Discipline Authority File Number: VIC-2009- 060

Police Complaint Commissioner File Number: 2009-4724

REVIEW ON THE RECORD
(Pursuant to Section 141(2) of the Police Act, R.S.B.C. 1996, c.267
In the matter of
Constable Jana Hardy and Constable Jason Ince
of the Victoria Police Department

MEMBER'S ARGUMENT FOR CONSTABLE INCE IN REPLY TO THE ARGUMENT OF THE POLICE COMPLAINT COMMISSIONER

1. This is a reply to the argument of the Commissioner and the paragraph references are to the paragraphs in his argument.
2. In response to paragraph 5, counsel for Constable Ince did attempt to refer to video evidence already before the adjudicator, but no other evidence, to attempt to negate the prejudice which has arisen as a result of a collection of documents being given to the reviewing authority in the absence of counsel for Constable Ince without any prior opportunity for counsel for Constable Ince to review the documents being given to the reviewing authority and with no clear record of what was given. In addition, where the nature of the complaint of Constable Ince to the fairness of the process is that the investigation and hearing have been unfair, this problem is compounded when the resulting evidence and rulings are handed to the reviewer with no opportunity to make an opening submission before the reviewer is potentially prejudiced by the material received. This was explained in the prehearing conference.
3. In response to paragraph 6, we do not wish to expand the evidence, but submit that no adverse finding ought to be made against the member based on the evidentiary record of an unfair hearing or a hearing rendered unfair by the existence of a reasonable apprehension of bias.
4. In response to paragraph 7, the issue is not whether there should be an evidentiary phase of the hearing but whether someone should be communicating with the decision-maker and transmitting information to the decision-maker directly in private and without forewarning and without providing an opportunity to the interested parties to scrutinize the material to be submitted in circumstances where the other parties are not present and have no opportunity to intervene or object. Our position is that should not occur. Inadmissible material, not part of the record was included. One example was the decision of the Supreme Court Judge on the injunction application. We do not know what else was given to the Reviewer as we were not there and it was not done in front of witnesses so there is no formal record.

Oral submissions

5. We do not seek the opportunity to make oral submissions.

Bias

6. In response to paragraph 10, we clearly intended by our argument to incorporate by reference the arguments and authorities made in the petition, which we are assured is in evidence, although it was transmitted to the reviewing authority not in our presence and it is not listed in the table of contents. Merely because those arguments were not repeated does not mean they are not being advanced. That was the meaning of paragraph 194 of our argument. We do not seek to make oral argument on bias or reasonable apprehension of bias. The arguments in the petition are sufficient.

Standard of review

7. In reply to paragraph 16, the correct citation for Jordan v. Jordan is 2011 BCCA 518(not 519). Where the standard of review is correctness it would be in error to provide deference on any matter where the reviewing authority disagrees with the result. An appeal to the Court of Appeal from a chambers application is not an appeal applying a correctness standard of review. The Jordan case is not applicable. Subsection 141(9) is applicable.

Retrospectivity

8. The issue is not whether the new statute should be applied retrospectively. The issue is whether one can disregard the transitional legislation which specifically gives deference to the Interpretation Act.

9. Paragraph 20 (f) of my friends argument which purports to express the intent of the legislature, if it is limited to the penalty provisions, may or may not be correct, but is irrelevant, because the penalty here sought was available both under the old and the new legislation.

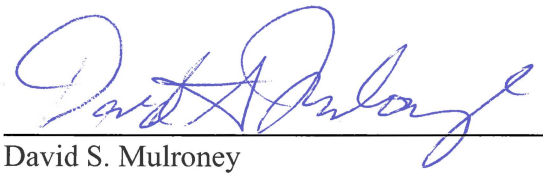
10. The issue is whether an act done without either recklessness or intent to disregard one's duty, which under the old police code of conduct would not have been misconduct, was retroactively rendered to be misconduct with the passage of new legislation. When something would not have been a delict under the law as it existed at the time, then unless there is clear intent to make such actions a delict retroactively, the law will not be so construed.

11. In this case the legislature has put its mind to the issue by enacting transitional legislation (Subsection 11(2)) which expressly says “without limiting sections 35 and 36 of the Interpretation Act, the new enactment applies...” If Sections 35 and 36 of the Interpretation Act are not limited, then lawful conduct must remain lawful (even if the same conduct at a later time covered by the new statute might have become unlawful.)

12. The law on this issue is well summarized by adjudicator Alan Filmer in the excerpt at paragraph 81 of our prior argument. To ignore the requirement for intent or recklessness would be to change the definition applying to past conduct to make

something that was not misconduct into misconduct retroactively. There is no uncertainty with the statute that the legislature intended that section 35 and section 36 would continue to apply. Trying to draw inferences to the contrary about legislative intent in the face of that express legislation is, with respect, not maintainable on any theory.

All of which is respectfully submitted.



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Dated December 20, 2011