SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Littler v. Howie, 2013 NSSC 84

Date: 20120301
Docket: SFSNF-006481
Registry: Sydney

Between:

Donald Littler

Applicant

v.

Denise Howie

Respondent

Judge:	The Honourable Justice Theresa Forgeron
Heard:	February 19, 2013, in Sydney, Nova Scotia
Oral Decision:	March 1, 2013
Written Decision:	March 6, 2013
Counsel:	Donald Littler, on his own behalf Denise Howie, on her own behalf

By the Court:

[1] **Introduction**

[2] Mr. Littler and Ms. Howie are former spouses, and the parents of two adult children, Vanessa and Cory. Litigation has been ongoing despite their 2001 divorce. Their most recent variation order, the last of four, is dated February 2012. Within months of the last order issuing, both parties filed variation applications. These applications are scheduled to be heard in April 2013.

[3] In addition, an interlocutory recusal motion was filed by Mr. Littler on February 12, 2013 and heard on February 19, 2013. This decision will determine the outcome of the recusal motion.

[4] **Issues**

[5] Should the recusal motion be granted?

[6] **Analysis**

[7] *Position of Mr. Littler*

[8] Mr. Littler advanced the recusal motion for various reasons, including the following:

- He filed several complaints with the Canadian Judicial Council about the court's 2012 decision and conduct. Copies of these complaints were also forwarded to politicians;

- He stated that during previous hearings and the January 29, 2013 organizational pretrial, the court favoured Ms. Howie by interrupting him, preventing certain cross examination questions from being raised, asking questions of witnesses, and ruling in Ms. Howie's favour;

- He stated that during the January 29, 2013 organizational pretrial, the court "threatened" him with costs and "hinted" that he should retain a lawyer;

- He stated that the court demanded that he file a motion, affidavit, and brief to advance his recusal request;

- He stated that the court made negative comments about him in the 2012 decision;

- He stated that he was not satisfied with the 2012 decision, including the statements of law and the factual findings made;

- He stated that he was placed in a precarious financial position as a result of the court's 2012 retroactive child support ruling;

- He stated that the frequent and frivolous applications have caused him stress and anxiety, and that his charter rights have been violated; and

- He stated that he met with me when I was practising law sometime in late 2000. Mr. Littler indicates that he had discussions with me over personal issues. In his last complaint to the Judicial Council, Mr. Littler notes as follows:

> Should a judge who had issue with a person when she was an attorney also made a bias comment during this interaction be presiding over the same person with the same "children" involved and same ex-wife?

[9] *Ms. Howie's Position*

[10] Ms. Howie does not agree that the recusal motion should be granted for a number of reasons, including the following:

- Mr. Littler's main complaints surround the court's findings of fact and rulings flowing from the February 2012 Order and Decision. Mr. Littler did not proceed to an appeal;

- Mr. Littler was treated without bias. In fact, not all rulings favoured Ms. Howie's position, including the court's decision respecting child support for Cory;

- Very little evidence was submitted by Mr. Littler in support of the motion. Most of his concerns were contained in the complaints to the Judicial Council; and

- The court continued to treat Mr. Littler with respect after the complaints had been lodged.

[11] *Discussion of the Law*

[12] When considering a recusal motion, the court begins with the presumption of judicial impartiality. As such, the burden is upon Mr. Littler to prove disqualification. This is noted by the Supreme Court of Canada in **Wewaykum Indian Band v. Canada**, 2003 SCC 45, at para. 59, which states as follows:

> Viewed in this light, "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles for Judges* (1998), at p. 30). It is the key to our judicial process, and must be presumed. As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in S. (R.D.), *supra*, at para. 32, the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

[13] The concepts of actual bias and reasonable apprehension of bias were reviewed by the Nova Scotia Court of Appeal in **Geophysical Services Inc. v. Sable Mary Seismic Inc.**, 2012 NSCA 33, wherein Beveridge, JA states at para. 61as follows:

> Actual bias and reasonable apprehension of bias are related, but distinct concepts. Both seek to ensure for the parties, and for society, that judges conducting trials or other proceedings do so impartially and fairly; and also have every appearance of having done so. If a judge acts with bias against one party it is fatal to the validity of the outcome. If a judge says or acts in a manner that to an informed and reasonable observer demonstrates he or she is not impartial, there is an apprehension of bias; the outcome is also vitiated.

[14] The standard for determining a reasonable apprehension of bias is set out in the dissent in the **Committee for Justice and Liberty v. Canada National Energy Board** [1978] 1 S.C.R. 369, at page 394 as follows:

> ...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…

This description of reasonable apprehension of bias was approved by the Supreme Court of Canada in **R. v. S(R.D.)**, [1997] 3 S.C.R. 484.

[15] In **Geophysical Services Inc. v. Sable Mary Seismic Inc**., ***supra***, Beverage, JA reviews the meaning of impartial, impartiality and bias at para. 65 as follows:

> In any event, I need not decide the issue on this basis, since I am far from convinced that the appellants have demonstrated a reasonable apprehension of bias or bias. The main thrust of the appellant's submission was that they were not able to obtain a fair hearing as a result of the decision by the trial judge to strike the jury notice. One of the leading cases in Canada on the issue of bias is R. v. S. (R.D.), [1997] 3 S.C.R. 484 (S.C.C.). In that case, Cory J. explored a number of key concepts about impartiality, bias and reasonable apprehension of bias. With respect to the polar opposites of impartiality and bias, he noted the authorities that establish that the word impartial connotes absence of bias, actual or perceived; and that impartiality is a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions (para. 104). Bias is a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues (para. 105).

[16] *Decision*

[17] Before applying these principles to the motion, I will discuss the evidentiary issue raised by Ms. Howie. I agree that Mr. Littler's affidavit is thin on facts. I will nonetheless consider the additional material brought forth by virtue of the various complaints which Mr. Littler sent to the Judicial Council and which became part of the court record.

[18] *Complaints to the Judicial Council*

[19] Complaints to the Judicial Council do not automatically result in a finding of bias or a reasonable apprehension of bias: **Murray v. New Brunswick Police Commission**, 389 N.B.R. (2d) 372; **McElheran v. Canada**, 2006 ABCA 161; **Allain Sales & Services Ltd. v. Guardian Insurance Co. of Canada**, (1996) 180 N.B.R. (2d) 338; and **Suresh v. Canada (Minister of Citizenship & Immigration)**, 2000 258 N.R. 119 F.C.A. Public policy and administration of justice concerns dictate that a litigant should not succeed in a recusal motion for reasons that he/she manufactured. The comments of the Federal Court of Appeal at para 9 of **Suresh v. Canada (Minister of Citizenship & Immigration)**, ***supra***, are noteworthy, and provide as follows:

> As for the complaint to the Canadian Judicial Council, the filing of such a complaint as late as 11 months after the reasons for judgment complained of were released, but only one week before the motion for recusation was made, appears to us, at best, to be self-serving and principally designated to bolster ground a). We believe, as did Teitelbaum J., that a person well informed of all these circumstances and the nature of the complaint would not conclude that they give rise to a reasonable apprehension of bias. Indeed, counsel for the appellant concedes that the complaint by itself could not give rise to a reasonable apprehension of bias.

[20] In **Murray v. New Brunswick Police Commission, *supra,*** Robertson J.A. discussed the "tactical manoeuver" of "judge shopping" in the context of the laying of judicial complaints at paras. 9 and 10, which state as follows:

> ...What is particularly disturbing is his contention that once a recusal motion is rejected and a complaint is filed with a governing body, such as the Canadian Judicial Council, the judge is thereafter precluded from hearing any matters involving the person who sought the recusal. Indeed, this is not the first time this Court has seen an appeal record which discloses that one party has unsuccessfully

> sought the recusal of a judge of the Court of Queen's Bench and has filed a formal complaint with the Canadian Judicial Council with a view to ensuring that the judge is disqualified from sitting on all future matters in which the complainant is a party. In plain language, this tactical maneuver is called "judge shopping" and is not to be tolerated by any judge of any court in this Province.
>
> 10 Unfortunately, what courts are facing today is a cluster of cases in which the self-represented litigant is generally unwilling and, at times, hostile to the prospect of taking instruction from the court, particularly as to what can be argued. This is the litigant who is under the mistaken impression they have an unfettered right to pursue their self-interests without regard to the rights of the opposing party under the rules of evidence and the Rules of Court. These are the cases in which the simple case becomes unnecessarily complex and court proceedings become marathon sessions. These are the cases in which the self-represented litigant operates on the mistaken assumption that if he or she is unsuccessful on any ruling it is because of bias on the part of the decision-maker. These are the litigants who, if confronted with the law, will plead ignorance and seek the court's indulgence. Otherwise, they continue to believe they have mastered the intricacies of statutory interpretation, the application of legal principles, doctrines and rules — without the benefit of legal training. Often, these are the cases where the opposing party has had to retain and pay legal counsel to defend unmeritorious interlocutory proceedings in circumstances where everyone knows the self-represented litigant lacks the financial resources to pay any costs award, be it large or small. These are cases where the self-represented litigant will expect, if not demand, that he or she be given greater and persistent access to court staff, whose primary function is to serve the public at large by accepting documents that comply with legal requirements and not to act as quasi-judicial advisors. Fortunately, most cases and most self-represented litigants do not fall within these descriptions. The law reports support this observation: e.g., Girouard v. Druet, 2012 NBCA 40, [2012] N.B.J. No. 136 (N.B. C.A.). Regrettably, it only takes a few to grind down the pace at which justice is delivered in this Province and to stretch the patience of all judges who, as a matter of fact, are truly committed to ensuring that all litigants are provided with meaningful "access to justice". On the other hand, the extent to which Rule 76.1 will be viewed as a viable means for controlling vexatious proceedings is a matter beyond the scope of these reasons.

[21] Similarly, Mr. Littler’s complaints to the Judicial Council appear to have been orchestrated in an attempt to have another judge hear the upcoming applications; Mr. Littler is “judge shopping.” His complaints were not filed until months after the 2012 decision and order issued. Mr. Littler’s complaints were strategic, tactical, and opportunistic.

[22] Further, Mr. Littler's complaints were based upon his disagreement with the court's rulings and decision. Such complaints are outside the jurisdiction of the Judicial Council, as was noted in the Judicial Council's dismissal of the complaints, although I recognize that Mr. Littler has since filed at least two other complaints with the Judicial Council.

[23] *Organizational Pretrial Concerns*

[24] The variation applications were originally scheduled to be heard on January 29, 2013. This hearing was changed into an organizational pretrial for two reasons. First, Mr. Littler expressed an interest in making a recusal motion, but had not filed the necessary documents in keeping with the *Rules*. It was appropriate that the recusal motion be determined prior to the variation applications. Second, disclosure was outstanding on the child support issues.

[25] A person well-informed of all of the circumstances and viewing the matter realistically and practically would not conclude that the following organizational pretrial events would give rise to bias or a reasonable apprehension of bias:

- The court urging both parties to obtain legal counsel. A well informed person would not see this suggestion as problematic. Many of Mr. Littler's complaints arose because of his failure to understand basic rules of evidence and the applicable law. A lawyer could likely provide Mr. Littler with insight;

- The court discussing cost consequences. The court's comments were directed at both parties. A well informed person would understand such statements to be educational. Parties should weigh cost ramifications when determining whether an expert, an orthodontist in this case, should be required to testify, in lieu of the expert report being tendered by consent;

- The court providing filing deadlines for the recusal motion. A well informed person would understand that such documents must be filed to conform with the *Rules* of court; and

- The court providing filing deadlines to meet disclosure requirements associated with the April variation proceedings. A well informed person would understand that such disclosure is necessary to enable the court to properly assess the child support issues.

[26] *2012 Rulings and Decisions*

[27] A well informed person would not conclude that the 2012 rulings and decision create bias or a reasonable apprehension of bias. The rulings and decision were based upon correct legal principles and findings of fact which had their genesis in the evidence presented at the time. Extraneous factors, that are indicative of bias, were not considered during the course of the 2012 proceedings.

[28] Further, the fact that some of the court's 2012 rulings favoured Ms. Howie, while other rulings favoured Mr. Littler, is not relevant to the issues of bias and reasonable apprehension of bias. A judge must make decisions based upon the relevant law and the factual evidence before her. In some cases, one party may be completely successful, while in other cases, success may be divided. Bias does not turn on judicial outcomes.

[29] In summary, neither the 2012 decision, nor the rulings made during the course of the 2012 hearing, suggest that this court was, or is, predisposed to a particular result, or that this court is not open to persuasion by the evidence and submissions.

[30] *Personal Stressors*

[31] Mr. Littler's personal stressors related to finances and anxiety are not relevant to the issue of bias or reasonable apprehension of bias, nor is Mr. Littler's belief that his charter rights have been violated.

[32] *Meeting in 2000*

[33] The final issue which I must address concerns Mr. Littler's last minute disclosure that he met with me 13 years ago to discuss his divorce case, and matters involving his wife and children. He states this meeting creates a

reasonable apprehension of bias because of the extent of his disclosure and the comments which I allegedly made to him.

[34] The court has significant concern about the timing of this disclosure. Mr. Littler only recently raised this issue. He never alluded to this fact during the course of the 2012 proceedings. Given the file's history, one would expect that had Mr. Littler been genuinely concerned about a meeting that occurred 13 years ago, early disclosure would have been made. The only logical and reasonable inference to be drawn is that Mr. Littler is being strategic, tactical, and opportunistic.

[35] In relation to this allegation, I advise as follows:

- My practice is to review court files to determine if I had a past legal association with any of the parties. Nothing in the **Littler v. Howie** file indicated such an association;

- I have absolutely no recollection of ever meeting Mr. Littler in 2000, or at any other time outside of these judicial proceedings;

- I have, however, checked, and I can confirm that I did indeed meet with Mr. Littler while I was practising law. I am not aware of the date, nor of the reasons, but a meeting did in fact take place; and

- I have reviewed Mr. Littler's statements surrounding this meeting. Although I have no independent recollection, I am sceptical of the version of events presented by Mr. Littler as such is not in keeping with my prior practice. Further, Mr. Littler has been selective and misunderstood much of what was said by this court in the past. I have no doubt that his faded memory of a meeting held many years ago is likely subject to the same interpretation difficulties.

[36] I have been placed in the unfortunate position of having to provide personal commentary about a past association with Mr. Littler. It is likely that such comments would be viewed by a well informed person as creating a reasonable apprehension of bias.

[37] **Conclusion**

[38] The recusal motion is granted because I had to provide commentary and have made inferences concerning a meeting which I had with Mr. Littler approximately 13 years ago, although I have no recollection of such a meeting. The other grounds in support of the recusal motion are without merit, including the various complaints made to the Judicial Council, the concerns expressed about the 2013 organizational pretrial conference, the court's past decisions, and Mr. Littler's personal stressors.

[39] Scheduling will arrange to have another justice hear the variation applications.

Forgeron, J.