



Office of the
Police Complaint Commissioner

British Columbia, Canada

ROR 2011-02
OPCC File No. 2009-4724

NOTICE OF REVIEW ON THE RECORD
(Pursuant to Section 141(2) of the *Police Act*, R.S.B.C. 1996, c.267)

In the matter of
Review on the Record into the complaint against
Constable Jana Hardy and Constable Jason Ince
of the Victoria Police Department

TO: British Columbia Civil Liberties Association (3rd Party Complainant)
c/o Mr. David Eby

AND TO: Constable Jana Hardy (Member)
Victoria Police Department

AND TO: Constable Jason Ince (Member)
Victoria Police Department

AND TO: Chief Constable Jamie Graham (Discipline Authority)
Victoria Police Department

WHEREAS:

1. On June 27th, 2009, Mr. Kevin John Vigar was one of three individuals who had been arrested for being "intoxicated in a public place", and brought to the Victoria Police cells where it was intended that he be lodged until sober. All three arrestees had been "asleep" at the time of the initial police attendance. The three individuals were transported together in a police van and taken to the Victoria Police cells. Mr. Vigar's condition deteriorated during the booking process. Mr. Vigar slipped to the floor at one stage and was dragged into a single cell by a police officer and a guard. Mr. Vigar's condition could only be described as "questionable consciousness." An empty 26 oz alcohol (Vodka) bottle was found in the prisoner transport vehicle as the prisoners were being removed and being processed. It is unknown who had been in possession of the vodka bottle or how much liquor had been consumed by anyone during the transport. After being in a cell for just over 40 minutes, Mr. Vigar was discovered by the jail supervisor as

unresponsive. Despite efforts by jail staff and paramedics to resuscitate Mr. Vigar, he died. Following an autopsy the pathologist noted an amount of ethanol in Mr. Vigar's blood sufficient to account for his death.

2. On July 8th, 2009, the Office of the Police Complaint Commissioner received a Form One Record of Complaint from Mr. David Eby, on behalf of the B.C. Civil Liberties Association. The complaint was characterized at that time as a Public Trust complaint and was forwarded to the Professional Standards Section of the Victoria Police Department for investigation. In the Form One Mr. Eby indicates the following issues:

The BCCLA is concerned that Victoria police failed to meet appropriate professional standards in discharging their duty of care toward the unidentified victim. One of our concerns is that the attending officers failed to properly communicate with ambulance paramedics the severity of intoxication; for example, by reporting to ambulance attendants that the three individuals were not conscious when police arrived.

Furthermore, we are concerned that, while in custody, the arrested individuals were not properly monitored in terms of the frequency and adequacy of the jail staff's physical checks, the frequency and adequacy of visual checks via CCTV monitoring, and the provision of medical treatment due to intoxication. Given recent revelations contradicting official police versions of events in the Dziekanski death, the Bush death, the St. Arnaud death, the Paul death, and other in-custody deaths, we encourage you to test the official version of events provided by police by reviewing videotape and witness statements, and by comparing police witness statements for internal inconsistencies.

3. On March 31st, 2010, amendments to the *Police Act* were enacted and the *Code of Professional Conduct Regulation* was repealed.
4. On August 4th, 2010, the external investigator into this matter, Staff Sergeant Kelly Dukeshire of the Saanich Police Department, submitted his Final Investigation Report into the allegations against Constable Jana Hardy and Constable Jason Ince.
5. On October 5th, 2010, Chief Constable Graham, as the Discipline Authority, issued Notices of Decision pursuant to section 112 for both Constable Jana Hardy and Constable Jason Ince. Chief Constable Graham determined that the evidence contained within the Final Investigation Report appeared to substantiate three allegations of Neglect of Duty against each of the members.

Synopsis of Disciplinary Proceedings of Constable Jana Hardy:

6. On December 7th, 2010, Chief Constable Graham convened a Discipline Proceeding with respect to the allegations against Constable Hardy. At that time he received evidence from the investigating officer and Constable Hardy. During the course of the proceedings, counsel for Constable Hardy examined the investigating officer and provided submissions to the Discipline Authority.

7. On December 14th, 2010, Chief Constable Graham issued his Findings of Discipline Authority, pursuant to section 125(b), wherein he determined that all three allegations of Neglect of Duty were proven against Constable Hardy and provided his reasons.
8. On January 12th, 2011, Chief Constable Graham issued his Disciplinary Disposition Record, pursuant to section 128(1)(b), and imposed the following discipline and corrective measures with respect to each of the following findings of misconduct:
 - i. **Neglect of Duty** (s.77(3)(m)(ii) of the *Police Act*) where the member must promptly and diligently do anything that it is her duty as a member to do. On June 27th, 2009, Constable Hardy failed to provide the prisoner, Kevin John Vigar, with the appropriate medical treatment when it was obvious that the prisoner had become unconscious due to intoxication.

Disciplinary/ corrective measures:

- Suspension from duty for a period of (3) days; and
 - Undertake specified training or retraining - a supervised review of the appropriate jail policy relating to prisoners and medical treatment for person in custody.
- ii. **Neglect of Duty** (s.77(3)(m)(ii) of the *Police Act*) where the member must promptly and diligently do anything that it is her duty as a member to do. On June 27th, 2009, Constable Hardy failed to conduct a complete and thorough search of the female prisoner [REDACTED] following her arrest.

Disciplinary/ corrective measures:

- Written reprimand, and
 - Undertake specified training or retraining - proper searching techniques of prisoners. This may be accomplished by a review by an immediate supervisor as to Constable Hardy's understanding in this area.
- iii. **Neglect of Duty** (s.77(3)(m)(ii) of the *Police Act*) where the member must promptly and diligently do anything that it is her duty as a member to do. On June 27th, 2009, Constable Hardy failed to notify the jail supervisor of all "relevant" information in relation to Kevin John Vigar's loss of consciousness during the booking process and in relation to his continued state of unconsciousness following his placement in cells.

Disciplinary/ corrective measures:

- Written reprimand
9. On February 9th, 2011, the Office of the Police Complaint Commissioner received correspondence from Counsel on behalf of Constable Hardy requesting a Review on the

Record pursuant to section 133(5) of the *Police Act*. The determination of this request was held in abeyance until the completion of discipline proceedings for Constable Ince.

10. The Office of the Police Complaint Commissioner did not receive a request from the complainant (BCCLA) for a Review on the Record or Public Hearing in regard to Constable Hardy.

Synopsis of Discipline Proceedings for Constable Jason Ince:

11. On July 13th, 2010, counsel on behalf of Constable Ince, wrote to Chief Constable Graham expressing concern that there may be a conflict of interest acting as the Discipline Authority in this matter.
12. On January 6th, 2011, Constable Ince through counsel initiated a petition to the Supreme Court of British Columbia in which he sought an interim injunction and an order directing the recusal of Chief Constable Graham as the Discipline Authority in this matter.
13. On January 21st, 2011, the Honourable Madam Justice Ballance dismissed the application on the basis that it was premature, directing that the recusal application be raised before and decided upon by the Discipline Authority prior to the discipline proceedings. The application was subsequently made before the Discipline Authority and denied with reasons.
14. On March 21st, and April 1st, 2011, the discipline proceedings for Constable Ince took place before Chief Constable Graham acting as Discipline Authority.
15. On April 27th, 2011, Chief Constable Graham issued his Findings of Discipline Authority, pursuant to section 125(b) of the *Police Act* wherein he determined that all three allegations of Neglect of Duty against Constable Ince had been proven and provided his reasons.
16. On May 19th, 2011, Chief Constable Graham issued his Disciplinary Disposition Record, pursuant to section 128(1)(b) of the *Police Act* and imposed the following discipline and corrective measures with respect to each of the following findings of misconduct:
 - i. **Neglect of Duty** (s.77(3)(m)(ii) of the *Police Act*) where the member must promptly and diligently do anything that it is his duty as a member to do. On June 27th, 2009, Constable Ince failed to provide Kevin John Vigar with the appropriate medical treatment when it was obvious that the prisoner had become unconscious due to intoxication.

Disciplinary/ corrective measures:

- Suspension from duty for a period of (5) days; and
- Undertake specified training or retraining - a supervised review of the appropriate jail policy relating to prisoners and medical treatment for person in custody.

- ii. **Neglect of Duty** (s. 77(3)(m)(ii) of the *Police Act*) where the member must promptly and diligently do anything that it is his duty as a member to do. On June 27th, 2009, Constable Ince failed to conduct a complete and thorough search of the prisoners Mr. Vigar and Mr. [REDACTED] following their arrest.

Disciplinary/ corrective measures:

- Written reprimand, and
- Undertake specified training or retraining - proper searching techniques of prisoners. This may be accomplished by a review by an immediate supervisor as to Constable Ince's understanding in this area.

- iii. **Neglect of Duty** (s. 77(3)(m)(ii) of the *Police Act*) where the member must promptly and diligently do anything that it is his duty as a member to do. On June 27th, 2009, Constable Ince failed to notify the jail supervisor of all "relevant" information in relation to Mr. Vigar's loss of consciousness during the booking process and in relation to his continued state of unconsciousness following his placement in cells.

Disciplinary/ corrective measures:

- Written reprimand

17. On June 20th, 2011, the Office of the Police Complaint Commissioner received correspondence from Counsel on behalf Constable Ince requesting a Review on the Record or a Public Hearing pursuant to sections 136 and 138(1) of the *Police Act*.

18. This office has not received a request from the complainant (BCCLA) for a Review on the Record or Public Hearing in regard to Constable Ince.

19. Having reviewed this matter, including the record of the disciplinary decision, I have determined that pursuant to s.138(1)(d) of the *Police Act* that a review on the record is necessary in the public interest. In arriving at this determination I have reviewed all the relevant factors including, but not limited to the following:

The Nature and Seriousness of the Complaint or Alleged Misconduct [s.138(2)(a)]

This is a very serious matter as it involves issues related to the duty of care of individuals arrested by police for their own welfare for public intoxication and lodged in police cells. Police must frequently take intoxicated persons into their custody when they are not able to care for themselves. The duty of care extends to the need to monitor the physical well being of persons while in police custody.

The Nature and Seriousness of the Harm Suffered by Any Person [s.138(2)(c)]

Kevin John Vigar tragically died as a result of the consumption of a lethal quantity of alcohol prior to and possibly while in police custody.

Whether an Arguable Case Can be Made that the Discipline Authority's Interpretation or Application of this Part or any other Enactment was Incorrect [s.138(2) (d)(iii)]

- A legal issue arises from the proceedings in relation to the Discipline Authority's decision to not recuse himself from presiding over the discipline proceeding of Constable Ince.
- A legal issue arises from the proceedings in regard to the interpretation of the law as it relates to the retrospective application of new legislation.
- A legal issue arises from the proceedings in terms of the Discipline Authority's interpretation of what constitutes "neglect of duty" as defined under the Act.

Nature of Adjudicative Review

In the circumstances of this complaint, one Review on the Record for both members is an efficient and effective means of adjudicative review having regard to the sufficiency of the Record of Disciplinary decision and the issues engaged.

20. It is therefore alleged that Constable Jana Hardy committed the following defaults pursuant to s. 77 of the *Police Act*:

- i. **Neglect of Duty** – (s.77(3)(m)(ii) of the *Police Act*) where the member must promptly and diligently do anything that it is her duty as a member to do.

That on June 27th, 2009 Constable Jana Hardy failed to provide the prisoner, Kevin John Vigar with the appropriate medical treatment when it was obvious that the prisoner had become unconscious due to intoxication.

- ii. **Neglect of Duty** - (s.77(3)(m)(ii) of the *Police Act*) where the member must promptly and diligently do anything that it is her duty as a member to do.

That on June 27th, 2009 Constable Jana Hardy failed to conduct a complete and thorough search of the female prisoner [REDACTED] following her arrest.

- iii. **Neglect of Duty** - (s.77(3)(m)(ii) of the *Police Act*) where the member must promptly and diligently do anything that it is her duty as a member to do.

That on June 27th, 2009 Constable Hardy failed to notify the jail supervisor of all "relevant" information in relation to Mr. Vigar's loss of consciousness during the booking process and in relation to his continued state of unconsciousness following his placement in cells.

21. It is therefore alleged that Constable Jason Ince committed the following defaults pursuant to s. 77 of the *Police Act*:

- i. **Neglect of Duty** – (s.77(3)(m)(ii) of the *Police Act*) where the member must promptly and diligently do anything that it is his duty as a member to do.

That on June 27th, 2009 Constable Jason Ince failed to provide the prisoner, Kevin John Vigar with the appropriate medical treatment when it was obvious that the prisoner had become unconscious due to intoxication.

- ii. **Neglect of Duty** - (s.77(3)(m)(ii) of the *Police Act*) where the member must promptly and diligently do anything that it is his duty as a member to do.

That on June 27th, 2009 Constable Jason Ince failed to conduct a complete and thorough search of prisoners Mr. Vigar and Mr. [REDACTED] following their arrest.

- iii. **Neglect of Duty** - (s.77(3)(m)(ii) of the *Police Act*) where the member must promptly and diligently do anything that it is his duty as a member to do.

That on June 27th, 2009 Constable Jason Ince failed to notify the jail supervisor of all "relevant" information in relation to Mr. Vigar's loss of consciousness during the booking process and in relation to his continued state of unconsciousness following his placement in cells.

NOW THEREFORE:

22. A Review on the Record is arranged pursuant to section 138 of the *Police Act*.

23. Pursuant to the recommendation of the Associate Chief Justice of the Supreme Court of British Columbia, adjudicator to be named shortly to preside as Adjudicator in these proceedings, pursuant to s. 142 of the *Police Act*.

24. TAKE NOTICE that all inquiries with respect to this matter shall be directed to the Office of the Police Complaint Commissioner:

#501, 947 Fort Street, PO Box 9895, Stn Prov Govt, Victoria, BC V8W 9T8
Telephone: (250) 356-7458 / Facsimile: (250) 356-6503

DATED at the City of Victoria, in the Province of British Columbia, this 19th, day of July, 2011.



Stan T. Lowe
Police Complaint Commissioner
for the Province of British Columbia