SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Colpitts*, 2015 NSSC 117

Date: 20150415
Docket: CRH 346068
Registry: Halifax

Between:

R. Blois Colpitts

Applicant

v.

Her Majesty the Queen

Respondent

DECISION ON RENEWED RECUSAL MOTION

Revised Decision: The text of the original decision has been corrected according to the attached erratum dated April 16, 2015.

Judge: The Honourable Justice Kevin Coady

Heard: April 14, 2015 in Halifax, Nova Scotia

Written Decision: April 15, 2015

Counsel: Mark Covan, James Martin and Scott Millar for the Federal Crown
Tyler Hodgson. for R. Blois Colpitts
George MacDonald Q.C. and Jane O'Neill, for Daniel Potter

By the Court:

BACKGROUND:

[1] On November 21, 2014 all three defendants filed a motion for an order recusing the trial judge from any further involvement in these proceedings. I dismissed that application at 2014 NSSC 431. Since that time I have heard an extensive *O'Connor* application. That application resulted in three written decisions. The first ruling dealt with a contested procedural issue (2014 NSSC 441). The second ruling dealt with the issue of privilege (2015 NSSC 26). The third and ultimate ruling dealt with the likely relevance of the sought after Nova Scotia Securities Commission documents (2015 NSSC 59). I concluded the defendants had not met the onus of likely relevance with respect to the last 400 documents in issue. Consequently I did not order their production.

[2] The *O'Connor* application involved in excess of 20,000 documents. On the privilege issue the majority were protected from production. On the likely relevance ruling I quoted the Crown's position at paragraph 3:

> The defendants in this case are not in a "Catch 22" situation. They are already in possession of a massive amount of information from which to fashion a defence. They have received over 16,000 files from the Crown. They have received the entire NSSC regulatory file consisting of 1745 documents (often referred to as 34 banker's boxes). They have received

> emails of the NSSC's main investigator not otherwise located in the regulatory file (1645 emails). They have everything generated by the Crown and the NSSC over an 11 year period, with the exception of the roughly 400 documents that are subject to this application.

Obviously I was not satisfied that there was a reasonable possibility that the remaining few documents were logically probative to an issue at trial or the competence of a witness to testify.

THE INVESTIGATIVE NOTES:

[3] In the final *O'Connor* ruling I ordered the release of the investigative notes of the two principle Securities Commission investigators. In the privilege ruling I commented as follows at paragraphs 46 and 47:

> [46] Mr. Connell-Tombs was an investigator in the enforcement department of the Investment Dealers Association of Canada throughout the NSSC investigation. He is named in the amended section 27 order dated April 23, 2003. I have been provided with a binder that contains 959 pages of handwritten notes. They span the period from August 28, 2002 until September 30, 2004. Much of these notes are illegible.
>
> [47] The notes do not carry any privilege designation. They are clearly the same as police officer's notes in a *Criminal Code* investigation. A police officer's notes are routinely disclosed to defendants. Given that the NSSC cooperated with the RCMP, I see no reason why these notes attract any kind of privilege. Scott Peacock's notes are no different than a police officer's notes.

I released these notes as I felt they should not have been the subject of the *O'Connor* regime. The Securities Commission have, from time to time, released documents to the defendants by consent. I would have expected these notes would

be similarly released. Given that the RCMP cooperated with the Securities Commission, I question why they were not subject to first party *Stinchcombe* disclosure.

[4] I am also of the view that the Scott Peacock notes attract the same analysis. They should not have been subject to the likely relevance analysis for production. The disclosure of the investigators' notes are routinely disclosed to defendants. I ordered the release of these investigative notes without resort to a likely relevance analysis. Clearly I misspoke at paragraph 52 of my February 27, 2015 decision when I stated "I have concluded the defendants have not established they are likely relevant to an issue in this trial." However, I made it very clear in the next sentence that "I am prepared to release Scott Peacock's notes as investigator's notes."

[5] Mr. Colpitts submitted as follows at paragraph 13 of his April 7, 2015 brief:

> 13. At paragraph 52 of your decision, Your Lordship explicitly found that the notes of Scott Peacock (and Brian Connell-Tombs) were <u>not</u> likely relevant but nonetheless ordered them disclosed. If Your Lordship had truly been of the opinion that these notes did not meet the likely relevant standard, such an order for disclosure would have been illegal and in violation of the rights of affected third parties. Your Lordship has previously found that the court does not enjoy any inherent jurisdiction to make such an order, especially once an *O'Connor* application has been filed, and (as reviewed above) your Lordship recognized that if documents are found not to be likely relevant *O'Connor* does not provide any authority to order the documents produced. Accordingly, it was not open

> to the court to reach this conclusion and make the production order that it did. The order is illegal on its face.

I want to make it crystal clear that these investigative notes were produced to assist the defendants and without resort to the *O'Connor* analysis. I reject the suggestion that releasing these notes amounts to evidence of judicial partiality.

RECUSAL NUMBER TWO:

[6] On April 7, 2015 Mr. Colpitts filed an "Application for Renewed Recusal." The introductory paragraph of his brief states:

> 1. The Applicant, R. Blois Colpitts, brings a second recusal motion out of the reasons issued by your Lordship on February 27, 2015. This recusal application must be considered cumulatively with the first recusal motion that was heard by the court on December 4, 2014 and dismissed on December 8, 2014. The Applicant renews and expands the grounds that formed the basis of the first recusal motion.

I have not found the authorities advanced in support of this proposition persuasive.

[7] The Crown views this approach as an attempt to re-litigate the first recusal application. It further argues that this second recusal motion amounts to a collateral attack on my *O'Connor* ruling. I accept there is an element of both at play. Nonetheless, I am prepared to consider the second recusal motion cumulatively to the first. This does not mean that I will change my conclusions on the first motion. I will only revisit those comments if the applicant establishes that

comments attributed to me in the first motion have been materially enhanced by comments attributed to me in the February 15, 2015 *O'Connor* decision.

[8] On the first recusal motion the applicants relied on comments made during a June 26, 2014 case management conference; during a November 10, 2014 case management conference; as well as in an October 31, 2014 written decision respecting third party production. On the first I stated "the trial dates set for January, 2015 would not move come hell or high water." During the second event I stated that the October 31st decision "had a message in it" and that "those were strong words, those words are not going to change, and they are words that will come into play in relation to future defence applications."

[9] The following statements were attributed to me in the October 31, 2014 decision:

> - "There is absolutely no good reason for the defendants to be allowed to circumvent O'Connor."
> - "I can only conclude that the defendants have an alternative purpose in proceeding as they have."
> - "It is my view that the defendant's approach amounts to an 'end run' around O*'Connor* and is driven by section 11(b) considerations."
> - "It seems to me the defendant's refusal to return the hard drive is another attempt at the 'end run' around *O'Connor*."

Clearly the applicants took the position that these impugned quotations impacted on my hearing of the defendant's delay/abuse of process application currently scheduled for the week of April 20, 2015.

[10] In order to cumulatively assess this motion relative to the first, it is necessary to revisit some of those comments. It is my view that they all amount to an effort to spur counsel to move this case forward in an expeditious manner. I have stated this goal ever since I took over conduct of this file.

[11] I recognize that words can be interpreted in different ways for different purposes. In relation to the "hell or high water/ strong words" quotes, the applicants seem to suggest that I have prejudged the section 11(b) application and that a trial is a certainty. Is it not just as plausible they mean that the trial will proceed as scheduled should the section 11(b)/ abuse of process application not succeed? Given that I had no submissions before me at the time of the first recusal motion, the applicants' interpretation suggests that I would dismiss that application out of hand. Such an interpretation does not displace the presumption of judicial impartiality.

[12] In relation to the "end run" comments found in my October 31, 2014 decision, the defendants' suggestion was that I judged their conduct of the

production issue as the cause of much of the 2014 delay. I anticipate there will be much debate about which side had the responsibility to go after the Securities Commission documents. Clearly that will be a section 11(b) issue. It has been obvious throughout that there has been delay in getting this matter to trial. It has also been obvious that both the Crown and the defence have been attempting to avoid responsibility for this delay. The production of the third party records will figure prominently in the section 11(b)/ abuse of process application. I also expect production will figure prominently in assessing the reasons for adjourning the trial.

[13] I continue to reject the defendants' submission that I have formed an opinion as to their credibility. There has been much strategy exercised over the past few years by both the Crown and the defence. I accept that as entirely legitimate. The Court's response to that strategy should not be viewed as a challenge to anyone's credibility. The Court's only interest has been getting this case to trial as soon as practically possible.

[14] In *R. v. Baccari*, 2011 ABCA 205 the Court confirmed that trial judges can participate in the legal debate, state preliminary views and challenge counsel's opinions without triggering recusal. The Court stated at paragraph 24:

> [24] During argument, trial judges are not precluded from commenting on evidence or attempting to focus the argument on issues of particular

> concern to the trial judge. Give and take between a trial judge and counsel may be robust but observations made by a trial judge during argument are not pronouncements: *R. v. Hodson*, 281 A.R. 76 at paras. 33 and 35. A trial judge is not precluded from voicing concerns about the evidence. Nor is a trial judge precluded from directing counsel's attention to the real issues in the case. Trial judges are not expected to be mute manikins: *R. v. W.F. M.* (1995), 169 A.R. 222 (C.A.) at para. 10.

[15] I take the view the impugned comments in the first recusal motion have been taken out of context. As the Crown stated in their brief "in a recusal application, context is everything." In *R. v. Balua*, 2006 BCSC 1234 the Court stated at paragraphs 56 and 57:

> [56] The reasonable and informed observer does not expect perfection and is not entitled to expect perfection. A lack of perfection is not the same as an apprehension of bias.
>
> [57] It is a mistaken and unfair approach to pull specific remarks of the judge out of context in order to determine whether or not there is an apprehension of bias. Rather, one must review the remarks in the context in which they were spoken, as well as within the larger context of the entire trial.

Context was lost in the first recusal application.

RECUSAL NUMBER TWO – GROUNDS:

[16] Mr. Colpitts pleads the following grounds in support of the second recusal application:

> 3. In addition to the grounds that formed the basis of the first recusal motion, the Applicant advances the following grounds to demonstrate that your Lordship's decisions of December 8, 2014 and February 27, 2015 demonstrate both a reasonable apprehension of bias and actual bias due to

> your predisposition of the pending s. 11(b)/ abuse motion or significant aspects of the s. 11(b)/ abuse motion; namely:
>
> i. Your Lordship's ruling on December 8, 2014, that the Court's impugned comments that were subject to the first recusal motion were merely preliminary and directed solely towards case management issues, as opposed to substantive issues, is simply not borne out by the transcript or proceedings and, with respect, is an attempt by this court to justify *ex post facto* comments which go to the very heart of the merits of the forthcoming abuse /s. 11(b) application and that "will come into play, no doubt" at that application;
>
> ii. Your Lordship's insistence that the defendants had not met the likely relevance standard in relation to *any* documents that were the subject of the *O'Connor* application – including those that your Lordship ordered disclosed – is unsustainable in law and demonstrates actual bias or, at minimum, gives rise to a reasonable apprehension of bias on the Part [sic] of your Lordship, especially since several of the documents that your Lordship ordered disclosed are not only *likely* relevant but in fact are *actually* relevant under the *Stinchcombe* standard of relevancy; and
>
> iii. As with previous decisions of this court, in the course of your February 27, 2015 decision your Lordship made findings of fact there were neither preliminary nor tentative in nature that were not based on any evidence or pleadings before you in the likely relevance *O'Connor* motion. These findings have pre-judged or, at the very minimum, indicated an inclination or predisposition on the part of your Lordship to decide substantive issues that will be relevant to the forthcoming abuse/s. 11(b) motion and/or trial, including the fact that the joint investigation could not plausibly have had "any deleterious impact on the course of the investigation."

These grounds are an invitation to re-litigate the first recusal application. They sound more like grounds of appeal. The only comment that could possibly enhance the first motion's comments was "I am unable to conclude that the joint investigation had any deleterious impact on the course of the investigation." Once again context is everything. Conveniently not included are the words "my review

of the records." The only records before me were the *O'Connor* records. Counsel seem to forget that I am in possession of only a fraction of the materials disclosed to them. I conclude that this phrase does not displace the presumption of judicial impartiality.

[17] The authorities respecting recusal are set out in detail in 2014 NSSC 431 and I see no reason to repeat them here.

[18] For the reasons cited herein I dismiss this renewed application for recusal.

Coady J.

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Erratum dated April 16, 2015

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Erratum:

[19] Page 5, paragraph 5, last line, where it reads "I reject the suggestion that releasing these notes amounts to evidence of judicial impartiality" should read "I reject the suggestion that releasing these notes amounts to evidence of judicial partiality".

Coady J.