C.A.C. No. 126612

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. McQuaid, 1996 NSCA 254

Chipman, Bateman and Flinn, JJ.A.

BETWEEN:

HERMAN McQUAID	)	John D. O'Neill
	)	for the Appellant
Appellant/ Applicant	)	
	)	
- and -	)	
	)	Kenneth W.F. Fiske, Q.C.
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Application Heard:
	)	December 5, 1996
	)	
	)	
	)	Decision Delivered:
	)	December 9, 1996

DECISION ON RECUSAL MOTION

THE COURT: The motion is dismissed, per reasons of Bateman, J.A.; Chipman and Flinn, JJ.A. concurring.

BATEMAN, J.A.:

This is a motion by counsel for Herman McQuaid requesting that the panel who heard his appeal, but has not yet rendered a decision, recuse itself.

Background:

On February 27, 1996, after a single trial by judge alone, running from February 5 to February 19, the appellant, Herman McQuaid and five others (Guy Robart, Spencer Dixon, Cyril Smith, Stacey Skinner and Damon Cole) were convicted of aggravated assault upon Darren Watts, some of the accused being convicted, as well, of aggravated assaults upon others, those assaults occurring on the same evening. (Decision reported at (1996) 148 N.S.R. (2d) 321.) All offenders were sentenced on March 1, 1996. (Decision on sentence reported at (1996) 149 N.S.R. (2d) 104.) All have appealed both conviction and sentence. Six separate appeal hearings were scheduled, each relating to a single accused. On June 12, 1996, a panel of this court heard the appeal of Damon Cole and by decision rendered August 23, 1996, allowed the appeal and ordered a new trial. A fuller background to these proceedings may be found in the **R. v. Cole** decision (1996 N.S.J. 332).

The appeals of Mr. Robart, Mr. Dixon, Mr. Smith and Mr. McQuaid were heard, each separately, by this panel on September 11 and 12, 1996. Decision was reserved in each, none of the decisions has yet been delivered. Mr. Skinner's appeal is scheduled to be heard December 11, 1996, having been adjourned from an earlier date at the request of his counsel.

A central issue on each of the appeals heard to date is counsel's application to admit fresh evidence. The Crown had failed to provide to the defence, before trial, four witness statements. The existence of the statements became known during trial when, on February 8, 1996, police Occurrence Reports were made available to defence counsel. The reports,

among other things, summarize the contents of these statements. Counsel did not, however, request production of the statements until after conclusion of the proceedings, nor did counsel bring the matter to the attention of the trial judge. The appellants now seek to have the statements admitted as fresh evidence on the appeals.

The appeal of Spencer Dixon was heard on the morning of September 11, 1996. Mr. McQuaid's appeal was heard that afternoon. On the **R. v. McQuaid** appeal, Mr. O'Neill tendered, in addition to the four witness statements, four affidavits - his own of September 6, 1996; an affidavit of Stanley W. MacDonald, trial counsel for co-accused Damon Cole; an affidavit of Peter Katsihtis, trial counsel for co-accused Cyril Smith; and an affidavit of Anthony Michael Brunt, articled clerk in the office of counsel for a co-accused young offender. Those latter three affidavits had been tendered and accepted by the panel at the hearing of **R. v. Cole**. The affidavit of Mr. MacDonald confirms that he received copies of the police Occurrence Reports on February 8, 1996 and that he determined, based upon the contents of the Occurrence Reports, not to request production of the statements.

Mr. O'Neill requested admission of the material tendered "to challenge the validity of the trial process".

Mr. O'Neill deposed, in part, in his Affidavit of September 6, 1996:

> 13. That during the course of the trial, Police Occurrence Reports were provided to Defence Counsel and that upon having reviewed the supporting Affidavit of Stanley W. MacDonald, I verily believe that the Reports were disclosed sometime in and around February 8, 1996.
>
> 14. That owing to the demands of the trial, I did not review the Reports immediately.
>
> **15. That I subsequently had discussion regarding the Reports and their contents with other defence counsel.**
>
> **16. That given my understanding of the Reports, I did not request copies of the statements of Terris Daye, Terrance Tynes, Edmond (T.J.) Levia or Travia Carvery from the Crown**. (emphasis added)

In **R. v. Dixon**, heard by the panel in the morning of the same day, L.W. Scaravelli, counsel for Mr. Dixon on both the trial and the appeal, had filed an Affidavit dated September 6, 1996 and stating, in part:

> 11. The occurrence reports which Mr. Fiske refers to in the letter to Mr. Garson dated April 16, 1996, were not provided by Crown counsel for the co-accused (sic) until part way through the trial. There were approximately 160 pages of original occurrence reports. I believe I requested them from Constable Tom Martin. The originals appeared on the Crown counsel table one morning. Most counsel were not aware of them until I mentioned it to Stanley MacDonald and the others. Copies were asked for and provided.
>
> **13. That I recall on Monday February 12, 1996, Stanley MacDonald and the other defence counsel had a brief huddle wherein Mr. MacDonald advised us of what he saw and of course, we all agreed that there did not appear to be anything that we saw that would aid us in making a full answer and defence.** (emphasis added)

In addition, Mr. Scaravelli attached to his affidavit, as an exhibit, a copy of a letter dated April 16, 1996, from Crown counsel to Craig Garson, appellate counsel for Damon Cole, which letter made certain assertions about the availability of the statements prior to trial.

During the hearing of the McQuaid appeal the panel referred Mr. O'Neill to his own affidavit and to the contents of Mr. Scaravelli's affidavit in relation to the "huddle" by defence counsel and to the contents of the letter of April 16, 1996.

Subsequent to the appeal hearing, by supplemental submission dated October 9, 1996, Crown counsel advised that the representations contained in the letter of April 16 were not put forward by the Crown to the panel as a reliable representation regarding the availability of the statements prior to trial. Additionally, Mr. Scaravelli, in a supplemental affidavit filed September 27, 1996, deposes:

> 9. With respect to paragraph 13 of my Affidavit, I subsequently spoke with Kevin Coady and John O'Neil who are

> adamant that they were not involved in any "huddle" as described in my Affidavit.
>
> 10. That at the time I prepared by (sic) Affidavit, it was my recollection upon reflection that it was pointed out to the group of us by Stanley MacDonald, what he had seen in the occurrence reports with respect to the four statements.
>
> 11. That again after having discussed the matter with Mr. O'Neil and Mr. Coady, I cannot swear that a discussion took place with regard to the information contained in the occurrence report or that there was any kind of agreement. I can only say that there did not appear to be anything of relevancy to the Appellant's defence. I therefore did not pursue the matter further.

Motion for Recusal:

Mr. O'Neill submits that this panel should recuse itself on the basis that the remarks of the panel created a reasonable apprehension of bias. In this regard, he refers in his written submission to a statement purportedly made by Chipman, J.A. at p.19 of the transcript:

> Well, you did . . . . . read this stuff and huddled with you (sic) people on Monday morning and you collectively decided, well, we won't bother with those statements.

Mr. O'Neill submits:

> . . . this statement allowed for the single inference, being that Justice Chipman had determined that counsel had huddled and collectively decided not to pursue the statements in question.
>
> . . .
>
> The Appellant submits that the Court having made a determination of an important issue, being the huddle and collective decision not to pursue the statements might be perceived as being able (sic) to revisit the issue with a totally fresh mind.
>
> The Appellant further submits that it is no answer to state that the subsequent curative Affidavits of counsel and the October

> 9, 1996 correspondence corrects the apprehension that the Court was biased.
>
> If the Court did not recuse themselves and subsequently made the same ruling, the Appellant submits that a reasonable person in the Appellant's position would perceive that ruling as arising from a desire for consistency, rather than the product of an impartial decision.

In his oral submission, Mr. O'Neil said that the mere fact that the panel asked questions of him in regard to the Scaravelli affidavit reflects bias, because Mr. O'Neil had not filed the Scaravelli affidavit and, thus, it did not form part of the record.

The Law:

In **Smith v. Whiteway Fisheries Ltd**. (1994), 133 N.S.R. (2d) 50 (N.S.C.A.) Pugsley, J.A., in considering an appeal from a recusal motion wrote, for the court, at p. 58:

> The words of Lord Hewart, C.J. in **Rex v. Sussex Justices**, Ex parte McCarthy (1924), 1 K.B. 256 at 259, are generally cited when an issue respecting apprehension of bias arises:
>
> > "...it is not merely of some importance, but is a fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."
>
> Lord Denning, after referring to these words, wrote "Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking: the judge was biased." (**Metropolitan Properties Co (F.G.C.) Ltd. v. Lannon** (1969), 1 Q.B. 577 at 599.)
>
> The test for us was set out by Laskin, C.J.C., in **Committee for Justice and Liberty v. National Energy Board** (1976), 68 D.L.R. (3d) 716 (S.C.C.) at p. 733:
>
> > "This court on fixing on the test of reasonable apprehension of bias, as in **Ghirardosi v. Minister of Highways** (B.C.), [1966] S.C.R. 367, and again in **Blanchette v. CIS**, [1973] S.C.R. 833 (where Pigeon, J. said at p. 842-3 that 'a reasonable apprehension that the judge might not

> act in an entirely impartial matter is ground for disqualification') was merely restating what Rand, J. said in **Szilard v. Szasz**, [1955] S.C.R. (3d) at pp. 6-7, in speaking of the 'probability or reasoned suspicion of biased appraisal and judgment, unintended though it may be'. "

Pugsley, J.A. continued at p.60:

> The following guidelines, I suggest, are discern able from the authorities.
>
> 1. There is a presumption a judge will carry out his oath of office to render justice impartially.
>
> . . .
>
> 2. **The test is an objective one and involves ascertaining whether a reasonable and right-minded person, with knowledge of all the facts, would conclude that the judge's impartiality might reasonably be questioned.**
>
> 3. The reasonable person is presumed to possess knowledge of all the circumstances.
>
> 4. **A lawyer who wishes to object to a presiding judge on the ground of reasonable apprehension of bias is expected to make the recusal motion with reasonable promptness after ascertaining the grounds for filing the motion**; otherwise there will be a waste of judicial time and resources and a heightened risk that litigants would use recusal motions for strategic purposes (**Preston et al v. U.S**. (1991), 923 F. (2d) 731 (U.S. Court of Appeals Ninth Circuit)
>
> . . .
>
> 5. The usual remedy, if a reasonable apprehension of bias, is established, would be to vacate the judgment and remand the case for retrial by a different judge. (emphasis added)

Mr. O'Neill cites the following passage from **Re Regina and Nolin** (1983), 1 C.C.C. (3d) 36 (Man.C.A.) at page 39:

> I think that there is a reasonable apprehension that a judge in the same proceedings, involving the same parties, having made

> a determination of an important issue, might be perceived as not being able to approach it with a totally fresh and open mind.

In **Nolin,** the Provincial Court judge had ruled at the preliminary inquiry, that certain statements were inadmissible. At the conclusion of the Crown's evidence the accused asked for a re-election. He made a motion, as well, to have a trial by a judge alone and asked that the evidence at the preliminary inquiry be read in and form the evidence at trial. Crown counsel opposed the motion and submitted that the judge alone trial should be heard by a different Provincial Court judge, because, on the preliminary inquiry, the judge had decided an important issue, being the admissibility of the statements. The preliminary inquiry judge ruled that the trial could proceed before him. He further held that while he had made an important ruling as to the admissibility of the statements, he was capable of "re-thinking" the issue on the trial. On an application for prohibition, the Crown raised the issue of bias. The court, on the basis that the judge's prior ruling created a reasonable apprehension of bias, granted an order for prohibition and directed that the matter be remitted for trial before a different Provincial Court judge. This was upheld on appeal.

Analysis:

At the commencement of his submissions on the appeal hearing, Mr. O'Neill accurately identified the issues before the court:

> . . . I'm going to boil it down to three issues. The one I understand is a question of diligence in determining whether the statements were in existence. **Two [is] whether there was a failure to exercise due diligence in obtaining the copies of those statements**. And, from the Appellants point of view, most importantly, whether those statements or one of those statements could have impacted on his ability to answer this charge or these charges. (emphasis added)

Due diligence was, indeed, an important and potentially decisive issue in relation to the non-disclosure. (see **R. v. Bramwell** (1996), 106 C.C.C. (3d) 365 (B.C.C.A.) (appeal to S.C.C dismissed) at p. 374: ". . . where, as here, defence counsel makes a tactical decision not to pursue disclosure of certain documents, the court will generally be unsympathetic to a plea that full disclosure of the documents was not made."; see also **R. v. Stinchcombe** (1992), 60 C.C.C. (3d) 1 (S.C.C.))

As was pointed out by Chipman, J.A. on the appeal hearing, in paragraph 15 of his own affidavit, Mr. O'Neill says "That I subsequently had discussion regarding the [Occurrence] Reports and their contents with other defence counsel." Paragraph 16 continues: "That given my understanding of the Reports, I did not request copies of the statements of Terris Daye, Terrance Tynes, Edmond (T.J.) Levia or Travia Carvery from the Crown." Thus, that Mr. O'Neill knew of the existence of the statements during the trial and had determined not to request production, was beyond dispute. A crucial issue to be decided by the panel, however, was whether Mr. O'Neill, in not requesting production of the statements, had made a tactical decision which might preclude him from now raising the issue.

Of concern to the panel in this regard was why defence counsel, having determined not to request production of the statements during the trial, became interested in obtaining those statements after the proceedings had concluded. This was relevant to the question of due diligence. At the outset of the appeal hearing Mr. O'Neill was questioned on this point and failed to provide an answer, as illustrated by the following exchange:

> **CHIPMAN, J.:** Now what . . . what . . . **what amazing revelations would come to light that would cause you to want those statements then when you didn't want them on February 12th?**
> **MR. O'NEILL:** Well, My Lord . . .

> **CHIPMAN, J.:** Because you certainly knew about them then. You really knew about them long before then because you had the cross-reference sheet and circles, but you sure knew about them then. And it seems to me from the both of the affidavits, there is a little huddle on the 12th and you decided not to go after them. **I put it to you, what would so change your attitude after the conviction and sentence that you would take a different attitude to these statements?**
> **MR. O'NEILL: My Lord, I believe that there is a number of ways you can answer that question.** And . . .
> **CHIPMAN, J.:** And it may appear that if you feel that there are answers that you would like to make to some of these questions, we indicated this morning, if counsel wish to take the opportunity to file additional affidavit material, we would receive it because we want to make sure everybody gets a chance to get all the material before us on this fresh evidence issue that can possibly be of assistance to us in dealing with this difficult issue.
> **MR. O'NEILL: My Lord, perhaps if I can answer the question in this way: In my mind when I listen to your question, what I believe that I'm answering is, what is the purpose of that question? The purpose of that question in my mind goes back to the whole criminal trial process as a whole. What Mr. McQuaid was entitled to was the benefit of a fair trial and that, in my mind, is the most important question that this court and counsel must address. That's the paramount issue is whether Herman McQuaid had the benefit of a fair trial. That's what he's entitled to. Quite frankly and without any disrespect whatsoever, what we have is unchallenged affidavits indicating that the statements were not received.** (emphasis added)

The panel's concern surrounding this issue was further heightened by the contradictions within Mr. O'Neill's responses to the panel about when he became aware that the statements existed. I refer in this regard to the following exchanges at three points in the appeal hearing:

> **FLINN, J.:** When do you say you first became aware that Terris Daye had made a statement?
> **MR. O'NEILL:** My Lord, quite frankly, I've had the opportunity to review this over quite a considerable period of time. What I can say with certainty is that I received those statements through the Garson, Knox & MacDonald firm, and that I received them subsequent to my own request to the crown's office for disclosure of those statements.

Mr. O'Neill's answer was unresponsive to the question.

> **BATEMAN, J.:** But isn't the issue that you referred to Terris Daye's statement in your cross-examination of Danny Clayton?
> **MR. O'NEILL:** I am Yes, but not . . .
> **FLINN, J.:** And the times given.
> **MR. O'NEILL:** ...for a moment, My Lady, going to indicate to this court by way of affidavit or in oral evidence, that I was in possession of those statements at that time.
> **BATEMAN, J.:** I'm not suggesting you were, but you certainly knew at that point in the trial that Terris Daye had given a statement.
> **MR. O'NEILL:** No. My recollection, My Lady ...

The Occurrence Reports, summarizing the statements, had been produced on February 8, 1996, prior to the cross-examination of Danny Clayton, who was the Crown's key witness.

> **FLINN, J.:** You're getting into the materiality of it and I have a couple of questions on diligence before we get into materiality. Whether or not there was a joint decision not to pursue these statements, you were aware, were you not, that Terris Daye and Tynes had made . . . had given the police statements before you cross-examine Clayton?
> **MR. O'NEILL:** I would have to concede to Your Lordship that I would have had to have been.

Mr. O'Neill submits that this panel should not have referred to the affidavit of Mr. Scaravelli (extracted above) nor the attached letter from the Crown attorney dated April 16th, 1996, submitted by counsel on the **R. v. Dixon** appeal, because those documents did not form part of the record on this appeal. He cites no authority for the proposition that, in this kind of application, on an appeal arising from a joint trial, the panel is prevented from raising material of this nature.

Mr. McQuaid's appeal was one of six arising from the same trial. In a companion proceeding, the panel had been presented with information, on oath, from Mr. Scaravelli, the senior defence counsel at that trial, attesting to the fact that the defence counsel had "huddled" and collectively decided not to request production of the statements. Indeed, the

affidavit of Mr. O'Neill appears consistent in that it confirms that he had discussed the Occurrence Reports with other defence counsel and determined not to request production of the statements. While the Scaravelli affidavit was submitted in another appeal hearing, it was information relating to the same trial and apparently concerning an event involving Mr. O'Neill.

Counsel occupy a special place as officers of the court and in that capacity owe a duty of candour. In *Legal Ethics and Professional Conduct: A Handbook for Nova Scotia Lawyers,* a publication of the Nova Scotia Barristers' Society, at Chapter 14, one of the "Guiding Principles" in relation to the obligation of candour provides:

> (e) A lawyer has a duty not to knowingly attempt to deceive or participate in the deception of a court or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive or exaggerated or inflammatory affidavit, **suppressing what ought to be disclosed** or otherwise assisting in any fraud, crime of illegal conduct. (emphasis added)

As identified by Mr. O'Neill at the outset of the hearing, he sought admission of the material tendered on the fresh evidence application to "challenge the validity of the trial process". It would be wrong for the panel to ignore a factual submission, under oath, from an officer of the court, attesting to Mr. O'Neill's participation in the meeting of defence counsel, in the very same trial proceeding which he sought to challenge, without bringing the submission's existence to the attention of Mr. O'Neill. While Mr. O'Neill asserts that the panel was confined to a review of the record, this was an application to admit fresh evidence. Mr. O'Neill was himself asking the court to consider material extending beyond the record of the trial, including, the affidavits of certain of the other defence counsel, Mr. MacDonald and Mr. Katsihtis. In such circumstances it is the obligation of the panel to fully consider the evidence before it in relation to the trial, whether Mr. O'Neill chose to file it or it was filed by other officers of the court. It would be absurd to suggest that on these four

appeals, individual defence counsel could appear before the same panel and give differing accounts of their collective activity at trial.

Mr. O'Neill was invited to respond to the panel's concerns by supplementary submission:

> **CHIPMAN, J.:** And it may appear that if you feel that there are answers that you would like to make to some of these questions, we indicated this morning, if counsel wish to take the opportunity to file additional affidavit material, we would receive it because we want to make sure everybody gets a chance to get all the material before us on this fresh evidence issue that can possibly be of assistance to us in dealing with this difficult issue.

As set out above, Mr. McQuaid's appeal, which was video recorded for television broadcast, was heard on the afternoon of September 11, 1996. At the appeal hearing, Mr. O'Neill's attention was drawn by the panel to the contents of his affidavit which appeared to be consistent with that of Mr. Scaravelli:

> **CHIPMAN, J.:** Well, we have to look at the . . . we have to examine the due diligence as part of the . . . as part of the picture, Mr. O'Neill and unfortunately we do have to take that into account. It may not be the sole factor. The weight of the material is obviously another matter to be taken into account, but I refer to Mr. Scaravelli's affidavit that, "I recall on Monday, February 12th, Stanley MacDonald and the other defence counsel, had a brief huddle wherein Mr. MacDonald advised us of what he saw and of course we all agreed there did not appear to be anything that we saw that would aid us in making full answer in defence."
>
> Well, I don't know why he doesn't say you were in the huddle. He says, "all other defence counsel" or "other defence" . . . does he say "all other" or "all"? Let's see to get it straight. And . . .
>
> **MR. O'NEILL:** My Lord, . . .
>
> **CHIPMAN, J.:** "...and the other defence counsel." I don't know what . . .
>
> **MR. O'NEILL:** I do not have the benefit of Mr. Scaravelli's affidavit.
>
> **CHIPMAN, J.:** No, but your affidavit is perhaps not too far inconsistent with that. You say the . . . you say that "I had discussions regarding the reports and their contents with other defence counsel." It's not as clear as whether they were "all" or

> not. "Given my understanding of the report, I did not request a copy."
>
> Well, it seems strange at such a key place in trial when you are gearing up to cross-examine the one witness that is either going to make or break your client that you wouldn't want to see the statements of people who were in his presence and vicinity on that night, and which you were knew were in his presence and vicinity and which you now knew for the second time, having regard to the chart, that the police had statements. So we have to ask those questions, Mr. O'Neill and as I say, if you care to file any further affidavit material on that subject, we will be more than willing to give latitude.

In response to the panel's offer to accept supplementary material, Mr. O'Neill filed an affidavit on September 27, 1996. In that affidavit Mr. O'Neill advised that he was provided with a copy of Mr. Scaravelli's affidavit on September 12, 1996. In this regard he deposes:

> 6. That with respect to paragraph 13 of Mr. Scaravelli's Affidavit, I state that I did not engage in a brief huddle on Monday, February 12, 1996 with Mr. MacDonald and other defence counsel wherein Mr. MacDonald advised us of what he saw nor did I agree with other defence counsel that there did not appear to be anything from what we saw that would aid us in making a full answer in (sic) defence. That I also state that at no time did I make or participate in a "strategic" decision to not pursue any of the above-noted statements.

The supplemental affidavit does not elaborate upon paragraphs 15 and 16 of Mr. O'Neill's earlier affidavit which provide:

> 15. That I subsequently had discussion regarding the Reports and their contents with other defence counsel.
>
> 16. That given my understanding of the Reports, I did not request copies of the statements of Terris Daye, Terrance Tynes, Edmond (T.J.) Levia or Travia Carvery from the Crown.

Notwithstanding Mr. O'Neill's submission that he was disadvantaged at the appeal hearing, in not having a copy of Mr. Scaravelli's affidavit, the relevant portions were read to him by the panel, and he was provided with the affidavit the following day. It is of particular importance, that he was clearly invited to respond to the panel on this, or any other issue,

by supplemental submission, and did so. Mr. O'Neill submits, as well, that by not having the affidavit in advance of the appeal hearing, he was denied an opportunity to cross-examine Mr. Scaravelli on its contents. As Mr. O'Neill had filed affidavits prepared by certain other defence counsel, the panel presumed he had access to all such affidavits. Again, any hardship was remedied by the repeated and broad invitation to Mr. O'Neill to submit supplemental material. Had he wished to call Mr. Scaravelli for cross-examination, he could have made that request of the panel. He did not do so, presumably because of Mr. Scaravelli's supplemental filing.

The discussion regarding due diligence concluded shortly after the following comment by Chipman, J.A.:

> **CHIPMAN, J.:** But just before you leave the disclosure, you're familiar with this passage from **R. v. McAnespie** in the Supreme Court of Canada where Justice Sopinka says
>
> > "With respect to (1), we are of the opinion that although disclosure of information ought to have been made earlier, counsel for the respondent failed to bring this to the attention of the trial judge at the earliest opportunity as required. In **R. v. Stinchcombe**... in referring to this obligation, we stated: 'Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.'"
>
> Now this is exactly what this principle of law that I'm reading to you is exactly what . . . is at the back of my mind when I have been asking you these questions. And I think in the back of Justice Flinn's mind and we are concerned about these words "at the earliest opportunity" and failure to do this, well, would be an important factor in deciding whether a new trial can be ordered. Now that's the law that we have to apply here and we have to test you on. So if we appear to be testing you severely . . .
>
> **MR. O'NEILL:** My Lord, let me go back . . .
>
> **CHIPMAN, J.:** ...it's only because we have the test laid down for us by that high court.

Disposition:

As noted by Pugsley, J.A. in **Smith v. Whiteway, supra**, "A lawyer who wishes to object to a presiding judge on the ground of reasonable apprehension of bias is expected to make the recusal motion with reasonable promptness after ascertaining the grounds for filing the motion." Mr. O'Neill's allegation of bias relates to comments by the panel at the hearing on September 11, 1996. Remarkably, not until forty-three days later, on October 24, did he advise the court of his intention to bring forward a recusal motion, indicating at that time that just two days earlier he had ordered a copy of the transcript of all four appeal hearings. Mr. O'Neill offers no explanation for his delay in bringing the motion. In this regard he says only that ". . . the motion has been brought in a timely fashion."

One would expect that the apprehension of bias claimed by Mr. O'Neill, if reasonable, would have been immediately apparent to him during the hearing. That he did not act upon it with dispatch leads, possibly, to the inference that the alleged apprehended bias was, indeed, not apparent to Mr. O'Neill. This places the bona fides of his application in doubt. While he might answer that it became apparent to him only upon reflection, it is inexplicable that he did not, then, raise it when he had a further clear opportunity to do so in his supplemental submission filed two weeks after the hearing.

R. v. Nolin, supra, cited by Mr. O'Neill in support of his application bears no factual similarity to this matter. The quotation relied upon by Mr. O'Neill concerns a situation where the judge had made a prior ruling on a critical issue. There was no such ruling here. The panel was simply concerned about the position taken by Mr. O'Neill, at the appeal hearing, which was inconsistent with his own affidavit. Troubling, as well, was the fact that it was not until some time after the trial proceedings had concluded that

he decided that the statements were important to the defence, with no explanation as to why he developed an interest in the statements at that point.

When a reasonable apprehension of bias is raised an objective test is to be applied - "whether a reasonable and right minded person, with knowledge of all the facts, would conclude that the judge's impartiality might reasonably be questioned." Whether there existed a reasonable apprehension of bias calls for a review of the transcript in full. I am satisfied, having reviewed the transcript, that it would be clear to the dispassionate reader that neither the panel nor any of its members had come to a final decision that Mr. O'Neill had made a tactical decision not to request the statements. Simply put, judges must ask questions about issues raised on appeal.

In my opinion the motion cannot succeed. The panel should not recuse.

Bateman, J.A.

Concurred in:

Chipman, J.A.

Flinn, J.A.

C.A.C. No. 126612

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HERMAN McQUAID Appellant Applicant - and - HER MAJESTY THE QUEEN Respondent	)	REASONS FOR JUDGMENT BY: Bateman, J.A.