COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Sabo v. Clement***,
2008 YKCA 6

Date: 20080603
Docket: 07-YU597

Between:

Daniel Sabo

Appellant

And

**Marcel Clement, Richard Herd,
Gina Lecheminant, Cpl. Dan Parlee,
Charles F. Roots, Bill Schneck, John Wood**

Respondents

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Tysoe

Oral Reasons for Judgment

Appellant appearing In Person

A. McConville

Counsel for the Attorney General of
Canada representing all Respondents

Place and Date:

Whitehorse, Yukon
3 June 2008

[1] **NEWBURY, J.A.**: Mr. Sabo appeals on order dismissing his application to have Mr. Justice Veale recuse himself from this case on the grounds of bias or reasonable apprehension thereof. The case, which has not yet been set for trial, concerns an alleged meteorite found by Mr. Sabo in 1986. He claims it has unique crystal formations on it and that various government officials removed an "off-cut" from it without his permission, and made fraudulent misrepresentations as to tests performed on it and as to the fate of the off-cut. In pleadings filed in February 2003, Mr. Sabo claimed various breaches of duty and misrepresentations on the part of the defendants. He also sought the return of the off-cut or the fair market value thereof and damages, including punitive damages.

[2] Mr. Justice Veale has been the case management judge in this matter since February 2003, and has presided over at least ten case management conferences, for which we have transcripts. Case management conferences are, of course, not conducted with the formality of trials and was stated in ***Authorson* v. *Canada (Attorney General)*** (2002) 161 O.A.C. 1, 32 C.P.C. (5th) 357 (Ont. Div. Ct.) at para. 14, the case management judge may make inquires and even express tentative views about the conduct of the litigation in order to explore possible problems that may arise at trial. At the same time, he or she must keep an open mind regarding the substantive issues to be tried, whether or not he or she is to be the trial judge.

[3] A judge faced with a recusal motion on the basis of bias must apply the test formulated by the Supreme Court of Canada in ***Committee for Justice and Liberty* v. *National Energy Board*** [1978] 1 S.C.R. 369:

> 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.

The British Columbia Court of Appeal has also made it clear that this test requires the demonstration of serious grounds on which to base the apprehension and that a judge's impartiality is presumed: ***Taylor Ventures Ltd.* v. *Taylor*** [2005] BCCA 350 at para. 7. Thus the onus lies on the person asserting bias or the apprehension thereof.

[4] Veale J.'s reasons are indexed as 2007 YKSC 60. After referring to some case law, he turned first to the question of the timing of Mr. Sabo's allegations, which had first been asserted in December 2006, almost two months after the previous case management conference and three years after the first. The defendants argued that with respect to those conferences that had been held prior to June 29, 2006, Mr. Sabo had failed to bring his concerns forward in a timely manner. The authorities are clear that applications of this kind must be brought forward timeously, but there is no hard and fast rule as to how long is too long.

[5] In ***R.* v. *Curragh Inc.*** [1997] 1 S.C.R. 537, the Court said the application must be made "as soon as reasonably possible" and ruled that a five-day delay was not fatal. Mr. Justice Veale reviewed this and other relevant authorities and concluded that although the timing in a case management context can be more "flexible," Mr. Sabo should not be permitted to raise matters that occurred prior to October 31, 2006. Veale J. stated:

> The necessity for and value of the timeliness rule becomes clear when one contemplates backdating the recusal of a judge by some 3 to 4 years. The reason is that all progress in the case could be set aside placing all parties back at the very beginning. This is not fair to either party nor is it appropriate to waste valuable court time. This policy reason is more than theoretical in the case. A recusal order arising out of an allegation of fact from 2003 would result in nullifying the court order of October 27, 2005 for examination for discovery and the order of December 13, 2005 appointing Dr. Stephen A. Kissin as a court-appointed expert. A great deal of time and money for both sides of this dispute, not to mention valuable court time, has been incurred. For these reasons, it is too late to consider the grounds for recusal application that arose before October 31, 2006. The application for recusal on those grounds is dismissed.

[6] The Court then turned to the case management conference held on October 31, 2006. This conference had been requested by the defendants to deal with a number of matters, including the discovery of some defendants, the striking of some defendants, and additional testing of the off-cut. At one point, the judge said this:

> I don't have much stomach for the fight about who's not being professional, quite frankly. I have to tell you that sometimes those allegations are appropriate, but sometimes they're not. My impression is that both of you want to move this. You have to understand that moving the Federal Government is not always the easiest task. I don't envy Ms. Duncan's job a lot, because her clients are in Ottawa and they're in the mining business, I guess, or the geology business, so they're flying all over the place.
>
> Does anybody have any suggestions on an appropriate discovery date that everybody can meet?

Mr. Sabo alleged that this showed favouritism for Ms. Duncan, counsel for the defendants. The discussion at the conference then turned to the striking of the defendants, one of whom had been Mr. Ralph Goodale, then a minister of government. Mr. Justice Veale commented that, "I'm sure there's no point in having

him in there," and Ms. Duncan replied that he, Mr. Goodale, had already been struck as a defendant. The style of cause had not yet been amended.

[7] Next, discussion on October 31 turned to an RCMP officer, Dan Parlee. Mr. Justice Veale said this to Mr. Sabo:

> The main issue on this relates to the meteorite, or the object, okay, and the damage that occurred. All these people are sort of – well, the RCMP is definitely in a collateral matter, I think we would describe it as. Where you have a fight with the government, you go to the RCMP, you know, you can end up having lawsuits against everybody you've ever talked to but it really doesn't get you anywhere. In other words, you have to focus on what the goal is.

[8] On the resucal application, Mr. Justice Veale reviewed the relevant case law, and then applying it to the conference of October 31, said this:

> My refusal to become involved in the allegations by Mr. Sabo against Crown counsel is based upon my experience that cases can be sidetracked by delving into allegations of misconduct alleged by any lawyer or party against the other lawyer. Mistrust will often arise between parties during litigation. In my view, the most satisfactory way to proceed was not to take any side in this particular dispute about discovery dates but to move the case forward by setting the discovery dates. I do not consider this approach nor my comments to be an indication of bias but rather a means of getting the parties to focus on moving the case forward.
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> My comment about Ralph Goodale was simply an attempt to focus on why Mr. Sabo wished him to be a defendant. The fact that the claim against him had already been dismissed makes the comment somewhat irrelevant.
>
> My comment about the RCMP Corporal as a defendant was made to elicit from Mr. Sabo his explanation for including the Corporal as a defendant. The issue of whether any defendants would be struck was not before me for a decision but rather to determine the issues that might be addressed in the formal application. The discussion ended with my statement that it was necessary to "have that application proceed, because the two of

> you do not agree and I really can't make a decision until the law is put in front of me, I really ... I don't want to strike anybody or leave anybody in until I see what the law is."
>
> The final matter that may have precipitated this application was the issue of further scientific testing on the meteorite to be undertaken by Dr. Kissin and the expert retained by Mr. Sabo. There is a dispute about the mechanics of further testing and the expense involved. At the case management meeting of October 31, 2006, I ordered that Dr. Kissin, the court-appointed expert, be permitted to complete the testing of the meteorite. That decision does not in any way preclude Mr. Sabo from applying to have his expert conduct tests as well.
>
> To conclude, I do not find a reasonable apprehension of bias and dismiss the application. Mr. Sabo and Ms. Duncan may speak to costs.

The application was therefore dismissed.

[9] In this court, Mr. Sabo sought not only to have the order of Veale J. set aside, but also sought the "unconditional return" of the off-cut. Much of his factum was devoted to the subject. However, since Veale J. made no order regarding the return of the off-cut, and this indeed is one of the remedies the plaintiff is seeking at trial, this aspect of his appeal was inappropriate. We cannot deal with that part of the relief sought by Mr. Sabo.

[10] With respect to the question of bias, Mr. Sabo did not restrict himself on appeal to the October 31 conference. He said this in the opening statement to his factum:

> In this case a reasonable apprehension of bias arises primarily from the comments and decisions of the chambers judge with respect to the ownership and control of the NRC off-cut, and from his comments and decisions in the circumstances involved in the contest to decide the terms of the order for testing under rule 30(4), cumulating with the second order for testing made on

> October 31, 2006, and collateral issues relating to an allegation of sharp practice and the removal of defendants from the suit.
>
> And finally, the chambers judge made comments early on in the proceedings, well before the plaintiff was even aware of the concept of recusal or a reasonable apprehension of bias, which caused immediate financial hardship and complete loss of livelihood, which, if not fatal to these proceedings, invites catastrophic consequences with respect to land claims and mining regulations which the sale of the original authentic meteorite in 1999 was intended to prevent in the first place.

I interpret this to be an argument that the cumulative affect of the judge's comments and decisions at the case management conferences over the three years, ending October 31, 2006, should be considered, especially given that Mr. Sabo says he was not even aware of the concept of recusal.

[11] The principle that an allegation of bias must be advanced as soon as possible stems at least in part from the fact that once bias is found, at the very least, a cloud forms over the entire proceeding. Certainly where bias is found on the part of a trial judge, all the decisions and orders made by him during the trial are generally "void and of no effect". Here, I quote from the majority judgment of the Court in ***Currah***, *supra*. (I note that Madam Justice McLachlin and Mr. Justice Major, in their dissent, took a different view, at paragraph 106.)

[12] While I do not see any error in Veale J.'s restricting his consideration to the October 31 conference, I have reviewed the transcripts of the earlier conferences and the parties' submissions concerning them. I do not intend to set these out or discuss them individually in these reasons, but having done this review, I see no basis for any allegation that a reasonable apprehension of bias arises from the

and the parties' submissions concerning them. I do not intend to set these out or discuss them individually in these reasons, but having done this review, I see no basis for any allegation that a reasonable apprehension of bias arises from the Court's conduct of those conferences. Veale J. has indeed shown a great deal of patience in dealing with the various delays, changes in tactics and other difficulties that have arisen in this case. If Mr. Sabo has misunderstood some of the Court's orders or comments, it cannot, in my view, be laid at the Court's feet. Veale J. seems to have made every effort to explain the process and the rules to Mr. Sabo and to give him the opportunity to advance his case subject to the rules. I am left in no doubt that no basis for an apprehension of bias exists and that therefore this appeal must be dismissed.

[13] I would dismiss the appeal.

TYSOE J.A.: I agree.

KIRKPATRICK J.A. : I agree.

NEWBURY J.A.: Thank you, the appeal is dismissed.

Newbury J.A.

The Honourable Madam Justice Newbury