IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Costa v. Electec Engineering Inc., 2014 NSSM 73

Claim No: SCCH 424595

BETWEEN:

Name	Perry Costa	**Claimant**
Address	c/o Leon S. Tovey Burchell's LLP 1800 – 1801 Hollis Street Halifax, NS B3J 3N4	
Phone	(902) 423-6361	

Name	Electec Engineering Incorporated	**Defendant**
Address	c/o Kevin A. MacDonald Crowe Dillon Robinson 200 – 7075 Bayers Road Halifax, NS B3L 2C1	
Phone	(902) 453-1732	

Leon S. Tovey appeared for the Claimant.

Kevin A. MacDonald appeared for the Defendant.

DECISION ON MOTION FOR RECUSAL

This decision follows a motion for recusal brought by Mr. MacDonald on behalf of the Defendant, Electec Engineering Incorporated, which was raised for the first time in Small Claims Court on the evening of September 4, 2014. The motion stems from a statement in an e-mail sent to counsel on June 17, 2014, while I was attempting to schedule times for resumption of this hearing (hereafter referred to as the "impugned e-mail").

> "I find it difficult to believe that Mr. MacDonald's clients are not available at all for much of the summer, particularly when we were initially considering dates in late June or parts of July. I am interested to know the reasons for this."

Mr. MacDonald alleges that these comments are indicative of a predetermination on my part of his client's credibility.

To be clear, I was expressing frustration with the lack of progress in scheduling, a suggestion that Mr. MacDonald and his client ought to try harder to arrive at a particular date. More importantly, I was in no way biased against him or his client. I opined that I saw nothing in the context of the thread of e-mails which one could objectively perceive as bias. Accordingly, I denied his request and ordered the matter to proceed on the second scheduled date of the hearing, September 15, 2014, where I would preside as Adjudicator.

At the conclusion of the hearing I expressed my intention to file written reasons for my decision. These are those reasons.

Status of Stay of Proceedings

Before addressing the crux of the recusal motion, it is important to clarify the status of the stay of proceedings and Mr. MacDonald's submissions that the matter is *res judicata*.

Following the stay of proceedings on April 24, Mr. MacDonald made it clear in an e-mail dated June 3, 2014, that he intended to raise the issue of *res judicata* and issue estoppel when the hearing resumed. Indeed, he had suggested that if after his motion, the matter was found not to be *res judicata*, the court should proceed to hear evidence. Mr. Tovey acknowledged that in a subsequent e-mail dated June 11.

As I noted in the decision respecting the stay, (currently at 2014 NSSM 16, hereafter referred to as "the Stay Decision"), a stay of proceedings is a temporary measure. This differs significantly from a finding of *res judicata*, which is a final disposition of the matter (subject to appeal). In my view, the proper course is to lift the stay and consider the issue of *res judicata* if counsel wishes to pursue it. If not, the matter will proceed as scheduled. Whichever option is chosen, the stay should be lifted without prejudice to Electec Engineering's rights to raise an argument of *res judicata* if it so chooses.

I look forward to hearing counsel's submissions on the issue of *res judicata* and issue estoppel.

I return to the motion for recusal.

The Recusal Motion

It is settled law that the party who seeks a finding of an apprehension of bias has the onus to prove its existence on a balance of probabilities. The courts have stated repeatedly that "cogent evidence" must be adduced in support. In arguing his motion for recusal, Mr. MacDonald provided no evidence in support of his motion, other than his submissions and a copy of the impugned e-mail. Furthermore, he cited no case law, statute or any other authority whatsoever in support of his position. On that basis alone, I am inclined to simply state the onus has not been discharged and summarily dismiss the motion. Nevertheless, given the fundamental importance

of the allegation, it is both necessary and appropriate to provide more fulsome reasons for this decision.

In setting out these reasons, I have rejected the motion and been particularly critical of its timing. However, lest there be any thoughts to the contrary, I have no doubt Mr. MacDonald is raising the issue of an allegation of bias on behalf of his client solely as an exercise of his professional judgment for the advancement of his clients' interests. Both counsel have exercised considerable professionalism in their handling of this matter on behalf of their clients. Each comes to court with impressive credentials earned over the duration of their respective careers.

The Facts

Before reviewing the applicable law, it is necessary to view the correspondence in its context. As sometimes occurs for scheduling issues, e-mails were exchanged between counsel, the Small Claims Court Clerk and me to set the matter down for hearing. All parties were copied on each e-mail. I have placed a full copy of the e-mail strings which comprise the correspondence in the court file.

Below is a summary of the e-mails. In the interests of brevity and clarity, I have deleted the salutations, closings and other formalities. In some instances, I have summarized the text. The e-mails appear in sequential order.

June 3, 2014

The e-mails on June 3rd make reference to the concluding paragraph of the Stay Decision, which states as follows:

> "The proceedings in Small Claims Court are at an early stage with little evidence heard. Thus, I am not inclined to consider myself seized with jurisdiction; likewise, I do not feel I have heard sufficient evidence that would require my recusal. Nevertheless, if either counsel has an issue with my hearing or not hearing this matter, I will consider submissions before the matter is scheduled to resume."

After confirming he had no objection to my hearing the matter, Mr. Tovey advised the court as follows:

> "Mr. Costa has advised Labour Standards he is proceeding with the Small Claims matter and has withdrawn his complaint. He asks that the matter be set down for a hearing as soon as possible. We are available June 11 and 23-27, as well as on several dates in early July, if necessary."

The Small Claims Court Clerk, Christina McCorry, then advised counsel of several dates, including four dates in July.

I sent the following e-mail to counsel with a copy to Ms. McCorry:

"Mr. Tovey correctly stated my position on my hearing the matter. However, as we have not heard from Mr. MacDonald yet, I do not want to prematurely book my time should he or his client have any objection to me hearing the matter.

I can advise that the June dates are no longer available. I will have a better sense of my calendar by the end of this week and will advise of my availability by Monday, Tuesday at the latest.

I do not recall if this matter was intended to be held in one night or over two or more. Lately, I have found it prudent to book a second night for special hearings, particularly if either side plans to call more than two witnesses. The nights need not be consecutive but reasonably contemporaneous. This saves on the difficulties experienced when attempting to resume a hearing several months after the initial evidence was tendered. I encourage both counsel to give some thought to that and let Christina know in advance if a second night could be required."

The e-mail string became interrupted. First, I received the following from Mr. MacDonald:

"Many thanks Your Honour - Dianna is presently away but will co-ordinate a date that works for me and my witnesses once we have Your Honour schedule. We will be maintaining that the matter is res judicata but we should probably schedule that to be heard at the outset then reserve time to proceed if you decide it is not"

My reply:

"Thank you Mr. MacDonald:

I have assumed from your comments you have no objection to me hearing the matter.
I will advise all of you of my schedule early next week."

And his response:

"You are correct and I apologize for not stating that we have no objection to your hearing this matter"

June 11

Mr. Tovey:

"Further to your email of last week, I wonder if your schedule for July has solidified to the extent that this matter can be set down again? Although I don't believe this matter will require two nights (the claimant is likely to be our only witness), I agree it may be prudent to book a second night in proximity to the first, particularly given Mr. MacDonald's position on the res judicata issue.

I can advise I am currently available any evening in July prior to the 24th (after which I will be away until August 4), with the exception of July 8, when I am scheduled for another Small Claims matter."

Ms. McCorry responded on July 12, confirming my availability and the availability of a court room for four dates in July, namely, July 14, 15, 21 and 22.

June 12

Mr. MacDonald:

"I am away the week of the 14th and have a comment (*sic*) on the 21 but I am good for 22nd and I also have the 23 if that is available for everyone else. I am already scheduled for Small Claims on the 24th but okay the following week on the 29th - 31st. I have not checked these dates with my witnesses yet but will do so once we have a sense what may work for Counsel and his Honour. I am copying Dianna so she can co-ordinate a date and make sure it works for our clients and witnesses (3-4 witnesses) once we have your further suggest dates"

Mr. Tovey:

"Both I and my client are available for the 22nd. I can also do the 23rd, but as previously indicated, I am unavailable between July 24 and August 4. I am available all of the following week (August 5-9), in case we do need a second night and the 23rd is not available."

I confirmed my availability to both counsel and Ms. McCorry.

June 16

Ms. McCorry sought confirmation of Mr. MacDonald's schedule from Dianna Burns, a paralegal at his office.

June 17

Ms. Burns advised:

"Unfortunately Mr. MacDonald's clients are not available the end of July and much of August and Mr. MacDonald will be away from the office in August as well.

I'm instructed to offer their next available dates which fall in September: 4, 15,16,17,18,22,23,25"

The impugned e-mail was then sent in response. I have reproduced it below in its entirety.

"Mr. MacDonald and Mr. Tovey:

I find it difficult to believe that Mr. MacDonald's clients are not available at all for much of the summer, particularly when we were initially considering dates in late June or parts of July. I am interested to know the reasons for this.

Nevertheless, if we must book into September, all dates except September 4 work for me at this time. One caveat, for the benefit of those with students in their family, September is the month when school commitments arise. I recommend booking 3 or 4 of those dates which we can work around should any conflicts arise.

Yours truly,

Gregg W. Knudsen
Adjudicator"

Following my e-mail of June 17, the only other correspondence from counsel came from Mr. Tovey indicating his availability on September 4, 15 and 16. In the interim, I was able to address

my scheduling conflict on September 4 and Ms. McCorry confirmed the dates for the hearing as September 4 and 15.

Nothing further was heard from either counsel, until the following e-mails were sent to me, again with copies to opposing counsel and Ms. McCorry:

September 4

Mr. Tovey:

"An issue has arisen in this matter which I feel obliged to bring to your attention. I received a faxed letter from Mr. MacDonald this morning indicating he intends to ask that in the event you lift the stay of this matter, he will seek to have the matter heard by another adjudicator at a later time.

From your emails to the parties between June 3 and 17, 2014, I understood the April 24 stay had been lifted and this matter would be proceeding on the merits this evening (and if necessary, on September 15). In the Claimant's view, the time to raise any objection to your hearing the merits of this claim would have been back in June. The Defendant raised no such objection at that time or over the two-and-a-half months since."

This was followed by an e-mail from Mr. MacDonald:

"In light of Mr. Tovey's unilateral communication that may prejudice your view of this matter, I submit that the Claimants Motion to have the Stay Lifted should now be heard in front of another adjudicator to remove any suggestion or perception of prejudice that may result. I will be pleased to speak to this matter for fully this evening."

Apparently, Mr. MacDonald had communicated to Mr. Tovey his intention to move for my recusal on the basis of my decision to lift the stay. However, at the hearing of September 4, I explained to counsel, Mr. MacDonald in particular, that since the matter had been withdrawn at the Nova Scotia Labour Standards Tribunal, the stay of proceedings could be lifted. In support of this position, I referred to the Stay Decision and the cases therein as well as our Court of Appeal's decision in *New Scotland Soccer Academy v. Nova Scotia*, 2012 NSCA 40. He could still proceed with his application for a finding of *res judicata*.

Following that exchange, for the first time, Mr. MacDonald raised his motion for my recusal on the ground that the impugned e-mail raised an apprehension of bias.

That is the full sequence of events. I turn now to the law respecting an allegation of an apprehension of bias.

The Law

In order to justify the recusal or disqualification of an Adjudicator, it is not necessary to find actual bias but a reasonable apprehension of bias. Counsel are well familiar with the long cited principle espoused by Lord Hewart C.J.: "(it) is of fundamental importance that justice should

not only be done, but should manifestly and undoubtedly be seen to be done": *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259.

The leading case in Canada for the test for an apprehension of bias is found in the case of *R. v. R.D. S.*, [1997] 3 S.C.R. 484, where Cory, J., stated the following:

"[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:

> [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. 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":...

[112] The appellant submitted that the test requires a demonstration of "real likelihood" of bias, in the sense that bias is probable, rather than a "mere suspicion". This submission appears to be unnecessary in light of the sound observations of de Grandpré J. in *Committee for Justice and Liberty*, *supra*, at pp. 394-95:

> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added.]

Nonetheless the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough. .....

[113] Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. ....Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

[114] The onus of demonstrating bias lies with the person who is alleging its existence: *Bertram, supra*, at p. 28; *Lin, supra*, at para. 30. Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case." *(Emphasis mine unless noted)*

Justice Cory's decision has been cited numerous times by the courts in this province and elsewhere as authority for the following:

- There is a presumption in favour of impartiality and a lack of bias on the part of an Adjudicator or other decision maker. An allegation of bias calls into question the integrity

of both the Adjudicator and the administration of justice as a whole. As a result, the threshold for establishing a reasonable apprehension of bias is high. The onus of demonstrating bias (or an apprehension of bias) lies with the person alleging its existence, who must adduce cogent evidence to discharge that onus.

- The apprehension of bias must show a real likelihood of bias, and not a suspicion or conjecture.

- The test is an objective one. The actual intention of the Adjudicator (or other decision maker) is irrelevant as is the perception or opinion of the person alleging the existence or apprehension of bias. As Justice Cory noted, the test is based on the assumption of a reasonable, "informed person, with knowledge of all of the relevant circumstances including the traditions of integrity 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."

The Adjudicator facing such an allegation is required to consider his or her conduct according to an objective standard. I note the following comments of Justice Richard in the case of *Mitsui & Co. (Point Aconi) Limited v. Jones Power Co. Limited*, 2001 N.S.S.C. 29, where his Lordship stated the following:

> It appears to be the practice that such applications are made before the judge to whom the application is directed – see *Cominco Ltd v. Westinghouse Canada Ltd., et al.* (1979), 108 D.L.R. (3d) 579 (B.C.S.C.) and *Arsenault – Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851. As *Jones* said in its opening remarks:
>
> Having looked that the authorities, it's quite clear that the application has to be made before the judge himself which is a difficult position to put a judge in and in effect to try and be an informed observer standing to the side but that's what the authorities seem to say and so that's why we are before you today.
>
> This places the judge at a rather unique but challenging position of having to rule upon his or her own conduct and rule whether or not such conduct raises a real likelihood of probability of bias. Except in the most egregious of circumstances, it is only the presiding judge who can properly determine the question of his or her own bias. The judge must be careful to bring the same degree of impartiality and attachment into these deliberations as would be the case in regular court proceedings. The judge must be careful to assume the role of an informed person with a complex and contextualized understanding of the issues. To do otherwise would be to subvert the process and bring into question the whole notion of judicial impartiality and fairness. (underlining mine)

Justice Richard found in that case there was no basis for an apprehension of bias. While his decision was overturned on appeal, Justice Richard's comments are often considered by judges and adjudicators facing an allegation of an apprehension of bias. For example, Chief Adjudicator C. Gavin Giles, QC, recently considered this issue in *McWhirter v. Shankle*, 2013 NSSM 28 and aptly noted:

"As a practical matter, the application of the decision-maker's discretion in motions for recusal is difficult. In some respects, the common practice casts the decision-maker in the roles of witness, advocate and decider."

Findings

Based on a review of the facts, sixteen e-mails were exchanged from June 3 – June 17 proposing a total 15 different dates stretching from June 3 – September 16. Finally, two dates were agreed upon by counsel and the court based on availability, namely July 22 and 23.

Ms. Burns' e-mail stated, Mr. MacDonald's witnesses "were not available the end of July and much of August". Further, Mr. MacDonald was merely described as "away in August". No details were given as to the dates or duration of his absence in August. Ms. Burns' e-mail was somewhat ambiguous.

The impugned e-mail sent in response employed a common colloquialism, "I find it difficult to believe…", often used to denote mild frustration. The problem of course is that the same expression used by an Adjudicator in the context of a decision is sometimes, but by no means always, used in statements addressing a witness' credibility.

Nevertheless, even if the paragraph were taken out of context, read in isolation and given its full literal meaning, it cannot be said that difficulty believing an individual on one issue suggests that he or she will disbelieved on all issues affecting credibility.

Mr. MacDonald submitted that my expressed frustration and request for an explanation was actual bias and that I must recuse. I disagree. There was nothing stated to malign Mr. MacDonald or his client or, more importantly, to show a disposition against either of them. I have yet to hear from his witnesses at all.

Fortunately, the tests do not require the paragraph to be read in isolation. The test is for a reasonable apprehension of bias. Thus, it must be based on what a reasonable, informed person with an understanding of the courts' traditions for impartiality and objectivity would see the tests to mean in its context. In my opinion, such a person would not lightly attribute a statement in that context as a prejudgment of the case or the credibility of the witness on any matter. It would be viewed as something much more innocuous, namely mild frustration.

In actual fact, it was a suggestion that counsel for the Defendant did not try hard enough. One more evening over the course of 38 days was all that was sought. The matter was going to be delayed. It was an unfortunate choice of words and perhaps a more direct statement ought to have been employed.

Timing

As indicated at the outset of this decision, the impugned e-mail was sent on June 17, while the motion for recusal was not brought until the night of the hearing of September 4, a total of 79 days later. No communication was received from Mr. MacDonald in the interim.

The Nova Scotia Court of Appeal had occasion to deal with the timeliness of motions for recusal. In the case of *Smith v. Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (N.S.C.A.), Pugsley, J.A., reviewed several criteria for the finding of reasonable apprehension of bias addressed in the *R. v. R.D.S.* case, *supra*, and stated the following:

> The following guidelines, I suggest, are discernible from the authorities.
>
> 4. **A lawyer who wishes to object to a presiding judge on the ground of reasonable apprehension of bias is expected to make the recusal motion with reasonable promptness after ascertaining the grounds for filing the motion; otherwise there will be a waste of judicial time and resources and a heightened risk that litigants would use recusal motions for strategic purposes**.
> (**Preston et al v. U.S.** (1991), 923 F. (2d) 731 (U.S. Court of Appeals Ninth Circuit)...
>
> 5. The usual remedy, if a reasonable apprehension of bias is established, would be to vacate the judgment and remand the case for retrial by a different judge. (emphasis added)

In that case, his Lordship was considering an allegation of apprehension of bias against the presiding Provincial Court judge where one counsel was a former partner in their law practice. Further, that lawyer had previously described the judge as "a friend" in testimony before the Civil Aviation Board. The Court found the motion was raised in a timely manner, despite the passage of time. Further, they found no apprehension of bias. The court dismissed the application.

R. v. McQuaid (1996), 156 NSR (2d) 182, is a case where a motion to recuse was found by the Court of Appeal not to have been brought in a timely manner. The circumstances alleging bias are far different than in the instant case. In that case, the Court considered a motion by defense counsel 43 days after the incident which was allegedly perceived as biased.

In considering the facts of this case, the motion for recusal based on an apprehension of bias was brought without notice to the court prior to the hearing. Earlier that day, Mr. MacDonald sought to raise two other grounds for recusal, the lifting of the stay of proceedings, which I have already addressed and an issue of "unilateral communications" from Mr. Tovey which was not pursued in any meaningful way. At the hearing, Mr. MacDonald indicated he was not ready to proceed as he thought the Court was only entertaining the motion for *res judicata*, a position wholly inconsistent with his last e-mail of June 3.

As illustrated through the e-mails, a total of 79 days passed between the date of the impugned e-mail and the timing of the motion. Presumably, at all times, the e-mail was in Mr. MacDonald's possession, whether in his files or on his computer. Yet no objection was made by him.

This shows a complete lack of courtesy to the court and opposing counsel. Even if I had been fully convinced that there were grounds for my recusal, this lack of notice is completely unacceptable in the circumstances.

In my view, the proper approach is to raise an objection at the time or shortly thereafter. The Adjudicator would then be given the opportunity to answer any objections. If the facts are so compelling that the explanation or any other explanation, cannot be reconciled by the party, the Adjudicator should be given adequate notice so he or she can give the issue the consideration it deserves.

Mr. MacDonald's motion followed the passage of two and a half months and two previously unsuccessful attempts seeking my recusal. It was raised without any notice whatsoever. This seriously affects the credibility of Mr. MacDonald's motion. Furthermore, to allow such a motion in these circumstances would invite abuse of process in the future from those seeking to thwart cases for tactical reasons.

Summary of Findings

Judicial impartiality is a fundamental tenet of the system of justice in Canada. As Adjudicators, we are required under s. 6(6) of the *Small Claims Court Act* to swear an oath to "do right to all manner of people after the laws of the Province without fear, favour, affection or ill will." The oath is similar in effect to other oaths and affirmations taken by judges and other decision makers in this province. It is one all Adjudicators take very seriously and adhere to. An allegation of bias, whether actual or apprehended goes to the core of the administration of justice. It is the reason given why the threshold for a finding of an apprehension of bias is a high one.

When a lawyer is faced with an apprehension of bias, the court and client expects nothing less than for him or her to raise those objections. However, it is not just another legal argument in a counsel's repertoire to be used when earlier arguments have proven unsuccessful. To use the words of Justice Cory, it…

…must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. ....Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly….

As previously mentioned, I fully believe that Mr. MacDonald has "fearlessly raised" such objections with the best interests of his client in mind. With all due respect, I find he raised the issue in circumstances that come nowhere close to the more serious allegations and circumstances found in the case law.

In reviewing all of the facts, I find that a reasonable, informed person, having thought the matter through would conclude that the impugned e-mail does not create an apprehension of bias. A reasonable person who understands the traditions of impartiality and the oaths Adjudicators are required to uphold would not see this as a predisposition towards a lack of credibility. It takes far more to amount to a reasonable apprehension of bias.

Thus, I find that Mr. MacDonald on behalf of the Defendant, Electec Engineering Incorporated, has not met the high threshold set down by the Supreme Court of Canada in *R. v. R.D.S* and other cases to establish a reasonable apprehension of bias. The motion for recusal must be denied.

Conclusion

For the reasons stated previously, the motion for recusal is denied. The matter is scheduled to be heard by me on September 15 at 6:00 pm at Provincial Court in Halifax.

Order accordingly.

Dated at Halifax, NS,
on September 12, 2014.

_____

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)