DECISION ON RECOMMENDATIONS

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 Marlene Batiuk of the South Coast British Columbia Transportation Authority Police

To: Constable M. Batiuk

And to: Mr. Kevin Woodall, Counsel for Constable Batiuk

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

And to: Mr. Joe Doyle, Commission Counsel

And to: D. Lepard, Chief Officer, South Coast British Columbia Transportation Authority Police

And to: Inspector MacDonald, the Discipline Authority

Following a Review on the Record I found on January 26, 2016 that Cst. Batiuk of the BC South Coast Transit Authority Police (hereafter the Transit Police) had not committed neglect of duty by declining to provide evidence to an RCMP investigator. At counsel's suggestion, I invited submissions on recommendations that might flow from the review.

The allegation of misconduct arose from Cst. Batiuk's decision on the advice of counsel not to provide a statement to the RCMP, who were investigating an incident involving a suspect being investigated by Cst. Batiuk and her partner, during which Cst. Batiuk discharged her service weapon. Cst. Batiuk's decision followed the RCMP's refusal to permit her to review a video of the incident before providing her statement.

I found that Cst. Batiuk had a duty to provide the statement, but that in the circumstances she had good and sufficient cause to refuse. The fact that she was denied permission to review the video was one relevant circumstance; another was her uncertainty regarding whether her statement to the RCMP could be used against her in subsequent criminal or disciplinary proceedings which might arise from the use of the weapon.

Counsel for Cst. Batiuk, Counsel for the Commissioner, and Chief Lepard of the Transit Police kindly filed thorough and timely submissions suggesting recommendations in the following two areas:

1. A policy regarding Transit Police members' viewing of video recordings prior to providing statements or giving evidence.
2. A policy providing certainty and clarity regarding whether Transit Police members providing statements or giving evidence to outside police agencies may claim use immunity in subsequent proceedings.

1. Use of Video Recordings

The RCMP investigation in this case was completed in the Fall of 2014. Fortuitously, in the Summer and Fall of 2014, the issue of whether officers should be permitted to view video recordings before providing statements was addressed in a discussion paper published by the Vancouver Police Department and authored by the current Chief of the Transit Police, Doug Lepard, who was at that time Deputy Chief of the

Vancouver Police Department, and Legal Advisor Bronson Toy. Chief Lepard took office as Transit Police Chief in early March 2016, in time to make submissions in the recommendation phase of this matter.

The discussion paper, entitled *Showing Incident Video to Respondent Police Officers in Police Act or Criminal Investigations*, made recommendations and included a “model policy”. That policy was adopted by the BC Association of Chiefs of Police and the RCMP in November 2014. The issue has been settled since then for BC’s municipal and RCMP police agencies, but not as yet for the Transit Police.

All parties propose that I make a recommendation that the Transit Police adopt the Discussion Paper model policy, as was done by other police agencies. There are some variations in the submissions regarding whether I should expand or modify the policy: in the case of counsel for the member, to include a recommendation permitting review of other materials in addition to video recordings, and in the case of counsel for the Commissioner, to include a recommendation that all witnesses, not just police witnesses, be permitted to review video recordings in accordance with the model policy.

I prefer to confine my specific recommendations to the situation arising from the record in this case, for which there is an evidentiary base, and to which all of the parties directed their submissions. As the issues of additional materials and non-member witnesses did not arise here, they were not fully canvassed on the record or in submissions. That is not to say these additional policies cannot be independently considered by the Transit Police.

In relation to the provision of additional materials to police witnesses, I am advised the practice is already in place in municipal forces and, if that is the case, the Transit Police may simply wish to take instruction from that in revising their policies. In relation to the use of reliable real evidence to refresh a non-member’s memory before an interview or statement, there would seem to be ample authority contained in the Discussion Paper, in the practice of other agencies, and now in this case, to provide guidance. As suggested by counsel for the Commissioner it may be as simple as following the model policy for such witnesses, and I will leave that for the able consideration of the Transit Police, as they consider amendments to their policies.

My recommendation on this issue is therefore that the Transit Police adopt the model policy contained in the Discussion Paper in relation to the provision of evidence or statements by its members, and if deemed appropriate after due consideration, in relation to the review of other materials, and to statements by non-member witnesses. I would only add that, in the rare circumstance where a member has been charged criminally, rights of disclosure including the right to a copy of available video recordings will of course override some of the provisions of the policy.

2. Use Immunity

It was common ground that when the RCMP requested her statement, Cst. Batiuk faced potential jeopardy, while perhaps remote, under both the *Criminal Code* and the *Police Act*, as a result of discharging her weapon. Although I stated in my reasons on the review that the issue of whether use immunity applied to the member’s statement to the RCMP did not squarely arise in this case, i.e. it was not necessary for me to answer that question, Cst. Batiuk’s uncertainty as to whether her statement to the RCMP could later be used against her was relevant as context in assessing the reasonableness of her refusal to provide it.

Counsel and Chief Lepard submitted that I consider recommending a policy that a superior officer direct compliance with the request for a member’s statement by an investigating agency, in order to dispel uncertainty and make it clear that the officer was operating under compulsion in providing a statement.

Counsel for the Commissioner asked that any recommendation I provide be confined to circumstances involving officers who are facing potential criminal jeopardy and not potential *Police Act* jeopardy, with respect to which there are provisions dealing with use immunity for compelled statements made to a *Police Act* investigator. Section 101 of the *Police Act* contains a provision that compels a member to provide a statement in connection with an investigation in which they are the respondent, and section 102 provides immunity from use of such a statement in subsequent criminal proceedings, with certain exceptions. On my reading of the *Act*, however, it does not appear that a statement made outside the context of a *Police Act* investigation, such as the one requested here, would necessarily receive the protection of Section 102, although as it turns out, I do not need to resolve that issue.

That is because, on a closer examination of the case law pertaining to use immunity, commencing with *R. v. White*, and including the recent case of *R. v. Kelly,* 2014 NLPC 1313A0227, it became apparent to me that, while compulsion is a prerequisite for immunity against later use of a witness's statement to a police officer, it will not necessarily create use immunity, in and of itself.

R. v. White prescribes four factors to be considered in determining whether a compelled statement attracts use immunity, below, and the court emphasizes that these need to be considered on a case by case basis:

> (1) was there an adversarial relationship between the accused and the investigative agency at the time the statement was provided;
> (2) was there any coercion involved in the obtaining of the accused person's statement;
> (3) is there a risk of unreliability as a result of the statutory compulsion; and
> (4) would permitting the use of the statement lead to an increased risk of abusive state conduct?

I asked counsel and Chief Lepard for further submissions regarding the wisdom of a recommendation that the Transit Police adopt a policy requiring that a superior direct an officer to comply with a request for a statement, given that it may not create certainty as to the application of use immunity. Both counsel submitted that a direction would provide clarity regarding the element of corecion, and go a long way toward establishing use immunity in future proceedings, and Chief Lepard adopted that position.

As I read the cases, however, a superior's direction would not be sufficient to engage use immunity with certainty, because of the need to consider the four *White* factors on a case by case basis, and the extent to which the remaining three factors will vary based on the timing and circumstances of the investigation.

It is also clear from the following passage in the *Kelly* case (cited above) that it is not open to a provincial entity like the Transit Police to create a use immunity in the criminal context through a policy amendment.

> [212] A use immunity "created by a provincial statute cannot extend to proceedings under the Criminal Code, because it would be *ultra vires* the province to restrict the admissibility of evidence in criminal matters" (see ***R. v. Soules***, 2011 ONCA 429 (CanLII), [2011] O.J. No. 2500 (C.A.), at paragraph 47 and ***White*** at paragraph 35). Thus, an accused person who seeks exclusion of a statement based upon compulsion must establish that the introduction of the statement would violate her or his right to silence.

Indeed, this passage may cast some doubt on the efficacy of Section 102 of the *Police Act* to afford a blanket immunity from use of those compelled statements in criminal proceedings, although it is hard to imagine a case in which a statement made under Section 101 would not be excluded in a later criminal prosecution after the *White* factors are applied.

I am not satisfied however that the same would hold true for a policy requiring a superior officer to direct compliance on the part of a Transit Police member who is asked for a report or a statement. While such a policy could satisfy the prerequisite of coercion, and thereby address the second of the four *White* factors, it could not provide a blanket answer to the other three.

I am concerned that making a recommendation for such a direction, far from creating clarity or certainty, might place an officer in an untenable position by creating both disciplinary jeopardy for failure to comply and a false assurance of use immunity.

The unfortunate result is that it will remain unclear whether an officer who provides evidence or a statement in connection with a criminal investigation may claim use immunity regarding that statement in subsequent criminal or *Police Act* proceedings against the officer. The law dictates an after-the-fact, case by case analysis, instigated by an application on the part of the defendant in the subsequent proceedings. It is frankly unclear to me how the law as it currently stands can assist in fostering truthful compliance on the part of police officers in the provision of evidence or making of statements, but so be it. It would be disingenuous of me, and possibly dangerous, to try to design a recommendation that would increase clarity in this area.

The only suggestion I feel able to make is that the Transit Police may wish to consider formalizing the requirement to cooperate with a jurisdictional police agency by specifying in policy that there is a duty on an individual officer to provide a statement when requested to do so. Such a policy would align with the duty I have found to exist. However, I do not believe it is open to the Transit Police to create a policy providing assurance of subsequent immunity from use of such a statement and, if an amendment is drawn up it should probably make that clear and perhaps suggest that an officer facing potential jeopardy seek legal advice before proceeding.

It might also be open to the Transit Police to consider on a case by case basis, and perhaps on the advice of counsel, whether, in a particular case, a direction from a superior officer would assist to create clarity because of the obvious satisfaction of the other three *White* factors in that particular case, and to document the decision for the benefit of the officer in case they find themselves in jeopardy later. I would think this would almost assuredly be effective, for instance, if there were an active criminal investigation against an officer at the time that an investigator requested a statement from the officer as a material witness to a criminal event.

I will have to leave these remarks short of a recommendation, however, and I regret that I cannot be of more assistance in making a recommendation in this area.

Dated at Vancouver, British Columbia, this 25th day of May, 2016

Carol Baird Ellan
Retired Judge of the Provincial Court
Adjudicator