

"Scowling visage" not grounds for judicial recusal

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Introduction

The Ontario Court of Appeal recently confirmed that a judge's face is off limits as grounds for judicial bias. In a concise 20-paragraph endorsement, **(1)** Justice Doherty put litigants on notice: they are not entitled to pick their judge and judges will not step aside when presented with specious bias claims, even when their physical appearance is under scrutiny.

Background

In June 2016 Doherty was scheduled to hear a motion via video conference for an extension of time to bring an application for leave to appeal. Several days before the motion date Doherty was informed that he and numerous other colleagues had been named by the moving party's counsel (Mr Shekhdar) as judges who should not preside over matters that Shekhdar had before the court. Doherty refused to recuse himself. He advised Shekhdar that he could make submissions in support of a bias claim at the start of the motion.

In a 61-page brief submitted by Shekhdar before the motion hearing, Doherty was accused of having demonstrated "racism, corruption and/or criminal case fixing" while presiding over two panels where Shekhdar's appeals were ultimately dismissed. In a litany of ill-advised allegations ranging from the ridiculous to the offensive, Shekhdar effectively submitted that he did not like Doherty's attitude, his tone or his face. Doherty summed up Shekhdar's bias claims as follows:

*"[T]he moving party alleges that my tone of voice in delivering those reasons... and my 'scowling visage' when I read the reasons demonstrated my contempt for him. He writes that he 'suspects' that my 'contempt' reflects my racism and disdain for anyone who is not a 'white Canadian'. Finally, the moving party asserts that I did not pay attention during the proceedings and fell asleep at one point."***(2)**

Shortly before the video conference was scheduled to commence, Shekhdar emailed the court and refused to attend. It is impossible to say whether Shekhdar had finally realised his folly or was merely steadfast in his resolve. However, Shekhdar declared that the motion should not proceed before Doherty and he would not call in.

Decision

Doherty dismissed the motion with respect to both its merits and Shekhdar's allegations of bias. Lacking any evidence to support his allegations, Shekhdar's subjective opinion about Doherty's tone of voice, appearance and attentiveness during the proceedings fell short of overcoming the strong presumption in favour of judicial impartiality:

"It is perhaps not surprising that a losing litigant takes offence with the tone or appearance of the judge delivering the decision... There is no air of reality to the moving party's

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Comment

Despite a series of spectacular failures in court etiquette and common sense, this decision contributes to a body of case law striving to define the scope of judicial bias within the context of the equitable administration of justice. While justice must be administered impartially and allegations of bias carefully considered, the administration of justice suffers where judges simply yield to unreasonable and unsubstantiated recusal demands. It remains to be seen whether Doherty's 'air of reality' threshold will be applied as a test to weigh up allegations of bias going forward.

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Endnotes

(1) *Beard Winter LLP v Shekhdar*, 2016 ONCA 493.

(2) *Ibid* at Para 6.

(3) *Ibid* at Paras 12 and 14.

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