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The Facts

[7] The proceedings to date have been protracted. The abuse of process motion and other proceedings have taken a total of fifteen hearing days. The hearing on the merits has not yet begun.

[8] The respondents have completed their evidence in the abuse of process motion. The Prosecutor is presenting evidence

[9] An issue arose during Commissioner Fantino's evidence-in-chief on October 17, 2008, founding the primary grounds for the Prosecutor's concern about bias

[10] The Adjudicator ruled prior to the lunch break that the Commissioner could not refresh his memory with respect to the contents of Exhibit 45. The Adjudicator agreed with submissions made by the respondents' counsel that the Commissioner had given clear answers with respect to his decision to extend the six-month limitation period for disciplinary hearings prior to reviewing submissions from the respondents. After the lunch break the Adjudicator allowed the final page of Exhibit 45 signed by Commissioner Fantino to be presented to him. Questions were asked and answers given. Concerns were raised primarily in the absence of the Commissioner by respondents' counsel based upon the answers given as to whether or not there may have been some communication with the Commissioner over the lunch break.

[11] This concern is reviewed in the absence of the Commissioner at page 100-101 of the transcript:

MR. GOVER: Well, I can assure you that there has been no communication with the witness over the lunch hour.

THE ADJUDICATOR: I'll decide. Now, I'm not saying anything further but I'm upset and I'm not putting anything further on the record, getting close to professional conduct. Now, I'm going to have the Commissioner return and you move on to another subject. You understand?

[12] It is these comments that ground the Prosecutor's primary concern about bias

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[13] Counsel for the respondents confirm in submissions that there is no suggestion made that the Prosecutor in any way acted inappropriately.

[14] The Adjudicator states at page 101-102 of the transcript:

THE ADJUDICATOR: And Mr. Falconer, I agree with you 100 per cent. I'm not pointing my finger at Mr. Rees or Mr. Gover. All counsel have been up front with me since I started, and I don't put any reflection on your integrity whatsoever, but I just put on the record that with that gratuitous comment made in the manner in which it was, it's upsetting and it's something I'll have to deal with when I come to do my thing. Thank you, gentlemen. So the Commissioner will return.

[15] Counsel had a conference call with the Adjudicator on October 31, 2008 to schedule the balance of the abuse of process motion. No mention was made by the Prosecutor during the telephone call of any issue with respect to a potential recusal motion.

[16] It was agreed that the evidence of Commissioner Fantino would be completed on November 5, 2008 or at the latest, on November 10, 2008, when the final prosecution witness was to be called. Argument on the abuse of process motion was scheduled to be completed on November 10, 2008.

[17] On November 3, 2008, the prosecution brought a motion returnable November 5, 2008 requesting that the Adjudicator recuse himself due to bias. He filed a lengthy factum and on November 5, 2008, when it was anticipated that the evidence of Commissioner Fantino would continue, the Prosecutor made submissions with respect to the recusal motion.

[18] When questioned by respondents' counsel and the Adjudicator as to why no mention had been made of the proposed recusal motion during the telephone conference call on October 31, 2008, Mr. Gover responded at page 14 and 15 of the transcript:

Questions have been raised about the timing of this motion, Mr. Adjudicator, and I'll address them in a moment. I want to assure you that this motion is not lightly brought, and I'll be taking you to the authorities in that respect. But initially in relation to timing I would ask you to make note of this that, of course, as with many situations, the issue of whether to raise this motion was an evolving

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situation and, clearly, consideration was given to it prior to our conference call of last Friday, October 31

Now, the question might be asked what changed, and something profound changed and that is that we were told Monday morning that, in fact, we had the support of the Attorney General. We could expect that in the event of taking any further steps, so hence, the decision then to proceed with the motion for recusal.

[emphasis added]

[19] In response to the request by the respondents' counsel for disclosure about the involvement of the Attorney General, the Adjudicator states at page 18 and 19 of the transcript:

THE ADJUDICATOR: I think that's fair in respect to the Attorney General. I'd like to know too. I mean, right now it's hanging in the air. What's it about? Have you got something to file? Can you help me?

MR. GOVER: I can indicate, and I would like to get some submissions to respond to other issues, but I can tell you, sir, that we've had communication with counsel for the Ministry of the Attorney General, with counsel at the Legal Services Branch of the Ministry of Community Safety and Correctional Services, that have taken us to the conclusion on Monday morning that the support of the Attorney General could be anticipated in the event of any further proceedings in relation to this motion, and I put it on that basis. And I can tell you quite frankly, Mr. Adjudicator, that in the event that the motion for recusal – and I just say this because the issue has been raised.

I don't say this in any way to manifest any disrespect, far from it. But in the event of the motion for recusal being dismissed, we expect to bring an application for judicial review and we expect to have the Attorney General's support in doing that.

[emphasis added]

[20] Respondents' counsel then raised various concerns about perceived and actual conflict of interest. Several counsel from the Attorney General's department had represented various witnesses during their testimony in the abuse of process motion.

[21] The Adjudicator states at pages 24 and 25 of the transcript that he would not get into the merits but he would await submissions during argument of the recusal motion:

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THE ADJUDICATOR: Mr. Falconer, I'm sitting here as an adjudicator and I have this Notice of Motion to recuse me. I'm not going to get deeply into your position. I'm going to let Mr. Gover put his case before me. I realize I'm focusing on this Notice of Motion.

At the end of the day, both counsel will argue with me or place argument in front of me as to what I should do. Mr. Gover certainly will. And then after I hear everybody and I read everything, I'm going to make a decision as to whether I'm going to recuse myself or not, and it's proper or improper -- I don't care what word you use -- it has already been indicated that if I say "no" that there is going to be a judicial review

Sometimes you wonder whether that's proper conduct or proper words to use when you have a motion before you of this nature, but it has been said and it's there. In other words, Your Honour, if you don't recuse yourself, we're going to have a judicial review. That's like telling a judge in a criminal courtroom, well, if you don't give me a dismissal, I'm going to appeal your decision.

So I mean, Mr. Gover probably wants to put me in the picture as to just where he is and he certainly tells me when he indicates that to me, but your comments are on the record and I'm going to focus today on this Notice of Motion. And Mr. Gover, I'm going to let him go through it and I'll make my decision.

[22] Mr. Gover chose to recuse himself from the argument of the recusal motion and appointed alternate counsel to conduct that motion. Mr. Thomas Curry argued the recusal motion on November 10, 2008 as well as this motion for a stay.

[23] On November 10, 2008 after hearing submissions, the Adjudicator declined to recuse himself. In his reasons, he was highly critical of the conduct of the Prosecutor. I refer to excerpts from his reasons:

(page 6) I found Mr. Gover's comments to me as an adjudicator to be highly improper. These comments are particularly shocking since at the time they were made I had not yet made a decision to voluntarily remove myself or not.

(page 8) The comments to this Tribunal by Mr. Gover have absolutely, as far as I am concerned, no relevancy on this motion and you have to wonder why they were made. I've been a judge for 33 years and, therefore, my association with the Attorney General's office have been very limited but I can say this, that over all these years I've always found this Ministry to be fair and honourable and, to my knowledge, not even a hint of any interference with a judicial officer.

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(page 9) Mr. Gover even placed on the record names of a few lawyers who expressed support for a judicial review. If this is in fact the case, it has political overtones and it is as close to political interference as you can get.

(page 10) I respectfully submit that these comments considered in their totality amounts to an attempt to pressure and to intimidate a judicial officer and that would be so whether you're sitting in a courtroom, whether you're before an adjudicator, or presiding over an administrative tribunal.

This Stay Motion

[24] Counsel for the Commissioner in this motion for a stay raises three issues with respect to perceived or actual bias. The first issue relates to comments made by the Adjudicator with respect to another witness. The second is with respect to comments made by the Adjudicator with respect to Commissioner Fantino. The third is with respect to the critical comments made about the conduct of the prosecution in the reasons for the Adjudicator refusing to recuse himself.

[25] I turn to consider each of these three submissions.

Issue One – Evidence with Respect to Another Witness

[26] A highly ranked officer agreed to co-operate and provide evidence on behalf of the respondents in the abuse of process motion. Inadvertently, the officer produced a document to the respondents' counsel from another file. This document was noticed by junior counsel for the respondents. It was not actually reviewed by Mr. Falconer. Quite properly, the inadvertent error with respect to disclosure of the document was disclosed by respondents' counsel to the Prosecutor and to the Adjudicator. There was discussion on the record about how to resolve the issues to enable the officer to testify without personal jeopardy. Mr. Gover undertook that he would not initiate any proceedings with respect to this inadvertent disclosure but the police authorities would not provide such an undertaking. The Adjudicator does express concern that the authorities were not more co-operative.

[27] In my view the comments made by the Adjudicator must be taken in context. The comments express frustration with the position of the authorities in the circumstances, but do not

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express bias. I find that there is no basis to conclude that the Adjudicator is biased in favour of one side or the other based on any comments with respect to this witness or any suggestions about how any potential personal jeopardy for the witness could be overcome.

Issue Two – Commissioner Fantino

[28] I have carefully reviewed the evidence of Commissioner Fantino including the comments made by the Adjudicator. I note that most of the comments were made in the absence of the Commissioner.

[29] Counsel for the respondents consent and agree that the Prosecutor may clarify during re-examination, what, if anything transpired during the lunch hour with respect to Exhibit 45 to clear any cloud or perceived cloud with respect to the evidence of Commissioner Fantino. In my view this issue can be adequately dealt with during the re-examination. This solution was referred by the Adjudicator in his reasons in the recusal motion. I refer to page 13-14 of those reasons:

I took the view that I – rightly or wrongly, that it was a matter properly dealt with re-examination by Mr Gover after Mr. Falconer had completed his cross-examination. I took this approach in the interest of fairness and in accord with the principle of natural justice. No ruling was ever made by this adjudicator that Commissioner Fantino committed professional misconduct at any time, in spite of Mr. Gover's claim to the contrary, and if a ruling to this effect has been reported in the media then it is an error.

[30] In my view, it was inappropriate to bring a motion prior to completion of the cross-examination and re-examination of Commissioner Fantino.

[31] In any proceeding, be it an administrative proceeding before a tribunal, or during a trial, there are often perceived issues that arise during the proceeding that appear to have great impact. However, once the evidence is completed and there is a full context, the perceived issue becomes a non-issue, or much less important.

[32] As a minimum, in my view, the Prosecutor should have allowed the evidence of Commissioner Fantino to have been completed before seeking any judicial remedy

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Standing

[33] In any event, it is not clear to me that the Commissioner, not as a witness, but as Chief of the disciplinary process for the Ontario Provincial Police, has standing to bring a motion for a stay of this disciplinary proceeding

[34] The Commissioner cannot seek judicial review of a substantive order made by an adjudicator when there is no right of appeal afforded in the *Police Services Act*, R.S.O. 1990, c. P.15: see *Watson v. Catney* (2007), 84 O.R. (3d) 374 (C.A.).

[35] In *Watson v. Catney*, the Adjudicator appointed by the Chief of Police had granted a stay of the police disciplinary hearing after a finding that there had been an abuse of process. The Chief then attempted to initiate judicial review upon the merits of the abuse decision. The Ontario Court of Appeal concluded that allowing the Chief of Police to judicially review a decision of his delegate would undermine confidence in the police disciplinary process. I refer to para. 28-30 of the decision:

It is, in my view, logical and consistent with the PSA that the Chief not enjoy a right of appeal because the Chief is, in effect, the decision-maker — sometimes personally and other times, as in this case, through the police officer he appoints to be the hearing officer. In logic and in policy, if the Chief cannot challenge the decision of his delegate by way of appeal, he should not be able to mount a similar attack through the vehicle of judicial review. Such an attack “would be allowing that to be done indirectly which cannot be done directly”: see *Manitoba Chiropractors Assn. v. Alevizos*, [2003] M.J. No. 206, 177 Man R. (2d) 45 (C.A.), at para 28.

In addition, the absence of a right of appeal for the Chief, and rejection of standing for the Chief to challenge a decision of a hearing officer by way of judicial review, makes sense in light of the Chief’s pervasive role in the discipline process. The Chief is the principal actor in this process — he may make a complaint about the conduct of one of his police officers (s.64(1)); he shall cause the complaint to be investigated (s.64(1)); he must determine if the impugned conduct might constitute misconduct and, if it does, he must hold a hearing (s.64(7)); he designates the prosecutor at the hearing (s.64(8)); he decides whether to conduct a hearing himself or to authorize another police officer to conduct on his behalf (s.64(7) and 76(1)); and he must take action against a police officer if misconduct is proven at the hearing (s.64(10) and s.68(1)).

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If, in the absence of an explicit appeal right, the Chief were granted a standing to review his decision or, as in this case, the decision of a police officer he has delegated to hold a hearing on his behalf, it could erode confidence -- on the part of the police generally, though subject to discipline proceedings, and the public at large -- in the independence and fairness of a disciplinary process. The PSA reflects principles of fairness and natural justice in that it does not allow the Chief, who has control of virtually all aspects of the discipline process, to seek to overturn a decision he does not like by a hearing officer he appointed. The Chief concedes that he cannot do this by way of appeal; in my view, a proper interpretation of the PSA, and considerations of principle and policy, preclude an identical attack grounded in judicial review.

[36] The Adjudicator is the Commissioner's delegate to conduct this disciplinary proceeding. Two previous Adjudicators appointed by the Commissioner were disqualified to conduct this disciplinary proceeding. One candidate may have been a witness in the abuse of process motion. The other Adjudicator recused himself as he had a very close connection to the Commissioner who would be a witness in the abuse of process motion.

[37] The Adjudicator, Leonord Montgomery is a retired trial judge. He was appointed as Adjudicator in the Commissioner's capacity as chief of police. The issue of standing is further complicated in this case as the Commissioner is a witness who is seeking equitable relief.

[38] A stay is an extraordinary discretionary remedy. In this case the stay is requested during a disciplinary hearing from which the Commissioner has no right to initiate judicial review. He is a witness. It appears that bringing a motion to stay, at this very unusual point in the abuse of process motion during the cross-examination of the Commissioner Fantino, may be an attempt to circumvent the clear ruling and impact of the *Watson v. Catney* decision.

Issue Three — Conduct of prosecution

[39] In his reasons, the Adjudicator is highly critical of the Prosecutor's conduct. The Adjudicator interpreted the submissions of the Prosecutor as a threat to both his independence and the integrity of the proceeding. An Adjudicator, like a judge, has the obligation to control the proceeding before him or her. At times, conduct of counsel warrants criticism and censure. This appears to be such a case. Perhaps the Adjudicator overreacted. Perhaps he did not, and simply called a spade a spade. On either view, I do not think the comments of the Adjudicator

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are evidence of bias. They are certainly evidence of strong criticism of the comments made by the Prosecutor in circumstances that the Adjudicator found offensive.

[40] I note the Adjudicator is a former trial judge of some 33 years experience. Mr. Gover is an experienced and respected counsel. A review of the transcripts reveals that the proceeding, until this point in time, has been conducted by all with impeccable politeness and respect

[41] I am confident, when cooler heads prevail, that the abuse motion can be completed as anticipated in the near future. The prosecutor may decline to complete the motion and may appoint alternate counsel. Mr. Curry argued this motion. He, too, is a respected experienced counsel and it is clear to me from his able submissions that he is fully informed of the issues in the case.

[42] To grant a stay, even if the remedy was available to the applicant, accomplishes nothing. A full panel of the Divisional Court will not be in any better position than I am to assess the allegations of bias out of context, without a substantive ruling, at this very awkward and perhaps inappropriate point in the proceedings. In my view the Adjudicator has expressed frustration and concern but has not exhibited bias. The Adjudicator has not lost jurisdiction as suggested by Mr. Curry. For all of these reasons, I conclude that the applicant has failed to meet the three-pronged requirements of section 4 of the *Judicial Review Procedure Act* justifying an order for a stay. I conclude that it would not be appropriate for me to exercise my discretion to grant the relief requested in the circumstances of this case.

Conclusion

[43] The applicant's motion for stay is therefore denied. The respondents' request to quash the stay is granted.

[44] The abuse motion should be completed before the Adjudicator as soon as reasonably possible. The parties can then determine what course of conduct they wish to take once a substantive ruling has been made on the abuse of process motion.

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[45] Counsel for the respondents has conceded that the applicant may seek to raise the issue of bias before the Divisional Court following the completion of the abuse of process motion and after receipt of the Adjudicator's substantive reasons on that motion.

[46] This concession does not of course admit the presence of any bias by the Adjudicator now or later. As well, the respondents clearly have raised issues with respect to the Commissioner's standing to bring this motion. The respondents' concession simply preserves the applicant's rights now into the future.

[47] I thank counsel for their submissions. If counsel are unable to agree on costs, counsel shall exchange costs submissions within 30 days of the release of these reasons, and I would ask that respondents' counsel file consolidated cost submissions with me.



JANET WILSON J.

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ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:

COMMISSIONER, ONTARIO PROVINCIAL
POLICE

Applicant

- and -

KENNETH MACDONALD and ALISON
JEVONS

Respondents

REASONS FOR JUDGMENT

JANET WILSON J.

Date of Release: November 27, 2008