

IN THE SUPERIOR COURT OF JUSTICE

BETWEEN:

DAVID BROWN, DANA CHATWELL, and  
DAX CHATWELL BY HIS LITIGATION GUARDIAN DANA CHATWELL

Plaintiffs

- and -

HER MAJESTY THE QUEEN, in the RIGHT OF THE PROVINCE  
OF ONTARIO, ONTARIO PROVINCIAL POLICE COMMISSIONER  
GWEN M. BONIFACE, ONTARIO PROVINCIAL POLICE COMMISSIONER  
JULIAN FANTINO AND ONTARIO PROVINCIAL POLICE  
INSPECTOR BRIAN HAGGITH

Defendants

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ENDORSEMENT ON MOTION FOR RECUSAL

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BY THE HONOURABLE JUSTICE T. BIELBY on  
November 12, 2009, at HAMILTON, Ontario

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APPEARANCES:

J.F. Evans  
M. Bordin

Counsel for the Plaintiffs

S. Blake  
D. Feliciant  
A. Leamen

Counsel for the Defendants

THURSDAY, NOVEMBER 12, 2009

ENDORSEMENT ON MOTION FOR RECUSAL

BIELBY, J:

5 I shall now read to you my endorsement with respect to the motion we heard on Tuesday.

10 On the morning of November 9, 2009, just before the trial in this matter was to start, I advised all counsel while in chambers that Mr. John Evans, one of the counsel for the plaintiffs, and I had a historical relationship.

15 As a result of that disclosure, counsel for the defendants has brought before me a formal motion for me to recuse myself.

20 The grounds for the motion are that as a result of the relationship there was a reasonable apprehension of bias that would not allow me to be impartial or be perceived as impartial.

25 All are agreed that the motion is properly brought before me. I now have to consider whether, and with respect to myself, if there is a reasonable apprehension of bias.

30 The relationship in issue between Mr. Evans and myself was professional. In 1995 I was practising law and a claim was made against me alleging

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professional negligence. Mr. Evans was retained by my insurer to defend the matter.

5 The matter was resolved, prior to trial, in my favour, and Mr. Evans advised the court that he closed the file in 1998. During that period I recall meeting with Mr. Evans once.

10 Contrary to the submissions of counsel for the Crown, these are more than enough facts to determine the issue before me.

15 I did not choose Mr. Evans to represent me, nor did I provide him with instructions. Mr. Evans, while he acted in my name, owed his primary obligation to the insurer.

20 We have had no further personal or professional contact since that time.

25 By chance I was assigned to conduct this trial without regard to the parties, the counsel, or the issues.

30 In the case before me, the plaintiffs owned property on Argyle Street in the town of Caledonia. Adjoining this property, which was in fact their home, was property referred to as the Douglas Creek Estates which was in the process of being developed for residential purposes.

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These development lands were at some point occupied by Aboriginal protesters who alleged ownership of these lands in the context of their overall land claims.

As a result of this occupation and the activities surrounding the occupation, the Ontario Provincial Police became involved.

As a result of this occupation and continued native protest, the plaintiffs alleged generally that they suffered personally and financially and brought this action against the province and the OPP, alleging again that the police failed in their duty to protect them and their property.

The plaintiffs have not made any claim against any of the Aboriginal protesters or the Bands thereof.

Counsel for the defendants in this motion argued that in light of the significant public interest issues at stake including the Crown-Aboriginal relationship, that my previous relationship with Mr. Evans creates a reasonable apprehension of bias.

Counsel argues that this case will focus on the relationship between the Crown and the Aboriginal peoples and argues that the exigencies of this relationship will be engaged. It is argued that these types of public interest issues heighten the

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Crown's obligation to ensure judicial impartiality.

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In his argument, counsel for the defendants seems to suggest that even the slightest perception of bias, given the Crown-Aboriginal issues, should require me to recuse myself and that, because of the sensitivities of these issues, the greater the reasonable apprehension of bias.

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Allegations of bias, as stated in the case of *Rothesay Residents Assn. Inc. v. Rothesay Heritage Preservation & Review Board*, 2006 Carswell NB 306, paragraph 14, states that the allegations of bias can arise in one of several distinct contexts. The first involves the decision-maker who has a financial interest in the outcome of the matter being decided. The second involves cases in which the decision-maker's impartiality is challenged because of a personal relationship with one of the parties or counsel. The third category consists of cases in which the decision-maker has been involved in some other capacity. The fourth category is tied to inappropriate behaviour or comment by the decision-maker.

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It seems to me that the facts of a case are very relevant in determining if there is an apprehension of bias in all but the second example which is, in fact, the issue before me. If a previous relationship between a judge and counsel creates bias, the facts of the case I do not

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believe to be extremely relevant. The concern would exist regardless of the facts of the case the decision-maker is to hear.

In my opinion, if the case before me involved two neighbours as parties in a nuisance action, as opposed to the context suggested by counsel for the defendants, the issue of an apprehension of bias regarding a past relationship should be dealt with in the same manner and by taking into account the same principles.

The principle of impartiality is a cornerstone of our judicial system and ought to apply equally to all parties in all cases. *The Charter of Rights and Freedoms* guarantees everyone to equality before the law. The fact that this action will probably focus in part on the Crown-Aboriginal relationship and the public interest that arises therefrom is, I think, to some degree - to the most degree, rather, irrelevant to the issues of whether or not my past relationship with Mr. Evans gives rise to reasonable apprehension of bias.

The question simply is, given any litigation on which I preside and Mr. Evans participates, is there a reasonable apprehension of bias, given our previous relationship?

One of the authorities provided to me by the defendants is the Supreme Court of Canada decision in *R. v. R.D.S.* determined in 1997.

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Counsel directed me to paragraph 111 and the quote of Grandpre J. in the decision, *Committee for Justice and Liberty v. National Energy Board*, a 1978 decision of the Supreme Court of Canada. Justice Grandpre set out to test for bias in that case and I quote - this was quoted to me:

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"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....The test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude...."

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The court goes on to say that the test 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.

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"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 that judges swear to uphold."  
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At paragraph 112 the court again references Justice Grandpre, at page 394 again of the decision, *Committee for Justice and Liberty*, page 394, in which the learned judge states that he

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sees no difference between the expressions found in the decided cases, be they reasonable apprehension of bias, reasonable suspicion of bias or real likelihood of bias. I quote:

"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."

At paragraph 113 the court states:

"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."

As the court points out in this case, all judges take an oath to be impartial and that the courts have rightly recognized there is a presumption that judges will carry out their oath of office.

Keeping in mind my earlier comments, I look to paragraph 118 of the decision, *R. v. R.D.S.* and quote:

"It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether

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the legal dispute arises between citizen and citizen or between citizen and the state.”

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So what do I take from all this? A reasonable apprehension of bias is a real likelihood of bias which must have some substance to it beyond a mere possible perception of bias. The threshold of finding such bias is high and that we start with a presumption of impartiality. The apprehension must be viewed realistically and practically.

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I acknowledge that I am bound by an oath to be impartial.

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It is my opinion that the circumstances of my professional relationship with Mr. Evans, as set out previously, does not meet the threshold and there is no reasonable apprehension of bias or any real likelihood of bias.

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In my opinion, there is no substance to the allegation, taking a realistic and practical view.

In preparing this endorsement, I have conducted research of my own. I reviewed a paper entitled *Legal Principles of Governing the Disqualification of Judges* by Dean Bryden of the University of New Brunswick, Faculty of Law, published in 2002 and updated by Dr. Julia Hughes in 2008.

In dealing with judges and past personal relationships, the authors state, where the past

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association is with a lawyer or client but not with the litigation itself, judges are normally disqualified from sitting on cases involving these persons for a cooling off period of between two to five years after their appointments.

As quoted in the *Rothesay* case, cited earlier, at paragraph 21:

"...the general understanding is that the duty of a judge to refrain from sitting on a matter dissipates with the passage of a reasonable period of time."

In *Arsenault-Cameron v. P.E.I.*, a decision of the Supreme Court of Canada, found at 1999 Carswell PEI 87, Justice Bastarache wrote at paragraph two:

"The test for apprehension of bias takes into account the presumption of impartiality. A real likelihood or probability of bias must be demonstrated."

In replying to the motion and in arguing against it, counsel for the plaintiffs submitted that the court also has to consider the traditions and issues of integrity between the bench and the legal profession. Protocols have been adopted and recognized and as stated earlier the presumption is that of impartiality.

The fact of the relationship in question does not in my mind rebut the presumption. More than 11 years have passed since Mr. Evans closed his file

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and, given the circumstances, that has dissipated,  
in my opinion, any duty that I might have to  
recuse myself.

Given the facts of the alleged grounds for bias  
and the authority that has been submitted and that  
I have reviewed, the defendants' motion for  
recusal is dismissed.

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11.  
Certification

**Form 2**  
**Certificate of Transcript**  
**Evidence Act, subsection 5(2)**

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I, Tricia Reed, certify that this document is a true and accurate excerpt transcript of the recording of David Brown, et al. v. Her Majesty the Queen in the Right of the Province of Ontario, et al. in the Superior Court of Justice held at 45 Main Street East, Hamilton, Ontario, taken from Recording No. 4799-702-205/2009, which has been certified in Form 1.

November 12, 2009 .....   
(Signature of Authorized Person)