



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Cabana v. Newfoundland and Labrador*, 2025

NLCA 13

Date: April 10, 2025

Docket Number: 202401H0062

BETWEEN:

BRAD CABANA

APPELLANT

AND:

HIS MAJESTY THE KING IN RIGHT OF
NEWFOUNDLAND AND LABRADOR

FIRST RESPONDENT

AND:

KATHY DUNDERDALE

SECOND RESPONDENT

AND:

TERRY FRENCH

THIRD RESPONDENT

Coram: F.P. O'Brien, D.M. Boone and K.J. O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 201201G5779
(2024 NLSC 104)

Appeal Heard: April 7, 2025
Judgment Rendered: April 10, 2025

Reasons for Judgment by: K.J. O’Brien J.A.
Concurred in by: F.P. O’Brien and D.M. Boone JJ.A.

Counsel for the Appellant: Self-Represented
Counsel for the First Respondent: Kyle S. Mercer and
Christina E. Driscoll
Counsel for the Second and Third Respondent: John F.E. Drover

Authorities Cited:

CASES CITED: *Cabana v. Newfoundland and Labrador*, 2018 NLCA 52; *Cabana v. Newfoundland and Labrador*, 2020 NLCA 44, leave to appeal to SCC refused, 39716 (2 December 2021); *Cabana v. Newfoundland and Labrador*, 2024 NLSC 104; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282; *Oleynik v. Memorial University of Newfoundland*, 2024 NLCA 44, leave to appeal to SCC requested; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729; *Metal World Inc. v. Pennecon Energy Ltd.*, 2014 NLCA 10.

OTHER: Canadian Judicial Council, “Statement of Principles on Self-represented Litigants and Accused Persons” (September 2006), online: <<https://cjc-ccm.ca/sites/default/files/documents/2020/Final-Statement-of-Principles-SRL.pdf>>.

K.J. O’Brien J.A.:

[1] This is an interlocutory appeal of a judge’s decision not to recuse himself. The appellant, Brad Cabana, who is self-represented, has sued the respondents for defamation, negligence and breach of his *Charter* rights.

OVERVIEW

[2] The trial commenced in 2016 and is not yet finished. During this period, there have been two previous interlocutory appeals to this Court (*Cabana v. Newfoundland and Labrador*, 2018 NLCA 52 (“*Cabana 2018*”) and *Cabana v.*

Newfoundland and Labrador, 2020 NLCA 44, leave to appeal to SCC refused, 39716 (2 December 2021) (“*Cabana 2020*”).

[3] In late 2023, Mr. Cabana applied to have the trial judge recuse himself on the basis that the judge’s conduct raised a reasonable apprehension of bias. The judge dismissed the application for recusal with written reasons (*Cabana v. Newfoundland and Labrador*, 2024 NLSC 104 (the “Decision”)).

[4] Mr. Cabana appeals the Decision, asserting that the judge erred in failing to recuse himself. He seeks to have the Decision set aside and have this Court order that the judge be disqualified from hearing the matter, a mistrial be declared, and a new trial be held with another judge.

[5] Mr. Cabana also asks this Court to reconsider certain aspects of *Cabana 2020*. In *Cabana 2020*, this Court dismissed Mr. Cabana’s appeal of two mid-trial rulings, one denying his application for a publication ban and the other denying his application for a mistrial because his psychologist’s clinical chart had been disclosed at trial.

[6] For the following reasons, I would dismiss the appeal. Mr. Cabana has not established that the judge made any reversible error in refusing to recuse himself. Nor has Mr. Cabana established grounds upon which this Court would reconsider *Cabana 2020*.

ERRORS ALLEGED IN THE DECISION

[7] The test for recusal is whether an informed person, viewing the matter realistically and practically, would conclude that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly. There is a strong presumption of judicial impartiality and a correspondingly high burden for proving a claim of an apprehension of bias. The inquiry into whether a judge’s conduct creates a reasonable apprehension of bias is contextual and fact specific (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 109; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, at paras. 20-26; and *Oleynik v. Memorial University of Newfoundland*, 2024 NLCA 44, leave to appeal to SCC requested).

[8] Mr. Cabana submits that the judge failed to apply the proper legal test for recusal by requiring proof of actual bias. I cannot agree. Although the judge did not

consistently refer to “reasonable apprehension of bias” each time he referred to “bias”, it is clear from the Decision as a whole that the judge properly instructed himself on and applied the correct legal test. He specifically stated that Mr. Cabana did not have to establish actual bias, only a reasonable apprehension of it (Decision, at para. 6).

[9] The other errors that Mr. Cabana alleges are of mixed fact and law. To be successful on appeal, Mr. Cabana must show that the judge made a palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10, 26-27, 36-37; and *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 33).

[10] Mr. Cabana alleges that the judge erred by failing to recognize that his interventions during trial, some of the language he used, some of the decisions he made, and his choice of evidence considered in making those decisions reveal that the judge did not have an open mind.

[11] I will deal with some of Mr. Cabana’s specific claims below but will begin with some general observations.

[12] First, a full review of the record reveals that the judge was fair and impartial towards not only Mr. Cabana, but all parties involved in the litigation. The record includes audio recordings and transcripts of the proceedings, and the judge’s written interlocutory decisions. The judge was alive to his duty to provide Mr. Cabana, as a self-represented litigant, information and reasonable assistance on procedural and evidentiary matters, while being alert not to compromise judicial impartiality and the fairness of the hearing. There is nothing in the record to suggest that the judge failed to be guided by the “Statement of Principles on Self-represented Litigants and Accused Persons” issued by the Canadian Judicial Council in September 2006.

[13] Second, the strong presumption of judicial impartiality is not displaced by the judge’s use of particular words, such as “squabble”, “strategic”, or “interesting”, considered in isolation. The judge’s comments and behavior must be assessed in the context of the proceedings. I have considered all of the examples of the judge’s language and behavior cited by Mr. Cabana in context and do not find that they, collectively or individually, come close to the point at which an informed person, viewing the matter realistically and practically, would conclude that it was more likely than not that the judge, whether consciously or unconsciously, would not decide fairly.

[14] Third, as stated by this Court in *Cabana 2018*, a judge's rulings during trial, even if ultimately determined to be wrong, do not in themselves mean that the judge was biased against the party affected by those rulings (at para. 110). Mr. Cabana objects to some of the judge's findings in an interlocutory decision he gave with respect to the recall of Ms. Dunderdale as a witness. In his factum, Mr. Cabana reviews at some length evidence that he submits the judge failed to properly consider. As the judge correctly noted, in deciding an interlocutory application a judge may have to preliminarily assess the evidence. However, those initial assessments are not determinative as the judge must hear all the evidence and the parties' submissions before making a final decision (Decision, at para. 12).

[15] I turn next to specific claims made by Mr. Cabana. Mr. Cabana submits that the judge demonstrated a reasonable apprehension of bias when he considered defence counsel's suggestion to proceed on liability alone partway through the trial. Defence counsel made this suggestion when Mr. Cabana's witness, his treating psychologist, was unexpectedly not available and further delay was anticipated as a result. I am satisfied that there is no merit to Mr. Cabana's claim. In the face of an unexpected development, the judge rightfully explored options to ensure trial efficiency. Given the unusually extended nature of this trial, the importance of making the best possible use of court and party resources was particularly acute. The judge heard from the parties and gave Mr. Cabana an appropriate explanation of defence counsel's proposal and time to consider the suggestion. The judge explained that it was Mr. Cabana's decision to make and, ultimately, respected Mr. Cabana's decision not to bifurcate the trial. There is nothing in the judge's dealing with this issue that would give rise to a reasonable apprehension of bias.

[16] It is likewise for the judge's granting of Mr. Cabana's request for an adjournment following his decision not to bifurcate the trial. Mr. Cabana requested the adjournment because, in his words, he was "emotionally really devastated" by the witness's failure to appear and did not feel well enough to proceed (Transcript, September 26, 2023, at p. 107). The defendants opposed the adjournment request. Acknowledging Mr. Cabana's poor mental health, the judge granted Mr. Cabana's request. The defendants were not happy with the decision, but the judge explained that he felt it was the right thing to do and, further, he suggested that if he did not grant the request, his decision would be vulnerable on appeal. He also stated, "So, you know, nobody wants to be in this position. I don't think Mr. Cabana wants to be in this position" (Transcript, September 26, 2023, at p. 126). First and foremost, the judge had to explain his decision to the defendants who opposed the adjournment. He did, and there is nothing in his doing so that would raise a reasonable apprehension of bias.

[17] Finally, as evidence of reasonable apprehension of bias, Mr. Cabana points to an email to him from counsel for Ms. Dunderdale and Mr. French wherein counsel expressed his opinion on the direction the judge was leaning, unless Mr. Cabana's testimony changed the judge's mind. Although this email was filed in the court below, the judge did not reference it in the Decision. Before this Court, counsel for Ms. Dunderdale and Mr. French submits that the judge properly did not consider the email because it is irrelevant, unreliable and inadmissible. I do not need to address the admissibility or reliability of the email because it is clearly irrelevant. The lawyer is a partisan advocate for his clients and the views he expressed to Mr. Cabana as to how the case was going are irrelevant to assessing how a reasonable, informed person would view the judge's actions. A judge must consider all of the relevant evidence and circumstances when deciding whether a reasonable apprehension of bias exists, not canvas for individual views of the matter.

[18] Mr. Cabana alleged bias and unfairness on the part of the judge in his two previous interlocutory appeals to this Court. Those allegations were considered and dismissed in both *Cabana 2018* (at paras. 110-113, 121-124) and *Cabana 2020* (at paras. 130-133). Some of the issues Mr. Cabana raised on this appeal were previously adjudicated on by this Court in those earlier decisions. For example, the judge's refusal to grant Mr. Cabana an adjournment during the hearing of his application for a publication ban was addressed in *Cabana 2020*. Subject to a successful application for reconsideration, this Court will not revisit issues previously decided. However, it may still consider those earlier events as part of the full context that must be considered in assessing bias or a reasonable apprehension of it. I have considered those earlier events in assessing the cumulative effect of the concerns Mr. Cabana has raised.

[19] Ultimately, Mr. Cabana raises nothing in the present application that, considered either individually or cumulatively, establishes on a balance of probabilities that an informed person, viewing the matter realistically and practically, would conclude that it is more likely than not that the judge, whether consciously or unconsciously, would not decide this matter fairly. He has not shown that the judge made any error of law or any palpable and overriding error of mixed fact and law in the Decision. As such, I would dismiss the appeal.

RECONSIDERATION

[20] I will now address Mr. Cabana's request to this Court to reconsider *Cabana 2020*.

[21] This Court considered the circumstances in which a previous decision of the Court may be reconsidered, both before and after a final order has been issued, in *Metal World Inc. v. Pennecon Energy Ltd.*, 2014 NLCA 10 (at paras. 17-19). As noted in *Metal World*, all court decisions are subject to the fundamental principle of finality. Reconsideration is only appropriate exceptionally, and such exceptions are limited in scope. To put it simply, the Court will not grant a reconsideration request where what is being sought is effectively a further appeal by another name.

[22] Mr. Cabana has not established that any of the possible grounds for reconsideration listed in *Metal World* applies in this case. For example, he has not shown that a fundamental basis for the decision in *Cabana 2020* is lacking or that the Court failed to consider something that it was required to consider. Although *Metal World* does not purport to exhaustively list grounds for reconsideration, the examples given illustrate the exceptional nature of the remedy.

[23] Mr. Cabana is effectively seeking a rehearing of the issues considered in *Cabana 2020*. He alleges errors on the part of the Court, but he has not established grounds that support a reconsideration. As such, I would dismiss his request for reconsideration.

DISPOSITION

[24] For the forgoing reasons, I would dismiss the appeal. I would further order that Mr. Cabana pay costs on this appeal to the respondents on column 3 of the scale of costs, on the basis of one counsel for the first respondent and one counsel for the second and third respondents.

K.J. O'Brien J.A.

I concur : _____

F.P. O'Brien J.A.

I concur : _____

D.M. Boone J.A.