Court of Appeal No.: C50442

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF a Judicial Review pursuant to the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1;
AND IN THE MATTER OF the *Police Services Act*, R.S.O. 1990 c. P. 15;
AND IN THE MATTER OF Superintendent K. MacDonald
AND IN THE MATTER OF Inspector A. Jevons.

BETWEEN:

COMMISSIONER, ONTARIO PROVINCIAL POLICE

Appellant

-and-

KENNETH MACDONALD AND ALISON JEVONS

Respondents

RESPONDENTS' FACTUM
(MAIN APPEAL)

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PART I: OVERVIEW

1. The Respondents, Superintendent Kenneth MacDonald and Inspector Alison Jevons, (at times referred to as the "Subject Officers") respectfully submit that the Divisional Court's ruling correctly applied the well developed jurisprudence on reasonable apprehension of bias to the unique facts of the proceedings below and, as a result, this appeal should be dismissed.

2. In dismissing the Appellant's application for Judicial Review, the Divisional Court, having reserved for eight weeks, released a detailed analysis that extensively considered each of the Appellant's allegations of bias and found that Justice Montgomery's conduct was reasonable and thus, did not give rise to a reasonable apprehension of bias. What the discipline hearing before Justice Montgomery reflects are the challenges inherent in managing a politically charged proceeding (Police Association complaint against Professional Standards Commander) in which the prosecution has opposed the defence calling of key witnesses including Commissioner Fantino (see January 7, 2008 transcript); has vigorously resisted standard disclosure obligations (see Disclosure ruling of June 24, 2008); and has made exceptional, and still unexplained, overtures to the Attorney General to remove the adjudicator. In this latter regard, the Divisional Court quite aptly observed (see judgment, para. 121, pg. 27) that, to date, no explanation has been offered for the prosecution's overtures to the Attorney General who has no statutory standing at a disciplinary hearing and had not demonstrated any interest in intervening in the matter.

3. Up to the point of the recusal motion, the Respondents had completed their case on the abuse motion consisting of six witnesses over seven days. The prosecution was calling its case. Commissioner Fantino began his testimony on October 17, 2008. Cross-examination began after 2:30 pm (the defence having estimated a half-day to a full day for the cross) and the evidence of the Commissioner was not completed by the end of the day. Citing unreasonable delay concerns, Counsel for the Subject Officers pressed to bring the abuse motion to a conclusion, including moving for the imposition of a timetable which was created on consent by judicial conference call on Friday October 31, 2008 (at 5:00 p.m.). No hint of the impending recusal motion was heard during the conference call.

Despite the timetable, a motion for recusal was served on the following business day Monday, November 3, 2008. According to the consent timetable, Commissioner Fantino was scheduled to complete his cross-examination on November 5, 2008, with a decision being released on November 20, 2008.

4. With this new prospect of the recusal motion (instead of finishing the Commissioner's evidence), Mr. Falconer addressed the adjudicator at the start of proceedings on November 5, 2008 and sought the cooperation of the prosecution to permit the cross-examination of the Commissioner to conclude before commencing their recusal motion. The prosecution insisted on proceeding with the recusal motion. Counsel for the Subject Officers raised concerns in writing as follows. In declining the invitation to permit completion of the Commissioner's cross-examination, counsel for the prosecution explained the timing of the motion and the apparent reversal on the consent timetable as follows:

> Now, the question might be asked what changed [since the Friday timetable], 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)
>
> Transcript dated November 5, 2008, p. 15 Tab 12 of Respondents' Compendium

5. It is submitted that, rather than this being about any genuine case of bias, the present circumstances suggest an invalid and improper exercise of Commissioner Fantino's discretion under the *Police Services Act* directed at serving the Commissioner's private interests rather than the discharge of legitimate prosecutorial powers, particularly having regard to the following:

> i) Commissioner Fantino both instructs prosecution counsel and appears as a witness; it is Commissioner Fantino's cross-examination that continues to be delayed and stands to be aborted should the Divisional Court's decision be overruled;
>
> ii) Commissioner Fantino is subject to serious allegations of witness interference as they relate to the witness Chief Superintendent Bill Grodzinski, who was abruptly transferred to North Bay (7:00a.m. on January 8, 2008) the day after the court filing of his notes (discipline hearing, January 7, 2008) documenting the Commissioner's comment about Superintendent MacDonald ("Are you going to execute the disloyal one, or should I?"); and
>
> iii) While the Divisional Court was under reserve in late January 2009, Deputy Commissioner Hawkes of the O.P.P. commenced a criminal investigation of Inspector Messham relating to his

testimony before Justice Montgomery. As argued in the stay materials before the Honourable Justice Laskin, this is but another example of reprisals directed at defence witnesses under the authority of the Appellant and should inform why the public interest is not served by further delays in the discipline proceedings.

PART II: THE FACTS

6. The Respondents accept the facts as set out in paragraphs 3, 4, 7-21 and 24-29 of the Appellant's factum. The Respondents take issue with the facts as setout in paragraphs 22-23 and 30 to 62 of the Appellant's factum. This section of the Respondents' factum will address the lengthy history of the proceedings below as well as the multiple court appearances that have arisen from Commissioner Fantino's application for judicial review. This context is necessary for understanding Justice Montgomery's management of the issues as they presented themselves below.[1] Following this overview, the factum will outline the facts specifically pertaining to the claims of bias raised by the Appellant.

I. Proceedings to Date

(a) Allegations Against the Respondents – Basis for Charging the Subject Officers

7. At the material times, Superintendent Kenneth MacDonald ("MacDonald") was the Bureau Commander of the Professional Standards Bureau ("P.S.B."). Inspector Alison Jevons ("Jevons") was a senior investigator with P.S.B. under the command of MacDonald. The charges relate to the manner in which the Respondents conducted an investigation mandated by the Ontario Civilian Commission on Police Services ("OCCPS") into OPP Detective Sergeant Mark Zulinski's ("Zulinski") criminal investigation of allegations of domestic violence by a fellow officer, Sergeant Robert Alarie ("Alarie"). The incident involved Alarie using a baseball bat to damage his estranged wife's car (Susan Cole).

[1] For convenience, the Respondents have attached to the herein factum Appendix "A", a timeline of proceedings to date and Appendix "B", a timeline of relevant dates for the abuse of process motion.

Evidence of car paint on the bat and wood fibers on the car were collected at the scene and later analyzed at the instance of Inspector Jevons.

February 17, 2005 OCCPS order to Woodhouse, Exhibit 7, Tab 15 of the Respondents' Compendium; Ontario Provincial Police Association complaint dated September 14, 2006, Exhibit 42, Tab 17 of the Respondents' Compendium

8. The investigation of Zulinski was ordered by OCCPS as a result of a public complaint made by Susan Cole ("Ms. Cole") into allegations that Zulinski did not follow the OPP Domestic Violence Policy ("Policy"). Of particular concern was that Zulinski failed to charge or arrest Alarie, as required by the Policy. Instead, Alarie was permitted to stay in the house he shared with Ms. Cole and she was brought to the detachment for a statement and then encouraged to stay somewhere else for the night.

Ontario Provincial Police Association complaint dated September 14, 2006, Exhibit 42, Tab 17 of the Respondents' Compendium; OCCPS Order dated February 17, 2005 to Susan Cole, Exhibit 2, Tab 13 of the Respondents' Compendium; Inspector Alison Jevons Investigative Report dated August 25, 2006, Exhibit 9, Tab 16 of the Respondents' Compendium.

9. Inspector Jevons concluded in her Report that Zulinski breached the Domestic Violence Policy in failing to effect an arrest of Alarie. Jevons arrived at this conclusion based on consultation with the officers involved in drafting the Policy and her review of the investigation file. Jevons also submitted the bat used in the domestic violence incident for forensic testing. Prior to Jevons' involvement in the matter, the bat had not been tested. While Jevons concluded that Zulinski had breached the Policy, she determined that a discipline hearing was unnecessary and that an educational discussion sufficed. OCCPS disagreed and ordered a hearing. At no time has OCCPS expressed any concern about the quality of the Professional Standards work performed by the Respondents. While OCCPS ultimately disagreed with Jevons and ordered a hearing into Zulinski's conduct in its decision dated February 3, 2006 (against the recommendation of Jevons who concluded it was unnecessary), they have never criticized the work of Inspector Jevons or Superintendent MacDonald.

Evidence of Inspector Messham, October 2, 2008 Transcript at pp. 88-89, Tab 8 of Respondents' Compendium; Inspector Alison Jevons Investigative Report dated August 25, 2006, Exhibit 9, Tab 16 of the Respondents' Compendium

10. A complaint against MacDonald and Jevons was commenced on September 14, 2006 by letter from Karl Walsh, the President of the Ontario Provincial Police Association ("OPPA"). The complaint is that the Respondents conducted a poor professional standards investigation and, had they done a competent investigation, they would not have concluded that Zulinski breached the Domestic Violence Policy and therefore OCCPS would not have had any basis for directing a hearing. At its heart, the OPPA took the position that the Respondent Officers had not gone far enough to exonerate Zulinski. The following month in October 2006, within weeks of the OPPA letter, Commissioner Fantino assumed office and at his very first Commissioner's Committee meeting (with his Deputy Commissioners) he advised all present that he had consulted with the OPPA and he was concerned with the conduct of Professional Standards.

Letter to Commissioner Boniface from Karl Walsh: OPPA dated September 14, 2006, Exhibit 42, Tab 17 of the Respondents' Compendium.

11. Inspector Jevons is also charged with one count of deceit. The allegation relates to the following three lines included in the version of Jevons' investigative report that was sent to Ms. Cole and OCCPS: "Detective Sergeant Zulinski is aware of the contents of this report and an educational discussion with respect to policy has occurred. It is the OPP's position that no further action be taken with respect to this matter". These three lines are not present in an earlier draft that Jevons sent to Zulinski before finalizing her report. The prosecution alleges that that no educational discussion occurred and that Ms. Cole was deceived when she was advised otherwise. "Educational discussion" is a term of art. Zulinski confirms that he and Inspector Jevons had a discussion about the Policy and that the Inspector told him that he ought to have made the arrest of Alarie. Zulinski says he disagreed.

Inspector Alison Jevons Investigative Report dated August 25, 2006, Exhibit 9, Tab 16 of the Respondents' Compendium; Exhibit 13, Duty Report of Zulinski dated December 21, 2006, Tab 21 of Respondents' Compendium

12. Ms. Cole, the public complainant, and Jinan Kubursi ("Kubursi"), a Ministry of the Attorney General lawyer who had carriage of a pre-hearing motion on the Zulinski prosecution, both testified before Justice Montgomery. In her testimony, Susan Cole outright rejected prosecution suggestions that she was in any way deceived by Inspector Jevons. Ms. Cole's evidence was that MacDonald and Jevons were the only officers who "stepped up" and helped with her complaint and that they in no way deceived her. Ms. Kubursi testified that she had been surprised to learn that MacDonald and Jevons were the subject of charges. The Ministry lawyer described the Respondents as good officers doing their best with a complex situation. Ms. Kubursi further testified that she negotiated with Zulinski's lawyer, Lorna Boyd, who never denied that an educational discussion had taken place with Zulinski.

Evidence of Jinan Kubursi, October 14, 2008 Transcript, pp. 68, 74, Tab 9 of the Respondents' Compendium; Examination of Susan Cole, July 17, 2008 Transcript at p. 134, Tab 7 of Respondents' Compendium

(b) The Pre-Hearing Motions: Privilege and Abuse of Process Motions

13. The positions advanced by the Appellant in the proceedings below have significantly delayed the commencement of the abuse of process motion. (Ret.) Superintendent Elbers ("Elbers") was the first adjudicator designated by Commissioner Fantino. Prior to his designation, Elbers provided the prosecution with a statement in which he was critical of the conduct of the Respondents. As a result of Elbers' involvement with the prosecution, the Respondents commenced a motion, dated July 30, 2007, to quash the proceedings. On July 30, 2007, the Respondents were advised that (Ret) Superintendent Neale Tweedy ("Tweedy") had been designated by the Commissioner as the adjudicator on this matter.

Submission of Julian N. Falconer, July 30, 2007 Transcript, Tab 33 of Respondents' Compendium

14. The Respondents had concerns that the second adjudicator designated by the Commissioner, Tweedy, was biased in favour of Commissioner Fantino due to their close personal relationship. From July to October 2007, the Respondents advised the prosecution of their concerns. The prosecution

dismissed the concerns, thereby requiring the Respondents to raise the issue formally at the commencement of the abuse of process motion on January 7, 2008. On January 8, 2008, Tweedy recused himself deciding that he would have to rule on the Commissioner's credibility and that he had an actual bias in favour of Commissioner Fantino. As a result of the Tweedy recusal, the Commissioner then selected Justice Montgomery to adjudicate over the proceeding below.

Sup. Tweedy recusal Ruling, January 8, 2008, Exhibit 58, Tab 3 of the Respondents' Compendium.

15. The Commissioner did not designate Justice Montgomery as the adjudicator until April 2008. Despite the fact that the abuse of process motion was scheduled to commence on June 12, 2008, the prosecution served the Respondents with a large disclosure package on June 2, 2008. By correspondence dated June 6, 2008, the prosecution divulged that it was claiming privilege over a lengthy list of documents. As a result, the abuse of process motion was delayed and a lengthy motion to determine the validity of the privilege claim was heard over June 12, 13 and 18 with final submissions being heard on June 20, 2008. Justice Montgomery delivered reasons on June 24, 2008.

16. Counsel for the prosecution conducted several interviews of OPP officers who were potential witnesses prior to the January 7, 2008 hearing dates as well as shortly thereafter and did not provide the Respondents with the witness statements until May and June, 2008. An example of this practice was a witness statement of Chief Superintendent Grodzinski taken on January 4, 2007, three days before the abuse of process motion was scheduled to be heard before Tweedy. The Respondents had advised the prosecution of their intention to call Chief Superintendent Grodzinski as a witness in the abuse of process motion in October 2007, approximately three months prior to the commencement of the abuse of process motion before Tweedy. Despite this fact, the prosecution only provided the January 4, 2007, statement to the Respondents on May 15, 2008. It was only disclosed after the Respondents conducted their own interview of Chief Superintendent Grodzinski and provided a copy

of the transcript of the interview to the prosecution on May 1, 2008. This statement provided evidence that the charges against the Respondents were politically motivated (the relevance of this evidence is described in below). On May, 15, 2008, the prosecution advised the Respondents that the statement was subject to prosecution work product privilege despite the fact that prosecution counsel was not present during the taking of Chief Superintendent Grodzinski's statement.

> Letter from Owen Rees to Sunil S. Mathai, dated May 15, 2008, at Tab 31 of the Respondents' Compendium

17. In his June 24, 2008 ruling, Justice Montgomery expressed concerns that "substantial relevant material" was not disclosed in a timely fashion:

> **Prosecution, with very little if any explanation, sat on substantial relevant material disclosure for approximately five months. You'd wonder why this took place, but it did.** But in the circumstances of this case, looking at the totality of the situation, this inordinate delay is not sufficient in itself for a stay but bears consideration as to procedural fairness and an abuse of process. (emphasis added)
>
> Justice Montgomery's disclosure ruling, June 24, 2008 at pp. 8-9, Tab 4 of the Respondents' Compendium

18. The prosecution's position that witness interviews could be conducted and not disclosed to the defence was rejected. As a result of the position taken by the prosecution, the Respondents' abuse of process motion was delayed until the week of July 15, 2008.

> Justice Montgomery disclosure ruling, June 24, 2008 at pp. 8-9, Tab 4 of the Respondents' Compendium

19. On July 15, 2008, the Respondents commenced their abuse of process motion. The Respondents' called six witnesses over the course of seven days. The prosecution's evidence was called on October 16 and 17, 2008 with a scheduled resumption date of November 5, 2008 at which time the prosecution's evidence would have concluded but was superseded by the recusal motion.

(c) Abuse of Process Allegations Regarding the Role of the Commissioner

(i) Reprisal Against Respondents' Witness, Chief Superintendent Bill Grodzinski

20. On March 1, 2007, approximately 14 days before charges were laid against the Respondents, Commissioner Fantino spoke with Deputy Commissioner Lewis ("Lewis"), Chief Superintendent Smith ("Smith") and Chief Superintendent Grodzinski ("Grodzinski") about concerns that a former detachment commander in Caledon was providing misinformation to the Caledon City Council on O.P.P. restructuring plans. At the time, the Commissioner incorrectly believed that MacDonald was responsible for "leaking" information. During this conversation, the Commissioner asked Grodzinski, "are you going to execute the disloyal one [MacDonald] or am I". In his evidence, the Commissioner confirmed he was referring to MacDonald and characterized the comment as "police appropriate language".

> Evidence of Grodzinski, July 16, 2008 Transcript at pp. 106-107, Tab 6 of the Respondents' Compendium; Notes of Grodzinski, Exhibit 18, Tab 22 of the Respondents' Compendium; Evidence of Commissioner Fantino, October 17, 2008, Tab 11 of the Respondents' Compendium

21. On December 13, 2007, Grodzinski advised Commissioner Fantino that despite applying unsuccessfully for a vacant Acting Deputy Commissioner position, he wished to stay in the Highway Safety Division (located in Toronto). During this conversation, the Commissioner advised Grodzinski that he was very happy with his work in the Highway Safety Division and that "it's not a bad thing, Bill, to retire as a Chief [Superintendent]". On January 3, 2008, Grodzinski was contacted by prosecution counsel to inquire into why the Respondents would want to call him as a witness. Grodzinski informed counsel about the notes of the March 1, 2007 conversation in the Caledon parking lot. Grodzinski was interviewed by Van Zant on January 4, 2008. On January 5, 2008, Van Zant met with Commissioner Fantino at a Kelsey's Restaurant in Barrie and provided the Commissioner with a brown folder containing the anticipated evidence of Grodzinski.

Evidence of Commissioner Fantino, October 17, 2008 Transcript at pp. 221-224, Tab 11 of the Respondents' Compendium; Evidence of Grodzinski July 16, 2008 Transcript at pp 151-155 and 145, at Tab 6 of the Respondents' Compendium; Exhibit 59 on Abuse of Process Motion - typed version of page 110 of Superintendent Van Zant's notes (with attached written version), Tab 20 of the Respondents' Compendium

22. On January 7, 2008, Grodzinski's March 1, 2007, notes were filed at the hearing on a motion to recuse Tweedy and to compel the testimony of the Commissioner. Prior to granting the Respondents' motion the following day, Tweedy advised the Commissioner (as confirmed by Commissioner Fantino in his evidence) that he planned to recuse himself. On January 8, 2008, at approximately 7:30 a.m., the Commissioner, Deputy Commissioner Lewis and Deputy Commissioner Beechey ("Beechey") attended a "Commissioner's Committee Meeting" wherein it was decided that Grodzinski would be transferred to the North East Region. Lewis' notes of the meeting indicate that the transfer was to occur "NOW". As a result, Lewis and Beechey immediately contacted two lower ranked officers and advised them that they would have to fill the vacancy caused by Grodzinski's transfer. At no time on January 8, 2008 did any of the attendees of the "Commissioner's Committee Meeting" contact Grodzinski and advise him that he would be transferred. On January 8, 2008 at 10:00 am, Adjudicator Tweedy delivered his recusal decision.

Evidence of Commissioner Fantino, October 17, 2008 Transcript, p. 220, Tab 11 of the Respondents' Compendium; Evidence of Commissioner Fantino October 17, 2008 Transcripts, pp. 136-138, Tab 11 of the Respondents' Compendium; Deputy Chief Lewis' January 8, 2008 notes, Exhibit "52", Tab 18 of the Respondents' Compendium.

23. On Thursday January 10, 2008, Grodzinski attended at Lewis' office. Lewis and Beechey advised Grodzinski that he was to be immediately relocated to the North East Region Headquarters in North Bay, Ontario. Later that day, Beechey advised Grodzinski that it was not his idea to transfer him. Grodzinski viewed this transfer as an "immediate punishment, sanction, reprisal" against him for taking notes of the March 1, 2007 conversation he had with Commissioner Fantino. On January 11, 2008, Beechey advised Grodzinski that the Commissioner had received a "Blackberry" message from Deputy Minister Deb Newman requesting information on his transfer. Later that day, Beechey advised

Grodzinski that he was not being forced to transfer to North Bay. The Commissioner admitted that the Deputy Minister had concerns that the relocation was a form of reprisal against Grodzinski. Lewis, a prosecution witness, testified that Grodzinski's transfer to North Bay was originally contemplated because Grodzinski was from North Bay and that it was intended to resolve concerns about high turnover rates in command due to retirement. As a result, appointing a new commander who was not on the verge of retirement would be beneficial to the region. Lewis further testified that the move to North Bay was a great opportunity for any officer and that he believed that Grodzinski would welcome the transfer.

> Evidence of Grodzinski, July 16, 2008 Transcript, p. 181-186, Tab 6 of the Respondents' Compendium; Evidence of Lewis October 16, 2008 Transcript, at pp. 130-133, 135, 173-175, 183, 235, Tab 10 of the Respondents' Compendium.

24. Despite the denials of the Commissioner that the transfer was a reprisal, the following stands undisputed:

a. No documentation exists prior to January 8, 2008 referring to consideration being given to transferring Chief Superintendent Grodzinski;

b. The timing of the transfer was the first order of business after the Commissioner learned of Adjudicator Tweedy's ruling;

c. Commissioner Fantino knew that Grodzinski was a pre-retirement commander and was therefore not going to solve the turnover problem involving retiring commanders (Transcript of October 17, 2008 at pg. 232-233, Tab 11 of Respondents' Compendium);

d. Commissioner Fantino knew that Grodzinski did not want to move from the Highway Safety Division (Transcript of October 17, 2008 at p. 232, Tab 11 of Respondents' Compendium);

e. Grodzinski was only advised that he would not be transferred after Deputy Minister Newman messaged Commissioner Fantino about her concerns (Transcript of July 16, 2008 at pp. 184-185, Tab 6 of Respondents' Compendium; Transcript of October 16, 2008 at p. 173, Tab 10 of Respondents' Compendium); and

f. Despite the claim that the North Bay position was a great opportunity, only one officer applied for the position and the position was not filled until April, 2008 (nearly 4 months after the proposed Grodzinski transfer). The lone officer who applied for and filled the position was already a Superintendent stationed in North Bay (Transcript of October 16, 2008 at p. 289, Tab 10 of Respondents' Compendium).

(II) The Facts Underlying the Bias Allegations

A. Inspector Messham/Proposed s. 80 Hearing (Appellant's Factum, paras. 30-36; pp. 7 -9)

25. Contrary to the position of the Appellant, Justice Montgomery's handling of a difficult situation involving Inspector Messham does not give rise to a reasonable apprehension of bias and, in particular, does not cast any shadow on the credibility of Superintendent Van Zant ("Van Zant"). Indeed, Justice Montgomery made the following positive comments about Van Zant: "I'm aware of the total evidence given by Superintendent Van Zant. **This officer's evidence, as far as this tribunal was concerned, was credible, trustworthy and reliable."**

> Justice Montgomery's disclosure ruling, June 24, 2008 at p. 14, Tab 4 of the Respondents' Compendium

26. On October 2, 2008, Inspector Keith Messham ("Messham") was scheduled to testify as a witness for the Respondents on the abuse of process motion. Respondents' counsel advised the prosecution and the Tribunal that Messham had mistakenly provided a copy of an internal investigation report to junior counsel in a pre-testimonial interview. Upon learning of the error, counsel directed the return of the document to Messham. Counsel neither reviewed the document nor retained a copy. It was following counsel's disclosure that the prosecution advised the Adjudicator that Messham's conduct may have breached the confidentiality obligations in section 80 of the *Police Services Act* ("*Act*").

> Submissions of Mr. Falconer and Mr. Gover, October 2, 2008 Transcript at pp. 10-30, Tab 13 of the Appellant's Appeal Book and Compendium

27. Out of concern that Messham would be subject to reprisal from the Commissioner for his inadvertent error, counsel for the Respondents sought assurances on the record from the prosecution and the investigating officers that they would not recommend *PSA* charges against Messham. Following off-the-record negotiations, the Mr. Gover advised the Tribunal that it would not

recommend any charges against Messham. No evidence was heard that morning and counsel jointly sought a further adjournment so that Van Zant could obtain instructions about giving the same assurances as prosecution counsel. Regrettably, Van Zant declined to give an assurance. Ultimately, Messham did not begin his examination in chief until approximately 2:15 p.m.

October 2, 2008 Transcript at p. 39, Tab 13 of the Appellant's Appeal Book and Compendium

28. As a result of the decision of the investigating officer not to join with the prosecution recommendation that there should be no charge against Messham, Counsel for the Respondents took the position that it may be necessary to obtain a ruling on whether Messham had violated section 80 of the *Act* before placing him in jeopardy as a witness. Justice Montgomery suggested a further recess to allow counsel to resolve the matter before hearing submissions from both counsel.

Submissions of Mr. Falconer and Mr. Gover, October 2, 2008 Transcript pp. 30-31 and 39, Tab 13 of Appellant's Appeal Book and Compendium.

29. After returning from a short break, counsel for the Respondents advised that in reliance on only the prosecutor's position, Messham was prepared to testify in the absence of a section 80 ruling. Therefore no ruling was issued.

Submissions of Mr. Falconer and Mr. Gover, October 2, 2008 Transcript pp. 30-31 and 39, Tab 13 of Appellant's Appeal Book and Compendium

30. In deciding that this allegation did not give rise to a reasonable apprehension of bias, the Divisional Court found that Justice Montgomery's comments about the position taken by Superintendent Van Zant did not by itself imply any criticism of Superintendent Van Zant. This is consistent with Justice Swinton's minority decision where she held that this allegation of bias did not even meet the low threshold of the serious issue element of the stay test.

Divisional Court ruling dated March 10, 2007, para 35-38, Tab 3 of the Appellant's Appeal Book and Compendium; Justice Swinton's minority decision at para. 20, Tab 4 of Appellant's Appeal Book and Compendium

B. Adjudicator's Reference to Delay occasioned on October 2, 2008 (Appellant's Factum, paras. 37-39; pp. 9-12)

31. By ruling dated June 24, 2008, the Adjudicator had provided direction to the parties on the requirements of prosecution disclosure of witness interviews including disclosure of notes. The ruling expressly directed the disclosure of the prosecution notes of interviews of Commissioner Fantino who was an upcoming witness. Some months following this ruling the prosecution re-interviewed Deputy Commissioner Chris Lewis and Commissioner Fantino on September 24, 2008 but would only provide a three page summary of what were interviews that lasted over two hours. Since the prosecutor refused to provide notes of those police officers who were in attendance on the interviews, the defence raised the matter at the October 2, 2008 hearing. Mr. Gover argued that the summaries he provided were "amalgams" in that they combined officer and counsel notes. He then proceeded to re-litigate the very issues he had argued on the June 24 ruling and the situation became strained with the Adjudicator when Mr. Gover characterized Justice Montgomery's ruling as "exceptional". At no time did the prosecution suggest that Justice Montgomery review the notes to determine whether prosecution work product privilege applied.

> Submissions of Mr. Gover, October 2, 2008 Transcript at p 155, Tab 14 of Appellant's Appeal Book and Compendium

32. After hearing submissions presented by both parties, Justice Montgomery directed the prosecution to disclose all counsel and police notes relating to the September 24, 2008 interviews. Upon hearing the Adjudicator's ruling, Mr. Gover closed his binder loudly enough to attract the attention of both counsel for the Respondents and then characterized Justice Montgomery's ruling as "exceptional":

> MR. GOVER: Well, Mr. Adjudicator, I will heed the direction you're giving me. It is exceptional, I hope everyone understands.

October 2, 2008 Transcript at p. 157, Tab 14 of the Appellant's Appeal Book and Compendium; Submissions of Mr. Falconer, November 10, 2008 Transcript at p. 132, Tab 14 of Respondents' Compendium

33. The subsequent exchanges between the Adjudicator and Mr. Gover (set out in para. 38 of the Appellant's factum) are in the context of a case where the prosecution had the benefit of an already lengthy June 24 privilege ruling which Mr. Gover was now seeking to re-visit. Throughout the exchange detailed at pp. 155-160 of the October 2, 2008 transcript, Justice Montgomery made it clear that he was not accusing the prosecution of any improper motive or bad faith:

> THE ADJUDICATOR: You must have known that months ago [on the issuance of the Ruling of June 24]. **Surely, both of you have figured out what kind of a person I am.** I want everything up front and I don't want anybody trying to hide anything. Get it up front. Put it before me and I'll make the decision in the long run down the road, but I want the information the same as the defence does.
>
> ***
>
> THE ADJUDICATOR: I know you're not playing games, but I want information, and today we wasted a lot of time today. It wasn't necessary. It was not necessary. Sometimes, we get so academic, we lose sight of the real issue, and I think that happened today. **And I know I have said this to both of you before**, sometimes sit down and put a very common sense does my proposed action square with good common sense here, because that's what we're all here for.
>
> .... Argument time is going to come. Place your arguments before me and I'll make my decision, but to horse around the way we have today, it doesn't make me happy. (emphasis added)
>
> October 2, 2008 Transcript at p. 158, Tab 14 of the Appellant's Appeal Book and Compendium

34. At paragraph 39 of its factum, the Appellant argues that Justice Montgomery's above noted comments were directed solely at prosecution counsel, Mr. Gover and Mr. Rees. At the time the comments were made, all counsel in the room knew that Justice Montgomery was directing his comments at the two senior counsel acting on the matter, Mr. Gover and Mr. Falconer. Justice Montgomery made this clear in his November 10 ruling on the recusal motion:

> A further indication under section (c) alleging that the Adjudicator was personally invested in the subject officers is that the Adjudicator attributed the delay occasioned by the issues surrounding Inspector Messham's testimony to the prosecution. There is no doubt that we spent two hours or so in dealing with section 80 of the *Police Services Act.* **Both counsel actively participated in this matter.**
>
> It was my view, rightly or wrongly, that we could have spent that time hearing evidence. Inspector Messham wanted to give evidence in spite of the position taken by the investigating team in not going along with Mr. Gover's suggestion. He wanted to give evidence in spite of it, and in fact, he did under

> the protection of the *Canada Evidence Act* and he did so under the protection of the -- yes, the *Canada Evidence Act.*
>
> This Adjudicator did not attribute this two hour or so delay to the prosecution. It was neutral time. **Both counsel in good faith participated in the section 80 [*sic*] matter. It was not attributed to the prosecution or to the defence.**
>
> November 10, 2008 Ruling, at p. 178 (emphasis added), Tab 16 of Appellant's Appeal Book and Compendium

35. The Divisional court dismissed this allegation of bias and held that the comments that "we wasted a lot of time today" and that it was "not necessary" were not attributable to any particular party. The Divisional Court further held that the impugned comments reflected Justice Montgomery's frustration over the delay in commencing Inspector Messham's evidence.

> Divisional Court ruling dated March 10, 2007, paras. 35-38, Tab 3 of the Appellant's Appeal Book and Compendium.

C. Testimony of Commissioner Fantino (Appellant's Factum, paras. 40 – 51; pp. 12 -15)

36. In their abuse motion, the Respondents alleged that Commissioner Fantino pre-determined the granting of an extension of the limitation period to lay charges against them without considering their written submissions. Section 69(18) of the *PSA* requires notices of hearing to be served on subject officers within six months of the complaint, but the limitation period was not met in this case. As a result, on March 20, 2008, the prosecution made written submissions to the Commissioner for an extension. The Respondents' submissions on the extension were served on May 7 (response submissions) and May 11, 2007 (sur-reply). On May 13, 2007, Commissioner Fantino released a one paragraph decision granting the extension.

> Exhibit 45 on the Abuse Motion, at p. 119, Tab 4 J of Appellant's Exhibit Book.

37. During his evidence on October 17, 2008 (in chief), the Commissioner confirmed that he had actually decided on the extension issue as early as April 18, 2007, one month prior to receiving the Respondents' submissions. Specifically, Commissioner Fantino adopted as accurate a note of a

conversation he had with Superintendent Michael Armstrong (President of the Commissioned Officers Association). The note was filed, on consent, as an exhibit in the proceedings and reads as follows:

> Discussed Ken MacDonald, Alison Jevons PSA charges. **He [Fantino] advised he has to give an extension.** Ken and Alison can make their case to the Adjudicator. When they are head of PSB, it looks like the six months was on purpose. I advised Ken indicates he was acting on the advice of Ministry lawyers and will be applying for indemnification from the government. [emphasis added]
>
> Commissioner Fantino's evidence, October 17, 2008 Transcript at pp. 77-78, Tab 15 of the Appellant's Appeal Book and Compendium; Exhibit 57, Notes of Superintendent Armstrong dated April 18, 2007, Tab 19 of the Respondents' Compendium

38. Following Commissioner Fantino's adoption of the above note, the prosecution next questioned the witness on the materials he reviewed in relation to the extension:

> Q. Now, you received submissions of both the Professional Standards Bureau and the subject officers on this issue of the extension of time request; is that right?
>
> A. The Professional Standards, yes, and I believe I was made aware of the subject officers not agreeing to it, or some such thing.
>
> Q. Right. And did you review anything that was filed by or on behalf of the subject officers?
>
> A. Not that I recall.
>
> Commissioner Fantino's evidence, October 17, 2008 Transcript at p. 82, Tab 15 of the Appellant's Appeal Book and Compendium

39. It is apparent from the above that the substance of Commissioner Fantino's evidence was that he decided to grant the extension early in the process (certainly as of April 18, 2007) and, as for the Subject Officers' arguments against the extension: "Ken and Alison can make their case to the Adjudicator". The Commissioner's statement "not that I recall" was a simple acknowledgment of the insignificant nature of the Respondents'' submissions and was entirely consistent with the Commissioner's answers as related in the above paragraphs. It was as a result of this evidence that the Respondents objected to the prosecution providing Commissioner Fantino with Exhibit 45 (a collection of the extension submissions collated for the hearing by prosecution counsel).

> October 17, 2008 Transcript at pp. 88-89, Tab 15 of the Appellant's Appeal Book and Compendium

40. Justice Montgomery agreed with the Respondents' objection and ruled that the prosecution could not provide Exhibit 45 to the Commissioner. The essence of Justice Montgomery's ruling was that placing a package of documents assembled **by counsel after the fact** to the Commissioner in these circumstances could amount to leading the witness on his basis for decision-making. The luncheon recess was taken after the ruling and, upon resuming, the prosecution requested permission to put the final page of the collated document (Exhibit 45) to the Commissioner since it was the signature page confirming the Commissioner's disposition of the extension. After cautioning counsel about abiding by the ruling, Mr. Gover was allowed to put the single page to Commissioner Fantino. After reviewing this page, Commissioner Fantino advised that his decision to grant the extension was accurate and that the reasons, "reflected the various points of reference that that whole document contained".

Evidence of Commissioner Fantino, October 17, 2008 Transcript at pp. 97- 100, Tab 15 of the Appellant's Appeal Book and Compendium

41. Both Justice Montgomery and prosecution had the benefit of observing the Commissioner's demeanour and gestures as he referred to the "whole document". Justice Montgomery requested that Commissioner Fantino exit the hearing room. When queried by Justice Montgomery, Mr. Gover acknowledged that the Commissioner's evidence "wasn't in response to a question" and the Adjudicator agreed. Furthermore, the exchange between Mr. Gover and the Adjudicator on the record leaves no doubt that both were of the view that the Commissioner was referring to the entire Exhibit 45 when he identified "the whole document". At no time during this exchange did Mr. Gover request to ask further questions to the Commissioner on Exhibit 45 or suggest that the "whole document" comment was related to the document containing the signature page as opposed to the collated set of documents.

Evidence of Commissioner Fantino, October 17, 2008 Transcript, pgs. 97-100, Tab 15 of the Appellant's Appeal Book and Compendium

42. When queried, Mr. Falconer added the following with respect to the Commissioner's evidence:

> Mr. Adjudicator, in my dealings with Mr. Gover over the course of this hearing I have never once seen anything by him that I would term unethical or improper, and if Mr. Gover tells you that he had no communication with the witness, then I accept him at his word. That doesn't mean communications weren't had with the witness. I'm simply saying it wouldn't have been at Mr. Gover's instance or encouragement or Mr. Rees' instance or encouragement. I simply don't believe it. I simply put that on the record because that's not my experience with these two gentlemen.
>
> October 17, 2008 Transcript, at pgs. 101-102, Tab 15 of the Appellant's Appeal Book and Compendium

Subsequently, Justice Montgomery advised that he was not, "pointing his finger at Mr. Rees or Mr. Gover" and 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**".

> October 17, 2008 Transcript at pg. 102, Tab 15 of the Appellant's Appeal Book and Compendium

43. In dismissing this allegation of bias, the Divisional Court held that Justice Montgomery had not predetermined the issue of the Commissioner's credibility. Rather, the Divisional Court held that Justice Montgomery had explicitly left the door open on whether Commissioner Fantino had in fact reviewed the Respondents' submissions on the extension.

> Divisional Court ruling dated March 10, 2007, paras. 86-89, Tab 3 of the Appellant's Appeal Book and Compendium

D. Ruling re Prosecution Invoking Support of the Attorney General (Appellant's Factum, pars. 52- 62; pp. 16-18)

44. A judicial conference call of Friday, October 31, 2008 (at 5:00 pm) resulted in a consent time table to conclude the abuse motion including a date for delivery of reasons (November 20, 2008). By the following Monday a recusal motion was served. In light of the timetable described earlier and the implications for Commissioner's cross-examination, the timing of the motion was the subject of some concern. On November 5, 2008, Counsel for the prosecution advised the Tribunal and the Respondents

that the unusual timing of the recusal motion was caused by the Attorney General lending its support to the prosecution's motion and, if necessary, a judicial review application:

> Mr. GOVER: Now, the question might be asked what changed [since the Friday timetable], 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].
>
> November 5, 2008 Transcript at p. 15, Tab 12 of Respondents' Compendium
>
> MR. GOVER: I can indicate, and I would like to get to 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 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.
>
> November 5, 2008 Transcript at pgs. 18-19, Tab 12 of the Respondents' Compendium
>
> Letter from Mr. Falconer to Mr. Gover dated November 4, 2008, Exhibit "C" on Recusal Motion, Tab 23 of the Respondents' Compendium.

45. On November 5, 2008, the Ministry of the Attorney General advised that Mr. Gover had requested that the Ministry bring a judicial review application for the purpose of removing the adjudicator. On November 6, 2008, Dennis W. Brown, General Counsel for the Ministry of the Attorney General, advised Mr. Gover that the Attorney General was not a party to the proceeding below and had taken no position on the proceedings or the recusal motion. Mr. Brown further denied that the Ministry would be taking any position on the recusal motion or a subsequent judicial review.

> November 5, 2008 email from Mr. Crawley, Exhibit "C" on Recusal Motion, Tab 24 of the Respondents' Compendium; November 6, 2008 letter from Mr. Brown, Exhibit "C" on Recusal Motion, Tab 25 of the Respondents' Compendium

46. On November 10, 2008, Justice Montgomery dismissed the recusal motion finding that his conduct and decisions had not given rise to a reasonable apprehension of bias. In dismissing the prosecution's motion, Justice Montgomery was critical of the submissions of the prosecution as they pertained to invoking the support of the Attorney General to remove Justice Montgomery. In

dismissing this allegation of bias, the Divisional Court held that Justice Montgomery's comments were critical of the prosecutions submissions, not of counsel for the prosecution, and were reasonable in light of the fact that the prosecution had not addressed why the prosecution had solicited the assistance of the Attorney General.

> Divisional Court ruling dated March 10, 2009, para 124-126, Tab 3 of the Appellant's Appeal Book and Compendium; November 10, 2008 Transcript, Tab 6 of the Appellant's Appeal Book and Compendium

(III) Judicial Proceedings to Date

47. On November 12, 2008, the Commissioner commenced an application for judicial review and sought a stay of the proceedings below. The stay motion was argued before The Honourable Madame Justice Wilson on November 24, 2008. On November 27, 2008, Madam Justice Wilson dismissed the defendant's stay motion.

48. The Commissioner appealed the decision of Justice Wilson to a panel of the Divisional Court. On December 11, 2008 a majority of the Divisional Court set aside Justice Wilson's order and imposed a stay pending the final determination of the application for judicial review. The Honourable Madame Justice Swinton dissented and would have dismissed the Commissioner's motion. In her dissenting opinion, Justice Swinton made the following findings:

> 20 Given the low threshold to establish a serious issue to be tried, I am satisfied that the Appellant has established a serious issue to be determined with respect to reasonable apprehension of bias on the basis of the treatment of the Commissioner and the comments about prosecution counsel. **However, the allegation with respect to Superintendent Van Zant [Messham] does not cross that low threshold.**
>
> 29....While it is not the role of the court on a stay application to determine the merits of the application for judicial review, **the strength of the Appellant's case is also a factor that can be considered in determining the balance of convenience. In my view, the case on the merits, while arguable, is not a strong one.**
>
> Reasons of Justice Swinton, para. 20, 26 and 29, Tab 4 of the Appellant's Appeal Book and Compendium

49. On January 8, 2009, the Commissioner's application for judicial review was argued before a full panel of the Divisional Court. On March 10, 2009, the Divisional Court released a unanimous

decision dismissing the Commissioner's application for judicial review. The Divisional Court's decision will be addressed in the following section of the Respondents' factum.

PART III: ISSUES

50. The questions raised by this appeal are as follows:

(a) Did the Divisional Court apply the correct legal test to its analysis of the allegations of a reasonable apprehension of bias?

(b) Did the Divisional Court err in its conclusion that the words and conduct of Justice Montgomery did not amount to a reasonable apprehension of bias?

(c) Did the Divisional Court err by failing to weigh Justice Montgomery' impugned conduct cumulatively?

(d) Did the Divisional Court err by relying on the Adjudicator's oral reasons on the recusal motion to "cure" the alleged apprehension of bias?

51. The following paragraphs will detail the relevant law on reasonable apprehension of bias and analyze each legal question at issue.

(I) Law on Reasonable Apprehension of Bias

52. The removal of a judge is appropriate when there is shown to be a reasonable apprehension of bias. The test for apprehension of bias is set out in *R. v. R.D.S*:

> the 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. The test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through conclude.
>
> *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 31, Tab 1 of the Respondents' Book of Authorities

53. The test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable. "The grounds for this apprehension must, however, be substantial… and the test [will not] be related to the very sensitive… conscience." The reasonable person must have consideration of the knowledge and understanding of the judicial process and the nature of judging.

> *Authorson Litigation guardian of) v. Canada (Attorney General)* [2002] O.J. No. 2050 (Div. Crt.) at para. 10, Tab 2 of the Respondents' Book of Authorities; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at paras. 31, 37, Tab 1 of the Respondents' Book of Authorities

54. When a disqualifying apprehension of bias is alleged, the strong presumption of judicial impartiality is also a companion consideration. The onus rests on the Appellant to demonstrate a reasonable apprehension of bias.

> *R. v. Brown*, [2003] O.J. No. 1251 (C.A.) at paras. 37-39, 105, Tab 3 of the Respondents' Book of Authorities

55. When determining whether or not there is a reasonable apprehension of bias, the court must take into the consideration the context regarding the impugned behaviour.

> *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at para. 77, Tab 4 of the Respondents' Book of Authorities; *Stetler v. The Ontario Flue-Cured Tobacco Growers' Marketing Board*, [2005] 76 O.R. (3d) 321, (C.A) at para. 96, citing *Wewaykum Indian Band v. Canada*, Tab 5 of the Respondents' Book of Authorities.

56. It is inappropriate for a party to bring a disqualification motion if the essential purpose of that step is a form of reverse "judge shopping" because of subjective dissatisfaction with the arbitrator. A reviewing Court should be vigilant in examining the motive for bringing a motion to ensure that it is not brought for a purely tactical advantage.

> *Authorson (Litigation guardian of) v. Canada (Attorney General)* [2002] O.J. No. 2050 (Div. Crt.) at para. 4, Tab 2 of the Respondents' Book of Authorities; *Credit Union Central of Ontario Limited v. Heritage Property Holdings Inc. et al.* (2007), CanLII 16821 at para 29, Tab 6 of the Respondents' Book of Authorities

57. It is not an apprehension of bias for a judge to make reasonable criticism of counsel or witnesses who appear before them.

R. v. McCullough [1998], O.J. No. 2914. at para. 17, Tab 7 of the Respondents' Book of Authorities

(II) The Divisional Court applied the proper legal test in its bias analysis (Appellant's factum pars. 64-77, pg. 19-23)

58. The Appellant suggests that the Divisional Court applied the wrong test in analyzing each allegation of bias. The Appellant argues that the Divisional Court failed to determine whether a reasonable, informed and right minded person would have viewed Justice Montgomery's conduct as giving rise to a reasonable apprehension of bias. With respect, the Appellant's argument fails to appreciate the practical application of the reasonable apprehension of bias test.

59. In the circumstances of the proceeding below, if the conduct of Justice Montgomery was reasonable then it is logically inconsistent to suggest that a reasonable, informed and right minded person, who is knowledgeable of the facts and of court procedure, would find that a reasonable apprehension of bias exists. Put another way, reasonable conduct cannot be viewed as giving rise to a reasonable apprehension of bias. The Divisional Court reviewed all six allegations of bias separately and determined that Justice Montgomery's conduct was reasonable. As such, no reasonable and informed person, viewing the matter realistically and practically, would think that Justice Montgomery is unable to render an impartial decision.

60. The Appellant submits that the Divisional Court applied a reasonableness standard when reviewing Justice Montgomery's decision on the recusal motion. This is incorrect. In order to determine whether there was a reasonable apprehension of bias, the Divisional Court was required to examine whether Justice Montgomery had a reasonable basis for his criticism of the prosecution's submissions on soliciting the assistance of the Attorney General. This was not tantamount to reviewing Justice Montgomery's recusal decision on a reasonableness standard.

61. Finally, the Appellant submits that the Divisional Court failed to articulate the appropriate standard of review. With respect, this argument is without merit. There is no standard of review that

applies to a judicial review based on a reasonable apprehension of bias. In reasonable apprehension of bias cases, a reviewing court must determine whether the conduct complained of amounts to a reasonable apprehension of bias. In doing so, the court does not review the conduct on either a reasonableness or correctness standard.

(III) The Divisional Court Did Not Err In Its Conclusion That The Words And Conduct Of The Adjudicator Did Not Amount To A Reasonable Apprehension of Bias

62. The following paragraphs address each allegation of bias as setout in paragraphs 78-82 of the Appellant's factum.

(a) Testimony of Commissioner Fantino (Appellant's Factum, pars. 72- 80; pp. 23-24)

63. The Appellant asserts that Justice Montgomery's comments, direction and rulings raise a reasonable apprehension that the Tribunal pre-judged the credibility of Commissioner Fantino. With respect, in reviewing the entire transcript of Commissioner Fantino's evidence, it is clear that Justice Montgomery had not pre-judged the Commissioner's credibility.

64. Justice Montgomery's request that the prosecution "move on" does not suggest that he closed his mind to the extension issue. The request to "move on" reflects the fact that Justice Montgomery had already made a ruling, after hearing submissions and reviewing the evidence, on whether further questions on that subject matter would be allowed. Continuing with the prosecution's line of questioning would have been an indirect attack on his earlier ruling.

65. Properly read, the Divisional Court's ruling rejects the Appellant's argument on the ground that Justice Montgomery explicitly left open the issue of the Commissioner's credibility (i.e. he had not predetermined the issue of the Commissioner's credibility):

> 85. **The Adjudicator said he would not say anything further about it at that point, but that it was something he would have "to deal with when I come to do my thing"**. It was surely in order for the Adjudicator to put counsel on notice this way so that they could consider how best to address the issue.

> 86. The Appellant submits that the Adjudicator had effectively decided the question of the Commissioner's credibility with regard to the Commissioner's answer about the "whole document". **The Adjudicator's statement directly contradicts that contention. He opened the issue; he did not close it.** There is nothing in the record to suggest that the Adjudicator's statement should not be taken at face value. Moreover, the issue can reasonably be regarded as an open one. Whether any inference bearing on his credibility can properly be drawn from the Commissioner's answer is something that can only be determined after the hearing of all of the evidence and the argument based on the evidence. The Adjudicator's statements are consistent with that position.
>
> Divisional Court decision dated March 10, 2009, at Tab 3 of the Appellant's Appeal Book and Compendium

66. In Justice Montgomery's November 10, 2008, ruling he corrected the prosecution by advising that he had never used the words "professional misconduct". This, however, was not an attempt to "cure" an appearance of bias. As noted by the Divisional Court, Justice Montgomery's decision was based on the fact that he had made **no ruling** that the Commissioner had committed "professional misconduct", not that he had been misquoted:

> 87 The Appellant subsequently referred to the Adjudicator's characterization of his concern as being about "professional misconduct". In his reasons for decision on November 10, the Adjudicator objected to this characterization, pointing out the words he actually used. The Appellant submits that what the Adjudicator was concerned about was obviously misconduct. That is so, but nothing turns on it. The point the Adjudicator was making was that he had not made any decision on the issue.
>
> Divisional Court's decision, dated March 10, 2009 at Tab 3 of Appellant's Appeal Book and Compendium
>
> ****
>
> 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.
>
> I even note in the grounds for motion that I have just read, (b), the words "professional misconduct" are mentioned. Why? It never was said. This adjudicator did not at any time use the word "misconduct" but I note Mr. Gover in error alleges so repeatedly in his factum, in the Notice of Motion, and comments made directly to this Adjudicator. There was no closing of the mind on this issue.
>
> Justice Montgomery's reasons for decision, dated November 10, 2008, Tab 6 o f Appellant's Appeal Book and Compendium

(b) Ruling re Prosecution Invoking Support of the Attorney General (Appellant's Factum, pars. 81 – 82; pp. 24)

67. The Appellant suggests that Justice Montgomery's criticism of Mr. Gover is unwarranted because his revelations about the Attorney General's involvement in this matter were made at the

insistence of the Respondents and Justice Montgomery. With respect, the Appellant's argument fails to answer the fundamental question addressed by Justice Montgomery in his November 10, 2008 ruling – why was the Attorney General's office contacted to commence an application for judicial review? To date, no answer to this question has been forthcoming from the Appellant.

68. It is respectfully submitted that Justice Montgomery's comments on November 10, 2008, were not an attack on Mr. Gover for advising the court of the reasons for his decision to commence the judicial review application:

> I indicated initially that I was going to place a few comments on the record and I was going to try to measure my words and I'm still trying to do that. 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.**
>
> **If Mr. Gover's comments that he had the support of the Attorney General is correct**, then it seems to me he talked to the people at the Attorney General's department, discussed the matter with them, felt that he had their support and indicates to me he did, and in fact, if that is the case it seems to follow that nothing was heard from the subject officers or counsel in respect to the alleged support from the Attorney General. It seems a long-standing principle of our jurisprudence that before making a decision you listen to both sides went by the wayside.
>
> Justice Montgomery's recusal ruling, November 10, 2008 Transcript at pg. 6, Tab 6 of the Appellant's Appeal Book and Compendium

69. The above cited passages clearly indicate that Justice Montgomery's criticism was directed towards Mr. Gover's comments of soliciting the intervention of the Attorney General. The prosecution was attempting to seek the assistance of the Attorney General for a judicial review application in respect of a decision <u>that had not yet been made</u>. It was to this issue that Justice Montgomery directed his impugned comments.

70. A close review of the November 5, 2008 transcript reveals that the prosecution's comments about judicially reviewing a negative decision were not made at the insistence of counsel or Justice Montgomery. In response to counsel's request for an explanation as to the odd timing of the recusal motion, the prosecution advised not only that the Attorney General's support was obtained, but <u>that he could expect that the Attorney General would support taking any further steps</u> (i.e. an obvious

reference to judicial review). The latter gratuitous comment about expecting the Attorney General's support, "in the event of taking any further steps" cannot be realistically viewed as responsive to the Respondents' request for an explanation on the timing of the recusal motion. The prosecution went into much greater detail when asked by Justice Montgomery whether the prosecution had any documents to file with respect to the support obtained from the Attorney General.

> Justice Montgomery's recusal ruling, November 10, 2008 Transcript, Tab 6 of the Appellant's Appeal Book and Compendium

71. Justice Montgomery's reasons for decision on the recusal motion do not give rise to real or perceived bias. Justice Montgomery's comments reflect a measured and appropriate criticism of counsel for attempting to interject the Attorney General into the proceedings below.

72. In its ruling, the Divisional Court reviewed all the relevant transcripts and determined that the prosecution had provided no explanation for why it had solicited the assistance of the Attorney General. The Divisional Court further held that the relevance of the Attorney General's support in commencing the recusal motion was not clear. As a result, it was reasonable for Justice Montgomery to request an answer to why the Attorney General's assistance was being sought. With no answer received, the Divisional Court held that Justice Montgomery's adverse characterization of Mr. Gover's comments did not give rise to a reasonable apprehension of bias.

73. Finally, if this Honourable Court finds that Justice Montgomery's adverse characterization of Mr. Gover's comments was unreasonable, then it is respectfully submitted that these comments alone, or taken cumulatively with the other allegations, do not give rise to a reasonable apprehension of bias. Justice Montgomery's negative characterization of Mr. Gover's comments do not suggest that he has closed his mind to the prosecutions case on the abuse of process motion or that he had closed his mind to the recusal motion. In order for a reasonable apprehension of bias to exist, this Honourable Court must find that Justice Montgomery's comments demonstrate to a reasonable and informed observer

that he a predetermined an issue either on the appeal or on the recusal motion itself. Justice Montgomery's comments do not go to any issue on the appeal or in the recusal motion and, as a result, do not give rise to a reasonable apprehension of bias.

(IV) The Divisional Court Weighed the Adjudicator's impugned conduct cumulatively (Appellant's Factum, pars. 83 -84; pp. 24-25)

74. The Appellant acknowledges that the Divisional Court explicitly recognized the need to determine whether the individual allegations of bias collectively gave rise to a reasonable apprehension of bias. At paragraph 132 of the decision, the Divisional Court states, "taking into account all of the above considerations, the matters complained of do not give rise to a reasonable apprehension of bias from a cumulative perspective". In its 30 page decision, the Divisional Court addressed each of the Appellant's allegations of bias and found that none of the individual allegations gave rise to a reasonable apprehension of bias. The Appellant suggests that the Divisional Court should have repeated its analysis of each allegation when determining whether the allegations cumulatively gave rise to a reasonable apprehension of bias. Respectfully, this argument is without merit. For the Appellant's argument to be successful, the statement "taking into account all of the above considerations" must be read in isolation, as applying only to the five preceding paragraphs in the conclusion section. This is not a reasonable interpretation of the decision.

75. The Divisional Court did turn its mind to all the Appellant's allegations in conducting a cumulative analysis. Paragraph 129 of the Court's decision begins by acknowledging that there are more than two allegations of bias: "In two of the instances that are the subject of complaint". The Divisional Court focuses on two particular arguments because they were the only instances where it was alleged that Justice Montgomery had predetermined an issue – the essence of a reasonable apprehension of bias case. In light of the lengthy analysis that preceded this section of the ruling, it

was entirely reasonable for the Divisional Court to only address two arguments in detail and rely upon its earlier analysis for the remaining four arguments.

(V) The Divisional Court did not rule that the Adjudicator "cured" his bias through oral reasons (Appellant's factum pars. 85-91 pp. 25-27)

76. The Appellant relies on two sentences for its suggestion that Divisional Court erred in finding that Justice Montgomery "cured" the apprehension of bias as it related to Commissioner Fantino's evidence:

> 88 The Appellant submits that, by directing Mr. Gover to move on to another subject, the Adjudicator improperly foreclosed any further examination of the Commissioner in this area. The Adjudicator had already made the rulings noted above as to Exhibit 45 and questions had been put to the witness in accordance with the rulings and answers given. The only outstanding question not put to the Commissioner has been considered above. There was no indication from Mr. Gover to the Adjudicator that there were other questions which he ought to be allowed to put to the Commissioner. So the direction which the Adjudicator gave was a reasonable one. **Moreover, the Adjudicator has said that the matter is a proper one to be dealt with by way of re-examination. What that may mean specifically is not indicated, but it indicates that more evidence may be possible on the point** (emphasis added).
>
> Divisional Court decision dated March 10, 2009, at Tab 3 of the Appellant's Appeal Book and Compendium

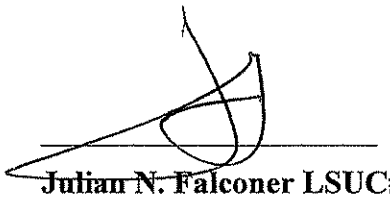
77. It is respectfully submitted that the Divisional Court's reasons for dismissing this ground of bias are found in paragraph 87 and 88 cited above (i.e. that Justice Montgomery had not predetermined the issue of the Commissioner's credibility). The Divisional Court found that the direction given by Justice Montgomery was a reasonable one, without relying on Justice Montgomery's November 10, 2008 decision. No bias was found in the earlier comments that required a "cure". In *obiter*, the Divisional Court simply observes that Commissioner Fantino can be re-examined on this issue.

PART IV – ORDER REQUESTED

78. The Respondents respectfully submit that the herein appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Toronto, this 28th day of August 2009.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484

2. *Authorson (Litigation guardian of) v. Canada (Attorney General)* [2002] O.J. No. 2050 (Div. Crt.)

3. *R. v. Brown*, [2003] O.J. No. 1251 (C.A.)

4. *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259

5. *Stetler v. The Ontario Flue-Cured Tobacco Growers' Marketing Board*, [2005] 76 O.R. (3d) 321, (C.A)

6. *Credit Union Central of Ontario Limited v. Heritage Property Holdings Inc. et al.* (2007), CanLII 16821

7. *R. v. McCullough* [1998], O.J. No. 2914

SCHEDULE "B"

STATUTORY PROVISIONS

Police Services Act

R.S.O. 1990, CHAPTER P.15

Six-month limitation period, exception

69(18) If six months have elapsed since the facts on which a complaint is based first came to the attention of the chief of police or board, as the case may be, no notice of hearing shall be served unless the board (in the case of a municipal police officer) or the Commissioner (in the case of a member of the Ontario Provincial Police) is of the opinion that it was reasonable, under the circumstances, to delay serving the notice of hearing. 1997, c. 8, s. 35.

APPENDIX "A"

TIMELINE OF PROCEEDINGS TO DATE

DATE	OCCURENCE
June 13, 2007	• First Appearance of Superintendent Ken MacDonald and Inspector Alison Jevons before Adjudicator Elbers.
July 30, 2007	• Appearance before Adjudicator Elbers. • Recusal Motion brought by Subject Officers • Adjudicator Elbers advises that Commissioner has appointed Ret. Superintendent Tweedy as adjudicator.
January 7, 2008	• Appearance before Adjudicator Tweedy. • Recusal motion argued.
January 8, 2008	• Adjudicator Tweedy renders decision granting motion for recusal
April, 2008	• Prosecution advises that Justice Montgomery has been selected as the adjudicator.
June 2, 2008	• Large disclosure package provided by prosecution.
June 3, 2008	• Pre-Conference hearing in which prosecution advised that all disclosure had been received.
June 5-10, 2008	• Further disclosure provided by prosecution
June 6, 2008	• Prosecution claims privilege over various documents
June 12, 2008	• Appearance before Justice Montgomery. • Subject Officers' request an adjournment of the abuse of process motion due to disclosure received from prosecution on June 2nd. • Subject Officers' commence motion to compel

	production of documents. • Adjournment granted and disclosure motion commenced with evidence of Superintendent Van Zant.
June 18, 2008	• Evidence of Sergeant Tina Chalk.
June 20, 2008	• Continuation of evidence of Sergeant Tina Chalk. • Final submissions made on disclosure motion. • Approximately 70 pages of factum filed by prosecution on disclosure motion.
June 24, 2008	• Ruling by Justice Montgomery on Disclosure Motion. Justice Montgomery orders the prosecution to turn over interview notes of potential witnesses.
July 15, 2008	• Abuse of Process Motion Commenced • Evidence of Kate Karn.
July 16, 2008	• Continuation of evidence of Kate Karn. • Evidence of Chief Superintendent Bill Grodzinski.
July 17, 2008	• Continuation of evidence of Chief Superintendent Bill Grodzinski. • Evidence of Susan Cole.
July 18, 2008	• Evidence of Superintendent Mary MacLachlan.
September 25, 2008	• Continuation of evidence of Superintendent Mary MacLachlan.
October 2, 2008	• Evidence of Inspector Keith Messham.
October 14, 2008	• Continuation of evidence of Inspector Keith Messham. • Evidence of Jinan Kubursi.
October 16, 2008	• Evidence of Deputy Commissioner Chris Lewis.

October 17, 2008	• Evidence of Commissioner Fantino.
November 5, 2008	• Scheduled continuation of evidence of Commissioner Fantino. • Prosecution brings motion for recusal of adjudicator.
November 10, 2008	• Ruling by Justice Montgomery on Recusal Motion. Justice Montgomery finds that there is no reasonable apprehension of bias.

APPENDIX "B"

TIMELINE OF RELEVANT DATES

DATE	OCCURRENCE
April 25, 2004	• Sergeant Alarie strikes estranged wife Susan Cole's car with a baseball bat.
February 17, 2005	• OCCPS orders hearing of the investigation done by Detective Sergeant Mark Zulinski of the Alarie domestic violence allegation.
August 25, 2005	• Inspector Alison Jevons prepares investigative report into Zulinski Investigation and finds that there was a violation of the Domestic Violence Policy and notes that an educational discussion has taken place with Zulinski.
August 30, 2006	• Email from Gavin May, legal counsel for the OPPA to Karl Walsh, President of the OPPA expressing that, "we may have the ammo to take down MacDonald."
September 14, 2006	• Complaint made against Superintendent MacDonald and Inspector Jevons for their handling of the Zulinski investigation. Complaint was made by Karl Walsh, President of the OPPA.
January 24, 2007	• Deputy Commissioner Lewis informs Chief Superintendent Bill Grodzinski that Superintendent MacDonald would be charged under the *Police Services Act* as a result of the investigation being performed by Superintendent Mark Van Zant. Van Zant's report is not completed at this time. Notice of Hearing would not be executed until March 15, 2007
February 19, 2007	• Duty reports submitted by Subject Officers to Superintendent Mark Van Zant.
March 1, 2007	• Commissioner Fantino asks Chief Superintendent

	Grodzinski in a parking lot in Caledon, "are you going to execute the disloyal one [MacDonald] or am I?" • Chief Superintendent Grodzinski makes notes of the conversation.
March 15, 2007	• Notices of Hearing are executed
March 20, 2007	• PSB requests extension to serve Notices of Hearing on Subject Officers.
April 18, 2007	• Meeting between Commissioner Fantino and Chief Superintendent Mike Armstrong, where Commissioner Fantino informs Chief Superintendent Armstrong that he is going to grant the extension.
May 7, 2007	• Subject Officers file their extension submissions.
May 15, 2007	• Commissioner Fantino formally grants extension to PSB.
December 13, 2007	• Commissioner Fantino has a conversation with Chief Superintendent Grodzinski in which he tells him that he is happy with the work he is doing in Highway Traffic and that it's not a bad thing to retire as a Chief Superintendent. • During this conversation Chief Superintendent Grodzinski asks Commissioner Fantino to keep him in the Highway Traffic Division.
January 3, 2008	• Prosecutor Owen Rees contacts to Chief Superintendent Bill Grodzinski regarding his subpoena and potential evidence at motion scheduled to commence on January 7, 2008.
January 4th, 2008	• Chief Superintendent Bill Grodzinski interviewed by Superintendent Mark Van Zant.
January 5th, 2008	• Superintendent Mark Van Zant meets Commissioner Fantino at a Kelsey's restaurant and delivers a brown

	envelope containing the anticipated evidence of Chief Superintendent Grodzinski.
January 7th, 2008	• March 1, 2007 Notes of Chief Superintendent Bill Grodzinski filed with the tribunal.
Evening of January 7th, 2008	• Commissioner Fantino informed by Ret. Superintendent Tweedy that he will be recusing himself from the hearing.
January 8th, 2008	• Commissioner holds an "ad hoc" Commissioner's Committee Meeting at 7:30am where it is decided that Chief Superintendent Grodzinski is to be transferred to North Bay immediately. • Lower ranked officers advised by Deputy Commissioners Lewis and Beechey that they will be replacing Chief Superintendent Grodzinski in the Highway Traffic Division.
January 10th, 2008	• Deputy Minister Newman calls both Commissioner Fantino and Deputy Commissioner Lewis to express concern around the timing of the transfer of Chief Superintendent Grodzinski.
January 10th, 2008	• Chief Superintendent Bill Grodzinski is informed by Deputy Commissioner's Lewis and Beechey that he was being transferred to North Bay and was to report first thing Monday January 14th, 2008.
January 11, 2008	• Chief Superintendent Grodzinski receives a phone call from Deputy Commissioner Beechey asking whether or not he contacted anyone at the Ministry regarding the transfer. • Chief Superintendent Grodzinski informed that he will no longer be transferred to North Bay.

Commissioner, Ontario Provincial Police -and- **Kenneth MacDonald and Alison Jevons**

Applicant/Appellant

Respondents/Respondents in Appeal

Court of Appeal File No. C50442

COURT OF APPEAL FOR ONTARIO

Proceedings commenced in TORONTO

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