OPCC File No. 201-9836
November 21, 2017

IN THE MATTER OF THE ***POLICE ACT***, R.S.B.C. 1996, c. 367

AND

IN THE MATTER OF CONSTABLE DAVID BUNDERLA AND CONSTABLE RICHARD O'ROURKE OF THE SOUTH COAST BRITISH COLUMBIA TRANSPORTATION AUTHORITY POLICE SERVICE

Review on the Record Pursuant to s. 141 of the *Police Act*

**REASONS OF ADJUDICATOR ON RECUSAL APPLICATION**

TO: Complainant, Ms. Maria Lopez

TO: Constable David Bunderla #111 and Constable Richard O'Rourke #250

AND TO: Mr. Kevin Woodall, Counsel for Constables Bunderla and O'Rourke

AND TO: Mr. Bradley Hickford, Commission Counsel

AND TO: Chief Officer Doug LePard, SCBCTAPS

AND TO: Mr. Stan Lowe, Police Complaint Commissioner

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## INTRODUCTION

1. This is an application by the respondent officers for an order that I recuse myself as an adjudicator in these proceedings on the grounds of a reasonable apprehension of bias. It is brought in the context of a review on the record pursuant to s. 141 of the *Police Act*, R.S.B.C. 1996, c. 367, as amended.

## BACKGROUND

2. Constables David Bunderla and Richard O'Rourke are members of the South Coast British Columbia Transportation Authority Police Service ("SCBCTAPS"). The officers faced a number of allegations of misconduct under the *Police Act*. The allegations related to their conduct during an investigation and arrest that took place on July 17th and 18th, 2014. Chief Officer Doug LePard was the Discipline Authority. On August 9th, 2016, he concluded that while some allegations were not proved, three relating to misconduct were proved. He went on to recommend sanctions for the misconduct he had found.

3. On November 18, 2016, the Police Complaint Commissioner issued a Notice of Review on the Record, pursuant to s. 137(2), and appointed me to conduct that review. My review is limited to the appropriateness and adequacy of the disciplinary or corrective measures.

4. Before I completed my review of this matter, the two members, through counsel, brought an application in which they seek to have me recuse myself. These are my reasons on that application.

## EVIDENCE

5. Counsel have filed somewhat lengthy written submissions and as well, have presented comprehensive oral arguments. For the most part, the relevant evidence is not in dispute. Brock Martland is a Vancouver lawyer engaged in private practice. As a part of his practice from time to time, he provides legal advice to the Office of the Police Complaint Commissioner ("OPCC"). Mr. Martland's legal services are also made available to retired judges who sit as adjudicators or discipline authorities under the *Police Act*. While he is available to give advice to retired judges, not all judges avail themselves of the advice. It is therefore argued that because Mr. Martland provides legal advice to the OPCC and is also available to give legal advice to the retired judges, an informed person, viewing the circumstances realistically and practically, would come to the conclusion that there is a reasonable apprehension of bias on the part of the adjudicator.

6. It is useful to examine the roles of the relevant parties in the oversight process. The Police Complaint Commissioner is at the focal point of the process. The role of the Commissioner is to act as a guardian of the public interest and to ensure there is a fair and effective form of civilian oversight of police conduct. As well, his role is to foster public confidence in the process. The hallmark of the office is independence. It is for these reasons that the Police Complaint Commissioner is an independent officer of the Legislature. In making him an independent officer of the Legislature, the clear intent was to clothe the Commissioner with unfettered independence. It is his duty to implement the Act fairly, independently and impartially. It is his responsibility to ensure that a complaint under the Act is heard before an independent retired judge who would act impartially either as an adjudicator or a discipline authority.

7. Section 142(1) provides the Commissioner the legal authority to appoint an adjudicator. Once the Commissioner has determined there are sufficient grounds to arrange a public hearing or a review on the record under s. 138, the Commissioner then requests the Associate Chief Justice of the Supreme Court to consult with retired judges of the Provincial Court, the Supreme Court or the Court of Appeal to recommend one or more retired judges to act as adjudicator. The Commissioner then must appoint one of the retired judges recommended as adjudicator for the purposes of a public hearing or a review on the record. Thus, the Commissioner does not determine the merits of any alleged misconduct. That is not to say that he does not have any role to play in the process because he is empowered to participate as a party through Commission counsel as the circumstances may warrant (s. 141(6)).

8. The retired judges who are appointed under the Act must be, and perhaps more importantly be seen to be, impartial and independent in the discharge of their duties. There is of course, a distinction between independence and impartiality. Counsel for the Commissioner Mr. Hickford has fairly pointed out that distinction in his reliance on *Valente v. The Queen*, [1985] 2 S.C.R. 673 at page 685:

> Although there is obviously a close relationship between independence and impartiality, there are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation

> to the issues and the parties in a particular case. The word "impartial" ...connotes absence of bias, actual or perceived. The word "independent" in s. 11(d) [of the *Canadian Charter of Rights and Freedoms*] reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions and guarantees.

9. In this case, counsel for the officers Mr. Woodall does not question the independence of the retired judges. Rather, his concern is with the impartiality or at the very least, the appearance of impartiality.

**LAW**

10. The issue raised in these proceedings is whether Mr. Martland — in giving legal advice both to the Commissioner and also being available to give legal advice to retired judges — raises a reasonable apprehension of bias. The principle of reasonable apprehension of bias was clearly defined by de Grandpré J. in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at page 394:

> ...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.

11. In determining whether there is a reasonable apprehension of bias, each case must be examined contextually and the inquiry is fact specific (see *Wewaykun Indian Band v. Canada* 2003 SCC 45). The test is objective. The apprehension of bias must be reasonably held by reasonable and right-minded persons.

12. Mr. Woodall has placed much reliance on the *The King v. Sussex Justices Ex parte McCarthy* [1924] 1 K.B. 256. The facts are worth noting. The justices were dealing with a case involving a motor vehicle collision. The acting clerk to the justices

who were presiding, was a member of the firm of solicitors that was acting for one of the parties in a claim for damages against the applicant for injuries. At the conclusion of the evidence, the justices retired to consider their verdict. The acting clerk retired with the judges when they considered their decision. He did not take part in their decision. The court held that the conviction must be quashed as it was improper for the acting clerk to be present with the justices when they were considering their decision. Lord Hewart C.J. at page 259 made the following comments:

> It is not merely of some importance but it is a fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

13. The facts herein are not at all like those in *Sussex Justices*. There the acting clerk retired with the justices when they retired to consider their decision. Admittedly, he did not take part in the decision but clearly the decision was tainted because of the appearance of injustice. The most that can be said in this case, is that Mr. Martland is available to give advice to a retired judge. The suggestion is that he could, at the behest of the Commissioner, persuade the retired judge to render a decision in a particular way. Of course, there is not one iota of evidence that would support that inference. The case that appears to be more on point is *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)*, [1993] B.C.J. No. 2337 (B.C.C.A.). The issues were not dissimilar to those raised here. The facts are as follows. Omineca held two timber sale harvesting licences. The regional manager of the Ministry of Forest cancelled the licences. After an unsuccessful appeal to the chief forester, Omineca appealed to an Appeal Board established under the *Forest Act*. The Appeal Board appointed a lawyer to give advice. The lawyer was being paid by the Attorney General. Counsel for Omineca objected that the lawyer was being paid by the Attorney General and therefore there was a reasonable apprehension of bias. The argument was that the Government had two separate lawyers acting against them. Counsel also argued that he could not understand why the Appeal Board needed a lawyer. The issue before the Court of Appeal was whether the facts raised a reasonable apprehension of bias. Gibbs J.A. at para 23 addressed the issue as follows:

It is apparent that Omineca does not refer to reasonable apprehension of bias in the sense in which it is normally understood, as in *Committee for Justice and Liberty v. National Energy Board* and like cases. What Omineca intends the expression to mean is that the process is so biased against it that a reasonable person would apprehend that it will not be accorded natural justice, viz. the third ground in the petition:

> The Appeal Board breached the rules of natural justice by retaining a lawyer paid by the Attorney General thereby creating a reasonable apprehension of bias against the Petitioner. (emphasis added)

14. At paragraph 26:

> Of course, the government does not have two lawyers. No question has arisen as to the integrity of Mr. Webster or of any of the Board members. All are clearly conscious of Mr. Webster's function. Until some event occurs which demonstrates that the limits on the function have been transgressed the court must, in my opinion, accept that during the course of the hearing the proprieties will be observed and that Mr. Webster will act only in the capacity of counsel to the Board. Moreover, in law the Board is charged with the duty impartially to decide the issues between the parties on the merits. In my opinion, the court must also accept at this stage that the Board will conscientiously discharge that duty regardless of who the paymaster might be.

15. At paragraph 28:

> There is another aspect to the natural justice ground. It is that the allegations are premature. Omineca has not yet been denied anything going to the merits or even going to procedure, other than the termination of Mr. Webster's retainer. Except to the extent that reasonable apprehension of bias is an ingredient of natural justice, not a single one of the cases cited in argument, aside from *Committee for Justice & Liberty v. National Energy Board*, upholds a denial of justice plea based upon events preceding the commencement of the hearing. That is not surprising since the party raising the plea will be obliged to point to some event or record to support it and, in the normal course, that kind of evidence will only emerge during or after the hearing.

> The only event Omineca can point to here is that Mr. Webster accompanied the Board when it retired to consider its position in respect to the adjournment application. I will return to that event in due course.

16. At paragraph 30:

> Returning to the retirement to consider adjournment, given the heightened sensitivities of Omineca it may have been more prudent not to include Mr. Webster. However, Omineca obtained what it wanted and so cannot claim prejudice arising. And it is understandable that the Board might wish to have the assistance of counsel while discussing the options open to it as well as the administrative or housekeeping consequences of an adjournment. We do not know what matters were discussed but we do know that the subject matter of the dispute between Omineca and the Minister of Forests had not yet been reached. There are, therefore, no grounds for concluding that the private discussion had adverse impact upon Omineca's cause.

17. Similarly, Mr. Woodall has questioned the need of retired judges to have legal assistance. He has raised a question as to when the practice of providing legal advice to retired judges began. Mr. Woodall has suggested that for 15 years, the retired judges had no access to counsel. He has argued that suddenly without explanation, Mr. Martland has become the lawyer available to the judges. Implicit is his suggestion that there appears to be some attempted means of control by the Commissioner in appointing only Mr. Martland. He has argued:

> We are not aware of any case where a retired judge, acting on his or own, has run into problems that have made it difficult or impossible to carry out the duties which they were appointed.

18. I agree with Mr. Hickford that there is no evidence when the practice of providing legal counsel to retired judges began, and in any event, it is not relevant. As well, Mr. Woodall has questioned the need for retired judges to receive legal advice. The Act is silent on the question of retired judges needing legal assistance. The fact that a retired judge needs or does not need counsel is irrelevant to the issue whether there is a reasonable apprehension of bias. In any event, the Applicant's argument holds little

weight in light of the complex nature of the *Police Act*. In that vein, I make particular note of the words of Newbury J.A. in *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92, wherein she described at paragraph 6 the Act as:

> ...dense, complicated and often confusing. Its provisions are hedged around exceptions, qualifications and limitations that are often located in other sections not in close proximately. One must frequently follow cross references to other sections, and few provisions can be said to stand alone. It is not a model of clarity.

19. If anything, the quotation of Newbury J.A. endorses the need for retired judges to have legal assistance. It must be noted that the retired judges often decide complex issues of law and fact that often have enormous consequences on not only the police, but on the reputation of the system.

20. Mr. Woodall has throughout his argument, referred to Mr. Martland as Commissioner Lowe's personal lawyer. That argument was based on the following facts. In an unrelated proceeding, Commissioner Lowe was subpoenaed to give evidence. A Provincial Court Judge quashed the subpoena. Mr. Martland acts as Counsel on behalf of Commissioner on an appeal of the judge's decision. Clearly, Mr. Martland was acting for Commissioner Lowe in the Commissioner's capacity. Accordingly, it cannot be concluded that Mr. Martland is Commissioner Lowe's personal lawyer.

## CONCLUSION

21. The material facts herein are not in dispute. Mr. Martland is a lawyer in private practice. It appears that one of his areas of expertise is the *Police Act*. He has what appears to be a general agreement with the Commissioner pursuant to which he gives legal advice. Through the OPCC, he has been made available to give advice to retired judges. It is admitted that there is no evidence that Mr. Martland was acting improperly. Rather, it is alleged that his relationship with the Commissioner and the retired judges leads to reasonable apprehension of bias. From those facts alone, I cannot conclude that an informed person, examining the circumstances realistically and practically,

would come to the conclusion that there is a reasonable apprehension of bias on the part of an adjudicator based on the conduct of Mr. Martland. There is no evidence that would lead me to conclude that there is a reasonable apprehension of bias. As well, there is a presumption of regularity that a duly constituted tribunal will act fairly and impartially (see *University of British Columbia v. University of British Columbia Faculty Association*, 2007 BCCA 201). The onus is on the applicants to prove on a balance of probabilities that there is a reasonable apprehension of bias. I cannot conclude that the Applicants have discharged that onus. The evidence here falls far short of meeting the test established in *Committee for Justice and Liberty*, *supra*.

22. For these reasons, the application for an order for recusal is dismissed.

**The Honourable Wally Oppal, Q.C.**
This 21st day of November, 2017