NOVA SCOTIA COURT OF APPEAL
Citation: *McPherson v. Campbell*, 2019 NSCA 23

Date: 20190403
Docket: CA 470083
Registry: Halifax

Between:

Drew McPherson

Appellant

v.

Jamie Campbell

Respondent

Judge:	The Honourable Justice Jamie W.S. Saunders
Appeal Heard:	March 13, 2019, based on written submissions only, by previous order of the Court
Subject:	**Judicial Immunity. Vexatious Litigant. Abuse of Process. CPR 88.02(1)(a). Abridgement of Time Limits. CPR 2.03. Procedural Fairness. Judicial Bias. Leave to appeal. Standard of Review.**
Summary:	The appellant, a self-represented litigant, currently an inmate in a federal penitentiary, sued a Justice of the Nova Scotia Supreme Court accusing him of having committed "torts and crimes" said to have caused him "severe damages" for which the appellant claimed punitive damages and an order prohibiting the respondent from continuing to be a judge. The respondent filed a motion seeking the dismissal of the proceeding as well as injunctive relief against the appellant. Following a hearing in the Nova Scotia Supreme Court, the judge granted the respondent's motion after finding that his only involvement arose in the performance of his judicial duties and, accordingly, he was protected by an absolute judicial immunity. The motions judge also granted a permanent injunction

barring the appellant from commencing any proceeding in any court in Nova Scotia, and directing court staff to reject any document the appellant might ever attempt to file, except with the Court's leave.

The appellant appealed.

Held: Appeal dismissed with costs. The appellant's grounds of appeal and written submissions make no sense and require very little response. Sadly, one suspects they are the product of the appellant's publicly acknowledged treatment for mental illness, all well-documented in reported decisions, which may explain the bizarre and entirely unfounded claims brought against the respondent.

The motions judge did not err in either fact, law or the exercise of her judicial discretion in her analysis and conclusions, which led her to find that the appellant's pleadings constituted an abuse of process and that on the facts of this case the respondent was protected by an absolute judicial immunity because his only involvement with the appellant arose during the performance of his duties as a judge. Neither was there any merit to the appellant's complaint that he was denied procedural fairness or that the motions judge was biased. On this record it was perfectly reasonable for the judge to abridge formal time limits on the basis that the appellant was fully aware of the motion materials, had ample time to prepare his position, was in no way prejudiced, and participated fully at the hearing.

The record in this case clearly establishes that the appellant is a vexatious litigant who routinely files meritless claims and flagrantly abuses the courts' processes. Such conduct should be exposed and denounced.

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Respondent

Judges:	Bourgeois, Saunders and Fichaud, JJ.A.
Appeal Heard:	March 13, 2019 based on written submissions only, by previous order of the Court
Held:	Leave to appeal granted and appeal dismissed per reasons for judgment of Saunders, J.A.; Bourgeois and Fichaud, JJ.A. concurring.
Counsel:	Appellant (Written brief only) Justin E. Adams, for the respondent (Written brief only)

Reasons for judgment:

[1] The appellant is currently an inmate in a federal penitentiary. Following a trial by judge and jury, he was convicted of various driving offences, all arising out of a collision that occurred on September 30, 2011. The most serious offences were criminal negligence causing death and bodily harm. He was sentenced to 10 years' imprisonment less credit for time spent on remand.

[2] The appellant is no stranger to litigation in Nova Scotia. Since 2011 he has initiated a number of claims against various justice system participants and other parties.

[3] One of his targets was the respondent, Justice Jamie Campbell of the Nova Scotia Supreme Court, who came into contact with the appellant while presiding over some of these proceedings.

[4] To provide context I will briefly describe the two claims brought by the appellant against the respondent. Beyond that I will add further detail as may be required during my analysis of the issues. In each claim, Mr. McPherson accused Justice Campbell of having committed "torts and crimes" against the appellant, said to have caused him "severe damages" for which the appellant claimed various forms of relief including punitive damages and an order "… prohibiting Jamie Campbell from continuing to be a judge, lawyer, law clerk or from participating in any legal profession for the rest of his life …".

[5] In February 2016 Mr. McPherson filed a Notice of Action and Statement of Claim (Hfx. 448092) against Justice Campbell ("the first proceeding"). On March 14, 2016, the respondent's counsel wrote to the appellant asking that he discontinue the first proceeding. Subsequently, in January 2017, the respondent filed a motion seeking the dismissal of the first proceeding along with injunctive relief against Mr. McPherson. That motion came before Associate Chief Justice Deborah K. Smith on February 9, 2017. Under questioning by Smith, A.C.J. as to whether he had received the motion materials, Mr. McPherson acknowledged that he had deliberately chosen not to collect his mail. Accordingly, Smith, A.C.J. directed the respondent's counsel to serve the appellant with the motion materials at the Burnside jail, where he was in custody at the time. A few months later, respondent's counsel became aware that on May 29, 2017, the appellant had filed a Notice of Discontinuance with respect to the first proceeding. The appellant had

not given any notice to the respondent of this filing (or his intention to file) at any time before or after the filing of his Notice of Discontinuance.

[6] During a subsequent search of the files at the Court Registry, the respondent's counsel became aware that on April 28, 2017, the appellant had filed a Notice of Action and Statement of Claim (Hfx. No. 463087, "the second proceeding") against the respondent, prior to discontinuing the first proceeding. Here again, the appellant gave no notice to the respondent of his filing (or his intention to file). This second proceeding was never served.

[7] In October 2017 the respondent brought a motion to dismiss the appellant's second proceeding as an abuse of process. That motion was heard by Nova Scotia Supreme Court Justice Suzanne M. Hood. After considering the record and submissions from both parties, Hood J. delivered a brief oral decision granting the respondent's motion. Based on the evidence presented, Justice Hood was satisfied that Justice Campbell's only involvement with the appellant arose in the performance of his judicial duties.

[8] Applying the principle of judicial immunity, Justice Hood dismissed "all of the claims" in Hfx. No. 463087 as being an abuse of process pursuant to *Civil Procedure Rule* 88.02(1)(*a*). She granted a permanent injunction prohibiting the appellant from starting any further actions against either Campbell, J., or any other member of the Nova Scotia Supreme Court, or the Nova Scotia Court of Appeal, or Justice Campbell's legal counsel, in any Nova Scotia court without first obtaining leave. In her confirmatory order dated October 13, 2017, Justice Hood also directed Court staff to reject any documentation filed by the appellant in contravention of her order.

[9] Three and a half weeks after Justice Hood issued her order, the appellant filed a handwritten Notice of Appeal (General). In it he asked that the judgment appealed from be reversed, to which he added the words "punitive damages".

[10] He filed an Amended Notice of Appeal on June 13, 2018. His grounds of appeal state:

> (1) The order claims that judges are allowed to commit crimes, including homicide but obviously we can't have that
>
> (2) The judge made an order which affects her own interests which is clearly a conflict

> (3) The precedent relied upon is also clearly wrong and dangerous since it says that anyone who has ever had any judicial immunity for anything is allowed to murder the appellant
>
> (4) The plaintiff was not given any notice of the motion for summary judgment
>
> [Emphasis in original]

[11] On February 20, 2019, my colleague, Justice Beveridge, sitting in Chambers, heard motions involving the appellant in this and other proceedings. He granted an order on that date confirming the appellant's desire that this appeal from Justice Hood's order proceed as scheduled, but without the appellant having to appear or participate by videoconference or otherwise. The appellant asked that the appeal be heard by the panel assigned to it, based on written submissions only. It is on that basis that I have considered the record on appeal and the merits of Mr. McPherson's complaint.

[12] Having done so, while I am prepared to grant leave, I would dismiss the appeal, for the reasons that follow.

Issues

[13] The grounds of appeal enumerated by Mr. McPherson in his amended Notice of Appeal, together with his written submissions, make no sense and require very little, if any, response. Sadly, one suspects they are the product of his mental illness. The appellant readily and publicly acknowledges that he has experienced mental illness, and that over the years he has had a number of psychiatric assessments. His condition and treatment are well-documented in reported decisions and need not be repeated here. See for example, the decision of Boudreau, J. (2015 NSSC 236); the decision of Bryson, J.A. (2018 NSCA 82); and the decision of Beveridge, J.A. (2018 NSCA 87). Respectfully, this may help to explain the bizarre and entirely unfounded claims he brought against Justice Campbell in this case.

[14] The submissions contained in the single page written brief filed by the appellant on this appeal are not lengthy and I will reproduce them here verbatim:

> Nobody told me how to do one of these things, so I hope this meager attempt is sufficient. Sorry for being weird.
>
> I was given literally ZERO notice of the fact that a motion had been filed on the new action.

> A judge was literally STEALING my court documents, which was completely BLOCKING my access to the justice system. This is bad enough, but consider the fact that the majority of the court documents were trying to resolve a homicide that was committed against a justice system participant to prevent him from testifying against an organized crime group which specializes in crimes against children such as child pornography; that's horrific. Plus, the fact that the court documents were aiming to prevent the imminent homicide of this same person.
>
> Just tell me he's allowed to target me and block my access to the whole justice system by keeping my documents on his desk for a year or indefinitely at least until the deadlines pass.
>
> This certainly makes it appear that the judge is involved somehow with the crime group. The severity of his actions are known to him because when I confronted him about it, the mere mention of the phrase "Canadian Judicial Council" triggered such a powerful fear reaction in him that it was quite visible from the gallery. The question remains on the table, why would he be willing to do such a severely unethical and/or criminal action if he has nothing to gain personally?
>
> Justice Hood is certainly in conflict, she is involved in the facts of the case considering she works in the courthouse where the perpetrator(s) are located and could in fact be one of the direct perpetrators, plus the ruling directly affects herself. This looks bad no matter how you slice the pepperoni and it creates OPPORTUNITY to have the judiciary to fall into disrepute due to a totalitarian criminal usurping of control. We must avoid all such opportunities at all costs. A change of jurisdiction is the only sensible recourse, and if the dismissal has actual merit, then there will be no issue with a court of a different jurisdiction making that ruling. If however, it has merit, the chance of a judge making an adverse ruling to herself is just about zero, so the outcome of the case was pre-determined from the start, which I believe is why the AG made sure the motion happened in this very venue. In fact, the Appeal court is in conflict too because it is in the same building and the document theft could have been involving any one of the appeal court judges and in fact, there have been documents disappearing from the appeal court, as well as by the appeal registrar, Tim Morse.

[15] I agree with what the respondent says at ¶8 of his factum:

> 8. At their core, the Appellant's complaints are irrelevant. This Appeal concerns a single issue: Did Justice Hood err in finding that the Appellant's pleadings against the Respondent were an abuse of process and, subsequently, exercising her discretion to dismiss the proceeding?

[16] I also agree with the way in which the respondent has chosen to frame the issues. In the analysis that follows I will address them in that same sequence against the requisite standard of review:

1. Should leave to appeal be granted with respect to any of the issues raised in the Amended Notice of Appeal?
2. Did Justice Hood err in finding that the Appellant's pleadings against the Respondent were an abuse of process and, subsequently, exercising her discretion to dismiss the proceeding?
3. Was the process before the court below procedurally fair to the Appellant?

Standard of Review

[17] The question of granting leave to appeal is one of first instance. We do not undertake a standard of review analysis. As this Court explained in *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38, ¶18:

> **Standard of Review**
>
> [18] As to the first issue, the question of granting leave to appeal is one of first instance. Accordingly, there is no applicable standard of review. The test for leave to appeal is well-known. It requires an appellant to raise an "arguable issue". An arguable issue must do more than simply identify a matter of pure academic interest. It must be an issue that actually arises on the facts and merits this Court's attention. It must be "an issue that could result in the appeal being allowed". See for example, *Nova Scotia v. Roué*, 2013 NSCA 94, and *Burton Canada Co. v. Coady*, 2013 NSCA 95.

[18] The second issue has two parts. Whether Mr. McPherson's pleadings constituted an abuse of process is a question of law, reviewable on a standard of correctness. So too Justice Hood's understanding and application of the principle of judicial immunity. When interpreting and applying the law to the evidence before her, Justice Hood had to be right. See for example, *Aliant Inc. v. Ellph.com Solutions Inc.*, 2012 NSCA 89 and *Laushway v. Messervey*, 2014 NSCA 7.

[19] If we are satisfied that Justice Hood was correct, as a matter of law, to find that the appellant's pleadings were an abuse of process, and that there was an evidentiary basis for her to conclude, as a matter of fact, that Justice Campbell's only involvement with the appellant arose during the performance of his duties as a judge, then her decision to ultimately dismiss the action on that basis and invoke other injunctive relief against the appellant amounted to an exercise of her judicial discretion. The standard of appellate review applied to a discretionary decision is settled law. Deference is owed. Our intervention is only warranted if we were satisfied that Justice Hood erred in law, or that her decision produced a patent injustice. See for example, *Innocente v. Canada (Attorney General)*, 2012 NSCA

36; *Burton Canada Co. v. Coady, supra*; *Brekka v. 101252 PEI Inc.*, 2015 NSCA 73; and *Homburg v. Stichting Autoriteit Financiële Markten*, *supra*.

[20] With respect to the third and final issue, procedural fairness is a particularly unique question of law which is not subjected to a standard of review analysis. Rather, we consider the procedures that were engaged in the specific circumstances of the case on appeal, against the factors and principles described by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. The issue of procedural fairness is not one that triggers any notion of deference. In matters where a duty of fairness is owed to an appellant, the role of this Court on appeal is to determine whether there was a breach or not. See for example, *MacNutt v. Acadia University*, 2017 NSCA 57, and the cases cited therein.

[21] These then are the principles I will apply to my analysis in this case.

Analysis

[22] While it could very easily be said in this case that the appellant had failed to meet the test for granting leave, and that leave to appeal ought to be denied, I am prepared to consider the merits of Mr. McPherson's complaints, in one respect. That concerns his submission that he did not have any notice of the motion heard and granted by Justice Hood. While that position is untenable, I will address it later in these reasons.

[23] But first I will deal with the issue as to whether Hood, J. erred in finding that the appellant's pleadings were an abuse of process and that because Justice Campbell was protected by the doctrine of judicial immunity, she should exercise her discretion to dismiss the proceeding and bar the appellant from any attempt to reinstate it. Respectfully, those allegations can be summarily dismissed.

[24] The absolute immunity of Superior Court Judges in Canada is a rule of the common law that has been applied since at least the early 17th century. In *Floyd v. Barker* (1607), 12 Co. Rep. 23, 77 E.R. 1305, the principle of judicial immunity was recognized on the following basis:

> …for this would tend to the scandal and subversion of all justice. And those who are the most sincere, would not be free from continual calumniations …

The public policy rationale for immunizing judges against civil suit for actions taken in the course of their judicial duties was explained in a frequently quoted

passage from *Garnett v. Ferrand* (1826-27), 6 B. & C. 611, 108 E.R. 576 at pp. 625-626:

> This freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be.

See *Morier v. Rivard*, [1985] 2 S.C.R. 716 and the cases cited therein; *Sirros v. Moore*, [1974] 3 All E.R. 776 (C.A.); and *Jordan v. Nation*, 2013 ABCA 117.

[25] Justice Hood was satisfied, based on her review of the evidence, that Justice Campbell's only interaction with the appellant came about as a result of Justice Campbell fulfilling his duties as a judge. She found:

> … the affidavit of Justice Campbell makes it clear that he was acting only in a judicial capacity and I accept that to be the case. No material facts were pleaded …by the plaintiff Mr. McPherson which would lead me to believe otherwise. Therefore because of the principle of judicial immunity …and the fact that therefore Justice Campbell was acting in a judicial capacity, the action is an abuse of process under Rule 88.02(1)(a) and the action in this matter is therefore dismissed, that's the matter of Drew McPherson and Jamie Campbell, Hfx. No. 463087. An action against a judge is *prima facie* an abuse of process in light of the principle of judicial immunity. …

[26] Having reviewed the record in this case, Justice Hood's finding of fact that Justice Campbell's only involvement with the appellant occurred while Campbell, J. was acting in a judicial capacity is indisputable. In his comprehensive written brief and oral submissions, counsel for the respondent carefully reviewed the long-settled jurisprudence establishing that Justice Campbell enjoyed the protection of an absolute immunity from civil suits while performing his judicial function. The transcript of the hearing demonstrates that Justice Hood understood the law and applied it properly to the motion before her.

[27] Whether to grant the respondent's requested remedy dismissing the action, as well as imposing certain injunctive relief, called for the exercise of judicial discretion. Justice Hood said, in part:

> … Further remedies that are sought by … the defendant are to prevent further actions against Justice Campbell and the court has brought authority under Rule 88 to prevent further abuse of process. Therefore … not only are future actions against Justice Campbell therefore prohibited by injunction but also against any

> Supreme Court Judge, Court of Appeal Judge, or counsel for Justice Campbell in this matter… and therefore the court … is granting an injunction to prevent further actions against not only Justice Campbell but … any other Supreme Court judge, Court of Appeal Judge or counsel for Justice Campbell in this matter….the only exception would be if the court grants prior approval to the filing of any further action and … to put that into effect, the court staff are authorized to reject court documents from Mr. McPherson … unless that prior approval from the court has been granted. …

[28] I am satisfied that Justice Hood's directives were a proper exercise of her judicial discretion. The record in this case clearly establishes that the appellant is a vexatious litigant who routinely files meritless claims and flagrantly abuses the courts' processes. Such conduct should be exposed and denounced. (While expressed in the context of *CPR* 90, this Court's admonitions concerning such behaviour are equally apt. See for example, *Doncaster v. Chignecto-Central Regional School Board*, 2013 NSCA 59; *Macdonald v. First National Bank GP Corporation*, 2013 NSCA 60; and *Liu v. Atlantic Composites Ltd.*, 2014 NSCA 58.) Any suggestion Justice Hood's order is flawed or leads to a patent injustice is completely without merit.

[29] I turn now to the third and final issue, which concerns this assertion in Mr. McPherson's factum:

> I was given literally ZERO notice of the fact that a motion had been filed on the new action.

[30] This amounts to a complaint by the appellant that he was denied procedural fairness. Such an allegation can also be quickly rejected.

[31] As soon as the hearing before Justice Hood began, counsel for the respondent stipulated that the appellant had likely not received the motion materials ten clear days before the hearing date, but asked that the period for service be abridged and that the matter proceed. Hood, J. granted the respondent's request for an abridgement of time. After hearing from both parties she said:

> … Mr. McPherson … I have concluded that … it was certainly possible for you to have looked at these very submissions back when the material was delivered to you in February and that as Mr. Adams has just pointed out there was a letter sent to you almost a year before that … suggesting that you discontinue the action for the very reasons that Mr. Adams has put forward today ... I believe you are as capable of answering those … submissions today as you would be … at any time in the future and you've had the opportunity to do research on this subject … earlier this year.

[32] I would uphold Justice Hood's decision for several reasons. First, our Nova Scotia *Civil Procedure Rules*, and in particular, *CPR* 2.03, provide a broad discretion to judges to abridge timelines and excuse non-compliance with non-mandatory provisions of the *Rules*. On that basis alone, *CPR* 2.03 can be dispositive. But I would go further.

[33] Having received multiple copies of the motion materials in the first proceeding, Mr. McPherson cannot complain that he did not receive adequate notice of the case he had to meet. To the extent he claims to have not received the motion materials for the second proceeding, I agree with Hood, J. that the appellant was in no way prejudiced. The motion materials for each of the two proceedings were substantially the same.

[34] Similarly, if one were to take the respondent's lawyer's letter to the appellant dated March 14, 2016 as the starting point, and the hearing before Justice Hood as the finale, the reality is that Mr. McPherson had almost one and a half years' notice of the respondent's intention to bring the motion to dismiss his claims as an abuse of process. As Justice Hood found, Mr. McPherson had ample time to prepare his position.

[35] Further, the appellant's past habit of not collecting (and even ignoring) service of legal documents hardly gives him a platform to claim that the court process was unfair to him.

[36] I have no doubt the appellant was afforded procedural fairness, and was able to fully participate in opposing the respondent's motion at the hearing before Justice Hood.

[37] Before leaving this subject I should also deal with the appellant's allegation of bias against Justice Hood based on these statements in his factum:

> … Justice Hood is certainly in conflict, she is involved in the facts of the case considering she works in the courthouse where the perpetrator(s) are located and could in fact be one of the direct perpetrators, plus the ruling directly affects herself. This looks bad no matter how you slice the pepperoni and it creates OPPORTUNITY to have the judiciary to fall into disrepute due to a totalitarian criminal usurping of control… A change of jurisdiction is the only sensible recourse, and if the dismissal has actual merit, then there will be no issue with a court of a different jurisdiction making that ruling. If however, it has merit, the chance of a judge making an adverse ruling to herself is just about zero, so the outcome of the case was pre-determined from the start …

[38] I agree with the respondent that the appellant's argument is entirely without merit and, arguably, a further illustration of his continuing abuse of process. The test for disqualification on account of bias is long-established. So too the fact that the party alleging bias carries the burden of proving it. In *Wewaykum Indian Band v. Canada*, 2003 SCC 45, the Supreme Court of Canada declared:

> 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:
>
> > ... 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."

See as well, *Doncaster v. Chignecto-Central Regional School Board, supra;* and *Nova Scotia (Attorney General) v. MacLean*, 2017 NSCA 24.

[39] At no time during the hearing before Justice Hood did the appellant express any concerns regarding bias. In my view – having regard to the circumstances in this case – the appellant should not be permitted to remain silent in the court below and then raise an allegation of bias for the first time on appeal.

[40] Further, there is not one iota of evidence to sustain a finding of reasonable apprehension of bias, let alone actual bias. The appellant chose to commence a legal proceeding in the Supreme Court of Nova Scotia, against a sitting justice of the Supreme Court of Nova Scotia. He ought not be seen to invoke the jurisdiction of that court and then allege that none of its members should be permitted to hear it.

Conclusion

[41] The motions judge did not err, in fact or in law, in finding that the appellant's claims against a sitting judge constituted an abuse of process and that the judge was protected by absolute immunity from civil suit since his only dealings with the appellant arose as a consequence of fulfilling his judicial duties.

The relief granted by the motions judge fell well within the proper exercise of her judicial discretion. The appellant's assertions that he was denied procedural fairness or that the motions judge was biased against him are completely unfounded. In sum, each of the appellant's complaints is entirely without merit.

[42] For these reasons I would dismiss the appeal with costs in the amount of $2,000.00, inclusive of disbursements.

Saunders, J.A.

Concurred in:

Bourgeois, J.A.

Fichaud, J.A.