely claim they saw the applicant operating a motor vehicle. All right. I have no affidavit material that that's not the case, from your client.
>
> Counsel: The Charter Application is supposed to, ah, from my understanding of the law in *Kutynec* in its progeny is that it is supposed to advise Your Honour, give Your Honour a brief outline of issues. And um, ah, paragraph two of the Notice of Application indicates that the police attended on scene, as Your Honour read, and will likely claim that they saw the applicant operating the motor vehicle. Um, I anticipate that that's what the evidence is likely to be and I have attached an Affidavit with the disclosure and the statements of the police witnesses who were present and on scene. There isn't any requirement in law, in common law, or otherwise, that my client file an Affidavit. . .
>
> The Court: Well, the Rule is, in 30.05(c), that when you're filing your Application where necessary to complete the record an Affidavit by or on behalf of the Applicant deposing to the matters described in sub-rule 2. It's just a question of whether you have completed your Application Record and provided the court with sufficient material that they let your application go forward, because we screen the Applications. Filing a Charter Motion does not entitle you to the hall for the day, you've got to get passed [sic] the screening phase.
>
> Counsel: Well, the screen phase envisioned by *Kutynec* Your Honour … it's a hurdle not a high-jump um, and . . . if Your Honour could ask me, I would certainly advise Your Honour of ... any difficulty ... or let's just deal with it this way Your Honour. If you have some question, if I have failed to meet whatever test Your Honour believes is imposed by *Kutynec*, I'm happy to give Your Honour some further information.

[14] The Court asked one question of counsel relating to the allegation of a breach of the right to counsel (s. 10(b)). After responding, defence counsel offered to provide further assistance to the Court:

> The Court: You see, I'm looking at what you filed to support this Charter Application on a factual basis, and I'm looking at page five of 18, and

you're alleging they stopped somebody, she provides a driver's licence, she asks me why I was stopping her, I smelt alcohol on her breath, I asked her if she had drank alcohol, she replied yes, I read her the roadside, I asked if she understood and she replied yes. And then they go into the failure to provide a sample. And you're alleging that she should have had her rights before providing a sample or attempting to provide a sample. Is that what you're saying?

Counsel: . . . I happen to know that there's some other information um, about the encounter. For instance . . . the police witness statement, which is provided at . . . page five of 18 on the bottom right of the Application Record, doesn't talk about the genesis of the investigation, it doesn't talk about the initial call made to the police and . . . I know that because I received that as part of disclosure and ah, if this was the way that the encounter happened, um, then I would lose my Charter Application. . . . this isn't the way the encounter happened. The police were called to a scene um, and they picked the wrong person. They didn't see what they claim to have saw [*sic*].

The Court: Anything else?

Counsel: Other than, Your Honour, I'm happy to answer any questions that you might have, if you're confused in any way or my friend is prejudiced in any way by the Charter Application.

[15] Instead of asking for further clarification, the trial judge chose to rule on the *Charter* application, ultimately dismissing it. The trial judge ruled in part:

> ... In argument we've canvassed the necessity of the accused filing an Affidavit and certainly [it] is not necessary to file an affidavit from the accused. Rule 30 speaks of completing a record. But of the factual information I have before me in this matter, I don't see the threshold being passed. There's a statement in paragraph 12 of the Application. The arresting officer failed to comply with his obligation to advise the applicant of the reason for her detention or her rights to retain and instruct counsel. I don't have the defence position on that. I don't have her indicating or another person indicating that that is a fact that exists and had it been so in an Affidavit perhaps Crown could have conceded the point and the charge would have been withdrawn, or the Charter violation would have been conceded, or we could have moved on to the question of remedy. None of that was done here and of course the Charter Application was not advanced by the date of the pre-trial.
>
> There's a statement in paragraph 15, society does not have a compelling interest in the prosecution of a case in which no one was injured and the motor vehicle was not operated on a highway. Three citations are given, but that statement certainly is in opposition to the statements of Mr. Justice Cory in the *R. v. Bernshaw*.

The bald statement filed with the Application outlining the Will Say of the police officer in which I have no evidence on the background of why or for what purpose the Will Say is generated alleges an observation that Miss Hill was operating a motor vehicle, a stop under the *Highway Traffic Act*, the detection of an alcoholic odour and a demand, but I see no evidence here that leaps out passed [sic] the threshold that there's a valid Charter Application here.

But even from there, identifying a Charter Application is the first step. The remedy is exclusion. And the Application is grossly deficient. I am provided with a decision of the *R. v. Russo* from the Alberta Provincial Court. The Factum does not mention *Vanderbruggan* [*sic*], in the Ontario Court of Appeal, *Wilding*, while there is reference to *Grant* (SCC). There's no focus on this Application regarding the seriousness of the Charter breach. It fails to meet that screening test, that valuable court time should be dedicated to a Charter Application, which hasn't passed the threshold of being viable.

For this reason, I am not permitting late service of the Charter Application and I do that in conjunction with determining the threshold hasn't been passed on the Charter Application, indicating that it is viable on an exceptionally low threshold.

So, Mr. Thorning, no Charter Application.

Crown, begin your case.

The Judge's Ruling on the Missing Witness, and his Verbal Abuse of the Defence

[16] The effect of the misdirection relevant to the missing witness was lessened by the eventual interruption of the trial as defence counsel is now able to cross-examine the previously missing witness.

[17] However, the prevailing attitude of the trial judge is revealed in the discussion between the judge and defence counsel with respect to his request that the witness be available and with respect to pre-trial notes. The scolding that defence counsel was subjected to is inappropriate and is particularly strong evidence of bias.

[18] I quote from the defence factum:

> At the conclusion of the evidence of one of the officer's [*sic*] who was present the Crown closed its case. In addition to requesting a directed verdict, the Defence requested an adjournment to secure the attendance of the second officer.
>
> The Defence advised the Court that it had expected the second officer was going to be present at trial, and that the Defence was not aware that he was not going to be present until moments before the trial was to commence.

Counsel: The request for the adjournment Your Honour is based on this – two grounds. One, this is a case where I expected to have another officer here for the purpose of testifying in-chief for the Crown Attorney and I would be given the opportunity to cross-examine him and there are two issues, at least, that I would cross-examine him about and one is the nature of the conversation that was had with the cabdriver and two, and more generally, is the dynamic and interaction between the officer and my client. Ultimately I might make the argument that Your Honour shouldn't accept that my client was ever pointed out by anybody as being one of the persons who was in the cab. Then, two, that no demand was ever read, that the device was not presented, that there's – and I would expect that the other officer would testify that my client's understanding of what it is that was transpiring was not as this officer said now.

So I had a look at the certificate, which is attached to the information in this case.

The Court: Can I see that please, Certificate of Readiness for Trial?

Counsel: Yes, Your Honour. And it indicates that the Crown was going to call two witnesses and of course I was a bit taken aback this morning when my friend told me for the first time, I'm not blaming my friend, of course it's not his fault, but that the other officer, who I expected to be called and whose will say I provided in an Application Record, is actually not present and not available today. And had I known that the Crown didn't intend to call that person, I certainly would have made some efforts to either obtain the Crown's cooperation in having the witness present or subpoenaing that officer to have him present here today.

Essentially what I think Your Honour has heard is that the other officer is a material witness in the sense that he was present when these things were transpiring and so I'm seeking an adjournment so the court could have the benefit and my client can have the benefit of that officer's evidence and that of course is critical in my client's determination as to whether or not she is going to testify or call any evidence in this case, that officer's evidence.

The Court then asked if the Defence had earlier canvassed reading the officer's evidence in:

The Court: Okay. And did you canvas [*sic*] that at the pretrial September 28th, which of course. . .

Counsel: Canvas [*sic*] what, Your Honour?

The Court: Canvas [*sic*] his attendance or whether there could be a read-in of his evidence or the steps that we take under CJRC or the Martin Report to eliminate the attendance of unnecessary witnesses, to shorten issues, to get earlier trial dates. Did you canvas [*sic*] with the Crown at that point in time about Officer Stewart, whether he was necessary, whether the Crown was going to bring him in or not?

The Defence submitted that the police witnesses' credibility was important, and that in such a case, there could be no "*reading in*" of his evidence. The Court notionally agreed, but noted: "*it's not the way modern trial* [*sic*] *ought to be conducted"*.

The Court did not ask the Crown whether they canvassed reading the officer's evidence in, but did ask the Crown whether they thought the witness was "material".

The Court then turned again to Defence and asked why the issue of the necessity of the officer's attendance was not addressed at the pre-trial, and part way through the response from counsel, the Court became sarcastic and eventually angry:

The Court: But I get back to this question where you had a pretrial. We tried to get this thing on track at the pretrial, it's not addressed?
Counsel: Well, Your Honour, it was addressed and. . .
The Court: Oh, you have notes now that you didn't have before Mr. Thorning?
Counsel: Your Honour, I don't, I don't appreciate you being sarcastic with me.

The Court denied it was being sarcastic; made some further comments about the *Charter* application, and told Defence that it was not sure the Court could rely on a Defence Undertaking:

The Court: I'm not being sarcastic. You told me you had no notes and I'm asking you if you've now found those notes that you told me you didn't have and not for a minute think that I'm being sarcastic. I am serious Mr. Thorning. This woman is facing a serious charge and I'm looking at this matter and I'm not getting the sense that people were focused upon today as a day in which this very serious matter would be resolved. I have a late filing of a Charter Application and in my experience a late Charter Application is more in the nature of an after thought. It's not an attempt by counsel to say I've got something valid here, I want the Crown to know, maybe this charge will get withdrawn, because there's no basis. It borders on trial by ambush. That concerns me and you have a witness you want to testify to be present to challenge credibility, Crown doesn't need him. I'm not even – I'm not totally certain you have any idea of what this witness is going to say. I don't know whether I can rely upon your undertaking to do that. So this is a serious matter.

Counsel: Undertaking to do what?

The Court: That witness is material.

Counsel: Are you kidding me, Your Honour. The witness – you already know that the witness was present when this. . .

The Court: I don't know whether. . .

Counsel: . . . I'm not finished ...

The Court: . . . he was within 20 feet. . .

Counsel: . . . I'm not finished.

The Court: . . . I don't know whether – I appreciate that. I'll let you finish.

Counsel: All right. The witness, the other officer was present when the crime occurred. The other officer was in the car when there was a conversation with the cabdriver.

The Court: That is correct.

Defence: So, if I was under the reasonable impression that the Crown Attorney was going to call a second witness, because that's what they had indicated and I only find out this morning, the day of trial, that the witness is not going to be here, what else could I have done?

. . .

. . . and to suggest that that would engage in trial by ambush, when I filed a Charter Application 48 hours late, when the Crown Attorney is not even asked whether or not they're prejudiced and of course they weren't, because they filed a Charter response, is, is, is, incorrect, is incorrect and we should state that also for the record.

The Court: Well, you have your option, you can always appeal my decision should you wish, but I've stated my reasons and they're quite clear.

After denying the directed verdict application, the case is remanded without further comment about the other police witness.

The Availability of a Prerogative Remedy

[19] The applicant argues that a prohibition order is an available remedy in the present case:

> The Superior Court may issue a prohibition order to prevent the commencement of or continuance of a proceeding where a court has committed jurisdiction error. Jurisdictional error does not flow from simple disagreement over the correctness of a legal ruling. On the contrary, errors

of jurisdiction affect the fundamental fairness of the trial, cannot be corrected on appeal and require the immediate intervention of the Superior Court.

R. v. Felderhof, [2002] O.J. No. 4103 (O.S.C.J.)

Jurisdictional errors may flow from a gross denial of natural justice; an irreparable judicial violation of constitutional rights; or, a reasonable apprehension of bias or prejudgment. In this case, the Applicant alleges that the decisions made by the trial judge resulted in a gross denial of natural justice and amount to a reasonable apprehension of bias.

There is no question that Superior Court may issue a writ of prohibition where an applicant establishes, with "cogent evidence", a reasonable apprehension of bias on the part of the Judge.

R. v. Steele (1985), 26 O.R. 540 (C.A.);
R. v. Handley (1921), 54 N.S.R. 470 (C.A.);
Nichols v. Graham (1937), 68 C.C.C. 349 (Man. K.B.).
R. v. Musselman, [2004] O.J. No. 4226 (O.S.C.J.)

Analysis

[20] In *R. v. Felderhof*, [2002] O.J. No. 4103 at paras. 11-16 (S.C.J.), Justice A. Campbell commented in detail on the availability of a prohibition order in the middle of a trial:

> A heavy burden lies on any applicant who asks the court to remove a judge in the middle of an ongoing trial.
>
> ...
>
> There are rare cases where mid-trial intervention has been justified on behalf of an accused person. *A gross denial of natural justice, an irreparable judicial violation of constitutional rights or a reasonable apprehension of bias or prejudgment could amount to a loss of jurisdiction during the course of trial.*
>
> Such cases are few and far between. Cases where prohibition has issued at the behest of the prosecutor are even virtually unprecedented. The applicant must demonstrate that this case is almost unique in our legal history. Despite its unusual aspects, nothing in this case displaces the general rule against mid-trial intervention. [Emphasis added and footnotes removed]

[21] As noted above, on an application for prohibition, the applicant bears the onus of proof. In this case, a mid-trial prohibition order will not be granted unless the applicant is able to prove the existence of the alleged reasonable apprehension of bias.

[22] As set out in *R.D.S.*, *supra*, the test for bias is a two-fold objective test. It was articulated in *R. v. Musselman*, [2004] O.T.C. 897 at para. 23 (S.C.J.) as follows:

i. The person by whom bias is apprehended must be a reasonable person, invested with full knowledge of the circumstances said to give rise to bias; and

ii. The apprehension of bias, itself, must be reasonable and not far-fetched or the product of an overly sensitive mind.

[23] I am satisfied on the onus required that the applicant has established that bias exists in this case from the trial evidence. There is an apprehension of bias and in the interests of judicial fairness there should be an order prohibiting the trial judge from continuing to preside over this trial. It is ordered that the applicant should be afforded a new trial before a differently constituted court.

[24] Order to go as directed.

The Honourable Mr. Justice John C. Kennedy

Date: June 23, 2011