Federal Court  Cour fédérale

Date: 20110309

Docket: T-1261-01

Citation: 2011 FC 282

Ottawa, Ontario, March 09, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

DELVIN STEWART POTSKIN,
ALBERT LAWRENCE POTSKIN AND
ROCHELLE MARIE POTSKIN

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF
CANADA AS REPRESENTED BY THE
MINISTER OF INDIAN AFFAIRS AND
NORTHERN DEVELOPMENT

Defendants

REASONS FOR ORDER AND ORDER

[1] On March 1, 2011, I held a pre-trial teleconference with counsel for the Parties. At that time, counsel for the Defendant advised he had just learned I was to hear the trial. He raised a concern on the basis that I had been counsel for the mother of the Plaintiffs sixteen years ago. At

the time, she was pursuing on behalf of her children the same issue on behalf that her now adult children are raising in this action.

[2] I do not have any recollection of the matter. I requested the Defendant's counsel provide copies of the documentation he had. He undertook to do so and the pre-trial conference was adjourned to this date. He subsequently provided several letters that I had written to officials of the Department of Indian Affairs and Northern Development in 1995 raising the issue and advocating for the mother's position concerning her children. On receipt of copies of the correspondence, I made a similar request of the Plaintiff's counsel who has been unavailable until today's date. He advises he has nothing to add.

[3] The lawsuit at hand was commenced by the children, now young adults, in 2001 after I had been appointed a provincial court judge in Alberta.

[4] Defendant's counsel said that his concern is that there may be a reasonable apprehension of bias, were I to hear this trial. He also advised he would seek instructions concerning my presiding in the trial and has since advised he has instructions to bring a motion for recusal.

[5] I have come to a decision on my own motion to recuse myself for the following reasons.

[6] In *Wewaykum Indian Band v Canada*, 2003 SCC 45, [2003] 2 SCR 259 [*Wewaykum*], the Supreme Court of Canada stated that:

> First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de

> Grandpre J. added these words to the now classical expression of the reasonable apprehension standard:
>
> > The grounds for this apprehension must, however, be substantial, and I . . . refus[e] to accept the suggestion the test be related to the "very sensitive or scrupulous conscience".

[7] The presumption of judicial impartiality rests on the judicial oath. Justice Teitelbaum referred to the judicial oath in *Samson Indian Nation and Band v Canada*, [1998] 3 FC 3 in coming to his own decision on a recusal motion. I do so as well, although in my instance I took the Oath of Office on a Bible and with an eagle feather. I hold to my oath:

> I, Leonard S. Mandamin, do solemnly and sincerely promise and swear that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as a Judge of the Federal Court.
> So Help me God.

[8] The eagle feather does not alter my judicial oath; it informs that oath. The eagle feather reminds me of the aboriginal perspective, a perspective discussed by Chief Justice Lamer in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 148 to 150, which must be kept in mind by judges when addressing questions of aboriginal rights. Such a perspective is appropriate here given this action raises a very important issue concerning the rights of Indian children and their membership in a First Nation.

[9] I am also mindful of the Canadian Judicial Council's *Ethical Principles for Judges* which provides as a guide that "a judge who was in private practice should not sit on any case in which

the judge . . . was directly involved as either counsel or in any other capacity before the judge's appointment."

[10] Finally, the Supreme Court in *Wewaykum* acknowledged that judges are often guided by reasons other than disqualification in deciding to recuse themselves. The Court stated:

> . . . . But hypothesis about how judges react where the issue of recusal is raised early cannot be severed from the abundance of caution that guides many, if not most, judges at this early stage. This caution yields results that may or may not be dictated by the detached application of the standard of reasonable apprehension of bias. In this respect, it may be well that judges have recused themselves in cases where it was, strictly speaking, not legally necessary to do so. . . .

[11] Another consideration is the need to preserve judicial resources and to avoid the delay and expense of the disqualification motion. This brings me back to the eagle feather. The aboriginal perspective is holistic, taking in the whole view as does an eagle in flight. It is not only judicial resources that are impacted by the diversion of a disqualification motion; it is also the resources of the parties.

[12] I agree with the observation of Justice Blais, now Chief Justice of the Court of Appeal, in ruling on the Defendant's motion for summary judgment in *Potskin v Canada (Minister of Indian Affairs and Northern Development),* 2006 FC 1469, when he said:

> Finally, there is jurisprudence to the effect that the scope of the fiduciary duty of the applicant Her Majesty the Queen may warrant a broader interpretation than the one that was provided by counsel for the applicant. In my view this question should be examined in greater details by the hearing judge.
>
> **...**

> We have before us a situation where three children -- as a result of the application of different sections of the Act, the passage of time, the marriage of their parents, and a decision by those parents to recognize them as their children when they were very young -- have suffered a real financial prejudice. Even though many years have passed since those critical decisions were made on their behalf, I find that there is no reason, at this stage, to grant this application for summary judgment.

[13] The trial should be focused on these important issues as between the parties and not on the judge hearing the matter. It should proceed to trial on the merits of the case without the distraction and expense of a motion for disqualification. This consideration is enough for me to decide and I do not need to hear a motion for disqualification.

[14] As a result, being mindful of my oath, the eagle feather, and my ethical obligations, I make the following order.

ORDER

THIS COURT ORDERS that he recuse himself from sitting on this trial and that the matter be remitted to the Chief Justice of this Court to be set down for hearing by another judge.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1261-01
STYLE OF CAUSE:	DELVIN STEWART POTSKIN, KEVIN ALBERT LAWRENCE POTSKIN AND ROCHELLE MARIE POTSKIN and HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 9, 2011 (BY VIDEOCONFERENCE)
REASONS FOR ORDER AND ORDER:	MANDAMIN J.
DATED:	MARCH 9, 2011

APPEARANCES:

Terence P. Glancy	FOR THE PLAINTIFFS
Kevin Kimmis	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Terence P. Glancy Barrister and Solicitor Edmonton, Alberta	FOR THE PLAINTIFFS
Myles J. Kirvan Deputy Attorney General of Canada Edmonton, Alberta	FOR THE DEFENDANTS