IN THE MATTER OF A REVIEW ON THE RECORD UNDER THE *POLICE ACT* R.S.B.C. 367 RE:

CONSTABLE JASON INCE AND CONSTABLE JANIS HARDY

HON. ALAN J. FILMER (RET'D) Q.C., ADJUDICATOR

SUBMISSIONS OF THE POLICE COMPLAINT COMMISSIONER

Introduction

1. The Police Complaint Commissioner makes the following submissions to the Adjudicator pursuant to section 147 of the *Police Act* R.S.B.C. 367 or ("*Police Act*" *or* "the Act").

2. At the October 14, 2011 Pre-hearing Conference, the Adjudicator directed the parties to make written submissions on the matter before him, including, if the parties should be permitted the opportunity to make oral submissions to him later in the proceedings.

3. The Adjudicator directed that the Discipline Authority and the Commissioner may make submissions in response and that the members would have a final reply.

4. Further to the apparent intent of sections 148 and 150 of the *Police Act* and the notice the Commissioner's counsel gave to the Adjudicator and the parties of the Pre-hearing Conference, the Commissioner arranged to have the members' submissions published on the Commissioner's website and these submissions will be similarly published.

5. At the Pre-Hearing Conference, counsel for Constable Ince sought to play video evidence for the Adjudicator and, possibly, lead other evidence that is part of the Record of Disciplining Decision as that is defined in section 141(3) of the Act.

6. No party has sought to expand the evidence beyond that in the Record or Disciplinary Decision pursuant to section 141(4) of the Act and the Commissioner submits there are no special circumstances in this matter that would make such an expansion necessary and appropriate.

7. The Commissioner notes that the Act refers to the parties making submissions. The Commissioner further submits that there should not be an evidentiary phase in which the parties lead evidence and then a submissions phase and that the parties should be limited to making submissions on the evidence.

8. Further, the members made no submission on why they should be allowed to make oral submissions, rather both said they may make such submissions once they had read the submissions of the Discipline Authority and the Commissioner.

9. The Commissioner respectfully submits that there is no need for the Adjudicator to convene a further hearing to hear oral submissions inasmuch as:

a) the Discipline Authority will be making no written or oral submissions;

b) the Commissioner does not seek to make oral submissions on his own behalf;

c) there is no new evidence to adduce;

d) the evidence is already before the Adjudicator in the Record of Disciplinary Decision and the parties should not be given further opportunity to lead or speak to that evidence, save for in their submissions;

e) the parties have been given the opportunity to make written submissions in which they marshal the evidence that they consider beneficial to their position and make submissions on the law as it applies to the evidence;

f) the parties, save for the Discipline Authority, have taken the opportunity to make such submissions and the members have a further opportunity for reply;

g) the members, though directed to do so, have not made submissions on why they ought to be able to make oral submissions through their counsel to supplement their written submissions and have stated they intend to do so once the other parties no longer have a right of response;

h) oral submissions are not available to any party as a right;

i) the convening of a further hearing will add to the cost of the proceedings and delay the outcome; and

j) the transparency of the Review on the Record process will be maintained by the Commissioner's publication of the parties' submissions and the publication of the Adjudicator's decision on the matter.

The Preliminary Matters at the Discipline Proceeding

10. The Commissioner has considered Constable Ince's submissions that the Discipline Authority was biased and that Constable Ince reasonably apprehended bias on the part of the Discipline Authority that should have lead the Discipline Authority to recuse himself from presiding at the Discipline Proceeding. Constable Ince's submissions in this regard are found primarily at paragraphs 12-13, 57-58 and 189-194. The Commissioner notes that, though given the opportunity to do so, Constable Ince's written submissions to the Adjudicator contain no legal authority or direct argument on why the Discipline Authority was legally required to recuse himself.

11. Constable Ince appears to suggest that he is content for the Adjudicator to rely on what authorities and submissions Constable Ince put before the Supreme Court in his application for judicial review of the Discipline Authority's decision not to recuse himself (see Constable Ince's November 18, 2011 submissions at paragraph 194).

12. The Commissioner submits that, having been given an opportunity to make full submissions to the Adjudicator on the issue of bias and apprehension of bias, and having chosen not to do so, Constable Ince should not now be granted an opportunity to make oral submissions on the basis that he wishes to expand on his written submissions on bias and apprehension of bias.

13. The Commissioner has considered the *Findings of the Discipline Authority in Relation to the Preliminary Application of Constable Ince* dated February 6, 2011. The Commissioner submits that in his *Findings* the Discipline Authority correctly set out the law on the circumstances and considerations which might require a statutory decision member to recuse himself or herself from a proceeding and appropriately applied the law to the facts of this matter. The Commissioner further submits that the Adjudicator should uphold the Discipline Authority's decision to preside at the Discipline Proceeding.

The Standard of Review

14. The Commissioner agrees with the submissions of Constable Ince (at paragraph 62) and of Constable Hardy (at paragraph 68) that the standard of review in this Review on the Record is that of correctness. However, the Commissioner does not agree that the intended interpretation of the standard, including as expressed by the Supreme Court of Canada in *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190, is as the members expressed it (at paragraphs 66 and 72 respectively) that the Discipline Authority had to be "correct on both the facts and the law". This is not the law.

15. While the Supreme Court of Canada may have merged reasonableness simpliciter and patent unreasonableness, it did not merge the analysis of a trier of fact's view of the facts and application of the law to these facts.

16. The standard of correctness allows a reviewing body to decide whether it agrees with the decision maker and, if not, substitute its own view and provide the correct answer. However, the Commissioner respectfully submits that the Discipline Authority, the body who presided over the proceedings and saw all the testimony – and his or her view on the facts – should not be displaced unless, in the view of the Adjudicator, the Discipline Authority has made a "palpable

and overriding error" in regard to the facts or factual inferences drawn from accepted facts (*Jordan v. Jordan*, 2011 BCCA 519, at para. 45).

17. The Commissioner agrees with the submissions of the members (Ince: at paragraphs 67-69 and Harding: at paragraphs 73-75) that the Discipline Authority was required to scrutinize the relevant evidence with care and to determine if it is more likely or not that certain events occurred.

Extent of Retrospective Application of the New Act

18. The members submit that the Discipline Authority erred in law by not applying the *Code of Professional Conduct Regulation*, a regulation that had been repealed at the time of the Discipline Proceeding, to the alleged conduct of the members (Ince: paragraphs 73-89 and Hardy: paragraphs 78-93). The Commissioner notes that the members acknowledge that, on the authorities, the Discipline Authority's decision to proceed under section 77 "may not be fatal to" the Discipline Proceeding and the Commissioner agrees. The Discipline Proceeding was not rendered a nullity or invalid or otherwise frustrated by the Discipline Authority's decision to proceed under section 77 of the Act – a decision which the Commissioner further submits was the correct interpretation and application of the Canadian law on the temporal application of new statutory provisions.

19. Further, the Commissioner respectfully disagrees with the entirety of the members' submissions on the application to these proceedings of the *Police Act* provisions brought into force in March 2010 for the reasons set out below.

20. The issue before the Adjudicator is the application of Part 11 of the amended *Police Act* (*Act*) to *Police Act* proceedings commenced prior to March 31, 2010, the date on which

amendments came into force. The Commissioner submits that the new *Police Act*, as amended, applies to these proceedings both procedurally and substantially for the following reasons:

a) there is no common law rule against the retrospective application of legislation;

b) the common law rule against retroactive application of an enactment is a rebuttable presumption applicable to the interpretation of an enactment. This presumption can be rebutted by evidence of a clear intention of the legislature that the new enactment is to apply retroactively, or expressed in words in the enactment that carry a necessary implication of this intent;

c) the rule against retroactive application is strong when it is applied to prohibit interference with certain "vested rights"; otherwise, it carries only modest weight in the face of the legislature's express or implicit intention;

d) the *Police Amendment Act* provisions do not affect the kind of rights that the courts have described as having, once vested, protection against retroactive application of legislation that is not clearly intended to affect such rights. Save for when the *Charter* is engaged in matters that could lead to penal consequences, police officers do not have a "vested right" to only be subject to penalties in a prior enactment;

e) the proceedings arising in this matter did not receive final disposition under the former enactment prior to the new enactment coming into force on March 31, 2010; and

f) the Legislature clearly expressed an intent that complaints not disposed of under the former enactment would be subject to the new enactment's provisions, and all that implies, including subjecting officers to new penalty provisions.

No common law rule against retrospective application

21. In *Sullivan and Driedger on the Construction of* Statutes, 4th Edition,[1] Professor Sullivan notes that the law governing the temporal application of legislation is notoriously difficult (at p. 543) and that even the courts have added to the difficulty having, for a great deal of time regarded the terms "retroactive" and "retrospective" as synonyms (at p. 548). *Sullivan and Driedger* sets out the legal principles by which legislative changes should be allowed to govern past events, including that the changes:

a) are essentially procedural in nature;

b) are retrospective, not retroactive, in effect;

c) are retroactive in effect, but were intended by the legislature to be so; and

d) though retroactive, do not significantly interfere with rights vested under the prior enactment.

Retrospective

22. "Retrospective applications" are defined in *Driedger* as "applications that would change only the future effects of a past situation." This definition was explicitly approved by the Supreme Court of Canada in *Benner v. Canada (Secretary of State)*.[2] The new *Police Act* provisions, including provisions respecting new penalties, are retrospective and not retroactive in effect. They will only take effect in respect of future events, that is, in the course of disciplinary decisions made after the "in-force" date. They will change the future legal effect of past conduct, but they will only operate forward; they will only be applied in the future – but look backward – and, potentially, attach new legal consequences to an event that happened before the

[1] Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th Edition, (hereinafter "*Driedger*").
[2] *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, at paras. 39-40 (hereinafter "*Benner*").

in-force date. There is no rule of construction that such retrospective provisions should be given anything but full effect.[3]

23. *Driedger and Sullivan* sets out a summary of the general rules with respect to temporal application of legislation. There, Professor Sullivan states unequivocally that at common law there is no presumption against the retrospective application of legislation.[4] The definition of "retrospective" adopted in *Driedger* is the definition that the Police Complaint Commissioner adopts in this submission: namely that a retrospective application changes the future legal effect of a past situation.[5]

Retroactive

24. The rule of construction against retroactive application is rebutted by an express or implied intention of the legislature for such application.

25. The Commissioner says that the use of section 77 represents a retrospective application of the Act. However, if the Adjudicator were to take the view that the transitional provisions are or could be characterized as retroactive in their operation, this does not mean that the provisions are without force or that the Adjudicator should, for example, overturn a Discipline Proceeding disposition because provisions of the amended *Police Act,* including new penalty provisions, were applied.

26. According to *Driedger*, "[w]hen it comes to the temporal operation of legislation, the primary source of law is the statute or regulation whose operation is at issue."[6] A new enactment will be applicable to prior actions in its entirety where the legislature has clearly expressed an intent to retroactively modify the substantive rights at issue or when such an intent is a necessary implication of a new enactment's wording. It is only when the new enactment at issue is silent or ambiguous as to the legislature's intent with respect to temporal application that general rules of

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[3] *Driedger*, at page 547.
[4] *Driedger*, at page 547.
[5] *Dreidger*, at page 546.
[6] *Driedger*, at page 520.

statutory interpretation, of which the presumption against retroactivity is one, apply. The presumption against retroactive application is merely a rule of construction. It is only applicable where there is an ambiguity in a new enactment that prevents the court from finding an express or implied intention of the legislature in favour of retroactive application.

Express Legislative Intent

27. The Legislature clearly intended that complaint proceedings commenced under the former enactment would be subject to the amended *Police Act*. It expressly anticipated circumstances where proceedings commenced under the former enactment would be continued under the amended *Police Act*, as described in the transitional procedures of s. 11 of *Bill 7 – Police Amendment Act*.

28. The definition of 'transitional complaint' and the other provisions in s. 11 (labeled 'Transition' in the *Act*) demonstrates an explicit legislative intent that the amended *Police Act* is to apply to proceedings that pre-date the coming into force of the new Act. A 'transitional complaint' as defined in section. 11 (1) "means a complaint against a respondent member or former member that was submitted under the former enactment but has not resulted in a complaint disposition before the effective date". Section 11 (2) clearly and unreservedly states that the amended *Police Act* applies to transitional complaints:

> "Subject to subsection (3) and without limiting sections 35 and 36 of the *Interpretation Act*, the new enactment applies in respect of a transitional complaint and an investigation or proceeding initiated or instituted under the former enactment."

29. The transition section was discussed in Committee of the Whole House, where Attorney General Mike de Jong stated:

> "Here's the intention. These are truly transitional, in the sense that when these provisions of the act come into force, it will be for the Police Complaint

> Commissioner to look at existing proceedings and determine where they should be placed in the new proceedings.
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> They won't continue under the old act. They'll actually find a home in the new procedures and the new places, but it will be for the Police Complaint Commissioner to determine where along that line existing files should be placed."[7]

30. The intention of the Legislature in enacting section 11 should be taken to be that existing complaints would not continue under the former enactment, despite the substantive implications this would hold for members, complainants, and others.[8] How the amended *Police Act* ultimately applies procedurally to a transitional complaint has been left to the Commissioner, to whom the legislature has given both authority and guidance. The Commissioner has authority to:

a) make final and binding determinations as to the stage in the new enactment process that "most nearly corresponds"[9] to a transitional complaint's stage under the former enactment;

b) waive or modify prerequisites to attaining a particular new enactment stage and waive or extend time limits for things to be done under the new enactment; and

c) establish guidelines to assist parties and decision makers in respect of the transition.

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[7] Mike de Jong. "Bill 7 – Police Amendment Act" In British Columbia. Legislative Assembly. Legislative Debates (Hansard). 39th Parl., 1st Sess. (October 27, 2009)(hereinafter: *Committee*), at 1638.

[8] Some of the obvious cases where individuals may be negatively affected by the transitional provisions and to which the legislature must have turned its mind include:

a) persons who are not the subject of complaints, but who may now become compellable witnesses to, or required to cooperate with, transitional complaint proceedings;
b) complainants and members who can be ordered into mediation processes in the course of transitional complaint proceedings;
c) members who may become subject to stiffer penalties than were available under the former enactment in the course of a transitional complaint proceeding;
d) Discipline Authorities who disagree with a determination by the Commissioner that disciplinary or corrective measures arrived at in pre-hearing conferences or discipline hearings are not sufficient, particularly in light of the new expanded range of penalties.

[9] Bill 7 – Police Amendment Act, s. 11 (3) (b).

31. However, the Commissioner, and, the Commissioner submits, all persons appointed under *Police Act* proceedings, are given no discretion to waive substantive aspects of the amended *Police Act* in proceedings commenced under the former enactment. They have no authority, for example, to facilitate the transition of an existing complaint into the new enactment while restricting the disciplinary outcomes to those provided for under the repealed *Code* regulation. The Commissioner respectfully submits that, similarly, no Discipline Authority or Adjudicator conducting proceedings has any authority to apply substantial provisions of the repealed *Code* regulation enactment to proceedings involving a transitional complaint. This is because the legislature specifically repealed and replaced the regulation describing the characterization of complaints and the penalties available and stated in s.11 (2) of the Bill that this engages s. 36 of the *Interpretation Act*. Therefore, the Legislature must be taken to have been aware that the *Police Amendment Act* made transitional complaints subject to new characterizations and penalties.

The *Interpretation Act*

32. The transitional provisions of the *Police Amendment Act* place only two restraints on the application of the entire amended *Police Act* to complaints commenced, but not disposed of, under the former enactment. First, the Commissioner is given authority to assign to transitional complaints the most comparable procedural steps in the new Act and to waive procedural requirements. Second, the *Police Amendment Act* declares that it applies to the transitional complaints "without limiting sections 35 and 36 of the *Interpretation Act*". The latter portion of the declaration is likely redundant, since ss. 35 and 36 of the *Interpretation Act* operate on all enactments, whether or not such declarations are contained in a particular enactment. However, the Legislature's inclusion of this affirmation may be taken as conclusively eliminating all doubt that the Commissioner's discretion is subject to the *Interpretation Act*.

33. Section 35 of the *Interpretation Act* is subtitled "Repeal". The *Police Act* amendment case involves one enactment being repealed and another substituted in its place, which is dealt with under section 36. It is the Commissioner's submission that section 35 has no bearing on the

implementation of the new enactment. Section 36, on the other hand, provides in the case of "Repeal and Replacement" that, among other things:

a) every proceeding commenced under the former enactment must be continued under and in conformity with the new enactment so far as it may be done consistently and with the new enactment; and

b) the procedures in the new enactment must be followed as far as it can be adopted in a proceeding relating to matters that have happened before the repeal (emphasis added).

34. Essentially, the transitional provisions direct that, subject to his authority to make stage determinations that "most nearly correspond", the Commissioner must continue transitional complaint proceedings under and in conformity with the amended *Police Act*, including its substantive provisions, and must follow the new enactment's procedures – unless he is able to show as per section 36 of the *Interpretation Act*, that this cannot be done in a manner consistent with the new enactment or the new procedures cannot be adopted to a transitional complaint.

35. In enacting section 36 of the *Interpretation Act*, the Legislature should be taken to have consciously turned its mind to the potential situation in which new enactments in a "repeal and replace" scenario may result in the imposition of either lesser or greater penalties for certain conduct, where the subject conduct occurred before the coming into force of the new enactment. Section 36(1)(b) states that every proceeding commenced under a former enactment must be continued under and in conformity with the new enactment, so far as it may be done consistently with the new enactment. Section 36(1)(d) indicates that the Legislature considered the case where the new enactment contains new lighter penalties and the Legislature decided after the person subject to ongoing proceedings would be given the benefit of any new lighter penalties. The Legislature could have also said, had such been its intent, that new tougher penalties will not apply - as an exception to the section 36(1)(b) general requirement that the whole enactment apply - but the Legislature did not do so.

36. The Commissioner is required to continue transitional complaint proceedings under and in conformity with the amended *Police Act.* Without admitting that the *Police Amendment Act* is retroactive in its application - as the Commissioner's position is that the entirety of the new provisions are retrospective in application - the Commissioner submits that, if the Adjudicator holds that the new provisions are retroactive in application, the Legislature has been sufficiently clear in its intentions as to the handling of transitional complaints that, so long as the Commissioner remains within his statutory authority and the requirements of section 36 of the *Interpretation Act*, the presumption that the Act's retroactive application should not be allowed, is rebutted.

Implied Legislative Intent

37. In the event the Adjudicator determines that the Legislature was not sufficiently clear in favour of a retroactive application, the Commissioner submits that it may be found by necessary implication that the Legislature intended for the amended *Police Act* to apply retroactively, considering the scheme of the *Police Act* and the purpose of the transitional enactments.

38. This principle is described by the Supreme Court of Canada in *Healey v. Quebec.*[10] There, the question was the nature of the federal government's ownership rights on Indian reserve land:

> It is clear that the (...) *Act* contains no express provision making it retroactive or giving retroactive effect to the amendment made (...). However, the legislator's intent can be deduced from the purpose of the legislation and the circumstances in which it was adopted. It can also be manifested by the procedure employed by the legislator. Finally, it may be inferred from the only possible interpretation that is likely to make sense of it.[11]

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[10] *Healey v. Quebec,* [1987] S.C.J. No. 4, [1987] 1 S.C.R. 158, (cited to S.C.J.)(hereinafter "*Healey*").
[11] *Healey* (see note 25), at paras. 68-69.

The *Police Act* is a complete code. It is legislation aimed at the maintenance of public confidence in the police, by providing for the processing and adjudication of complaints about police conduct. This procedure is necessarily composed of various stages through which a complaint must progress from receipt to resolution. The Legislature was certainly well aware that, at the time the new Part 11 was to be brought into force, there would have been a significant number of proceedings that remained outstanding. The Legislature, by the enactment of transitional provisions purporting to govern outstanding complaints, must by implication be taken to have intended that the amended *Police Act* would apply to complaints that remained outstanding under the regime of the prior enactment.

39. The material provisions of the former *Police Act* were repealed and replaced by the legislature.

40. It has been suggested elsewhere that section 10 of the *Police Amendment Act*, by adding Part 11, is essentially an addition *de novo* to the *Police Act*, and as such does not constitute repeal and replacement and does not trigger section 36, rather than section 35, of the *Interpretation Act*. However, this assertion overlooks the clear and simple division of the former Part 9 into the new Parts 9 and 11 and, among other things, the incorporation into the *Police Act* of the repealed *Code of Professional Conduct Regulation*. Despite a change in wording between the definitions in the repealed *Code* regulation and the new enactment, the meaning of misconduct is substantially similar.

41. The *Police Amendment Act* also made these primary changes to the former *Police Act*:

- repealed and replaced the definition of "police complaint commissioner" to provide for the appointment of an acting commissioner;

- separated the part setting out the creation, powers, and duties of the Commissioner (new Part 9) from the part setting out misconduct, investigation, and disciplinary procedure, powers, and duties (new Part 11). These new Parts of the *Act* were previously both contained within the former Part 9;

- provided for an informal dispute resolution process in the new Part 11, Division 4;

- provided for mandatory reporting and investigation of in-custody death or serious harm;

- allowed for third party complainants that are not directly affected but who witnessed an incident to initiate a complaint;

- set out a 12-month time limit within which to file a complaint;

- set out requirements for the preservation of evidence;

- set out investigative powers with respect to municipal police departments; and

- both repealed, and repealed and replaced, numerous references to former sections that in light of the new Part 11 no longer referred to the appropriate section.

Vested Rights

42. Police members subject to the *Police Act* proceedings do not have a vested right to repealed *Code* regulation provisions on discipline as vested rights are understood in the law on temporal application.

43. The presumption against retroactive application is strong where the court believes it must be applied to prevent interference with recognized rights that had already vested when the enactment in question came into force. The court will not apply the presumption, however, where it determines that the legislature intended an enactment to apply, despite its prejudicial effect.[12] If the Adjudicator finds that there is sufficient express or implied intent within the *Police Amendment Act* for it to apply despite its prejudicial effects, which the Commissioner submits is the case, then the Adjudicator should only insulate the members against the new

[12] *Gustavson Drilling (1964) Ltd. v. Canada*, 1975 CarswellNat 330 , [1977] 1 S.C.R. 271, (hereinafter *Gustavson*)(cited to Quicklaw) at para. 15.

provisions if he considers that there is sufficiently serious interference with the "vested rights" of the members.

44. In determining if the members have a vested right not to be subject to section 77 penalties for conduct that occurred prior to March 31, 2010, the Adjudicator must ask himself:

a) as the Discipline Authority has already found, when setting the Discipline Proceeding, that their conduct appeared to justify some form of discipline, can the members' relationship to the form of discipline in the repealed *Code* regulation be accurately characterized as a legal right? and

b) if it can be, had that right already vested or accrued to the members on the day the amended *Police Act* came into force?

45. Generally, the nature of the vested rights that the courts have been concerned with in applying the presumption against retroactivity are those having economic value:

> "To deprive individuals of existing interests or expectations that have economic value is akin to expropriation without compensation, which has never been favoured by the common law. If the application of new legislation creates special prejudice for some, or windfalls for others, the burdens and the benefits of the new law are not rationally and fairly distributed (...). For these reasons, interference with vested rights is avoided in the absence of a clear legislative directive".[13]

46. The law is that, unless it has done so with a clear intention, the Legislature should not be taken to have enabled expropriation without compensation. When such intention is clear, the legislature should be taken to have intended as little economic harm as necessary to give effect to the new law.

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[13] *Driedger*, at page 569.

47. Unlike the rule of construction against the retroactive operation of enactments where the legislature's intent is unclear, the Canadian authorities are to the effect that the presumption against interference with vested rights carries only modest weight in the face of the legislature's express or implicit intention.[14] The principles can be expressed as follows: once the government undertakes to regulate a matter to protect the interests of particular groups or the public at large, individuals who organize their affairs on the assumption that 'promised' advantages will not be withdrawn do so at their own risk.[15] Expressed alternatively, when the primary purpose of a provision is to abolish a right of which the legislature disapproves, a tribunal may readily conclude that the legislature intended to target existing as well as future examples of that right. If the purposes of the legislation would be defeated by failing to apply it to existing rights, the presumption against interfering with these rights is conclusively rebutted.[16]

48. The courts have held that the retroactive application of legislation is "fortified" when the legislation has as its objective the protection of the public interest.[17] The purpose of the *Police Act* is the protection of the public from police misconduct and to provide an adjudicative mechanism that holds police members accountable for their misconduct. The amendments to the *Police Act* reflect weaknesses identified by the legislature and considered by Josiah Wood Q.C. in his *Report on the Review of the Police Complaint Process in British Columbia.*[18] To find that there is a vested right to particular penalties that existed in the repealed *Code* regulation would fail to give full effect to the Legislature's objective – namely, to repeal and replace legislation that it considered inadequate to protect the public.

49. The *Police Amendment Act* does not affect an economic right. Members do not have a vested right to be subject only to penalties in the repealed *Code* regulation for conduct that may fall below the standards of both the repealed *Code* regulation and section 77. The suggestion that members have a vested right to an unchangeable range of given punishments in the event of their misconduct is to stretch the notion of a vested right beyond recognition.

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[14] *Driedger*, at page 576.
[15] *Gustavson*, at para. 15.
[16] *Driedger*, at page 581.
[17] *Bhadauria*, at paras. 22-25
[18] Josiah Wood Q.C., *Report on the review of the police complaint process in British Columbia*, February, 2007.

50. *Driedger* states with respect to vested rights that "there is a vast range of claims that may be made pursuant to statute for benefits, authorizations, exemptions, remedies, orders and the like"[19]. However, the Commissioner submits that it is problematic to suggest that a member's right to a given range of discipline is somehow 'crystallized' at the moment that their impugned conduct occurs or when proceedings related to that misconduct commenced. Nor do the members claim that their conduct would have been different had they known that the range of punishments they might face could change.

51. Even if the Adjudicator were to conclude that members had rights to a particular immutable penalty and those rights had vested at March 31, 2010, the Commissioner submits that the Legislature should be taken to have expressly or implicitly intended to subject those rights to impingement the Legislature thought necessary to protect the public. If one were dealing with new penalties for penal offences, it is clear that section 11(9) of the *Charter* would not impinge such rights, if they exist at all, and would limit the penalties levied in transitional complaints to those that existed prior to the in-force date. However, this provision of the *Charter* does not apply to disciplinary or corrective measures imposed by administrative tribunals.[20]

The Members' authorities

52. The members rely on three recent decisions in *Police Act* proceedings which they say stand for the proposition that the conduct that is before the Adjudicator "must be adjudged only by reference only to the changes defined" by the repealed *Code* regulation (Ince: at paragraph 84; Hardy: at paragraph 89).

53. With respect, the members have misread or misapplied these decisions or the decisions themselves are distinguishable from the case at hand.

54. The members cite a single paragraph from the September 8, 2010 ruling of this Adjudicator in *O'Neill and Asmussen* and misapply it. Adjudicator Filmer's reference to "future

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[19] *Driedger*, at page 570.
[20] *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, [1987] S.C.J. No. 71, at para. 23-24.

disciplinary decisions" in his summation of the legal concept of retrospectivity is clearly meant to state that a retrospectively-applied Act - as described in the words of the Commissioner's submissions that the Adjudicator excepts above - changes the future legal effect of past conduct, that is, a new Act can govern "future disciplinary decisions" arrived at since the repeal of an "old Act" and in regard to conduct that predated the new Act.

55. What the members entirely fail to note in their reliance on Adjudicator Filmer's ruling is his conclusion on page 3 that "the new Act governs procedurally and substantively". The Commissioner notes that, as with the instant case, *O'Neill and Asmusssen* involved conduct that preceded the new Act coming into force and proceedings after the - in force date and, the Commissioner submits, the *O'Neill* decision is good authority, when applied to the current facts, that the Discipline Authority lawfully conducted these proceedings by reference to section 77.

56. The members also rely extensively on the decision of Mr. Ian Pitfield who conducted a review of a discipline authority's decision in the case of Complaint against *Constable X et al.* The proceeding in Constable *X* can be distinguished from the instant matter in that Mr. Pitfield decided it under a section 117 review based solely on the Final Investigation Report and attendant documents. Unlike Adjudicator Filmer in *O'Neill*, Mr. Pitfield did not have the benefit of any argument on the issue of the temporal application of the substantive portions of the new enactment. With the greatest respect, Mr. Pitfield likely erred when he:

a) relied on section 35 of the *Interpretation Act* which deals with repealed enactments, and not section 36, which applies - as in the case of the amended *Police Act*, to circumstances where one enactment has been repealed and replaced; and

b) relied on a criminal case for authority on the temporal application of the penalties in new enactments when the criminal law is affected by the unique and express application of the *Charter*: conduct that predates a new enactment and which

carries the risk of penal sanction may not be subjected to new penalties if those new penalties are higher.

57. With the benefit of argument, Mr. Pitfield's attention would likely have been drawn also to the repealed and replace requirements of section 36 which require that any proceeding commenced under the former enactment must be continued under and in conformity with the new enactment, as well as to the Legislatures express provision that the subjects of commenced proceedings have the benefit of any lower penalties in a new enactment, a strong suggestion that -by the absence of any comparable express provision insulating a subject person from new higher penalties - that the legislature was content that the latter eventuality may arise and that a person may be subject to new tougher penalties imposed on conduct that predated a new enactment.

58. Finally, the Commissioner respectfully submits in regard to Adjudicator Singh's decision in the matter of a *Complaint against Constable Alex Wood* that the issue of the temporal application of the substantive provisions of the amended *Police Act* were not joined and the Adjudicator did not have the benefit of full argument on that issue.

59. In summary, the Commissioner submits that the *Police Amendment Act* is retrospective in operation and that there is no common law rule against the retrospective application of legislation.

60. Further, even if the *Police Amendment Act* were found to be retroactive in its application, the rule against retroactive application of an enactment is merely a rebuttable presumption in the interpretation of an enactment. The presumption can be rebutted by a clear intention of the legislature that the new enactment is to apply retroactively. The rule against retroactive application is strong when it is applied to prohibit interference with vested economic rights; however, it carries only modest weight in the face of the legislature's express or implicit intention.

61. The present question as to the temporal application of the *Police Amendment Act* does not affect economic rights. Police members have neither a *Charter* right nor a common law vested

right to be subject only to penalties in the former enactment for conduct that was culpable under both the former and new enactments. The Legislature clearly expressed an intent that complaints not disposed of when the *Police Amendment Act* came into force would be subject to the provisions of the amended *Police Act* with all that it implies. This includes being subject to new penalty provisions. This is reinforced by the fact that section 36 of the *Interpretation Act* requires that, in the context of full application of a the new enactment to a person in ongoing proceedings, the person is expressly required to have the benefit of any lighter penalties, but the section is silent on whether a person should be similarly insulated from penalties in a replacement enactment that are tougher.

62. For all of the foregoing reasons, the Commissioner submits that the Discipline Authority's reference to section 77, in the conduct of the Discipline Proceeding and in his disposition of the complaint, should be upheld.

All of which is respectfully submitted

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