SUPREME COURT OF NOVA SCOTIA

Citation: *DLF Law Practice Incorporated v. McDonald et al.*, 2024 NSSC 315

Date: 2024 10 22
Docket: PIC No. 525281
Registry: Pictou

Between:

DLF Law Practice Incorporated, a body corporate, and Donn Fraser

Plaintiffs

v.

Mary Jane McDonald, Eric Atkinson, SPI Et Pomquet Inc., a body corporate, Jennifer Hamilton Upham, Kate Harris, Joel Sellers, Julie MacPhee, Mary Jane Saunders, Dennis James, Gerald Green and 3241964 Nova Scotia Limited (previously known as Carm Legal Services Inc.), a body corporate, and the legal partnership known as the firm Patterson Law

Defendants

DECISION ON MOTION FOR STAY AND RECUSAL

Judge: The Honourable Justice Scott C. Norton

Heard: By Correspondence

Decision: October 22, 2024

Counsel: Donn Fraser, self-represented
DLF Law Practice Incorporated, on its own behalf by its Officer Donn Fraser
Michael Scott, representative of the Defendant Patterson Law
Dennis James KC, on his own behalf
Gavin Giles, KC, for the remaining Defendants

By the Court:

Introduction

[1] The Plaintiffs [Mr. Fraser personally and as an officer of his professional services company, DLF Law Practice Incorporated ("DLF")], bring this motion for a stay or, alternatively, for an order that I recuse myself from further involvement in this proceeding. The Defendants oppose the motion.

[2] I am the case management judge for this proceeding and related but separate action titled Donn Fraser and DLF Law Practice Incorporated, a body corporate v. Julie MacPhee PIC No. 521514. A motion for a stay or alternatively an order for recusal was not filed in the MacPhee action.

[3] I agreed to hear the present motion by correspondence with the agreement of the parties. By letter dated October 11, 2024, I gave the parties my bottom line decision dismissing both motions with reasons to follow. These are my reasons.

[4] Mr. Fraser, in his affidavit filed in support of these motions, states that nothing stated in the affidavit or argued in the submission should be taken to suggest that he has not and does not have the utmost respect for me as a Justice of this Court. I wish to assure him that I take no offence from his submissions which neither disclose nor imply any disrespect.

[5] Both motions before me are tied to rulings made by me as case management judge in a separate proceeding in which Mr. Fraser and DLF have claimed against Bruce Tait MacIntosh (Hfx No. 522091) (the "MacIntosh action"). Mr. MacIntosh is not a party to this action. The Defendants in this proceeding are not parties to the MacIntosh action.

[6] It is useful to explain the claims made in this action and the MacIntosh action.

[7] This action was filed by the Plaintiffs following dissolution of a law firm (colloquially referred to as Mac, Mac & Mac ("MMM")) in which the Plaintiff, Donn Fraser, was a partner (through his professional corporation DLF). Several of the Defendants, who were partners with DLF in MMM, subsequently joined the firm called Patterson Law. The Plaintiffs' Statement of Claim alleges liability against Patterson Law for the tort of conspiracy, and accessory liability for assisting in

fiduciary breach by other Defendants who subsequently became partners in Patterson Law.

[8] In this action, I have issued two decisions. One was to grant the motion of the Plaintiffs to exclude Mr. Michael Scott from acting as counsel for the Patterson Law defendant (2024 NSSC 206) and ordering costs on the motion to be paid to the Plaintiffs. The other was to determine costs on a motion heard and determined by Justice Hoskins who had reserved the issue of costs and, due to his decision to recuse himself, it fell to me as case management judge to make the costs determination.

[9] In the MacIntosh action, the causes of action against Bruce MacIntosh include breach of fiduciary duty related to Mr. MacIntosh's actions as mediator of alleged differences between the Plaintiff and other partners in MMM, defamation, inducement or encouragement of contractual breach, interference with contractual or economic relationships, and the civil tort of conspiracy. The allegations allegedly relate to the defendant MacIntosh's relationship with many of the partners in MMM in which MacIntosh had been a partner, and later counsel, before retirement.

[10] In the MacIntosh action, I denied motions by Mr. Fraser for an order requiring Mr. MacIntosh to provide a more complete Affidavit Disclosing Documents and additional record disclosure and production. I granted a motion by Mr. MacIntosh requiring Mr. Fraser and DLF to post security for costs. Mr. Fraser and DLF appealed those rulings and in the Notice of Appeal (C.A. No. 535539) argued:

> In addition, on account of the proceedings and related dealings underlying the Chambers hearing or hearings on June 18, 2024 which resulted in the Orders, as well as dealings with the Chambers Judge prior thereto, there developed and existed at least a reasonable apprehension of bias, predetermination and/or prejudgment and/or unfair partiality against the Appellants, or otherwise reasonable apprehensions that the Chambers Judge would not decide matters fairly as they relate to the Appellants, such that the Chambers judge lost jurisdiction and the Orders are invalid or should be invalidated.
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> …
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> Further and with out [*sic*] limiting the generality of the forgoing [*sic*], the Learned Chambers Judge also erred specifically in making costs awards in each Order, through:
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> …
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> > c. without limiting the generality of the foregoing, issuing costs dispositions that were a product of conduct of the Chambers Judge, which at a minimum and as a whole, raised a reasonable apprehension of bias, predetermination

> and/or prejudgement and/or unfair partiality against the Appellants, or otherwise raised reasonable apprehensions that the Chambers Judge would not decide matters fairly as they relate to the Appellants.

Mr. Fraser and DLF request that the Court of Appeal make a determination and declaration that a reasonable apprehension of bias, predetermination and/or prejudgement and/or unfair partiality by me against them has existed or otherwise that a reasonable apprehension that I would not decide matters fairly as they relate to them has existed such that I have lost jurisdiction in matters concerning them.

[11] The Appeal is scheduled to be heard on March 25, 2025.

Motion for Stay

[12] The Plaintiffs argue that I should stay this action until the Court of Appeal issues its ruling (on the issue of bias) in the MacIntosh action.

[13] There is no order that I have made in this proceeding that the Plaintiff seeks to stay pending appeal. Accordingly, the Plaintiffs assert that the stay process contemplated by *Rule* 7.29 invoking the tripartite test for an injunction does not apply. Rather, they argue that the stay should be ordered in "the interests of justice" pending the outcome of the appeal in the MacIntosh action.

[14] Superior courts have inherent jurisdiction to control their own process. This jurisdiction is confirmed by s. 41(e) of the *Judicature Act*, RSNS 1989, c. 240. Consistent with this authority, *Civil Procedure Rules* 2.03 and 26B provides me with the authority as case management judge to give directions with respect to the conduct of this proceeding.

[15] Patterson Law, in its submission, says that in determining whether to grant a stay of proceedings in these circumstances, the factors for consideration are as set out in *Workman Optometry v. Aviva Insurance*, 2021 ONSC 3843, at para. 14:

(a) whether there is substantial overlap of issues in the relevant proceedings;

(b) whether the two cases share the same factual background;

(c) whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources; and

(d) whether the temporary stay will result in an injustice to the party resisting the stay.

While that decision was made in the context of a motion to stay individual actions pending the certification of a class proceeding, I find that the factors considered are applicable here.

[16] I approach the motion for a stay considering the overarching object of the *Rules*: the fair, just and efficient determination of this proceeding.

[17] The underlying claims in this proceeding and the MacIntosh action are separate and distinct. There has been no suggestion that the MacIntosh action should be joined with this proceeding for trial or case management. The commonality of the cases are essentially related to the involvement of the Plaintiffs and the fact that I have been appointed the case management judge in each.

[18] While the question of whether there exists a reasonable apprehension of bias with respect to my case management of the MacIntosh action is squarely before the Court of Appeal, whether it exists in this action is squarely before me on this motion.

[19] The Plaintiffs contend that if I were to deny the motion for a stay, I would then rule on the motion for recusal. If I were to deny the motion, the Plaintiffs would appeal. That, they say would practically stay any further step in my case managing the proceeding pending the appellate ruling. To do otherwise, the Plaintiffs say, would risk any interlocutory rulings or case management directions being overturned by the appeal ruling and having to be relitigated before a new case management judge if the appeal was successful. That appeal, they say, would no doubt be informed by the outcome of the appeal in the MacIntosh action.

[20] I am positioned to render a decision on the current motion for recusal. There is little to be gained in delaying this proceeding only to account for the possibility that the Nova Scotia Court of Appeal might, at some future date, come to a different conclusion on a similar issue in a different case. The Plaintiffs' proposed stay of proceedings would not prevent unnecessary and costly duplication of judicial and legal resources, but it would subject the Defendants to unnecessary delays that are contrary to the objects of the rules and the goals of case management.

[21] The Defendants make the argument that they have rights as well. The Plaintiffs' allegations against them, on their face, constitute attacks on their personal and professional integrity, honesty and competency. Prolonging the proceedings can only aggravate the harm to the Defendants if the allegations are not proved.

[22] All parties are deserving of having the issue of recusal and apprehension of bias determined so that the matter can proceed under case management for the furtherance of the object of the *Rules.*

[23] The Plaintiffs bear a heavy onus of demonstrating that a stay is required to avoid an abuse of process, not merely an inconvenience: *Watkins v Hines*, 2009 NSSC 182, at paras. 17-19.

[24] I agree with the Defendants that they are entitled to access the court's processes in furtherance of *bona fide* defence efforts. The circumstances in which a temporary stay will be justified are exceedingly rare. They do not include the Plaintiffs' preference to avoid having further motions heard by the appointed case management judge, nor do they include efforts to delay already-scheduled defence motions for security for costs.

[25] The motion for a stay of proceedings is dismissed without costs.

Recusal or Disqualification

[26] The Plaintiffs say that they seek an order that I recuse or disqualify myself as alternative relief to the stay motion. They assert this relief is sought in light of "a cumulative effect of all evidence, facts and circumstances on what an informed person, viewing the matter realistically and practically and having thought the matter through would conclude in terms of whether such person would hold a reasonable *apprehension* of bias against the Plaintiffs or reasonable *apprehension* that matters involving the Plaintiffs would not be decided fairly" (Plaintiff's Brief, para. 42).

[27] As to particulars, the Plaintiffs refer to Mr. Fraser's letter to me, dated July 8, 2024 inviting me to recuse myself. In response to that letter, I advised Mr. Fraser that if the Plaintiffs wished to bring a motion for recusal (or disqualification) on a proper record, I would hear it.

[28] In the affidavit filed in support of the motion, Mr. Fraser attaches, as Exhibit "F", the July 8 letter and attests that the statements of fact in numbered paras. 1 to 17 of the letter are true to the best of his knowledge. These "facts" appear to be the allegations contained in the argument made to the Court of Appeal in the MacIntosh action.

[29] The legal test for recusal was recently considered by the Nova Scotia Court of Appeal in *Fraser v. MacIntosh*, 2024 NSCA 85. In his argument on that appeal,

Mr. Fraser alleged, *inter alia,* that the comments and conduct of Justice Lynch in deciding an issue of costs illustrated her bias against him. Justice Beaton, writing for the court, denying the appeal, described the legal test as follows:

> [26] There is a strong presumption in favour of judicial impartiality. Mr. Fraser bears a heavy burden to demonstrate judicial bias (*Ward v. Murphy*, 2024 NSCA 81 at paras 26-27). The test to establish judicial bias is discussed in *Green v. Green*, 2022 NSCA 83:
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> > [41] In *Wewaykum Indian Band v. Canada*, 2003 SCC 45, the Supreme Court of Canada explained that the apprehension of bias must be a reasonable one:
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> > > 60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 394, is the reasonable apprehension of bias:
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> > > > ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."...
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> > [42] As stated by this Court in *R. v. Potter; R. v. Colpitts*, 2020 NSCA 9 where there is a finding of a reasonable apprehension of bias, the offending judge's decision results in an error of law:
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> > > [753] If a reasonable apprehension of bias arises from, or an actual bias is found in, a judge's words or conduct, then the judge has exceeded his or her jurisdiction and erred in law.

[30] In *Fraser v. Nova Scotia Barristers' Society*, 2024 NSCA 79, Justice Derrick was faced with a request by Mr. Fraser that she recuse herself. Justice Derrick reviewed the legal principles in paras. 40 to 46:

> [40] When a motion for recusal is made, the judge whose recusal is being sought must hear and determine the issue (*Bossé v. Lavigne*, 2015 NBCA 54, at paragraph 5). This approach was taken in *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851, and by Saunders, J. of this Court in *Doncaster v. Chignecto-Central Regional School Board*, 2013 NSCA 59, at para. 14.

[41] Delay in bringing a recusal motion may be a basis for dismissing it (*R. v. McQuaid*, 1996 NSCA 254, at paras. 34-35; *R. v. Van Wissen*, 2018 MBCA 100, at para. 14). I have decided the applicant's motion on its merits, and have not taken into account any delay in bringing it.

[42] The law that governs recusal motions grounded in allegations of a reasonable apprehension of bias is well-settled and long-standing. As stated in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at pp. 394-395 and repeated in *R. v. R.D.S.*, [1997] 3 S.C.R. 484, at paragraph 31:

> …the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information…[T]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[43] The Supreme Court of Canada in *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*, 2015 SCC 25 noted its consistent endorsement of the reasonable apprehension of bias test, and set out the governing principles in paragraphs 22 and 23:

> • The objective of the test is to ensure not only the reality, but the appearance of a fair adjudicative process.
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> • The issue of bias is "inextricably linked to the need for impartiality".
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> • Impartiality "connotes absence of bias, actual or perceived" (*Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685).
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> • Impartiality and the absence of bias have both legal and ethical requirements. "Judges are required – and expected – to approach every case with impartiality and an open mind".
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> • Public confidence in the legal system is "rooted in the fundamental belief" that judges will adjudicate free or bias or prejudice and "must be perceived to do so" (*Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, at paragraph 57).

[44] A judge confronted by a recusal motion is expected to assess subjectively whether they are able to adjudicate with impartiality. And even in the event a judge concludes they are able to judge impartially, they must then consider "whether there is nevertheless a reasonable apprehension of bias (*Bossé*, at para. 7). The test for a reasonable apprehension of bias is objective (*R. v. K.J.M.J.*, 2023 NSCA 84, at para. 57).

[45] Due to a strong presumption of judicial impartiality, an applicant's burden on a recusal motion is a heavy one, requiring cogent evidence of bias. The grounds advanced in support of a reasonable apprehension of bias "must be considered in

> the context of the circumstances, and in light of the whole proceeding" (*R.D.S.*, at para. 141).
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> [46] These principles have been emphasized by this Court in *Nova Scotia (Attorney General) v. MacLean*, 2017 NSCA 24:
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> > [39] First, as a matter of law, there is a strong presumption of judicial impartiality, which is not easily displaced. Second, there is a heavy burden of proof upon the person making the allegation to present cogent evidence establishing "serious grounds" sufficient to justify a finding that the decision-maker should be disqualified on account of bias. Third, whether a reasonable apprehension of bias exists is "highly fact-specific". Such an inquiry is one where the context, and the particular circumstances, are of supreme importance. The allegation can only be addressed carefully in light of the entire context. There are no shortcuts. See *Wewaykum Indian Band v. Canada*, 2003 SCC 45.

[31] In deciding this motion I have not taken into account any delay in bringing it.

[32] In this action, the most significant ruling that I have made was to disqualify Mr. Scott as counsel for the Patterson Law defendant as requested by the Plaintiffs. Although successful on the motion, the Plaintiffs complain that the form of order I granted favoured Mr. Scott. I disagree. It simply gave effect to my decision that Mr. Scott could not appear as counsel but did not pre-judge Mr. Scott's ability to be appointed as a representative of the partnership, of which he is a partner, as is permitted by a separate *Civil Procedure Rule*. It is open to the Plaintiffs to seek such further relief in that regard as they consider appropriate.

[33] The majority of the Plaintiffs' concerns relate to rulings I made in the MacIntosh action which will be reviewed and decided by the Court of Appeal. With all due respect to Mr. Fraser, and while I accept that he subjectively, sincerely, and vehemently believes that I have not and will not treat him fairly, I must disagree and state categorically that he is mistaken. I am completely satisfied I have and will fairly and impartially adjudicate the issues before me in this proceeding based on the evidence and the law as is my legal and ethical obligation and the guiding principle for my judicial role.

[34] I consider that my directions to the Plaintiffs in this action and the MacIntosh action are completely consistent with and supportive of the objects of the *Civil Procedure Rules* and best practices for parties before the court. They can be summarized as requesting that the parties be judicious in their use of court time, efficient in such submissions as they wish to make, and being respectful and professional to their opponents and their opponent's Counsel.

[35] The motion record has failed to overcome the strong presumption of judicial impartiality. Mr. Fraser may disagree with my decisions, orders and directions. He has the right to appeal them. However, I believe that any informed person, viewing the motion evidence realistically and practically and having thought the matter through would find that I have and would decide the issues raised in this proceeding fairly.

[36] The motion for recusal or disqualification is dismissed without costs.

Norton, J.