**CITATION:** Martin v. Ontario Civilian Police Commission, 2020 ONSC 1116
**DIVISIONAL COURT FILE NO.:** 331/19 and 341/19
**DATE:** 2020406

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**C. Aitken, L. Pattillo and M. Penny JJ**

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| **BETWEEN:** | |
| PAUL MARTIN IN HIS CAPACITY AS CHIEF OF THE DURHAM REGIONAL POLICE SERVICE AND THE DURHAM REGIONAL POLICE SERVICES BOARD<br>Appellants/Applicants | *Sean Dewart and Chris Donovan* for Paul Martin<br>*David Migicovsky* for the Durham Regional Police Services Board |
| **– and –** | |
| ONTARIO CIVILIAN POLICE COMMISSION<br>Respondent | *Jeremy Glick, Daniel Mayer and Joshua Tallman* for the Respondent |
| | **HEARD:** January 17, 2020 |

## REASONS FOR JUDGMENT

### Overview

[1] In January 2019, the Solicitor General for the Province of Ontario requested that the Ontario Civilian Police Commission conduct an investigation under s. 25 of the *Police Services Act,* R.S.O. 1990, c. P.15 into allegations of misconduct by senior members of the Durham Regional Police Service and the ability of the Durham Regional Police Services Board to discharge its statutory responsibilities and provide the proper oversight required for the administration of the Service.

[2] The Solicitor General also asked the Commission to conduct a preliminary review, prior to a formal investigation, to determine which officers of the Service and members of the Board, if any, should be subject to s. 25 investigations under the PSA into their individual conduct and/or performance of duties.

[3] In response to the request of the Solicitor General, the Commission initiated a preliminary review of the issues identified by the Solicitor General. Among other things, the Executive Chair reviewed the complaints of seven individual employees, including both officers and civilians, and the results of a poll conducted by the Durham Regional Police Association of its membership.

[4] Based on the information obtained during the Commission's preliminary review, the Executive Chair was satisfied that the circumstances required a thorough and systematic investigation. Accordingly, by Interim Order of May 23, 2019, she initiated a formal investigation under s. 25 of the PSA, setting out the parameters of that investigation in Terms of Reference attached to her order.

[5] The Commission's preliminary review also revealed what the Executive Chair referred to as "a crisis of confidence" within the Service which had the potential to negatively affect policing and, consequently, the communities that the Service and Board serve. The preliminary review revealed a deep sense of mistrust in the judgment, integrity and capacity of the Service's leadership and the Board's oversight abilities. The most commonly expressed reason for this mistrust was allegations of cronyism manifested as favouritism by the senior administration of the Service, which included tolerance of workplace harassment, intimidation of subordinates and retaliatory discipline. The Commission concluded that this crisis could not solely be addressed by the Commission's investigation powers during the investigation and that the particular nature of this crisis could, in fact, severely hamper the Commission's investigative process.

[6] As a result, the Commission formed the opinion that the crisis of confidence within the Service constituted an emergency and that the appointment of an Administrator under ss. 23(1) and 24(1) of the PSA, to perform specified oversight functions, was necessary in the public interest. The specified oversight functions were in three discrete areas: disciplinary proceedings, promotions and secondary employment.

[7] Section 24(1) provides:

> The Commission may make an interim order under subsection 23(1) without notice and without holding a hearing, if it is of the opinion that an emergency exists and that the interim order is necessary in the public interest.

[8] In accordance with s. 24(1), the Commission's Interim Order was made without notice to the Durham Chief of Police or to the Board, and without a hearing.

[9] It is from this Interim Order of the Commission appointing an Administrator to provide specified oversight functions over the Chief and the Board, that the Chief, supported by the

Board (which was added as a party applicant), appeals or, in the alternative, seeks judicial review.

**The Issues**

[10] In support of his application, the Chief filed a lengthy affidavit. The admissibility of a significant portion of this affidavit is opposed by the Attorney General. The Chief, therefore, moves for leave to file fresh evidence. The Attorney General also filed fresh evidence, in the event that the Chief's motion was granted.

[11] There are, accordingly, six issues:

(1) Should the Court admit fresh evidence?

(2) What is the standard of review?

(3) Did the Commission act without jurisdiction because the statutory conditions precedent to the appointment of an Administrator were not met?

(4) Did the Commission err in determining that there was a state of emergency and in making the Interim Order for the "impermissible" purpose of facilitating its investigation?

(5) Was the Commission's order made without adequate procedural fairness? and

(6) Is there a reasonable apprehension of bias on the part of the Commission resulting from the fact that the Executive Chair, who is head of the investigations branch, made the Interim Order rather than the Vice Chair who is the head of the adjudicative branch?

[12] For the reasons that follow, I would dismiss the appeal and application for judicial review.

**Fresh Evidence**

[13] The Chief moves to admit fresh evidence in the form of his affidavit and the affidavit of Udaypal Singh Jaswal, the former Deputy Chief of the Service. Essentially, the grounds for the motion are that the Interim Order was made without notice or any hearing such that: a) the Chief had no opportunity to put in evidence before the Commission; b) the Chief did not receive a copy of the complaints before the Commission which gave rise to the Interim Order until they were provided in the Respondent's record on this review; and (c) the Chief's arguments relating to the Commission's alleged failure to provide procedural fairness and bias cannot be assessed in the absence of this evidence.

[14] The Chief relies on the principle, established by the Court of Appeal for Ontario in *R. v. Rajaeefard* (1996), 27 O.R. (3d) 323 (at p 325), that "where the new evidence sought to be admitted is relevant to the validity of the trial process itself, rather than directed at a finding made at trial, it is admissible" and the test in *R. v. Palmer* does not apply. Similarly, an

appellate court will receive evidence adduced to establish a reasonable apprehension of bias on the part of an adjudicator, *Langstaff v. Marson*, 2014 ONSC 510 at paras. 21-23.

[15] In addition, however, to evidence concerning fairness and bias, the Chief also seeks to adduce evidence that he says the Commission "ought to have considered" in determining whether an emergency existed to justify the exercise of its interim powers and whether the Chief, the Service and the Board have flagrantly and repeatedly failed to comply with the prescribed standards of police services. This evidence, the Chief submits, seeks to place the material the Commission considered in its "proper context", offers the Chief's perspectives on the events set out in the complaints and describes the conduct of the Chief, the Service and the Board that is relevant to showing potential ulterior motives on the part of the individual complainants for making their complaints to the Commission.

[16] Generally, an application for judicial review proceeds solely on the record that was before the tribunal. In some cases, fresh evidence in an application for judicial review may be permitted to supplement the record if it is in the nature of general background, demonstrating a complete absence of evidence on an essential point or, as argued by the Chief, if it is necessary to show a breach of procedural fairness or bias arising out of circumstances or information not already contained in the record.

[17] The limitation on the admission of fresh evidence arises out of the purpose of judicial review. The court does not re-weigh the evidence in such cases. Restricting the admission of fresh affidavit evidence therefore discourages parties from inappropriately seeking to expand judicial review into a hearing *de novo* by challenging findings of fact or attempting to reframe or contradict evidence that was before the original decision-maker.

[18] The Attorney General does not object to the parts of the Chief's affidavit that appear to relate to general background and the allegations of bias. Those paragraphs are:

> paragraphs 2 to 34, 36 and 41 to 43: general background, and
>
> paragraphs 143 to 145: bias.

[19] The balance of the Chief's affidavit and the entire affidavit of Deputy Chief Jaswal, however, seek to put into the Record before the court evidence that was not before the Commission in order to challenge the substance of the Commission's decision. The Chief submits that the Commission should not have relied solely on the evidence before it but rather ought to have looked at other evidence and, particularly, his own. The majority of the evidence in these affidavits attempts to recharacterize, minimize or dismiss each of the complaints that were put before the Commission.

[20] The Chief's approach to this fresh evidence, in our view, misunderstands the purpose to which this judicial review must be directed. The question of whether the decision of the Commission was reasonable must be decided based on the information which was before the Commission. Judicial review of the Commission's Interim Order is not a hearing *de novo* of the need for the Interim Order or a merits hearing on the validity of the complaints. Section 24(1) of the PSA contains no procedure comparable to rule 40.02 of the Rules of

Civil Procedure limiting the effect of an interlocutory injunction made without notice to 10 days and requiring any motion to extend that period to be brought on notice to every party affected by the order. As noted in the Attorney General's factum, the Chief will have an opportunity to provide information to the investigators during the investigation and the opportunity to provide the Commission with a response to each allegation made against him before the Commission concludes its investigation. If there is ever a hearing on any of these matters, the Chief will have access to the full panoply of natural justice rights attendant on such hearings.

[21] I agree with counsel for the Attorney General that, other than those paragraphs of the Chief's affidavit listed in para. 18 above, the Chief's and Deputy Chief Jaswal's affidavits are not admissible. The inadmissible portions of these affidavits go to the merits of the underlying complaints and the Commission's *prima facie* findings, not to the validity of the process the Commission followed leading up to the Interim Order.

[22] Because the bulk of the fresh evidence is not being admitted, the Attorney General's motion to admit responding fresh evidence is also dismissed.

**Standard of Review**

[23] The Interim Order in issue was made under s. 24(1) of the PSA which provides:

> The Commission may make an interim order under subsection 23(1), without notice and without holding a hearing, if it is of the opinion that an emergency exists and that the interim order is necessary in the public interest.

[24] Under s. 23(11), a party may appeal to the Divisional Court within thirty days of receiving notice of the Commission's decision. This right of appeal, however, is only engaged after a hearing has been conducted under s. 23(1).

[25] There is no explicit right of appeal from an interim order under s. 24(1). Nor can s. 24(1) reasonably be read as incorporating the appeal right under s. 23(11) because the s. 23(11) appeal is expressly conditioned upon there being a decision following a hearing. This conclusion is also consistent with the policy of limiting appeals from interim decisions of administrative decision-makers, encouraging the parties to get on with addressing the merits, and fostering the efficient use of the court's procedures and judicial resources.

[26] I find, therefore, that there is no statutory right of appeal from the Commission's Interim Order under s. 24(1).

[27] The interim order was, nevertheless, the product of a statutory power of decision subject to judicial review.

[28] Since *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65 (released after the parties delivered their factums but before oral argument in this matter), it now matters whether the review is proceeding by way of statutory appeal, under which the usual test for review on appeal in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at

para. 8 applies, or judicial review, under which the test of reasonableness presumptively applies (including to matters of what used to be called "true" jurisdiction). There are specified exceptions to this presumption in certain circumstances (such as questions of constitutional law or legal questions of central importance to the legal system as a whole) which are not applicable here.

[29] Thus, the standard of review of the Commission's Interim Order is reasonableness, as that term is understood and explained in *Vavilov*.

[30] The court does not, however, conduct an assessment of the appropriate standard of review with respect to issues of procedural fairness. Whether the decision maker complied with the duty of procedural fairness is always reviewed using the correctness standard.

**Jurisdiction**

[31] Section 22 of the PSA sets out the Commission's powers and duties generally. The Commission's powers and duties include various items such as conducting inquiries of municipal police matters, hearing appeals from disciplinary hearings and making recommendations with respect to the policies of, or services provided by, a police force.

[32] The interpretation of s. 22(1)(a) is controversial in this case. Section 22(1)(a) provides that the Commission may take certain actions on the basis of advice from the Solicitor General:

> 22(1) The Commission's powers and duties include,
> (a) if the Solicitor General advises the Commission that a board or municipal police force is not complying with prescribed standards of police services or standards established under the Police Record Checks Reform Act, 2015,
> (i) directing the board or police force to comply, and
> (ii) if the Commission considers it appropriate, taking measures in accordance with subsection 23(1).

[33] Subsection 23(1) of the Act provides that if the Commission is of the opinion, after holding a hearing, that a board or municipal police force has flagrantly or repeatedly failed to comply with prescribed standards of police services, the Commission may take some or all of the following measures:

> 1. Suspending the chief of police, one or more members of the board, or the whole board, for a specified period.
> 2. Removing the chief of police, one or more members of the board, or the whole board from office.
> 3. Disbanding the police force and requiring the Ontario Provincial Police to provide police services for the municipality.
> 4. Appointing an administrator to perform specified functions with respect to police matters in the municipality for a specified period.

[34] Section 24 of the PSA provides that the Commission may make an interim order under s. 23(1), without notice and without holding a hearing, if it is of the opinion that an emergency exists and that the interim order is necessary in the public interest, provided that the Commission shall not remove a person from office or disband a police force by means of an interim order.

[35] Section 25 of the Act provides that the Commission may "investigate, inquire into and report on", inter alia, the conduct of police officers, chiefs of police and the manner in which police services are provided for a municipality. It may do so "on its own motion or at the request of the Solicitor General". Section 25 further provides that following a hearing and a finding of misconduct or incapacity, the Commission may impose specified penalties.

[36] Based on this statutory regime, the Chief argues that the Commission is empowered by ss. 22 and 25 to inquire, investigate and act on its own initiative but that s. 22(1)(a) only empowers the Commission to take measures under s. 23(1), and, specifically, appoint an administrator to perform specified functions, "if the Solicitor General advises the Commission that a board or police force is not complying with prescribed standards of policing." It is common ground that the Solicitor General provided no such advice in this case.

[37] Rather, on January 16, 2019, the Solicitor General asked the Commission to "investigate, inquire into and report on matters relating to" the Service. This request tracks the language in s. 25 of the Act verbatim. The Solicitor General expressly asked the Commission to "conduct an investigation pursuant to s. 25" of the Act. She also asked the Commission to conduct a preliminary investigation to determine which officers and board members, if any, should be subject to investigation into their individual conduct. The Solicitor General advised the Commission of her concern that there "may be negative impacts on policing and the communities that the Service and Board serve". The Solicitor General did not, on any reading of her letter referring the matter to the Commission, advise that either of the Service or the Board was "not complying with prescribed standards of policing".

[38] In brief, the Solicitor General referred the complaints to the Commission for investigation under s. 25 of the Act without mentioning either s. 22(1)(a) or s. 23(1) and, more importantly, without advising the Commission that the Service or the Board was "not complying with prescribed standards of" policing. The Chief submits that reliance on the exercise of any power by the Commission under s. 23(1) must be conditioned on advice from the Solicitor General that a board or police service is "not complying with prescribed standards of" policing. Accordingly, in the absence of this advice from the Solicitor General, the Chief argues, the Commission had no statutory power: a) to take any measures under s. 23(1); or b) to make a s. 24(1) "interim order under" s. 23(1). The Commission therefore erred in law in assuming such jurisdiction and in ordering the interim appointment of an administrator.

***Analysis***

[39] It is well settled that the words of a statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. This approach to statutory interpretation involves a textual, contextual and purposive analysis of the statute or provision in question, *Ayr Farmers Mutual Insurance Company v. Wright*, 2016 ONCA 789 at paras. 26-33.

[40] It is also presumed that the provisions of legislation are meant to work together as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework. Because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal. It is not unusual for an administrative body to be given overlapping powers by the legislature; when this happens, each is meant to apply, and overlap between powers is not a basis for narrowing their scope, see Ruth Sullivan, *Construction of Statutes*, 6th ed. (Toronto Lexus Nexus Canada Inc., 2014) at paras. 11.2 and 11.7 – 11.15.

[41] Section 22(l) of the PSA is clearly not exclusive of the powers of the Commission because it starts with the expression "the Commission's powers *include...*". Section 25, for example, lists numerous other powers as well.

[42] Section 22(1)(a) of the PSA sets out what the Commission may do if the Solicitor General advises it that a board or service is not complying with prescribed standards of police service. The Commission has the power to direct the board or service to comply without holding a hearing. It may also, if it considers it appropriate, "take measures" following a hearing in accordance with s. 23(1).

[43] I do not read the purpose of s. 22(1)(a), however, as being to circumscribe when the Commission may hold a hearing under s. 23(1) but, rather, to provide the Commission with the power to take action immediately if the Solicitor General makes *her own* finding and advises the Commission that a board or service has failed to comply with prescribed policing standards. It allows the Commission, among other things, to make compliance orders before proceeding to a hearing and to move to a hearing under s. 23(1) without the necessity of conducting its own investigation under s. 25.

[44] There is no specific provision in the PSA empowering the Commission to hold hearings, but that power is necessary and obvious, given that s. 23(1), and ss. 25(4), (4.1), (4.2), (4.3) and (5) all contemplate what the Commission may do *after* holding a hearing. In my view, s. 23(1) is a freestanding source of authority for the Commission, after it has held a hearing, which is not conditioned on the need for the Solicitor General's advice under s. 22(1)(a).

[45] In circumstances where the Solicitor General has not made a finding that a board or service has failed to comply with prescribed policing standards, the Commission can still independently proceed to a hearing under s. 23(1). In the absence of a finding by the

Solicitor General, however, recourse to s. 23(1) by the Commission is likely to take place only after an investigation has been conducted under s. 25. The power of the Commission to hold a hearing under s. 23(1) on its own initiative is consistent with the purpose of the PSA and the role of the Commission within the PSA. This interpretation of s. 22(1)(a) is also consistent with the differing but overlapping oversight roles of the Solicitor General and the Commission.

[46] For these reasons, I find that the Commission did not act without jurisdiction in purporting to rely on s. 23(1) as a source of authority to issue the Interim Order.

**Whether the Commission's Decision Was Reasonable**

[47] The power to issue an interim order derives from s. 24(1) of the PSA. The Commission may make an interim order under s. 23(1) without notice and without a hearing if it is of the opinion that:

> (a) an emergency exists; and
>
> (b) the interim order is necessary in the public interest.

[48] As noted earlier, any order made by the Commission under s. 23(1) following a hearing would necessarily require a finding that the Board or the Service had "flagrantly or repeatedly failed to comply with prescribed standards of police services". The Chief submits that the Commission did not even mention, let alone analyze, whether the evidence established flagrant or repeated failures to comply with prescribed policing standards.

[49] Section 24(1), of course, contemplates an interim order made without notice or a hearing. This engages the question of what evidentiary threshold is required to sustain an interim order under s. 24(1).

[50] The Chief submits that there is no evidence the Commission considered whether the subject matter of the complaints involved flagrant or repeated failures to comply with prescribed policing standards as required by s. 23(1), and that there is certainly no evidence to support a conclusion that this requirement has been established.

[51] The Chief is critical of the *bona fides* of the complaints made against him and other senior management. He submits that these complaints arise out of old labour relations issues being tenaciously pursued by disgruntled employees, both officers and civilians. Among other things, he argues that seven complaints cannot support sweeping conclusions that a crisis of confidence is "prevalent," "clear" or "widespread" within the Service.

[52] Part of the evidence before the Commission involved a survey conducted by the Durham Regional Police Association. The survey disclosed that large percentages of the membership had lost trust in Mr. Martin and wanted a new chief, did not trust senior command, thought senior management was doing a bad job and operated within a culture of favouritism and that rank and file officers were not treated fairly. The Chief attacks the validity and reliability of that survey on a number of grounds. Essentially, the Chief argues

that "a complaint based on a popularity contest calls at a minimum for some level of incredulity, however none can be found in the Executive Chair's reasons."

[53] The Chief also submits that the evidence before the Commission was insufficient to establish either that there was an "emergency" or that the Interim Order was "necessary in the public interest" and that the decision to issue the Interim Order was, therefore, unreasonable.

[54] The Chief argues that an emergency must be a serious, unexpected and potentially dangerous situation requiring immediate action, a sudden state of danger or an unforeseen combination of circumstances that calls for immediate action. Other Ontario statutes define an emergency as "a situation or impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property." He submits that the complaints and other information considered by the Commission cannot constitute an emergency because:

(i) the Solicitor General asked the Commission to conduct an investigation in late November, 2018 but the Commission waited four months before issuing the Interim Order;

(ii) the individual complaints mostly involve events that took place years ago; and

(iii) several of the complaints have already been investigated through existing internal mechanisms.

[55] The Chief also submits that the Commission's reasons are intrinsically contradictory. The Executive Chair recites in her reasons that the Commission's review of the complaints had not progressed beyond the preliminary review undertaken five months before she made the order. As there has not been any investigation, she was forced to concede that the Commission "does not, at this time, have sufficient information to make findings regarding the merits of [the] allegations [in the complaints]." It is impossible for a decision-maker to form a reasonable and *bona fide* opinion that there is an emergency or that there are flagrant or repeated failures to follow prescribed policing standards, if he or she does not conduct any investigation and admits they lack the ability to make any findings.

[56] The Board adopts these arguments. Specifically, the Board submits that there was no evidence, and the Commission's reasons for the Interim Order disclose no analysis, of the Board's complicity in any flagrant or repeated failures to follow prescribed policing standards or in bringing about an emergency in Durham Regional policing requiring drastic action in the public interest.

***Analysis***

**<u>Flagrant or Repeated Failure</u>**

[57] In my view, the Commission was not required, as a condition of making an interim order under s. 24(1), to satisfy itself that there had been flagrant or repeated failures to comply

with prescribed policing standards. This would be inconsistent with the lack of notice or a hearing and would impose too high a threshold for the purposes of an interim order. Section 23(1) empowers the Commission to make final orders following a hearing; s. 24(1) empowers the Commission to make an interim order in an emergency situation where it is of the opinion that it is in the public interest to do so.

[58] The task of the decision-maker at the interim stage is not to make a determination on the merits but to determine whether there is a *prima facie* case of misconduct, and whether the circumstances require an interim order to be made to protect the public from the reasonable prospect of harm while the regulatory body completes its investigation, *Scott v. College of Massage Therapists of British Columbi*a, 2016 BCCA 180 at paras. 81, 88.

[59] To make an interim order under s. 24(1), the Commission does not need to make a finding that flagrant or repeated failures to comply with prescribed policing standards have occurred. Purporting to do so in the absence of notice and a hearing would be a breach of natural justice. Rather, it is sufficient that there be credible allegations which, if true, would constitute flagrant or repeated failures to comply with prescribed policing standards.

[60] The complaints were not anonymous and came largely from mid to senior levels of the sworn and civilian workforce. The conduct alleged, if true, could constitute discreditable conduct, deceit and even corrupt practice. Although largely directed toward the Chief and senior management, some of the individual complaints, and the polling data, were also directed at the Board.

[61] I agree with the Attorney General that the allegations of the seven complainants and the concerns which appear to be embodied in the polling data would, if true, indicate flagrant or repeated failures to comply with prescribed policing standards. There is, therefore, a *prima facie* case under s. 23(1).

**Emergency**

[62] Since *Vavilov,* questions of "true" jurisdiction are no longer a distinct category attracting correctness review. The argument that supports this category (the delegated decision-maker should not be free to determine the scope of its own authority) can be addressed adequately by applying the framework for conducting reasonableness review. The reasonableness review is both robust and responsive to context. Precise or narrow statutory language will necessarily limit the scope of interpretation open to the decision-maker; broad powers conferred in general terms will be indicative of legislative intent to grant greater leeway, *Vavilov* at paras. 67 and 68.

[63] The term "emergency" is necessarily a fluid and contextual one, the meaning of which must be determined in all of the circumstances. Here, the interpretation of emergency must be understood in the context of the PSA and the oversight role of the Commission as a whole.

[64] I agree with the Attorney General that in the context of s. 24(1) of the PSA, an emergency must be a policing emergency where, if decisive action is not taken, there is a reasonable apprehension of danger or the approach or imminence of danger.

[65] A police force is a para-military organization whose members are authorized in appropriate circumstances to use force, including lethal force. In a para-military organization like a police service, maintenance of the chain of command is essential, *Durham Regional Police Service v. Sowa*, 2019 ONSC 1902 (Div. Ct.) at para. 38.

[66] The proper functioning of the chain of command requires that officers trust their leadership. A fear of reprisals, a belief that the decision-making of the senior leadership is unfair, or that senior leadership will not act to stop misconduct if the wrong-doer is on the "inside", all have the potential to strike at the heart of the proper functioning of that chain of command.

[67] It seems to me that the potential for a wide-ranging break-down in the chain of command would qualify as a policing emergency. The potential dangers of such a break-down would include the proliferation of misconduct within the Service, a loss of public confidence in the Service as the issues become public, as well as less effective policing of the communities the Service serves. These dangers are not remote but, as found by the Commission, may be reasonably apprehended as the logical consequence of the kind of conduct within the Service which was raised in the material before the Commission.

[68] The Chief's attempt to minimize the complaints on the basis that they have either been addressed or can be addressed through processes already in place, misunderstands the nature of these complaints. The real burden of the complaints is that the existing processes are insufficient to deal with misconduct within the Service and that the senior leadership of the Service has willfully misused those processes to favour "insiders". It also misunderstands the basis for the emergency order - that because of those underlying allegations and others like them, the large majority of the Service's rank and file members have lost confidence in the Chief, the Board and the senior leadership team.

[69] The polling data suggests, on a *prima facie* basis, that this is not just a case of a few disgruntled officers with an axe to grind or engaging in isolated acts of insubordination. On the evidence before the Commission, 77% of the membership of the DRPA wanted a new Chief of Police because they had lost trust in the current one; 82% of the membership of the DRPA thought senior management was doing a bad job; 79% of the membership of the DRPA felt that management exercised a culture of favoritism; and, well over half of the membership felt that rank and file officers were not treated fairly.

[70] There was evidence before the Commission upon which it could reasonably form the opinion that decisive action was required to prevent serious pending or apprehended harm. There was, in short, a reasonable basis for a finding that there was an "emergency" within the meaning of s. 24(1).

**Public Interest**

[71] The determination of whether an interim order is necessary in the public interest is, again, a contextual decision, dependent on the harms or dangers occasioned or risked by the emergency, and the specific impact those harms would have on the public interest.

[72] The term "public interest" is not defined in the PSA. I agree with the Board's submission that there must be a proper factual foundation for any determination that a prescribed action is in the public interest. The grounds for acting in the public interest obviously requires more that reliance on the decision-maker's whim. The public interest is, nonetheless, a broad term that allows the Commission to take a variety of considerations into account in its decision-making process. The determination of the public interest is a matter of public policy in the true sense of the word and demands a high degree of deference, *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission),* 2001 SCC 37 at paras. 39-45.

[73] The Commission's discretion in defining the public interest is, of course, limited by the general purpose of the PSA which is "to increase public confidence in the provision of police services". The PSA lists a number of guiding principles by which it achieves this goal, including ensuring the safety and security of all persons and property in Ontario and ensuring that police services are accountable and transparent to the communities they serve. It is also achieved by the Commission's role, as set out in the PSA, to provide oversight of police services across Ontario.

[74] The factors that will influence a decision whether an interim order is necessary in the public interest will include:

1. the nature and quality of the evidence disclosing a *prima facie* case of a problem requiring immediate action (discussed earlier);

2. the seriousness of the risk; and

3. the impact of the order on its subject. There must be a balance between the need for an interim order and the consequences to the subject,

see *Scott* at para 55.

[75] It was reasonable for the Commission to find that it was necessary to make the Interim Order in the public interest. The apprehension of a crisis of confidence within the Service required immediate action. The Interim Order struck the appropriate balance between dealing with the apprehended risk and being the "least intrusive" measure reasonably possible. The Chief's "core duties" were not "stripped" as he alleges. Instead, an additional layer of review was placed above him in three discrete areas unrelated to the daily operation of the Service. By appointing an Administrator restricted to overseeing discipline, promotions. and secondary employment, the Interim Order assured members of the Service and the public that the Commission would, for the term of the Interim Order, ensure the proper functioning of the Service in these areas. Similarly, the impact of the

Interim Order on the Board is minimal while at the same time addressing the serious concerns identified in the preliminary review in a way that protects the public interest.

[76] The Commission found there was a serious risk that a considerable portion of the members of the Service would be deterred from participating forthrightly in the investigation unless robust protections were put in place to alleviate their fear of reprisal. The Commission also found that it was in the public interest to mitigate against potential interference in the Commission's investigation so that the public can be assured that a full accounting will be achieved.

[77] The Chief argues that these were improper considerations.

[78] I do not agree. An essential purpose of the PSA is to ensure public confidence in policing. As set out in the text, *Issues of Civilian Oversight of Policing in Canada*, that confidence is essential to effective policing:

> The perception by a community that public complaints against the police are not being adequately investigated can have a detrimental impact on that community's confidence in the police. Therefore, civilian investigation and oversight of the police is an important aspect of police accountability, and can play a fundamental role in improving relationships between police and the community.
>
> Ian Scott, *Issues in Civilian Oversight of Policing in Canada,* (Toronto: Carswell, 2014) at pp. 165 – 166.

[79] It was reasonable for the Commission to take the public interest in the integrity of its investigation into account when determining whether the Interim Order was necessary. This is particularly true where the potential impediment to the Commission's impartial investigation and public confidence in the investigation is one of the very ills which the Commission has been asked to inquire into and which it determined must be investigated. Ensuring the public has confidence in the investigation ensures confidence in policing, which in turn ensures effective policing.

**<u>Procedural Fairness</u>**

[80] The Chief and Board submit that they were denied procedural fairness. They argue that, although the PSA allows the Commission to make an interim order without notice or holding a hearing in an emergency, it is nevertheless required to act with procedural fairness. Any administrative decision that affects the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness. The rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the relevant statutory provisions and the nature of the matter to be decided. They are based on the right to participate, so that persons who are to be affected by a decision can put their position forward and have it considered by the decision-maker, *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at p. 682.

[81] At a minimum, the principle of procedural fairness will always require some right to participate, even if it involves only the most rudimentary ability to respond to the allegations being made. There should be few cases in which courts will regard a situation as so emergent that the court will not insist on some minimal level of procedural fairness, *Hundal v. Superintendent of Motor Vehicles*, 1985 CanLII 772 (BCCA) at para. 22; Huscroft, Grant, "The Duty of Fairness: From Nicholson to Baker and Beyond", *Administrative Law in Context*, ed. Collen Flood and Lorne Sossin, (Emond Montgomery Publications: Toronto, 2008) at pp. 128-129.

[82] An administrative body is required to act fairly, even if it is not held to the formal rules of natural justice. The duty to act fairly extends to administrative agencies even when conducting a purely investigative function, *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 13 (C.A.) at p. 13.

[83] In the present case, the Commission acted judicially. It made the Interim Order with significant consequences for the Chief and the Board. The Commission advised the Chief on February 13, 2019 that the results of the preliminary review would be provided when they became available. On March 1, 2019, it advised the Board that it did not need to hear from the Board "at that time" and that sufficient details of the complaints would be provided if a formal investigation was initiated.

[84] At a minimum, the duty of fairness required the Commission to find out what the Chief and Board's positions were regarding the allegations. It failed to do so, thereby depriving the Chief (and the Board) of procedural fairness.

***Analysis***

[85] I am unable to agree with these arguments. The cases and principles cited by the Chief (and Board) did not arise in the context of an unambiguous statutory authority to issue interim orders without notice or a hearing. Any common law rights to notice or a hearing were, therefore, expressly displaced by the language of the PSA.

[86] Where a statute expressly or by necessary implication limits or completely does away with procedural fairness, the language of the statute takes precedence over the common law, *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52 at paras. 22 and 27; *Walpole Island First Nation v. Ontario* (1996), 31 O.R. (3d) 607 (Div. Ct.) at paras. 48-63.

[87] The Legislature's intent when enacting s. 24(1) was to provide the Commission with the power to make interim orders without a hearing or notice when the Commission was of the opinion that there were emergent circumstances and that it was necessary in the public interest for temporary remedial steps to be taken immediately. The intention was to completely displace any rights to a hearing or notice prior to the issuance of an interim order under that subsection.

[88] The purpose of s. 24(1) – the prevention of emergent harm – is furthered by the express exclusion of the rights to a hearing or to notice. The subsection ensures that the

Commission can act decisively in an emergency. Imposing common law procedural fairness requirements would defeat the purpose of the emergency power granted to the Commission and render s. 24(1) redundant, given the powers of the Commission and the hearing regime set out in s. 23 of the PSA.

[89] The Chief's (and Board's) argument to the effect that the Commission was at least required to find out what the Chief's and Board's positions were regarding the allegations before issuing the Interim Order is both unworkable in practice and contrary to the express language of s. 24(1).

[90] In light of the express language of s. 24(1), the only right to procedural fairness that the Applicants were entitled to was reasons for the Commission's decision, disclosure of the Record and the right to seek court review the Interim Order. They received those reasons and the Record and have exercised their right to appeal/judicial review. They also received individual letters setting out details of what the Commission would be investigating under s. 25 and advising them that further details would be provided before any interviews are conducted.

[91] There was, in these circumstances, no denial of procedural fairness.

**Reasonable Apprehension of Bias**

[92] The Commission is divided into investigatory and adjudicative branches. There is nothing in the PSA which permits an overlap of these functions. As a general principle, a member of a commission may not act as investigator and adjudicator in the same case, as this gives rise to an apprehension of bias. In this case, the Executive Chair is the head of the investigatory branch that was responsible for the preliminary review and is now responsible for overseeing the investigation that she determined should proceed. The Chief argues, in these circumstances, that the Executive Chair acted in an adjudicative capacity in making the Interim Order and, in doing so, impermissibly sat as judge in her own cause, *2747-3174 Québec Inc. v. Québec (Rêgie des permis d'alcool)*, [1996] 3 S.C.R. 919 at para. 60

[93] The Chief submits that this merger of the investigative, prosecutorial and judicial functions of the Commission gives rise to a reasonable apprehension of bias. The Interim Order has significant implications on the applicants' statutory and common law powers and responsibilities and substantially interferes with his command of the Service. Issuing the Interim Order was an exercise by the Commission of its judicial function, which this Court has held must be separated from its investigative function, *Gardner v. Ontario Civilian Commission on Police Services*, 2004 CanLII 2540 (ONSC (Div. Ct.)) at paras. 14 and 27.

[94] He further submits that, rather than taking the matter before a Vice Chair appointed to exercise the Commission's judicial function, the Executive Chair, who heads the Commission's investigative branch, signed the order herself with a view to furthering "the Commission's investigative process".

[95] The Executive Chair made numerous, very serious and definitive "findings" such as the presence of "a deep sense of mistrust in the judgment, integrity and capacity of the

Service's leadership and the Board's oversight capacity". She found that it is "clear that the Service's morale suffers from a prevalent perception" of favouritism, that "there is a widespread belief" that members of the Service who make complaints are subject to reprisals and that "there is a widespread view" that the Service is plagued by "cronyism" and that its members are "demoralized".

[96] A reasonable observer, the Chief argues, could only conclude that an investigator who had only heard one side of the story from biased raconteurs, had not sought out any response, admitted the impossibility of determining the merits of the matter, but who then went on *qua* adjudicator to make damning findings of fact and an order with highly serious consequences, had not approached the matter with an open mind.

***Analysis***

[97] In *Gardner*, the Divisional Court found that the composition of a hearing panel raised a reasonable apprehension of bias because the members of that panel had participated in meetings of the full membership of the Commission where decisions were made to conduct an investigation, where the report was received and discussed and where it was decided that an inquiry would go forward. This Court found that the PSA did not displace the common law right to an impartial hearing panel.

[98] The Commission, following *Gardner*, separated the investigative and adjudicative branches and created administrative walls between those functions to protect the integrity of both roles. The Executive Chair is the head of the investigative branch and a Vice Chair is the head of the adjudicative branch.

[99] The decision of the Executive Chair was an interim decision in the context of an ongoing investigation. The Executive Chair did not make any final determinations with respect to the allegations against the Chief – that is the role of the adjudicative branch should this matter proceed to a hearing. Instead, the Executive Chair's decision was concerned with whether there was *prima facie* evidence of a failure to comply with policing standards giving rise to a policing emergency and whether an interim order was necessary in the public interest.

[100] The Interim Order was akin to the interim order made in *Scott* by the Inquiry Committee of the College of Massage Therapists of British Columbia. That inquiry committee was differently constituted than the discipline committee of the College and the two committees were concerned with two different issues. Similarly, here the question considered by the Executive Chair was different than the question for a member of the Commission assigned to the adjudicative branch, if there were to be a hearing. The question, ultimately, was whether the Interim Order (that is, a temporary order while the Commission conducts a full investigation (and, possibly, a hearing)) was required in the public interest having regard to the purpose of the PSA.

[101] The ability of the Commission to make the Interim Order without a hearing and without notice is authorized by statute. An interim order can be made at any time on the basis of

*prima facie*, not final, assessments of the circumstances where the requisite preconditions are otherwise met. That statutory authorization, by itself, cannot support an assertion of reasonable apprehension of bias. The PSA does not restrict interim orders under s. 24(1) of the PSA to the Vice Chair and the adjudicative branch. The Executive Chair is not an adjudicator; she is not the judge in her own cause. The Executive Chair will not, because of the independence of the two branches of the Commission, be on a hearing panel if one is convened.

[102] The Chief argues that an interim order can never be made in aid of an investigation. This stands the purpose of s. 24(1) on its head. By its very terms, s. 24(1) authorizes the making of an interim order without notice and without a hearing. This means that in most cases, an interim order will be made prior to or in the course of an investigation. Where the identified emergent and public interest concerns call into question the very possibility of a fair and unimpeded investigation, it seems to me that the very purpose of enacting s. 24(1) would be defeated by the interpretation of that provision urged upon us by the Chief.

[103] For these reasons, I cannot agree with the Chief's counsel that the Interim Order issued by the Executive Chair merged the investigative, prosecutorial and adjudicative functions of the Commission in the manner that was found improper in the *Gardner* case. In my view, in the circumstances of this case, the Executive Chair's Interim Order did not create a reasonable apprehension of bias.

[104] The conduct of the Chief and the Board will be under scrutiny, to be sure. And, while the Interim Order does impose some limited restraint on the full range of authority the Chief and Board would otherwise wield, that is the price of occupying powerful, high profile and publicly accountable positions in a liberal democratic, bureaucratic state. No determinations have been made about the truth or falsity of the allegations involving the Chief or the Board. There will be a full investigation. The Chief and Board members will be entitled to full notice and disclosure and, in the investigation, will have every opportunity, with the benefit of counsel, to respond to each and every allegation made against them and their management team. And, if it comes to a hearing, they will have the opportunity to present a full defence to whatever allegations are made and to confront, and cross examine, their accusers. If the Chief's account of the complaints and the polling data prevail, the investigation may vindicate him entirely. Even if there is a hearing, the same may be true.

[105] The Chief also alleged that the Commission has "sided" with one of the complainants. This allegation was based on so-called "leaks" to the Toronto Star and the timing of certain comments by the complainant's counsel (this complainant is involved in an ongoing police discipline matter). These allegations are based on speculation and innuendo. I cannot find any basis upon which to conclude the Commission has "sided" with anyone against the Chief or members of the Board or even that there is a reasonable basis to believe this might be the case.

**Conclusion**

[106] For the foregoing reasons, the appeal and application for judicial review are dismissed.

**Costs**

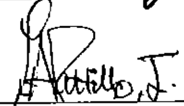
[107] The parties agreed that each party will bear its own costs. Accordingly, there is no order as to costs.

M. Penny J.

I agree

C. Aitken J.

I agree



L. Pattillo J.

**Released:** April 6, 2020

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**DIVISIONAL COURT FILE NO.:** 331/19 and 341/19
**DATE:** 20200406

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**C. Aitken, L. Pattillo and M. Penny JJ**

**BETWEEN:**

PAUL MARTIN IN HIS CAPACITY AS CHIEF OF THE DURHAM REGIONAL POLICE SERVICE AND THE DURHAM REGIONAL POLICE SERVICES BOARD

Appellants/Applicants

**– and –**

ONTARIO CIVILIAN POLICE COMMISSION

Respondent

**REASONS FOR JUDGMENT**

**Released:** April 6 , 2020