IN THE MATTER OF THE *POLICE ACT*, RSBC 1996, c. 367

AND IN THE MATTER OF A REVIEW ON THE RECORD PURSUAN TO SECTION 141 OF THE *POLICE ACT* BEFORE THE ADJUDICATOR, THE HONOURABLE JAKOB de VILLIERS, QC

SUBMISSIONS OF COMMISSION COUNSEL

Introduction

1. The Police Complaint Commissioner (the "Commissioner") arranged this Review on the Record ("ROR") pursuant to section 141 of the *Police Act*.

2. The ROR arises from the April 14, 2011 disciplinary decision of the Discipline Authority ("DA"), Mayor Dean Fortin, Chair of the Victoria Police Board, with respect to the conduct of Victoria Police Department Chief Constable Jamie Graham.

3. The DA found that on November 30, 2009, Chief Constable Graham committed the discipline default of "discreditable conduct" by making certain comments, while on duty, during a speech to the International Security Conference in Vancouver, BC, contrary to s. 5 of the *Code of Professional Conduct Regulation* to the *Police Act* (as in force on November 30, 2009).

4. The DA's disciplinary decision followed a discipline proceeding on March 31, 2011, at which the Final Investigation Report was filed, and testimony heard, from the author of that report, the investigating officer, Chief Superintendent R.G. (Rick) Taylor of the RCMP. Chief Constable Graham also testified at the discipline proceeding.

5. This ROR was arranged by the Police Complaint Commissioner, as set out in his Notice dated October 7, 2011.

6. At the ROR Conference on November 4, 2011, before Adjudicator de Villiers, it was determined that the ROR would proceed on the record set out in section 141(3), with no further evidence adduced. Adjudicator de

Villiers set out a schedule of dates for provision of submissions by Chief Constable Graham, Mr. Dean and Commission Counsel (which schedule was adjusted through subsequent correspondence).

7. Section 141(9) of the Act provides:

> *"the standard of review to be applied by an adjudicator to a disciplinary decision is one of correctness".*

Issues

The "New" Investigation by Chief Superintendent Taylor

8. In submissions before the DA at the March 31, 2011 discipline proceeding counsel for Chief Constable Graham noted the "new" investigation carried out by Chief Superintendent Taylor, and noted that no citation of authority had been given for the PCC's order for that new investigation. This was merely a comment made by counsel in the course of chronicling the matter, and not an attack on the jurisdiction of the tribunal.

9. For the reasons set out in the Notice of Review on the Record of October 7, 2011 (paragraph 9), the PCC concluded that a "new investigation must be conducted pursuant to Section 93(1)(a) of the *Police Act*. That new investigation was ordered by the PCC on July 26, 2010.

10. The new investigation was conducted by Chief Superintendent Taylor, who presented and was cross-examined about his Final Investigation Report at the discipline proceeding under review herein. Chief Constable Graham raises no jurisdictional issue on this basis, and his counsel confirmed this at the ROR Conference on November 4, 2011. Mr. Dean contends the new investigation was flawed, but raises no jurisdictional issue either.

11. It is respectfully submitted that the Act is clear that the PCC has the power to order the new investigation under section 93(1)(a), and that the discipline proceeding before the DA on March 31, 201 proceeded correctly in the jurisdictional sense.

The Interview of the Bus Driver

12. In correspondence to the participants in advance of the ROR Conference, Adjudicator de Villiers noted issues he would likely raise at a subsequent hearing, including: "What inference, if any, should be drawn from the fact that the investigator apparently did not interview the driver of the bus, the alleged 'cop'".

13. Mr. Dean raises concerns about this lack of an interview, or at a minimum the failure by the investigating officer to determine if the driver was an undercover officer or not. Among other things, he submits that Adjudicator de Villiers cancel this review; an adjudicator is not provided that avenue of recourse by s. 141(10).

14. Section 141(3) sets out the materials which may be reviewed by an adjudicator conducting an ROR, Adjudicator de Villiers not having found that there are special circumstances and that is was necessary and appropriate to receive other evidence under s. 141(4).

15. Accordingly, it is respectfully submitted that Adjudicator de Villiers has before him the record of a disciplinary decision as mandated by the Act, and it is that record which he must consider in determining the matter under s. 141(10).

The Applicable Definition of "Discreditable Conduct"

16. This matter was raised at the ROR Conference as an issue to address, since the alleged misconduct occurred November 30, 2009, prior to the amendments to the Act.

17. The amendments to the Act replaced the definition of "discreditable conduct" in section 5 of the *Code of Professional Conduct Regulation* (and the associated section 17 provision regarding the mental element of disciplinary default) with section 77(3)(h) of the new Act.

18. An issue before the DA at the March 31, 2011 discipline proceeding was which definition of "discreditable conduct" was applicable. The DA found that the old definition applied.

19. Mr. Hern, on behalf of Chief Constable Graham, has provided fulsome submissions in that regard to the DA, and has again in this ROR. Those include reference to earlier decisions from Adjudicators under this Act: Adjudicator Pitfield, dated January 14, 2011 (Tab 8) and Adjudicator Filmer, dated October 11, 2011 (Tab 9).

20. At the ROR Conference, and for completeness, I made reference to an earlier decision from Adjudicator Filmer, from the public hearing into Constables O'Neill and Asmussen (Victoria, September 8, 2010). At the bottom of page 2 of that decision, Adjudicator Filmer states:

"I accept the definition of "retrospective" and its effect on the law as set out on page 3 of the argument of Counsel for the PCC.

> "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 Brenner v. Canada (Secretary of State). 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 in-force date. The amended Police Act does not reach back in time and change non-culpable behaviour into culpable behaviour. There is no rule of construction that such retrospective provisions should be given anything but full effect.

"The effect of retrospectivity in this matter would be to allow the new Act to govern future disciplinary decisions to be applied to past conduct, ***but not to change the definition of past conduct contained in the old Act."*** [boldfaced emphasis added]

21. Accordingly, it is respectfully submitted that the DA was correct in applying the definition of "discreditable conduct" from the old *Code of Professional Conduct,* which was in force on November 30, 2009.

22. Thus, the relevant portion of the definition of "discreditable conduct", as set out in section 5 of the *Code,* was correctly noted by the DA at page 5 and 6 of his April 14, 2001 decision:

> *For the purposes of section 4(1)(a), a police officer commits the disciplinary default of discreditable conduct if*
>
> *(a) the police officer, while on duty, acts in a disorderly manner or in a manner that is*
>
> *i. prejudicial to the maintenance of discipline in the municipal police department with which the police officer is employed, or*
>
> *ii. likely to discredit the reputation of the municipal police department with which the police officer is employed.*

23. As well, section 17 of the *Code* is also relevant to this matter:

> *Unless otherwise specified in the Code, a police officer commits a disciplinary default if the police officer intentionally or recklessly*

committed the act or omission constituting the disciplinary default.

Was Chief Constable Graham "On Duty" When Making the Speech?

24. Counsel for Chief Constable Graham does not raise this as an issue on the ROR, though he did raise it at the discipline proceeding.

25. The DA addressed this issue at page 6, noting that Chief Constable Graham testified he had not turned his mind to the issue of whether he was on or off duty during the speech. The DA noted that the Chief Constable "was presented as the Chief Constable of the Victoria City Police to the audience and as part of the billing for the conference". The DA went on to find:

"Appearing at the conference is clearly within the terms of his employment contract. It includes authority to represent the department in a variety of public speaking engagements, appearances, presentations and various community meetings. He was introduced as the Chief Constable of the Victoria Police Department and was engaged as such.

"It is my conclusion that Chief Constable Jamie Graham was on duty at the time of making the statement."

26. Given the nature of the position of Chief Constable, the nature of the appearance (including the "billing" of the Conference) and the topic, it is respectfully submitted that the DA was correct in this determination. As noted, Chief Constable Graham does not challenge that finding by the DA.

Burden of Proof

27. To address a subsidiary issue raised by Adjudicator de Villiers, it is respectfully submitted that the law is now clear that the burden of proof in civil matters such as this one is proof on a balance of probabilities. This was the standard employed by the DA (page 6), and it is submitted it is the correct standard.

28. That this is the correct burden of proof to apply in civil matters was recently clarified by the Supreme Court of Canada in *F.H. v. MacDougall*, [2008] 3 SCR 41, where the Court made it clear that there are not varying degrees of proof depending on such factors as the "seriousness" of the matter. After discussing various approaches to the issue, the Court set out commencing at paragraph 40 the approach Canadian Courts should adopt, concluding at paragraph 49 by stating:

"In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred".

Did Chief Constable Graham Commit the Default Alleged?

29. It is respectfully submitted that this brings matters to the key issue for the Adjudicator to assess: do the comments of Chief Constable Graham in the circumstances amount to discreditable conduct as defined in section 5 of the *Code of Professional Conduct Regulation*, bearing in mind the mental element as set out in section 17? Or, in the words of section 141(10), Adjudicator de Villiers must "decide whether any misconduct has been proven"

30. As noted, the facts in this matter are largely not in dispute. There is no question the comments at issue were made on the date in question at the Conference.

31. Moreover, there is no question that the comments were improper, particularly as they related to possible undercover operations in the context of the 2010 Olympics and the on-going Torch Relay. The Chief Constable's actions following the comments, in particular his apologies, are indicative of his own awareness of the resultant negative impact. Indeed, this is referred to by Mr. Hern in his submissions in this matter, at paragraph 11.

32. As noted in the investigating officer's evidence (page 22, line 22 to page 23, line 11), there was no specific evidence that the Chief Constable knew that there "was or was not" an undercover officer on the bus, but the investigating officer found that the remarks were "inappropriate in that setting" and a "poor attempt at humour".

33. Mr. Hern submits that the comments by Chief Constable Graham were, variously, "inadvertent", "unscripted", "spontaneous", "in jest" and "off the cuff". He submits, as he did before the DA, that the comments were neither "intentional" nor "reckless", and thus do not rise to the level of "discreditable conduct" when assessed in light of sections 5 and 17.

34. Mr. Hern submits that the DA's decision in this regard is not correct, and it is on this basis alone that the Chief Constable, as summarized at paragraph 43 of his submission herein, seeks a finding that the DA's decision be set aside and the allegation dismissed.

35. In essence, Mr. Hern submits that the DA should have found that the act committed (the words spoken) was neither intentional nor reckless, and so

cannot constitute the disciplinary default of "discreditable conduct" contrary to section 5, due to section 17.

36. Mr. Hern notes in his request for the ROR that this issue was squarely put to the DA in both written and oral submissions at the discipline proceedings. However, he submits that the DA misconstrued the issue and erred.

37. Mr. Dean notes in his submissions that the investigation did not determine if the person driving the bus was an undercover officer. Mr. Dean also makes the submission that, whether or not that was the case, the comments amount to discreditable conduct. Mr. Dean appears to submit that the making of a joke is indicative that the comments were both intentional and reckless.

38. On an assessment of this matter by Adjudicator de Villiers, it is respectfully submitted that if the comments are found to be either "intentional" or "reckless", on a balance of probabilities, misconduct has been proven. Conversely, if the comments were neither "intentional" nor "reckless", misconduct has not been proven.

39. The concepts of "intentional" and "reckless" behaviour are both well known to the law, and the various definitions cited by Mr. Hern are of assistance.

40. With respect, there can be no question that Chief Constable Graham intended to make the comments. There is no suggestion that he was not aware of what he was saying. To the contrary, he acknowledged that the comments were an attempt at humour (Transcript, page 23, lines 9 to 11).

41. Rather, it is contended on Chief Constable Graham's behalf, as it was before the DA, that the comments made were "unscripted and spontaneous", and as such the requisite mental state for proof of misconduct is absent.

42. The DA noted the importance of the position of Chief Constable, as a representative of "the whole of the Victoria Police Department" and "the public face of the department". The DA also noted the length of service of the Chief Constable at "high executive positions", and that this was not a case of "a constable making a rookie mistake".

43. With respect, and contrary to the submissions of Mr. Hern, these comments by the DA may be viewed as a finding that in making the comments, albeit with the intent of humour, the Chief Constable thereby intentionally or recklessly acted in a manner likely to discredit reputation of the department.

44. In other words, it is respectfully submitted that it may be that the DA correctly found, and that it is the case, that although the motive behind the comments may have been humour, the making of such comments in such a setting (spontaneously or otherwise) by an executive officer as experienced as the Chief Constable, on a topic as sensitive as undercover operations in relation to the 2010 Olympic Games, is misconduct.

All of which is respectfully submitted this 9th day of January, 2012.

Joseph M. Doyle
Commission Counsel