DIVISIONAL COURT FILE NO.: 564/08
DATE: 20081211

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CUNNINGHAM A.C.J.S.C.J., SWINTON and GRAY JJ.

B E T W E E N:	
COMMISSIONER, ONTARIO PROVINCIAL POLICE	*J. Thomas Curry and Emily McKernan*, for the Applicant
Applicant	
- and -	
KENNETH MacDONALD and ALISON JEVONS	*Julian Falconer*, for the Respondents
Respondents	
	HEARD at Toronto: December 8, 2008

CUNNINGHAM A.C.J.S.C.J.:

[1] Within a disciplinary hearing under Part J of the *Police Services Act* (the "PSA") involving the respondents before the Honourable L.T. Montgomery (the adjudicator), the Commissioner brought a motion to have the adjudicator recuse himself. This motion was brought before the adjudicator on the basis that he had created a reasonable apprehension of bias. The adjudicator dismissed the motion and the prosecution then brought an application for an order prohibiting the adjudicator from continuing with the hearing. That application is now scheduled to be heard by the Divisional Court on January 8, 2009.

[2] Following the adjudicator's dismissal of the recusal motion, the prosecution sought to have the disciplinary hearings stayed, pending the determination of the application, on motion

November 24, 2008. The motion judge on November 27, 2008 denied the motion for a stay. It is the decision of the motion judge that is the subject of the proceeding before this panel. The applicant seeks an order pursuant to s. 21(5) of the *Courts of Justice Act*, setting aside the order of the motion judge and staying the hearing. As well, the applicant seeks to have the respondent's cross-motion to quash the main application dismissed.

[3] The applicant argues that the motion judge erred in four ways:

1. she failed to direct herself to the test for a stay;
2. she applied the wrong test for whether a reasonable apprehension of bias exists and incorrectly concluded there was no evidence of bias;
3. she erred in concluding the Commissioner may not have standing to bring the application; and
4. she failed to articulate that if a reasonable apprehension of bias exists, it cannot be cured by compelling the parties to continued with the hearing.

[4] Did the motion judge fail to direct herself to the test for a stay? The test for many years has developed as follows. The moving party must show that:

(a) the application raises a serious question;

(b) irreparable harm will result if the stay is not granted; and

(c) the balance of convenience favours the granting of a stay.

(See *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17 paras. 43, 78-80;

College of Physicians and Surgeons of Ontario v. Power, [2003] O.J. 590 at para. 6.)

[5] In *Longley v. Canada (Attorney General)*, [2007] O.J. 929 at para. 14, the court made it abundantly clear that the overarching consideration is whether the interests of justice call for a stay.

[6] What then did the motion judge say with respect to the aforementioned test? After a review of some of the exchanges and portions of the adjudicator's decision on the recusal motion, the motion judge proceeded to consider three issues:

(a) comments made by the adjudicator with respect to a prosecution witness;

(b) comments made by the adjudicator with respect to the Commissioner;

(c) the critical comments made by the adjudicator about prosecution counsel.

[7] In all three cases, she concluded the adjudicator had not demonstrated bias but rather a degree of frustration. In the case of the Commissioner, she concluded it would be preferable to complete his evidence before seeking a remedy saying it was not clear to her, based on *Watson v. Catney* (2007), 84 O.R. (3rd) 374 (CA); that the Commissioner even had standing to bring a motion for a stay. As the motion judge stated at para. 38:

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

[8] In my view, the Commissioner clearly has standing to bring the application and the motion judge erred in concluding otherwise. In *Watson, supra*, the issue was whether a Chief of Police has standing to bring an application for judicial review of an arbitrator's final decision. The Court of Appeal concluded the Chief lacked standing. As the Court stated at para. 28:

> Section 70(1) of the PSA grants a right of appeal to a police officer or complainant, but not to the Chief. In my view, it is logical and consistent with the PSA that the Chief not enjoy a right of appeal because the Chief is, in effect, the decision-maker—sometimes personally and other times, as in this case, through the police officer he appoints to be the hearing officer. In logic and in policy, if the Chief cannot challenge the decision of his delegate by way of appeal, he should not be able to mount a similar attack through the vehicle of judicial review.

[9] While the court made it clear that the Chief (in our case the Commissioner) was precluded from seeking judicial review of an arbitrator's final decision on the merits there was no foreclosure of the Chief (Commissioner) from seeking a review on the basis of procedural fairness or an apprehension of bias. In my view, the Commissioner, who controls the statutory tribunals process, must have standing to seek a review in order to preserve procedural fairness in the discipline process.

[10] The entire thrust of the motion judge's reasons seems to be that cooler heads ought to prevail and that the hearing should continue until the Divisional Court deals with the application in January.

[11] As to the issue of the stay, at para. 42, the motion judge stated:

> To grant a stay, even if the remedy was available to the applicant, accomplishes nothing. A full panel of the Divisional Court will not

> be in any better position than I am to assess the allegations of bias out of context, without a substantive ruling, at this very awkward and perhaps inappropriate point in the proceedings. In my view the Adjudicator has expressed frustration and concern but has not exhibited bias. The Adjudicator has not lost jurisdiction as suggested by Mr. Curry. For all of these reasons, I conclude that the applicant has failed to meet the three-pronged requirements of section 4 of the *Judicial Review Procedure Act* justifying an order for a stay. I conclude that it would not be appropriate for me to exercise my discretion to grant the relief requested in the circumstances in this case.

[12] The test the motion judge refers to in the paragraph, "the three pronged requirements of s. 4 of the JRPA..." is not the test for a stay. All this section does is provide the court, in an Application for Judicial Review, with power to make such interim orders as it considers proper pending the determination of the Application.

[13] In my view, rather than articulate and consider the proper test for a stay, the motion judge in effect took on the role of the Divisional Court panel which will be hearing the matter of bias in early January. Nowhere in her reasons does she consider whether there was a serious issue to be tried, nor does she speak of or analyse the issues of irreparable harm and the balance of convenience. I am of the view that had the motion judge applied the proper test, recognizing the low threshold for establishing "serious", she would have, as I do, concluded the matter ought to be stayed. Indeed, even in her consideration of the impugned comments, the motion judge did not articulate the test for whether a reasonable apprehension of bias exists. It is not whether she was persuaded there was evidence of bias, but rather whether an "informed person, reviewing the matter realistically and practically... and thought the matter through (would) conclude..." that a reasonable apprehension of bias exists. On the issue of whether a reasonable apprehension of bias exists, it is clear there is a serious issue to be tried.

[14] In my view, the applicant will suffer irreparable harm if the stay is not granted. As noted by the court in *RJR MacDonald*, *supra*, at para. 59, "'Irreparable' refers to the nature of the harm rather than its magnitude." In the case of a denial of natural justice or bias, it is difficult to see how it could be cured. A tribunal loses jurisdiction when a reasonable apprehension of bias arises. To force a litigant to continue to appear before such a tribunal would constitute irreparable harm. Anything the tribunal did to attempt to cure the appearance of bias would be suspect.

[15] Finally, the balance of convenience favours the applicant. The adjudicator has apparently scheduled four days of hearing between now and January 8, 2009, the date scheduled for the Application for Judicial Review to be heard by the Divisional Court. While the adjudicator had previously indicated he would be unavailable from January to June 2009, that is no longer the case. He has signified that he will now be available to hear the matter throughout that period. All that will be lost if the applicant is unsuccessful is seven hearing days within a one-month period. There is no reason to believe that those dates cannot be rescheduled relatively quickly.

[16] This conclusion might be different if there were a longer period of delay for the hearing of the application, or if the administrative hearing were likely to be more severely disrupted.

[17] For these reasons, we have determined that the order of the motion judge should be set aside, and an order should issue granting a stay of the hearing before the adjudicator. The stay shall be in effect until the Application for Judicial Review has been disposed of by the Divisional Court. The motion to quash the Application for Judicial Review is dismissed.

[18] In the circumstances, there will be no order as to costs.

Cunningham A.C.J.S.C.J.

Gray J.

Swinton J. (dissenting):

[19] I agree with my colleagues that the motions judge erred in the test applied with respect to a stay and with respect to the determination of bias. I also agree that the Commissioner has standing, and that the respondents' motion to quash the application for judicial review should be dismissed.

[20] Given the low threshold to establish a serious issue to be tried, I am satisfied that the applicant 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 VanZant does not cross that low threshold.

[21] In my view, the applicant has failed to establish that irreparable harm will be suffered if the stay is not granted. Were the motion for abuse of process to continue before the adjudicator, there would be at most four more days of hearing and a decision to be issued December 17, 2008. If the application for judicial review ultimately succeeds, any findings will be set aside.

[22] While there has been considerable media coverage of the comments about the Commissioner and counsel, any harm has already been done. If the application succeeds, there will be a remedy.

[23] The applicant argues that it is in the public interest to stay these proceedings, as public confidence will be eroded if the adjudicator continues to preside. The applicant relies on *Booth v. Huxter*, [1993] O.J. No. 2810 (Div. Ct.), where a coroner's inquest was stayed when it was alleged, among other things, that a reasonable apprehension of bias existed.

[24] The Supreme Court of Canada in *RJR, supra* stated that the public interest should be considered at the stage of the balance of convenience (at para. 57).

[25] This is not a case like *Booth*, where the failure to grant a stay would have forced the applicants to continue the inquest without counsel of their choice. Real prejudice to the applicants was established in that case. No such prejudice has been established in this application.

[26] In my view, the public interest favours the continuation of this proceeding to allow the timely determination of the abuse of process motion. There have been nine days of hearings to date, and Commissioner Fantino's cross-examination has been interrupted since October 17, 2008. Only four more days of hearings will complete what has already been a lengthy process.

[27] This Court has often said that it is undesirable to interrupt the course of administrative proceedings by an application for judicial review, absent exceptional circumstances (*Ontario College of Art v. Ontario (Human Rights Commission)* (1993), 11 O.R. (3d) 798 (Div. Ct.) at paras.5-7). It is preferable to have judicial review on the basis of a complete record so as to be able to determine the full impact of any potential error or, in this case, the impact of certain comments.

[28] The panel hearing the application for judicial review on January 8, 2009 will be in a better position to assess the merits of the application if the abuse motion has concluded. In his reasons on the motion for recusal, the adjudicator stated that he contemplated Commissioner Fantino would be asked to clarify the comment about the "whole document" in re-examination. Counsel for the respondents has indicated that he will not object if this line of questioning is pursued. To have the answer clarified will be an advantage for the adjudicator and ultimately for the Court in assessing the reasonable apprehension of bias argument.

[29] The onus to prove reasonable apprehension of bias is on the applicant. There is a presumption of impartiality on the part of a judicial decision-maker. This should be kept in mind in the context of this stay application, where the adjudicator is a retired judge (*R. v. R.D.S.*, [1997] 3 S.C.R. 484 at paras. 33 and 117). 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 applicant'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.

[30] Therefore, as the applicant has not established irreparable harm and as the balance of convenience weighs in favour of completing the motion for abuse of process, I would dismiss the motion to vary the order of the motions judge.

K. Swinton J.

Swinton J.

Released: December 11, 2008

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REASONS FOR JUDGMENT

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