IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Grimsmo v. Jones,
2021 BCSC 575

Date: 20210330
Docket: S2011991
Registry: Vancouver

Between:

Cst. Bjorn Grimsmo

Petitioner

And

Chief Officer David Jones

Respondent

And

The Police Complaint Commissioner of British Columbia

Respondent

Before: The Honourable Madam Justice W.A. Baker

On judicial review from: An order of the Discipline Authority of the Police Complaints Commission, dated August 14, 2020 (OPCC File: 2014-9474-04).

Reasons for Judgment

Counsel for Petitioner:	C. Tobias, Q.C. J. Cliffe, Q.C.
Counsel for David Jones:	D. McKnight
Counsel for The Police Complaint Commissioner of British Columbia:	D. Lovett, Q.C.
Place and Date of Hearing:	Vancouver, B.C. February 18, 2021
Place and Date of Judgment:	Vancouver, B.C. March 30, 2021

Overview

[1] On August 14, 2020 David Jones, the discipline authority ("DA"), in a discipline proceeding constituted under the *Police Act*, R.S.B.C. 1996, c. 367, issued a decision in which he refused the petitioner's request that he recuse himself. The discipline proceeding is ongoing. In this petition for judicial review, the petitioner seeks the unusual order to have DA Jones removed prior to the completion of the discipline proceeding.

[2] The petitioner seeks various remedies, but the essence of his complaint is that a reasonable apprehension of bias exists on the part of DA Jones against the petitioner and, in failing to recuse himself, DA Jones has failed to comply with the requirements of procedural fairness in the proceeding.

[3] The respondents oppose the petition on the basis that it has been brought prematurely and the Court ought not determine the petition until the discipline proceeding is complete and all statutory rights of review have been exhausted. In the alternative, the respondents argue that no finding of reasonable apprehension of bias should be found on the evidence presented. The respondent Police Complaint Commissioner ("PCC") also argues that an order in the nature of *mandamus* compelling the PCC to appoint a new DA is not available to the petitioner.

[4] For the reasons that follow, I have concluded that in the circumstances of this case the application for judicial review is premature.

Background facts

Legislative framework

[5] The *Police Act* governs the conduct and discipline of municipal police offers in British Columbia. Part 11 of the *Police Act* sets out a complete code as to discipline proceedings, including the process to be followed when allegations of misconduct are made, the conduct of investigations, the appointment of DAs, the conduct of discipline proceedings, and the process to be followed in any reviews of the final DA report.

[6] The Act provides that the Office of the Police Complaints Commissioner ("OPCC") will act as a gatekeeper in ensuring oversight of police complaints. The OPCC decides whether complaints are admissible (s. 82), whether investigations should be ordered (s. 93), and who should be appointed as DA (s. 135).

[7] Pursuant to s. 112 of the *Police Act*, the DA must review the final investigation report ("FIR") prepared by the investigator relating to the alleged misconduct. If the DA determines the conduct described in the evidence as set out in the FIR appears to constitute misconduct, the DA is required to convene a disciplinary proceeding in respect of the matter.

[8] A member who is the subject of a discipline proceeding is entitled to request any of the witnesses listed in the FIR attend the discipline hearing to be examined or cross-examined (s. 119).

[9] If a member is aggrieved by any of the matters in the DA's final report, the member is entitled, pursuant to s. 133(5), to request a public hearing or a review on the record.

[10] If a review on the record is ordered, the record on the review includes the materials set out in s. 128(1). The entire unedited record of the discipline proceeding is included in the record, pursuant to s. 128(1)(e). Pursuant to s. 154(2), a decision on a review on the record is final and not subject to review by a court.

[11] If a public hearing is held, either pursuant to s. 137 or s. 138, an appeal on a question of law lies to the court of appeal, with leave of a justice of the court of appeal, from a decision of the adjudicator conducting the public hearing (s. 154(3)).

Factual background

[12] The petitioner and another constable, Constable Nicholson, were both members of the Abbotsford Police Department. Constable Nicholson was arrested on criminal charges on May 5, 2013. The charges included breach of trust, obstruction of justice, and conspiracy to traffic a controlled substance.

[13] On May 8, 2013 the staff sergeant of the Abbotsford Police Department requested an investigation into the conduct of Cst. Nicholson pursuant to the *Police Act*.

[14] In August 2013, Chief Officer David Jones was appointed by the PCC to act as an independent external DA in relation to the investigation of Cst. Nicholson.

[15] During the investigation of Cst. Nicholson, allegations of misconduct were identified against the petitioner. Constable Nicholson and the petitioner were alleged to have acted together in committing acts of misconduct contrary to the *Police Act*. Discipline proceedings against the petitioner were commenced in 2014.

[16] The investigation and disciplinary hearings against Cst. Nicholson and the petitioner were separated, although DA Jones was assigned to hear both proceedings. At one point, DA Jones was assigned to proceedings in relation to 16 members of the Abbotsford Police Department.

[17] The investigation into the petitioner's misconduct was suspended from April 28, 2014 to June 24, 2014. On September 29, 2014 the OPCC issued an amended order for investigation into 14 allegations of misconduct against the petitioner.

[18] The investigation was then suspended from January 12, 2015 to June 15, 2015 to avoid prejudicing the separate criminal prosecution of Cst. Nicholson.

[19] The allegations against both constables were based on statements made to investigators by JA, a confidential informant. Constable Nicholson was JA's primary handler and it is alleged the petitioner was his co-handler.

[20] In February 2017, 10 of the 14 allegations against the petitioner were discontinued, leaving only four active allegations.

[21] In September 2017 Cst. Nicholson pleaded guilty in BC Supreme Court to one count involving three incidents of breach of trust.

[22] In October 2018, RCMP Corporal Murdy assumed the role of lead investigator in relation to the petitioner.

[23] On April 10, 2019 Cpl. Murdy submitted the FIR regarding the four allegations against the petitioner. At that time, the petitioner had not been well enough to provide a statement in response to questions raised by the investigator. The petitioner was given an accommodation in response to his health issues, to allow him to complete a written response.

[24] On April 10, 2019 Sergeant Wellard of the RCMP submitted the FIR regarding the six allegations against Cst. Nicholson.

[25] On April 18, 2019 DA Jones determined, in relation to Cst. Nicholson, that there was sufficient evidence presented in the FIR to support a finding that five of the six allegations of misconduct could be substantiated and a discipline proceeding was authorized to commence.

[26] On May 13, 2019 Cpl. Murdy submitted a Supplemental Report which attached a statement given by the petitioner. Based on her review of the petitioner's statement, Cpl. Murdy found the evidence unclear as to the following material allegations:

a) the petitioner enhanced his personal and professional reputation by directing the confidential informant JA into actions against the law and contrary to Abbotsford Police Department policy to produce results that would benefit him or his career;

b) the petitioner was with Cst. Nicholson when Cst. Nicholson facilitated the drug trafficking to a named party; and

c) the petitioner used his position as a police officer to influence JA to facilitate unauthorized trafficking of a controlled drug and substance to produce tangible results to benefit the petitioner or his career (corrupt practice and neglect of duty).

[27] On May 22, 2019 DA Jones determined in relation to the petitioner that one allegation of misconduct was not substantiated, but sufficient evidence was presented with respect to three allegations of misconduct to allow a discipline proceeding to proceed. A Notice of Discipline Proceeding in relation to the petitioner was issued on July 10, 2019. Two of the allegations were identical to the allegations of corrupt practices being advanced in the discipline hearing against Cst. Nicholson.

[28] The discipline hearing against Cst. Nicholson was set to begin on June 5, 2019. Constable Nicholson denied all allegations against him. Constable Nicholson ceased his participation in the hearing before it was complete and the proceedings continued in his absence pursuant to s. 130 of the *Police Act*. The evidence at the proceeding was contained in the affidavit of Sgt. Wellard.

[29] On January 10, 2020 DA Jones determined that allegations against Cst. Nicholson were substantiated and recommended that Cst. Nicholson be terminated from the Abbotsford Police Department.

[30] The discipline hearing against the petitioner began on July 10, 2019. The matter was adjourned from time to time. The decision of DA Jones which is the subject of this judicial review describes the reason for the adjournments as being due to the fact that the petitioner's health prevented him from advising his counsel or participating in the hearing for more than one hour at a stretch.

[31] On March 19, 2020, the petitioner appeared at the hearing by video and formally denied the allegations against him.

[32] DA Jones received into evidence at the discipline proceeding correspondence from the petitioner's treating psychologist, Dr. Lingley, and his treating physician with expertise in chronic pain, Dr. Ong. The letter from Dr. Lingley is dated March 29, 2020. The letter from Dr. Ong is dated June 3, 2020.

[33] Other than the statement in the decision under review, referred to above, there is no evidence in the record as to what accommodations have been made to address the petitioner's health issues, including his severe migraine headaches.

However, it appeared to be common ground in the oral submissions of the parties that DA Jones has accommodated the participation of the petitioner in the hearing by reducing the hearings to 45–60 minutes at a time and spreading out the hearing days over considerable periods of time. The petitioner is currently on long term disability from the Abbotsford Police Department.

[34] On May 11, 2020, following a request from the petitioner's counsel, DA Jones advised that the discipline hearing involving Cst. Nicholson was concluded.

[35] On June 8, 2020, the petitioner asked DA Jones for a hearing to determine whether DA Jones should recuse himself. The petitioner argued that there was a reasonable apprehension of bias on the part of DA Jones because he had already determined the allegations against Cst. Nicholson which involved the same issues of fact advanced against the petitioner and which relied on the same evidence as advanced against the petitioner, including the evidence of JA, the confidential informant.

[36] The recusal application was heard by DA Jones in July 2020. On August 14, 2020 DA Jones issued his decision finding that no reasonable apprehension of bias on his part existed.

[37] After receiving the decision of DA Jones, the petitioner asked the PCC to assign a different DA to hear the allegations against the petitioner, again arguing a reasonable apprehension of bias exists on the part of DA Jones. The request was refused.

Has the petition for judicial been brought prematurely?

[38] Many courts have considered whether a court has jurisdiction to determine a judicial review prior to the conclusion of an administrative proceeding. Such a review will only be permitted in exceptional circumstances.

[39] In *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 [*C.B. Powell*], Mr. Justice David Stratas, in a proceeding addressing the exercise of authority under a federal statute, summarized the law as follows:

> [4] The Act contains an administrative process of adjudications and appeals that must be followed to completion, unless exceptional circumstances exist. In this administrative process, Parliament has assigned decision-making authority to various administrative officials and an administrative tribunal, the CITT, not to the courts. Absent extraordinary circumstances, which are not present here, parties must exhaust their rights and remedies under this administrative process before pursuing any recourse to the courts, even on so-called "jurisdictional" issues.
>
> …
>
> [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. […] Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin*, *supra*; *Okwuobi*, *supra* at paragraphs 38-55; *University of Toronto v. C.U.E.W, Local 2* (1988), 55 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

[40] *C.B. Powell* was cited with approval by the Supreme Court of Canada in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras. 35–36:

> [35] The second aspect of *Bell* (1971) [*Bell v. Ontario Human Rights Commission*, 1971 CanLII 195, [1971] S.C.R. 756] is its approach to judicial intervention on grounds which have not been considered by the tribunal or before an administrative process has run its course. Since *Bell* (1971), courts, while recognizing that they have a discretion to intervene, have shown restraint in doing so: see, e.g., the authorities reviewed in *C.B. Powell*, at paras. 30-33; …
>
> [36] …Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes: …Thus, reviewing courts now show more restraint in short-circuiting the decision-making role of the tribunal, particularly

> when asked to review a preliminary screening decision such as that at issue in *Bell* (1971).

[41] Further, this doctrine has been often applied in the context of police discipline inquiries in BC and Canada, including *Ackerman v. Ontario (Provincial Police)*, 2010 ONSC 910; *Black v. Canada (Attorney General)*, 2012 FC 1306, aff'd 2013 FCA 201; *Chu v. British Columbia (Police Complaint Commissioner)*, 2019 BCSC 1273; and *Montgomery v. Edmonton Police Service*, 1999 ABQB 913.

[42] In *Montgomery*, like in the case before me, the applicant alleged personal bias on the part of the decision maker, during the course of the hearing. The court held:

> [56] The issue of whether objections relating to bias *prima facie* justify judicial review prior to the conclusion of the administrative hearing was discussed recently in *Lorenz v. Air Canada,* 1999 CanLII 9373 (FC), [1999] F.C.J. No. 1383 (F.C.T.D.). The specific issue before the court was whether an allegation of bias which arose after the hearing had commenced, but prior to its conclusion, provided a ground for judicial review.
>
> [57] After a careful examination of the case law, the court concluded that even when the issue involved the potential bias of the tribunal, the court retains a discretion as to whether or not it should require the applicant to proceed through the administrative process. The court further stated that
>
> > ... the exercise of the Court's discretion here turns principally on a weighing of two competing considerations. On the one hand are the possible hardships caused to [the applicant], and the time and resources that will have been wasted, if the bias question is not determined prior to the completion of the proceeding before the adjudicator. On the other hand, there are the adverse consequences of delaying the administrative process and of countenancing a multiplicity of litigation.
>
> [58] The court indicated that the court may favour exercising its discretion to intervene in cases of alleged bias
>
> > ... when the allegation reveals a very clear case of bias and the issue arises at the outset of a hearing that is scheduled to last for a significant length of time.
>
> [59] I agree that allegations of bias do not automatically justify judicial review and intervention. Rather, the court must weigh all relevant factors in determining whether, in the particular circumstances, judicial review should be undertaken….

[43] The petitioner must establish exceptional circumstances exist which would allow the court to intervene prior to the conclusion of the hearing before DA Jones

and any consequent reviews permitted by the *Police Act*. The petitioner argues that exceptional circumstances of hardship and prejudice are present in the case before me which justify judicial intervention prior to the conclusion of the discipline proceeding.

[44] Specifically, the petitioner argues that it is too onerous to expect him to complete the discipline hearing before DA Jones. As set out in his written submissions:

> 47. The investigation and proceedings to date have profoundly aggravated the Petitioner's illness, as described in detail by Dr. Lingley and Dr. Ong. He has endured seven years of such aggravated illness, including 1 ½ years since the first appearance before the Respondent Jones. He was unable to participate in an interview under the *Police Act*. The proceedings have been, and will be, protracted because the Petitioner's illness limits his ability to focus on the materials, advise counsel or participate in the proceedings to very short periods of up to about one hour at a time. According to Dr. Lingley, whether the Petitioner will be able to participate effectively in the hearing is questionable.
>
> 48. The hearing before the Respondent Jones, which technically began in July, 2019, is in its early stages. The Grimsmo FIR, Supplementary Report and related documents have been filed. Cross-examination of Cpl. Murphy has begun but to date has been restricted to issues of disclosure. The decision by the Respondent Jones that precipitated a reasonable apprehension of bias was made in January, 2020; the Petitioner became aware of the relevant circumstances in May, 2020, proceeded with the recusal application in June, 2020.
>
> 49. The Petitioner has exhausted all remedies available to him at this point. He has asked the Respondent Jones to recuse himself and has asked the Respondent PCC to assign a different discipline authority. No right of review is available under the *Police Act* until the Respondent Jones renders a final decision. Unless this Court exercises its discretion to grant relief, the Petitioner will have to continue with a process that has become procedurally unfair.

[45] In considering whether to allow the judicial review to proceed at this time, I must balance the possible hardships caused to the petitioner, and the time and resources that will have been wasted, if the bias question is not determined prior to the completion of the proceeding before DA Jones, against the adverse consequences of delaying the administrative process and of countenancing a multiplicity of litigation and permitting a short circuiting of the process specifically determined by the legislature to address disciplinary complaints.

[46] In *Air Canada v. Lorenz*, [2000] 1 FC 494, the Federal Court, Trial Division, set out six factors which are often considered in determining whether a judicial review should be permitted before the conclusion of the administrative process. These factors have been adopted by numerous courts, including the Manitoba Court of Appeal in *Thielmann v. The Association of Professional Engineers and Geoscientists of the Province of Manitoba*, 2020 MBCA 8. These factors were summarized at para. 38 in *Thielmann* as: hardship to the applicant, including an element of urgency; waste; delay; fragmentation; strength of the case; and statutory context.

Hardship to the applicant

[47] I am not satisfied that the petitioner has established his health issues prevent him from continuing with the hearing and the process set out in the *Police Act*. While I have been provided with the two letters from treating medical professionals which were accepted by DA Jones, the decision under review is unrelated to the health issues of the petitioner. I find the letters are equivocal as to the impact of the hearing on the petitioner's health.

[48] Dr. Lingley states "[i]t is difficult to predict what impact having to testify at the hearing might have on Cst. Grimsmo." Dr. Lingley poses a number of questions, wondering whether the petitioner will be able to cope with the hearing process. Ultimately, Dr. Lingley states "I cannot answer these questions but I think they are pertinent when reflection [*sic*] on how Cst. Grimsmo might be impacted by this hearing and his capacity to fairly and accurately present himself in them."
Dr. Lingley's letter was written on March 20, 2020. While the hearing in relation to the petitioner had technically commenced in July 2019, due to various adjournments nothing of substance had occurred before March 19, 2020 when the petitioner formally denied the allegations on the record. As such, it appears that the accommodations in relation to the length of each hearing day and the spacing out of hearing days was established after DA Jones received the letter from Dr. Lingley.

[49] Dr. Ong, writing in June 2020, states that she has started the petitioner on new medications and states "[i]t usually takes at least 4-6 weeks prior to the effect of the above medications to manifest with optimal effect achieved in 2 months. At that time, I will be able to assess his mood disorder (anxiety and depression) response to the above medications. Likewise, his treating psychologist should be able to assess his mood disorder and cognitive ability. I am hopeful that his sleep and anxiety will improve significantly resulting in reduction of his headache and improvement of his cognitive function and ability to deal with the stress of disciplinary proceedings."

[50] The letters from the petitioner's doctors do not support his submissions on the impact of the current accommodated hearing on the petitioner's health.

[51] There is no evidence before me that the accommodations provided by DA Jones are insufficient to address the health issues raised by the petitioner. This is confirmed by the fact that the petitioner is not arguing that a discipline proceeding cannot commence; he is simply arguing that it should proceed before a different discipline authority. He is opposed to having to repeat the hearing process before a new discipline authority if he is forced to bring (and succeeds on) a judicial review at the conclusion of the entire discipline process.

[52] The petitioner relies on *Oberlander v. Canada (Public Safety and Emergency Preparedness)*, 2021 FC 124. The facts in *Oberlander* are entirely different from the facts in the case before me. The court in *Oberlander* heard an application for a stay of an immigration hearing pending determination of an application for judicial review of an earlier immigration decision. The court was satisfied that the applicant had raised a serious issue that exceptional circumstances warranted departure from the prematurity principle. This conclusion was based on a finding that the applicant was significantly compromised due to his advanced age (96 years old), and hearing and cognitive deficits, which resulted in his inability to prepare for and effectively communicate during the hearing.

[53] The court in *Oberlander* did not decide the issue of exceptional circumstances. Rather, it found that the lower bar applicable on a stay application

had been met. Further, I find that the exceptional facts in *Oberlander* do not line up in any way with the facts in the case before me.

[54] I find that the evidence of the petitioner's health issue is also insufficient to meet the test of exceptional circumstances.

[55] The petitioner argues that he should not be forced to continue with a process that has become procedurally unfair due to the determinations made by DA Jones in the disciplinary proceeding against Cst. Nicholson. It is clear from the authorities that an allegation of bias alone is not sufficient to meet the test of extraordinary circumstances which would allow a judicial review prior to the completion of the hearing.

Waste

[56] This brings me to a consideration of the whole discipline process and whether the hearing before DA Jones would result in a waste of time and resources.

[57] The petitioner has not alleged that any rulings with respect to the admission of evidence are unfair or suspect. The petitioner has not given notice that he requires the confidential informant, whose evidence is referred to in the FIR, to attend the proceeding to be cross-examined. The petitioner has not alleged that he has been prevented from calling the evidence which is necessary to prove his defence. The petitioner has not alleged that his health issues are not accommodated by the hearing process. While the petitioner argues that his right to procedural fairness has been impaired by a reasonable apprehension of bias in the decision maker, DA Jones, he does not allege that DA Jones has made any procedural rulings which have impaired the fairness of the hearing. Rather, he alleges that DA Jones will be unable to assess the evidence with an open mind.

[58] The *Police Act* provides an opportunity for a member to have a decision reviewed if the member is not satisfied with the outcome. A member can request either a public hearing or a review on the record. The public hearing is a hearing *de novo*. The review on the record includes the entire unedited transcript of the hearing

before the DA, along with other specified information such as the FIR. The *Police Act* stipulates that the PCC has the authority to decide whether a public hearing or review is justified and to determine which process for review is appropriate. The decision of the PCC is final and not subject to review. If the PCC determines that a public hearing or review is appropriate, the PCC will appoint an adjudicator, who must be a retired judge.

[59] Given that within the *Police Act* there is a full mechanism for review before an independent adjudicator if the petitioner is not satisfied with the decision of DA Jones, I cannot accede to the petitioner's argument that the time spent calling evidence before DA Jones will be wasted. If the petitioner is dissatisfied with the outcome before DA Jones, the evidence on the discipline hearing will either form the basis of a review on the record or will be replaced with a hearing *de novo* in a public hearing in accordance with the regime established by the legislature.

Delay

[60] I am satisfied that the petitioner raised his concerns in a timely way before DA Jones and has proceeded with this judicial review in a timely way. In addition, the parties appear to have agreed to continue with the discipline proceeding while this judicial review was pending.

[61] For reasons which appear to relate primarily to the health of the petitioner, the discipline proceeding is progressing extremely slowly. The hearing before DA Jones has been constituted for over one and a half years. The petitioner did not dispute that cross-examination of Cpl. Murdy began almost one year ago and has taken approximately five days over the course of those many months. Further, I was advised during the hearing that Cpl. Murdy has health issues which required a further break in the hearing.

[62] In *Lorenz* the court noted that delay must be considered not only on the facts of the case at bar, but also as it may affect other administrative proceedings. In other words, permitting the petitioner to advance his judicial review mid-way through the discipline proceeding may encourage participants in other administrative

proceedings to commence judicial reviews with a view to delaying the underlying administrative process.

[63] On the facts before me, I find that delay is not a significant factor in my considerations. This is a unique case where the proceeding is significantly delayed for reasons unrelated to the judicial review.

Fragmentation

[64] Fragmentation is a significant issue in the case at bar. The *Police Act* sets out an extensive process to address allegations of misconduct, with decisions taken by the PCC and the DA at various points in time. The processes are part of an integrated whole which is vulnerable to being fragmented if members are permitted to bring judicial reviews on decisions taken prior to completion of the processes created by the legislature. A decision in the within judicial review will not finally dispose of the issues, it will simply put the process back to the beginning and open the door for further applications for judicial review on other issues as the process winds its way to conclusion.

Strength of the case

[65] As stated by the court in *Lorenz* at para. 27, the potential harm arising from a decision to either determine or not determine the merits of the application for judicial review prior to completion of the discipline process is largely premised on the likely success or failure of the allegation of bias.

[66] A reasonable apprehension of bias will be found if the court is satisfied that an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that there is a real likelihood of bias: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 20–26.

[67] I agree with the respondent Jones that the key issue in the petitioner's discipline proceeding is whether the petitioner engaged with Cst. Nicholson or JA to

facilitate the trafficking or delivery of drugs to certain named parties and, if so, the extent to which he did so for the purposes of misconduct allegations.

[68] In the recusal decision, DA Jones confirms the following:

a) He has not prejudged the case against the petitioner and has not made comments which suggest he would reach the same conclusion in relation to the petitioner that he did in relation to Cst. Nicholson.

b) The allegations against the petitioner and Cst. Nicholson do rely on much of the same evidence.

c) A finding against one member does not equate to an automatic finding against another member. The allegations do not require that the members acted in concert.

d) The statements of Cst. Nicholson and the petitioner did not form part of each other's proceedings and the notice of decision in relation to Cst. Nicholson was issued prior to receipt of the petitioner's written submission.

e) Constable Nicholson did not challenge the evidence of JA, or seek to cross-examine JA, or challenge any of the evidence provided by JA. Constable Nicholson simply failed to participate in the proceedings.

f) The evidence of JA has not been tested and his credibility has not been assessed.

g) DA Jones relied on s. 130 of the *Police Act* which allowed him to draw adverse inferences against Cst. Nicholson in the event he chose not to participate in the proceedings.

h) DA Jones referred to the criminal prosecution, including guilty plea, of Cst. Nicholson, which impacted the credibility of Cst. Nicholson in the final decision against him.

[69] DA Jones concluded that facts in relation to the Cst. Nicholson matter "are such that a reasonably, well informed person would comprehend that there are significant differences in the process, circumstances and material evidence that [the petitioner] is facing and challenging. As opposed to [Cst. Nicholson], [the petitioner] is mounting a vigorous defense, with the able and effective assistance of legal counsel."

[70] I have a concern with the assertion of DA Jones that the written statements of the members were not contained in each other's FIRs. The evidence is clear that the statement of Cst. Nicholson was included in the FIR in relation to the petitioner. The statement of the petitioner was not prepared at the time the FIR in relation to Cst. Nicholson was finalized, however.

[71] I am not satisfied that the allegations of bias advanced by the petitioner are so clear cut that the exceptional circumstances test is met. While the petitioner has advanced a reasonable case, I also accept the assessment made by DA Jones as reasonable, notwithstanding his mistake on the inclusion of the statement of Cst. Nicholson in the FIR in relation to the petitioner. Given my conclusion on the prematurity of this judicial review, in these reasons I will not set out in depth my assessment of the allegations of bias, as that may be left for another court to determine.

[72] I find that the petitioner has not made out a clear and obvious case of bias which would allow me to make a determination on this judicial review on the merits prior to the completion of the discipline process set out in the *Police Act*.

Statutory context

[73] Through the *Police Act*, the legislature has provided a complete code with respect to reviews of decisions of discipline authorities. The PCC in the first instance determines whether a review is appropriate, and determines the method of review which will be followed. The adjudicator on either form of review is an independent retired judge. As found by this court in *Brown v. Police Complaint Commissioner*, 2001 BCSC 1115:

> [48] The *Police Act* is an important piece of legislation. It establishes a procedure by which the conduct of police officers can be reviewed. Although Brown may find this procedure cumbersome, it exists in part to prevent the courts from having to engage routinely in the review of disciplinary matters - a review that would be far more costly for the parties and the public, much less accessible, and undoubtedly, even more cumbersome. The fact that Brown has yet to be disciplined under the procedures set out in the Act only serves to reinforce my concern about the prematurity of his application. I can conceive of no possible alternative disciplinary procedure that would satisfy Brown while still ensuring that the necessary and desirable public interest in reviewing the conduct of officers is upheld. The procedure established by the Act serves such a purpose and should be followed to its end before any application for judicial review is entertained. Premature applications for judicial review are a drain of the resources that tribunals such as the one set up under this Act are designed to save.

[74] I note that in the case at bar the petitioner took the additional step of requesting the PCC to appoint a new DA on the basis of the same allegations of bias brought before DA Jones. The PCC is vested with the authority to determine the public interest in the disciplinary process. The PCC declined the petitioner's request. The petitioner now asks the court to make a decision contrary to the decision of the PCC, without directly attacking the decision of the PCC.

[75] The petitioner relies on *Diaz-Rodriguez v. British Columbia (Police Complaint Commissioner)*, 2020 BCCA 221 in support of his proposition that this is one of the cases where the demands of justice and efficiency weigh in favour of early review by the courts. However, *Diaz-Rodriguez* concerned a judicial review of the PCC's decision to convene a public hearing. The court noted that this decision of the PCC was final; there was no right of appeal or review within the scheme of the *Police Act*. As such, it was a final decision and judicial review was appropriate. The facts in *Diaz-Rodriguez* are entirely distinguishable from the facts before me.

[76] I am satisfied that it would be improper to subvert the carefully crafted comprehensive legislative regime created in the *Police Act* by allowing the petitioner to proceed with a judicial review before the hearing is complete, before DA Jones has rendered his decision, before the petitioner has availed himself of any reviews permitted under the *Police Act*, and in contradiction of the decision of the PCC to refuse the reappointment of a DA in this case.

Conclusion

[77] The petition for judicial review is dismissed.

[78] The parties have leave to make submissions as to costs, which application must be brought within 30 days of this decision.

"Baker, J."