

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

***AND IN THE MATTER OF A POLICE ACT PUBLIC HEARING
INTO ALLEGATIONS AGAINST CONSTABLE BRIAN HOBBS,
VANCOUVER POLICE***

BEFORE: Adjudicator Brian M. Neal QC (rt)

PUBLIC HEARING COUNSEL:	B. HICKFORD
COMMISSION COUNSEL:	G. DELBIGIO, Q.C.
COUNSEL FOR CONSTABLE HOBBS:	M.K. WOODALL
PLACE AND DATE OF HEARINGS:	VANCOUVER, B.C. NOVEMBER 6 & 7, 2017

**REASONS FOR JUDGMENT
ON APPLICATIONS-PART I**

I – The Applications

[1] On June 5, 2017 the Police Complaint Commissioner (the “Commissioner”) ordered a Public Hearing be convened into certain allegations concerning Constable Brian Hobbs (the “Applicant”) pursuant to ss. 138(1) and 143(1) of the *Police Act* R.S.B.C. 1996, c. 367, as amended.

[2] I have been appointed as Adjudicator with respect to this Public Hearing as a result of the Commissioner’s order.

[3] Counsel for Constable Hobbs has made application that I recuse myself from these proceedings. The recusal application is set out in a four-part Notice of Motion dated October 11th 2017 (the “Notice of Motion”).

[4] The Notice of Motion is based on the argument that there is a reasonable apprehension of bias resulting from the fact that Mr. Brock Martland has been retained to provide legal advice to myself as Adjudicator. Specifically, it is argued that a reasonable objective observer, taking into account all of the circumstances surrounding the Office of the Police Complaint Commissioner (the “OPCC”), Mr. Martland’s role as counsel and the public hearing process under the *Police Act*, would conclude that there is a reasonable apprehension of bias with respect to my continued service as Adjudicator in this proceeding.

[5] The Applicant has sought an initial hearing and ruling on parts 1 to 3 of the Notice of Motion requesting the following orders, namely that:

(1) *An order be made pursuant to s. 143(5) and 147 of the Police Act directing the Police Complaint Commissioner and the Deputy Police Complaint Commissioner to:*

(a) *Attend the public hearing to answer questions relevant to the retainer of Mr. Martland as lawyer for the Adjudicator in these proceedings, including but not limited to the topics addressed in the letters attached to the affidavit of Kaari Hytainen sworn 18 September 2017, pgs. 100-106 (“the Letters”); and*

(b) *to bring the all records of communication of any kind among any combination of the following person concerning the retainer of Mr. Martland to act as lawyer for the Adjudicator in these proceedings: the Adjudicator, Mr. Brock Martland, the Police Complaint Commissioner, the Deputy Police Complaint Commissioner, and any employee of the OPCC.*

(2) *The Affidavit of Andrea Spindler dated 14 September 2017 not be admitted into evidence.*

(3) *In the alternative to the relief sought in paragraphs 1 -3, that Andrea Spindler be directed to attend the review on the record for cross-examination on her affidavit.*

(the “Applications”)

II- Evidence in support of the Applications

[6] The evidence in support of the Applications is set out in two affidavits:

- (a) The affidavit of Tom Stamatakis sworn September 29th, 2017; and
- (b) The affidavit of Kaari Hytainen sworn September 18th, 2017.

[7] A third affidavit tendered by Counsel for the Commission, that of Andrea Spindler, has been marked for identification as Exhibit “A” (the “Spindler Affidavit”). Counsel for the Applicant opposes the admission of the affidavit into evidence in these proceedings.

[8] The evidence in support of the Applications adduced by the Applicant can be summarized as follows, namely that:

- (a) Mr. Martland has been retained by the Commissioner to serve as legal counsel in other proceedings, including personal representation for the Commissioner;
- (b) Mr. Martland has been retained by the OPCC to act as legal counsel to Adjudicators, including myself, in these and other similar proceedings under the *Police Act*. Indeed, the Applicant submits that Mr. Martland is the only lawyer to have been retained for the benefit of Adjudicators in the last five *Police Act* proceedings.
- (c) Until relatively recently, Adjudicators have not previously had legal counsel available to provide advice in the context of *Police Act* proceedings.
- (d) Mr. Martland has advised Mr. Stamatakis, President of the Police Union, that he is “*working exclusively for the OPCC on Police Act matters and could not act for police members because of his OPCC relationship*”;
- (e) The Commissioner is a party to these proceedings and represented by legal counsel. Furthermore, the Commissioner is in a position to participate fully in the hearing through counsel, to call witnesses, to introduce evidence and to make submissions on the appropriate outcome; and
- (f) The Spindler Affidavit establishes that the proper parties to give evidence on the issues raised by the Applicant are the Commissioner and Deputy Commissioner.

III- Applicant's submissions

[9] The submission of Counsel for the Applicant is that the evidence surrounding the appointment of Mr. Martland as counsel for myself as Adjudicator raises a prima facie case of a reasonable apprehension of bias that needs to be further explored by calling witnesses and obtaining additional documents.

[10] The Applicant concedes that the facts in evidence do not meet the evidentiary test necessary to show actual bias. However, it is argued that such facts do raise the reasonable possibility of such a perception which would support the recusal of myself as Adjudicator.

[11] Specifically, the recusal argument advanced by the Applicant may be summarized as follows, namely that:

- (a) Mr. Martland may have been appointed as counsel to Adjudicators as a result of the direct, or indirect, influence of the Commissioner, or persons acting under his authority at the OPCC;
- (b) Mr. Martland's relationship with the Commissioner and the OPCC could taint the independence of Adjudicators, including myself, by virtue of the reasonable apprehension of influence of the Commissioner's Office in these proceedings through Mr. Martland;
- (c) There is no authority for Adjudicators to make use of legal counsel appointed by the OPCC, such as Mr. Martland, in the course of *Police Act* proceedings.
- (d) The Commissioner has a broad constellation of direct and indirect control in these and other proceedings. This includes the authority to order the commencement of processes such as public hearings, the appointment of adjudicators, the appointment of public hearing counsel and commission counsel and most recently, the appointment of counsel to represent and advise adjudicators. The Applicant submits that the depth and extent of such control, now extending to the appointment of counsel such as Mr. Martland for adjudicators, raises a reasonable apprehension of bias in the adjudicative function.
- (e) Well established principles of judicial independence applicable to the role of Adjudicators under the *Police Act*, such as those articulated in *Sekela v British Columbia* 2001 BCCA 572, may be violated as a result of Mr.

Martland's potential influence on proceedings while he maintains his other professional relationships and service obligations with the OPCC and Commissioner.

[12] The first part of the Applicant's recusal motion raises the issue of the need for further direct evidence with respect to:

- (a) Mr. Martland's professional relationship with the Commissioner;
- (b) The counsel appointment process utilized by the OPCC; and
- (c) The relationship of the Commissioner, Deputy Commissioner and OPCC staff with Adjudicators and counsel appointed for Adjudicators.

[13] Counsel for the Applicant submits that the information detailed in paragraphs 1 (a) and (b) of the Notice of Motion is needed to fully understand the scope of issues involving counsel, the Commissioner and Adjudicators. Specifically, it is submitted that such information is needed to ensure that the principles considered in *Sekela* (relating to the role of *Police Act* adjudicators) and the general test with respect to bias set out in *The King v. Sussex Justices* [1924] 1 KB, 256 have not been violated. It is the Applicant's position that only the Commissioner and Deputy Commissioner have the information relevant to the matters in issue as set out in the Notice of Motion and that therefore, an order compelling their attendance for cross examination is required.

[14] Counsel for the Applicant submits that there is statutory authority under sections 143(5) and 147 of the *Police Act* to compel the attendance of the Commissioner and Deputy Commissioner to:

(a) attend the public hearing to answer questions relevant to the retainer of Mr. Martland as lawyer for the Adjudicator in these proceedings, including but not limited to the topics addressed in the letters attached to the affidavit of Kaari Hytainen sworn 18 September 2017, pgs. 100-106 ("the Letters"); and

(b) to bring the all records of communication of any kind among any combination of the following person concerning the retainer of Mr. Martland to act as lawyer for the Adjudicator in these proceedings: the Adjudicator, Mr. Brock Martland, the Police Complaint Commissioner, the Deputy Police Complaint Commissioner, and any employee of the OPCC.

[15] In paragraph 2 of the Notice of Motion, the Applicant seeks an order prohibiting the filing of the Spindler Affidavit by Commission Counsel. The affidavit in question, dated September 14, 2017, has been sworn by Andrea Spindler, a senior member of OPCC staff. The affidavit outlines the process by which Adjudicators are appointed under the *Police Act* and confirms the process by which lawyers are made available to Adjudicators, if requested.

[16] Counsel for the Applicant submits that:

- (a) Ms. Spindler does not have personal knowledge of the matters deposed to;
- (b) The affidavit does not address a number of questions raised by the Applicant in correspondence with the Commissioner; and
- (c) The only parties with direct evidence of the matters in issue are the Commissioner and Deputy Commissioner.

[17] As such, Counsel for the Applicant argues that the affidavit of Ms. Spindler should not be admitted into evidence.

[18] In paragraph 3 of the Notice of Motion, Counsel for the Applicant poses an alternative argument in the event Ms. Spindler's affidavit is admitted into evidence. An order is sought directing Ms. Spindler to attend these proceedings for cross examination on the material in her Affidavit in order maintain procedural fairness in the public hearing.

IV- Submissions of Commission Counsel and Public Hearing Counsel

[19] Commission Counsel and Public Hearing Counsel take no issue with the principles of judicial independence and integrity referenced by Counsel for the Applicant.

[20] However, it is the position of such counsel that the Applicant's submissions in relation to the *Sekela and Sussex Justices* decisions have no bearing on the applications currently before this proceeding.

[21] With respect to paragraphs 1 (a) and (b) of the Notice of Motion, Commission Counsel and Public Hearing Counsel submit that:

- (a) The deficiencies identified by the Court of Appeal in *Sekela* with respect to the appointment of Adjudicators and conduct of their work have long since been resolved. As such, it is contended that *Sekela* has no application to the

current proceedings in that none of the evidence supporting the Application raises a prima facie issue of bias or infringement of the principles set out in *Sekela*;

- (b) Adjudicators have a role defined by statute without inherent jurisdiction;
- (c) Sections 51.03, 142(1), 143(1) and 147 of the *Police Act*, read in conjunction with Part 11 of that Act, limits the authority of Adjudicators to compel the attendance of witnesses in public hearings to those who have evidence relating to the misconduct alleged;
- (d) Such authority, it is submitted, does not extend to calling the witnesses sought by the Applicant;
- (e) The orders sought by the Applicant are collateral to the statutory mandate of this public hearing and not required to address the issues assigned to myself as Adjudicator;
- (f) There is no evidence that Mr. Martland's representation of the Commissioner in other proceedings is a personal retainer. Furthermore, even if such representation was a personal matter, the submission is that such facts are irrelevant. The decisions to appoint independent adjudicators and to support adjudicators in the discharge of their duties is, it is submitted, part of the statutory role of the Commissioner under ss. 177(2)(j) of the *Police Act*.
- (g) Procedural fairness principles do not extend to facilitate the broad scope of discovery sought by the Applicant as the issues raised by the Applicant are collateral to the mandate of this public hearing; and
- (h) The Applicant's submissions are based largely on unsupported speculation and do not raise a prima facie case of a reasonable apprehension of bias.

[22] With respect to paragraph 2 of the Notice of Motion, Commission Counsel and Public Hearing Counsel take the position that:

- (a) The Spindler's Affidavit is relevant to the issues raised in the Notice of Motion;
- (b) The affidavit is sworn by Ms. Spindler on the basis of personal knowledge, except where expressly stated to be made on information and belief; and
- (c) The information in the Affidavit completely addresses the evidentiary matters required to meet the issues raised in the Applicant's recusal motion.

[23] As such, it is the submission of both Commission Counsel and Public Hearing Counsel that the Spindler Affidavit be found to be admissible in these proceedings.

[24] Finally, with respect to the relief sought in paragraph 3 of the Notice of Motion, Commission Counsel and Public Hearing Counsel take the position that:

- (a) There is no statutory authority to compel Ms. Spindler to attend for cross examination on her affidavit for the purposes identified by Counsel for the Applicant;
- (b) Procedural fairness does not require cross examination on the Spindler Affidavit because no prima facie issue of a reasonable apprehension of bias has been established in the limited evidence adduced by the Applicant; and
- (c) To permit cross examination on the Spindler Affidavit would simply result in a fishing expedition to try to uncover evidence demonstrating a reasonable apprehension of bias which the Applicant has thus far failed to identify in the evidence supporting the Notice of Motion.

V – Analysis - Application - Paragraphs 1 (a) and (b) of the Notice of Motion

[25] The ultimate issue to be determined in considering the Applicant’s Notice of Motion is whether or not a recusal order should be made. All counsel agree that this is an objective test which is succinctly set out in the Supreme Court of Canada decision, *Committee for Justice & Liberty v Canada (National Energy Board)* [1978] 1 S.C.R. at 394:

“[T]he 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.”

[26] The first three paragraphs of the Applicant’s Notice of Motion must be considered taking into account this important legal context.

[27] With respect to paragraph’s 1 (a) and (b) of the Notice of Motion, I find that there is no statutory authority which would permit me to make the order sought by the Applicant for the following reasons:

- (a) My role as Adjudicator is defined by statute. There is no specific statutory authority

to compel the attendance of persons for the purposes sought by the Applicant.

(b) Subsection 143(5) of the *Police Act* provides authority for Commission Counsel, Public Hearing Counsel and Counsel for the Applicant to call witnesses. However, such witnesses may only be called to give “relevant evidence”. The focus of this public hearing is the conduct of Constable Hobbs, not the Commissioner or Deputy Commissioner. As such, I find that calling either the Commissioner or Deputy Commissioner would be irrelevant to the statutory mandate of this Public Hearing.

(c) Section 147 of the *Police Act* provides as follows:

147 (1) The adjudicator of a public hearing or review on the record may order a person to do either or both of the following:

(a) attend, in person or by electronic means, before the adjudicator to give evidence on oath or in any other manner;

(b) produce for the adjudicator a record or thing in the person's possession or control.

(2) An order under subsection (1) must be in the form of a summons, served on the person by personal delivery or registered mail to the person's last address known to, or on record with, the police complaint commissioner.

I find that the powers under section 147 are ancillary to those under subsection 143(5) empowering an adjudicator to compel the attendance of witnesses called by Commission Counsel, Public Hearing Counsel or Counsel for the Applicant. I do not find that section 147 provides an adjudicator with the independent right to call witnesses and compel their attendance. If I am incorrect with respect to that conclusion, I find that the Applicant has not established a prima facie case warranting an order compelling the attendance of the Commissioner or Deputy Commissioner under section 147.

[28] I have also considered whether or not the order sought under paragraphs 1 (a) and (b) of the Notice of Motion must be made to ensure procedural fairness in these proceedings. I find that there is no basis to make such an order for the following reasons:

(a) The Applicant seeks additional evidence from the Commissioner and Deputy Commissioner to augment the affidavits supporting the Notice of Motion. The Applicant bears the burden of establishing that such evidence is material, relevant and necessary to ensure fairness in the conduct of these proceedings. I cannot find that the Applicant has

discharged the fundamental burden of establishing an evidentiary foundation in support of the need for further evidence on the issues raised in the Applications. Let me explain.

- (i) The Spindler Affidavit is sworn on the basis of personal knowledge, except where expressed to be on information and belief. Ms. Spindler clearly holds a senior role within the OPCC and has given sworn evidence on many of the issues raised by the Applicant. I am not satisfied that any basis has been established to expand on that information as sought by the Applicant by calling other witnesses. The issues may be of interest to the Applicant, but are collateral to the mandate of this public hearing;
- (ii) Mr. Martland has clearly acted for the OPCC in various capacities, including representation of the Commissioner, although there is no evidence that such representation relates to anything other than the discharge of the Commissioner's duties under the *Police Act*.
- (iii) Mr. Martland has also apparently refused assignments to act on behalf of police officers or their associated unions.
- (iv) However, as counsel, it is Mr. Martland's prerogative to accept or reject retainers and to structure his practice as he sees fit. In doing so, Mr. Martland is obviously bound by his ethical obligations as a lawyer. Those obligations include a fundamental obligation to avoid conflicts of interest and to serve the best interests of his clients in accordance with the law.
- (v) The fact that Mr. Martland has chosen to restrict his practice by not accepting retainers from police officers does nothing to raise a prima facie case warranting examination of his relationship with other clients, including the OPCC and Commissioner.
- (vi) With respect to the provision of legal counsel to adjudicators, there is clear authority for such resources to be made available to decision makers: *Omineca Enterprises Ltd. V British Columbia* B.C.J. No 2337 (C.A.)
- (vii) With respect to the constellation of powers associated with the Commissioner's role relating to counsel and adjudicators, the *Police Act* sets out a broad statutory duty under subsection 177 (1) as follows:

(1) The police complaint commissioner is generally responsible for overseeing and monitoring complaints, investigations and the administration of discipline and proceedings under this Part, and ensuring that the purposes of this Part are achieved.

As such, the Commissioner's role is much different than that of other parties involved in *Police Act* processes. The Commissioner's role is not designed to achieve a particular outcome or decision, nor does it serve personal objectives of the Commissioner. The Commissioner is mandated by statute to perform a wide variety of tasks in the public interest, including the engagement of a variety of independent decision makers, including adjudicators responsible for public hearings.

(viii) With respect to the engagement of adjudicators, the Commissioner also has an important specific statutory responsibility under sub section 177 (2) (j) of the *Police Act* to “inform, advise and assist adjudicators” in discharging their duties under Part 11. As such, I find that the Commissioner has a clear statutory duty to maintain engagement with adjudicators to support their role.

(b) I find that considering such circumstances, and the test for a reasonable apprehension of bias articulated by the Supreme Court of Canada, the evidence and argument advanced by Counsel for the Applicant does not demonstrate the need for further orders compelling additional evidence from the Commissioner, Deputy Commissioner or any other staff member at the OPCC to ensure procedural fairness.

(c) If there is a reasonable apprehension of bias to be considered, it must be evidence known to the Applicant or a reasonable person at the time a recusal application is made. I agree with Commission Counsel that supplementary investigation of relationships in the manner sought by the Applicant can best be characterized as a fishing expedition.

(e) My obligation as Adjudicator under section 142(3) of the *Police Act* is to proceed with this public hearing at the “*earliest practicable dates*”. That statutory duty cannot, however, compromise my fundamental obligation to ensure a fair hearing for the Applicant. Taking into account both of those obligations, I find that there is no compelling reason proven by the Applicant to delay the proceedings by embarking on a collateral investigation of issues surrounding Mr. Martland's role as counsel, and any possible connection with a reasonable apprehension of bias.

(e) Finally, it is important to recognize Mr. Martland's role in these proceedings under the *Police Act*. Mr. Martland serves as a legal advisor, not the statutory decision maker. As such, any consideration of the need for further exploration of additional evidence to with respect to allegations of a prima facie case of an apprehension of bias are collateral to consideration of my role as Adjudicator. The allegations made in submissions by Counsel for the Applicant focus on the possible indirect influence Mr. Martland may be perceived to have over my role as Adjudicator. I find that the Applicant has not established a prima facie case warranting further examination of other witnesses concerning the indirect role of Mr. Martland.

[29] The relief sought in paragraphs 1 (a) and (b) of the Notice of Motion is therefore denied.

VI – Analysis - Application – Paragraph 2 of the Notice of Motion

[30] The Spindler Affidavit clearly touches on many of the issues raised by Counsel for the Applicant. It may not extend to collateral matters the Applicant wishes to explore, however, it does directly address the subject of these applications.

[31] There is no specific statutory provision providing me with authority to prohibit Commission Counsel from filing Ms. Spindler's affidavit, nor any to compel the augmentation of the affidavit content in any manner.

[32] The Applicant has not demonstrated any compelling reason to exclude the Spindler Affidavit to ensure procedural fairness in these proceedings. Indeed, it might be argued that given the extensive reference to the affidavit in submissions of counsel, the filing of the same serves fairness by putting into evidence material which has been a major focus of the applications before me.

[33] I find that the Spindler's Affidavit is therefore relevant to consideration of these applications and, I find, admissible. The Spindler Affidavit is marked as Exhibit # 6 in these proceedings.

VII – Analysis - Application – Paragraph 3 of the Notice of Motion

[34] I find that the request to compel Ms. Spindler to attend these proceedings for cross examination is advanced without statutory authority. There is no evidence that Ms. Spindler has relevant evidence to give with respect to the subject of these proceedings, which is the conduct of Constable Hobbs. Absent such a conclusion, I find that I have no statutory authority to order Ms. Spindler's attendance at this public hearing.

[35] I further find that procedural fairness does not require me to make an order compelling Ms. Spindler's attendance for the following reasons:

- (a) Ms. Spindler's affidavit provides context in connection with certain administrative matters involving the OPCC, adjudicators and legal counsel. It does not touch on the specifics of the allegations concerning Constable Hobbs. The matters raised in the Ms. Spindler's affidavit are therefore collateral to these proceedings.
- (b) The Applicant has not established that fairness in this public hearing requires an order to expand the focus of the hearing to consider any other evidence Ms. Spindler may have on the questions addressed in her affidavit; and
- (c) The evidence adduced by the Applicant has not established an issue of relevance material to the mandate of this public hearing which would permit Counsel for the Applicant to embark on further exploration of the issues raised in connection with Mr. Martland, the Commissioner and the OPCC. The limited evidence adduced by the Applicant simply does not raise any prima facie issue putting in issue the presumption of regularity. Nor does it justify further investigation of the issues raised in the Notice of Motion: *R. v Pires* [2005] 3 S.C.R. 343.

[36] The application to cross examine Ms. Spindler is therefore denied.

VIII – Remaining Matters on the Notice of Motion

[37] One final matter remains outstanding under the Applicant's Notice of Motion, the substantive application for my recusal as Adjudicator. The parties may speak to that matter at 9:30 am November 15, 2017 at the Robson Square Provincial Courthouse.

Brian M. Neal Q.C.(rt)

Adjudicator