

Court File Number: CU-13-10280-CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

DBDC Spedine Ltd et al

Plaintiff(s)

AND

NORMA WALTON et al

Defendant(s)

Case Management ☐ Yes ☐ No by Judge: _____

Counsel	Telephone No:	Facsimile No:
<u>See attached list</u>		

- ☐ Order ☐ Direction for Registrar (No formal order need be taken out)
☐ Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

- ☐ Adjourned to: _____
☐ Time Table approved (as follows):

March 11, 2016

Ms Walton moves for an order that I recuse myself from presiding over the continuation of the hearing of the application. There is currently scheduled a hearing on March 15, 2016 but that is going to have to be rescheduled.

This application has a history, which is one of the reasons that it is extended that

Date

Judge's Signature

☐ Additional Pages 1079

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there would be a reasonable apprehension of bias if I were to continue.

On October 4, 2013 I ordered that Schenfeld Inc be appointed an inspector over the Schedule B properties. On November 8, 2013 I appointed Schenfeld Inc as a manager of these companies. In the course of reasons for appointing the manager, I referred to Ms Walton admitting that "\$2.1 million was 'diverted'" and stated that what happened, not to put too fine a point on it, was theft. On a motion by Ms Walton I refused to change my reasons to remove the word theft. The order appointing the manager was upheld by the Court of Appeal, which stated that the use of the word "theft" was not necessarily a mischaracterization of some of the conduct of Ms Walton who acknowledged a knowing misappropriation of funds.

It is also said that comments I made in two 9:30 a.m. scheduling appointments ~~in the~~

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give rise to a reasonable apprehension of bias.

The standard for disqualification is well settled. See Roberts v R [2003] 2 S.C.R. 259 at para 60.

Impartiality must be presumed and the burden is on a party arguing for disqualification to establish the circumstances justifying a finding that a judge must be disqualified. The grounds must be serious in light of the strong presumption of judicial impartiality. Roberts at paras 59 and 76. The entire context must be considered.

Roberts at para. 77

The fact that a judge has ruled adversely in a previous case as the credibility of a party does not necessarily result in a reasonable apprehension of bias. Something more is required showing a ~~reasonable~~ predisposition by the judge with respect to the party such as to amount to prejudgment of the result of the further hearing. R v Nova

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(1995), 54 B.C.C.A. 152 at para 7. See also
Authorn v Canada (A.S.) [2002] O.J. No. 2050
(Div. Ct) at para 4

The ~~practice~~ ^{practice} direction for the Commercial list provides that it is anticipated that a judge who determines a substantive component of a proceeding will continue to hear all subsequent components in that proceeding. Ongoing matters are to be case managed. Thus it is expected that a judge will not be required to recuse him or herself by reason of making prior decisions against a party. If a case management judge does not continue as management judge, the value of the judge's knowledge of the case will be lost to the prejudice of the parties.

See Authorn at para 12.

The fact that a case is being case managed on the Commercial list with the expectation that the judge will hear all substantive matters is a factor that a reasonable person, properly

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informed, would have to take into account in considering whether removal should take place.

I agree with Master Heberman's comments in Mother of God Church v Bakhdi's ~~at para.~~ [2005] O.J. No 1638 at para's 27 - 30.

I do not see how an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that by ordering the appointment of Schonfeld Inc as manager and making the adverse findings that I did from the evidence before me that I would be inclined to pre-judge the matters still before me. Mr. Cohen concedes that there were grounds for me to make the order I did and it is clear from the Court of Appeal's reasons that there were grounds to make the findings that I did.

Mr. Cohen contends that because Ms. Walker intends to attack Dr. Bernstein for applying for the appointment of the manager

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and claim that he caused the subsequent losses as a result of the appointment of the manager, I would be in a tough spot in considering the case as I appointed the manager. Whether I am in a tough spot is not the issue but whether that could give rise to a reasonable apprehension of bias. In my view it clearly could not. There is no reason to think that I will not decide the future matters on the basis of the evidence and arguments put before me. There is no argument that I am aware of that I should not have made the order appointing the manager. It is conceded there were grounds for me to make that order.

A case conference was held at 9.30 a.m. on December 15, 2015 to schedule matters.

Ms Walton said she was considering making a claim against Dr. Bernstein (it has since been made). In light of what had occurred

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in this application over the years, I wondered what the basis for such ~~an~~ application claim would be, and I asked her briefly. I do not recall Ms Walton describing the grounds of a claim but I do recall Ms Walton commenting as to whether I should be hearing the matter further. I did not in any way make any comment pre-judging her claim and no reasonably informed person would think otherwise. In a case management conference discussing future steps, a judge has to have some inkling of what the future steps are all about.

It is ironic that Ms Walton suggests I cannot deal with her claims judicially. Over the objections of the other interested parties, I granted Ms Walton several adjournments she requested for various reasons. I also ordered that substantial sums be paid to her for legal fees and for her living

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expenses. These requests were hotly contested and, as I explained to Mr. Gher during the argument of this motion, it was I for the most part who was the only person looking out for her interests.

At another case conference on February 1, 2016 attended this time by Mr. Gher on behalf of Ms. Walton, there was discussion about the steps to be taken for the hearing scheduled for March 15, 2016. One of the issues was a contest between creditors of the Schedule B properties (Dr. Bernstein's companies) and creditors of the Schedule C companies (Ms. Fisher's clients) over proceeds realized from the Schedule C companies. In my short note of the conference I stated that I was not certain what Ms. Walton's interest was in the matter to be heard on March 15. That is what I was referring to, not her interest in defending the claim by Dr. Bernstein against her for

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70 million or more. No reasonable person could conclude that I had prejudged the issue of her defence to that claim or her claim against Dr. Bernstein that had not yet even been filed, or to any claim she might have to prove of the schedule C properties.

The Commercial List is a small court. It is not easy to simply shuffle a matter off to another judge and saddle that judge with a complex matter that has been ongoing for several years. Each judge, including me, has a responsibility to hear matters assigned to each. Unless there is good reason for recusal, my responsibility is to hear this matter. I find that applying the legal principles for recusal that I have set out, Ms. Walton has not met her burden to establish that I should recuse myself. Her motion is dismissed.

COUNSEL SLIP

COURT FILE NO CN-13-10280 - 00CL

DATE MARCH 10TH 2016

NO ON LIST 6

@ 230

TITLE OF
PROCEEDING

DBDC SPADINA LTD V. WALTON

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