

Date: 20140107

Docket: 13/63

Citation: *Cabana v. Newfoundland and Labrador*, 2014 NLCA 1

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

BETWEEN:

BRAD CABANA

INTENDED APPELLANT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF
NEWFOUNDLAND AND LABRADOR

FIRST INTENDED
RESPONDENT

AND:

NALCOR ENERGY

SECOND INTENDED
RESPONDENT

AND:

INNU NATION OF LABRADOR

THIRD INTENDED
RESPONDENT

Coram: Welsh J.A.

Application Heard: December 11, 2013

Decision Rendered: January 7, 2014

Reasons for Decision by Welsh J.A.

Counsel for the Intended Appellant: Self Represented

Counsel for the First Intended Respondent: Rolf Pritchard Q.C.

Counsel for the Second Intended Respondent: Thomas Kendell Q.C. and
Melissa Hill

Counsel for the Third Intended Respondent: Maggie Wentz

Welsh J.A.:

[1] This application for leave to appeal involves two distinct issues. First, Mr. Cabana submits that the applications judge erred when she refused to recuse herself from hearing his interlocutory application for interim relief. He did not take steps to appeal that decision at the time but, instead, proceeded, unsuccessfully, with the substantive issues in his application. He now is seeking leave to appeal both decisions.

BACKGROUND

Application for Interim Relief

[2] Mr. Cabana sought an interim injunction against the Crown to prevent the Lower Churchill hydroelectric power project from proceeding. The applications judge explained (2013 NLTD(G) 115, 340 Nfld. & P.E.I.R. 113 (the “substantive decision”)):

[3] On November 16, 2012, Mr. Cabana issued a Statement of Claim and filed an Interlocutory Application naming as Defendants/Respondents Her Majesty the Queen in Right of Newfoundland and Labrador, Nalcor Energy and Innu Nation of Labrador. The substance of the claim can be summarized as a challenge to the development of the Lower Churchill River for hydroelectric purposes, without holding a general referendum for the Province’s population.

[4] The interim relief sought in the Interlocutory Application is stated as follows:

104. ...

d) That the continued site work on, and continued development of, the Lower Churchill River hydro-electric project by the First Respondent [the Crown], including expenditure of public funds thereon, without the expressed consent of the people of the province by way of referendum, constitutes a violation of Section 7 of the Charter of Rights and Freedoms. For clarity, the expenditure of such a large amount of public money on a project that lacks legal certainty imperils the average citizen’s, and the Province’s, financial well-being to the extent that it constitutes a violation of the right to security of the person;

...

Because an injunction is not a remedy available as against the Crown, the applications judge determined that declaratory relief would be the appropriate remedy should Mr. Cabana's application succeed.

[3] However, the judge concluded that, in the circumstances, the test for granting interim injunctive or declaratory relief was not satisfied. She determined that Mr. Cabana had not established any of the three required elements; that is, that there is a serious issue to be tried, that Mr. Cabana would suffer irreparable harm if the relief was not granted, and that the balance of inconvenience favoured Mr. Cabana.

Recusal

[4] After the hearing of the application on the substantive issues had begun, Mr. Cabana alleged that the applications judge was in a conflict of interest and should recuse herself. After addressing the grounds for Mr. Cabana's allegation, the judge determined that this was not a situation in which recusal was warranted, and denied Mr. Cabana's request (2013 NLTD(G) 36, 334 Nfld. & P.E.I.R. 78 (the "recusal decision")).

ANALYSIS

[5] A party seeking to appeal from an interlocutory order requires leave of the Court (rule 57.02(1) of the *Rules of the Supreme Court, 1986*). In the instant application, the analysis turns on whether there is an arguable case in respect of the substantive issues, and on concerns with the efficient use of judicial resources together with clarification of the law regarding the recusal of judges.

Leave to Appeal – Recusal Decision

[6] The potential effect of delaying an appeal until the matter is completed in the Trial Division is relevant in determining whether to grant leave on the recusal question. Rule 57.02 (1.1) specifies that issues not disposed of on an interlocutory basis may be included in an appeal of a final decision:

A failure to obtain leave to appeal or to make an application under paragraph (1)(a) does not prejudice the right of a party to appeal a final order.

[7] Accordingly, in the instant case, should leave to appeal be refused, any appeal upon completion of the action on the statement of claim could

include issues related to the recusal question. If successfully appealed, the remedy would be to set aside all the decisions made by that judge in the matter. The potential for the inefficient use of judicial resources is of concern.

[8] Emphasizing this consideration, counsel for the respondents submit that Mr. Cabana was, in fact, required to appeal the recusal decision before proceeding with the substantive issues. The submission is that, by proceeding, Mr. Cabana waived his right to appeal the recusal decision. However, the question of when an appeal against a judge's decision on recusal may or must be brought has not been determined by this Court. Indeed, contrary to the respondents' submission that Mr. Cabana was presumed to have waived his right to an appeal, there is authority from other jurisdictions that an appeal against a recusal decision should not be heard until the trial has been completed. (See, for example, *MacKinnon v. MacKinnon*, 2001 PESCAD 20, 203 Nfld. & P.E.I.R. 355, at paragraphs 2 and 3; *Middelkamp v. Fraser Valley Real Estate Board* (1993), 83 B.C.L.R. (2d) 257 (BCCA), at paragraph 20.) This is an issue on which further consideration and clarification by this Court would be of assistance.

[9] Aside from the question of when an appeal against a recusal decision should or must be taken, the facts forming the basis for the appeal must also be considered in determining whether leave to appeal should be granted. The question is whether there is any basis on which the appeal on the recusal issue may succeed. Leave will not be granted where the grounds for appeal are frivolous or without any merit (*Langor v. Spurrell* (1997), 157 Nfld. & P.E.I.R. 301 (NFCA), at paragraph 23).

[10] The Supreme Court of Canada has outlined a test to be applied when recusal by a judge is in issue (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484). The Court emphasized the fact-specific nature of the assessment. The test accepted by the Court, stated in the decision by L'Heureux-Dubé and McLachlin JJ., refers to the statement by de Grandpré in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369:

[31] ... Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: [authorities omitted]. De Grandpré J. stated, at pp. 394-95:

... 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. ... [T]hat test is “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.”

...

[11] One ground on which Mr. Cabana alleged that the applications judge should recuse herself relates to former clients. He submits that the judge represented Newfoundland and Labrador Hydro on a general rate application before the Public Utilities Board in 2006/2007. While Hydro is not a party to Mr. Cabana’s application, he submits that the nature of business carried on by Hydro is sufficiently connected to that of Nalcor and the Lower Churchill hydroelectric power project so as to raise a reasonable apprehension of bias.

[12] For purposes of determining whether leave to appeal should be granted on this ground, it is necessary only that the issue be arguable. In the circumstances, it cannot be said that the issue is frivolous or without any merit. The nature and scope of the solicitor-client relationship and the duration of the judge’s removal from the relationship are issues that may be assessed on an appeal of the recusal decision. For purposes of the leave application it is unnecessary to consider whether any of the other grounds for recusal relied upon by Mr. Cabana have any merit.

[13] Given the above considerations, I conclude that leave to appeal the recusal decision should be granted. I am satisfied that there is at least one ground of appeal that would not be characterized as frivolous or without any merit. In addition, the appeal will provide this Court with an opportunity to give guidance regarding the procedural issue of when an appeal as to a recusal decision may or must be brought.

Leave to Appeal – Substantive Decision

[14] As noted above, should Mr. Cabana succeed in his appeal against the recusal decision, all the decisions made by the applications judge in the matter would, as a consequence, be set aside. However, in the event that that appeal is dismissed, a decision regarding leave to appeal against the substantive decision would be required.

[15] In refusing interim declaratory relief the applications judge applied the three-pronged test referenced by Sopinka and Cory JJ., for the Court, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at page 334:

Metropolitan Stores [[1987] 1 S.C.R. 110] adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. ...

Regarding the first component of the test Sopinka and Cory JJ. explained, at pages 337 to 338:

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[16] Interim relief in the nature of injunctive or declaratory relief will be granted only if all three prongs of the *RJR-MacDonald* test are satisfied. Failure by Mr. Cabana to meet one component of the test would preclude the granting of interim relief, leaving him with the option of pursuing his remedy by way of a trial based on his statement of claim.

[17] Although Mr. Cabana directed his submissions primarily to the first prong of the test, it is convenient for purposes of the leave to appeal application to begin with a consideration of the applications judge's decision on the third prong of the test, the balance of inconvenience. The judge concluded that the balance weighed, not in favour of Mr. Cabana, but of the respondents:

[113] I agree with counsel for the Respondents that Mr. Cabana has failed to set out, with any certainty, the harm he will suffer if interim relief is denied. I have previously characterized his claim for diminished property values, increased taxes and power rates as speculative.

[114] On the other hand, at paragraphs 35-49 of the Affidavit of Gilbert Bennett, filed on January 18, 2013, Nalcor's V.P. for the Lower Churchill Project outlines serious consequences which his evidence supports would result to Nalcor, if the Project was to be suspended pending trial. These estimates are based on Nalcor's

current records, load forecasts prepared by qualified professionals, and the reality of the Province's current competitive employment environment. He addressed (inter alia):

- (i) Direct financial harm in three categories: costs of contractors undertaking site work, additional fuel consumption at the Holyrood thermal generating plant and direct costs associated with corporate support, salaries, professional fees, suspension or cancellation of vendor/supply contracts, and insurance/financing;
- (ii) Termination costs associated with trigger payments under contracts with third parties such as SNC-Lavalin in respect of engineering, procurement and construction management;
- (iii) Loss of key project team members and construction tradespeople who would move to other viable projects;
- (iv) High financing insurance costs due to the enhanced risk perceived by such institutes to the Project's liability; and
- (v) A postponement of key project timelines would affect the delivery of essential components such as turbines or undersea cable, would delay the income accruing to the local economy, and defer payments due to the Innu Nation.

[115] I am satisfied that these are (to varying degrees) examples of significant losses and risks to Nalcor (and the Province as its sole shareholder) if the Project was to be subject to the Declaratory Order Mr. Cabana seeks.

[116] The balance of convenience factor requires me to weigh these identified examples of losses against Mr. Cabana's claim for speculative personal financial losses, should the Project proceed. There is no reasonable comparison. I conclude that the balance of convenience favours the Respondents in denying the interim declaratory relief.

[18] Finally, regarding the inconvenience to Mr. Cabana, the applications judge concluded:

[109] Further, there was no evidence placed before me to suggest that (should Mr. Cabana succeed at a later date in establishing that the Project should not have been pursued) the loss he would suffer, as an individual, could not be compensable in damages.

[19] There is no basis on which to conclude that there is any merit to Mr. Cabana's appeal in respect of the balance of inconvenience prong of the

RJR-MacDonald test. The applications judge considered the evidence, applied the appropriate analysis and gave reasons for her decision. The result is that, regardless of any merit to the arguments on the first and second prongs of the test, the appeal could not succeed. Accordingly, leave to appeal must be denied. Mr. Cabana is left with the option of proceeding with the trial of the action set out in his statement of claim.

DISPOSITION

[20] Leave to appeal the recusal decision is granted. Leave to appeal the substantive decision is denied. Costs will be as determined on the appeal. Should Mr. Cabana not proceed with the appeal against the recusal decision, the parties will bear their own costs of this application.

B. G. Welsh J.A.