Case Name:

Ontario (Commissioner, Provincial Police) v. MacDonald

Between
Commissioner, Ontario Provincial Police, Applicant,
and
Kenneth MacDonald and Alison Jevons, Respondents

[2009] O.J. No. 970

Court File No.: 564/08

Ontario Superior Court of Justice
Divisional Court

J.D. Carnwath, J.M. Spence and W. Low JJ.

Heard: January 8, 2009.
Judgment: March 10, 2009.

(136 paras.)

Administrative law -- Natural justice -- Bias -- Reasonable apprehension of bias -- Application by Fantino, the Commissioner of the Ontario Provincial Police (OPP), for judicial review of adjudicator's dismissal of his application for an order prohibiting adjudicator from hearing further proceedings in prosecution of two senior OPP officers dismissed -- Matters complained of, considered individually or cumulatively, did not give rise to reasonable apprehension of bias -- Adjudicator and counsel were professionals with well understood responsibilities that were informed by duties applicable to officers of the court -- Reasonable expectation was that Tribunal's work would go forward in proper manner.

Professional responsibility -- Regulated occupations -- Administration -- Boards and tribunals -- Duties -- Investigation -- Occupations -- Police officers -- Application by Fantino, the Commissioner of the Ontario Provincial Police (OPP), for judicial review of adjudicator's dismissal of his application for an order prohibiting adjudicator from hearing further proceedings in prosecution of two senior OPP officers dismissed -- Matters complained of, considered individually or cumulatively, did not give rise to reasonable apprehension of bias -- Adjudicator and counsel were professionals with well understood responsibilities that were informed by duties applicable to officers of the court -- Reasonable expectation was that Tribunal's work would go forward in proper manner.

Application by Fantino, the Commissioner of the Ontario Provincial Police (OPP), for judicial review of an adjudicator's dismissal of his application for an order prohibiting the adjudicator from hearing further proceedings in the prosecution of MacDonald and Jevons, two senior OPP officers, for misconduct. The adjudicator was a retired judge. The officers brought a motion for a stay of the discipline hearing as an abuse of process. During the hearing of that motion, issues arose that resulted in a motion by Fantino to have the adjudicator recuse himself on the basis that his conduct raised a reasonable apprehension of bias. The issues involved several exchanges between the adjudicator and counsel for the prosecution, wherein the adjudicator made comments that the investigation's approach was unusual, unfortunate and a mystery, and that time had been wasted unnecessarily. Fantino alleged that the remarks were directed at counsel for the prosecution and were unfair because the problems encountered with that issue were not of the prosecution's making. Fantino also argued that the adjudicator's words of admonishment and his disregard for the claim of privilege while focusing exclusively on getting the information before him, gave rise to a reasonable apprehension of bias. Fantino further contended that, by the rulings and remarks the adjudicator made in connection with his testimony, the adjudicator created a reasonable apprehension of bias on the issues of whether Fantino had reviewed the submissions of the officers before granting an extension of time for services of notices of hearing on the officers, and the credibility of the testimony of Fantino relating to that issue. He also argued that the adjudicator exhibited bias by questioning prosecution counsel's motive for bringing the recusal motion, and by admonishing counsel for stating that an application for judicial review would have the support of the Attorney General.

HELD: Application dismissed. The matters complained of, considered individually or cumulatively, did not give rise to a reasonable apprehension of bias. Nothing in the adjudicator's remarks suggested that he was criticizing the lead investigator. The adjudicator's comments about time-wasting did not attribute blame in any particular direction. The adjudicator expressed his frustration that a great deal of time had been wasted. Reasonable counsel would have perceived the comment to be an admonition to avoid falling into the trap of such time-consuming complications unnecessarily. Judges gave such admonitions to counsel often enough that experienced counsel should have known that this was part of the nature of the work and was not to be taken personally. The adjudicator acted reasonably in ordering the disclosure of prosecution counsel's notes, and the adjudicator did not effectively decide the question of Fantino's credibility. The adjudicator's rulings on the issue of Fantino's answers were reasonably made in the circumstances. The adjudicator's adverse characterization of prosecution counsel's remarks that a judicial review application would have the support of the Attorney General was reasonable. The adjudicator and counsel were professionals with well understood responsibilities that were informed by the duties that applied to officers of the court. The reasonable expectation was that the work of the Tribunal would go forward in a proper manner.

Statutes, Regulations and Rules Cited:

Ontario Regulation 123/98, s. 2(1)(c)(i), s. 2(1)(d)(ii)

Police Services Act, R.S.O. 1990, c. P.15, s. 80

Counsel:

J. Thomas Curry and Emily McKernan, for the Applicant.

Julian N. Falconer and Sunil S. Mathai, for the Respondents.

REASONS FOR DECISION

The following judgment was delivered by

THE COURT:--

Overview

1 The Commissioner of the Ontario Provincial Police, Julian Fantino (the "Commissioner" or the "Applicant"), applies for an order prohibiting the Adjudicator, the Honourable Leonard T. Montgomery, from hearing further proceedings in this matter. The Applicant asserts that there is a reasonable apprehension of bias on the part of the Adjudicator. The Respondents move to quash the application of the Commissioner.

2 The proceedings involve the prosecution of the Respondents, two senior officers of the Ontario Provincial Police (the "OPP") for misconduct alleged to arise as a consequence of an internal investigation conducted by the Respondents of other OPP police officers. Both of the subject officers are charged with neglect of duty and Inspector Jevons is charged with deceit. The hearing is currently stayed pursuant to an Order of this Court, dated December 11, 2008.

3 In the underlying proceeding, the Respondents brought a motion for a stay of the discipline hearing as an abuse of process. The hearing has gone on for fifteen days, nine of which have been taken up by the motion. There have been no hearing days on the merits.

4 In the course of the hearing of that motion, issues arose that resulted in a motion by the Prosecution to have the Adjudicator recuse himself on the basis that his conduct raised a reasonable apprehension of bias. On November 10, 2008, for oral Reasons, the Adjudicator dismissed the motion. The Applicant then brought this application.

The Background Facts

5 The proceeding underlying this Application is a hearing conducted pursuant to the *Police Services Act*, R.S.O. 1990 c. P.15 (the "PSA") (the "Hearing"). The Adjudicator is presiding over that matter.

6 The Hearing was commenced by way of Notices of Hearing served on the Respondents, Superintendent Kenneth MacDonald and Inspector Alison Jevons (collectively, the "Respondents") on March 15, 2007. The Respondents were each served with a Notice of Hearing alleging that they are guilty of Neglect of Duty contrary to s. 2(1)(c)(i) of the Code of Conduct contained in the Schedule of Ontario Regulation 123/98 (the "Code of Conduct"). Another Notice of Hearing relating only to Inspector Jevons alleges that she is guilty of deceit contrary to s. 2(1)(d)(ii) of the Code of Conduct.

7 On December 18, 2007, the Respondents served a Notice of Motion seeking, inter alia, to stay the proceedings against them on the basis of abuse of process. The argument of the abuse of process motion began on January 7, 2008 before Superintendent Neale Tweedy (Ret.), as Adjudicator.

8 However, because of the possibility that Commissioner Fantino would be called as a witness, Superintendent Tweedy recused himself. The Adjudicator, a retired judge of the Ontario Court of Justice, was then appointed to hear proceedings in this matter and he sat for the first time on June 12, 2008.

9 On June 3 and 10, 2008 the Respondents served Notices of Motion seeking, inter alia, further particulars and disclosure. The motion for further disclosure and further particulars was determined on June 24, 2008 after three days of evidence and submissions.

10 On July 8, 2008, the Respondents served a Fresh as Amended Notice of Motion seeking a stay of proceedings on the basis of an alleged abuse of process. In their July 8, 2008 Notice of Motion, the Respondents made a number of allegations involving the Commissioner, including that:

(1) reprisals have been made against the Respondents including the Commissioner's interference with their attempt to seek funding for independent legal counsel;
(2) the Commissioner's "relocation" of Chief Superintendent Grodzinski was an act of reprisal intended to influence or punish him for acting as a witness;
(3) the actions of the Commissioner in pursuing these proceedings and in subsequent dealings with the interests of the Respondents gives rise to a real bias or a reasonable apprehension of bias; and
(4) the Commissioner decided to grant the extension for service of the Notices of Hearing prior to receiving the Respondents' submissions.

11 The abuse of process motion commenced on July 15, 2008 and continued for nine hearing days until the Prosecution brought a motion for the recusal of the Adjudicator, which was heard on November 5 and 10, 2008. The Adjudicator dismissed the motion with oral reasons.

The Motion to Quash

12 The grounds stated for the motion to quash are that the application is legally deficient in that it fails to name the Adjudicator as the Respondent and instead incorrectly names the named Respondents; that the Commissioner appears before this Court in his role as a witness in the middle of cross-examinations and lacks standing; the timing of the request for recusal gives rise to a reasonable perception that the Applicant is seeking to interrupt his ongoing cross-examination; the conduct of the Applicant in seeking a pledge of support form the Attorney General for the judicial review application should disentitle the Applicant from pursuing the application; the Commissioner is prohibited by law from judicially reviewing the decision of the Adjudicator and the abuse of process motion has already suffered from a considerable amount of prosecutorial delay caused by the prosecution.

13 The Applicant moved in November of 2008 for a stay of the discipline hearing pending the hearing and the outcome of the application for judicial review. The motions judge in Divisional Court denied the request for a stay on November 27, 2008. The Applicant sought an order from a panel of the Divisional Court setting aside the order of the motions judge and staying the hearing. The Court granted the request and, as noted above, a stay was ordered on December 11, 2008.

14 The Divisional Court, in its reasons of December 11, 2008, held the Commissioner was not foreclosed from seeking judicial review on the basis of procedural fairness or an apprehension of bias.

15 On the motion by the Commissioner for a stay, the Divisional Court also had before it a cross-motion by the Respondents to quash the application for judicial review. The Divisional Court dismissed the motion to quash. The grounds stated for the motion are the same as those advanced on

the present motion except for the contention that the Adjudicator should be the Respondent rather than the subject officers. It would not be in order for this Court to address the grounds that have previously been advanced to the Court in the previous unsuccessful motion to quash. Moreover, since that motion has been dismissed, the proper course for the Respondents would have been to seek leave to appeal that decision rather than now to move a second time for the same relief.

16 In the circumstances, all that needs to be said about the ground that the wrong respondent has been named is that, as submitted by the Applicant, the following factors all run contrary to the position of the Respondents:

(1) there is no statutory requirement to name the Adjudicator as a respondent to this proceeding. In any event, the Adjudicator has notice of this proceeding and he could have sought to be added as a party if he so chose;
(2) indeed, had he sought to be added as a party, practically, the Adjudicator would likely have been granted only limited standing on the Application as the issues on review go to his impartiality;
(3) the case law cited by the Respondents is distinguishable;
(4) notwithstanding their assertion to the contrary, the Respondents are not at risk of an adverse costs award; and
(5) factually, the Respondents vigorously contested the recusal motion below. They are properly Respondents to this Application and there will be a fully informed adjudication of the issues on it without the Adjudicator's participation.

17 For the above reasons, the motion to quash the application is dismissed.

The Law: Reasonable Apprehension of Bias

18 Impartiality and the appearance of impartiality are essential to procedural fairness:

> The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. [...]
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> *Newfoundland Telephone Co. v. Newfoundland Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at para. 22

19 An adjudicator, who serves a purely adjudicative and quasi-judicial function, must be held to the highest standards of fairness and freedom from apprehension of bias. The adjudicator is expected to comply with the standard applicable to courts.

Newfoundland Telephone, supra at para. 27

20 Whether perceived bias exists must be determined on a carefully considered analysis of the facts of a particular case. The factors to consider in that analysis include prejudgment of issues, prejudgment of credibility, undue and one-sided interventions with counsel or in the examination of witnesses, as well as the reasons of the judge. It is essential that a court consider these factors cu-

mulatively. The test that must then be applied is as follows: taken cumulatively, would all of the relevant factors lead a reasonably informed observer to have a reasonable apprehension of bias on the part of the adjudicator and to conclude that there had not been a fair and impartial proceeding?

Newfoundland Telephone, supra, at para. 22

Sorger v. Bank of Nova Scotia (1998), 39 O.R. (3d) 1 (C.A.) at para. 3

21 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. R.D.S., [1997] 3 S.C.R. 484 at paras. 31 and 111

22 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 knowledge and understanding of the judicial process and the nature of judging.

R. v. R.D.S., supra, at paras. 31 and 37

23 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 (C.A.) at para. 17

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

R. v. Brown, [2003] O.J. No. 1251 (C.A.) at paras. 37, 39 and 105

25 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; *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*

26 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. Ct.) at para. 4; *Credit Union Central of Ontario Limited v. Heritage Property Holdings Inc. et al.* (2007), CanLII 16821 (as cited in *Tazco Holdings Inc. v. Advantage Products Inc.*, [2007] F.C.J. No. 1143)

Issues as to Reasonable Apprehension of Bias

The Evidence of Inspector Messham

Facts

27 On October 2, 2008, Inspector Keith Messham ("Messham") was scheduled to testify as a witness for the Respondents on the abuse of process motion. Mr. Falconer advised the prosecution and the Tribunal that he had learned that Messham had mistakenly provided a copy of an internal investigation report to junior counsel in a pre-testimonial interview. Mr. Falconer said that he had directed the return of the document to Messham and had neither reviewed the document nor retained a copy. The Adjudicator was then advised that Messham's conduct may have breached section 80 of the PSA concerning confidentiality obligations. Counsel for the Applicant proposed that part of the evidence of Inspector Messham should be heard *in camera*.

28 Counsel for the Respondents sought assurances from the prosecution and the investigating officers that they would not recommend that Messham be charged. Following off-the-record negotiations, the prosecution advised the Tribunal that it would not recommend any charges against Messham. Counsel for the Respondents then sought an undertaking from the lead investigating officer, Superintendent VanZant ("VanZant"), that he would make a similar recommendation. VanZant determined he could not provide such an undertaking given his statutory duties as a police officer. Counsel for the Respondents requested that the Adjudicator rule on whether there had been a contravention of s. 80 of the PSA. The Adjudicator made comments, including the following:

> It's unfortunate that we haven't got an undertaking from the investigating side in respect to no consequences. I thought that was pretty well settled before lunch, but I know it wasn't definitely settled. It would then get us on the way. But having to go this route, we're going to spend at least this afternoon doing that, and we're never going to get to Inspector Messham.
>
> It also seems rather unusual from my limited experience for this approach to be taken by the investigation side. I just don't understand it. I have all this information that has been placed before me by both counsel. I know what it's all about already. It's there, and why, this approach is a mystery to me, but I think what we should do first is have a break.
>
> Mr. Falconer can apprise his client as to what is happening, put him in the picture, and just see what flows from that point. If nothing flows of any significance, then if we have this *voir dire*, I guess we start it and see what we can get in.
>
> [emphasis added]

29 The Applicant's allegation of a reasonable apprehension of bias concerns the remarks that are underlined for emphasis in the preceding paragraph.

30 The Adjudicator then agreed that a further requested recess would be permitted before hearing submissions from both counsel. Prior to taking the break prosecution counsel gave notice that he would make submissions on whether the requested ruling related to purely collateral matters.

31 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. No ruling was sought and none issued.

32 As a result of the time take on the submissions on the above matter, no evidence was heard on October 2, until some time early after 2:08 p.m. Evidence was then taken until 4:45 p.m. The Adjudicator then heard submissions from counsel about other matters. Mr. Falconer asked for production of certain interview notes. Counsel made submissions for and against. The Adjudicator asked - with the time now close to 5:00 p.m. - "So, we are going to continue on further on this?" Mr. Falconer made further submissions. The Adjudicator made his ruling on disclosure, which favoured Mr. Falconer's position. Mr. Gover said he would heed the direction the Adjudicator had given to him and added, "It is exceptional. I hope everyone understands." The Adjudicator took exception to that remark. He made remarks about his expectations in respect of disclosure. An exchange with Mr. Gover followed in the course of which he made the following comments which the Applicant submits support a reasonable apprehension of bias when taken together with the other conduct on the part of the Adjudicator which is also the subject of complaint:

> 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.
>
> Let's get common sense in the area. Forget about the academic part for some extent, because sometimes, you can get so tied up you lose sight of what the issue really is, and as far as I'm concerned, the issue is get the information before me. 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.
>
> MR. GOVER: I understand that, Sir, and I hope that because I'm the one on my feet currently that you don't feel that this is solely or otherwise my responsibility.
>
> THE ADJUDICATOR: So I would think when interviews are taking place September 24, whatever date, somebody is there taking notes, get them out. Let them interpret, make their own interpretation about the notes, and down the road you can both argue about it in front of me and I'll make my decision.
>
> MR. GOVER: I'll do that, and I hope you understand that we've acted in good faith and tried to produce the --

> THE ADJUDICATOR: I don't doubt it a bit, but sometimes, trying to act in good faith you get so tied up academically you forge about the real issue, and we all know what the real issue is here. Just get the information tome and I'll make a decision. Don't try and keep it from me or from the defence. All right. That's all I'm saying today and we're back here October 14th. ...

Analysis

33 The Applicant submits that the Adjudicator's statements that "we wasted a lot of time today" which "wasn't necessary" and his admonition not "to horse around the way we have today" are directed at Mr. Gover with respect to the time spent on the issue of the evidence of Inspector Meesham and are unfair because the problems encountered with that issue were not of Mr. Gover's making.

34 The statement of the Adjudicator that "it's unfortunate that we haven't got an undertaking from the investigating side" does not by itself imply any criticism of Superintendent Van Zant. The balance of the paragraph which begins with that statement makes it clear that what the Adjudicator is addressing is the additional hearing time that is going to be required as a result.

35 The Adjudicator went on to say that, "It also seems unusual from my limited experience for this approach to be taken by the investigative side", and this led him to conclude, "What we should do first is to have a break". Nothing in these remarks suggests that the Adjudicator was saying anything other than that it would make sense for the parties to have another opportunity to see if they could find some way to deal with the matter before launching the proposed request for a s. 80 ruling. The Adjudicator did not say that he was content that he had jurisdiction to make the ruling. He was ultimately not asked to make any such ruling.

36 Later on October 12, at the end of the day, after hearing evidence from Inspector Messham and submissions of counsel concerning the disclosure issue, the Adjudicator made the comments set out above concerning being "academic" and "wasting time" and the need for common sense. In its factum, the Applicant submits that these comments relate to the disclosure issue that is considered below. However, in his submissions for the Applicant, Mr. Curry submitted that the comments related, or also related, to the submissions made during the morning of October 2 about the evidence of Inspector Messham. The comments that "we wasted a lot of time today" and that it was "not necessary" seem to be related to the morning submissions and it does not attribute blame in any particular direction. Mr. Gover said he hoped that the Adjudicator did not feel he was solely or otherwise responsible, to which the Adjudicator did not respond directly, but instead made comments that related instead to the disclosure issue, which remained the focus of his subsequent comments.

37 The fairest view of the exchange, as regards the evidence of Inspector Messham, is that at the 5:00 p.m. end of a day in which it appeared little progress with the hearing had been made, the Adjudicator expressed his frustration that a great deal of time had been wasted. Judges and counsel know that such things happen from time to time. Hearings sometimes take unexpected turns and that, compounded by the complexity of the law, can result in the expenditure of more time than expected. Reasonable counsel would perceive the comment about a waste of time to be an admonition to them to try to avoid falling into the trap of such time-consuming complications unnecessarily. Judges give such admonitions to counsel often enough that experienced counsel should know that this goes with the nature of the work and is not to be taken personally.

38 For the above reasons, the matters complained of in regard to the evidence of Superintendent Messham do not give rise to a reasonable apprehension of bias.

Disclosure re Witness Interviews

Facts

39 In the underlying proceeding, the Respondents sought disclosure of notes taken by Prosecution counsel in the course of a meeting to prepare the Commissioner to give evidence in the abuse of process motion. The Applicant resisted disclosure on the basis that the notes were subject to prosecution work product privilege. The Adjudicator ordered disclosure of the notes of counsel.

40 The facts giving rise to the assertion of work product privilege were as follows. By a 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 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 summaries which, in respect of the Commissioner, consisted of four pages of notes for an interview that lasted about two hours and in the case of Deputy Commissioner Lewis, consisted of three pages and a bit more for an interview of similar length. Since the prosecutor did not 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 said as follows:

> And let's be clear about this, the primary note-taker was Detective Constable Wyatt who attended both interviews along with Superintendent Van Zant and recorded notes using a computer, but what has been produced is actually an amalgam of our notes and Detective Constable Wyatt's notes so that nothing is being withheld so that, in fact, Mr. Falconer has the recollections of all of us. So beyond that, my submission is that this is a question of the substance of the information having been provided.
>
> Mr. Falconer wants to go further and he wants any sort of handwritten notes that counsel took even where an officer was taking notes of new information, and in my submission, given that we provided the substance of that in this amalgam document in respect of each of these potential witnesses, and actually, I have said I will call Commissioner Fantino, my submission to you is that he has disclosure. And I submit that no further obligation arises to produce not only the typewritten version of our notes, but also the handwritten version. That's just fishing, with respect.

41 Mr.Falconer argued that the "amalgam" notes were simply a document based on other documents and that he should be given the source documents; *i.e.* the notes taken at the meeting, whether by officers or counsel. He said the prosecution should have anticipated this in the light of his earlier approach to the issue of disclosure.

42 The Adjudicator responded as follows:

> You know, Mr. Gover, I don't want to go on at great length on this, but I agree with Mr. Falconer. You'll recall my comments made a long time ago about notes and things of that nature. I don't think it's fair for somebody else to compose the September 24th whatever it is date, and to use your words, put it together and then produce it maybe as new information or whatever. But I don't think the defence should have to rely on that. I think the defence is entitled to notes and let them decide what they want to do. Otherwise, we're gong to be in trouble again down the road.

43 As noted above in the consideration of the issue about the evidence of Superintendent Messham, Mr. Gover said he would heed the direction, but that it was "exceptional".

44 The Adjudicator responded as follows:

> Mr. Gover, I do not understand [my order] as exceptional. When I look at natural justice, procedural fairness, administrative law, I don't think it's exceptional in that range and you know what my order is and I expect you to comply. It's rather shocking to me that this comes along at this stage, September 24, and I realize that there is an obligation on behalf of the Crown to continue giving information in disclosure, but this doesn't look too good to me at this stage, that the investigation that has taken place now two or three times, evidence given, excluding witnesses. So I'm not going to say anything more, but I expect disclosure to be made to the defence in respect to what these two letters I have in front of me. ...
>
> 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.

45 The Adjudicator then continued with the remarks set out above with respect to the issue of the evidence of Superintendent Messham, to the effect that a lot of time had been wasted that day, "we get so academic that we lose sight of the real issue" and the need for common sense, concluding with his direction that "when interviews are taking place September 24, whatever date, somebody is there taking notes, get them out...you can both argue about it in front of me and I'll make my decision".

Analysis

46 The Applicant objects that the belittling way the Adjudicator dealt with the Applicant's claim of counsel's work privilege, by using such words as "so academic" and "horsing around", together with his disregard for the claim of privilege while focusing exclusively on getting the information before him, give rise to a reasonable apprehension of bias.

47 The Applicant submits that the Adjudicator, in the remarks he made, was belittling the good faith of the Applicant. However, the Adjudicator said he did not doubt that the prosecution had acted in good faith but he said that in trying to do so "you get so tied up academically that you forget about he real issue", which was to get the information to him. The gist of the complaint is that the Adjudicator's demand to have the information was wrong in law and that this error is such as to give rise to a reasonable apprehension of bias.

48 The Applicant submits that work product privilege has a sound foundation in criminal jurisprudence and protects the notes of counsel that are created while preparing a witness to give evidence. This proposition is not disputed. Mr. Gover told the Adjudicator that the interviews in question were not for the purpose of taking statements, but to prepare the witnesses to testify and that what the amalgam notes did was to record the substance of new information disclosed at the interviews. Mr. Falconer said in effect that he should not be required to accept the prosecution's decision as to which notes were to be regarded as new information. The Adjudicator accepted this submission. The Adjudicator also alluded to the earlier Ruling he had made on June 24, 2008.

49 The Applicant invokes the approval that has been given to the use of "will-say" statements. The Applicant relies on the sanction given to this approach by Sopinka J. in *R. v. Stinchcombe* as follows:

> A special problem arises in respect to witness statements and is specifically raised in this case. There is virtually no disagreement that statements in the possession of the Crown obtained from witnesses it proposes to call should be produced. In some cases the statement will simply be recorded in notes taken by an investigator, usually a police officer. The notes or copies should be produced. If notes do not exist then a 'will-say' statement, summarizing the anticipated evidence of the witness, should be produced based on the information in the Crown's possession.
>
> *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at para. 14

50 In *R. v. Johal*, [1995] B.C.J. No. 1271 (B.C. S.C.) at paras. 10 to 12, the Court noted the passage from *Stinchcombe* and went on to observe that "notes taken by Crown counsel are not in the same category because they are not made for the primary purpose of recording the witnesses' statements".

51 The passage from *Stinchcombe* on which the Applicant relies deals with only the use of a "will-say" statement where notes do not exist. The decision does not address the situation where notes already exist and a question is raised whether the statement properly reflects the information in all of the notes taken at the interview and how best to determine if that is so. Mr. Falconer seized on that question in his submission and the Adjudicator accepted that the question was an important one and held that it should be the Adjudicator who decides if the statement is adequate. These two determinations seem manifestly reasonable, at least in terms of concerns about reliability. Otherwise, information can be shielded simply by its being recorded in the notes of counsel rather than the notes of the police present at the meeting.

52 However, it also seems true that such an approach undercuts the work product privilege of counsel. There may be various ways that the problem could be avoided: a meeting of investigators and counsel with the witness to obtain new information followed by a separate meeting of counsel with the witness to prepare the witness for trial. It is not evident that such a two-stage process would be impracticable. If it is not impracticable, then if the choice is made to do both things in the same meeting, why should the court be barred from enquiring as to which notes are new information and which are not? Another possible approach would be, in circumstances like the present case, for the notes to be produced to the Adjudicator for his assessment. The Applicant makes the point here that

the Adjudicator did not ask to see the notes before he ordered their disclosure. But no-one suggested to the Adjudicator that he should look at the notes.

53 For the above reasons, there is no basis here for a reasonable apprehension of bias.

54 There is no suggestion that the disclosure in counsel's notes which the Adjudicator ordered has been prejudicial to the Applicant in the cross-examination to date. If the Respondents seek to use the disclosure in a way that the Applicant considers objectionable, that issue can be dealt with when it arises. These further considerations do not provide a reason to alter the view expressed above that the Adjudicator has acted reasonably in this regard.

The Testimony of Commissioner Fantino

Facts

55 In the abuse of process motion, the Commissioner provided his testimony relating to his granting of an extension for the time for service of notices of hearing on the Respondents. The Applicant contends that, by the rulings and remarks the Adjudicator made in connection with the testimony of the Commissioner, the Adjudicator created a reasonable apprehension of bias on two matters: (i) whether the Commissioner had reviewed the submissions of the Respondents before granting the extension; and (ii) the credibility of the testimony of the Commissioner relating to that issue.

56 This contention concerns, first, two rulings the Adjudicator made with respect to the questions that could be put to the Commissioner with respect to a document which had been entered into evidence as Exhibit 45. The Exhibit consisted of copies of a number of documents collated together for the hearing and filed in Court on September 25, 2008. Exhibit 45 comprises the request for extension signed by Superintendent MacLachlan, dated March 20, 2007, the submissions of the Respondents against the extension dated, May 3, 2007 and May 11, 2007, a letter from Superintendent MacLachlan to Mr. Falconer, dated May 7, 2007, advising that all the submissions from the Respondents would be forwarded to the Commissioner, and a copy of the request for extension with the decision of the Commissioner on the last page, dated May 13, 2007. Each of the documents in Exhibit 45 had been generated separately from the others in the Exhibit.

57 On October 17, 2008, the Prosecution called the Commissioner as a witness in response to the abuse of process motion.

58 During examination-in-chief, the Commissioner was asked whether he had read any of the materials filed on behalf of the Respondents regarding a request for an extension of time for service of the notices of hearing. He replied, "Not that I recall."

59 Counsel for the Respondents pre-emptively rose to object to the Prosecutor's next question. The Commissioner was asked to step out of the hearing room so that the Adjudicator could hear the objection:

> We'll break for 15 minutes. Don't discuss the matter with anyone, Commissioner. Thank you.

60 Counsel for the Respondents anticipated that the Prosecutor would seek to put Exhibit 45 before the witness. Counsel for the Respondents objected to the Prosecutory putting Exhibit 45 before the witness and asking the Commissioner whether he had seen it before. He claimed that to do so would be to "cross-examine" the Prosecution's own client.

61 The Adjudicator ruled:

> This Court is of this view that Mr. Gover has received his answers from the Commissioner with respect to the review and respect from the Respondents, and as far as I'm concerned, he is stuck with those answers. I am not going to allow him to present Exhibit 45 to the Commissioner.

62 The Adjudicator then called the luncheon recess, without recalling the Commissioner into the hearing room.

63 Upon resuming, in the absence of the Commissioner, Mr. Gover asked the Adjudicator whether he could put the page bearing the Commissioner's endorsement on the extension of time request, which also forms part of Exhibit 45, before the Commissioner. With the agreement of counsel for the Respondents, the Adjudicator ruled that the page could be placed before the Commissioner and it was separated out from Exhibit 45 for that purpose.

64 The Commissioner was then re-called to give evidence with respect to the last page of Exhibit 45; *i.e.* the page bearing the endorsement of the Commissioner.

65 The Prosecutor put the page bearing the endorsement before the Commissioner and asked him whether it reflected his decision. The Commissioner stated that it did and read the endorsement into the record. The Prosecutor then asked the Commissioner the following questions:

> Q. And is that an accurate statement, sir, of your reasons for extending time?
> A. Yes, and it reflected the various points of reference that that whole document contained.
> Q. And when you refer to the 'whole document', sir, what do you refer to?

66 Counsel for the Respondents then objected. The Adjudicator stated, "This is rather disturbing to me" and directed the Commissioner to leave the hearing room. The following exchange then ensued:

> THE ADJUDICATOR: You had better have some good comments to make to me about this. I'm upset. Go ahead, Mr. Gover.
>
> MR. GOVER: Well, thank you, Mr. Adjudicator.
> Mr. Adjudicator, what you just heard from the witness was
> that he read the whole document.
>
> THE ADJUDICATOR: I did.
>
> MR. GOVER: That wasn't in response to a question.
>
> THE ADJUDICATOR: No, it wasn't. Why?
>
> MR. GOVER: Well, I can assure you 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?

67 Counsel for the Respondents stated:

> ...If Mr. Gover tells you that he had no communications 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.

68 Following this statement, the Adjudicator responded as follows:

> 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.

The Applicant objects to the remarks made by the Adjudicator concerning "professional conduct".

69 In dismissing this ground on the subsequent recusal motion, the Adjudicator held that it was a matter properly dealt with on re-examination.

Analysis

70 The Applicant submits that the Adjudicator's ruling preventing counsel from refreshing the Commissioner's memory with Exhibit 45 was completely at odds with well-established principles concerning counsel's ability to do so. It resulted in an incomplete and inaccurate picture being put before the Adjudicator on an issue that he would later characterize as one going to "the very heart of the abuse motion brought by the [Respondents]".

71 The Applicant submits that the clear implication of the statement, "I'm not pointing my finger at Mr. Rees or Mr. Gover" is that the Adjudicator was pointing his finger at the Commissioner. The Applicant says this was a very serious allegation of professional misconduct against the Commissioner in the absence of any evidence of improper communication. Although the Adjudicator used the words "professional conduct", the Applicant contends there is no doubt that the Adjudicator was referring to professional misconduct, leaping to a conclusion and closing the door on the matter, and by doing so, he created a reasonable apprehension that he had prejudged the Commissioner's credibility.

72 The Applicant further submits that the Adjudicator's comments suggest that he prejudged another significant issue on the abuse of process motion, namely, whether the Commissioner had reviewed the submissions of the Respondents before deciding the extension of time issue.

73 The issues of the credibility of the Commissioner and as to whether he reviewed the submissions of the Respondents are important issues on the abuse of process motion.

74 The two rulings the adjudicator made about Exhibit 45 restricted the extent to which the Exhibit could be put to the Commissioner to the last page of that Exhibit, the page which bore the

Commissioner's endorsement of his decision. Prior to the Adjudicator making his first ruling, he received submissions of counsel. Mr. Gover said he simply wished to refresh the memory of the witness as to what material he had before him when he made his decision on May 13, 2007, which he said was fair and was a frequent practice. Mr. Falconer objected, as follows:

> ... There would be times that it's appropriate to refresh one's own witness' memory about something. I don't really have a problem with that. If the gist of the evidence was, as I indicated before, which was he said that he recalls simply that the subject officers didn't agree with the extension and the gist of the evidence is he decided as of April 18th, and then Mr. Gover says well, did you look at the submissions of the subject officers, his answer is very important.
>
> A sophisticated witness in answer to that question answers not "I can't recall and if you show me some paper I'll give you the answer". That's not what he says. He says, "No, not that I recall." So you know, what is going to happen now? Well, Mr. Gover is going to show him paper with a clear message: "Don't you recall this?" That's the problem. That's the leading nature of it, but I'm not trying -- my point is the integrity of the evidence at this stage is that he simply has in his mind no -- it's not just a recollection. No position -- he does not take the position he reviewed our submissions, and Mr. Gover is trying to get him to move from that. That's my objection.

75 In making his first ruling, the Adjudicator noted briefly the evidence counsel had referred to and he said that the Tribunal and counsel had to protect the integrity of the evidence.

76 Following an exchange on other matters, the lunch break was taken. Upon resuming, the Adjudicator made his second ruling, which was that Mr. Gover could put the signature page to the witness. The Adjudicator reminded counsel that he had made his earlier ruling. This comment was obviously a warning that the Adjudicator was not going to allow a line of questioning that would indirectly avoid that ruling.

77 The concern that the Adjudicator expressed to protect the integrity of the record was reasonable. The fact that the submissions of the Respondents were not part of the document that the Commissioner signed supports the decision of the Adjudicator that it was not in order to put before the Commissioner the entire Exhibit 45 with the submissions collated within it, together with the document signed by the Commissioner. Instead the Adjudicator allowed the signature page of the decision document to be put to him, which was what Mr. Gover requested in response. Mr. Gover did not indicate in advance what particular questions he wished to put to the witness about the signature page.

78 The question that Mr. Gover put was whether the page in question reflected the decision of the Commissioner and he said it did. Mr. Gover asked the Commissioner to read the text of the decision and he read the substantive portions as to the extension of time. The same part of the page where those portions appear also contains a statement that the Commissioner has read any submissions made by the Respondents as to the request for the extension. The Commissioner did not read out that statement.

79 Next, Mr. Gover asked if the text of the decision that the Commissioner had read out was an accurate statement of his reasons for extending the time. The Commissioner gave the answer noted above and the exchange between the Adjudicator and counsel noted above followed.

80 The Adjudicator did not allow the Commissioner to answer the question as to what his phrase, "the whole document", referred to. When the page in question was put to the Commissioner, Mr. Gover described it only as "a portion of Exhibit 45", so it is not apparent from the record what else the phrase "the whole document" could have referred to. As noted, Exhibit 45 included the nine-page notice of extension which contained the page that was shown to the Commissioner. No-one referred to that nine-page document during the examination by Mr. Gover up to the time when the Commissioner referred to the "whole document". Nothing in the submissions made in this hearing indicates what the significance, if any, might have been of the answer that might have been given to the question. Nor is there any indication of any further questions that Mr. Gover might have sought to put to the Commissioner, having regard to the reasonable rulings that the Commissioner had already made. Mr. Gover did not indicate that he had any other questions he wished to put. So, there is no basis to conclude that the Commissioner, by directing Mr. Gover to move on to another area, had acted unreasonably.

81 The objection of the Applicant is, in part, that the actions of the Adjudicator virtually prejudge the question whether the Commissioner read the submissions of the Respondents. That is not so. The answer, "Not that I recall", is not the same as stating that he had not done so. Whether it reasonably supports an inference that he had not done so is a matter for argument in light of all the evidence. As noted, the evidence also includes the statement on the last page of Exhibit 45 that the Commissioner has read the submissions.

82 The evidence also contains the Commissioner's statement that his decision as set out on that page "reflected the various points of reference that the whole document contained". So that statement is also before the Tribunal as part of the evidence to be considered in due course.

83 It is this statement that prompted the impugned remarks of the Adjudicator, as noted above. The Adjudicator characterized the statement as "gratuitous". That characterization is fair: the statement was not a response to the question put by Mr. Gover, which the Commissioner had already answered.

84 The Adjudicator said that the occurrence was "disturbing" to him. After the submissions from Mr. Gover, he said that it was "getting close to professional conduct". He said he was "not pointing the finger" at counsel, suggesting that the indicated concern related to the Commissioner. The submission that Mr. Gover made before these latter two remarks showed an anticipation that the Adjudicator could be concerned whether there had been any communication with the witness over the lunch hour. In the circumstances, it was not unreasonable for the Adjudicator to have a concern to that effect or to characterize it as "getting close to professional conduct".

85 In his remarks to counsel, the Adjudicator made that concern explicit. That put counsel on notice that it was a matter of concern to the Adjudicator. 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 Applicant 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.

87 The Applicant 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 Applicant 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.

88 The Applicant 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.

89 The rulings that the Adjudicator made on the issue of the Commissioner's answers were, in the context of the objections raised by the Respondents and in view of the gratuitous response of the Commissioner after the recess, reasonably made in the circumstances. For the above reasons, the actions of the Adjudicator relating to the testimony of the Commissioner do not give rise to a reasonable apprehension of bias.

The Reasons for the Timing of the Recusal Motion

Facts

90 At the outset of the November 5, 2008 motion, counsel for the Respondents objected to the timing of the recusal motion. The objection was that as recently as the previous Friday the parties had settled on a timetable and no mention had been made of any intention to bring the motion. Mr. Gover was then pressed by the Adjudicator and counsel for the Respondents about the timing of the decision to bring the recusal motion.

91 What Mr. Gover said at that point was this:

> 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.

In this answer Mr. Gover did not refer specifically to bringing an application for judicial review.

92 The second stage occurred when, pressed further by counsel for the Respondents and the Adjudicator, Mr. Gover said the following:

> 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.
>
> ...
>
> So we've been told we have that support in the event that it's necessary to seek judicial review and that I put it on that basis, and in my submission, that is a full answer.

93 Mr. Gover stated that this matter was only being discussed because he was being required to account for not raising the motion at an earlier time.

94 Both Mr. Falconer and the Adjudicator then enquired into the identity of counsel at the Ministry of the Attorney General and the Ministry of Community Safety & Correctional Services with whom Mr. Gover had communications. Mr. Gover then put those names on the record.

95 After the conclusion of the Prosecution's argument, the recusal motion was adjourned to provide the Respondents time to prepare their materials.

96 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 advised Mr. Gover that it would be taking any position on the recusal motion or a subsequent judicial review.

97 By correspondence to Mr. Falconer, dated November 8, 2008, Mr. Gover stated that he had a clear understanding that the Attorney General would support any further proceedings in relation to his recusal motion.

98 On November 10, the motion for recusal continued. The Adjudicator noted that Mr. Gover had gone off the record for the recusal motion and Mr. Curry assumed carriage of the motion for the Commissioner.

99 Mr. Falconer submitted that soliciting the Attorney General, a non-party, for support to commence judicial review was a very unusual step for a police discipline prosecutor to take. He submitted that this step had to be considered in its context: the Commissioner, who was instructing counsel, was in the middle of his cross-examination. He said that the case law, as expressed in the decision in *Watson v. Catney* (2007), 84 O.R. (3d) 374 (C.A.), does not permit a Commissioner to judicially review a decision of an adjudicator at a discipline hearing. He submitted that the prosecution's request of the Attorney General represented an effort by the Commissioner to "orchestrate a back-room deal to do directly what he could not do directly".

100 In his reply, Mr. Curry submitted, with regard to the matter of the Attorney General, that the *Watson v. Catney* decision, properly understood, does not immunize an adjudicator from allegations of an apprehension of bias.

101 The Adjudicator delivered his reasons for decision orally on November 10. He said Mr. Gover explained that he communicated with counsel for the Ministry of the Attorney General and with counsel for the Ministry of Community Safety and Correctional Services and then "decided to bring this motion to remove the Adjudicator with the support of the Attorney General for a judicial review, that's the way I understood it".

102 The Adjudicator continued as follows:

> ... 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.

103 The Adjudicator alluded to the comment of the Ministry of the Attorney General on November 5 and the letter of Mr. Gover of November 8 referred to above.

104 The Adjudicator then stated:

> The comments to this Tribunal by Mr. Glover have absolutely, as far as I'm concerned, no relevancy on this motion and you have to wonder why were they 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.

He added:

> 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.

The Adjudicator then continued:

> I also found it highly improper when Mr. Gover clearly expressed on the record a comment to this effect; I can tell you quite frankly, Mr. Adjudicator, that in the event that you do not remove yourself I will be bringing an application for a judicial review with the support of the Attorney General. Now, that's the same as saying to a criminal court judge, Your Honour, I want to make it clear that unless

> you find my client not guilty, I will be appealing your decision to the Court of Appeal.
>
> In my many years on the bench I have, I admit, on rare occasions had comments of that kind put to me by lawyers who were inexperienced in court matters, but never by counsel of Mr. Gover's experience in our courts. These comments have absolutely no relevancy on this motion to recuse, and you have to really wonder why they were made. Why were they?
>
> I respectively submit sitting here as an adjudicator, trying to keep it in perspective, trying to determine what was going on in the adjudication or hearing room at the time, what am I as an adjudicator supposed to think, or what is a judge supposed to think if, in fact, a judge were sitting. I respectively 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.

In the concluding portion of his remarks on the matter, the Adjudicator said:

> The comments made to me as an adjudicator by Mr. Gover were wrong plainly and simply. You can dress up any words you want to try to explain why that would take place, but I know and he knows -- and I use simple words -- they were wrong plainly and simply and represent a pressure which no adjudicator or judge should be subjected. People need to feel entirely confident that every judge or adjudicator does no more than apply the law impartially and objectively.
>
> There must not be the slightest reason to wonder whether the judge or adjudicator was influenced, for example, political support or intervention, or that the threat that if my application is dismissed I will seek judicial review. ...

Submissions of the Parties

105 The Applicant submits that the Adjudicator made these comments without referring to the fact that Mr. Gover's basis for making reference to the Attorney General was to answer requests by counsel for the Respondents and the Adjudicator himself and that Mr. Gover made it clear that his remarks were not intended to convey any disrespect. The Applicant submits that:

> In mischaracterizing and misquoting Mr. Gover's comments and concluding that the motive behind those comments was to pressure or intimidate the Adjudicator, the Adjudicator engaged in a personal attack on Mr. Gover. His intemperate comments were without a reasonable basis and create a reasonable apprehension in the informed and reasonable observer that he cannot fairly and impartially hear and consider submissions from the Prosecution, particularly as it came moments before his ruling on the merits of the recusal motion. The Adjudicator's unfair criticism of Mr. Gover undermines public confidence in the proceedings and in the impartiality of our systems of justice and administrative law.

106 The Respondents submit that the Applicant's argument fails to answer the fundamental question addressed by the Adjudicator in his November 10, 2008 ruling - why was the Attorney General's office contacted to commence an application for judicial review? They submit that no answer to this question was forthcoming from the Applicant. They say that the Prosecution's comments about judicially reviewing a negative decision cannot be regarded as having been made at the insistence of counsel or the Adjudicator. In response to counsel's request for an explanation as to the timing of the recusal motion, the Prosecution advised not only that the Attorney General's support was obtained, but that the Prosecution could expect that the Attorney General would support taking any further steps. They say that the latter 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. They characterize the comment about "further steps" as "gratuitous".

Analysis

107 In considering how to assess the remarks of the Adjudicator in his reasons for decision on November 10, it is important to take into account the remarks he made on November 5 about this matter and the submissions that he received from counsel on November 5 and November 10.

108 On November 5, Mr. Gover was asked after he made his first comment about the Attorney General, whether he would consider bringing his recusal motion later when the evidence of the Commissioner was completed. Mr. Gover responded as follows:

> ... My submission is that the law is clear that where what is contended to be a disqualifying reasonable apprehension of bias arises, then it must be brought immediately, and as we will see, there is compelling authority from the Supreme Court of Canada and the Court of Appeal holding that the proceedings are effectively nullified once such a reasonable apprehension of bias arises, hence, the need to raise the issue in a timely way, and hence, the urgent need for the Tribunal to deal with that issue before proceeding further. I'll take you to those authorities shortly, so I do not accept that there is any obligation on me to allow further evidence to proceed before raising this motion.

109 Mr. Falconer then made submissions about the matter of the Attorney General. He said:

> I'm having some difficulty even understanding the significance even if the Attorney General is supporting it. Does that all of a sudden mean the Commissioner who instructs Mr. Gover -- make no mistake about that. Mr. Gover made some words before about acting for the OP. Mr. Gover has been quite clear that the Commissioner instructs him.
>
> Now, how did it change the Commissioner giving instructions all of a sudden because the Attorney General lent support on Monday morning? ...
>
> Now, I would ask, if I could, Your Honour, with respect, that there be a ruling on the issue of the affiant, and then I would ask for full disclosure on the issue of the position of the Attorney General since Mr. Gover tells us it's such a lynchpin issue. I would like to know where this Attorney General support is. I would like to

> know what it looks like, and I'd like to know the Attorney General's position before we go any further.

110 The submission of Mr. Falconer raised two issues: (1) why did Mr. Gover consider it necessary to consult the Attorney General; and (2) Mr. Falconer's request for "full disclosure on the issue of the position of the Attorney General". The first issue is different from the second, although it would be understandable if in the context of the oral submissions that were being made, the first issue raised by Mr. Falconer appeared to be more in the nature of a submission that was being advanced in support of the request for full disclosure of the position of the Attorney General, rather than an independent question.

111 The Adjudicator responded as follows:

> 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?

112 The Adjudicator's direction did not address expressly the issue raised by Mr. Falconer as to why the Attorney General was consulted. The direction is framed in a general way and could be taken to endorse both issues raised by Mr. Falconer, but it did not do so specifically.

113 In reply Mr. Gover made the second statement set out above, in which he said the Prosecutor expected to have the Attorney General's support for an application for judicial review. This answer was obviously responsive to the request for full disclosure of the position of the Attorney General. But it did not deal with the first issue raised by Mr. Falconer, *i.e.* as to why Mr. Gover chose to consult the Attorney General.

114 Mr. Falconer said that this reply was not a full answer and he wanted the names of the counsel referred to.

115 The Adjudicator then said:

> I've tried to get the point across, Mr. Gover, that I'm interested in this point. I mean, all of a sudden it appears before me initially simply that you have the support of the Attorney General. Now, that's not good enough for me to sit here and listen and somewhere down the line make my decision. I need information and you know I want information and I want information that you can get your teeth into, not just something tossed into the air. So this is an important point for me. It seems to be for Mr. Falconer, as well, but I've got to make a decision down the road, and with this put on the record, I want to know all about it.

116 As noted above, Mr. Gover then put the names on the record.

117 Mr. Falconer sought to pursue an issue as to conflicts of interest in the Ministry of the Attorney General that he considered arose from the advice just given by Mr. Gover, but the Adjudicator refused to deal with that question further at that stage. He said:

> 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.

118 In the submissions which he then made, Mr. Gover did not touch further on the matter of the Attorney General.

119 Mr. Falconer then made submissions. He made the following statements:

> ... I find it astounding that Mr. Gover would suggest to you today that the reason he decided to bring this motion since Friday at 4:30 -- in other words, the change in position since Friday at 4:30 -- would be because he solicited the Attorney General's support on Monday, November 4th. I apologize, Monday, November 3rd.
>
> Is this how we decide to bring motions, how many allies we can get? If I don't have enough allies, I don't bring this serious kind of motion, the judge isn't committing bias, but if I can line up my allies, then I bring the motion? Is that how we do business?

He returned to the issue, as follows:

> ... The revelation this morning that the Attorney General intends to support Commissioner Fantino's position in the Divisional Court is incomprehensible and gives rise to a whole series of issues of abuse on their own.
>
> The prospect that the Attorney General would advise Mr. Gover that he supported a judicial review of a decision that has yet to be rendered, that he would support a judicial review before a decision has even been made that could be judicially reviewed, is simply stunning. I accept Mr. Gover at his word that the Attorney General has indicated they will support this judicial review.
>
> You have already made reference to the interesting dilemma an adjudicator is placed in when told by counsel arguing a case that they intend to appeal and/or jurisdictionally review their decision before it's even rendered. You've spoken to that. Suffice to say that -- sorry. Suffice to say this, it becomes even more un-

> usual when a court is told not only will that happen, but we have the support of the Attorney General before you even render your reasons.
>
> The only materials the Attorney General could have seen as of Monday morning since Mr. Gover and the Attorney General were the only ones who knew about this, were Mr. Gover's materials. The Attorney General would have pledged his support for the Commissioner's position before seeing the materials of the subject officers or even reading or reviewing your decision.
>
> I made submission that Mr. Gover put to Commissioner Fantino in my opening remarks: quote,
>
> '... At its heart, the position of the subject officers is that this is a political prosecution. It is not a prosecution about deceit and neglect of duty. It is not actually about that. It is a political prosecution hatched by a political Association and continued, with respect, by an equally political Commissioner, with respect ...'
>
> > What is one to think now? An Attorney General has weighed in through Mr. Gover before a decision is rendered. That same Attorney General has dispatched lawyers for Superintendent MacLachlan, testified in a supportive fashion for Commissioner Fantino, has dispatched lawyers to quash summonses, has dispatched a lawyer to support and represent Deputy Minister Newman, and these same lawyers have now pledged their support for a judicial review of a decision that hasn't even happened.
> >
> > That's why in part I'm requesting this adjournment, and so I say with respect we ought to have the opportunity to consider our position, consider the implications of the revelations of this morning, among other things, and to respond with appropriate written submissions and a factual record. ...

120 When the motion resumed on November 10, submissions on the matter of the Attorney General were made by Mr. Falconer and Mr. Curry as described above in the review of the facts.

121 In the result, taking into account all the submissions of counsel made on November 5 and November 10 for the Applicant on the matter of the Attorney General (*i.e.* the submissions of Mr. Gover at the outset on November 5 and the submissions of Mr. Curry on November 10 about the *Catney* decision), none of these submissions by the Applicant addressed the question as to why Mr. Gover had decided to consult the Attorney General.

122 If, as Mr. Gover submitted, there was an obligation to bring the motion for recusal on a timely and urgent basis once the reasonable apprehension of bias had arisen, it would have been reasonable for the Adjudicator to infer that that obligation was a sufficient reason for the bringing of the motion. On that basis, it would also have been reasonable to consider that the support of the Attorney General could not be regarded as a relevant factor in determining the need for the motion. Furthermore, since the relevance of that support is not evident, it would have been reasonable for the Adjudicator to wonder why that support was mentioned and specifically why Mr. Gover went on to say the support would be given "in the event of taking any further steps". The Adjudicator's concern in this regard was reasonable.

123 The Adjudicator did not leave the question at this stage of the analysis. On November 5, he had said in his remarks prior to Mr. Gover's submissions on the merits of the motion that, after he had heard everyone, he would decide as to recusal and as to whether it is proper or improper for counsel to tell him that if he denies the recusal motion, there is going to be a judicial review. However, in the submissions that followed, counsel for the Applicant made no submissions on that question of propriety. The only submissions on the question were those of Mr. Falconer which are referred to above. In the light of the submissions he had received, and the lack of submissions on the issue from counsel to the Applicant, the Adjudicator addressed the issue by raising the public policy consideration that the public must be able to have confidence that a judge is not subject to pressure such as political support or intervention or threat of judicial review. The content of the remarks of the Adjudicator on this point is not the subject of any dispute.

124 On this analysis, the question to be decided is whether it was unreasonable for the Adjudicator to say that the impugned remarks amounted to an "attempt to pressure and intimidate a judicial officer". The Applicant submits that the impugned remarks must be understood in their context, which was the requirement from the Adjudicator to explain the timing of the recusal motion, a requirement to which Mr. Gover alluded a number of times as he made the remarks. For the reasons given above, Mr. Gover's remarks may well have been properly responsive to the request for full disclosure about the position of the Attorney General, but they did not deal with the issue as to why he had considered it necessary to consult the Attorney General. Mr. Gover may not have perceived that issue as a question that he was expected to answer. However, without submissions on that question it was reasonable for the Adjudicator not to consider that the context in which those remarks were made rendered them innocuous. In these circumstances, the Adjudicator's adverse characterization of the impugned remarks was reasonable.

125 The Adjudicator acknowledged that Mr. Gover is an experienced counsel. At an earlier point in the hearing of the motion on October 17, during the exchange relating to the Commissioner's evidence with respect to the extension of time request, the Adjudicator stated that all counsel in the hearing had been up front with him since he started and he did not put any reflection on their integrity. At first blush, the Adjudicator's characterization of the impugned remarks as an "attempt to pressure and intimidate" might be thought incompatible with the Adjudicator's acknowledgement of Mr. Gover's experience and earlier conduct, and therefore an overreaction and a reason to apprehend bias. The answer to this point is that the adverse characterization relates to the specific impugned remarks. It is not addressed to Mr. Gover's standing. Nor is it addressed to whatever may have been his underlying intention in making the impugned remarks which, as discussed above, may well have been simply to respond to the question which he understood was to be answered.

126 For the above reasons, the Adjudicator's reaction to the impugned remarks was reasonable. That reaction does not give rise to a reasonable apprehension of bias.

Conclusion

127 For the reasons set out above, none of the matters complained of gives rise individually to a reasonable apprehension of bias.

128 The determination whether such a reasonable apprehension arises also requires the matters complained of to be considered cumulatively.

129 In two of the instances that are the subject of complaint, the manner in which the Adjudicator dealt with the issue before him gives, at first glance, an appearance of peremptoriness. These

two instances are the ruling about the disclosure of counsel's notes, on October 2, 2008, and the direction to Mr. Gover, on October 17, 2008, to move on in his questioning beyond the Exhibit 45 issue.

130 Each of these instances must, however, be understood in context. In each case, the Adjudicator had made a prior ruling. In the case of the disclosure ruling, the Adjudicator had made an extensive ruling on June 24, 2008 dealing with the same issue and he referred expressly to that ruling in dealing with the disclosure issue presented to him on October 2. In the case of the direction to Mr. Gover on October 17, the Adjudicator had made a ruling prior to the lunch break and had reminded counsel about the need to observe that ruling. In each of these instances, it would have been reasonable for the Adjudicator to take the prior ruling into account in considering how to deal with the matter before him and to decide that enough had been said and heard.

131 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.

132 We reject any suggestion that, taking into account all of the matters before the Court, including the fact that the Applicant has moved against the Adjudicator for recusal and has now sought recusal by way of judicial review, there is bound to be an adverse impact on the ability of the Tribunal to proceed with its remaining duties properly. Such a suggestion would be tantamount to saying that, because of the recusal motion of the Applicant concerning the Adjudicator, there could be a reactive bias on the part of the Adjudicator. Such a suggestion would be without foundation. Since, in respect of the impugned matters, the Adjudicator has acted reasonably, it would be only conjecture against the experience to date to suggest that he would act unreasonably in the future.

133 If, in such circumstances, a suggestion of this kind could succeed, it would imply, at least potentially, that a party to proceedings could attempt to remove an unwanted judicial officer simply by bringing a complaint of bias against the officer, regardless of whether the complaint succeeded or not. That would be inimical to the proper working of the justice system.

134 It is advisable to remember that the Adjudicator and counsel are professionals with well understood responsibilities that are informed by the duties that apply to officers of the court. The reasonable expectation should be that the work of the Tribunal will go forward in a proper manner.

135 For the above reasons, the application for judicial review is dismissed.

136 Counsel may make written submissions as to costs within 30 days.

J.D. CARNWATH J.
J.M. SPENCE J.
W. LOW J.

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