Federal Court  Cour fédérale

Date: 20230203

Docket: T-1686-21

Citation: 2022 FC 1759

Edmonton, Alberta, February 3, 2023

PRESENT: Madam Associate Judge Catherine A. Coughlan

BETWEEN:

CHRISTOPHER JOHNSON

Plaintiff

and

CANADIAN TENNIS ASSOCIATION, MILOS RAONIC, GENIE BOUCHARD, DENIS SHAPOVALOV and FELIX AUGER-ALIASSIME

Defendants

AMENDED ORDER AND REASONS

I. Overview

[1] The self-represented Plaintiff, Mr. Johnson, brings this motion pursuant to Rule 383 (a) of the *Federal Courts Rules* [*Rules*] seeking the assignment of a new case management Judge. This motion is predicated on the assumption that I will recuse myself from continuing as case management judge of the within action. Regardless of the manner in which Mr. Johnson has sought to frame his motion, it is in fact a motion seeking my recusal and I will deal with it accordingly.

[2] By way of background, on November 3, 2021, Mr. Johnson commenced an action alleging copyright infringement against a number of Defendants including the Canadian Tennis Association (Tennis Canada), Milos Raonic, Genie Bouchard, Denis Shapovalov and Felix Auger-Aliassime. In his claim, Mr. Johnson, a journalist and photographer alleges that the Defendants have infringed his copyright in certain photographs contrary to the *Copyright Act.* In consequence, Mr. Johnson seeks declaratory and injunctive relief. He also seeks damages and an accounting of the Defendants' profits.

[3] The Defendants, Tennis Canada, Denis Shapovalov and Felix Auger-Aliassime have defended the action and are represented by Mr. Blake Hafso of Calgary, Alberta (the Hafso Defendants). The Defendant, Milos Raonic has defended the action and is represented by Mr. Mark Feigenbaum of Thornhill, Ontario. The Defendant, Genie Bouchard, has not been served with the Statement of Claim.

[4] In a letter dated May 20, 2022, Mr. Johnson requested that the action be case managed to "secure the just, most expeditious, and least expensive determination of this action on the merits." In a letter dated May 24, 2022, Mr. Hafso acknowledged that his clients had no objection to the action being case managed as a Specially Managed Proceeding.

[5] On May 25, 2022, I ordered that the action be specially managed and directed that no further interlocutory relief could be sought without first requesting a case management conference. On May 30, 2022, the Chief Justice appointed me as case management judge.

[6] Although the action has only advanced to the examination for discovery stage, it has become mired in unnecessary and duplicative motions. This can be divined from the fact that

between February 23, 2022 and December 7, 2022 the Recorded Entries confirm the Court, through various Judicial officers, has issued ten (10) Orders, twelve (12) Directions and held two (2) case management conferences totalling 77 minutes of court time. Many of the Orders and Directions were issued as a direct result of Mr. Johnson's manner of conducting the litigation.

[7] On October 12, 2022, Mr. Johnson wrote a letter to Chief Justice Crampton requesting a new case management Judge be appointed. That letter was conveyed to me and I raised it with Mr. Johnson at a case management conference on November 2, 2022. At that time, I advised Mr. Johnson of the correct procedure to bring a motion for recusal. Although Mr. Johnson indicated that he trusted my judgment, he filed the within motion November 19, 2022.

[8] Mr. Johnson seeks my recusal on a number of bases including my rejection of his request made on November 7, 2022, for a further case management conference to address, what Mr. Johnson perceived as important issues raised by him but not addressed by me at a Case Management Conference on November 2, 2022. Further, his written representations and affidavit set out a litany of complaints that challenge my impartiality and cast aspersions on my colleagues, Justice Diner and Associate Judge Ring.

[9] For the reasons set out below, I decline to recuse myself.

II. The Law of Recusal

[10] The test for recusal or reasonable apprehension of bias was set out by Justice de Grandpré in a dissenting Judgment in *Committee for Justice and Liberty et al v National Energy Board et al*, 1976 CanLII 2 (SCC). His articulation of the test is well-established and has been subsequently adopted with approval by the Supreme Court of Canada: *R v S (R.D.),* 1997 CanLII 324 (SCC) [*S*

(R.D.)] and *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 7 [*Wewaykum*]. That test asks whether the informed person, viewing the matter realistically and practically, and having thought the matter through, would think that it is more likely than not that the decision-maker consciously or unconsciously would not decide the matter fairly.

[11] In a more recent decision of the Supreme Court of Canada *in Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para 26, the Court explains:

> [26] The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias: see *Wewaykum*, at para. 77; *S. (R.D.)*, at para. 1[41], per Cory J. As Cory J. observed in S. (R.D.):
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> > …allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding. [Emphasis added by the Supreme Court; para. 141.]

[12] The Federal Court of Appeal also instructs that "the onus of establishing a reasonable apprehension of bias lies with the person who alleges it, and the threshold for perceived bias is high": *ABB Inc v Hyundai Heavy Industries Co, Ltd*, 2015 FCA 157 at para 55. The test is an objective one engaging a reasonable and informed observer and that his or her apprehension of bias must be reasonable. The threshold is necessarily high because there is a strong presumption that judges honour their oaths to be impartial and will dispense justice without bias: *Wewaykum* at

para 59. Further, that presumption can only be displaced with convincing evidence: *S (R.D.)* at paras 32-33, 117: *Wewaykum* at paras 59 and 76.

[13] Finally, an apprehension of bias is not established merely because a litigant is not successful. In *Vanderidder v Aviva Canada Inc*, 2010 ONSC 6222 at paras 16-19, Justice Granger observed that an apprehension of lack of success does not equate to a reasonable apprehension of bias. There may be many instances, particularly in a case management context where a judge must issue numerous decisions against one party in the same proceeding: *Collins v Canada*, 2011 FCA 171 at paras 10-11. This is not cause for alleging an apprehension of bias. As noted by Slatter, J.A. in *Alberta Health Services v Wang*, 2018 ABCA 104 [*Alberta Services*] at para 9, "[m]aking decisions is the essence of the judicial function, and a reasonable person, properly informed, would not conclude that a judge would have a bias towards any one party just because that party was unsuccessful on one particular application."

III. Facts

[14] In support of his motion, Mr. Johnson filed his own affidavit. The affidavit contains 84 paragraphs, which chronicles Mr. Johnson's subjective perceptions of this Court's mishandling of the proceeding over the last twelve (12) months since the action was commenced. Principally, Mr. Johnson asserts two broad categories of complaints that should lead to my recusal. First, he argues that the Defendant, Tennis Canada has "[s]ince 2018 mounted a malicious disinformation campaign to smear [him]." This behaviour, Mr. Johnson asserts has caused the Court, Justice Diner, Associate Judge Ring and me, to spend additional time on this case but we have all failed to punish and deter the Defendants' behaviour. He baldly asserts that we have made errors of fact which have lead to decisions based on false premises propounded by the Defendants. In that regard,

he deposes that he spent several weeks preparing a complaint, which was not sent, to the Canadian Judicial Council in respect of Justice Diner's decision to dismiss his Rule 51 appeal from my decision to dismiss his motion for an order of substitutional service.

[15] Second, with respect to my suitability to case manage this file, Mr. Johnson claims that because I am a graduate of the University of Alberta Law School and so apparently is Mr. Hafso, the perception of bias is overwhelming and undeniable and cannot be overlooked. He says this fact alone necessitates my recusal.

[16] These broad categories of complaints animating Mr. Johnson's motion for recusal are summarized at paragraphs 81-83 of his affidavit reproduced below:

> 81. In summary, more than a year has passed since I filed my Statement of Claim on November 3, 2021. The Court has not punished the Defendants for trying to evade service; for filing Statements of Defence full of fabrications and contradictions; for refusing to negotiate in good faith to resolve the dispute pursuant to Rule 257; for filing an Affidavit of Documents more than 100 days after the 30-day deadline; for evading examination questions for months and then providing evasive "non-answers", for providing no requested records or documents whatsoever; for lying in sworn affidavits; and for their persistent disinformation campaign meant to mislead the Court. The Defendants have done this because the Court has allowed them to act in bad faith with impunity while punishing the Plaintiff for alleged "technical deficiencies" and "lack of knowledge" about rules, litigation and bureaucratic practices.
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> 82. As a result of these double standards and unnecessary delays, I am being denied my rights to a proper discovery process and a fair, impartial and expeditious pursuit of justice while the Defendants continue to derive unjust profits from my work.
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> 83. Based on the history of my pursuit of justice since 2018, I do not in good faith believe that, under the current circumstances, I will have a fair and equal opportunity to state my case or defend myself against law graduates of the University of Alberta who have spent

> their careers as “pitbull lawyers” defending governments, federal entities or corporations.

IV. Analysis

[17] With respect to the complaints at paragraph 81 of Mr. Johnson’s affidavit, those complaints evidence Mr. Johnson’s frustrations with the litigation process and his lack of understanding of those processes. For example, Mr. Johnson brought an *ex parte* motion for default judgment against the Defendant Bouchard. That motion was dismissed by the Associate Chief Justice for lack of proof of service on that Defendant. Thereafter, Mr. Johnson sought an order for substitutional service which was dismissed by me and upheld on appeal by Justice Diner. While no further appeal was taken by Mr. Johnson he nevertheless continues to assert that rather than correcting mistakes and factual errors attributable to me, Justice Diner dismissed the appeal and ordered Mr. Johnson to pay costs to Mr. Hafso’s Defendants. Moreover, as noted in paragraph 81 of his affidavit, Mr. Johnson views these decisions as failings by the Court to punish the Defendants for trying to evade service.

[18] With respect to the complaint that the Court has refused to punish the Defendants for filing Statements of Defence that he asserts are full of fabrications and contradictions, once again, this complaint merely reflects Mr. Johnson’s lack of understanding of the litigation process. He does not apprehend that inconsistent pleadings are permissible and it is the proper role of the trier of fact to make determinations on the allegations made and the defences raised. It is not for a case management judge to make such determinations on a summary basis at a case management conference.

[19] Similarly, Mr. Johnson's assertion that the Court has not punished the Defendants' late responses to written interrogatories, again ignores the fact that the Hafso Defendants brought a successful motion to strike most of the questions as being improper or irrelevant. While Mr. Johnson did not appeal those decisions, he nonetheless continues to assert that the Defendants were non-responsive or late in answering the questions thus effectively ignoring the decisions of this Court.

[20] With respect to Mr. Johnson's assertion that I rejected his request for a further case management conference to address matters he felt I had failed to deal with at the November 2, 2022 case management conference, I issued a Direction indicating why a further case management conference was not warranted. That is not an indication of bias but rather the Court controlling its own processes and properly managing judicial resources.

[21] In my opinion, a reasonably informed person, understanding the traditions of impartiality would regard these vague and generalized allegations not as evidence of an apprehension of bias but as evidence of an apprehension of lack of success. Or, as a lack of familiarity with the litigation process more generally. A reasonably informed person would recognize that in a case management context, a judge must sometimes make numerous decisions in any one proceeding; sometimes against the same party. A reasonable person would appreciate that the essence of the judicial function is to make decisions and that there is always going to be an unsuccessful party: *Alberta Services* at para 8. The mere fact that Mr. Johnson has not been successful on his motions would not lead a reasonable person to conclude that the Court has been biased against him.

[22] I turn now to the second category of complaint, namely that my background and education lead inexorably to disqualification on the basis of reasonable apprehension of bias. Referring to

me, Mr. Johnson claims that "whether consciously or unconsciously, and even with the best intentions, she cannot possibly adjudicate this particular case fairly, and without a perception of bias, because of her longtime (sic) involvement with the University of Alberta's faculty of law, and her longtime (sic) career representing the federal government of Canada…."

[23] With respect to my former employment, Mr. Johnson asserts that any reasonable person would apprehend a perception of bias because the current case involves a national agency, presumably, Tennis Canada, which according to Mr. Johnson receives "millions of dollars in federal funding and….which has been represented since 2019 by a fellow graduate of the University of Alberta's faculty of law…." He goes on to note that "any person who spent more than three decades on 'Team Canada' could not possibly take a detached, neutral and impartial view of a high-profile, national governing body such as Tennis Canada, which receives million of dollars in federal funding through the Department of Canadian Heritage." I pause to note that there is no evidence whatsoever before this Court as to funding sources for Tennis Canada, nor is there any evidence about my former employment and any connection with either Tennis Canada or Mr. Hafso. There is nothing more than Mr. Johnson's wholly unsupported allegations and assertions that my former status as legal counsel for the Department of Justice supports my disqualification.

[24] The mere fact that Mr. Hafso and I may have attended the same law school is hardly a basis for recusal. Were it otherwise judges would be forced to recuse themselves whenever a fellow alumnus appeared before them. That would create an impossible standard and one which neither the law nor the Canadian Judicial Council's Ethical Principles for Judges recognizes. Such an assertion fails to recognize the presumption of neutrality and the oath that all judges take to render justice impartially.

[25] As noted by Justice Lafreniere in *Hardy Estate v Canada (Attorney General),* 2013 FC 728, citing: *Sawridge Band v Canada,* 1997 CanLII 5294 (FCA), 3 FC 580 at paras 11 and 12, it is not uncommon for an unsuccessful litigant to attribute the decision to bias or an appearance of bias on the part of a judge. Nevertheless, a litigant should not be allowed to avoid a case management judge by simply casting aspersions on his or her character, integrity or motives. As explained by Mr. Justice Mason in *Re JR.* (1986), 161 CLR 342 (HC), at paragraph 5:

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking disqualification of a judge, they will have their case tried by someone thought to be more likely to decide in their favour.

V. Conclusion

[26] To conclude, I am satisfied that a reasonable and right-minded person, fully apprised of the facts and the context, would conclude that my involvement in this action has been impartial, reasonable and fair. Accordingly, I conclude that based on the test for reasonable apprehension of bias and the paucity of objective evidence presented by Mr. Johnson the high threshold for recusal has not been met and this motion is dismissed.

AMENDED ORDER in T-1686-21

THIS COURT ORDERS that the motion is dismissed.

"Catherine A. Coughlan"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1686-21
STYLE OF CAUSE:	CHRISTOPHER JOHNSON v CANADIAN TENNIS ASSOCIATION, MILOS RAONIC, GENIE BOUCHARD, DENIS SHAPOVALOV AND FELIX AUGER-ALIASSIME

MOTION IN WRITING CONSIDERED AT EDMONTON, ALBERTA PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS	COUGHLAN A.J.
DATED:	DECEMBER 19, 2022
AMENDED:	FEBRUARY 3, 2023

WRITTEN REPRESENTATIONS BY:

Christopher Johnson	FOR THE PLAINTIFF (ON HIS OWN BEHALF)

SOLICITORS OF RECORD:

McLennan Ross LLP Barristers and Solicitors Calgary, Alberta	FOR THE DEFENDANTS CANADIAN TENNIS ASSOCIATION, DENIS SHAPOVALOV AND FELIX AUGER-ALIASSIME
Mark Feigenbaum Professional Corporation Barrister and Solicitor Thornhill, Ontario	FOR THE DEFENDANT MILOS RAONIC