SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Salah v. Salah, 2012 NSSC 381

Date: 20121101
Docket: 1201-062188
Registry: Halifax

Between:

Melissa Ann Salah

Applicant

v.

David Joseph Salah

Respondent

Judge:	The Honourable Justice Douglas C. Campbell
Heard:	October 29, 2012, in Halifax, Nova Scotia
Counsel:	Melissa Salah, self-represented C. LouAnn Chiasson, Q.C., for the respondent

By the Court:

[1] This is an application by the applicant in this proceeding, Melissa Salah, requesting that I recuse myself from hearing the within application to vary the access provisions in the Corollary Relief Judgment issued between the parties in their divorce as a result of my written decision dated October 5, 2010. Her affidavit filed with the court on October 16, 2012 and sworn on the same date supports her motion for recusal by stating that as a result of the contents of my above noted decision, she is led to believe that it is impossible for me to maintain ongoing impartiality and that she does not feel that she will be treated fairly in the upcoming hearing. She recites certain portions of my decision as examples to support her recusal motion.

[2] The above referenced divorce trial was interrupted by many adjournments. It occurred over an almost two-year period running from the first hearing date of October 27, 2008 to the final hearing date on September 27, 2010. It would be accurately described as a very "high conflict" divorce. My decision that resulted from that hearing, which took place on at least parts of 13 days of trial, left Mr. Salah with custody of the only child of the marriage and Ms. Salah with specified access to him.

[3] The above noted trial related to parenting issues only. Other matters of Corollary Relief and *Matrimonial Property Act* relief were the subject of a later consent arrangement and once they were reduced to an order, my involvement with these parties was at an end. With the issuance of the orders in regard to these parenting and financial orders, I was *functus*.

[4] Ms. Salah reminded me at the hearing of this recusal motion that she had asked me by letter to recuse myself shortly after my October 5, 2010 decision. After that hearing, I reviewed the court file and confirmed that such a letter was filed; however, the remaining items for remedy became the subject of a settlement and therefore that recusal request (which was never formalized in an application) became moot.

[5] More than one year later, in October , 2011, the applicant, Ms. Salah, brought an application before this court to increase her parenting time. She sought at least one adjournment and eventually sought to withdraw her motion but that

application was contested by Mr. Salah because, by then, he had brought an application to decrease Ms. Salah's parenting time. It was at that point in the chronology of events that Ms. Salah sought my recusal by formal motion.

[6] Accordingly, it should be noted that I was not seized with the hearing of the application to vary brought by Ms. Salah. I am not aware of the circumstance by which this Variation Application was set on my docket and can only assume that it was mere coincidence.

[7] The examples given in the affidavit filed by Ms. Salah in support of her recusal motion do not justify my recusal (but I pay considerable attention to the fact that these are only examples given by her and do not exhaust her reasons for suggesting my recusal). I will deal with each of the points raised in that affidavit to explain my conclusion to that effect.

[8] Before I do that, certain background information which I will now present would be helpful to the reader of this decision. In this high conflict custody/parenting/access dispute, various allegations by Ms. Salah, if believed, might have governed the dispute in her favour. For example, she alleged that Mr. Salah had been physically and sexually abusive to her; that he had failed to protect their son from physical abuse from his developmentally delayed sister; and, that he had caused the child to be caught in a "loyalty bind" between them. There were other allegations about specific behaviors and incidents which, if believed, would paint Mr. Salah in a negative light with respect to the appropriateness of his being the custodian of their child. All of these allegations were vehemently denied and accordingly the credibility of both the parties became an issue at the trial.

[9] Mr. Salah made allegations that Ms. Salah had been engaged in the city of Moncton, New Brunswick, on a certain date as an "exotic dancer" which included stripping to a naked state in front of an audience. Not only did she deny this event, but she brought an affidavit purported to be signed by the manager of the Moncton, New Brunswick enterprise that featured "exotic dancing" which denied her involvement. That person was never presented as a witness for cross-examination and the purported affidavit from that person was never proved. Moreover, Mr. Salah retained a private detective firm to "stage" a so-called "stag party" who engaged Ms. Salah and her sister to perform a so-called "exotic dance".

[10] This “sting operation” was designed, at least in part, for the purpose of proving that Ms. Salah was in fact engaging in such activities. From that evidence it would be argued that Ms. Salah had lied when she denied such engagement in Moncton, New Brunswick (above noted) so as to cast doubt on her credibility generally. There were several other factual denials made by Ms. Salah which this “sting operation” was designed to reveal.

[11] The Minister of Community services became involved in the lives of this couple at the request of Ms. Salah at about the same time as the “sting operation” was taking place. In the course of that proceeding, the private detective who had been engaged to administer this operation, gave a sworn affidavit in which he testified that the “exotic dance” at the “sting operation” not only took place but was captured on an audio/video device that had been installed in a clandestine way so that the “dancers” could not know of its existence. The affidavit confirmed that the “dancers” were Ms. Salah and her sister.

[12] When the trial in the divorce involving parenting issues next resumed, and after Ms. Salah and her counsel had been in receipt of the affidavit of the private detective which alleged her involvement in the “exotic dancing”, (which included performing in a naked state), she conceded the validity of the affidavit of that private detective as it related to her involvement in “exotic dancing”. In doing so, her counsel on her behalf commented in court that she took some exception to certain facts in that affidavit but that she did not deny the salient facts. As a result, her credibility with respect to her denial of her exotic dancing in Moncton, New Brunswick was destroyed. There were other aspects of her evidence that were at the same time destroyed which I have not alluded to here but which I mentioned in detail in my decision, above noted.

[13] As a result of these events in the testimony at the trial, I made serious and significant findings of a lack of credibility of the applicant.

[14] Turning to the affidavit of Ms. Salah which supports her motion for recusal, I will reply to each of those points against the background and context of the above noted remarks.

[15] In paragraph 5 of that affidavit, Ms. Salah refers to paragraph 53 on page 8 of my decision in which I referred to her "scheme ". She contends that the use of that word suggests that there was some intent to conceal truth and that there was one person's word against another in that regard. She objects to my use of the phrase "star witness" to conclude that her impression was that I was making a mockery of events whose opposite presentations were the subject only of opposing observations from competing witnesses.

[16] The Canadien Oxford Dictionary defines "scheme" as "an artful or deceitful plot". Given my finding of credibility, the word "scheme" is quite apt and merely refers to her plan by which she attempted to present evidence that was not credible. The same applies to the use by me of the words "star witness".

[17] In paragraph 7 of her affidavit she refers to my decision on page 9 at paragraph 57, and she complains that my reference to the "staged" bachelor party, above referred to, was filmed without her knowledge and may have contravened a certain section of the Criminal Code. Whether or not the filming involved a criminal offence on someone's part is irrelevant to the question of whether or not I should recuse myself.

[18] In paragraph 8 of her affidavit, Ms. Salah suggests that the subject video has become a public record by having been submitted into evidence and that I had a duty to avoid its admission into evidence. Let me make it abundantly clear that the video was never introduced in evidence. Ms. Salah should be fully aware of that fact and it surprises me that she is not so apprised. The evidence about the subject video was the affidavit of the private detective who described the existence of the videotaping and its contents. The video itself was never introduced in evidence. Even if it had been, there would have been no valid objection to its admission since one purpose of the video was to attack the credibility of Ms. Salah who had been adamantly denying her role as an "exotic dancer" until the video proof made it impossible for her to continue her false denial.

[19] In the same paragraph, Ms. Salah attempts to transfer some sort of responsibility to me over the fact that family members have since seen the video and that fact should somehow affect my conclusions about how her son would be affected by seeing it. I have no evidence that those facts are accurate and even if they were accurate, I see no connection between those out-of-court alleged

circumstances and my role. At the recusal hearing, Mr. Salah testified that he had never seen and was never in possession of the video. I accept his word on those points.

[20] In paragraph 9 of her affidavit, Ms. Salah takes exception to my reference to her admission to the "exotic dancing" as having been born out of her having been caught in the act "red-handed", suggesting that such a phrase represents a "mocking" of the events which impairs my impartiality. The fact is that the reference to Ms. Salah having been caught "red-handed" is a particularly accurate description of the method by which she was caught in her lie. It would have no impact on my ability to be impartial. That hyphenated word was used simply to emphasize the extent to which her evidence had been impeached.

[21] In paragraph 10 of her affidavit, Ms. Salah sites my description of her behavior in the courtroom as having been "bizarre and unacceptable" as a basis to conclude that I have formulated an opinion which is not going to change any time and thereby affects my impartiality.

[22] On that point, the fact is that my reference to her bizarre and unacceptable behavior was an accurate reflection of my observations of her that entitled me to conclude that at the time of the trial she was involving herself in out-of-control behaviors which if not corrected and controlled would diminish her ability, without major insight into those behaviors, to provide a safe and healthy environment for her son, which would protect his best interests. Ms. Salah's behaviors were described in detail by me in my decision, a reference to which should cause a reasonable person to conclude that my description was accurate. That comment would not cause a reasonable person to formulate an apprehension of bias on my part some two years later.

[23] The Yukon Territory Court of Appeal in the decision of M (D.M.) v. M. (T.B.), 2011 CarswellYukon 86, 2011 has most recently set out the law as it relates to the recusal of judges most succinctly. In that case, the trial judge refused to recuse himself and the Court of Appeal agreed.

[24] The Court of Appeal noted that the thrust of the submissions on the recusal application against the judge who had heard many application concerning the appellant's exercise of access to her son, could no longer be perceived as

impartial. She contended that her vision for her trial appeared to be hopeless after so many defeats in front of that Trial Judge.

[25] The Court of Appeal confirmed that the standard must be an objective one. The Court referred to the case of *Roberts v. R.*, 2003 SCC 45 at paragraph 60, which adopted the ruling in *Committee for Justice and Liberty v. National Energy Board* in which it was stated that:

> … The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question in obtaining thereon the required information. In the words of the Court of Appeal, the test is "what would an informed person, viewing the matter realistically and practically – after 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".

[26] The Yukon Court of Appeal went on to say that there is a:

> strong presumption of judicial impartiality. For that reason, the grounds advanced to support a request for disqualification must be serious and convincing and the party who is arguing for recusal carries the burden of establishing that circumstances exist that justify a finding that the judge must be disqualified.

[27] A mere suspicion is not enough. The reasonable person tests means that such a person would be "informed" not only of the relevant circumstances of the particular case also in the tradition of integrity and impartiality that are the backdrop for our judicial system and which are reflected in and reinforced by the judicial oath.

[28] Many cases have decided that the mere fact that a judge had previously decided adversely on a case involving a person does not create a reasonable apprehension of bias. The presumption of judicial impartiality prevails in the absence of cogent evidence to the contrary.

[29] The Nova Scotia Court of Appeal in the *Children's Aid Society of Cape Breton-Victoria v. S. (M.)*, 2004 NSSC129 upheld the right of the trial Judge to refused to recuse himself based on a history of favorable findings to one party. In doing so, it quoted from its earlier decision in *Children's Aid Society of Cape Breton v. M (L.)*, [1998] N.S.J. No. 191 at paragraph 15:

> ...the threshold for a finding of real or perceived bias of a Judge is high. The onus of demonstrating it lies with the person who is alleging its existence. There is a presumption that judges will carry out their posts of office...

[30] Given these principles and based solely on the applicant's affidavit which supports her motion for recusal, I would not be inclined to recuse myself. Her affidavit does not persuade me that I should do so. It does not show a reasonable apprehension of bias as required by the case law to displace the presumption of judicial impartiality as seen through the eyes of a reasonable and fully informed observer. However, that is not the end of my analysis.

[31] In all of the cases above-noted and those others to which I have been referred or have read, a refusal by a trial Judge to recuse himself/herself at the request of a litigant has always occurred in circumstances where that Trial Judge was willing to continue with the case (unless there was convincing argument that recusal should occur). There is an overriding discretion for a Trial Judge to refuse to hear a case and to defer it to be set down before another Judge for reasons that cause that Trial Judge a level of discomfort from which he or she is not willing to continue with the case.

[32] After an involvement in this case for many years and a clear conclusion by Ms. Salah that she cannot expect a fair result if I am to preside, I have decided that I am not willing to hear this matter.

[33] Even if I had not reached that conclusion, I would feel compelled to look at certain other aspects of my involvement and of my decision above-noted which were not argued by Ms. Salah which may or may not have raised an apprehension of bias.

[34] For example, in my decision, I resisted the suggestion by Mr. Salah, through counsel, that Ms. Salah's access to their son should be supervised. Instead, I offered suggestions as to how she must change her own behaviors and how she must gain insight into how those behaviors are impacting negatively on her son. More importantly, I remarked that, in the place of supervised access, she must face the reality that future applications to vary her access as made by Mr. Salah for a decrease in access might and perhaps should result in her legally losing contact with the child.

[35] In light of that remark (which I felt compelled to make), I can easily see that Ms. Salah or a reasonable and informed person might formulate an apprehension of bias on my part. If I had not determined that I am not comfortable with a continued involvement in this matter, I would have concluded that my warning about the outcome of future variations should cause me to recuse myself.

[36] I conclude that this application by Ms. Salah for an increase in access and Mr. Salah's cross-application for a decrease should have the benefit of a fresh inquiry by a different Judge. In reaching this conclusion, I have not ignored that Justice Williams and Associate Chief Justice O'Neil are already recused and that Justices Legere Sers and Dellapinna can not hear the case because that would create a conflict of interest for them.

[37] I hereby decline to hear this matter, not because of the examples in the affidavit which support the motion, but because of my discomfort above noted and my own view that after 2 years of hearing this case in the main, the variation issues on both sides require a fresh review by another Judge.

[38] I have issued an adjournment slip directing our Scheduling Office to set this matter down for three days for the Variation Hearing with a Judge other than Associate Chief Justice O'Neil, Justices Williams, Legere-Sers, Dellapinna and myself. In addition, this matter will be set for a one half hour conference as soon as possible with the Trial Judge to hear Mr. Salah's motion for Orders of Production and to generally organize for the next hearing.

CAMPBELL, J.