

Review on the Record Pursuant to s. 141 of the *Police Act*

Cst. Richard O'Rourke and Cst. David Bunderla

Submission of the Respondent Officers

Scope Review on the Record

1. The purpose of this submission is to address the scope of the review on the record.
2. The Police Complaint Commissioner has purported to limit the review to the appropriate disciplinary or corrective measures, excluding the question of whether misconduct has been proven at all. However, s. 141(10) of the *Police Act* provides as follows:

(10) After a review of a disciplinary decision under this section, the adjudicator ***must*** do the following:

(a) ***decide whether any misconduct has been proven;***

(b) determine the appropriate disciplinary or corrective measures to be taken in relation to the member or former member in accordance with section 126 or 127;

(c) recommend to a chief constable or the board of the municipal police department concerned any changes in policy or practice that the adjudicator considers advisable in respect of the matter.

3. This provision is clear on its face, and requires no further interpretation. The Adjudicator ***must*** determine whether any misconduct has been proven.
4. Given the clarity of the language, it is not necessary to attempt to explain it through policy arguments. But there are sound policy reasons for allowing the Adjudicator to come to his own conclusion on whether misconduct has been proven. The Adjudicator must determine the facts upon which a penalty will be based. If he or she comes to the conclusion that on the facts no misconduct has been proven, the Adjudicator would be put into the impossible position of imposing a penalty where he or she has concluded that no penalty is justified.

5. Such a situation would never arise in a criminal case. An appeals court would consider a sentence appeal in isolation from the more fundamental question of guilt or innocence only if neither the Crown or the defence had appealed the verdict.

6. The Police Complaint Commissioner relies on s. 138 of the *Police Act*. It states in material part:

S. 138(1) ... the police complaint commissioner must arrange a public hearing or review on the record if the police complaint commissioner

(c) considers that there is a reasonable basis to believe that

(i) the discipline authority's findings under section 125 (1) (a) [*conclusion of discipline proceeding*] are incorrect, or

(ii) the discipline authority has incorrectly applied section 126 [*imposition of disciplinary or corrective measures*] in proposing disciplinary or corrective measures under section 128 (1) [*disciplinary disposition record*], or

(d) otherwise considers that a public hearing or review on the record is necessary in the public interest.

...

(2) In considering whether a public hearing or review on the record is necessary in the public interest, the police complaint commissioner must consider all relevant factors including, without limitation, the following factors:

...

(d) whether an arguable case can be made that

(i) there was a flaw in the investigation,

(ii) the disciplinary or corrective measures proposed are inappropriate or inadequate, or

(iii) the discipline authority's interpretation or application of this Part or any other enactment was incorrect.

...

(5) If the police complaint commissioner determines, in respect of a request referred to in subsection (1) (a), that there are *insufficient grounds* to arrange a public hearing or review on the record under this section, the police complaint commissioner must give written reasons for that determination in the notification under subsection (4).

(6) A determination under subsection (5) is final and conclusive and is not open to question or review by a court on any ground.

(7) If the police complaint commissioner

(a) determines that there are sufficient grounds to arrange a public hearing under this section, or

(b) arranges a public hearing under section 137 [*circumstances when member or former member concerned is entitled to public hearing*],

the police complaint commissioner must, for the purposes of the public hearing under section 143, appoint legal counsel to present to the adjudicator the case relative to each allegation of misconduct against the member or former member concerned.

7. Section 138 establishes the criteria that the Police Complaint Commissioner must apply in determining whether to arrange a review on the record or public hearing. If the Police Complaint Commissioner does arrange a review on the record or public hearing, the duties of an Adjudicator within those procedures are set out elsewhere in the act. In the case of a review on the record, they are set out in s. 141.

8. Nowhere does s. 138 state that the Police Complaint Commissioner's reasons for arranging a public hearing or review on the record amount to a limitation on the broad power and duty imposed on the Adjudicator in s. 141(10). If the legislature had intended that the reasons for decision of the Police Complaint Commissioner under s. 138 limited the power and duty created by s. 141(10), the legislature would have had to state that s. 138 operates "notwithstanding" s. 141, or that s. 141 operates "subject to" s. 138, or both. Neither limiting language has been used.

9. Sub-sections (5) and (6) state the consequences if the Police Complaint Commissioner determines that there are insufficient grounds to call a public hearing or review on the record; that is, if contrary to the facts in this case, the Police Complaint Commissioner decides not to call a public hearing or review on the record. Under (5) the Police Complaint Commissioner must give written reasons for his decision. Under (6) his decision not to arrange a public hearing or review on the record is final and conclusive.

10. By contrast, (7) states what happens if the Police Complaint Commissioner decides to arrange a public hearing, as in this case. Then the Police Complaint Commissioner is required to appoint an Adjudicator and counsel. Oddly, there is no similar provision for what happens if the

Police Complaint Commissioner determines to arrange a review on the record instead of a public hearing.

11. Notably, s. 138 does not state in (7), or elsewhere, that a determination made under (1)(c) or 2(d) is final or conclusive. Yet, the position of the Police Complaint Commissioner here is that his finding that misconduct has been proven should be regarded as final and conclusive by the Adjudicator and all parties.

12. Therefore, it is submitted that s. 138 provides the criteria that the Police Complaint Commissioner must consider when deciding whether to arrange a review on the record. Section 141 states what the Adjudicator must do within a review on the record.

13. It should be observed that s. 138 deals with both the power to arrange a review on the record and the power to arrange a public hearing. If the reasons that the Police Complaint Commissioner gives for calling a review on the record have the effect of limiting the scope of the review on the record, his reasons for calling a public hearing would similarly limit the scope of a public hearing. That would be unworkable and would undermine the entire purpose of having a public hearing: to provide a full, fresh and public consideration of all the facts, and the legal consequences of the facts.

14. This interpretation of the purpose and effect of sections 138 and 141 is consistent with the **Police Act** as a whole. In *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92:

[2] At the beginning of his submissions to this court, counsel for the Police Complaints Commissioner (“PCC”) suggested that the Police Act is “highly specialized labour relations legislation dealing with the employment of police officers and the protection of the public by means of the disciplinary tools provided by the statute.” I see no reason to disagree with this description, but the focus of this appeal is the role of the PCC under Part XI. Section 177(1) of the Act states that the PCC is “responsible for overseeing and monitoring complaints, investigations and the administration of discipline” under Part XI. ***The PCC thus has what is often described as a “gatekeeper” or “supervisory” role that does not involve deciding complaints on their merits, but ensuring that misconduct on the part of police is appropriately dealt with in the public interest and in accordance with the Act.***

15. By deciding whether to arrange a review on the record or public hearing the Police Complaint Commissioner fulfills his role as gatekeeper, but does not decide the issues on their

merits. The decisions on the merits, including whether any misconduct has been proven, are made by the Adjudicator in accordance with the unambiguous language of s. 141(10)

ALL OF WHICH IS RESPECTFULLY SUBMITTED

February 7, 2017

A handwritten signature in blue ink, appearing to read "M. Kevin Woodall", enclosed within a large, hand-drawn blue oval. The signature is positioned above a horizontal line.

M. Kevin Woodall

Counsel for the Respondent Officers