

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, C. 367

AND

**IN THE MATTER OF THE DISCIPLINE PROCEEDING AGAINST [REDACTED]
[REDACTED] OF THE VANCOUVER POLICE
DEPARTMENT**

Counsel for the Respondent –

[REDACTED] –

Richard C.C. Peck, Q.C.

Eric V. Gottardi, Q.C.

Mark Iyengar

INTRODUCTION

1. [REDACTED] of the Vancouver Police Department (VPD) is alleged to have committed discreditable conduct pursuant to s.77(1)(3)(h) of the Police Act (Act) "Discreditable conduct", which is, when on or off duty, conducting ones self in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department.
2. The specific allegation of discreditable conduct relates to a letter written by [REDACTED] [REDACTED] to an adjudicator that failed to provide balanced, fair, accurate and complete information to the adjudicator.

BACKGROUND

3. In the early hours of December 26, 2011, Cst. [REDACTED] was on patrol in the city of Vancouver. He was driving an unmarked Chevrolet Tahoe SUV. At approximately 2:15 am, officers of the VPD noticed a Jeep Cherokee SUV driving at a high rate of speed on Commercial Drive. The vehicle was stolen. The vehicle turned left onto 1st Avenue and proceeded in an easterly direction. At some point

Cst. [REDACTED] became aware of the stolen vehicle and began a high speed pursuit. A shift supervisor gave orders on the police radio not to engage in a pursuit. However, Cst. [REDACTED] continued in pursuit and drove east on East Hastings Street, and then south on Nanaimo Street. For a brief period of time, Cst. [REDACTED] lost sight of the Cherokee, until he saw it at School Road and Rupert Street, where there was a collision that took place between the vehicles. The shift supervisor made further orders not to engage in the pursuit.

4. All police departments have protocols and guidelines on high speed pursuits. The reason for protocols and guidelines are that invariably high speed pursuits can create enormous danger to members of the public. Many have resulted in serious injury and harm to innocent third parties.

5. The circumstances were exacerbated by the fact that Cst. [REDACTED] made oral statements over the radio that he was not engaged in a pursuit and that the other driver was trying to ram his car. In fact a subsequent investigation revealed that it was Cst. [REDACTED] who rammed the other driver's vehicle contrary to his statements. An engineer who testified at a subsequent public hearing stated that in his opinion the two vehicles were travelling at speeds between 120km/hr to 150km/hr.

6. As a result of this incident, The VPD commenced disciplinary proceedings against Cst. [REDACTED]. On June 27, 2012, Superintendent [REDACTED] was delegated by [REDACTED] to be the Discipline Authority. [REDACTED], who is in house counsel to the VPD, acted as counsel to assist Superintendent [REDACTED]

7. On October 7, 2013, Superintendent [REDACTED] found that Cst. [REDACTED] had committed two disciplinary faults of deceit and neglect of duty. On the penalty phase of the process on January 15, 2014, Superintendent [REDACTED] concluded that the appropriate penalty for deceit should be dismissal and the penalty for neglect of duty ought to be two days suspension without pay.

8. Since Cst. [REDACTED] received a penalty of dismissal, he had a right to a public hearing under s.136 of the Act. In February 2014, the Office of the Public Complaint

Commission (OPCC) appointed retired Judge, the Hon. William Smart Q.C. as an adjudicator to preside over the hearing. At the public hearing Cst. ██████ was represented by counsel. As well he had the support of ██████, the President of the VPD Union. At the conclusion of the hearing, wherein a number of witnesses testified, Adjudicator Smart adjourned the matter for decision.

9. On July 30, 2014, the adjudicator found that Cst. ██████ committed the offences of deceit and neglect of duty by engaging in an unauthorized high speed pursuit and not being truthful to his fellow officers over the radio. He then adjourned the matter to a future date in order to determine the appropriate sanctions.

10. From the beginning, the position of the VPD executive in the sanctions phase of the hearing was clear. It was their position that Cst. ██████ ought to be dismissed. The executive determined that a letter ought to be prepared and signed by ██████ ██████ setting out the reasons for dismissal. In fact, two letters were prepared. The first one is dated September 8, 2014. The second was dated September 22, 2014. The second one was prepared in response to questions raised at the hearing.

11. It is not in dispute that the letters were not balanced, in that they contained nothing of a positive nature of Cst. ██████ 11 year career. I will deal with this issue in further detail. The letters made reference to a number of other allegations of misconduct. These included two earlier vehicle pursuits., the apparent failure to report an incident involving a rifle that had been accidentally discharged, an incident that took place at the Roxy Nightclub with his then girlfriend, as well as a previous "letter of expectation".

12. On September 2nd, President ██████ took strong exception to the position taken by the VPD. He argued that the VPD's submission contained information that was grossly exaggerated, misleading, and out of context. For instance, the VPD alleged that Cst. ██████ had previously been reprimanded for being involved in a high speed pursuit, contrary to instructions. However, the allegation made no reference of the fact that in that instance Cst. ██████ was a passenger and not the driver of the vehicle. President ██████ accused ██████ of bringing the

administration of the office of Police Discipline into disrepute. He said that the comments contained in the document prepared by the VPD were "at worst it could be argued as dishonest, and at best is misleading.". Counsel for the VPD dismissed the [REDACTED] comments as "mostly bluster".

13. On October 31, 2014, Adjudicator Smart made his decision. He concluded that Cst. [REDACTED] should receive a 40 day suspension rather than dismissal. He was critical of the VPD position because he said it lacked fairness. In his reasons, the adjudicator stated that the letters which formed a part of VPD submission and signed by [REDACTED], fell below the standard expected of a [REDACTED]. The adjudicator went on to state that a [REDACTED] submissions ought to be "fair, balanced, complete, and accurate". He did go on to say that his criticisms of the submission were directed at the VPD institutionally, rather than against [REDACTED] [REDACTED]

14. On January 23, 2015, Cst. [REDACTED] parents [REDACTED] and [REDACTED] filed a complaint with the Office of the Public Complaint Commission (OPCC). They alleged that the submission filed by [REDACTED] was "misleading, inaccurate, and untrue". They went on to allege that the submission was "made for the purposes of misleading the court". Coincidentally, on the same date, [REDACTED] announced his retirement from the VPD.

15. Since the complaint related to the conduct of a Chief Constable, the OPCC directed that an investigation be conducted by an external agency, the Burnaby RCMP. That order was made under s.91 of the Act. The purpose of the investigation was to determine whether [REDACTED] submission appeared to constitute discreditable conduct pursuant to s. 77(1)(3)(h) of the Act.

16. Former Police Complaint Commissioner Lowe appointed retired Judge, the Hon. Ian H. Pitfield, in order for him to exercise the powers and performed the duties of a Discipline Authority in relation to [REDACTED]. On February 12, 2015, [REDACTED] [REDACTED] [REDACTED] of the RCMP was assigned to conduct the investigation. [REDACTED] investigation was conducted pursuant to s.91 (1)(a)

of the Act. On May 31, 2016, ██████████ issued his Final Investigation Report (FIR). He concluded that the complaint against ██████████ appeared to be unsubstantiated.

17. However, on June 10, 2016, after reviewing the FIR, DA Pitfield found that the complaint against ██████████ "appeared to be substantiated". He too agreed with the comments of Adjudicator Smart and concluded that ██████████ submission was flawed for the same reasons expressed by Adjudicator Smart, in that it was not fair, balanced, or accurate. He went on to state that there were factual inaccuracies and omissions that were not corrected, even though the VPD union "alerted ██████████ to those flaws." DA Pitfield went on to state "that Cst. ██████████ career was one of misconduct and substandard performance did not conform to VPD records considered in their entirety." He thought that the totality of Cst. ██████████ service record had not been reviewed fairly. DA Pitfield then proposed disciplinary corrective measures pursuant to s.120 of the Act. He offered ██████████ a prehearing conference. It was declined.

18. Proceedings under the Police Act were delayed because on September 23, 2016, counsel for ██████████ filed a petition in the Supreme Court, seeking a judicial review of the appointment of The Honourable DA Pitfield, as well as the finding he made, that "the misconduct appeared to be substantiated". The petition sought other remedies as well, including an application to quash the decision relating to the admissibility of the decision under s.82 of the Act to accept the complaint.

19. On August 2, 2019, Justice Choi of the Supreme Court dismissed the Application for judicial review. ██████████ appealed that order. On August 29, 2021, the Court of Appeal for British Columbia dismissed the appeal.

20. While the appeals were pending, the disciplinary matters under the Act were held in abeyance. In the interim, DA Pitfield was no longer prepared to preside. Accordingly, the Commissioner appointed me, under s.135 (2)(b) of the Act to

exercise the powers and perform the duties of a Disciplinary Authority in relation to the allegation against former Chief Cst. Chu.

21. Eventually a hearing under s.135 of the Act was held on February 23 and 24, 2022. At the outset ██████████ denied the allegation of Discreditable Conduct. Mr. Gottardi, counsel for ██████████, called two witnesses. The first was retired ██████████ of the ██████████, who as stated above, had been appointed as the investigator. He reiterated his earlier opinion wherein he stated that ██████████ did not commit Discreditable Conduct. In his evidence he went further and supported the conduct of ██████████. He went on to praise the ██████████ ██████████ for the apparent care that he took in preparing his submission, the contents of which he fully agreed with.

22. ██████████ testified that in his investigation, he interviewed approximately 18 people and reviewed over 1,100 emails that were provided to him by the VPD. He said his task was to investigate the process that went into the drafting of the impugned letters that were the subject matter of the complaint. He said that he sought advice and direction from the OPCC. He concluded that it was his opinion that in the dismissal process of ██████████, ██████████ intent was to prepare the best letter possible that would support that decision. He said it was appropriate for him to enlist the assistance and opinions of a number of senior executives. He was almost effusive in his praise of ██████████, wherein he stated that

"and you know, upon reflection, as I completed the investigation, placing myself in ██████████ position and thinking what possibly could ██████████ have done, I'm at a loss."

23. When asked if the letter to the adjudicator ought to be "fair and balanced" ██████████ ██████████ replied

"I believe fair is relevant. Balanced, to me once again speaks about neutrality. You can't have a balanced letter if you are seeking dismissal, but you certainly could have that sense of fairness as I spoke earlier, out of a

sense of fairness and transparency, a fair process and not being underhanded or inappropriate speaks to the fairness. But the balance, in my mind, it can't be a balanced letter. You're seeking somebody's dismissal."

24. When asked about the fact that Cst. [REDACTED] had some 23 letters of commendation that were not included in [REDACTED] submission, he replied that letters of commendation and support are often "benign" and must be placed in context.

25. [REDACTED] testified. He stated that he felt that his role as a [REDACTED] [REDACTED] required him to take a position in the penalty phase of the public hearing. He said he sought the advice of a number of people, including Deputy Commissioner [REDACTED] of the OPCC. He testified that as a [REDACTED], both his role and duty were clear. He made his position clear. He felt that any submission to the adjudicator must be one that represents the best interests of the VPD. At all times he felt the process to be inherently adversarial. It is clear that in his view this was a labour management issue. As well, he sought the opinion of other senior officers. In fact, the letter that was placed before the adjudicator was essentially collaborative. A number of senior officers had a role in the preparation of the submission. The clear consensus of the executive was that Cst. [REDACTED] ought to be dismissed. The conduct of Cst. [REDACTED] appeared to be egregious. There was never any thought given to preparing a submission that was fair and balanced and one that took into account the commendations received by Cst. [REDACTED] during his career. And in any event, Cst. [REDACTED] was represented by counsel and by the VPD union, represented by President [REDACTED]. In the preparation of the submission, [REDACTED] relied on the advice given by other senior officers given by the VPD. As well, reliance was placed from material received from the human resources branch, the professional centres branch, and the officers home unit. The latter refers to the particular section where Cst. [REDACTED] was employed. He testified that throughout the process, he also relied on the legal advice given to him by counsel [REDACTED]

ANALYSIS

26. The allegation is that ██████████ committed discreditable conduct in that he failed to provide to the adjudicator a submission that was in the words of Adjudicator Smart, "not fair, balanced, or accurate." President ██████████ went further wherein he submitted that the VPD submission "could be argued as dishonest, and at best, misleading." In his findings the retired Judge Pitfield essentially agreed with the aforementioned comments.

27. Thus the issue in this hearing is whether there is a duty on the part of a ██████████ ██████████ to provide a submission to an adjudicator in a disciplinary matter that is neutral, fair or balanced. To that end, Adjudicator Smart stated that the opinion of a ██████████ could be of valuable assistance to an adjudicator. In his reasons, he made the following comments "doing so also ensures that an adjudicator appreciates the impact their decision may have on that police department. It is self evident, however, that any opinion and evidence from a ██████████ is expected to be balanced, fair, complete, and accurate." (emphasis added).

28. Counsel for ██████████ have argued that discipline hearings under the Act are inherently adversarial and a ██████████ is not required to provide a balanced submission. And it is argued that it is a duty of a ██████████ as a CEO of a police department to ensure that officers who have committed serious disciplinary defaults ought to in appropriate circumstances be dismissed.

29. In their written submissions, counsel for ██████████ have relied on the often quoted report of Josiah Wood, Q.C. wherein his 2007 *report on the review of the Police Complaint Process in British Columbia* made the following comments "Turning to the public hearing, both the police complaint commissioner, through counsel, and the respondent, either in person or through counsel or an agent, must have the ability to present their respective cases in full. That necessarily involves the right to call witnesses, to introduce evidence, to cross-examine the witnesses presented by the party opposing and to make full submissions at the conclusion of the evidence." CPRA 308.

30. In this case, it has been argued that notwithstanding the lack of balance or neutrality in [REDACTED] submission, the principle of fairness was nevertheless achieved because Cst. [REDACTED] was represented by counsel and by President [REDACTED]

31. This is a hearing under s.124 of the Act. The scope of that section is not unlimited. In fact, a hearing under this section is confined to the contents of the FIR, as well as any other written records. Moreover, the only persons who may testify are the authors of the FIR, in this case [REDACTED] as well as the respondent, in this case [REDACTED]. Ironically, the complainants, Mr. and Mrs. [REDACTED] have no right to give evidence under the Act.

32. I have found [REDACTED] to be a creditable witness. In spite of the allegations that the submission to the adjudicator was incomplete, I find there was no intent to mislead the adjudicator. As stated above, his intentions were clear, in that he wished to have Cst. [REDACTED] dismissed from the VPD. I am somewhat troubled by the evidence of [REDACTED] wherein he opined that letters of commendation and support are "benign". I would like to think that officers who have earned commendations and citations for services performed beyond the call of duty ought to have their commendations and citations be considered in a positive way as opposed to being merely benign. Surely there must be a better appreciation on the part of the executive of an officer who has earned commendations, that merely having a nomenclature attached to as benign.

33. There is no statutory provision under the Act, which governs the duty of a [REDACTED] [REDACTED] in relation to writing a letter to a Discipline Authority. The receipt of any letter in a hearing is in the discretion of the Disciplinary Authority to act reasonably in determining whether to accept or reject the letter as admissible written evidence. I do think however, that there is an implied duty for a person in the position of a [REDACTED] [REDACTED] to be accurate in a letter that would have the potential to affect the career of an officer. In this case, the letters did contain inaccuracies, however, those inaccuracies were brought to the attention of Adjudicator Smart by counsel and by President [REDACTED]

34. Based on the whole of the evidence that was before me, I must find that [REDACTED] [REDACTED] not commit discreditable conduct.


The Honourable Wally Oppal, Q.C.

This 30 day of May 2022