Court File No.: CV-13-1 0280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N:

DBDC SPADINA LTD.,

and THOSE CORPORATIONS LISTED ON SCHEDULE "A" HERETO

Applicants

- and -

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP LTD. and EGLINTON CASTLE INC.

Respondents

- and -

THOSE CORPORATIONS LISTED IN SCHEDULE "B" HERETO, TO BE BOUND BY THE RESULT

Responding Factum of Schonfeld Inc.

(Respondents' Motion for Recusal Returnable March 10, 2016)

Table of Contents

I. OVERVIEW 1

II. FACTS 2

III. Law and argument 5

A. The applicable test 5

(ii) Financial or personal interest of the decision-maker 6

(iii) Present or past link with a party, counsel or judge 6

(iv) Earlier participation in or knowledge of the litigation 7

(v) Expression of views and activities 8

(vi) Additional factor: Passage of time 8

I. OVERVIEW

1. This is the factum of Schonfeld Inc., in its capacity as court-appointed manager (the "**Manager**") in response to the motion by the Respondents (the "**Waltons**") for an Order requiring that Justice Newbould recuse himself from the hearing of the Applicants' ("**Bernstein**") application. Based on the prejudice that will redound to the detriment all stakeholders with an interest in the timely resolution of this matter, and the Manager's view that no reasonable person would conclude that there is an appearance of bias in this case based on the Waltons' evidence, or at all, the Manager opposes the Waltons' motion.

2. A party seeking to have a judge recused bears a heavy burden. Our justice system is founded on the presumption that judges can be trusted to act impartially. To displace this presumption, the moving party must establish "serious" and "substantial" grounds that would cause a reasonable person to conclude that the judge cannot or will not decide fairly. The evidence on this motion does not meet this high threshold. To the contrary, there is no precedent for a judge recusing himself because of findings of fact that are supported by evidence and upheld by the Court of Appeal.

3. The main source of the Waltons' concern is that Justice Newbould has previously made adverse findings in this proceeding. This is true, but not relevant. Norma Walton was found to have committed fraud and "theft" by Justice Newbould. Those findings were upheld by the Ontario Court of Appeal. At a later hearing, after an extensive investigation by the Manager/Inspector, Justice Brown (as he then was), found Norma Walton to have committed fraud based on four different sets of facts. Those findings were also upheld by the Ontario Court of Appeal on a later appeal. Truthful statements cannot be evidence of bias on the part of the speaker. Finding Norma Walton to have committed fraud is no more biased or prejudicial to future decisions than is calling her by the name Norma Walton.

4. The Waltons' only other complaints relate to: (i) Justice Newbould's alleged expression of surprise that – after more than two years of litigation – when the Waltons announced they intended to claim against Dr. Bernstein; and (ii) Justice Newbould's questions with respect to the Waltons' need to file further material in response to the March 15, 2016 hearing. The Manager respectfully submits that a reasonable person, apprised of the circumstances of this case, would

not view either statement to be evidence of bias. The Waltons waited more than two years and attended dozens of court hearings without raising the possibility of a claim against Bernstein or the Schedule "B" Companies. In these circumstances, it is hardly surprising that Justice Newbould asked about the basis for the proposed claim when Ms. Walton first mentioned it. Nor is there anything untoward about Justice Newbould's endorsement dated February 1, 2016, particularly considering the significant volume of evidence already filed by Ms. Walton and the findings of fact already made by this Court and upheld by the Court of Appeal.

II. FACTS

5. The Waltons' allegation that an apprehension of bias exists in this case appears to be based on their suggestion that Justice Newbould should be prepared to consider, without regard to his past findings, whether the Waltons acted properly. This position is summarized at paragraph 31 of the Waltons' factum:

> The Applicants have claimed, against the Respondents, damages in the amount of $22.5 million...on the basis of their claim that the Respondents had inappropriately utilised Dr. Bernstein's funds...In this regard, the Respondents have taken the position, in their responding materials, that the Applicants had received full value for the entirety of their $22.6 million damages claim.
>
> Factum of the Moving Party dated March 8, 2016 ("**Waltons' Factum**") at paras. 18-28, pp. 6-9

6. The Waltons' position that they provided various development and construction services in exchange for the money taken from the Schedule "B" companies was a central issue at the hearing before Justice Brown on July 16-18, 2014 (the "**July 2014 Hearing**"). Justice Brown considered the evidence before him and concluded that only $1 million of the $30.6 million worth of invoices issued by the Waltons had been substantiated:

> [87] Rose & Thistle no doubt provided some construction and maintenance work for the Schedule B Companies, but the Waltons bore the burden of establishing the validity and accuracy of the invoices which Rose & Thistle rendered for those services. Not only have they failed to do so, but one can only conclude from the refusal of the Waltons over the past nine months to provide back-up for the Rose & Thistle invoices – both to the Inspector and to

> their own cost consultants - that back-up for the full amounts of those invoices simply does not exist.
>
> [88] I therefore accept the view of the Inspector expressed in its Fifth Report, and I find that the Respondents have not produced the documentation needed to perform a detailed reconciliation of the alleged construction and maintenance expenses to the cash transfers to determine whether those transfers related to construction and maintenance work that Rose & Thistle actually performed for Schedule B Companies.
>
> [89] I make a similar finding in respect of the management fees charged by Rose & Thistle. Those fees were charged as a percentage of the construction costs incurred. Without an accounting of the accuracy of the construction costs actually incurred, an assessment of the reasonableness of the management fees is not possible. However, I will accept the reconciliation of management fees in the amount of $1 million reached by the Inspector with the Respondents for revenue-producing properties as reported in the Inspector's Third Report.
>
> [90] Taken together, those two findings mean that of the $30.6 million in invoices rendered by Rose & Thistle to the Schedule B Companies, the Respondents have established the validity and reasonableness of only $1 million of them – i.e the reconciliation relating to management fees for revenue-producing properties. The Respondents have failed to prove, on the balance of probabilities, that the remaining invoices covered work or services actually performed by Rose & Thistle for Schedule B Companies, notwithstanding that the information needed to do so remained in the possession and control of the Respondents.
>
> *DBDC Spadina Ltd. v. Walton*, 2014 ONSC 4644 at paras. 87-89.

7. The Waltons have also identified a number of adverse findings made by Justice Newbould in the Order date November 5, 2013 (the "**November 5 Order**") and take particular issue with His Honour's use of the word "theft." In its endorsement dated May 26, 2014, the Court of Appeal rejected the Respondents' argument that use of the word "theft" was inappropriate:

> [12] We also do not accept that the application judge's use of the word "theft" is necessarily a mischaracterization of some of the conduct of Ms. Walton. However, even if the word "theft" is

> considered inappropriate given its criminal connotation, Ms. Walton's own affidavit acknowledges a knowing misappropriation of funds in respect of at least one property.
>
> *DBDC Spadina Ltd. v. Walton*, 2014 ONCA 428 at para. 12.

8. The Waltons also take issue with an alleged statement made by Justice Newbould during a Chambers Appointment attended in December 2015. At paragraph 42 of their Factum, the Waltons state that Justice Newbould "opined that the Respondents could not conceivably bear any grounds for any future claim against the Applicants." However, there is no evidence that any such statement was made. In her affidavit, Ms. Walton's described a much more innocuous comment: "Justice Newbould queried what possible claim I could make against Dr. Bernstein."

> Waltons' Factum at para. 42, p. 18
>
> Affidavit of Norma Walton, sworn February 26, 2016 at para.3, Motion Record of the Moving Party ("**Waltons' Motion Record**"), Tab 2, p. 13

9. The Justice Newbould's questions are hardly surprising, given that the potential claim was raised for the first time after more than two years of contentious litigation.

10. The Waltons also take issue with the Endorsement of Justice Newbould dated February 1, 2016 (the "**February 1 Endorsement**") in which His Honour, in allowing the Waltons to file materials, commented "I am not certain what [Ms. Walton's] interest is in the matter to be heard on March 15/16."

> Endorsement of Justice Newbould dated February 1, 2016, Waltons' Motion Record, Tab 6, p. 146

11. While Justice Newbould is in the best position to know what was meant by the February 1 Endorsement, the statement must be understood in context and, in particular, the volume of material already filed by the Waltons.

III. LAW AND ARGUMENT

A. The applicable test

12. There is no dispute as to the applicable test on a motion for recusal. The Waltons bear the burden of establishing that there is a reasonable apprehension of bias on the part of Justice Newbould.

> *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 60; Manager's Book of Authorities ("BOA"), Tab 1.

13. The Supreme Court of Canada has defined bias in the context of a legal proceeding as "a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction." To establish a reasonable apprehension of bias, the Waltons must show that it is more likely than not that an "informed person" would conclude that Justice Newbould would not decide fairly.

> *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at paras. 58 and 60; Manager's BOA, Tab 1.

14. The Waltons assert in their factum that they will be prejudiced should Justice Newbould not recuse himself. However, pursuant to the above-noted test, prejudice is irrelevant to the determination of a reasonable apprehension of bias. The only relevant consideration is whether the Waltons have established that a reasonable, well-informed observer would be convinced that Justice Newbould cannot or will not decide the case fairly based on the evidence before him.

15. The burden to establish a reasonable apprehension of bias is, and should be, onerous. The moving party must have "substantial" and "serious" grounds for recusal. A decision to disqualify should only be exercised "sparingly and in the most clear and exceptional cases."

> *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 59; Manager's BOA, Tab 1.
>
> *Samson Indian Band v. Canada*, [1998] 3 F.C. 3 at para. 25, citing *Blanchard v. Canadian Paperworkers' Union, Local 263 et al.* (1991), 113 N.B.R.(2d) 344 (C.A.); Manager's BOA, Tab 2.

16. Judges "have taken an oath to execute their powers and trusts duly and faithfully." A motion for recusal rests on the allegation that a reasonable observer would think the judge unwilling or unable to abide by this oath. It is a serious allegation that must be supported by substantial evidence.

> *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 59; Manager's BOA, Tab 1.
>
> *Sanofi-Aventis Canada Inc. v. Novopharm Limited*, 2006 FC 1473 at paras. 21 and 24; Manager's BOA, Tab 3.

17. While the Supreme Court of Canada has said that the inquiry into a reasonable apprehension of bias is fact specific, it has laid out four potential indices of bias:

(i) financial or personal interest of the decision maker;

(ii) present or past link with a party, counsel or judge;

(iii) earlier participation in or knowledge of the litigation; or

(iv) expression of views and activities.

> *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 77; Manager's BOA, Tab 2

(ii) Financial or personal interest of the decision-maker

18. There is no allegation that Justice Newbould has a financial or personal interest in this litigation.

(iii) Present or past link with a party, counsel or judge

19. There is no allegation that Justice Newbould has any present or past link with a party, counsel or judge that is relevant to the within motion.

(iv) Earlier participation in or knowledge of the litigation

20. That Justice Newbould has extensive history with, and knowledge of, this case is not disputed. However, the Manager respectfully submits that it is this very experience that makes it appropriate for Justice Newbould to hear the application. This position is consistent with the history of this case and the practice of the commercial list. In insolvency proceedings, one judge typically decides all of the disputes between the various stakeholders. This approach has significant benefits, since it allows the Court to develop institutional expertise with the often complex history of a proceeding and the matters at issue.

21. Most of the Waltons' complaint relates to findings made by Justice Newbould in the November 5 Endorsement. However, all of these findings were upheld by the Court of Appeal. In other words, Justice Newbould considered the evidence before him and reached the correct conclusion. The hypothetical reasonable person posited in the test for recusal would hardly see this as evidence of bias.

22. The high threshold that must be met to disqualify a judge on the basis of past pronouncements is illustrated by the decision of the Federal Court and Federal Court of Appeal in *Sanofi-Aventis v. Apotex Inc.* In that case, Justice Snider admitted that she "has expressed conclusions as to the effect of the evidence before her [in the previous proceedings] and that certain of the issues and evidence in these proceedings is likely to be the same..." However, she nevertheless refused to recuse herself, stating as follows:

> The informed person would be familiar with the strong presumption of judicial impartiality. The informed person would be aware that judges are frequently called upon to apply the same legal principles in different cases. The informed person would know that a judge must reach his or her decision based on the evidence before the Court in that case, and not on the basis of evidence that is not before the Court. The informed person would recognize that, in pharmaceutical litigation, the Court frequently encounters cases involving the same parties, the same witnesses, the same or related drugs and the same grounds of infringement or invalidity.
>
> Order dated November 13, 2008, *Sanofi-Aventis v. Apotex Inc.*, Court File Nos. T-161-07 and T-1161-07 at pp. 5-6, aff'd 2008 FCA 394; Manager's BOA, Tab 3.

23. The Federal Court of Appeal upheld Justice Snider's decision.

Sanofi-Aventis v. Apotex Inc., 2008 FCA 394; Manager's BOA, Tab 4.

24. Unlike in this case, Justice Snider's past pronouncements related to issues not yet decided in the case before her. In this case, the Waltons' complaints relate almost entirely to matters that have already been determined.

(v) Expression of views and activities

25. There is no suggestion that this factor is relevant to the within motion.

(vi) Additional factor: Passage of time

26. While the above-noted indices can, in appropriate cases, indicate that recusal is warranted, the Supreme Court of Canada has noted that the passage of time can be a "significant factor" weighing against recusal. The Court stated: "Most arguments for disqualification rest on circumstances that are contemporaneous to the decision-making, or that occurred within a short time prior to the decision-making."

Wewaykum Indian Band v. Canada, 2003 SCC 45 at para. 85; Manager's BOA, Tab 1.

27. In this case, the Manager respectfully submits that the passage of time weighs heavily against the relief sought. Almost all of the findings underlying the Waltons' motion were made years ago in the November 5 Endorsement. Yet the Waltons did not bring the within motion until less than one month remained before the return of Bernstein's application, and after Justice Newbould presided over numerous other hearings related to this case without any suggestion from the Waltons that there was real or apparent bias.

III. CONCLUSION

28. For the foregoing reasons, the Manager respectfully submits that the Waltons' motion should be denied.

All of which is respectfully submitted this 9th day of March, 2016.

Goodmans LLP

SCHEDULE "A" COMPANIES

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investments Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Luttrell Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen's Corner Ltd.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Lands Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

SCHEDULE "B" COMPANIES

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Luttrell Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen's Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.
31. Eddystone Place Inc.
32. Richmond Row Holdings Ltd.

33. El-Ad (1500 Don Mills) Limited

34. 165 Bathurst Inc.

SCHEDULE "C" PROPERTIES

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 Prince Edward Drive, Toronto, Ontario
7. 24 Cecil Street, Toronto, Ontario
8. 30 and 30A Hazelton Avenue, Toronto, Ontario
9. 777 St. Clarens Avenue, Toronto, Ontario
10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario
11. 66 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319-321 Carlaw, Toronto, Ontario
14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lane Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview, Toronto, Ontario

SCHEDULE "D"

RELEVANT CASE LAW

1. *306440 Ontario Ltd. v. 782127 Ontario Ltd.*, 2014 ONCA 548

DBDC SPADINA LTD., et al Applicants	NORMA WALTON, et al Respondents	Court File No. CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

Proceeding commenced at Toronto

Factum of Schonfeld Inc.

(Motion for an Order Approving Interim Distributions in Respect of 44 Park Lane Circle, 1 and 9-11 Cityview and Liberty Village Properties Ltd. and Respondent's Motion for an Order Compelling the Manager to Conduct a Claims Process in Respect 346 Jarvis Street, Unit F returnable February 23, 2016)

GOODMANS LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Brian Empey LSUC#: 30640G
Mark S. Dunn LSUC#: 55510L

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Manager

File No. 14.0074