

IN THE MATTER OF THE
PUBLIC HEARING INTO THE COMPLAINT AGAINST
CONSTABLE #2198 JESSIE TIWANA
OF THE VANCOUVER POLICE DEPARTMENT

Ruling on the Issue of Whether Commission Counsel Can Cross-Examine Certain Witnesses

1. The Issue

Counsel for the respondent, M. Kevin Woodall, applied to prevent Commission Counsel Michael Tammen Q.C. from cross-examining the police witnesses and the respondent, if he chooses to give evidence.

2. Ruling

At the close of submissions on November 18, 2014, I indicated to counsel that I would permit Mr. Tammen's participation as Commission Counsel, and undertook to file these written reasons.

3. Background

This ruling takes place in the context of a public hearing into a police complaint under section 143 of the Police Act, RSBC 1996 Chapter 367, as amended, commenced on November 17, 2014. The legislation refers to the respondent by the somewhat more neutral term, "member" and that is how I shall refer to him in this ruling. Part 11 of the Police Act creates a framework for police disciplinary proceedings and specifies the duties and role of the Police Complaint Commissioner.

On November 5, 2014, Public Hearing Counsel Brock Martland provided member's counsel, M. Kevin Woodall, with written notice of the intention of Commission Counsel, Michael Tammen Q.C. to participate "in the evidentiary aspect of [the] hearing." There had been discussion at the pre-hearing conferences of the possibility that Mr. Tammen might participate in some fashion but this was only confirmed in writing a short time prior to the commencement of the hearing.

Mr. Woodall sought clarification of Mr. Tammen's intended role, and Mr. Tammen responded in a November 9 email, indicating that he intended to cross-examine the police witnesses about their observations and their initial statements to investigators, to cross-examine the member if he testified, and to make submissions about the legal test for misconduct.

Mr. Woodall raised this application at a convenient point in the proceedings in order to accommodate the non-police witnesses, which is appreciated.

4. Argument

Mr. Woodall in his thorough submissions argued that what he described as the unusual decision of the Commissioner to appoint commission counsel in this case firstly undermines the neutrality

of the Commissioner and places him in an adversarial position; secondly, unlawfully and unfairly permits the participation of two prosecutors in a disciplinary hearing; and thirdly, is an arbitrary measure in this particular case when compared with others.

5. Statutory Framework

Both Mr. Woodall and Mr. Tammen in their submissions took me through the provisions of the Police Act that relate to the role of the Police Complaint Commissioner in making decisions pertaining to public hearings, such as has been convened in this case. It is important to consider the issue of appointment of commission counsel, and the proposed cross-examination of the witnesses by him, in the context of the legislative scheme, the duties of the Commissioner, and the manner in which he exercised those duties in this case.

I will not go into the history of the complaint at this point or the investigative proceedings prior to the hearing being ordered. Those are contained in the Commissioner's Notice of Public Hearing dated May 14, 2014. It is sufficient to observe that the ordering of a public hearing in this case entailed a decision on the part of the Commissioner that there was a reasonable basis for concluding that the findings of a police Superintendent who, as the disciplinary authority under section 124 of the Act, cleared the member of misconduct were incorrect, *and* that a public hearing was necessary in the public interest. That wording is specifically contained in the Notice of Public Hearing, and it comes directly from section 138(1) of the Police Act, although they are alternative bases for ordering a hearing.

Section 138(2) specifies criteria that the commissioner may consider in ordering a public hearing in the public interest. In paragraph 11 of his Notice, the Commissioner itemized his criteria for ordering this hearing, in language similar in many respects to that provided in the statute.

The Police Act provides for the appointment, by the commissioner, of two differently defined types of counsel, public hearing counsel, and commission counsel, both defined in section 76 of the Act. Commission counsel is described only as counsel representing the police complaint commissioner, and public hearing counsel is described as legal counsel appointed under section 138(7) for the purposes of a public hearing.

Under section 138(7) the appointment of public hearing counsel "to present to the adjudicator the case relative to each allegation of misconduct" is mandatory. There is no provision governing when commission counsel may or should be appointed. There is at least one reference in Part 11 to the commissioner's right to participate or make submissions during the complaints process [apart from a public hearing], or to do so through commission counsel: See section 141(6). The only reference to commission counsel's role in a public hearing [that I have found] is contained in section 143(5), which expressly permits both public hearing counsel and commission counsel, in addition to the member or his/her counsel, to call, examine, or cross-examine witnesses, introduce evidence and make submissions.

The first issue raised by Mr. Woodall's application is whether, in light of the language of section 143(5), I have any discretion or power under the Act to restrict the statutory right to examine or cross-examine given to both public hearing and commission counsel. Mr. Woodall relies on section 145 which permits an adjudicator to restrict the participation of "participants" in the

proceedings. However, as pointed out by Mr. Tammen, that section must be read in light of both sections 143 and 144. Despite the heading “*Other participants in a public hearing*” above section 144, which is not part of the legislation, it is clear that this part of the Act dealing with public hearing process distinguishes between the parties or counsel mentioned in section 143(5) and “participants” who are permitted to appear under section 144.

On a plain reading of the sections, including the exception to section 144 of “public hearing counsel, commission counsel and the member...”, the remainder of that section, section 145 and section 146 all clearly pertain to participants other than public hearing counsel, commission counsel and the member or his counsel. The prescribed abilities of the adjudicator to limit participation under section 145 therefore do not extend to public hearing or commission counsel.

The adjudicator is specifically provided with a power to “control” the proceedings in section 143(6)(b), by excluding “anything unduly repetitious.” This discretion immediately follows (5) in which the cross-examination rights are provided to the member or his counsel, and public hearing and commission counsel. It is also notable that (6) is specifically stated not to limit the powers respecting participants given by section 145.

If the legislature had intended that the powers to limit participation under section 145 pertained to the rights afforded the member or his counsel, public hearing counsel and commission counsel, these sections would have been differently ordered, in my view. The sequence of them clearly indicates that the discretion to limit participation does not extend to the primary “parties” and/or their counsel.

On a plain reading of the Act and basic principles of statutory interpretation, I therefore find firstly, that there is no discretion afforded to an adjudicator to exclude or limit the right of *participation* of commission counsel provided in section 143(5), beyond that provided under section 143(6)(b), to exclude anything unduly repetitious.

My interpretation of the Act may be a complete answer to Mr. Woodall’s arguments; however, in the event that I have inaccurately interpreted or circumscribed the discretion of the adjudicator, I go on to consider the merits of the three bases on which he submits that I should exercise discretion to exclude commission counsel’s participation.

6. Neutrality of the Commissioner

Mr. Woodall points to the language of the Notice of Hearing in this case as indicative of a lack of neutrality on the part of the Commissioner. As I have noted above, the Commissioner is required by the wording of the Act to consider exactly the points set out in the Notice of Hearing, much of which is in essentially the same language as provided in the Act. Mr. Woodall points out that the Notice also specifies an allegation against the member in language similar to a criminal charge, which he submits is outside the matters the Commissioner needs to consider in deciding a hearing is warranted. He suggests it discloses that the Commissioner has arrived at a conclusion regarding the outcome.

I find the language of the allegation to be little different from that used in other hearing cases, and as well it appears to be a reasonable means of engaging the issues that the adjudicator will be

required to decide. In my view, the Act essentially requires the Commissioner to articulate an allegation [see section 138(7)], and it seems to me that is all he has done in the Notice.

Mr. Woodall relies on the case of *Lowe v. Diebolt*, 2014 BCCA 280, an appeal by the Commissioner of a retired judge's review on the record under section 117. The retired judge found that the disciplinary authority's decision should stand. The Commissioner pursued a review of that decision in the Supreme Court and when he was unsuccessful there, in the Court of Appeal.

Mr. Tammen says that the intention of the Commissioner in that case was simply to establish that the issue of misconduct was worthy of a hearing on the merits. The case may have been complicated by the fact that the Commissioner was seeking judicial review of a decision that the Police Act says is not appealable. It was most certainly complicated by the fact that the Commissioner's application was filed more than six months after the retired judge's decision.

The overriding focus of the two appeal courts' decisions was delay and its effect on the availability of the remedy of judicial review. In reviewing the factors to be considered in deciding whether to dismiss for delay, Groberman J.A. considered the statutory regime and need for timely resolution of complaints, the subject matter of the complaint process, and the importance of the case to the officer, and to the Commissioner as applicant. It was in that context that the learned justice made his comments at paragraph 67 relied upon by Mr. Woodall, to the effect that the Commissioner's role is "to ensure that complaints are dealt with properly under the statutory regime"... "as a neutral party in the administrative regime."

Mr. Woodall also relies on the further comments of the court in paragraph 74 regarding the Commissioner's standing, where the learned justice stated "the factum filed by the Commissioner takes an adversarial position against [the member], and potentially raises concerns" about his "neutrality in complaint proceedings".

Mr. Tammen submits that the court in *Lowe v. Diebolt* did not consider all the statutory provisions of the Act dealing with the role of the Commissioner. He submits that it is the Commissioner's duty under the Act to ensure that misconduct, if he believes it has occurred, is properly dealt with, and that the Court of Appeal misunderstood the Commissioner's motivation. In any event, he says, the remarks made in paragraph 74 are *obiter dicta*, as the court went on to decline to reach any conclusions as to the Commissioner's standing to seek a review.

In addition, Mr. Tammen submits, the comments in *Lowe v. Diebolt* are inconsistent with the court's own language in the case of *Florkow v. Police Complaint Commissioner*, 2013 BCCA 92, para.2, where the commissioner's role is described as "ensuring that misconduct on the part of police is appropriately dealt with in the public interest and in accordance with the Act."

In both cases, the Court of Appeal points out that the commissioner does not decide complaints on their merits, or take an interest in whether there is a finding of misconduct. I agree however with Mr. Tammen's submission that the commissioner always has an interest in whether a case has been properly dealt with, and that the Act, in particular section 138, imposes a duty on him to take certain actions if certain circumstances are found, or believed to exist. The commissioner is

clearly required to take action if he is of the view that misconduct has occurred and that it has not been properly dealt with, including where he believes a reviewer or adjudicator has not properly dealt with it.

For my part I do not see the role the Commissioner assumed in the *Diebolt* case as inconsistent with his duties under the Act, but that observation is not material to the analysis here. Whatever might be made of that decision, I do not take it as establishing a “principle” that the commissioner must act with absolute neutrality. The very nature of his duties under the Act will necessitate language and behaviour that appears adversarial. I have observed as much in relation to the language of the Notice of Hearing here, which is taken largely from the Act.

The duty of the commissioner under the Act is larger and more complicated than one of absolute neutrality. While he may be neutral as to the outcome, he is clearly not neutral as to the process or its effect on the public’s confidence. He is required in the process of assessing the conduct of complaints to consider whether there has been misconduct. I do not think an assertion on the part of the commissioner that misconduct has occurred, considered in the context of his duties under the legislation, implies that he lacks neutrality regarding the outcome, even if he uses apparently adversarial language to advance his views regarding faults in the process.

In any event, on the facts of this case there is no demonstrated interest beyond process on the part of the Commissioner. If Commission Counsel oversteps the bounds of questions that address the duties of the Commissioner, those can be controlled by objections during the hearing, as pointed out by Mr. Martland. The argument that Commission Counsel should not participate because of improper motives or lack of neutrality on the part of the Commissioner fails.

7. Two Prosecutors

Mr. Woodall submits that to have both counsel cross-examine the member and witnesses that may be sympathetic to him would essentially permit two prosecutors to participate in the hearing. This argument relies on language contained in paragraph 63 of *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19, a Supreme Court of Canada case dealing with a police disciplinary proceeding under the Ontario Police Services Act.

The Ontario legislation specifically refers to a person appointed to conduct an investigation as a “prosecutor,” so as pointed out by Mr. Tammen there is an immediate distinction before one considers the meaning of the passage referred to by Mr. Woodall [below]. In addition, the court was considering a different issue: the undesirable scenario that might result if it decided that a police disciplinary proceeding barred the complainant from pursuing a civil suit for damages. Such a decision it said, “risks turning the administrative process into a proxy for [the complainant’s] civil action”: para. 62.

The passage that Mr. Woodall relies on, in paragraph 63, reads, “...the officers, who have much at stake in the hearing, would effectively be forced to face two prosecutors instead of one, given the presence of counsel for the complainant.”

That passage deals with a hypothetical result in a different disciplinary regime where the complainant has standing but no right to compel the officer to testify, and a separate appointed

person “prosecutes” the complaint. The Supreme Court of Canada considered that in the context of the Ontario legislative scheme, it would be unseemly to have civil counsel participate on behalf of the complainant in addition to whatever role was provided for the complainant in the disciplinary proceedings. The court was not considering in depth the issue of fairness or the roles of the parties in a disciplinary proceeding. The passage does not in my view come close to establishing a “principle,” as suggested by Mr. Woodall, that there should not be two prosecutors, or more than one party adversarial in interest to a member, in a disciplinary proceeding. It seems to me there were in any event two such parties, the complainant and the prosecutor, in the proceedings being considered.

In any event, I agree with Mr. Tammen’s submission that it is not necessarily always unfair for a single witness, even a party who is in jeopardy, to be tested or challenged through cross-examination by more than one lawyer. He points to cross-examination of a criminal defendant by co-counsel for his co-defendants, co-defendants in civil cases, and in discipline proceedings, in a number of ways. For instance, he says, if there is more than one respondent member in a public hearing, co-counsel may well cross-examine. He points to other public hearings in which there were two members each with counsel and as well the complainant’s counsel participated. There is no basis, he says for a conclusion that cross-examination by more than one lawyer in a disciplinary proceeding is inherently unfair.

Mr. Woodall relies on the wording of section 143(6)(b) in arguing that participation of commission counsel in addition to public hearing counsel will of necessity be repetitious, because of their common roles, and that commission counsel should therefore be barred from participating. He argues that they have the same client and interests in relation to the proceedings. He points out that they work out of the same office and are both appointed and beholden to the commissioner for renewal of their contracts.

Mr. Martland took strong umbrage to a suggestion that he did not act independently from the Commissioner, and I find nothing in the legislation, as outlined above, to suggest that public hearing counsel is here to do the “bidding” of the commissioner.

The role of hearing counsel under section 138(7) is to present to the adjudicator the case relative to the allegation of misconduct, presumably by coordinating the witnesses and conducting the proceedings. He is not there particularly to advance the interests of or even represent the commissioner.

The role of commission counsel is clearly different; his duty clearly *is* to advance the interests of the commissioner. I have already considered [above] what those interests are. Commission counsel’s role must be considered in light of the role of the commissioner to safeguard the public’s confidence in the disciplinary process, and his absence of interest in the outcome.

Mr. Martland submitted that it would be premature to exclude commission counsel’s participation based on the fact that the two counsel might have duplicate or overlapping roles. Any issue of overlap, unfairness or repetition can be dealt with under section 143(6)(b) as the issues arise, he suggested. I agree.

I recognize that the member's livelihood and reputation are in jeopardy and the consequences of a finding of misconduct can in some cases, as pointed out by Mr. Woodall, be more severe than those flowing from a criminal conviction. However, I am not prepared to conclude, at the outset, that commission counsel should be excluded on the basis that both or either of these counsel act in the role of "prosecutor" toward the member in proceedings under our Act, or, in any event, in the same or even a necessarily overlapping role.

I am also not persuaded that cross-examination of the member, on different subject matter, by two counsel, is inherently unfair. I note that one of the justifications for ordering the hearing under section 138(2), or perhaps a primary purpose, is to "assist in determining the truth." Mr. Tammen's submission that cross-examination is one of the primary means of achieving that has merit. I do bear in mind that the officer's livelihood and well-being are squarely engaged by the process; also a primary focus; however, weighing those two purposes favours participation by commission counsel.

Fairness, again, can be managed during the proceedings. I am quite confident that an adjudicator can maintain a fair process without entirely barring the participation of commission counsel at the outset, through the use of discretion to prevent not only repetition but the appearance of counsel piling on or badgering the witnesses into a position at odds with the interests of the member.

8. Arbitrariness

Mr. Woodall submits that it is unusual for the commissioner to appoint commission counsel, and that his decision to do so in this case is arbitrary, and by inference, unjustified. He says that the only issue here is whether the member committed a disciplinary default, so there is no apparent justification for the decision. He says there is no issue of procedure or of general application to policing practices that exists separately from the merits of the alleged default.

I agree that the appointment does raise the question of why the Commissioner is of the view that he may need representation in this case as opposed to others in which he has not required it.

Mr. Tammen submits that it has always been contemplated, and was raised in pre-hearing conferences, that he would participate by making the argument regarding the legal test to be applied in connection with finding excessive force, and that he would perhaps cross-examine, although that was only recently confirmed. The fundamental reason for appointment of commission counsel, Mr. Tammen says, was to argue the legal test for misconduct relating to excessive force, in order to meet an argument made before the discipline authority as to what is meant by intent and recklessness in the statute. Beyond that, he says, the Commissioner envisaged Commission Counsel testing the evidence of the respondent should he choose to testify in relation to his use of force, as well as exploring some issues relating to the other officers who are going to testify.

Mr. Tammen also argues, essentially, that it should not be necessary, given the separate roles of the two counsel, as discussed above, for the Commissioner to justify his appointment of commission counsel in any particular case. He submits that, as discussed above, his participation is necessary in order for the Commissioner to ensure that his duties under the Act are fulfilled, in

particular his duty under section 143(1)(b) to act to “preserve or restore public confidence in the investigation of misconduct or the administration of police discipline.” He points to the use of cross-examination as the best method to get at the truth and the fact that apart from a public hearing, a lot of the evidence considered in disciplinary hearings goes untested. He says his role will necessarily be separate from that of public hearing counsel, which is simply to present the case relative to the allegations and not necessarily to ensure that public confidence is maintained.

Mr. Tammen says also that if these witnesses are sympathetic to the member, as is asserted by Mr. Woodall, there may be a need for him as Commission Counsel to cross-examine on matters of no interest to Public Hearing Counsel or perhaps to which he is not privy, relating to statements made by them and the process leading up to this hearing, as reviewed by the Commissioner. As I understand it, the point is that the Commissioner may have an interest in exploring the process leading up to the hearing for the purpose of ascertaining if it was in line with the Act.

As for whether it is rare to have commission counsel appointed, Mr. Tammen acknowledges that there are relatively few cases in which this has occurred but submits that it is irrelevant. He points as does Mr. Woodall to the public hearing cases of *Bowser & Robinson*, and another named *Robinson*, available on the website of the Office of the Police Commissioner, as examples of where commission counsel has participated.

The backdrop of this issue, Mr. Tammen says, is the history of prior problems with the complaints process and in particular with having matters get to a public hearing. I needn't go into that; it is sufficient to observe that there were changes to the legislation in 2010 providing for a process that is intended to be more transparent and accountable. It was in that context, and recently, that the roles of public hearing counsel and commission counsel arose and were defined. Mr. Tammen outlined some of the recent transitional experiences in order to show that the process is a new one, and submitted that it is early days to conclude that appointment of commission counsel is rare or unusual [let alone arbitrary], as it may indeed become more common as the roles are fleshed out.

Although I do find the way in which the separate aims of counsel have been articulated in this particular case to be a tad vague, I do not view it as necessary for commission counsel to justify his appointment. The Act provides for it. In any event, there is more than enough justification for the dual appointments in this case for me to find that involvement of Commission Counsel is not arbitrary.

9. Result

The application is dismissed.



Carol Baird Ellan, Retired Judge