IN THE MATTER OF AN ARBITRATION under the *Police Services Act*

BETWEEN:

MR. MICHAEL VANDERMEULEN
(The "Applicant" or "Complainant")

- and -

OTTAWA POLICE ASSOCIATION
(The "Respondent")

AND in the matter of a complaint concerning the Association's duty of fair representation

ARBITRATOR: William A. Marcotte

APPEARANCES:

FOR THE APPLICANT: M. VanderMeulen

FOR THE RESPONDENT: P. Machado, counsel
P. Laflamme, OPA

Hearings held in Ottawa on November 28, 2016 and February 6, 2017

PRELIMINARY AWARD

On October 31, 2016, I was appointed by the Ontario Police Arbitration Commission ("OPAC") to hear three separate complaints, one each filed by Messrs. Michael VanderMeulen, Matthew Clarke, and, Kelly Ryan against their bargaining unit, the Ottawa Police Association ("OPA"), claiming it did not meet its duty of fair representation concerning certain complaints they have against their Employer, the Ottawa Police Services Board. The appointment letters indicated the hearings of the three complaints were scheduled for November 28 and 29, and December 9, 2016, the first date to deal with Mr. VanderMeulen's complaint. The hearing was held on that date.

In an email dated January 6, 2017, Mr. VanderMeulen informed me, as follows, in part: "As a result of your lack of objectivity and denial of all evidence, it is my opinion that it would be appropriate for you to recuse your role [sic] as Arbitrator in this matter."

On January 9, 2017, I sent the following email to Mr. VanderMeulen and OPA counsel, Ms. Machado:

> Ms. Machado,
> I am forwarding to you an email I received from Mr. VanderMeulen on January 6, 2017, noting that he did not include you as a recipient. The motion for recusal will be dealt with on the next scheduled date of hearing, February 6, 2017. Given the nature of the motion, the hearing on the merits of the complaint is held in obeyance, pending my decision. Thus, it is prudent to cancel the hearing scheduled for February 7, 2017.

It is necessary to set out events that occurred following my October 31, 2016 appointment, those that occurred at the hearing on November 28, 2016, and, those subsequent to that date in order to establish the context of Mr. VanderMeulen's motion.

On November 17, 2016, Ms. Machado sent me an email, copied to the three Applicants, which states as follows:

> This letter will confirm we are the legal representatives for the Ottawa Police Association. Further to the upcoming hearings scheduled for November 28th, 29th, and December 9th, 2016 respectively, we can advise we have not yet received disclosure from the Applicants. We will require a reasonable amount of time to review same prior to the first day of hearing in order to effectively prepare for these matters.
>
> We take this opportunity to request the following on or before Friday, November 25th, 2016:
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> 1. All notes, emails or policies the Applicants intend to rely upon.
> 2. Any recordings and transcripts the Applicants intend to rely upon.
> 3. Dates and times of all meetings between the Applicants and the OPA, for which the Applicants intend to rely upon.
> 4. All notes, recordings and transcripts of said meetings for which the Applicants intend to rely upon.
> 5. Books of Authorities for which the Applicants intend to rely upon.
> 6. List of all Witnesses and a summary of their statements to be relied upon by the Applicants.
> 7. Any other information the Applicants intend to rely upon.
>
> The Association will provide its Book of Authorities and Disclosure electronically in due course in the interest of time, on or before November 25, 2016. We further undertake to provide hard copies at the hearing of each matter. Conditional upon full disclosure being received, the Association will be in a position to proceed at the commencement of each of these hearings.

On that same day, the Applicants responded by email to Ms. Machado's request: "We think it will be appropriate to wait for the Arbitrator to decide on the timelines for disclosure." On November 18, 2016, I emailed the parties as follows: "Friday, November 25th represents a reasonable amount of time in which to produce the information requested" (bearing in mind the hearing of the merits of the complaints was to begin on Monday, November 28, 2016).

On November 24, 2016, Ms. Machado sent to me the Association's Book of Authorities, preliminary disclosures, and notified that "Additional Disclosure

will be provided on November 25, 2016 as instructed by email dated November 18, 2016." She also advised, "We continue to await the disclosure of the applicants as requested from the Association..." There was no response from the Applicants.

At the commencement of the hearing on November 28, 2016, Ms. Machado indicated the Association had received no particulars from the Applicants. Mr. VanderMeulen submitted he and Messrs. Clarke and Ryan did not consider the direction in my email to the parties of November 25, 2016, to be an order. Certain matters arose which required rulings on my part.

Ms. Machado noted that Messrs. Clarke and Ryan were in attendance and objected to their presence in that the complaints had been filed as separate complaints. Mr. VanderMeulen stated to the effect he believed it was appropriate for them to attend. I ruled that since separate complaints had been filed, it would be appropriate for Messrs. Clarke and Ryan not to be present when Mr. VanderMeulen and the Association presented their evidence. I informed Mr. VanderMeulen he was entitled to have an advisor present at his hearing.

Ms. Machado observed that Mr. VanderMeulen had placed his cell phone in a prominent position in front of him. In response to her inquiry, Mr. VanderMeulen replied that he was recording the hearing. Ms. Machado objected. In line with the usual practice at arbitration hearings in Ontario, I ruled that absent extraordinary circumstances or agreement of the parties, Mr. VanderMeulen could not record the hearing. In response to his expressed concern that a reason for so doing was he did not believe himself capable of notetaking while presenting his evidence, I advised Mr. VanderMeulen he was entitled to have a note-taker present for his hearing.

Mr. VanderMeulen advised that, in his evidence, he would be relying upon some 6 to 8 hours of recordings he had made of meetings and, apparently, other discussions related to his complaint. Ms. Machado submitted that if he so intended, the Association requested a transcript of the recordings along with identification of those present, as well as the date, time and locations thereof. Mr. VanderMeulen was advised that if he was not prepared to provide the Association with a transcript, he could rely on notes of the matters recorded in presenting his case. The decision was left to him as to how he wished to proceed.

It became apparent at the hearing that none of the applicants had a response of any sort to the Association's request for particulars, nor had they requested particulars from the Association. Thus, an adjournment was necessary in order to afford the parties an opportunity to prepare their respective cases on the merits of the complaints. Consultations with the parties ensued and it was agreed that Mr. VanderMeulen's complaint would be heard on February 6 and 7, 2017, Mr. Clarke's on February 17 and 22, 2017 and Mr. Ryan's on February 27 and March 21, 2017. Two further dates, March 21 and April 4, 2017 were agreed to on an if-necessary basis.

The matter of the exchange of particulars was addressed. I indicated to Mr. VanderMeulen that he was entitled to request particulars from the Association in preparation for presenting his case, noting that procedural fairness so entitled him. Mr. VanderMeulen expressed his concern that if he provided the Association with his particulars, there was potential for it to tailor its version of events so as to favour its cause. In order to address Mr. VanderMeulen's concern, and without comment on it, I ordered that the parties would simultaneously exchange particulars by email. It was then agreed the parties would submit their request for particulars to each other and for this to occur at a time sufficiently in advance of the simultaneous exchange of particulars (which was agreed to occur at some point in time to be established after

consultation with the Association and Mr. VanderMeulen) in the week of January 9-13, 2017. The timelines were established also taking into account that Mr. VanderMeulen had indicated the person who would be advising him had recently undergone surgery and would not be available for some short period of time subsequent to November 28, 2017. I confirmed these arrangements with Ms. Machado and Mr. VanderMeulen in an email dated November 29, 2016:

> This letter serves to confirm that at the hearing on November 28, 2016, it was agreed the parties will simultaneously exchange particulars in the week of January 9 to 13, 2017 (the exact date to be determined) for all three (3) complainants.
>
> It was also agreed that, in preparation for the simultaneous exchange, the parties will notify each other of their requested particulars in sufficient time to formulate responses, taking into account the holiday season.
>
> Should it be necessary, a conference call will be held to deal with any issues raised by the parties in order for the simultaneous exchange to occur.

In a December 9, 2016 email to me, Mr. VanderMeulen states:

> We are aware that we have not provided the list of requested disclosure yet. Health is more important than administrative convenience. We would like to take this opportunity as well to ask if Mr. Marcotte was able to secure the services of OPAC for the transcriptions.

As concerns the above inquiry, I had indicated to the Applicants on November 28, 2016, when they expressed concerns over the cost of a transcript of the recordings they had referred to, that since this matter was a complaint regarding duty of fair representation where the Applicants were self-represented, and not the far-more common matters of a rights grievance or an interest arbitration, I would inquire of OPAC if it would undertake the costs for a transcription.

In a December 12, 2016 email, I responded to the Applicants as follows:

1) The response from OPAC is that "the parties are responsible for compiling their evidence and supporting materials including the associated costs and not the Commission."
2) I can appreciate there is a health issue with the person you have chosen as your advisor. However, you are responsible for providing the Assocation with your requested particulars and for a simultaneous exchange thereof with it in the week of January 9-13, 2017, which procedure was agreed upon by all parties on November 28, 2016.

In his email of January 6, 2017, Mr. VanderMeulen included the following in expressing his view of arbitrator bias:

ARBITRATOR`S BIASES

1. On November 17th 2016, OPA lawyer, Pamela Machado, sent an email to all involved parties of the dispute. In the email, Ms. Machado requested disclosure from the victims [sic] and set the time limit as November 25th, 2016 (7 days). As the Arbitrator, you agreed to the terms without consulting the victims. Disclosure is a key component of any case and to make this decision without any input from the victims was biased. It is my opinion that you sacrificed natural justice for administrative convenience.

2. As the Arbitrator, you advised that you would not be abiding by the 90-day rule as set out in the Police Service Act 122(3.5). This denied us, as the victims, the right to procedural fairness.

3. During the initial hearing on November 28th, 2016, as Arbitrator, you stated in words to the effect that Ms. Machado was a lawyer and she knows everything while I did not.

4. In your role as the Arbitrator, you refused to allow the victims to record the hearing for note taking purposes. This judgement was made prior to hearing all the evidence (see 09:20 of attached recording).

> 5. The biases depicted were so flagrant that my two remaining colleagues with the same OPAC complaints withdrew their arbitration applications.
>
> A person is barred from deciding any case in which he or she may be, or may fairly be suspected to be biased. A reasonable member of the public listening to the recording would deem your conduct to show bias or the appearance of bias. It is fundamental to fair procedure that both sides should be heard. Biases are preferences and biases affect decision making. The integrity of the proceedings requires fairness and the appearance of fairness throughout the whole process. My challenge to your impartiality necessitates a review of your conduct. As OPAC cannot review my complaint, I am asking you to address my concerns. As a result of your lack of objectivity and denial of all evidence, it is my opinion that it would be appropriate for you to recuse your role as Arbitrator in this matter.

In response to my email of January 9, 2017, Ms. Machado copied me on an email she sent to Mr. VanderMeulen that same date: "Please send the recording you intend to rely upon immediately." (No. 4 in Mr. VanderMeulen's above email.)

In an email dated January 13, 2017, Ms. Machado advised me as follows:

> We are still awaiting the recording that Mr. VanderMeulen intends to rely on. The delays being created by the Applicant in this matter are prejudicial.
> Furthermore, we require clarification concerning #2 of Mr. VanderMeulen's allegations of bias as it relates to the 90-day rule.

Also on January 9, 2017, Ms. Machado sent me an email, copied to Mr. VanderMeulen which states:

> As previously instructed, Mr. VanderMeulen, please ensure you include me on any and all correspondence involving this matter as required.
>
> Dr. Marcotte, should you wish to have the association make any submissions in relation to this motion, please advise.

In a reply email of that date, I state, "I would appreciate submissions from the association on the motion"

In regard to his point no. 1, Mr. VanderMeulen submitted that I had exhibited bias when I agreed to Ms. Machado's request for particulars from the Applicants by November 25, 2016 without consulting with him and that a reasonable and informed person would not have made this arbitrary decision.

As concerns point no. 2, Mr. VanderMeulen submitted that he found a fourfold test concerning the legitimate expectations of the parties, apparently in the circumstance of a proceeding like the one at hand, in Wikipedia:

1. Arbitration procedures make a promise.
2. The promise was to follow that procedure.
3. You have to be an interested person and [the procedure] has to affect your rights.
4. You have to have relied on that promise.

In specific regard to the above test, Mr. VanderMeulen referred to s. 122 (3.5) of the *Police Services Act,* which states:

> (3.5) The arbitration board shall give a decision within 90 days after the chair is appointed or, if the arbitration board consists of one person, within 90 days after the person is appointed.

Mr. VanderMeulen submitted that at the hearing on November 28, 2016, I had said that the 90-day rule would not apply. Therefore, I had denied him natural justice in dealing with his complaint only for purposes of administrative convenience.

In regard to point no. 3, Mr. VanderMeulen submitted that I came into the hearing with the bias that because Ms. Machado is a lawyer, "she knows everything and we know nothing". This attitude, he argued, does not leave room for an open mind because it presents a "pre-conceived idea about people", similar to pre-conceived ideas about "certain races".

In regard to point no. 4, Mr. VanderMeulen submitted that because I denied him and the other applicants the ability to record the hearing, that ruling was improper since I had not heard "all the evidence" and that I had questioned the legitimacy of the recordings before hearing them.

As concerns point no. 5, I ruled it was irrelevant in regard to his motion for recusal.

Mr. VanderMeulen argued he was entitled to have an unbiased decision-maker decide his complaint and that by my rulings, I was "only listening to one side", i.e., the Association. He submitted that justice must be seen as being done and it is reasonable to think that a person who makes decisions without listening to both sides will continue to make decisions the same way. He submitted that while I may believe I am acting in good faith, I could be acting with bias "because everyone has biases", perhaps albeit unconsciously held.

The Association submitted there is a common theme in Mr. VanderMeulen's submissions, namely, he has never had the opportunity to have an impartial hearing of his complaint. The Association submitted that Mr. VanderMeulen, himself, is an obstacle to his objective and that in raising his motion for recusal, he is adding further prejudice to the Association's cause in this matter; his procedural arguments are causing undue delay.

As to Mr. VanderMeulen's reliance on a test he found on Wikipedia, no weight ought to be given to it. Rather, the appropriate test as concerns the matter of

bias is set out in *Re R. v. S. (R.D.)*, [1997], 3 S.C.R. 484, para. 113, to wit: "whether a reasonable person properly informed would apprehend that there was conscious or unconscious bias on the part of the judge". The test requires objectivity on two fronts: the perspective from which the alleged bias is viewed is that of a reasonable person, and, the alleged bias must also be reasonable given the circumstances of the conduct *Re Wewaykum Indian Band v. Canada,* [2003] 2 S.C.R. 259, *para.* 66. As against the above twofold test, the Association takes no issue with my appointment, nor does it take issue with the assistance I have provided to the Applicants.

In regard to Mr. VanderMeulen's point no. 1, the Association submitted the role of the arbitrator is not to consult with the parties, nor is the arbitrator intended to work for a particular party; he makes orders. Disclosure is central to any matter, and the Applicants bear the onus of providing initial disclosure. The arbitrator accepted the applicants' request for more time when they did not follow his direction of November 18, 2016 and, further, despite that the onus is on the Applicants, the arbitrator allowed for a date for mutual disclosure.

In regard to Mr. VanderMeulen's point no. 2, on November 28, 2016, Mr. VanderMeulen made the point that he needed more time as he was not ready for disclosure. In granting him that time, there was no impact on his right to procedural fairness.

As concerns Mr. VanderMeulen's point no. 3, the Association submitted that the arbitrator's remark was made in reply to the "applicant's frustration with their lack of knowledge concerning procedure [and] is clearly explaining the procedure to the applicants." Further, the Association submitted my remark clarified the "difference between someone who has training and experience conducting [hearings] versus someone who does not.... This is a legal issue being explained to the applicants around the issues of exclusion of witnesses."

In regard to Mr. VanderMeulen's point no. 4, the Association noted that recording arbitration hearings is not traditionally done in labour or administrative tribunals absent a significant impairment or a legitimate accommodation requirement, which is not the case here.

The Association submitted that simply because Mr. VanderMeulen does not like the arbitrator's rulings on preliminary matters does not equate with bias. What is perceived to be an unfavourable decision toward Mr. VanderMeulen is not bias.

The Association submitted that Mr. VanderMeulen's further procedural arguments are causing undue delay and the Association will seek costs concerning his motion for recusal.

In reply, Mr. VanderMeulen iterated that he seeks an independent decision-maker, and, that his confidence in the arbitrator has been shaken. He further submitted that his motion is not about the preliminary rulings but, rather, how they were made. Mr. VanderMeulen noted that each side is responsible for its own costs and it is unfair of the Association to seek costs from him.
The issue to be determined in this award is whether or not the Applicant's motion for recusal on the basis of bias is to be upheld. I am not familiar with the Wikipedia test referred to by Mr. VanderMeulen. However, in *Re R. v. S. (R.D.) supra*, the Supreme Court of Canada provides for an appropriate test for determining bias, i.e., whether "a reasonable person properly informed would apprehend that there was conscious or unconscious bias on the part of the judge." The word "reasonable" implies that the person is fair-minded, thinks matters through and reaches a realistic and practical conclusion. The term "properly informed" implies the person has knowledge of the relevant context or circumstances in which the actions or words alleged to demonstrate bias occurred so as to have an understanding of the issues involved in the case.

The context in the instant case is an arbitration hearing, which hearings are conducted by way of an adversarial process. An adversarial process requires procedural fairness in order that each party has fair and ample opportunity to present its case. In that respect, an arbitrator has the discretionary authority to determine the procedures for the hearing so that is it fair to both parties. A fundamental element of procedural fairness is that a party is entitled to know the case it must meet in preparation for the hearing. Thus, prior to the hearing it is usual for the parties to exchange documents and particulars, with the party who files the complaint or grievance first providing the other party with that information. Should a dispute arise between the parties in regard to production, the arbitrator has the authority to order what each party will produce, again to ensure a fair hearing and for the hearing to proceed in an efficient and expeditious manner. It is this context in which Mr. VanderMeulen claims the existence of bias.

In regard to Mr. VanderMeulen's point no. 1, his belief that he was entitled to be consulted in regard to setting time limits for disclosure is ill-informed. The time line was established on my exercise of arbitral discretion in order to ensure procedural fairness on the part of the Association, since Mr. VanderMeulen, as the applicant in the instant case, bears the onus of initial disclosure. I would also note that in his November 17, 2016 email he states, "We think it will be appropriate to wait for the Arbitrator to decide on the timelines for disclosure". That is, Mr. VanderMeulen recognized that I have the authority to determine timelines for disclosure.

In regard to Mr. VanderMeulen's point no. 2, he correctly identifies that under s.122 (3.5) of the *Act* there is a 90-day time limit for an arbitrator to issue the decision from the date of appointment, in this case, October 31, 2016. At the commencement of the first day of hearing, November 28, 2016, Mr. VanderMeulen had not complied with my direction that he provide disclosure to

the Association. Nor had Mr. VanderMeulen requested disclosure from the Association.

Given these circumstances, it became abundantly clear that the hearing of the merits of Mr. VanderMeulen's complaint could not proceed as scheduled. In that respect, my notice of appointment included a 2-page document containing 14 complaints (some including sub-points) and 14 pages of matters presumably related to Mr. VanderMeulen's complaint against OPA.

In consultation with the parties, timelines were established for Mr. VanderMeulen to respond to the Association's production requests, for him to request disclosure from the Association, that a simultaneous exchange of particulars would occur, and, agreement on the dates for hearing the merits of Mr. VanderMeulen's complaint. On the last matter, it was agreed his hearing would continue on February 6 and 7, 2017, i.e., beyond the 90-day time limit. In these circumstances, it is improper for Mr. VanderMeulen to claim a lack of procedural fairness; he is the cause of my inability to issue a decision within 90 days of my appointment.

In regard to Mr. VanderMeulen's point no. 3, the Association, in its submissions, indicates the context of my remark. At that point in the hearing, the three Applicants were in the hearing room and, in response to the Association's objection, I ruled that Messrs. Clarke and Ryan would not be permitted to be in attendance when Mr. VanderMeulen's case was being heard. There were objections to my ruling by the applicants, at which point I explained that Ms. Machado could properly object to the presence of Messrs. Clarke and Ryan, noting that she has experience and training in these matters. It was clear to me at this point that none of the Applicants was informed, or aware of the requirements for procedural fairness in this adversarial process.

As concerns Mr. VanderMeulen's point no. 4, he is correct in noting that I ruled the hearing would not be recorded. That is, my ruling was in regard to the procedures that would be followed, which ruling falls within my discretionary authority. Given that Mr. VanderMeulen's stated reason for recording the hearing was concern over his ability to take notes in presenting his evidence, he was advised he was entitled to have a note taker present during the hearing of his complaint. Both rulings reflect the usual practices in arbitration hearings held in Ontario.

Based on the above examination of the particulars of Mr. VanderMeulen's allegations of bias on my part, and, in light of the test for bias in *Re R. v. S. (R.D) supra*, I find there is no justification for my recusal on the grounds of bias. As Mr. VanderMeulen stated in his submissions, his concern of bias is based not on my rulings, but on the way I made those decisions. Those decisions involve procedural matters and were made with proper regard to procedural fairness for both Mr. VanderMeulen and the Association.

Mr. VanderMeulen's motion for recusal is dismissed.

Dated at Toronto, this 22nd day of February, 2017.

William A. Marcotte

William A. Marcotte
Arbitrator