DECISION ON REVIEW ON THE RECORD

PURSUANT TO SECTION 141 POLICE ACT, R.S.B.C. 1996, c. 267

In the matter of the Review on the Record into the conduct of

Constable Ravinder (Rob) Thandi of the

Abbotsford Police Department

To: Constable Ravinder Thandi

And to: Mr. Stan T. Lowe, Police Complaint Commissioner

And to: Mr. D. Creighton, Counsel for Constable Thandi

And to: Mr. M. Jetté, Commission Counsel

And to: Chief Constable Bob Rich, Discipline Authority

Review dates: April 26 and 27, 2017

Place: Vancouver, BC

Counsel for the Applicant: Mr. D. Creighton

Counsel for the Police Complaint Commission: Mr. M. Jetté

1. Cst. Ravinder (Rob) Thandi (T) was charged in a Notice of Discipline Proceedings with allegations arising from a series of incidents relating to his relationship with one [redacted]. A Discipline Proceeding was conducted by Chief Constable Bob Rich of the Abbotsford Police Department (the Discipline Authority or DA) over 15 days between November 20, 2015 and May 19, 2016. That proceeding addressed 13 allegations of misconduct under the *Police Act*. On June 14, 2016 the DA found in Form 3 that T had committed the alleged acts of misconduct. On August 4, 2016 the DA determined in a Form 4 Disciplinary Disposition Record, that the appropriate penalties were periods of suspension and dismissal. I rely on the Form 3 and Form 4 findings made in the course of the Discipline Proceedings before DA Rich in my review below. For the sake of convenience, I note that the allegations at issue here were described at para. 1 of the Form 4 Disciplinary Disposition Record as involving:

a) 2 counts of Committing a Public Trust Offence;

b) 5 counts of Neglect of Duty;

c) 1 count of Deceit;

d) 2 counts of Discreditable Conduct;

e) 2 counts of Unauthorized use of Police Resources; and

f) 1 count of Improper Disclosure of Information.

2. Pursuant to section 137 of the *Police Act*, T sought an order from the Police Complaint Commissioner for a Public Hearing in respect to those findings. Upon reviewing the record, the Commissioner declined to order a Public Hearing but did direct a Review on the Record pursuant to sections 137(2). I, Ronald A. McKinnon, was appointed to conduct that review pursuant to section 142(2).

3. The standard of review to be applied by an Adjudicator to a discipline decision is "correctness": s. 141(9) of the *Police Act*. That standard was defined by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 50 as follows:

> As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

BACKGROUND

4. T joined the Matsqui Police Department in 1994, which became the Abbotsford Police Department (APD) in 1995. T testified at the Discipline Proceeding that right from the beginning of his career he would sometimes act obsessively and perform unusual behaviours. He also experienced severe anxiety over these obsessive acts. Notwithstanding, he did not seek medical help until April of 2005 when he saw Dr. [redacted], a psychiatrist, who diagnosed an Obsessive Compulsive Disorder (OCD). In 2009, Dr. [redacted] determined that T also suffered from Bipolar II and was prescribed medication for both conditions. Dr. [redacted] explained that Bipolar II is very similar to Recurring Depressive Disorder in that it is characterized by long periods of depression which also includes "infrequent" periods of hypomania. This is a condition where the patient's mood is elevated and he/she may make choices that are foolish or unwise. T's marriage ended in 2009 and he attributed the cause as related to his illnesses.

5. T appeared to do reasonably well for a time. Dr. [redacted] noted in May of 2010 that his mood disorder was in remission and he had minimal OCD symptoms. His note of June 8, 2011 included a comment that there was no evidence of hypomania. T stopped taking his medications for a period of approximately two years but did not advise Dr. [redacted] of this fact, and indeed Dr. [redacted] did not find out about it until T disclosed it in April 2014. There is some dispute about just when he stopped taking his medications but DA Rich determined from various records that it was probably in May of 2012.

6. T met [redacted] in December 2011. She was 23 years his junior, had a young son, and apparently consorted with a criminal element. T became infatuated with her, seeing her as the answer to all his problems. Mr. Creighton, in his written submissions at para. 28, states that T "was by early 2012 seeing her daily. He described being with her as like therapy". T paid for a breast augmentation, a trip to Disneyland and made numerous financial contributions to her, all of which he could ill afford. On January 30, 2013, he completed an application to add her and her son to his medical benefits through his employer, the APD, asserting that they were cohabiting. When advised by the APD's Human Resources Department in May of 2013 that his application could not be approved because T had indicated cohabitation since November 1, 2012 which was less than the one-year requirement, T "corrected" the date claiming confusion about what was being requested, and then claimed that the cohabitation commenced November 1, 2011. On the basis of that amended application, [redacted] and her son were added to T's benefits. Funds were paid by the carrier(s) over ensuing months in respect to them.

7. In fact they never cohabited and according to [redacted] never had a physical relationship. T asserts they did have a physical relationship but as stated by DA Rich, whether they did or not was not material to his determination. It was agreed that she never qualified as a "dependent" entitled to benefits. Ultimately, [redacted] sought police intervention to prevent T from having contact with her. On April 29, 2014, T was ordered to have no contact with [redacted] or her family.

8. In April 2014, the Office of the Police Complaint Commissioner received a request for an order to investigate from the APD's Professional Standards section, in relation to T's conduct arising from "circumstances surrounding his relationship with [redacted] [redacted]." On April 29, an investigation was ordered pursuant to section 93(1) of the *Police Act*. On October 20, 2014, upon being advised that Crown Counsel had approved two criminal charges against T, alleging fraud in respect to his actions adding [redacted] and her son to his benefits package, the Police Complaint Commissioner suspended the misconduct investigation.

9. On April 20, 2015, T pleaded guilty in Provincial Court to two counts of fraud and was given a conditional discharge. On May 15, the investigation suspension was lifted by the Commissioner and the matter proceeded to the ultimate hearing before DA Rich.

THE ISSUES RAISED IN THIS REVIEW ON THE RECORD

10. Counsel for T, in an impassioned submission, contended that T's mental illnesses were a complete defence to the misconduct alleged and sought to have "the *Police Act* convictions vacated with retroactive compensation and to have this matter referred back to the APD to determine, with psychiatric advice, an appropriate graduated return to work in his patrol position or other appropriate position".

11. Mr. Creighton set out the "errors" allegedly made by DA Rich, which Mr. Jetté compressed into the following summary which I adopt in these reasons:

1. The DA failed to recognize that Mr. Thandi's Bipolar II condition affected his ability to appreciate "the nature and quality of his actions", and that he conflated this with the "irresistible compulsion" caused by his Obsessive Compulsive Disorder ("OCD").
2. The DA failed to understand that Bipolar II can interact with and exacerbate the symptoms of OCD.
3. The DA erred when he found that the evidence failed to establish on a balance of probabilities that the OCD had compelled him to fail to report his "no contact" breaches in respect to [redacted] and her family — allegations 3-7 and 9-10.
4. The DA erred when he found that the evidence failed to establish on a balance of probabilities that Mr. Thandi's OCD had compelled him to search [redacted] name on police databases (allegation 15).
5. The DA erred when he found that the British Columbia *Human Rights Code*, RSBC 1996, c. 210, was irrelevant to the Discipline Proceedings.
6. The DA erred when he found that by application of the doctrine of abuse of process, the entering of guilty pleas by Mr. Thandi in the Provincial Court had determined the mental fault requirement for allegations arising from the same conduct at the Discipline Proceedings (allegation 1-2).
7. The DA erred when he failed to take proper account of the impact of Mr. Thandi's illnesses and the medications he was taking to treat those illnesses in assessing his credibility as a witness at the Discipline Proceeding.
8. The DA erred in failing to appreciate the limited probative value of "after the fact" admissions of wrongdoing by Mr. Thandi.
9. The DA erred in failing to appreciate or take proper account of the APD's failure to accommodate Mr. Thandi's mental illness, and the role its members played in the arrest and criminal prosecution of Mr. Thandi.

I note that, in identifying these myriad errors with the approach taken by DA Rich, T does not challenge the disciplinary or corrective measures imposed in the course of the Discipline Proceeding. As such, the focus of this Review is on the correctness of the DA's misconduct findings.

12. I will address these misconduct-related issues in the order set out above, using italicized subheadings to indicate the alleged error I am addressing.

Did the DA "misunderstand" Dr. [redacted] evidence regarding the connection between T's mental illnesses and his application to add [redacted] and her son to his APD benefits package?

13. At para. 106 of his Form 3 findings, the DA states:

> Counsel for Cst Thandi asked Dr. [redacted] for his observations about Cst Thandi putting [redacted] on his benefits: his OCD would have kicked in and driven him to think he must do this. However, his records show that he did see him several times during this period and provided consistent opinions that he was in remission and was fit for duty (lines 1598 to 1625).

14. Dr. [redacted], when responding to this, said he was "speculating" though in an "informed way". He did not concede or agree that T was "compelled". What he concluded in a "speculative" way was that T's "judgment was impaired".

15. In cross examination by counsel (Janet Winteringham, QC) on this point at lines 2149-2159 the following exchange took place:

> JW: You've provided an opinion that, ummm, Constable Thandi's judgment was impaired at the time that he placed [redacted] (sic) on his benefits package?
>
> RA: I've said that's my that's a speculation an informed speculation I wasn't there I didn't speak to him that day, ah, with great respect neither did you, I mean we're all kind of speculating to some extent, umm, but it's certainly again taking a longitudinal view of things it it's consistent with, ah, what has been going on in his mental state over the last ten years. Could it be something else sure it could be something else but I'm sitting here as his psychiatrist and you're asking me to make an [*sic*] comment I can give you my best I would like to say it's better than guess but my informed speculation that's the phrase I'm choosing to use.

16. There is ample evidence to support the DA's conclusion that this exchange amounted to little more than a "speculative, retrospective view." The DA was more persuaded by Dr. [redacted] contemporaneous notes of meetings with T at the relevant times, which suggested T was doing well with no mention of an elevated mood. The DA also noted a report by Dr. [redacted], an occupational psychiatrist employed by the APD, that at the relevant times, T was employable as a police officer with certain accommodations. Dr. [redacted] agreed with this conclusion.

17. It is clear from the evidence and submissions that T's decision to pursue [redacted] was made at a time when he was on his medications (early 2012), and equally clear that he was not taking them when he applied to add her to his benefits (2013). His "poor choices" were not confined to periods of non-medication.

Did the DA fail to understand that Bipolar II can interact with and exacerbate the symptoms of OCD?

18. I believe Mr. Creighton was alleging this synergy related to the two fraud counts, and that the evidence was capable of establishing that T may not have appreciated that his actions in adding [redacted] and her son to his benefits were wrong. This appears to reference the possibility that T was in a hypomanic state when he did this. In this respect the DA stated at para. 108 of his Form 3:

> I place more weight on Dr. [redacted] comments made contemporaneously in his reports, referenced above, than his somewhat speculative, retrospective view expressed in his evidence. He clearly was seeing Cst Thandi at the time that the frauds were being committed, and opined that he was well at the time.

19. There does not appear to be any evidence that even if T was in a hypomanic state (which the DA rejected), he could not appreciate that his actions were culpable. Indeed, the DA cited examples of T's conduct that led him to accept that he had the requisite guilty mind when adding them to his benefits. The following is a summary of those examples:

1. When arrested, T gave a warned statement admitting to committing an offence but excusing his actions as necessary to avoid the loss of his girlfriend.
2. He admitted to misleading Ms. [redacted] of the APD Human Resource Department when he backdated the time of cohabitation to 2011. In an interview with the Abbotsford Professional Standards Section investigator, he again admitted that it was wrong and that he intentionally sent the e mail to Ms. [redacted] to back-date the cohabitation time.
3. T clearly admitted that "I did fraud".
4. In his testimony before the DA he conceded in cross examination that "it was false…and I knew it was false at the time".
5. He was shown a text message he sent to [redacted] dated April 9, 2014 where he told her she and her son would soon be off his plan and they should thus get any dental work needed before that occurred.

20. It is clear to me that the issue of mental illness excusing culpability was front and centre for the DA. In para. 17 of his Form 4, the DA stated:

> Counsel asserted that Cst. Thandi had been in a hypomanic state when he committed the frauds in January 2013 and that Cst. Thandi's conduct was non-culpable. The contemporary medical evidence simply does not support that assertion, which is reflected in my first decision. I found that he committed the fraud knowing that it was wrong, and was in a mental state where he could have stopped himself, but did not want to. I accept that his OCD and anxiety were

very serious by April 2014, which is also reflected in the findings I made in my first decision. I cannot accept that Cst. Thandi's misconduct should be treated as non-culpable at this stage.

21. Mr. Creighton submitted that given the "out of character way T was acting", had Dr. [redacted] known of this it would suggest T was in a hypomanic state at the relevant time. However, Dr. [redacted] never even offered a "speculative opinion" that T was in a hypomanic state and as indicated earlier in this report, even if he had, there was no evidence a person in such a state would not be culpable.

22. In his submissions at paras. 95-108, Mr. Creighton sets out his own conclusions about T's mental state — conclusions which he implies could or should have been reached by Dr. [redacted] had he known "all the facts". However, none of this was put to Dr. [redacted] in the form of hypothetical questions. There was nothing proffered in the form of expert evidence that would refute the findings of the DA.

Did the DA err when he found that the evidence failed to establish on a balance of probabilities that the OCD had compelled him to fail to report his "no contact" breaches in respect to [redacted] *and her family?*

23. T was questioned on this issue by the DA, by his lawyer and by the presenting lawyer, excusing his failure to report on the basis that he "didn't know what to do". He said he "wasn't sure what to do so I just didn't do anything… I felt bad about doing it, I felt horrible about doing it… in crisis at the time". When questioned by the DA as to why he did not report breaches, he did say his mind was "taking a blender", that rational decisions were difficult for him, but then said that he did not want to get into trouble which would occur if he reported the breaches.

24. There was nothing proffered on this issue that could have led the DA to conclude that his OCD compelled him to act the way he did.

Did the DA err when he found that the evidence failed to establish on a balance of probabilities that T's OCD had compelled him to search [redacted] *name on police databases?*

25. In his cross examination, T recalled conducting a police database name search, and while he conceded it was an unauthorized search, he said he did not turn his mind to that issue. He also said he did not consider reporting the search results to [redacted] to be a problem because "she was there and was aware of the event". He ultimately conceded that there was no investigative purpose attached to the searches and that being so, they would be unauthorized.

26. There was no evidence of irresistible compulsion and in my view the DA was correct to reject the claim.

Did the DA err when he concluded that the British Columbia Human Rights Code was irrelevant to the Discipline Proceedings?

27. Mr. Creighton made submissions that characterized the human rights legislation as an overarching code that impacts all proceedings and hearings. At para. 189 of his submissions he stated:

> The Courts have held that the Human Rights Code is of a special nature and should be applied so as to give its purpose the true effect, that of removal of discrimination. The failure of a lay employer to properly understand the impact of mental illness and provide the necessary medical deference is a direct assault on the legislative mandate to give the legislation its "purpose and true effect".

28. He had asserted before the DA that section 13 of this legislation was applicable, and that the APD had violated T's rights by pursuing a criminal and *Police Act* investigation without taking his mental illness into account. The investigation failed to consider or understand his condition, and it is said that no consideration was given to diversion and that he was subjected to humiliating treatment on arrest.

29. The DA concluded that the Code had application to labour issues not to police discipline, which he said is "conceptually and jurisdictionally distinct from labour law". He also noted that insofar as the alleged misconduct in respect to the investigation was concerned, the decision to prosecute T in criminal court was made by Crown Counsel and not the APD. The decision to order the *Police Act* investigation was made by the Police Complaint Commissioner, not the APD.

30. I accept the submission of Mr. Jetté on this issue where at para. 39 of his submissions he states:

> The *Human Rights Code* is stand alone legislation, the provisions of which are triggered with the filing of a complaint filed with the British Columbia Human Rights Tribunal. The discriminatory practices which form the subject matter of this statute may be litigated in that forum, but they do not operate as some sort of overarching code to be applied across the legislative spectrum. In particular, the *Code* has no application to discipline proceedings instituted under the *Police Act*.

31. I conclude that the DA was correct in concluding that the Human Rights Code was irrelevant to his task, and endorse Mr. Jetté's submission that the DA lacked jurisdiction to apply the Code.

Did the DA err when he found that by application of the doctrine of abuse of process, the entering of guilty pleas by Mr. Thandi in the Provincial Court had determined the mental fault requirement for allegations arising from the same conduct at the Discipline Proceedings?

32. At para. 160 of his submissions, Mr. Creighton states the following:

> Since the doctrine of abuse of process is an equitable principle it should not be used to prevent an individual from advancing a defence of mental illness in the most appropriate venue. It is certainly accurate to say that the guarantee of a conditional discharge would not justify a more right robust response where the appropriate venue was under the Police Act or had the APD made a more appropriate decision how this was handled by way of labour arbitration.

33. In fact, T was not prevented from advancing a defence of mental illness in the course of his police misconduct process. That was the core of the submissions he made to the DA. At para. 68 of his Form 3 conclusions the DA stated:

> I consider that the proper approach in this case is to consider whether the evidence of Cst. Thandi and Dr. [redacted] and the submissions by Cst. Thandi's counsel rebut the presumption that he acted voluntarily, knowing what he was doing was wrong. I have decided that the most useful test for this context, from all of the cases cited above, is to ask whether any of the alleged misconduct occurred because Cst. Thandi was in a state of irresistible compulsion due to his mental illness. If I conclude that Cst. Thandi has proven, on a balance of probabilities, that he was suffering from such a compulsion, then even though he knew what he was doing and that his actions amounted to misconduct, he would not have been able to stop himself. Cst. Thandi does not struggle with mental illnesses that render him unable to know or appreciate the nature and quality of his actions. He does suffer from illnesses where it is possible he would not be able to stop himself from acting, even when he knows it is wrong, as he is driven to reduce his anxiety and responds to a strong compulsion. On the other hand, if the evidence does not lead to the conclusion that Cst. Thandi was in a state of irresistible compulsion when he committed the acts he has admitted to, I will conclude that the misconduct is substantiated.

34. At para. 124 of his Form 3 reasons the DA stated:

> The onus is on Cst Thandi to establish, on the balance of probabilities, that his mental illness compelled him to commit fraud, in this case because he was in a hypomanic state and/or was driven by OCD. Given all the evidence before me I find that he has failed to do so.

35. Having reached that conclusion, it was open to the DA to then rely upon T's guilty pleas to the fraud counts to determine culpability, and to reason that a finding to the contrary would result in an abuse of process as set out in *Toronto (City) v. C.U.P.E. Local 79*, 2003 SCC 63. At para. 54 of that case, the Supreme Court of Canada stated:

> These considerations [referencing para. 53] are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one,

the conclusion of the arbitrator has precisely that effect whether this was intended or not.

36. I accept that the discretionary factors set out in the *Toronto (City)* case which may be applied to prevent the doctrine of abuse of process from operating, simply do not arise in T's case.

37. As pointed out by Mr. Jetté, this is not a situation in which a litigant has had the door closed to advancing arguments, on the basis that the result is governed by earlier litigation. Instead, despite the earlier criminal process, T had the opportunity to litigate culpability and mental-health issues in the discipline proceeding.

Did the DA err when he failed to take proper account of the impact of Mr. Thandi's illnesses and the medications he was taking to treat those illnesses in assessing his credibility as a witness at the Discipline Hearing?

38. At para. 124 of his submissions, Mr. Creighton stated:

> In this case Cst. Thandi was misunderstood in an assessment of credibility due to the misapprehension of his disorder and the effect of medication on his cognitive facilities and his memory. There was no evidence whatsoever given by Dr. [redacted] that an individual in a hypomanic phase would be able to accurately recall his distorted thinking when in a period of remission.

39. This claim assumes T was in a hypomanic state which the DA failed to factor into his assessment of credibility. As indicated earlier in these reasons, the DA concluded on all the evidence that T was not in a hypomanic state when engaging in the (mis)conduct, and thus insofar as considering the credibility issue it was open to him to reach the conclusions he did. At para. 116 in his Form 3 reasons the DA stated:

> Cst Thandi's evidence was that he was both open and self aware. My assessment of the evidence is that this assertion was contradicted by his own evidence. His evidence lacks credibility because of the confused state in which he gave evidence. For example, he stated that he did not remember sending a text to [redacted] in contravention of an order he had received just a few hours earlier. The evidence he gave about stopping taking medication and whether he told his doctor, or is open and frank with his doctor, was confused and contradictory and therefore lacking in credibility.

Did the DA err in failing to appreciate the limited probative value of "after the fact" admissions of wrongdoing by Mr. Thandi?

40. Earlier in these reasons I set out some of these "after the fact" admissions which included admitting to misleading the APD Human Resources Department as to his

"cohabitation" with [redacted], excusing this by not wanting to lose his girlfriend, and conceding he "did fraud" and knew it was fraud at the relevant time.

41. In his submissions at para. 111, Mr. Creighton stated:

> An acknowledgement by a mentally ill individual in remission that he now knows his behavior was wrong in no way answers the question as to whether he was criminally culpable at the time of the impugned behaviour.

42. While that may be the correct assessment of a situation where an individual has in fact established non-culpability and has had his evidence accepted that he did not know at the time his conduct was wrong, it has no application to T's situation.

43. T clearly admitted that at the relevant time he knew his conduct was wrong. T never claimed that he acted without that awareness at the time, or that he only came to this realization later. On the basis of all the evidence it was open to the DA to come to the conclusions he did.

> *Did the DA err in failing to appreciate or take proper account of the APD's failure to accommodate Mr. Thandi's mental illness, and the role its members played in the arrest and criminal prosecution of Mr. Thandi?*

44. Whether the APD failed to "accommodate" Mr. Thandi's mental illness is not a matter capable of resolution in these proceedings. Nor is the conduct of APD members generally in respect to the conduct of the investigation.

45. The role of the DA was to determine whether there was "misconduct" on the part of T in respect to the 13 allegations set out. He determined there was misconduct.

46. My role on this Review on the Record is to ascertain whether he was "correct" in his findings. For the reasons advanced in this report I have determined that he was correct.

47. I also agree that the penalties imposed by the DA, including dismissal, are appropriate given the serious nature of the misconduct.

48. I have no recommendations to make pursuant to Section 141(10)(c) of the *Police Act.*

_____"Ronald A McKinnon"_____
Ronald A. McKinnon, Retired Judge

Dated at North Vancouver B.C. this 10th day of May, 2017