IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20110121
Docket: 11-0060
Registry: Victoria

Between:

Jason Ince

Petitioner

And:

Jamie Graham, Chief of Police for the City of Victoria, City of Victoria, Stan Lowe, Police Complaint Commissioner and British Columbia Civil Liberties Association

Respondents

Before: The Honourable Madam Justice Ballance

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	D. Mulroney
Counsel for the Respondent Jamie Graham, Chief of Police for the City of Victoria:	S. Hern
Counsel for the Respondent Stan Lowe, Police Complaint Commissioner:	J. Heaney
Date and Place of Hearing:	January 17-19, 2011 Victoria, B.C.

[1] THE COURT: This proceeding arises in the aftermath of the tragic death of Kevin Vigar on June 27, 2009, at the jail of the Victoria City Police Department. Following media reports of Mr. Vigar's death, a complaint was lodged by the B.C. Civil Liberties Association (the "BCCLA") to the Office of the Police Complaint Commissioner (the "Commissioner"). The complaint has been categorized by Chief Constable Graham, the Chief of Police for Victoria as a public trust complaint as defined under the *Police Act*, R.S.B.C. 1996, c. 367 (the *"Act"*). It pertains to the petitioner, Constable Jason Ince, his partner, Constable Hardy, and three other members of the department.

[2] On July 14, 2009, Chief Constable Graham requested that the Saanich Police Department conduct an investigation into the matter. Staff Sergeant Dukeshire was appointed as the investigating officer and investigated the complaints concerning all five members of the force. His investigation was not limited to the subject matters that were identified in the complaint lodged by the BCCLA.

[3] Staff Sergeant Dukeshire provided his investigation report to the Chief on August 24, 2010, in which he addressed allegations respecting the five members. With respect to Constable Ince, the report substantiated three allegations of neglect of duty as follows:

(1) that Constable Ince failed to provide Mr. Vigar with the appropriate medical treatment when it was obvious he had become unconscious due to intoxication;

(2) that Constable Ince failed to conduct a complete and thorough search of Mr. Vigar and a fellow prisoner after their respective arrests; and

(3) that Constable Ince failed to notify the jail supervisor of all "relevant" information in relation to Mr. Vigar's loss of consciousness during the booking process and in relation to his continued state of unconsciousness after his placement into cells.

[4] In accordance with s. 76 of the *Act*, Chief Constable Graham acts as the "Discipline Authority" presiding over complaints, resulting investigations, and discipline proceedings, including the complaint directed at Constable Ince. He reviewed Staff Sergeant Dukeshire's investigation report and on October 5, 2010 issued a decision pursuant to s. 112 of the *Act*, to the effect that the evidence referred to in the report appeared to substantiate the allegations made. That finding triggered the requirement for a discipline proceeding under the *Act* in respect of Constable Ince and the others. The discipline proceeding for Constable Ince is scheduled to be heard early next week and is expected to last a full day.

[5] On January 6, 2011, Constable Ince filed a petition seeking declaratory and injunctive relief, as well as the interpretation of a regulation, all in respect of the disciplinary proceeding. Phrased in broad terms, and I will expand upon these later in my reasons, the petitioner contends that the Chief ought to recuse himself or is otherwise disqualified to stand as the Discipline Authority because an alleged personal conflict of interest has raised a reasonable apprehension of bias.

[6] This application is not the hearing of the petition. It is a preliminary motion for an order enjoining and prohibiting Chief Constable Graham from taking any further steps as the Discipline Authority of the disciplinary proceeding. Accordingly, this hearing is not intended to determine whether the allegation of a reasonable apprehension of bias has any merit. It is to restrain the Chief from performing his role as the Discipline Authority for a matter of weeks, until the petition, which will confront the bias question head-on, can be heard.

[7] The Chief and Commissioner Lowe oppose the application. The Chief has filed a cross motion seeking an order that the within proceeding be stayed until certain milestones have been achieved in the internal review process set out in the *Act*, or until further court order.

[8] Returning briefly to the chronology, before Staff Sergeant Dukeshire had submitted his investigation report, Constable Ince's counsel wrote to the Commissioner asking that he consider replacing the Chief as the Discipline

Authority, by the appointment of an appropriate person external to the force. That letter expressed the concern that there would be substantial tension between finding that Mr. Vigar's death was connected to an alleged neglect of duty on the one hand, and the argument that Constable Ince intended to put forward to the effect that the Chief and his administration failed to adequately train him and live up to the promise to implement the recommendations contained in a report known as the Nielson Investigation. It was with reference to this context that petitioner's counsel voiced his grave concern that the Chief could not be an impartial decision-maker and that there was a reasonable apprehension that he would have difficulty in assigning responsibility, either to himself or his immediate reports or designates. The public perception was also cited as a potential contributor to the apprehension of bias. The clarity of the department's policy with respect to intoxicated and/or unconscious persons in custody was called into question as well.

[9] On the same day, Constable Ince's counsel wrote to the Chief enclosing his letter to the Commissioner. He politely suggested that the Chief may be unable to exercise a fair-minded judgment where one of the alternatives to finding misconduct on the part of Constable Ince would be to lay the fault at his own doorstep or that of his administration. The letter makes no request *per se* for the Chief to recuse himself. Rather, it asks that he turn his mind to initiating the suggestion of a replacement Discipline Authority to the Commissioner.

[10] On July 14, the Chief Constable replied to counsel, stating that he would adopt "the standard caution regarding the perception of bias to ensure any final decisions are fair and reasonable". He assured that nothing would happen until the report was in hand.

[11] There is evidence that approximately one month later the Commissioner concluded that a reasonable apprehension of bias did not exist based on the information before him at that time.

[12] As I mentioned, on October 5 the Chief Constable issued his decision determining that the evidence in the Dukeshire report substantiated the allegations

against Constable Ince and the others. In his decision, he proposed various sanctions, spanning from a five-day suspension to a written reprimand and additional training.

[13] Near the conclusion of his written decision, the Chief described his decisions as final and conclusive, "unless [the Commissioner] should disagree and appoint a retired judge as a new discipline authority pursuant to s. 117". For ease of reference, I will refer to this concluding paragraph as "Paragraph 12". The statements contained in Paragraph 12 cannot be said to be in the nature of boilerplate as they are clearly customized to this case. It is common ground that at that stage the Chief's decision was not to be final and conclusive under the *Act*.

[14] Quickly, and perhaps as soon as within the same day, the Chief recognized his error and issued an amended decision bearing the same date with the erroneous Paragraph 12 deleted.

[15] The contents of Paragraph 12 gave rise to the potentially awkward issue that the Chief had seemingly proceeded to render an unfavourable decision against Constable Ince on the understanding that he was making a final and binding decision without the hearing having yet taken place. This, in turn, suggested that he had possibly predetermined the matter in advance of any actual hearing. The inclusion of Paragraph 12 became an additional prong of the reasonable apprehension of bias allegation.

[16] On October 22, the petitioner's counsel wrote to the Chief asking that he step aside as Discipline Authority. On this occasion, he referenced the further allegation stemming from the unfortunate inclusion of Paragraph 12 in the Chief's decision. Petitioner's counsel wrote further that the policies of the Victoria force governing the medical care of persons in custody appeared to be in a state of confusion, and questioned whether the jail had been operating under policies which may not have been adopted by the Police Board. He contemporaneously sent a similar letter to the Commissioner, by which he enclosed a copy of his letter to the Chief and asked

the Commissioner to take steps either to recommend that the Chief recuse himself, or secure his removal.

[17] Within roughly the same timeframe, the initial complainant in this matter, the BCCLA, raised objection to the Chief continuing to sit as the Discipline Authority. The BCCLA filed a second separate complaint on November 3 alleging that the Chief had failed to ensure that officers were adequately trained to respond appropriately to prisoners whose consciousness was questionable, and to ensure that there were adequate policies in place.

[18] The BCCLA complained further that the Chief was in breach of his duty by remaining as the Discipline Authority in respect of Constable Ince's hearing, given the allegations of personal failures in training and that department policy in relation to the very subject matter of the disciplinary proceeding had been put directly in issue. The BCCLA had suggested that its complaint qualified as a public trust complaint. The Commissioner disagreed and instead classified it as a policy and service complaint to be addressed by the Police Board.

[19] Meanwhile, counsel for the Chief Constable wrote to the Commissioner setting out points said to be in support of the Chief remaining as the Discipline Authority. Constable Ince's counsel was supplied with a copy of that letter and responded to it by letter to the Commissioner dated November 30, which he copied to the Chief.

[20] By letter dated December 15, 2010, the Commissioner informed Constable Ince's counsel that he was satisfied at that time that there was no basis to exercise his authority under the *Act* to designate a new Discipline Authority.

[21] As noted previously, the Chief acted as the Discipline Authority in respect of the allegations against the petitioner's partner, Constable Hardy. A discipline proceeding was held on December 7. On December 14, the Chief issued his findings pursuant to s. 125(b) of the *Act* in relation to that complaint, concluding that Constable Hardy had misconducted herself. The petitioner contends that the

treatment and outcome of the Hardy complaint, which concerns virtually identical allegations in relation to the same incident, forcefully supplements his assertion of an apprehension of bias.

[22] Constable Ince has not brought an application within the discipline proceeding itself requesting that the Chief recuse himself.

DISCUSSION

[23] I will turn now to a discussion of the animating legal principles.

[24] Constable Ince's application for an interim injunction is an extraordinary remedy.

[25] In *British Columbia (A.G.) v. Wale* (1986), 9 B.C.L.R. (2d) 333, [1987] 2 W.W.R. 331 (C.A.) [*Wale*], the Court of Appeal endorsed a two-part test for granting an interlocutory injunction, stating at 345:

> The traditional test for the granting of an interim injunction in British Columbia is two-pronged. First, the applicant must satisfy the Court that there is fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended. Second, he must establish that the balance of convenience favours the granting of an injunction.

[26] In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 [*RJR-MacDonald*], the Supreme Court of Canada subsequently ratified the line of authority that had adopted the three-part approach as had been laid down by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396. The three-prong approach asks:

(1) Is there a serious question to be tried?

(2) Has the applicant demonstrated that it will suffer irreparable harm if the injunction is not granted? and

(3) Does the balance of convenience favour granting the injunction?

[27] The key difference between the *Wale* framework and the test followed in *RJR-MacDonald*, is that the former incorporates consideration of the vital concept of irreparable harm in its overall assessment of the balance of convenience. There is no difference of substance in the two approaches: *Expert Travel Financial Security (E.T.F.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd.*, 2005 BCCA 5, 249 D.L.R. (4th) 367, *per* Smith J.A. at para. 54, citing *Coburn v. Nagra*, 2001 BCCA 607.

[28] Using either model, the first branch of the test asks whether there is a fair question to be tried as to the existence of the legal right alleged by the applicant and a breach of that right. It is a low threshold, merely requiring that the applicant satisfy the court that its claim is neither frivolous nor vexatious: *RJR-MacDonald*, at 337.

[29] In *RJR-MacDonald*, the Court stated that the low threshold of the initial inquiry meant that an extensive examination of the merits of the applicant's claim was "neither necessary nor desirable" in the early days of the litigation (338). The Court was careful to acknowledge, at 338-9, the existence of exceptions to the general rule that an in-depth review of the merits should not be conducted at the outset; those exceptions do not apply here.

[30] In evaluating the balance of convenience, the court endeavours to ascertain and weigh the relative harm or so-called "inconvenience" to the parties in granting or withholding an injunction pending a decision on the merits. A wide array of factors is to be considered, but the weighing of the balance of convenience does not anticipate a tallying up of each relevant factor. As stated by Mr. Justice Lambert in *Canadian Broadcasting Corp. (CBC) v. CKPG Television Ltd.*, [1992] 3 W.W.R. 279 at para. 25, 64 B.C.L.R. (2d) 96 (C.A.)

> . . . it is a process of assessing all of the relevant factors at one time and in one unified context and reaching a single overall conclusion about where the balance of convenience rests.

[31] While the notion of irreparable harm commonly arises in equity, it does not carry a precise definition. The prevention of irreparable harm is the driving rationale

behind the court employing the extraordinary measure of enjoining a party before there has been an adjudication in court of that party's rights. In *RJR-MacDonald*, the Court provided these clarifying remarks at 341:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision . . . where one party will suffer permanent market loss or irrevocable damage to its business reputation . . . or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined. [citations omitted]

[32] The assessment of the factors bearing on the balance of convenience in this case, which incorporates the crucial element of irreparable harm, engages consideration of the question of whether Constable Ince has acted prematurely in bringing his petition seeking the Chief's disqualification as the Discipline Authority.

[33] Counsel made their submissions on this threshold issue in the context of the weighing of the balance of convenience, asking whether the Court should pre-emptively adjudicate an issue of bias before the disciplinary process for the petitioner and the internal review process under the *Act* have been completed.

[34] While a great deal of time on this application was devoted to the issue of prematurity on matters of judicial review, I wish to emphasize that line of argument was developed in relation to the assessment of the balance of convenience, given that the discrete issue is whether Constable Ince should be granted an interlocutory injunction at this time. Of necessity, I must comment on the concept of prematurity in the realm of judicial review.

[35] The respondents urge that the application for judicial review is premature in that Constable Ince has not yet brought a formal application in the convened proceeding before the Chief seeking his recusal. The respondents argue that, secondly and moreover, Constable Ince is compelled, first to endure the hearing conducted by the Chief, and if he disagrees with the outcome, to exhaust all internal avenues of redress set out in the *Act*, before he is at liberty to seek judicial

intervention. In a nutshell, they contend that the prematurity of this application militates against the balance of convenience tipping in favour of Constable Ince.

[36] The authorities support the prompt expression of an allegation of bias or an apprehension of it on the part of a tribunal: *Bajwa v. Veterinary Medical Association (British Columbia)*, 2010 BCSC 848 [*Bajwa*]; *Eckervogt v. British Columbia (Minister of Employment and Investment)*, 2004 BCCA 398 [*Eckervogt*]. However, there is no hard and fast rule as to the appropriate timing. It is a matter of judicial discretion.

[37] The issue of whether the court should assume its supervisory jurisdiction before the administrative process has itself concluded or in advance of the aggrieved party having exercised all rights of redress provided for in a particular statute, has received considerable judicial attention. Over time, the courts have acknowledged that the public interest does not always require intervention. That recognition has taken form in a series of discretionary bars to judicial review. One of those bars stipulates that the applicant must exhaust all internal forms of redress available under the governing legislation, unless the available internal remedy is not likely to be effective and adequate, before he or she arrives in the courtroom: *Timberwolf Log Trading* Ltd v. British Columbia (Forests and Range), 2010 BCSC 500; Canadian *Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 [*Matsqui*]; *Bussey v. British Columbia (Registrar of Mortgage Brokers)*, 2007 BCSC 1346 [*Bussey*]. This adequate alternative remedy doctrine and the notion of prematurity are intertwined and can be difficult to disentangle.

[38] There are several reasons why the court will be reluctant to embark on a review before the tribunal has completed its function. In *British Columbia (Ministry of Attorney General) v. New Denver Survivors Collective*, 2010 BCSC 1252, Madam Justice Adair, at para. 24, summarized those reasons as follows:

- judicial intervention may fragment the proceedings of the tribunal;
- the tribunal may resolve the dispute to the parties' satisfaction;
- intervention may become a moot event;

- it is helpful for the Court to have an evidentiary record and the tribunal's analysis of the dispute, especially where the tribunal has special expertise; and
- courts avoid deciding constitutional or *Charter* issues based on hypothetical facts or in a vacuum.

(See also *Kelowna (City) v. British Columbia (Human Rights Commission)*, [1999] B.C.J. No. 1848 (S.C.); *Vancouver (City) v. British Columbia (Assessment Appeal Board, Assessor of Area No. 09 – Vancouver)* (1996), 20 B.C.L.R. (3d) 79 (C.A.).)

[39] As a general rule, an applicant who fails to pursue redress afforded under the applicable legislation will bar judicial review, at least so long as the internal regime is seen to be an adequate alternate to intervention. A key question will be whether the statute creates an adequate forum to resolve the applicant's jurisdictional challenge, not whether it is a superior forum to that of the court: *Bussey*; *Matsqui*. It is always open to the court to depart from that general rule in appropriate circumstances. Petitioner's counsel referred to cases where deviation from the ordinary course had occurred, for example in *Dickhout v. Parker*, (unreported) October 29, 2010 B.C.S.C. No. S104994 and *C.D. Lee Trucking Ltd. v. IWA-Canada, Local 1-424*, [1998] B.C.J. No. 2776 (BCSC).

[40] The *Act* contains a comprehensive discipline adjudication scheme. In overview, it provides that at the close of a discipline proceeding, the Discipline Authority is required to make a determination as to whether a discipline default has been established and, if it has, the appropriate sanction or corrective measure. If dismissal or reduction of rank is the decided outcome (which all counsel agree is unlikely in the case at hand), the officer in question is entitled to demand a public hearing or a review on the record. A public hearing is a *de novo* hearing adjudicated by a retired judge; a review on the record is not. However, the review is conducted by a retired judge on a standard of correctness and the adjudicator has discretion to admit new evidence and hear submissions on behalf of the officer. The adjudicator

chosen to conduct either process has exclusive jurisdiction to decide all matters and questions of fact and law.

[41] Where the sanction following a discipline proceeding is not a dismissal or a reduction in rank, the respondent officer does not have a right to either a public hearing or a review on the record. He or she may make a request to the Commissioner for one or the other which may be granted or denied in the Commissioner's discretion. In other words, the officer must, in effect, seek leave to proceed further. Section 133(6) of the *Act* stipulates that if the request is not granted, then the findings and reasons of the Discipline Authority and the determination of discipline is final, conclusive, and not reviewable by a court. Section 154(2) of the *Act* contains a privative clause for a decision from a review on the record. Section 154(3) provides that a question of law arising from a decision of an adjudicator acting in a public hearing may be appealed with leave to the Court of Appeal. This is a convenient spot to note that all counsel conceded that where an allegation of apprehended bias is made out, preclusion of court review would not stand. Counsel for the Commissioner offered the case of *Dunsmuir v. New Brunswick*, 2008 Carswell NB 124, 2008 SCC 9, in support of counsels' collective acknowledgment that the nature of the alleged bias in the case at hand speaks against absolute preclusion.

[42] With that internal regime in mind, I turn next to the jurisprudence on prematurity.

[43] In *Brown v. Police Complaint Commissioner et al.*, 2001 BCSC 1115 [*Brown*], Kirkpatrick J. (as she was then) had before her a petition for review brought during an adjournment of a disciplinary hearing of a police officer under the predecessor legislation. The petition raised three issues which were broadly classified as jurisdictional, procedural, and constitutional.

[44] Kirkpatrick J. reiterated the list of factors identified by the *Matsqui* Court to be considered in exercising judicial discretion to permit a review before the applicant has moved through the entirety of the administrative and statutory appeal process.

That non-exclusive list includes: (1) the convenience of the alternative remedy; (2) the nature of the error; and (3) the nature of the appellate body; for example, its investigatory, decision-making, and remedial capacities (at para. 23).

[45] In *Brown*, Kirkpatrick J. rejected the officer's assertion that he should not be compelled to exhaust his remedies under the *Act* where the alleged jurisdictional error, if it were proved, would render the decision to be made void. In this regard, she noted that his argument was grounded on the dissenting opinions in *Matsqui*, and reasoned further at para. 35:

> Secondly, it is important to remember that, as yet, no decision has been made except to require a disciplinary hearing at the conclusion of which a proposed discipline may or may not be made. Thirdly, there is nothing to prevent Brown from raising these arguments at any of the three levels at which he has the opportunity to be heard. If he is denied an opportunity to address the jurisdictional and procedural errors he alleges at those levels, or if he is dissatisfied with the disposition of them, then the petition for judicial review would be cast in a far different light. Having considered the factors outlined in *Matsqui*, this submission with respect to defect in jurisdiction must fail. [underline in original]

[46] Madam Justice Kirkpatrick then undertook a detailed analysis of whether the predecessor *Act* provided an adequate alternative remedy. She concluded that despite its labyrinthine design, the internal procedure ought to be followed to its end before a judicial review is entertained. A notable difference, and one which may be of potential significance here, between the *Act* under consideration in *Brown* and the current version applicable to Constable Ince, is that the former statute gave an officer aggrieved by the disposition of a public trust complaint a right, without the need to obtain leave, to a public hearing no matter what discipline had been meted out.

[47] The principle that, barring exceptional circumstances, an individual must pursue his or her administrative remedies before seeking review was applied by this Court in the context of an assertion of an apprehension of bias in *Bussey*, and more recently in *Bajwa*.

[48] In *Bussey*, the applicant sought review of the refusal by the registrar of mortgage brokers to disqualify himself from continuing to sit on a conduct review on the grounds of a reasonable apprehension of bias. Under the applicable legal framework, the applicant had a right of appeal on the record (not a hearing *de novo*), to a separate tribunal which, if invoked, would trigger an automatic stay of the registrar's decision. A strong privative clause covered the decision on appeal. Relying on *Matsqui* as well as the decision of the Manitoba Court of Appeal in *Turnbull v. Canadian Institute of Chartered Actuaries* (1995), 129 D.L.R. (4th) 42 (Man. C.A.), leave to appeal refused [1995] S.C.C.A. No. 552, Goepel J. held that absent special circumstances, an application for judicial review is to be denied if the applicant has not first pursued the course of redress available under the statute to challenge the impugned decision, even where the alleged error is jurisdictional in nature or where allegations of bias are made.

[49] In *Bajwa*, Madam Justice Allan reached the same conclusion when confronting a late-in-the-day allegation of institutional bias made by a veterinarian against his self-governing professional body. One of the issues on review was whether the tribunal of first instance was correct in finding that it lacked jurisdiction to consider the applicant's allegation of institutional bias. Allan J. concluded that it was within the tribunal's jurisdiction to consider the bias allegation. Relying on *Eckervogt* and the more recent decision of the Newfoundland Court of Appeal in *Communications, Energy and Paperworkers Union of Canada v. Abitibi Consolidated Co.*, 2008 NLCA 4, Allan J. further held that it was well-settled that allegations of bias should be raised in the first instance before the tribunal and not on appeal or judicial review. At para. 77, her Ladyship continued:

> The law is clear that when an allegation of bias is made, the tribunal should consider that allegation and rule on it. If it rules that it is not biased, it may continue with the hearing and the party who wishes to pursue the allegation can raise it on a judicial review. The tribunal is not to be paralysed simply because the allegation is made.

[50] Continuing at para. 78, Allan J. remarked that had the proper methodology been followed and the administrative body ruled against the veterinarian, there would have been a record before the Court on judicial review.

[51] In *Robertson v. Edmonton (City) Police Services*, 2004 ABQB 519, the Alberta Court of Queen's Bench endorsed as the appropriate procedure to challenge an adjudicator on the basis of bias or reasonable apprehension of it, to first apply to the adjudicator seeking his or her recusal. In explaining the advantages of proceeding that way, the Court made these instructive remarks at para. 120:

> First of all, such an application respects the jurisdiction of the tribunal and the adjudicator over the issue; it prevents unnecessary interference by the Court. . . in the work of the tribunal. Secondly, in most cases, an application to the adjudicator will be faster and cheaper than a judicial review application. Thirdly, having to confront the adjudicator directly with the allegations of bias has a tempering effect on the type of allegations of bias that are made. Fourthly, and most importantly, an application directly to the adjudicator allows him or her to place on the record the facts relevant to the bias application, as happened in the appellate decisions mentioned in the previous paragraphs. An example of this in an administrative context can be seen in *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at p. 375, where the Board was able to place on the record a detailed history of Mr. Crowe's involvement with the pipeline, giving the reviewing courts a factual record from which to work.

[52] The issue of prematurity is not limited to cases where the allegation is of institutional bias. It arises also where an apprehension of personal bias on the part of the presiding decision-maker has been alleged. The distinction between those types of bias may be a relevant consideration in that institutional bias is largely dictated by the structure of the statute itself and may not give rise to the same challenges on the basis of bias. The rationale for that seems obvious enough - the legislature has designed the structure and in that sense has designed whatever appearances it might give rise to, and ought not to be interfered with, assuming that the legislation is constitutionally valid.

[53] In this case, there are allegations that could be characterized as institutional bias, but there is also an allegation of an apprehension of bias that is more personal to the Chief.

[54] In *Montgomery v. Edmonton (City) Police Service*, 1999 ABQB 913 [*Montgomery*], the Alberta Court of Queen's Bench, relying in great measure on the carefully reasoned decision in *Lorenz v. Air Canada*, [1999] F.C.J. No. 1383, concluded that allegations of personal bias or the apprehension of it do not automatically justify judicial review and intervention at an early point.

[55] The *Montgomery* Court cautioned that all relevant factors must be weighed in determining whether, in the particular circumstances, judicial review should be undertaken. It held that those relevant factors were uniquely case specific and included things such as hardship to the applicant, delay, waste of efforts, fragmentation of the proceedings, the statutory scheme at play, the adequacy of the alternate statutory remedy, and the strength of the bias argument on a *prima facie* level.

[56] Having referred in a general way to the relevant legal principles, I will now address the parties' competing arguments.

[57] The respondents' position that Constable Ince's application is premature for at least two reasons. First, because he has not formally applied for the Chief's recusal within the parameters of the discipline proceeding itself. Second, because he is committed to proceed through the hearing and if he disagrees with its outcome, must next exhaust his internal remedies under the *Act* before he has standing for judicial review.

[58] Constable Ince says that he has made his recusal application by way of his correspondence to the Chief and the Commissioner, in combination with the contents of his petition and the evidence filed in support of it. He asserts that implicit in the fact that the Chief has not stepped aside, the Chief has ruled against him. Constable Ince insists that his application for recusal has been sufficiently placed before the Chief (and, for that matter, before the Commissioner), and has been effectively denied. His counsel asserts – I think rather boldly – that had his letters to the Chief been headed with the style of cause of the discipline proceeding, there

would be no debate that his correspondence was in the nature of an application. I do not share that view.

[59] Counsel for the petitioner also stresses the not insignificant point that if a reasonable apprehension of bias were proven, the adjudicator's decision would be void and is considered a nullity at law: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities),* [*1992*] 1SCR 623. He submits that when the error complained of goes to the very jurisdiction of the administrative body, for a host of reasons it is preferable to allow judicial intervention sooner rather than later. Counsel asserts that movement into the actual hearing phase and possibly thereafter into the appeal stage is needlessly wasteful of both time and resources, with entailing prejudice to the petitioner if it turns out that the very underpinnings of the process are faulty. I agree that this is a consideration worthy of pause. However, it must be evaluated in light of the factors identified in the modern jurisprudence and within the larger policy context of the circumscribed role of judicial review. The court does not have a free hand.

[60] Constable Ince's counsel contends that the irreparable harm takes many forms. He emphasizes the prejudice flowing to Constable Ince of potentially having to cross-examine the investigator a second time, and thereby lose the element of surprise if a subsequent hearing comes about. He alludes to having made tactical decisions in his approach to the hearing on the basis that the Discipline Authority is apprehended to have bias. In my view, these matters, one of which is only theoretical at this stage, should not be used to leverage the Court's discretion.

[61] I intend no disrespect to petitioner's counsel when I observe that the grounds of bias have evolved as information has become known. The petitioner's assertion of an apprehension of bias was still in development when his counsel wrote to the Commissioner and the Chief in the summer and then in the fall of 2010, and it has continued to take shape thereafter. Notification of it, if it can be characterized as such, was truncated and arrived in instalments via correspondence, the petition and supporting affidavits. At the outset of the hearing, counsel for the petitioner referred

to the apprehended bias as having three distinct branches. During the course of submissions one or more additional components appeared to emerge. Not all of the alleged grounds had been put to the Chief before this hearing. As I have said, a recently expressed ground of bias, being the Chief's involvement in the disposition of the Hardy complaint, which may constitute a standalone basis for contending a reasonable apprehension of bias, was certainly not raised with the Chief or the Commissioner by way of letter.

[62] That the allegations of an apprehended bias have continued to expand after the correspondence was sent to the Chief and Commissioner of itself provides a compelling argument that a focused recusal application must be made before the Chief and ruled upon by him in the first instance. While it may be true that a decision-maker can at any time choose to recuse himself or herself, it does not follow that all of the reasons supporting an allegation of bias do not have to be put before the decision-maker for consideration. Moreover, one of the accusations relates to the allegedly unclear state of the governing policy in play at the given time and the Chief's involvement in setting such policy. In order to meaningfully assess whether a reasonable apprehension of bias has been raised, it is essential to have more fulsome evidence of the applicable policies and the history of their amendments than is contained in the materials.

[63] That the *Act* does not contain explicit provision allowing preliminary motions within the confines of a discipline proceeding is of no moment. As a matter of law, the decision-maker in a quasi-judicial adjudication of this sort would be required to hear and address such an elementary application were it brought.

[64] Administrative proceedings require an orderly process and a readily identifiable record. While there may be instances where the exchange of correspondence might adequately constitute a sufficient record for the purposes of judicial review, I would expect those to be rare and exceptional.

[65] On the other hand, I can foresee unintended, but nonetheless serious, mischief were the Court to sanction judicial surveillance based on an exchange of

correspondence, particularly where the allegations are still in development. A decision-maker who is responding to correspondence would not necessarily appreciate that his or her reply could be regarded as though it were the equivalent of a formal decision, susceptible to judicial scrutiny. In my view, this is neither a mere technicality nor a case of preferring form over substance. A reviewing court should have as full a record as possible of the identity of the matter to be decided, submissions, pertinent evidence, and, where applicable, reasons given for the administrative decision, before it steps in to review it. That is a matter of substance.

[66] The stubborn fact remains that a recusal application has not been properly brought before and ruled upon by the Discipline Authority in a convened discipline hearing. It is simply not ripe for review.

[67] I find that Constable Ince has not demonstrated that he will be irreparably harmed if he were denied injunctive relief at this phase. Any recourse he has to judicial review of such a decision will continue to be available. In weighing the factors, I conclude that the balance of convenience, which incorporates the concept of irreparable harm, favours withholding the injunctive relief. At a minimum, the recusal application must be made in the first instance to the Chief within the convened discipline proceeding.

[68] The application for an interim injunction is dismissed.

[69] I wish to make these closing remarks. I think it would be premature to invoke judicial review of the recusal decision, should it be unfavourable to Constable Ince, before the disciplinary hearing has been completed, unless new evidence enhancing or giving rise to a separate basis of apprehended bias or other special circumstances identified in the jurisprudence were to emerge between now and then. Articulated in the formulation of injunctive relief, my view is that the balance of convenience would likely support refusing an interim injunction before completion of the entire discipline hearing, absent special circumstances. Accordingly, it is my view that judicial restraint would be called for even had a recusal application been made to the Chief within the convened forum, and denied.

[70] Having said that however, counsel should not interpret these reasons as forbidding Constable Ince from resetting his petition after completion of the disciplinary hearing before the Discipline Authority, but before he has pursued any avenues for redress under the *Act*. My comments are not meant to foreclose that possibility. I do not make a ruling on whether, at the end of what I will call the first stage of the process, by which I mean the conclusion of the disciplinary hearing before the Discipline Authority, Constable Ince, if aggrieved, may seek judicial review. I observe that short of being demoted or dismissed, which counsel do not anticipate will be the case here, Constable Ince has no right to an appeal *de novo*, but is left merely to request a review on the record, which may or may not be granted. It therefore strikes me as an open question as to whether the internal course of redress available under the *Act* constitutes a sufficient alternate process which Constable Ince is compelled to follow as a prerequisite to judicial review. I am not deciding that point nor precluding Constable Ince from coming back to Court to have that matter squarely decided.

[71] In conclusion, the application for an interim injunction is dismissed and the hearing of the petition is stayed until further order of the Court. The stay is not tied to the achievement of any particular milestones, as urged by the respondents.

[72] If counsel are unable to agree as to costs, they are at liberty to make submissions.

Madam Justice Ballance