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

AND IN THE MATTER OF A POLICE ACT HEARING INTO ALLEGATIONS AGAINST CONSTABLE EDGAR DIAZ AND FORMER CONSTABLE MICHAEL HUGHES OF THE SOUTH COAST BRITISH COLUMBIA TRANSPORTATION AUTHORITY

File Number: 2016-01
November 17, 2017

Before: Adjudicator R. McKinnon

Reasons for Judgment

Public Hearing Counsel:	B. Hickford
Commission Counsel:	G. Del Bigio, Q.C.
Counsel for Constable Diaz:	D. G. Butcher, Q.C.
Counsel for Former Constable Hughes:	M.K. Woodall

[1] The applicants, by motion, seek my recusal in respect to a Public Hearing directed by the Police Complaints Commissioner (the PCC). The motion also sought preliminary relief in the form of discovery of documents and persons which relief I declined after hearing submissions on September 28, 2017. The substantive recusal motion was then reset and heard on November 17, 2017. These reasons relate to this substantive motion and should be read in conjunction with those filed consequent upon the September 28 hearing. For ease of reference I attach the September 28 hearing decision as appendix A to these reasons.

[2] Mr. Woodall (joined by Mr. Butcher) contends that notwithstanding my refusal to grant the preliminary relief, on the ”facts” that are before me, set against the appropriate legal test, recusal is the appropriate remedy.

[3] Commission Counsel (CC)and Public Hearing Counsel (PHC) dispute the applicants' version of the “facts” and submit that when one places the legal test against the evidence before me, there can be no question that the Applicants have failed to discharge the burden upon them to demonstrate apprehended bias so as to support recusal.

OVERVIEW

[4] The Applicants allege that my counsel, Mr. Brock Martland, is in a position whereby he could potentially influence my decisions for the following reasons:

> He is available to the Discipline Authority to provide advice and it is irrelevant whether that authority either seeks or receives advice.
>
> He acts for Adjudicators in five cases and is also the personal lawyer to the Commissioner.
>
> The Adjudicators have suddenly decided to engage their own counsel while for the previous fifteen years they did not have counsel.
>
> He is on a long term retainer with the Office of the Police Complaints Commission (OPCC) and is not free to work for police officers

[5] It is contended that “there is a reasonable apprehension that the PCC arranged for Mr. Martland to be retained so that Mr. Martland would give advice to the retired judge and that that advice will not be impartial as between the PCC and

the member." The Applicants say that they do not suggest that Mr. Martland would consciously influence an Adjudicator, nor that an Adjudicator would let him/herself be so influenced, rather the combined effects of the four factors set out above raises a reasonable apprehension of bias so as to deny the Applicants the right to an independent Adjudicator.

[6] In his written submission, Mr. Woodall stated in para 9 the following:

> The applicants' complaint is not with Mr. Martland or the Retired Judges. Their complaint is with the Police Complaint Commissioner. The Police Complaint Commissioner has a statutory duty to implement the Police Act with impartiality and transparency. The new practice in which Retired Judges have suddenly and unanimously begun appointing a lawyer, and that lawyer is also Mr. Lowe's lawyer, is the opposite of transparent, and appears deliberately intended to undermine the appearance of impartiality.

[7] One would be hard pressed to characterize that position as anything other than an allegation that there is a conspiracy, instituted by the PCC but encompassing Mr. Martland and myself, to deny the Applicants' their right to an independent Adjudicator free from apprehension of bias. I am reminded of the phrase, if it walks like a duck, sounds like a duck and looks like a duck, chances are it is a duck. Thus, notwithstanding the Applicants' assertion that no aspersions are cast upon Mr. Martland or myself, in my view, any informed person, viewing the Applicants' submission would conclude that they are alleging misconduct on the part of the Commissioner, the Adjudicator and Mr. Martland.

[8] In my reasons consequent upon the September 28, 2017 application, I rejected Mr. Woodall's version of the facts upon which he relied to demonstrate apprehension of bias. In particular, I determined the following:

> Mr. Martland does not and has not acted for Mr. Lowe "personally". Mr. Lowe is the Commissioner and it is the Commissioner for whom Mr. Martland acts.
>
> There is no evidence to support the assertion that Mr. Martland's decision to decline retainers from police officers was in any way motivated by some direct or inferred (mis)conduct on the part of the OPCC.

[9] The applicant's reference to a "new practice whereby Adjudicators suddenly have begun appointing lawyers to act for them" is similarly unsupported by any

evidence. I have only Mr. Woodall's assertion that this is something new. I endorse the submissions of CC on this aspect where at paras 9 and 10 he stated:

> 9.the Applicant also implies that it is somehow inappropriate for a retired judge acting in a non-judicial capacity as a statutory decision-maker in a Police Act matter, to have access to legal counsel because of his or her prior judicial status. Not surprisingly, the Applicant cites no authority for that proposition.
>
> 10. The law is clear that statutory decision-makers are entitled to have the benefit of legal counsel. Omineca Enterprises Ltd. v. British Columbia (Minister of Forests), (1993) B.C.J. No 2337 (C.A.); Sutherland v. British Columbia (Superintendent of Motor Vehicles), 2017 BCSC 263 at paragraph 85. While it may be an irrelevant consideration, it certainly is no secret that courts, up to and including the Supreme Court of Canada, have law clerks and other lawyers to assist them in their judicial work behind closed doors. It is nonsense to suggest that in a tribunal context, an adjudicator who was formerly a judge should not have the benefit of legal counsel because of his or her prior judicial expertise.

[10] I accept the Applicants' submission that the Police Act does not specifically state that a retired judge, acting as an Adjudicator, is entitled to the assistance of legal counsel. However, it does not prohibit it and in any event section 177(2) of the Police Act mandates that one of the duties of the PCC is that of "assisting and advising adjudicators and discipline authorities". As pointed out by CC, "as retired judges, unlike police discipline authorities, do not have the resources to retain counsel at their own cost, the PCC has assisted them by providing them with the option of having their own legal counsel."

[11] I also accept the submissions of CC that the following are examples of the Applicants' submissions that are replete with assertions of fact and speculation which lack any evidentiary foundation:

> Until a few months, ago retired judges have not had their own lawyers and have not had their own lawyers for at least fifteen years.
>
> In recent months, no lawyer other than the Lawyer has acted for a retired judge which the Applicant says cannot be coincidence.
>
> The PCC has a very small roster of lawyers who act as commission or public hearing counsel.
>
> Lawyers who agree to act for the PCC in the Police Act process may not act for other parties in the Police Act process.

> There are many experienced lawyers who do not act for the Police Complaint Commissioner or Mr. Lowe personally.

[12] There is no evidence whatsoever to support any of those assertions. Insofar as the Applicants' assertion that the appointment of Mr. Martland "cannot be a coincidence", I agree with CC that it is more likely his appointment reflects the high regard in which he is held by the Adjudicators. CC also points to numerous incidence where lawyers acting for the PCC have acted for individual police officers, including Mr. Martland.

THE EVIDENTIARY BURDEN AND THE PRESUMPTION OF REGULARITY

[13] The burden of proof lies with the Applicant to establish an evidentiary foundation to support bias allegations; mere suspicion or speculation will not suffice: Sutherland v. British Columbia (Superintendent of Motor Vehicles), 2017 BCSC 263 and paragraphs 76, 77: Bui v. British Columbia (Superintendent of Motor Vehicles), 2016 BCSC 1572.

[14] Absent evidence to the contrary, It must be presumed, public officers will act fairly and impartially in discharging their responsibilities and will consider the particular facts and circumstances of the case: Adams v. British Columbia (Workers' Compensation Board), (1989) B.C"J. No 2478 (C.A.).

[15] Having concluded that the Applicants' have failed to establish any evidence of "apprehension of bias" in respect to the PCC, the OPCC, Mr. Martland or myself, I must conclude that the presumption of regularity applies. Accordingly, the application for recusal Is dismissed.

Ronald A. McKinnon, Adjudicator

Appendix A

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

AND IN THE MATTER OF A POLICE ACT HEARING INTO ALLEGATIONS AGAINST CONSTABLE EDGAR DIAZ AND FORMER CONSTABLE MICHAEL HUGHES OF THE SOUTH COAST BRITISH COLUMBIA TRANSPORTATION AUTHORITY

OPCC File Number: 2016-01
Registry: Vancouver

Before: Adjudicator R. McKinnon

Reasons for Judgment

Public Hearing Counsel:	B. Hickford
Commission Counsel:	M. R. Jette
Counsel for Constable Diaz:	D. G. Butcher, Q.C.
Counsel for Former Constable Hughes:	M.K. Woodall
Place and Date of Trial/Hearing:	Vancouver, B.C. September 28, 2017

[16] **THE COURT:** A Public Hearing has been directed by the Police Complaints Commissioner, pursuant to ss. 138(1) and 143(1) of the *Police Act*, in respect to the alleged misconduct of Constable Edgar Diaz and former Constable Michael Hughes. I was appointed the Adjudicator in respect to that hearing.

[17] Counsel for Constable Diaz and former Constable Hughes have made an application for an order of recusal of me as an Adjudicator based upon the grounds of reasonable apprehension of bias. It is alleged that my counsel, Mr. Brock Martland, has acted for the Commissioner in other matters and thus may be biased so as to influence my conduct of this Public Hearing.

[18] The applicants, Constable Edgar Diaz and former Constable Michael Hughes, by notice of motion seek the following preliminary relief:

1. That a summons be issued, pursuant to ss. 143(5) and 147 of the *Police Act* for each of Mr. Stan Lowe and Mr. Rollie Woods 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 , sworn September 18, 2017 at 100-106 (“the letters”); and

    (b) Bring all records of communication of any kind between or amongst any of the following persons concerning the retainer of Mr. Martland to act as lawyer for the Adjudicator in these proceedings: the Adjudicator, Mr. Brock Martland; Mr. Stan Lowe, the Police Complaint Commissioner (“PCC”; Mr. Rollie Woods, the Deputy Police Complaint Commissioner; and any employee of the Office of the Police Complaint Commissioner (“OPCC”).

2. The affidavit of Andrea Spindler dated September 14, 2017 not be admitted into evidence.

3. In the alternative to the relief sought in paragraphs 1 and 2, a summons be issued to Andrea Spindler pursuant to ss. 143(5) and 147 of the *Police Act*.

[19] The motion goes on to seek other relief, including recusal of the Adjudicator, however, "other relief" is for another day. The applicants first seek a ruling on matters referred to in paragraphs 1, 2, and 3.

[20] The essence of the application in this matter, and in four other "companion" cases, is that the process leading to the appointment of counsel for the Adjudicator in these cases raises a reasonable apprehension of bias. At bar, it is contended that Mr. Martland may have been appointed my counsel through the direct or indirect influence of the Police Complaint's Commissioner or persons acting under his authority.

[21] The applicants' allege that the following uncontroverted facts raise a prima facie case of bias that needs to be fleshed out by calling witnesses and obtaining various documents:

a) Mr. Martland has acted for the Commissioner 'personally' in other matters.
b) Mr. Martland is acting in this and other companion cases
c) Mr. Martland has advised the police union president (see Ex. 3) that he will not act for police officers given that he acts for the OPCC.

[22] It is conceded that these facts do not meet the evidentiary test necessary to show bias, but it is contended that they raise the possibility, and thus the applicants should be given liberty to call the various witnesses and documents to see whether there is evidence of bias.

[23] In my view, none of the facts set out in paragraphs a), b), and c) raise a prima facie case of bias that would entitle the applicants to further enquiries. Mr. Martland has acted for the OPCC in various capacities, which is his right as counsel. A lawyer is free to accept or reject retainers and is free to restrict his/her practice however he or she sees fit. There is no evidence that Mr. Martland's decision to decline retainers from police officers was in any way motivated by some direct or inferred (mis)conduct on the part of the OPCC.

[24] Mr. Woodall claims that Mr. Martland has a personal relationship with Mr. Lowe, the Police Complaints Commissioner, but there is no evidence whatever to support that claim. The only evidence is that he has a professional relationship as does every lawyer who is retained to act.

[25] It is conceded by all counsel that my role is entirely statutory with no ability to invoke inherent jurisdiction. That being so, counsel for the Commissioner and public hearing counsel submit that a plain reading of ss. 51.03, 142(1), 143(1) and 147 read in conjunction with Part 11 of the *Police Act* limits my authority to call witnesses to those who have evidence relating to the misconduct alleged.

[26] I do not need to determine that issue given my conclusion that there is no evidence that raises any reasonable apprehension of bias sufficient to embark upon the enquiries sought by the applicants. In any event, that precise issue has been argued in the Supreme Court of British Columbia and decision has been reserved, see R v. Plummer 2017 BCSC 1579.

[27] Numerous cases were cited by the applicants and no issue was taken with the principles enunciated therein. The respondents simply submit that none of these cases assist the applicants, and in particular, the case of *Sekela v. Police Complaint Commissioner*, 2001 BCCA simply does not apply to the facts at bar.

[28] In *Sekela* the issue before the Court was whether the terms of a service contract entered into by a retired Supreme Court Judge, acting as an adjudicator under the *Police Act*, raised an appearance of bias. The contract included provisions allowing the PCC to terminate the contract at any time, to pay on a per diem basis up to a certain amount, and to review draft findings of adjudicators. The Court determined that those provisions did give rise to a reasonable apprehension of bias. In the result, the appointment process for Adjudicators was amended and they are no longer required to enter into a service contract, are not subject to termination by the PCC and once appointed are paid on a per diem basis. *Sekela*, therefore, has no application to the case at bar.

[29] I agree with counsel for the Commissioner that the applicants' submissions are replete with assertions of fact and speculation which lack any evidentiary foundation.

[30] The burden of proof lies with the Applicants to establish an evidentiary foundation to support their bias allegation, see *Sutherland v. British Columbia (Superintendent of Motor Vehicles)* 2017 BCSC 263, mere suspicion or speculation will not suffice.

[31] The relief sought in paragraph 1 of the motion is dismissed.

[32] I turn now to the relief sought in paragraph 2, which asks that the affidavit of Andrea Spindler not be admitted into evident. Alternatively, the applicants ask that a summons be issued pursuant to ss. 143(5) and 147 of the *Police Act*.

[33] Ms. Spindler's affidavit sets out the process by which adjudicators are appointed. She deposed that although Adjudicators are provided with a list of lawyers who are under contract with the OPCC, they are free to choose any lawyer. However, if they choose a lawyer not on the list, that person must contract with the OPCC and be paid at the set rate. In my view the Spindler affidavit is admissible in these proceedings.

[34] It is also my view that it would not be appropriate to issue a summons, assuming I have that authority, to Ms. Spindler. Given my determination that the Applicants have not raised any evidence of a reasonable apprehension of bias, the issuance of a summons to Ms. Spindler would simply be a fishing expedition to try and uncover bias which the applicants have been unable to establish thus far.

[35] The parties may set a resumption of the motion to determine the balance of the relief sought in paragraphs 5 and 6.

Ronald A. McKinnon, Ajudicator