Court of Appeal for Saskatchewan
Docket: CACV4161

Citation: *Korf v Canadian Mortgage Servicing Corporation*, 2024 SKCA 28
Date: 2024-03-12

Between:

Kordel Korf

Applicant/Respondent (Defendant)

And

Canadian Mortgage Servicing Corporation

Respondent/Appellant (Plaintiff)

Before:	Leurer C.J.S., Tholl and Kalmakoff JJ.A.
Disposition:	Application dismissed
Written reasons by:	The Court
On application from:	2024 SKCA 1, pursuant to Rule 47(1) of *The Court of Appeal Rules*
Application heard:	February 27, 2024
Counsel:	Reginald Watson, K.C. and Daniel Jukes for the Applicant Jeffrey Lee, K.C. and Shay Brehm for the Respondent

The Court

I. INTRODUCTION

[1] Kordel Korf applies pursuant to Rule 47(1) of *The Court of Appeal Rules* for a re-hearing of the appeal decided under 2024 SKCA 1. For the reasons that follow, his application is dismissed.

II. BACKGROUND

[2] Mr. Korf was the sole shareholder and officer of Korf Properties Ltd. [KPL]. In December of 2014, KPL obtained loan financing from Canadian Mortgage Servicing Corporation's [CMSC] predecessor, Atrium Mortgage Investment Corporation. In addition to pledging other forms of security, Mr. Korf gave a personal guarantee [Guarantee] respecting repayment of the loan. KPL ultimately defaulted on the loan, and CMSC commenced an action against Mr. Korf, seeking to recover under the Guarantee.

[3] A judge of the Court of King's Bench [Chambers judge] granted summary judgment dismissing CMSC's claim against Mr. Korf, on the basis that it was statute-barred under *The Limitations* Act, SS 2004, c L-16.1 (*Canadian Mortgage Servicing Corporation v Korf*, 2023 SKKB 27 [*Chambers Decision*]).

[4] CMSC appealed the *Chambers Decision* to this Court. The appeal was heard on September 21, 2023. This Court allowed the appeal and granted summary judgment in CMSC's favour against Mr. Korf (*Canadian Mortgage Servicing Corporation v Korf*, 2024 SKCA 1 [*Appeal Decision*]). In brief, this Court held that the Chambers judge had erred by dismissing CMSC's claim on the basis of the limitation period, because he erroneously concluded that a forbearance agreement entered into between CMSC and KPL did not have the effect of delaying when the limitation period began to run against Mr. Korf in relation to the Guarantee.

[5] The *Appeal Decision* was issued on January 3, 2024. On January 15, 2024, Mr. Korf filed his application for a re-hearing. In the affidavit filed in support of the application, he deposes that "[s]ubsequent to the hearing of the Appeal", he learned that Leurer C.J.S. had been a partner at MLT Aikins, the law firm that represents CMSC, prior to his appointment to the bench.

[6] Mr. Korf says that a reasonable apprehension of bias arises from the fact that Leurer C.J.S. was still a partner at MLT Aikins when some of the "key documents in this matter, including the Guarantee and Commitment Letter, were drafted" and that, as such, he ought to have recused himself, instead of sitting as a member of the panel that heard and determined the appeal. As a remedy, he seeks to have the *Appeal Decision* set aside and the appeal remitted to a wholly new panel of this Court for a full re-hearing.

III. ANALYSIS

[7] Rule 47 of *The Court of Appeal Rules* governs applications for the re-hearing of an appeal. It reads, in relevant part, as follows:

> **47**(1) There shall be no re-hearing of an appeal except by order of the court as constituted on the hearing and determination of the appeal.
>
> (2) An application requesting a re-hearing shall be by notice of application, served and filed before the formal judgment is issued.
>
> (3) The notice of application shall:
>
> (a) state the grounds for the application; and
>
> (b) be supported by a memorandum of argument.
>
> …
>
> (6) The formal judgment shall not be issued until an application requesting a re-hearing has been disposed of.

[8] A long line of authority holds that, for reasons that include considerations of cost and finality, the power to order a re-hearing is to be exercised only in "special and unusual circumstances" (*Borowski v Stefanson, Prisiak and Emerald (Rural Municipality)*, 2015 SKCA 140 at para 9, 472 Sask R 107; see also: *Double Diamond Distribution Ltd. v Garman Turner Gordon LLP*, 2021 SKCA 152 at para 3; *Storey v Zazelenchuk* (1985), 40 Sask R 241 at para 5; *Michel v Saskatchewan*, 2017 SKCA 5 at para 3; *Whatcott v Canadian Broadcasting Corporation*, 2016 SKCA 51 at para 1; and *HDL Investments Inc. v Regina (City)*, 2008 SKCA 59 at para 3). While the question of what constitutes special or unusual circumstances is determined on a case-by-case basis, the requirement to demonstrate the existence of such circumstances means that a party applying for a re-hearing generally "has a significant hurdle to overcome" (*101115379 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority*), 2019 SKCA 50 at para 11, [2019] 7 WWR 700).

[9] As noted, the basis of Mr. Korf's application for a re-hearing is his allegation that a reasonable apprehension of bias arises from Leurer C.J.S.'s participation in hearing and determining the appeal. He emphasizes that he does not allege that Leurer C.J.S. was *actually* biased, but rather that a reasonable person, viewing all of the circumstances, might conclude that he could not impartially rule on the matter at hand. That reasonable apprehension of bias, says Mr. Korf, amounts to special and unusual circumstances.

[10] As we will explain, we see no merit in Mr. Korf's position.

[11] While the determination of what amounts to special and unusual circumstances must remain contextual and fact specific, we accept that an apprehension of bias on the part of a judge hearing an appeal may, in some cases, constitute the basis for a re-hearing under Rule 47. This is because public confidence in our judicial 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. As a result, the validity of a judicial decision may be impugned where there is a reasonable apprehension that a judge who rendered the decision was biased (see, generally: *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 57, [2003] 2 SCR 259 [*Wewaykum*]).

[12] Establishing a reasonable apprehension of bias requires the party making the allegation to demonstrate that a reasonable and informed person, with knowledge of all the relevant circumstances and viewing the matter realistically, would conclude that it is more likely than not that the judge did not decide the case fairly (*Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 394; see also *Jans Estate v Jans*, 2020 SKCA 61 at para 128, 59 ETR (4th) 53 [*Jans Estate*]). This, however, is not a simple task; a party who alleges a reasonable apprehension of bias on the part of a judge must meet a "high burden" in order to prove their claim (*Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para 26, [2015] 2 SCR 282 [*Yukon*]). This is because the analysis of whether there is an apprehension of bias proceeds from the footing that the reasonable person understands that there is a presumption of judicial integrity and impartiality that is not easily displaced (*R v S.(R.D.)*, [1997] 3 SCR 484 at para 117; *R v Teskey*, 2007 SCC 25 at para 19, [2007] 2 SCR 267; *Yukon* at para 25). A mere suspicion of bias is not enough to upset this presumption; there must be cogent evidence that demonstrates the judge has done something which gives rise to a real likelihood or

probability of bias (*S.(R.D.)* at paras 112 and 117; *Teskey* at para 21; *Yukon* at para 25; *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para 22, [2013] 2 SCR 357; *R v T.F.*, 2019 SKCA 82 at paras 31–32).

[13] Mr. Korf takes the view that it may not be possible for a person in his position to present cogent evidence to support an allegation of bias, absent a "proffer" by a judge setting out any personal connection they may have to a matter, or a requirement that obligates parties to exchange any information of that nature in their possession. He says that, without such disclosure being made up front, litigants may never know enough about a judge's history to raise concerns about potential bias in a timely way. During oral submissions, his counsel argued that this application presents an opportunity for this Court to establish a set of best practices for judges, counsel and litigants concerning the disclosure of such information.

[14] We see no need to embark on that path. A "set of best practices" for judges already exists, in the form of the Canadian Judicial Council's *Ethical Principles for Judges* [*CJC Principles*]. Under the heading "V. Impartiality", that document recognizes the important principle that "Judges are impartial and appear to be impartial in the performance of their judicial duties". The *CJC Principles* also provide thorough commentary touching on many aspects of judicial conduct, including the expectation that judges are responsible for ensuring they approach the task of judging impartially, and for recognizing situations that may compromise their impartiality, either in fact or in appearance. On the subject of disclosing potential conflicts of interest involving litigants in cases over which judges are presiding, the *CJC Principles* state as follows:

> **5.C.10** In certain situations, it may be appropriate for a judge to make disclosure of a potential conflict and invite submissions from the parties. However, judges, not the parties or their counsel, bear the burden of ensuring respect for the principle of judicial impartiality. Neither disclosure of a conflict of interest nor the consent of the parties necessarily justifies judges ignoring circumstances which reasonably call into question their ability to hear a case and decide impartially.

[15] As mentioned above, there is a presumption that judges will carry out their oath of office. It is also to be presumed that they are capable of recognizing situations that may give rise to a conflict, and when it is appropriate or necessary to disclose information about potential conflicts to the parties (see: *Aalbers v Aalbers*, 2013 SKCA 64 at paras 72–76, 417 Sask R 69). It follows that there is no reason to impose an additional requirement for an information exchange to facilitate

some form of vetting process whereby a judge must demonstrate to the parties that they are *not* biased. Such a process would be inimical to the presumption of judicial integrity.

[16] Returning to present matter, the evidence falls far short of meeting the standard necessary to establish a reasonable apprehension of bias on the part of Leurer C.J.S. Cogent evidence that demonstrates a real likelihood or probability of bias is required to overcome the presumption of judicial impartiality and therefore give rise to a reasonable apprehension of bias. That sort of evidence does not exist here.

[17] It is common ground that all the steps in the litigation were taken after Leurer C.J.S. was appointed to the bench in November of 2017. That said, it is also now apparent that his former law firm represented CMSC and its predecessors during the time he was a partner with that firm. As part of this, the record reflects that some of the documents at play in this matter, including the Guarantee and the Commitment Letter, were prepared and executed before Leurer C.J.S. was appointed as a judge of the Court of Queen's Bench. However, it is also not disputed that MLT Aikins is a large law firm with many lawyers, who practice out of several offices, in four provinces. The evidence in the record suggests that the matters involving the parties in this case were handled by MLT Aikins' Saskatoon office. Chief Justice Leurer has stated on the record that, while he was a lawyer at MLT Aikins, his practice was based in Regina. He also stated that he had no personal involvement whatsoever with the matters at issue in this case, and that he gained no knowledge of the commercial relationship between the parties or any of the matters that came into dispute in the litigation that, we would reiterate, was commenced after he left MLT Aikins.

[18] The relevant jurisprudence firmly establishes that a reasonable apprehension of bias does not arise from the mere fact that a judge was a partner in a law firm at a point in time when the firm acted for a party that later appears before the judge (see, for example: *Wewaykum* at paras 81–90; *Jans* at para 144; and *Rando Drugs Ltd. v Scott*, 2007 ONCA 553 at paras 22–26, 284 DLR (4th) 756). Although the *CJC Principles* state that "judges who were involved in private practice should not sit on any case in which the judge or to their knowledge, the judge's former firm was directly involved in any capacity before the judge was appointed to office" (at V. Impartiality – Commentary 5.C.7), there is no absolute rule that recusal is required in such cases. The inquiry is always dependent on the circumstances of the specific case.

[19] Here, the constellation of facts to which we have earlier referred convince us that a reasonable and right-minded person would *not* hold an apprehension that Leurer C.J.S. was biased in this matter. Simply put, we see nothing to displace the presumption of judicial impartiality in the circumstances at hand. We would add, for completeness, that even with the benefit of hindsight we also see nothing on the record that should have led Leurer C.J.S. to recuse himself from sitting as a judge in the appeal.

[20] Moreover, even if the evidence had been sufficient to establish a reasonable apprehension of bias on the part of Leurer C.J.S., that would not amount to special circumstances justifying a re-hearing in this case. This is, in large measure, because the jurisprudence also strongly supports the notion that the question of judicial bias is assessed somewhat differently in the appellate context – where judges sit in panels – than in the single-judge setting of a trial court. Even if a reasonable apprehension of bias can be demonstrated with respect to one judge on a panel that has heard an appeal, that will not infect the entire panel with an apprehension of bias unless the impugned judge authored the decision themself, or cast a deciding vote where other members of the panel were deadlocked (see, for example: *Wewaykum* at paras 92–93; *Boardwalk Reit LLP v Edmonton (City)*, 2008 ABCA 176 at paras 68 and 89–90, [2008] 8 WWR 251; and *364661 Alberta Ltd. v 735608 Alberta Ltd.*, 2010 ABCA 6 at para 4). In this case, Leurer C.J.S. did not write the reasons for the *Appeal Decision*, and there was no deadlock to be broken. The reasons for the *Appeal Decision* were written by Kalmakoff J.A., and Tholl J.A. concurred with them in their entirety. Mr. Korf has not raised any allegation of bias on the part of either Kalmakoff J.A. or Tholl J.A. In other words, without giving any credence to the allegation of a reasonable apprehension of bias in relation to Leurer C.J.S.'s participation in the appeal, the case was nonetheless decided by two other judges whose impartiality is not challenged, and those two judges constituted a majority of the panel.

[21] We would also observe that a reasonable apprehension of bias on Leurer C.J.S.'s part, had one been found to exist, would not render his concurrence in Kalmakoff J.A.'s reasoning in the *Appeal Decision* problematic. This is so because, even though appellate judging involves a collegial process, in which judges discuss the merits of a case before deciding it, each judge on a given panel is required to prepare individually for the hearing of the appeal and, ultimately, to decide the appeal according to their own view of the proper outcome. Although it is often the case

that a three-judge appellate panel expresses its decision through a single set of reasons written by one member of the panel, that does not mean that the second and third judges simply defer to the position of the writer, or act as rubber stamps. All judges are duty-bound to apply their individual judgment to every case. If an appellate judge disagrees with the reasons given by a colleague on a panel, they are ethically obligated to express that disagreement, either in the form of separate concurring reasons, or in a dissenting judgment. It is presumed that appellate judges understand and adhere to these obligations, and, in this case, no evidence has been provided that would displace that presumption.

[22] There are two final points we wish to make about why it would not be appropriate to exercise the Court's power to order a re-hearing in this case.

[23] The first is that Mr. Korf waited until after the *Appeal Decision* had been rendered to raise the allegation of bias. The *Appeal Decision* was issued approximately two and one-half months after the appeal was heard. Mr. Korf does not suggest that he acquired the knowledge that underpins his allegation of bias only after the *Appeal Decision* was rendered. In fact, during the hearing of the application, Mr. Korf's counsel conceded that he learned that Leurer C.J.S. had once been a partner at MLT Aikins before the *Appeal Decision* was released. The only explanation he offered for why he did not raise the allegation of bias at an earlier date was that he did not realize that the interpretation of the Guarantee would play as large a role in the *Appeal Decision* as it did. This works against him in relation to the present application, as Tholl J.A. observed in *Jans Estate*:

> [130] There is an obligation on a party who is concerned about a reasonable apprehension of bias to object in a timely fashion. Objecting only after an unfavourable result is obtained creates difficulties for the party making such assertions: *R v E.E.D.*, 2007 SKCA 99 at para 16, 304 Sask R 192 [*E.E.D.*], and *R v Curraugh*, [1997] 1 SCR 537 at paras 11 and 113. An appellant faces a high hurdle, if not an outright prohibition, when it alleges a reasonable apprehension if the facts were known in advance or during the trial and the party failed to raise the issue at the time (*E.E.D.*):

[24] In other words, as Mr. Korf had knowledge of the facts that gave rise to his concerns about the issue of bias before the *Appeal Decision* was rendered, he had an obligation to raise the issue in a timely fashion. He was not entitled to wait and see if things worked out in his favour and then ask for a re-do, as he appears to have now done. However, we would also note that, even if Mr. Korf had raised the allegation of bias as early as the outset of the appeal hearing, it would not have led to a different result. The evidence he put forth would not have been sufficient to establish

a reasonable apprehension of bias before the hearing began, just as it was insufficient to do so after the *Appeal Decision* was delivered. The standard for demonstrating a reasonable apprehension of judicial bias is the same no matter when the issue is raised (*Wewaykum* at para 78).

[25] The final point is that in Mr. Korf's submissions on this application, he has not identified how, if at all, he suggests the *Appeal Decision* was in error. It is difficult to understand how or why a re-hearing before a different panel could properly be ordered where the party seeking the re-hearing has not identified any potentially reviewable error in the decision rendered by the original panel.

IV. CONCLUSION

[26] For the foregoing reasons, Mr. Korf's application for a re-hearing must be dismissed. CMSC is entitled to the costs of the application, calculated in the usual way.

"Leurer C.J.S."

Leurer C.J.S.

"Tholl J.A."

Tholl J.A.

"Kalmakoff J.A."

Kalmakoff J.A.