

CANADA / JUDGMENT

C.A.T. v. S.T.B.

2020 BCSC 593

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 593 C.A.T. v. S.T.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.A.T. v. S.T.B.,

2020 BCSC 593

Date: 20200417

Docket: 1956948

Registry: Prince George

Between:

C.A.T.

Appellant

And

S.T.B.

Respondent

Before: The Honourable Mr. Justice Marchand

On appeal from: An order of the Provincial Court,
dated October 7, 2019 (B. v. T., PG 1547336)

Reasons for Judgment

Counsel for the Appellant:

D.M. Duncan

Counsel for the Respondent:

K.W. Parker

Place and Date of Hearing:

Prince George, B.C.

February 14, 2020

Place and Date of Judgment:

Prince George, B.C.

April 17, 2020

Introduction

- [1] Self-represented litigants in family proceedings present special challenges for trial judges. These often come to the fore when child support is involved and a self-represented litigant, intentionally or unintentionally, does not comply with basic financial disclosure requirements and/or is unprepared for court.
- [2] In these circumstances, the interests of justice can pull in opposite directions. On the one hand, the court must assist a self-represented litigant to understand the legal process and their obligations within the process to ensure a fair outcome on the merits of the case. On the other hand, there are limits to the assistance the court can offer a self-represented litigant and the court cannot allow a self-represented litigant to unduly delay or otherwise thwart the legal process to the detriment of a child.
- [3] In this case, the trial judge was faced with this very problem. After lengthy delays, S.T.B.'s application for child support came before the trial judge on November 9, 2018. In the trial judge's opinion, despite various court orders, C.A.T., who was representing himself, had not made full financial disclosure and had not properly informed himself about the financial workings of the family owned company he worked for.
- [4] The trial judge determined that the "fairest" way to proceed was to significantly modify the usual trial process. After rather brief background testimony from S.T.B., the trial judge had C.A.T. take the witness stand to be cross-examined by counsel for S.T.B. Following the cross-examination, the trial judge intended to hear from C.A.T. "in response." Ultimately, C.A.T. did not provide any further evidence.
- [5] Based on the evidence he had, on October 9, 2019, the trial judge made income findings which resulted in significant retroactive and ongoing increases to previous interim child support orders.

- [6] C.A.T. now seeks to set aside the findings and orders made by the trial judge. C.A.T. submits that the trial was conducted in a manner that gives rise to a reasonable apprehension of bias and breaches the principles of natural justice.
- [7] S.T.B.'s basic response is that the trial process was fair and that C.A.T. is the author of his own misfortune.

Background of the Parties

- [8] S.T.B. and C.A.T. are the biological parents of L. They were not together when L. was born but now share guardianship of L. L. resides primarily with S.T.B. C.A.T. has regular parenting time with L., mostly on alternating weekends. L. is 11 years old.
- [9] S.T.B. resides with L., her partner and her partner's daughter. S.T.B.'s partner is the primary income earner in her household. S.T.B. has training in cosmetics and in personal care. At one time, S.T.B. was employed as a care aide but is now mostly a stay-at-home parent. She earns up to \$120 per month doing "eyelashes" out of her home.
- [10] In addition to L., C.A.T. has regular parenting time with a teenaged daughter from a prior relationship. C.A.T.'s daughter resides primarily with her mother. C.A.T. pays child support to his daughter's mother.
- [11] C.A.T. and his semi-retired father each own 50% of the shares of a numbered company. The numbered company owns one truck and has a contract to transport goods from Vancouver to Prince George two times each week. For the most part, C.A.T. drives the truck but C.A.T.'s father drives from time to time.

History of Proceedings

- [12] S.T.B. initiated family court proceedings in the Provincial Court of British Columbia in 2015. Since then, there have been numerous court appearances and the court has made a number of orders, including orders related to child support.
- [13] I do not have access to the full court file but I have been provided with a number of court orders and the transcripts of related proceedings before the trial judge, including from September 8 and November 2, 2017. I will highlight the key events.
- [14] At a family case conference held on September 30, 2015, the parties consented to an order that C.A.T. have contact with L. on alternating weekends and at other times as agreed. The parties also consented to an interim without prejudice order that C.A.T. pay S.T.B. child support of \$285 per month, commencing on October 1, 2015. According to information given by C.A.T. to the trial judge on November 2, 2017, this was the amount of child support he had been paying the mother of his teenaged daughter for the last 17 years.

- [15] On September 7, 2017, another member of the provincial court ordered C.A.T. to disclose various documents relevant to S.T.B.'s application for child support, including bank statements, credit card statements, and financial statements and general ledgers for the numbered company.
- [16] Following a contested hearing, on September 8, 2017, the trial judge awarded guardianship to C.A.T. but, for the most part, assigned parental responsibilities to S.T.B. After giving his oral reasons for judgment with respect to guardianship, at S.T.B.'s request, the trial judge imposed a deadline on C.A.T. to comply with the financial disclosure order that had been made the prior day. At S.T.B.'s request, the trial judge also seized himself of the file.
- [17] S.T.B.'s application for child support came before the trial judge on November 2, 2017. C.A.T. had not complied with the financial disclosure order. As a result, S.T.B. did not wish to proceed with the hearing. The trial judge decided to proceed for the purpose of making an interim order. C.A.T. took the witness stand and answered questions from the trial judge regarding the numbered company, his work, his compensation and his expenses. S.T.B. did not cross examine C.A.T.
- [18] At the conclusion of the hearing on November 2, 2017, the trial judge imputed income of \$52,000 to C.A.T. based on C.A.T.'s testimony that his father was paid \$200 per day when he drove for C.A.T.[1] The trial judge ordered C.A.T. to pay S.T.B. child support of \$478 per month[2] on an interim basis, commencing September 1, 2017.
- [19] The trial judge then made a number of further orders. Of relevance to the appeal, the trial judge ordered that C.A.T.:
- pay \$1,000 to S.T.B. for the benefit of L. and S.T.B. under s. 213(2)(d)(ii) of the Family Law Act, S.B.C. 2011, c. 25 [FLA] as a result of C.A.T.'s failure to properly disclose relevant financial information;
 - fully comply with the previous financial disclosure order by January 15, 2018; and
 - not make further applications without leave of the court.[3]
- [20] The expectation at the end of the day on November 2, 2017 was that the parties would appear before the trial judge in February or March 2018 to enable the trial judge to make a final child support order. No such hearing ever took place.
- [21] For reasons that are not clear to me, on June 29, 2018, S.T.B. filed a new application to determine C.A.T.'s income for the years 2015 to 2018 and for a final child support order to be made retroactive to June 1, 2015. This application came before the trial judge on November 9, 2018.

- [22] At the outset of the trial, counsel for S.T.B. informed the trial judge that C.A.T. had generally been cooperative in responding to counsel's requests for information but had not made full or timely financial disclosure. In particular, C.A.T. had provided counsel for S.T.B. with an incomplete financial statement the day before the trial and had not provided complete financial records for 2017 and 2018.
- [23] Counsel for S.T.B. then gave an opening statement that involved a great deal of discussion with the trial judge. Counsel informed the trial judge of the nature of the available financial documents and the arguments S.T.B. would be making regarding what they showed about the financial benefits C.A.T. derived from the numbered company. Counsel submitted that the case revolved only around C.A.T.'s income and that the court did not really need to hear from S.T.B. Counsel proposed that the court simply hear from C.A.T. about his financial documents.
- [24] The trial judge also engaged in discussion with C.A.T. C.A.T. succinctly outlined his position that he would be happy to pay child support in accordance with the Federal Child Support Guidelines, SOR/97-175 [Guidelines] based on his line 150 reported income (of between \$24,000 and \$32,000), highlighting that his tax returns had been prepared by an accountant.
- [25] After his discussions with counsel and C.A.T., the trial judge determined that the trial would begin with the court receiving testimony from S.T.B. and continue with C.A.T. answering questions from her counsel. The trial judge informed C.A.T. that he would have an opportunity to fill in anything that was missing, including by producing additional relevant documents, after the lunch break.
- [26] The trial largely proceeded in the modified fashion outlined by the trial judge. The trial judge began by questioning S.T.B. to obtain background information from her. Counsel then conducted his direct examination. C.A.T. conducted a brief cross-examination. Counsel then conducted his cross-examination of C.A.T. and concluded by making what were, in essence, closing submissions. There was insufficient time for C.A.T. to provide any further testimony or documents. The trial judge gave directions which resulted in a continuation of the trial on November 20, 2018.
- [27] On November 20, 2018, C.A.T. requested an adjournment of the trial on the basis that he had hired counsel who was unable to conclude the trial on such short notice. C.A.T.'s counsel subsequently appeared as a friend of the court and submitted that an adjournment was necessary to enable C.A.T. to involve an expert to determine the amount of income available to him within the numbered company for purposes of child support.
- [28] The trial judge dismissed C.A.T.'s adjournment application but gave him an opportunity to adduce further evidence and make submissions. Specifically, the trial judge made an order that C.A.T. "file any affidavit(s) or written submission(s) he wants considered in this proceeding by Friday, December 21, 2018." The trial judge ordered that S.T.B. file any responding submissions by January 25, 2019. Finally, the trial judge ordered C.A.T. to pay \$2,000 to S.T.B. by December 15, 2018 under s. 221(2)(c)(ii) of the FLA for his misuse of the

court process.

- [29] On December 17, 2018, counsel for C.A.T. filed an application seeking orders for a mistrial and a stay of the \$2,000 "penalty". As he has done on appeal, C.A.T. argued that the trial had been conducted in a way that raised a reasonable apprehension of bias and/or breached the principles of natural justice.
- [30] The trial judge heard C.A.T.'s application on February 11, 2019. Both parties were represented by counsel. The trial judge dismissed C.A.T.'s application on February 12, 2019.
- [31] In dismissing C.A.T.'s application for a mistrial, the trial judge highlighted the objectives set out in s. 199 of the FLA to minimize delay, formality and conflict in court proceedings and the purpose of the Provincial Court Family Rules, B.C. Reg. 417/98 [Rules] "to allow people to obtain just, speedy, inexpensive and simple resolution of matters arising under the [FLA] " The trial judge defended his decisions to alter the usual trial procedure and continue the trial on affidavit evidence, primarily on the basis that S.T.B. should not be further delayed due to C.A.T.'s lack of preparation. The trial judge noted that the issues before him turned largely on the corporate records, that his task was not overly complicated and that affidavit evidence would be adequate to complete the evidentiary record.
- [32] After dismissing C.A.T.'s application for a mistrial, the trial judge set new deadlines for the parties to submit the further materials contemplated by his November 20, 2018 order.
- [33] Ultimately, C.A.T. did not submit any affidavit evidence. Instead, without the assistance of counsel, on February 28, 2019, he submitted a one-page document titled "Written Submissions of [C.A.T.]". C.A.T. submitted as follows:
1. I wish to pay the table amount of child support based on my true income. I believe my true income may be about \$60,000.
 2. I have not been given the proper opportunity to present my case or conclude my cross examination of [S.T.B.] to determine the correct amount of child support I should pay. If I had been allowed to (call) witnesses, I would have called [D.T.], my mother and the bookkeeper for (the numbered company) and Howard Karpes, an accountant, and myself as a witness.
- [34] On March 8, 2019, S.T.B. filed a requisition indicating that she had no response to C.A.T.'s submission.
- [35] On October 7, 2019, the trial judge issued his written reasons for judgment. He made income findings based on C.A.T.'s wages, and various payments he received from the numbered company, unknown sources and his shareholder's loan account. The trial judge grossed up amounts that C.A.T. received on a tax-free basis.

- [36] The trial judge's income findings resulted in an order that C.A.T. pay S.T.B. significantly increased child support of \$890 per month from August 1 to December 1, 2015, \$732 per month from January 1 to December 1, 2016 and \$826 per month commencing on January 1, 2017.[4]

Dealing with Self-Represented Litigants

- [37] To provide context for my analysis of C.A.T.'s arguments, I consider it important to first say a few words about the special challenges courts face and the special responsibilities courts bear in dealing with self-represented litigants.

- [38] The Action Committee on Access to Justice in Civil and Family Matters chaired by former Supreme Court of Canada Justice Thomas Cromwell opens its October 2013 report "Access to Civil & Family Justice - A Roadmap for Change" as follows:

There is a serious access to justice problem in Canada. The civil and family justice system is too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve.

- [39] It is hardly surprising that our "complex, slow and expensive" justice system has led to an increasing number of self-represented litigants and that these litigants often struggle. This reality is especially daunting for the provincial court, which has the highest case load and the highest number of self-represented litigants amongst the courts of British Columbia. Even with its simplified and streamlined processes, problems and pitfalls abound.

- [40] To assist judges and other justice system participants in their dealings with self-represented litigants, in September 2006, the Canadian Judicial Council adopted a "Statement of Principles on Self-represented Litigants and Accused Persons" ("statement of principles"). The statement of principles was endorsed by the Supreme Court of Canada in *Pintea v. Johns*, 2017 SCC 23.

- [41] The statement of principles has many elements. All of them are predicated on the expectation that all persons will enjoy equal access to justice in Canada, including procedural justice and equal treatment under the law. Broadly, the statement of principles endeavours to provide practical guidance to judges and others to ensure fairness to self-represented litigants.

- [42] I will not reproduce the statement of principles in full. Rather, I will refer to the statements, principles and commentary that I consider most pertinent to C.A.T.'s appeal.

- [43] Under the heading "Promoting Rights of Access", the statement of principles leads off with the following statement:

Judges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation.

[44] Associated commentary highlights that self-represented litigants may be overwhelmed by even the simplest of court procedures, and are generally uninformed about their rights and the consequences of the choices they make. Recognizing that access to justice is promoted by all parties having legal representation, the statement of principles encourages judges and others to:

- a) inform any self-represented parties of the potential consequences and responsibilities of proceeding without a lawyer;
- b) refer self-represented persons to available sources of representation, including those available from Legal Aid plans, pro bono assistance and community and other services; and
- c) refer self-represented persons to other appropriate sources of information, education, advice and assistance.

[45] Under the heading "Promoting Equal Justice", the statement of principles states:

Judges, the courts and other participants in the justice system have a responsibility to promote access to the justice system for all persons on an equal basis, regardless of representation.

[46] The statement of principles then provides that judges and court administrators "should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons." Depending on the circumstances, judges should consider protecting the rights and interests of self-represented litigants by engaging in "non-prejudicial and engaged case and courtroom management". In particular, the statement of principles suggests that judges might:

- a) explain the process;
- b) inquire whether (the litigant) understand(s) the process and the procedure;
- c) make referrals to agencies able to assist the litigant in the preparation of the case;
- d) provide information about the law and evidentiary requirements;
- e) modify the traditional order of taking evidence; and
- f) question witnesses.

[47] Under the heading "Responsibilities of the Participants in the Justice System", the statement of principles states:

All participants are accountable for understanding and fulfilling their roles in achieving the goals of equal access to justice, including procedural fairness.

- [48] The statement of principles goes on to make clear that fairness is a two-way street and that there are limits to what a judge can be expected to offer a self-represented litigant. In particular, self-represented litigants are expected to familiarize themselves with the relevant legal practices and procedures, prepare their own cases, and be respectful of the court and the court process. Further, judges have no obligation to assist self-represented litigants who make no reasonable effort to prepare their case, or who are disrespectful or abusive.

Standard of Review

- [49] Issues concerning a reasonable apprehension of bias and/or a breach of the principles of natural justice are jurisdictional in nature. Simply put, decisions made where there is a reasonable apprehension of bias or in breach of the principles of natural justice are made without jurisdiction: *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537 at para. 5; *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31 at para. 23. Jurisdictional errors are errors of law, reviewable on a standard of correctness: *Bessette* at para. 23; *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

Reasonable Apprehension of Bias

Legal Principles

- [50] The legal principles regarding the determination of whether a reasonable apprehension of bias exists are not in dispute.
- [51] Current expressions of the test for reasonable apprehension of bias flow from the decision of the Supreme Court of Canada in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, where de Grandpré J. (dissenting but not on this point) held:

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, 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. In the words of the Court of Appeal, that 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."

- [52] In its very recent decision in *R. v. Hexamer*, 2019 BCCA 285, the Court of Appeal put the test this way at para. 218:

A two-fold objective inquiry is required: the person considering the apprehension of bias contention must be reasonable and informed as to context, and the apprehension of bias itself must be reasonable in the circumstances. The onus rests on the proponent of the claim to establish a real likelihood or probability that the conduct of a judicial officer gave rise to a reasonable apprehension of bias. Mere suspicion is not enough. The totality of the circumstances must be considered. Given the seriousness of the allegation, the threshold test for a finding of

perceived bias is high.

[53] I will apply the test as expressed in *Hexamer*.

Analysis

Position of C.A.T.

- [54] C.A.T. submits that the trial judge's conduct during the trial on November 9, 2018 and during the adjournment application on November 20, 2018 gives rise to a reasonable apprehension of bias.
- [55] On November 9, 2018, C.A.T. complains that the trial judge did not allow him to complete his cross-examination of S.T.B., subjected him to cross-examination before allowing him to give any testimony in direct, "shushed" him during his testimony and then put him over to November 20, 2018 with far less time to adduce evidence than was afforded S.T.B.
- [56] On November 20, 2018, C.A.T. submits that the trial judge demonstrated that his mind was already made up. For example, the trial judge stated that the financial records of the numbered company had already been "fairly extensively" examined on the first day of trial despite the fact that C.A.T. had not testified in direct or called any evidence from other witnesses such as the bookkeeper and accountant for the numbered company. C.A.T. also notes comments from the trial judge that "it may be of limited assistance to have another lawyer comment on it at this stage" and that he could file affidavits from his parents if he saw "the advantage" of doing so.
- [57] C.A.T. submits that any annoyance felt by the trial judge towards C.A.T. did not justify the trial judge employing one set of rules for S.T.B. and another set of rules for C.A.T. C.A.T. submits this is especially so because the trial judge had other avenues available to him to address any concerns raised by C.A.T.'s conduct, including by granting an adjournment to enable C.A.T. to call witnesses to testify and imposing a penalty on C.A.T. under s. 221(2)(c) (ii) of the FLA.

The Context

- [58] In analyzing whether the trial judge demonstrated a reasonable apprehension of bias, I must consider the totality of the circumstances. In my respectful view, this exercise must start in 2017 when the trial judge determined a number of parenting issues and seized himself of the child support issues.
- [59] On September 8, 2017, following his reasons for judgment on parenting issues, the trial judge raised child support issues with C.A.T. Based on his knowledge of some of C.A.T.'s assets, the trial judge commented that the \$285 per month in child support then being paid by C.A.T. seemed low.

- [60] The trial judge went on to explain to C.A.T. that his income for child support purposes might be higher than his wage based on personal benefits he derived from the corporation he was operating. He encouraged C.A.T. "to do some web research" regarding the Guidelines, and directed him to the courthouse library where the librarian might be able to assist him in locating an "annotated textbook" relied on by the court. He cautioned C.A.T. that he would not advance his position by "shooting from the hip" and emphasized the importance of C.A.T. complying with the financial disclosure order. On the whole, I would say that the trial judge encouraged C.A.T. to be informed about child support issues and forthright about his true income.
- [61] S.T.B.'s original child support application came before the trial judge in a substantive way on November 2, 2017. After ensuring C.A.T. had a pen and paper, the trial judge began to inform C.A.T. of the procedure the court would be following, namely that counsel for S.T.B. would outline S.T.B.'s claim and then call evidence after which C.A.T. would take the witness stand.
- [62] At that point, counsel informed the trial judge that C.A.T. had not complied with the financial disclosure order. Counsel submitted that C.A.T. was frustrating the court process and that S.T.B. did not wish to proceed with a hearing in the absence of proper disclosure. Counsel submitted that the court should impose a penalty against C.A.T. of up to \$5,000 under s. 213(2)(d) of the FLA, draw an adverse inference against C.A.T., and impute an annual income of \$125,000 to C.A.T. Counsel also submitted that C.A.T. was, on the one hand, blatantly refusing to comply with the court's financial disclosure order while, on the other hand, insisting that S.T.B. comply with his own very broad interpretation of the trial judge's guardianship order.
- [63] Rather than jump to conclusions as suggested by counsel for S.T.B., the trial judge informed C.A.T. that he would have to take the witness stand. The trial judge explained that was necessary to enable the trial judge to fulfill his obligation to ensure that child support was being dealt with in a reasonable and prudent fashion. The trial judge also signalled that he would have to deal with C.A.T.'s defiance of the financial disclosure order and take steps to prevent C.A.T. from threatening S.T.B. with court applications to get his way with parenting issues.
- [64] C.A.T. then took the stand. The trial judge gave C.A.T. an opportunity to share some information he had been anxious to put before the trial judge concerning S.T.B.'s communications with him. The trial judge then asked C.A.T. mostly open-ended questions about the numbered company, its operations, revenue and expenses, his qualifications, his work, his assets, his lifestyle, his daughter, his payment of L.'s hockey expenses and his personal expenses.

- [65] The trial judge's questioning uncovered that C.A.T.'s mother was involved in bookkeeping and that "a fellow in town" prepared year-end statements for the numbered company. C.A.T.'s testimony made clear that he relied on his mother with respect to financial matters and that he had not properly informed himself about the company's financial affairs to enable a proper determination of child support.
- [66] The trial judge paused on occasion to call out C.A.T. on what the trial judge saw as his deliberate attempt to delay matters by not making financial disclosure. The trial judge was forthright with C.A.T. about the possible consequences, including loss of credibility, adverse inferences, reprimand, contempt of court, civil penalties and even criminal penalties. The trial judge characterized C.A.T.'s conduct as "obstructionist" and "reprehensible" and indicated "it's not going to happen again."
- [67] The trial judge also paused during his questioning of C.A.T. to see whether counsel for S.T.B. had any questions. Counsel indicated that he did not. The trial judge informed C.A.T. that counsel would be able to cross-examine him "at the next court session" after he had provided financial disclosure.
- [68] After the trial judge completed his questioning of C.A.T., he gave C.A.T. advice on how to organize himself. He explained to C.A.T. how the parenting orders were intended to work and was critical of how C.A.T. appeared to have improperly tried to take control, which the trial judge characterized as "misbehaviour". The trial judge had some fairly strong words for C.A.T., including the following:

But I'm not going to repeat this again. If there's missteps by you, you need to get some legal advice. But if you're going to carry on in this fashion, representing yourself, you need to be much more informed about what the law requires. And certainly, there is absolutely no excuse for what happened after [the financial disclosure] order.

That's absolutely unpardonable. But I don't know if you, somehow, think that you can excuse your behaviour. But you've put yourself in a hole, in terms of good-faith behaviour for courts. You're not to be trusted. You don't - you defy court orders. So if you're asking for some type of further involvement in [L.'s] world, I would be very, very sceptical that I could have you placed on any court orders that you would obey, because you show your deliberate disobeying of orders, on the financial matters.

And of course, as you heard Mr. Parker saying, any lawyer would be saying the same thing: there should be an adverse inference. Somebody is trying to hide something. Why won't they disclose and tell us what's going on? And of course, why would that person be considered to have a larger role as a guardian, when they can't even fathom that it's important to have proper financial assistance for this young boy? If you don't see that as an important aspect of being a guardian, the child support, then why should there be other responsibilities given to you?

You aren't acting in that child's best interest; you're acting in your own self-interest. Or perhaps you're under the influence of your mother and father. I don't know where they are getting their legal advice, but you'd better be careful about how you conduct yourself. You get your own legal advice and make your own decisions because you're the one that's going to be found in contempt. You're the one that's going to pay penalties for what you've done.

[69] The trial judge then made his interim order imputing an annual income of \$52,000 to C.A.T. and requiring him to pay increased child support of \$478 per month to S.T.B. The trial judge also imposed the \$1,000 penalty on C.A.T. payable to S.T.B. for wasting court time by not making financial disclosure. The trial judge set out a new schedule for disclosure, ordered C.A.T. to file a financial statement 30 days in advance of the next hearing date and prohibited C.A.T. from filing further court applications without leave of the court. The trial judge concluded by telling C.A.T. he needed to conduct himself "with a bit more diligence" and comply with the financial disclosure order. Proceedings were adjourned to the office of the judicial case manager to find a new hearing date.

Did the Trial Judge's Conduct in November 2018 Give Rise to a Reasonable Apprehension of Bias?

[70] Turning to the proceedings on November 9 and 20, 2018, I have to say that I largely agree with the factual assertions made by C.A.T. about what transpired.

[71] The trial judge intervened during C.A.T.'s cross-examination of S.T.B. to assist C.A.T. in asking questions. When the judge finished asking S.T.B. questions to explore an issue C.A.T. had raised, he asked counsel for S.T.B. if there was any re-examination. He did not ask C.A.T. if he had any more questions.

[72] After S.T.B. completed her testimony, the trial judge had C.A.T. take the stand to be subjected to cross-examination without giving any direct evidence.

[73] During the cross-examination of C.A.T., the trial judge engaged in rather lengthy discussions with counsel for S.T.B. during which counsel was permitted to explain what the available financial documents disclosed about C.A.T.'s true income. At times, counsel strayed awfully close to giving testimony. At a minimum, he engaged in a sort of on-going submission. On a couple of occasions when C.A.T. tried to offer an explanation, he was essentially told not to interrupt and that he would be given a chance to say what he wanted later.

[74] In the most striking example, C.A.T. intervened to explain that a \$9,800 deposit into his bank account came from the sale of his Harley Davidson motorcycle. C.A.T. testified that the proceeds were used to pay off the loan he had taken out to purchase the motorcycle. Amongst other things, the trial judge said:

So you just hold onto that. But, yeah, make a note that you can comment on that \$9,800. Because, as it stands now, the evidence I have is that the source is unknown.

- [75] After counsel had completed his cross-examination of C.A.T., the trial judge put the matter over to November 20, 2018 for less time than had been afforded S.T.B. to cross-examine C.A.T.
- [76] It is true that on November 20, 2018, the trial judge stated that the financial records of the numbered company had already been "fairly extensively" examined despite the fact that C.A.T. had not testified in direct or called any evidence from other witnesses. It is also true that the trial judge said that a lawyer "may be of limited assistance" to C.A.T. and invited C.A.T. to file affidavits from his parents if he saw "the advantage" of doing so. Finally, it is true that the trial judge could have adjourned matters on November 20, 2018 to enable C.A.T. to call witnesses rather than submit affidavits.
- [77] Looked at in isolation, some of the words chosen or choices made by the trial judge might be considered problematic. But that is not how the trial judge's conduct is to be examined. The trial judge's conduct is to be considered having regard to the totality of the circumstances. Through that wider lens, I am unable to conclude that the trial judge's conduct gave rise to a reasonable apprehension of bias.
- [78] C.A.T. put the trial judge, S.T.B. and, more importantly, L. in a difficult position on November 2, 2017 and November 9 and 20, 2018. C.A.T. never fully complied with the financial disclosure order and never attended court informed or prepared to deal with financial issues of critical importance to L.'s short and long-term best interests.
- [79] Certainly, the trial judge had options. For example, he could have allowed C.A.T. to testify in direct before being subjected to cross-examination, limited counsel for S.T.B. to asking questions of C.A.T., allowed more time on November 20, 2018 for C.A.T. to call evidence and/or granted an adjournment on November 20, 2018 to enable counsel for C.A.T. to assemble evidence on C.A.T.'s behalf, including expert evidence. That the trial judge chose other options does not raise a reasonable apprehension of bias.
- [80] In line with the statement of principles, and good case and courtroom management, by November 9, 2018, the trial judge had already:
- explained the process and the law to C.A.T.;
 - informed C.A.T. of the importance of complying with the financial disclosure order;
 - recommended that C.A.T. hire a lawyer;
 - referred C.A.T. to appropriate resources;
 - encouraged C.A.T. to properly inform himself and prepare for trial; and
 - explained the consequences of non-compliance to C.A.T.
- [81] On my reading of the transcript, it appears that the trial judge did not check in with C.A.T. to see whether he had further questions of S.T.B. because he thought C.A.T. had already indicated that he did not. In particular, when the trial judge had earlier explained that C.A.T.

could ask "supplementary" questions, C.A.T. stated "I think I am fine" and indicated that he only wanted to know about S.T.B.'s home business, a topic that had been covered. At worst, it was an oversight on the trial judge's part not to double check with C.A.T. after the trial judge asked S.T.B. some further questions. I appreciate that it is difficult at times for self-represented litigants to speak up but note that C.A.T. did not indicate to the trial judge that he had further questions for S.T.B. It was also not raised as an issue by C.A.T. or his counsel on November 20, 2018.

- [82] In my respectful view, it would have been preferable for the trial judge to have given C.A.T. an opportunity to give direct testimony prior to being subjected to cross-examination. Direct testimony is, after all, essential to enable a witness to share all evidence considered to be material and relevant by the party calling the witness, and to make a favourable impression on the trier of fact. Cross-examination is also essential but, in eliciting evidence of assistance to the opposing party by way of leading questions, important information can be missed and a balanced view of the witness' testimony may not emerge.
- [83] While denying a party an opportunity to give direct testimony prior to being subjected to cross-examination might, in some circumstances support a finding of a reasonable apprehension of bias, the circumstances of this case do not.
- [84] First of all, the trial judge had been seized of the file since September 2017. As a result, the trial judge already knew a great deal of the relevant background concerning C.A.T. and the numbered company. In keeping with the objectives of both the FLA and the Rules to minimize delay, formality and conflict and allow people to obtain just, speedy, inexpensive and simple resolution of their family disputes, that did not need to be repeated.
- [85] Secondly, despite the trial judge's advice and admonitions, C.A.T. had not made full financial disclosure and had not informed himself regarding the Guidelines or the financial workings of the numbered company. He was not prepared for trial.
- [86] Thirdly, C.A.T. was the only person in the courtroom with personal knowledge of his and the numbered company's finances. Unlike the Supreme Court Family Rules, B.C. Reg. 169/2009, the Rules do not provide for robust pre-trial discovery of opposing parties.[5] The trial judge needed to hear from C.A.T. and requiring him to take the witness stand was the only way for that to happen.
- [87] Finally, given C.A.T.'s apparent lack of knowledge about what was really in issue, the trial judge felt that the "fairest" way to proceed was to have C.A.T. subjected to cross-examination following which he could adduce further evidence to assist the trial judge in making a good decision on the merits.
- [88] The trial judge's decision on how to proceed was well within the boundaries of the statement of principles, which contemplates modifying the traditional order of taking evidence and recognizes that there are limits to the accommodations afforded to self-represented litigants who do not make a reasonable effort to prepare their case.

- [89] I do not know why, from time to time, the trial judge cut C.A.T. off from sharing relevant information in favour of receiving quasi-evidence/early submissions from counsel for S.T.B. Respectfully, he should not have done that. These were, however, isolated incidents and, in any event, indicate that the trial judge had every intention of eventually hearing fully from C.A.T.
- [90] I am unable to make much of the amount of time the trial judge set aside for continuation on November 20, 2018. In retrospect, it may appear to have been inadequate but, at the time, the trial judge had no reason to think that C.A.T. would suddenly decide to prepare himself and call extensive evidence on the continuation.
- [91] I am also unable to make much of the trial judge's statements that the financial records of the numbered company had already been "fairly extensively" examined on the first day of trial, that a lawyer "may be of limited assistance" and that C.A.T. could file affidavits from his parents if he saw "the advantage" of doing so. I consider the first statement to be true, the second statement to be taken out of context and the third statement to be practical.
- [92] The examination of the financial records of the company on November 9, 2018 may not have been complete but it certainly had been "fairly extensive". Further, when the judge commented that a lawyer "may be of limited assistance", it is apparent that the trial judge was referring only to C.A.T.'s application to adjourn. The trial judge's comment did not reflect that he had already made up his mind regarding C.A.T.'s income and the appropriate level of child support. Finally, while the trial judge did not know what other evidence C.A.T. might offer following November 20, 2018, it is self-evident that C.A.T. would likely only adduce further evidence if he thought there would be some "advantage" to him in doing so. I cannot discern any indication that the trial judge said any of these things out of frustration with C.A.T. or because he had already made up his mind on the substantive issues.
- [93] On the whole, an objective person informed as to context, would not reasonably apprehend bias on the part of the trial judge. Rather, an informed objective person would conclude that the trial judge:
- understood his obligation to ensure that L. received an appropriate level of financial support from his father and charted a fair course to fulfill that obligation;
 - declined S.T.B.'s invitation on November 2, 2017 to impute an income of \$125,000 to C.A.T. without taking any evidence;
 - admonished C.A.T. only to send a clear message to him regarding his obligations to the court, S.T.B. and L.;
 - treated C.A.T. with courtesy and respect;
 - modified the usual order of taking evidence after already receiving what amounted to direct evidence from C.A.T. on a previous occasion and only after C.A.T. attended court unprepared for trial a second time;

- tried to assist C.A.T. by, for example, offering explanations, intervening to ensure he could give complete answers while being cross-examined and helping him to frame his questions for S.T.B.;
- denied C.A.T.'s adjournment application when he attended court unprepared for trial a third time;
- offered C.A.T. an opportunity to provide further evidence by way of affidavit, despite having denied him an adjournment, so as to avoid further unnecessary delay;
- remained engaged, inquisitive and open-minded throughout; and
- appreciated that he had to take into account the interests of S.T.B., L. and other court users, not just the interests of C.A.T.

[94] While there may have been some imperfections in the trial judge's handling of S.T.B.'s application, in my respectful view, these fell far short of the high threshold for a finding of perceived bias. Perfection is an unattainable standard and, overall, the trial judge did his best to balance the interests of both parties in very challenging circumstances.

Breach of Natural Justice

Legal Principles

[95] The principles of natural justice require that a litigant receive a fair hearing before a decision is made that negatively affects them. In the context of self-represented litigants, *Dauids v. Davids*, [1999] O.J. No. 3930, 125 O.A.C. 375 (C.A.) at para. 36 appears to be the leading statement on trial fairness:

The fairness of this trial is not measured by comparing the appellant's conduct of his own case with the conduct of that case by a competent lawyer. If that were the measure of fairness, trial judges could only require persons to proceed to trial without counsel in those rare cases where an unrepresented person could present his or her case as effectively as counsel. Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. Nor does fairness dictate that the unrepresented litigant have a lawyer's familiarity with procedures and forensic tactics. It does require that the trial judge treat the litigant fairly and attempt to accommodate unrepresented litigants' unfamiliarity with the process so as to permit them to present their case. In doing so, the trial judge must, of course, respect the rights of the other party.

[96] This passage has been cited with approval by various appellate courts across the country. Our Court of Appeal has cited it with approval in *Burnaby (City) v. Oh*, 2011 BCCA 222 at para. 35 and *Wright v. Sun Life Assurance Company of Canada*, 2019 BCCA 18 at para. 61.

[97] The fair hearing requirement means, amongst other things, that C.A.T. had to be given a reasonable opportunity to:

- Adduce evidence on all material points: *Porto Seguro Companhia De Seguros Gerais v. Belcan S.A.*, [1997] 3 SCR 1278 at para. 29; and
- Cross-examine witnesses called by S.T.B.: *Toronto Newspaper Guild v. Globe Printing Co.*, [1953] 2 S.C.R. 18 at para. 16; *R. v. Lyttle*, 2004 SCC 5 at paras. 41-42.

C.A.T.'s Position

- [98] C.A.T. submits that the trial judge breached the principles of natural justice by denying him a fair hearing. In particular, C.A.T. submits that the trial judge rendered his decision before C.A.T. had completed his cross-examination of S.T.B. or presented his case. As a result, C.A.T. submits that the trial judge did not afford him the same opportunity that S.T.B. had to present her case and cross-examine him.
- [99] For reasons which will become apparent, I consider it unnecessary to summarize further details of C.A.T.'s submissions regarding the trial judge's asserted breaches of the principles of natural justice.

Analysis

- [100] With all due respect to the detailed and thoughtful submissions of C.A.T. regarding the trial judge's asserted breaches of natural justice, they suffer from the same fatal flaw. The principles of natural justice afforded him a fair and reasonable opportunity to cross-examine S.T.B. and present his case. They did not guarantee that would, in fact, happen.
- [101] I will deal first with C.A.T.'s opportunity to present his case.
- [102] As disclosed by the history of proceedings, the trial judge afforded C.A.T. the opportunity to present his case no less than five times - by way of calling witnesses to testify on November 2, 2017, November 9, 2018 and November 20, 2018, and by way of affidavit evidence following the dismissal of C.A.T.'s adjournment application on November 20, 2018 and following the dismissal of C.A.T.'s application for a mistrial on February 12, 2019. The first two of these five opportunities were equal in every way to the opportunity afforded S.T.B. and, frankly, all other family law litigants, to present their cases.
- [103] Respectfully, the reason why C.A.T. did not present his case in an equal fashion as compared to S.T.B. is because he did not take advantage of the fair and reasonable opportunities afforded to him to do so.
- [104] He paid no heed to the assistance offered to him by the trial judge starting on September 8, 2017.
- [105] He did not comply with the financial disclosure order.
- [106] He did not hire a lawyer (at least not in a timely fashion).
- [107] He did not inform himself regarding the Guidelines.

- [108] He did not inform himself regarding the financial workings of the numbered company.
- [109] He did not adequately prepare for trial.
- [110] Had C.A.T. conducted himself differently, he would have had the opportunity to testify before being cross-examined - just as the trial judge had outlined would occur at the commencement of the hearing on November 2, 2017. Even after failing to present his case at the first opportunity on November 2, 2017, nothing in the transcript suggests that the trial judge would not have given him the same opportunity on November 9, 2018 - had he come to court prepared.
- [111] It is true that C.A.T.'s opportunity to present his case on and after November 20, 2018 was different from the opportunity afforded to S.T.B. but that is only because of his conduct. The trial judge was under no obligation to indefinitely afford C.A.T. the very same opportunity to present his case as S.T.B. By November 20, 2018, S.T.B., and more importantly L., had already been waiting for well over a year to deal with child support in a final fashion.
- [112] I cannot find fault in the trial judge's decision to press ahead. The trial judge had a duty to deal with L.'s right to child support and, after giving C.A.T. two equal opportunities to present his case, modified the process in an effort to effect justice between the parties. He even took the rather extraordinary step of giving C.A.T. an opportunity to adduce affidavit evidence on two separate occasions after denying his request for an adjournment.
- [113] I turn next to C.A.T.'s submission that the trial judge did not allow him to complete his cross-examination of S.T.B.
- [114] As indicated earlier in these reasons, on my review of the transcript, it appears that the trial judge thought that C.A.T. had completed his cross-examination. The trial judge then asked some further questions of S.T.B. and allowed her counsel to re-examine her. Nothing in the record suggests that C.A.T. wanted to ask or was prepared to ask S.T.B. any further questions. He did not suggest otherwise until after November 20, 2018 when he had counsel.
- [115] It may be that counsel for C.A.T. would have asked S.T.B. many more questions related to C.A.T.'s undue hardship claim. Unfortunately, C.A.T. did not hire a lawyer until after he had already exercised his opportunity to cross-examine S.T.B.
- [116] The bottom line is that the trial judge afforded C.A.T. an equal opportunity to cross-examine the opposing party and then present his case. The record compels me to conclude that the only reason he did not equally complete his cross-examination and present his case is because of choices he himself made.
- [117] In the challenging circumstances presented by the choices C.A.T. made, the trial judge did not breach the principles of natural justice.

Conclusion

[118] C.A.T.'s case is a cautionary tale for litigants who choose to represent themselves or who are forced to do so. C.A.T. and others in his shoes can expect the court's patience, courtesy and assistance - but only to a point. Self-represented litigants must also take responsibility for abiding by court orders, informing themselves regarding the applicable law and procedures, and coming to court prepared. They cannot stymie the court process and deny opposing parties appropriate remedies by failing to do so.

[119] In this case, the choices made by C.A.T. placed the trial judge in a difficult position. After affording C.A.T. a fair and reasonable opportunity to cross-examine S.T.B. and present his case, the trial judge determined to proceed by modifying the court process. Although the trial judge's conduct of the trial had some imperfections, considering the interests of L., S.T.B. and other court users, the trial judge's conduct did not raise a reasonable apprehension of bias and did not breach the principles of natural justice.

[120] In the result, the appeal is dismissed.

Costs

[121] As the successful party, S.T.B. is entitled to her costs of the appeal. There was nothing untoward in C.A.T.'s conduct of the appeal to justify an award of increased or special costs. She will have her costs at the scale for matters of ordinary difficulty.

[122] Further, I took S.T.B. to have abandoned her written submission that C.A.T. ought to be ordered to pay S.T.B. further amounts under s. 213 and/or s. 233 of the FLA in relation to his conduct before the provincial court. I consider that concession to have been appropriate. S.T.B. has cited no authority to support the proposition that this court has jurisdiction to make such an order on behalf of the provincial court in the absence of a successful appeal from an order denying such relief.

[123] I thank counsel for their detailed, thoughtful and helpful submissions.

"L.S. Marchand J."

MARCHAND J.

[1] The trial judge's calculation was $\$200/\text{day} \times 5 \text{ days/week} \times 52 \text{ weeks/year} = \$52,000/\text{year}$.

[2] This is the table amount for an annual income of \$52,000 under the Federal Child Support Guidelines.

[3] The court was concerned about C.A.T. making and/or threatening to make unwarranted applications regarding parenting issues.

[4] The trial judge reduced the table amounts of child support under the Guidelines by \$200 per month in recognition of C.A.T.'s obligation to support his teenaged daughter.

- [5] Specifically, there is no provision for examinations for discovery, discovery by interrogatories or notices to admit.
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