

**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

[1] 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.

[2] 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.

[3] 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 Hytainen , 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*.

[4] 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.

[5] 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.

[6] 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.

[7] 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.

[8] 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.

[9] 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.

[10] 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.

[11] 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.

[12] 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.

[13] 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.

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

[15] 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.

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

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

[18] 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.

[19] 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.

[20] 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, Adjudicator