NOVA SCOTIA COURT OF APPEAL
Citation: MacEwan v. Henderson, 2003 NSCA 133

Date: 20031205
Docket: CA 202004
Registry: Halifax

Between:

Patricia MacEwan

Appellant

v.

Roy Henderson

Respondent

Judges:	Glube, C.J.N.S.; Bateman and Oland, JJ.A.
Appeal Heard:	November 28, 2003, in Halifax, Nova Scotia
Held:	**Appeal dismissed by the Court.**
Counsel:	appellant in person Robert Pineo, for the respondent

Reasons for judgment by the Court:

[1] This is an appeal from an order of Justice J. Edward Scanlan of the Supreme Court of Nova Scotia dated May 28, 2003. Ms. MacEwan appeals Justice Scanlan's dismissal of her motion that he recuse himself from hearing her appeal from the decision of a Small Claims Court adjudicator.

[2] Ms. MacEwan was the plaintiff in an action in the Small Claims Court. She is represented here, as she was before the Small Claims Court and, on occasion, in the Supreme Court, by Mr. Graham Johnston.

[3] It was Ms. MacEwan's submission to Justice Scanlan, that in the preliminary proceedings leading up to the hearing of the appeal in Supreme Court, he acted in a way that demonstrated a reasonable apprehension of bias on his part, unfavourable to her.

[4] Actual or reasonably apprehended bias goes to jurisdiction and, if found, a new hearing must follow. In **R. v. S. (R.D.)**, [1997] 3 S.C.R. 484 this was expressed by Cory J. as follows:

> 99 If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction. . . . In the context of appellate review, it has recently been held that a "properly drawn conclusion that there is a reasonable apprehension of bias will ordinarily lead inexorably to the decision that a new trial must be held" . . .

[5] The party alleging bias bears the onus of proof to the following standard, again referring to the judgment of Cory J. in **R.D.S.**, **supra**:

> 111 The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:
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> > [T]he 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. . . . [The] test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. . . ."

> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram, supra*, at pp. 54-55; *Gushman, supra*, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark, supra*, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

[6] Contrary to the submission of the appellant, an application for recusal is properly heard by the judge whom the party is asking to withdraw from presiding over further proceedings. There was therefore no error on that account. We have applied the standard set out in **R.D.S.** to the record before us. We have considered, individually and collectively, the various points which the appellant says are reflective of disqualifying bias on the part of Justice Scanlan. We are not persuaded that the judge erred in dismissing the application for recusal.

[7] Accordingly, the appeal is dismissed. The respondent seeks costs. A decision of the Supreme Court on a small claims appeal is final and not subject to further appeal (**Small Claims Court Act**, R.S.N.S. 1989, c. 430, s.31(6)). This is not an appeal from a small claims proceeding but an appeal from a Supreme Court order under the **Judicature Act**, R.S.N.S. 1989, c. 240, s. 38(1). Costs on this appeal are, therefore, not limited to the costs prescribed in r. 23 of the regulations made pursuant to s. 33 of the **Small Claims Court Act**. It is appropriate that the

appellant pay to the respondent costs of this appeal which we fix at $1000.00 inclusive of disbursements.

Glube, C.J.N.S.

Bateman, J.A.

Oland, J.A.