SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Colpitts*, 2015 NSSC 272

Date: 20150929
Docket: CRH 346068
Registry: Halifax

Between:

R. Blois Colpitts and Daniel Potter

Applicants

v.

Her Majesty the Queen

Respondent

DECISION ON RECUSAL MOTIONS

Judge:	The Honourable Justice Kevin Coady
Heard:	September 22, 2015, in Halifax, Nova Scotia
Oral Decision:	September 24, 2015
Written Decision:	September 29, 2015
Counsel:	Mark Covan, James Martin and Scott Millar, for the Federal Crown R. Blois Colpitts, Self-Represented George MacDonald Q.C. and Gavin Giles Q.C., for Daniel Potter

By the Court: (Orally)

[1] Messrs. Potter and Colpitts seek my recusal for the remainder of this criminal prosecution. While they argue both apprehension of bias and actual bias, their submissions clearly suggest I am biased against them and favour the Crown. Essentially they suggest they are doomed at trial if I remain the trial judge. They also take the position that I have created a "smokescreen" to protect third parties thereby ensuring that any defence available to them has been compromised. These allegations are very serious and, as such, require cogent evidence to succeed.

[2] This is the third recusal motion brought by one or more of the defendants. On November 21, 2014 all three accused brought the first motion alleging I was biased against them. These applications came in the wake of a decision I released respecting third party document production. It also followed much discussion about the proper vehicle to access third party records. I dismissed those applications for recusal at 2014 NSSC 431. In the first application the defendants relied on the language I used in prior rulings, and in case management conferences, to support their assertions that I had prejudged their future applications.

[3] The Court's response appears at paragraph 31 of the first recusal decision:

> [31] I take the view that the words attributed to me in this application do not result in an apprehension of bias when applied to Justice de Granpré's language in *Committee for Justice and Liberty*. I take the further view that these phrases would be perceived as efforts to manage this trial in a way that respected the defendants fair trial rights including their right to make full answer and defence.

I was able to arrive at this ruling without putting the defendant's credibility in issue. I stated as follows at paragraph 48:

> [48] The defendants argue that my conduct/language impugned their credibility … With respect I do not accept this submission. The defendant's credibility is not in issue now and has never been the subject of comment by this Court. All phrases cited by the applicants are in response to their litigation strategy which had the potential to sidetrack the trial. At no time has this Court considered the credibility of Messrs. Clarke, Colpitts and Potter. I find that the reasonable person would not conclude that any of my words impugned the defendant's credibility.

[4] On April 7, 2015 Mr. Colpitts filed a second recusal motion once again alleging perception of bias and actual bias. That application came in the wake of my three rulings in the defendant's *O'Connor* application. I dismissed that recusal motion at 2015 NSSC 117. Mr. Colpitts' arguments centred around the assertion that I had prejudged the upcoming delay/ abuse of process application. He stated as follows in his motion brief:

> 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.

[5] Mr. Colpitts parsed the following phrases from my decision at 2014 NSSC 117:

> - "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*."

This Court stated at paragraph 10 of the second recusal decision that "It is my view that they all amount to an effort to spur counsel to move this case forward in an expeditious manner."

[6] Mr. Colpitts suggested once again that I commented negatively on his credibility. I responded to that allegation as follows at paragraph 13 of my decision:

> [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.

This reasoning is consistent with the reasoning in the first recusal motion.

[7] On September 10, 2015 Mr. Potter filed a third recusal motion. This motion came in the wake of my ruling on delay and abuse of process. Essentially Mr. Potter argues that his "concerns in recusal #1 appear to have been realized in the section 11(b) decision rendered on August 12, 2015 [stay decision]." He further argues I have "made findings about Mr. Potter's credibility and motives" and "made findings that Mr. Potter's main defence is not relevant to the charges against him."

[8] Mr. Potter filed an affidavit in support of his motion. The following conclusions appear in that document:

> 1. That in my February 27, 2015 ruling I failed to get the facts right.
> 2. That in my "stay" decision I overruled Justice Hood's *McNeil* ruling and that amounts to an impermissible appeal.
> 3. That I failed to see the significance of Mr. Rousseau's evidence in which he acknowledged he was "duped" by his NBFL superiors into giving the police false information.
> 4. That I erred in commenting on the "joint investigation" issue.
> 5. That I contracted the "virus of tunnel vision," and, as such, I am shielding NBFL from investigation.

It is clear from Mr. Potter's affidavit that he does not feel my prior rulings are correct. He goes so far as to describe my February 27, 2015 decision a "disaster."

He asserts that I have acquired a negative view of his credibility and, as such, he "no longer feel secure about testifying on my own behalf at the trial" and he "cannot have a fair trial if he remains as the trial judge." Essentially he argues that my prior rulings are the product of actual bias rather than legal analysis.

[9] On September 16, 2015 Mr. Colpitts filed a similar motion. He advanced the following grounds:

> 1. That I erred in the "likely relevance" decision by not finding "a single document met the likely relevance threshold."
> 2. That he objected to my release of the running notes of Mr. Peacock and Mr. Tombs without labelling them likely relevant.
> 3. That I had prejudged the delay/ abuse of process application by comments about a "joint investigation."
> 4. That I erred when I found the defendants were the cause of delay related to the production of third party records.

Mr. Colpitts also advances "the self-fulfilling prophecy" argument. In essence he said I "prejudged the stay application and your ruling confirms my suspicions."

[10] Mr. Colpitts filed an affidavit in support of his recusal motion. The focus of that affidavit is Scott Peacock. There is no evidence in that affidavit that supports a recusal motion.

[11] Mr. Colpitts also filed a brief in support of his recusal motion. He asserts that if I remain on the case he will be denied a fair trial. In essence he is saying that I am determined to convict him regardless of the evidence. Like Mr. Potter, he submits that my stay decision has deprived him of his main defence. Also like Mr. Potter, he argues that I overruled Justice Hood's *McNeil* decision and ignored the evidence of Mr. Rousseau.

[12] Mr. Colpitts filed a 42 page work product titled "Review of transcripts in R. v. Clarke, Colpitts and Potter – Instances of bias on the part of Justice Coady." At paragraph 63 of his brief, he summarizes what he gleaned from his review of the transcripts, which I have had the opportunity to review. He says:

> 63. As I reviewed the transcripts, I found that most of the points I noticed fell into three broad categories:
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> a. The first category relates to Your Lordship preferring to take instruction or guidance from the Crown far more frequently than from the defence. At times this guidance and instruction was on simple procedural matters, but at other times it seemed Your Lordship's decision-making and perception of the various motions and overall case was being led by the Crown. I also highlighted instances where it seemed there was a heightened level of collegiality between Your Lordship and the Crown. This collegiality doesn't suggest an improper relationship in itself, but helps provide context for the many instances Your Lordship looks to the Crown for instruction. I also noted instances where Your Lordship turned to the Defence for guidance and I found this occurred much less frequently and that the Defence's advice did not hold the same weight as the Crown's input.
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> b. The second theme point I noticed was your Lordship's repeated suggestions or allusions that Your Lordship was not capable of overseeing this case. This often came in the form of Your

> Lordship reminding the courtroom that your Lordship was not savvy with technology, or Your Lordship simply reminding the parties to talk to him as if he was "Homer Simpson". Under this heading I also included points where Your Lordship makes arguably inappropriate comments. The effect of these comments is that they detract from the seriousness of the hearings and seem to imply that Your Lordship doesn't appreciate the gravity of the situation.
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> c. Lastly, there are many instances where Your Lordship makes comments that suggest Your Lordship has already made up Your Lordship's mind or is leaning strongly towards the Crown's position before issues have even really come before Your Lordship. Also tied in to this heading are the many instances where your Lordship's comments and opinions suggest that Your Lordship really does not want there to be a successful section 11(b) Charter argument and Your Lordship wants to see this matter go to trial. This opinion is so clear in many instances that it begs the question if Your Lordship is a neutral adjudicator or has an agenda of how the proceeding will unfold. This became clearest to me at the recent adjournment application where there was an open discussion between Mr. Martin for the Crown and Your Lordship that I understood was a strategy on how to restrict further motions by the defence to in effect start the trial.

These are very specific allegations that, if proven, would certainly support Mr. Colpitts recusal motion.

[13] I find Mr. Colpitts stated grounds more akin to appeal grounds than recusal grounds. The suggestion that when finding the defendants responsible for much of the post-charge delay, I was exhibiting bias is not legally defensible. The *Morin* analysis requires me to attribute delay to the party causing the delay. If I got it wrong a successful appeal is the appropriate relief. Getting it wrong is never evidence of any kind of bias.

[14] I respectfully reject Mr. Colpitts' submissions as appear at paragraph 63 of his motion brief. He offered no evidence, cogent or otherwise, to support the following assertions:

- That I have taken guidance and instruction from the Crown more often than the defence.
- That my rulings to date reflected only the Crown's position and instructions.
- That I was more collegiate with the Crown.
- That I am not capable of overseeing this case.
- That I have made inappropriate comments that suggest I do not appreciate the gravity of the situation.
- That I was conspiring with Mr. Martin to find a strategy to restrict further motions by the defence.

I may not be as "technically savvy" as all of the players in this trial. I fail however to see how this reality supports recusal. Further, I make no apology for the use of humour to relieve the tension that has permeated this prosecution. Once again I fail to see how that supports recusal.

[15] Mr. Potter alleges I have made negative findings as to his credibility in the stay decision. Once again I was required to apply *Morin* and that meant apportioning responsibility for delay. He further alleges that my stay decision robs him of his main defence and was the product of my bias in favour of the Crown. I

reject this proposition as it ignores paragraph 41 of the decision, which I will repeat here:

> Should the defendants wish to pursue the avenues of investigation, that is their prerogative. It is open to them to call whatever evidence they find in response to the Crown's case. I conclude the RCMP and the Crown have complied with their constitutional and investigative obligations *vis-à-vis* NBFL and the NSSC.

I want to stress that my remarks were about investigative obligations and were not a prejudgment of any defence to be advanced by these defendants.

[16] On Mr. Potter's suggestion that I overruled Justice Hood's *McNeil* decision, I disagree, with respect. My stay decision assessed reasons for delay and not responsibility for disclosure. The findings were supported by evidence. If Mr. Potter feels I got it wrong, his remedy will lie in an appeal. In relation to the Rousseau issue, I did not find his evidence to be particularly relevant to the delay/ abuse of process application. The tunnel vision allegation amounts to nothing more than an allegation.

[17] The applicable legal principles are reviewed in my first recusal decision and it is not my intention to repeat them in this ruling. The basic test for recusal is well known and was recently affirmed in *Yukon Francophone School Board, Education*

Area #23 v. Yukon (Attorney General), 2015 SCC 25. Justice Abella stated at paragraph 20 as follows:

> [20] The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:
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> > . . . 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. [Citation omitted; *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, at p. 394, per de Grandpré J. (dissenting)].

[18] I am dismissing these applications for the following legal reasons:

- The burden of the applicants is an onerous one and must not appeal to the most sensitive or scrupulous conscience – to use the language in *Committee for Justice and Liberty.*
- The applicants have not produced the kind of cogent evidence required to displace the presumption of judicial impartiality.
- That in managing the trial process I am entitled to participate in legal debate, state preliminary views and to challenge counsel's positions on trial issues – to use the language of *Baccari*.
- The applicants failed to consider the remarks attributed to me in the context in which they were spoken, or within the larger context of the entire trial – to use the language of *Bulua*.

The allegations of real or actual bias have not been supported by the evidence. The principle of judicial impartiality is a cornerstone of our trial system. It has been

included as a *Charter* principle. I have not found any evidence (cogent or otherwise) that could displace that principle of judicial impartiality. The alleged incidents of real bias amount to nothing more than speculation and unsupported inference.

[19] The bottom line is that after I apply the basic principles, I have not concluded that I am biased or that my words and conduct created a reasonable apprehension of bias.

[20] Let me add a few words. I suspect this decision will not remove Messrs. Potter and Colpitts' opinion that I am with the Crown and against them. There is nothing I can say or do to change their minds. All I can say is that I always maintain an open mind. Twenty four years as a criminal defence lawyer, and twelve years as a judge, have shown me how important it is to maintain an open mind. I assure all three defendants they will have a fair trial.

Coady J.