In the matter of a review on the record, relating to the complaint against

**Chief Constable Jamie Hamilton Graham**

of the Victoria City Police Department, conducted by

**The Honourable Jakob S. de Villiers Q.C.**

**Adjudicator**,

with written submissions by:

Sean Hern, Esq., Counsel for Chief Constable Graham
Bruce Dean, Esq., in person
Joseph M. Doyle, Esq., Commission Counsel

January 30, 2012

NATURE OF THE PROCEEDINGS:

The Police Complaint Commissioner has granted a request by Chief Constable Jamie Hamilton Graham of the City of Victoria Police Department (hereafter called "Chief Graham") for a review on the record pursuant to the provisions of Section 138(1)(d) of the *Police Act,* of certain disciplinary proceedings taken against him, arising from his conduct on November 30, 2009, in making some allegedly improper remarks while addressing a meeting in Vancouver, attended by persons who had an interest and involvement in security measures related to the Olympic Games.

The disciplinary proceedings eventually resulted in a finding, on April 14, 2011, by His Worship, the Mayor of the City of Victoria, in his capacity as Chair of the Victoria Police Board, that Chief Graham had been guilty of "Discreditable Conduct", contrary to Section 77(3)(h) of the *Police Act* and his imposition of a penalty in the form of a written reprimand on May 12, 2011.

By virtue of a recommendation by the Associate Chief Justice of the Supreme Court I have, as a retired Judge of the Provincial Court, been appointed to preside as Adjudicator in these proceedings pursuant to Section 142 of the *Police Act.*

The various proceedings in this matter, preceding my appointment, have been tortuous and slow.

It is not in dispute that Chief Graham, at a meeting, on November 30, 2009, attended by at least 80 persons, and referring to security measures taken by the police in

conjunction with the then recent Olympic Games ceremonies, made the following remarks, as a keynote speaker :

*"The protestors, very few arrests were made, everybody left upset with ah why there wasn't really much action. And then you knew that the protestors weren't that organized when on the ferry on the way over they all rented a bus. They all came over on a bus. And there was a cop drivin' the bus."*

Because of a complaint made by Mr. Dean, a citizen, arising from Chief Graham's remarks, an investigation into the Chief's conduct was carried out, at the request of the Police Complaint Commissioner, by a senior officer of the Royal Canadian Mounted Police, ("the RCMP") who concluded that Chief Graham had not acted improperly. That resulted in Chief Graham being absolved by the Mayor. That investigation commenced on December 29, 2009 and was completed on May 28, 2010, with the submission of the officer's report, which was accepted by the Mayor.

Mr. Dean had no personal involvement in the subject matter of the events that led to the disciplinary proceedings. He was not a "protestor." Part of the officer's investigation had, however, focused on Mr. Dean's motives for making his complaint, which were, in my opinion, entirely irrelevant to the issue, since there was no dispute as to the facts of Chief Graham's conduct. Mr. Dean's credibility and motives for making the complaint were not in issue and should not have been treated as such. Whether or not Mr. Dean had a grudge against the police in general or Chief Graham in particular was immaterial. Mr. Dean, like any other citizen, had the right to report conduct of a police officer that, he believed, warranted investigation. Every citizen has the right, perhaps even the moral duty, to bring alleged police misconduct to the attention of the appropriate authorities. Treating the report of this incident as essentially a private dispute between Mr. Dean and Chief Graham, the officer attempted to bring them together to resolve the dispute. The attempt failed. However, as a result of the report of the investigating officer, Chief Graham was absolved by His Worship, the Mayor.

Mr. Dean complained about this disposition of his complaint and, by letter, dated July 7, 2010, requested a review by a retired judge, pursuant to Section 117 of the Police Act. On July 14, 2010, the B.C. Civil Liberties Association filed a separate complaint with the office of the Police Complaint Commissioner, supporting Mr. Dean in his complaint and request.

On July 26, 2010 the Commissioner requested that the RCMP appoint another officer to carry out a further investigation. That was done. That officer did carry out a thorough investigation, interviewing Chief Graham and 18 other persons, mainly police officers, and concluding that Chief Graham had acted improperly. A record of his interviews, submitted to the Mayor, has been provided to me. This investigator, quite properly,

concluded that Mr. Dean's motives for making his complaint were irrelevant, and he did not interview Mr. Dean.

On February 28, 2011 the Mayor wrote to both Mr. Dean and the BC Civil Liberties Association, inviting them to make written submissions. In his reply, received by the Mayor on March 16, 2011, Mr. Dean complained about both the adequacy of the investigation and the appropriateness of the proposed disciplinary or corrective measures. He emphasized that the bus driver had not been interviewed. He alleged that Chief Graham had had three previous "convictions" of discreditable conduct.

On March 31, 2011 the Mayor convened a discipline proceeding at which the second RCMP officer testified and was cross-examined by Chief Graham's counsel, and at which Chief Graham testified. I have read a transcript of it.

The RCMP officer, whose evidence was clear and well presented, stated that, although his investigation did not support Mr. Dean's allegation that Chief Graham had divulged the identity of an undercover police officer, the Chief's public allegation, that the driver was an undercover police officer, predictably caused much embarrassment to members of both the RCMP and the Victoria Police Department.

Chief Graham was not willing to make an admission of discreditable conduct, but admitted that he had made the remarks complained of on the occasion alleged. He characterized them as "spontaneous and off the cuff."

On April 14, 2011 the Mayor, as Discipline Authority, after a hearing, at which Chief Graham was given the opportunity to testify and at which his counsel made detailed submissions on the evidence and the law, found that Chief Graham had committed discreditable conduct, by making those remarks. On May 12, 2011 he imposed the penalty of a written reprimand. But he did not address the serious issues of alleged previous misconduct, raised by Mr. Dean.

It was not until July 5, 2011 that the Commissioner issued a letter of discontinuance of the first RCMP officer's investigation that had resulted in the exoneration of Chief Graham, but I note that in his submission to me Mr. Hern does not challenge the propriety of the Commissioner's decision to cause the second investigation to proceed.

In the meanwhile, on June 6, 2011 Chief Graham, by his solicitor, requested a review on the record of the Mayor's second decision. That request was granted by the Police Complaint Commissioner and on July 13, 2011 a retired Provincial Court judge was appointed as adjudicator, pursuant to Section 142 of the *Police Act*, to review the proceedings. That gentleman, I am informed, rendered his written decision on August 9, 2011, without having heard any submissions from any interested party. Having reviewed the provisions of the *Police Act*, the Police Complaint Commissioner concluded

that a material procedural irregularity had occurred, and arranged a new review on the record pursuant to Section 138(1)(d) of the Police Act. I am now conducting that review. I have not communicated with the said retired judge, and do not know what disposition, if any, he had proposed. I refrain from commenting on the Commissioner's conclusion that a procedural irregularity had occurred. The Commissioner has not, in his Notice of Review on the Record, disclosed the nature of the alleged irregularity. None of the parties before me has raised the issue of whether the Commissioner has the power to override a decision of an adjudicator, however irregular the proceedings resulting in that decision may have been, and to order a new review on the record. I can find no express provision in the Act, either allowing or prohibiting a second or subsequent review. I will therefore proceed on the assumption that I do have jurisdiction.

In addition to reading the record of evidence and proceedings (other than the proceedings before the retired judge) I have received written submissions from counsel for Chief Graham, from counsel for the Police Complaints Commissioner and from Mr. Dean personally. The B.C. Civil Liberties Association has not participated in the proceeding before me, although given an opportunity to do so, and His Worship, the Mayor, by his representative, informed me at the pre-hearing conference that he would make no submissions. I have nevertheless read and considered the complaint that the said Association has filed in this matter.

Having reviewed the record and read the submissions, made to me by counsel for Chief Graham, by counsel for the Police Complaints Commissioner and by Mr. Dean personally, I am now ready to render my decision and bring a conclusion to these proceedings. Before doing so, however, it is my duty to point out that the allegation which, according to Paragraph 27 of the Police Complaints Commissioner's Notice of Review on the Record, I must investigate, is stated to be:

*27. It is therefore alleged that Chief Constable Jamie Graham committed the following disciplinary default pursuant to section 77 of the Police Act:*

> ***Discreditable Conduct:*** *contrary to section 77 of the Police Act, subject member committed the disciplinary default of discreditable conduct, which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department.*

The Commissioner was in error in referring to that provision, which was not in force at the time of the alleged misconduct. Mr. Hern has not explicitly taken issue with the Commissioner's unintended mischaracterization of the alleged misconduct, although he has expressly, and correctly, in my opinion, presented lengthy submissions in support of the proposition that the law to have been applied to Chief Graham's conduct was the

now repealed *Code of Professional Conduct Regulation*, rather than the newly enacted Section 77 of the *Police Act.* Accordingly I shall treat the Commissioner's request for a review on the record as being a request that I determine whether Chief Graham's conduct constituted a **disciplinary default**, as defined in Section 4 of the said *Code*.

INTRODUCTION:

We Canadians are fortunate to live in a free and democratic society. One of our freedoms is the right to protest against that of which we disapprove, including the policies and practices of our democratically elected governments at all levels, however unreasonable or unfounded our protests may be. The right to protest does not, however, include the right to practise or advocate violence, the destruction of property or other unlawful acts.

I take judicial notice of the fact that some people, calling themselves "protestors," sometimes use the occasion of national or international gatherings and ceremonies, not only to voice their political and other grievances and advocate changes, but also to engage in or advocate acts of violence or destruction of property. For that reason our police forces, both national and municipal, have over the years learned to take adequate measures to thwart the activities of violent or destructive protestors. Such measures have usually, but alas, not always, been successful.

Successful police tactics do sometimes involve infiltrating groups of people that, the police have reason to believe, intend to disrupt lawful gatherings of people. There is nothing improper in such infiltration, provided the infiltrators do not themselves commit offences or instigate the commission of offences. The obvious purpose of the infiltration is to be alert to the possibility of impending improper conduct, to frustrate such conduct by appropriate, lawful measures and to prosecute the perpetrators of unlawful acts.

It would be highly improper for any member of any police force to reveal to the public the identity or existence of any police officer or police agent who has participated in an undercover capacity in any such activity, unless that member is required to do so while testifying in a court of law. Not only is such a revelation likely to embarrass the undercover operator and the police unit that employed him or her, but it is highly likely to render a future such strategy in respect of suspected would-be offenders wholly ineffective.

An employee in the private sector who, without the knowledge of his or her employer, is a police informer, and engages in spying on the activities of customers of an employer would be at risk of dismissal and feel betrayed. The revelation would probably frustrate the future efforts of police to recruit undercover operators.

One important event in our recent history, in which the police had reason to fear unruly conduct on the part of "protestors" was the Olympic games, in 2009. This event involved the carrying of the "Olympic torch" from Victoria, in relays, across Canada.

Since the torch carrying journey began in Victoria, the local police, including the City of Victoria Police, took such precautions as they judged appropriate, to avoid violent or improper "protests" at the games. They were apparently successful, and the carrying of the torch was conducted peacefully. Whether or not the police employed "undercover" operators and, if so, whether these operators were members of a police force or citizens assisting the police, is immaterial. What is obvious though is that if a citizen who is not a member of a police force, is assisting the police by in effect spying on citizens, the disclosure of his or her identity as a police informer is likely to be highly embarrassing, both to that person and to his or her employer, and, more importantly, to inhibit other potential future police informers from assisting the police.

CHIEF GRAHAM'S COMMENTS:

It was against this background that, in the aftermath of the Olympics event, a large number of representatives of those involved in the organization, supervision and security of the Olympic torch ceremonies gathered on November 30, 2009, in Vancouver, at the "12th Annual International Security Conference", and were addressed by those who had played a key role in taking the successful security precautions, in preparation for the Olympic torch relay. The purpose of the gathering was to learn from the experience of those involved in such security operations. The theme was described as **"Emergency Management/Public Safety Transformation - Meeting the Challenges of 2010 and beyond."**

One keynote speaker, by invitation, was Chief Graham, a man with more than 40 years of policing experience, who addressed a gathering of more than 80 persons in his capacity as Police Chief of the City of Victoria. He had no doubt been invited to speak on the assumption that he had been involved in supervising and directing security measures taken to avoid trouble by "protestors."

As a result of his above quoted remarks, that were immediately, and predictably, reported in the press, separate complaints, respecting his conduct, were made to the Police Complaint Commissioner, first by Mr. Bruce Dean and then by the British Columbia Civil Liberties Association.

At the request of the Commissioner a senior member of the Royal Canadian Mounted Police, as related above, conducted an investigation of Chief Graham's conduct.

Chief Graham freely admitted making the comments attributed to him, and said that they were false, inasmuch as he had no reason to believe that the driver was in fact a

constable, but were intended to be humorous and in fact provoked laughter. He did not explain and was not asked to explain in what manner he had intended his remarks to be humorous, nor did he say who the butt of his humour was or were, the passengers or the driver or, perhaps, the organizers or instigators of any "protests."

What he did say afterwards, when interviewed by the second RCMP officer was:

*I was trying to paint this picture of a group of ah, ah protestors on a bus all with their placards jammed on a bus. Coming to disrupt an event making it extremely easy for police surveillance to watch them and see what they're going to do. And from that ah there was I, drew some humour in that and, in an attempt to ah expand the humour, ah I made reference to the fact that well we were probably a there was probably an undercover operator driving the bus. And it got laughter in the audience and it was intended simply as an attempt at humour to poke fun at ah, the manner of protest, the fact that they're all contained in one, making it extremely easy for the police investigation of, of their ah pending improper conduct...*

This evidence is, to some extent, at odds with what he had actually said. Nowhere in his reported remarks did he qualify his statement of the presence of the "cop" with the adverb "probably." He purported to make a statement of fact.

Based on his own evidence, I will proceed on the assumption that Chief Graham did not know whether this particular driver was an undercover police agent, and that, whether or not the driver was in fact a "cop", he assumed, when making his comment, that the driver was not a "cop." Therefore when he made his remarks to his audience, he was either intentionally lying or he was reckless of whether his remarks were true, and he had no reason to believe that they were true. Nothing in his accompanying remarks to his audience suggested that he did not mean what he said when he made his allegation, concerning the identity of the driver.

In his submission to me, Chief Graham's counsel uses the term "in jest" when characterizing these remarks. One dictionary definition of "jest" is "a joke or witty remark."

I repeat that Chief Graham's excuse for making his statement has been that he intended to be humorous and to poke fun, not to be mocking or belittling people's right to lawful protest. He did not explain nor was he asked to explain in what way his remarks were humorous or who the butt of his humour was or were. His counsel has not, in his submissions to me, attempted to explain what the nature of the humour or "jest," was, presumably taking the position that the humour was self-evident. Notwithstanding that his remarks provoked laughter I am unable to characterize his remarks as either a joke or witty.

The only reasonable inference from the record is that Chief Graham intended to convey to his audience that the passengers in the bus were would-be protestors, that they were naïvely unaware that the driver was an undercover constable who eavesdropped on them, and that the driver's presence somehow frustrated their unlawful intentions. There is no evidence, one way or the other, that Chief Graham's audience had reason to believe that he was lying to them or that, although mocking the protestors, he was not serious in his allegation that the driver was a constable. On the contrary, he should have foreseen the probability that they would believe him, since it was common knowledge that the infiltration of potential trouble makers by the police or agents of the police had been a normal practice, as is confirmed by the statements given to the investigating RCMP officer by several members of the Victoria Police Department, of different rank, that he interviewed. Chief Graham must also have known that it would have been reasonable for his audience to assume that, as Chief Constable, he had been aware of the measures that the police, under his command, had taken to prevent unlawful activities, including the possible engagement of police infiltrators, and that he would have known if the driver was in fact a "cop."

As related above, counsel for Chief Graham submits that his remarks were in "jest." To the extent that he was perceived to be "jesting" I infer that it was by mocking the naïveté of the "protestors" in allowing themselves to be driven by a police spy. There was nothing in the context of his remarks, before or after he had uttered them, or in their substance, to indicate to his audience that he did not mean what he said.

REVIEW PROCEEDINGS OVERVIEW:

Section 141 of the current *Police Act* governs the proceeding before me.

Section 141(10) reads:

*After a review of a disciplinary decision under this section, the adjudicator must do the following:*

> *(a) decide whether any misconduct has been proven;*
>
> *(b) determine the appropriate disciplinary or corrective measures to be taken in relation to the member ... in accordance with section 126;*
>
> *(c) recommend to a chief constable or the board of the municipal police department concerned any changes in policy or practice that the adjudicator considers advisable in respect of the matter.*

Section 141(9) reads:

*In a review proceeding under this section, the standard of review to be applied by an adjudicator to a disciplinary decision is correctness.*

In *Dunsmuir v. New Brunswick* (2008) 1 S.C.R. 190 the Supreme Court of Canada described the "standard of correctness" as follows:

*When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process, it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset the court must ask whether the tribunal's decision was correct.*

Here the tribunal was His Worship, the Mayor of the City of Victoria, in his capacity as the Chair of the Victoria Police Board and as such the Discipline Authority. After reviewing the evidence submitted to him by the RCMP, hearing Chief Graham and considering the submissions made to him by counsel, His Worship found that Chief Graham's conduct was "discreditable" within the meaning of Section 77(3)(h) of the current *Police Act* and, by way of penalty, reprimanded him in writing pursuant to section 126(1)(h) of the *Act*.

My task is to review the evidence considered by His Worship in the light of the submissions made to me, to draw such inferences from the facts as I deem proper and to arrive at my own conclusions *de novo*. If I find that the evidence on the record does not support a conclusion that Chief Graham's conduct was discreditable I must dismiss the allegation against him and set aside the Mayor's findings. If, however, applying the correctness standard of review, I find the allegation substantiated, I must decide what, if any, penalty is, in my judgment, appropriate and proceed accordingly. Whilst I must be careful not to be swayed by the Mayor's reasoning there is no reason why I should not examine it and see whether it assists me in arriving at my own findings of fact, which may be the same as his or different. I have done so.

In his able written submissions to me, Mr. Hern, Counsel for Chief Graham, has approached the issues on the basis of whether or not His Worship, as disciplinary authority, applied the law correctly and, if he erred in law, Counsel in effect submits that the Mayor's decision should not only be set aside, but that his error should, for that reason, result in the dismissal of the proceedings. I respectfully disagree with that approach. My task, whether or not I find any procedural irregularity or mistake on the part of His Worship, is, pursuant to Section 141 of the *Police Act*, to decide for myself whether the Mayor's decision, finding that misconduct had occurred, however arrived at, was correct, based on the evidence on the record, and, if so, whether the penalty imposed should be confirmed or set aside and replaced by some other disposition.

The *Dunsmuir* decision does not mean that a decision maker's decision must inevitably be set aside simply because he or she had arrived at it by applying the wrong principles of law or statutory provisions, so long as the same disposition would inevitably have resulted from a decision based on the same findings of fact, but applying the correct legal principles.

A review on the record is not in law an appeal, governed by the principles that normally apply to appellate review, with its focus on the reasoning of the decision maker.

LAW:

Mr. Hern submits, quite correctly, that the RCMP officer who submitted his report erred in law by applying provisions of the *Police Act* that had not yet been in force at the time of Chief Graham's alleged misconduct, in determining whether the Chief had misconducted himself, although Mr. Hern concedes, again quite correctly, that the procedure now governing this proceeding before me is regulated by the amended provisions of the current *Police Act*. He submits that, although the Mayor correctly stated the issue of retroactivity, he failed to consider the mental element of the discipline default.

I agree that Chief Graham's conduct was, at the material time, governed by the provisions of the *Police Act Code of Professional Conduct Regulation*, B.C. Reg. 205/98, now repealed.

"Disciplinary default" was defined by Section 4 of that *Code* as, *inter alia, "*discreditable conduct" and "improper disclosure of information." Section 5 defined a number of acts and omissions, constituting such "disciplinary default." It included:

*" (a) the police officer, while on duty, acts ... in a manner that is ...*

*(ii) likely to discredit the reputation of the municipal police department with which the police officer is employed.*

And Section 8 provided that "*a police officer commits the disciplinary default of improper disclosure of information"* if that police officer "*disclose(d) information that is acquired by the police officer in the course of being a police officer ....."* when not required to do so in the performance of his or her duties.

What I thus am required to do is to determine whether Chief Graham's conduct, as alleged in the RCMP report and admitted by him, constituted a disciplinary default under the abovementioned *Code,* then in force and, if so, whether his act was either intentional or reckless.

The mere possibility that the Mayor inadvertently applied the penal provisions of the amended *Act,* rather than the *Code,* in arriving at his conclusion does not put an end to the matter. A reading of his reasons for his decision shows that he was well aware of the impact of the amendments to the law and of his duty to apply it as it existed at the time the impugned statement had been made by Chief Graham. It is my task to consider the undisputed evidence of Chief Graham's conduct and then to determine whether in my own opinion such conduct constituted a disciplinary default under the law as it applied at the time of the conduct complained of, whether or not the Mayor erred in his interpretation of the law. If so, I must determine what the consequence of such disciplinary default must be. I do not sit on appeal from the Mayor as disciplinary authority. I repeat that I must arrive at my own conclusions of law on the proven facts, rather than simply determine whether there are flaws in the Mayor's reasoning. That does not mean that I must ignore the Mayor's reasoning and conclusions. I have, with respect, found his reasoning and conclusions useful, even persuasive, but I am nevertheless required to arrive at my own conclusions.

In determining whether Chief Graham's conduct constituted a disciplinary default I have not been referred to any other quasi-judicial proceedings in which a police officer had been subject to disciplinary proceedings because he or she had purported to reveal the identity of an undercover police officer or agent, whether seriously or in jest. I must form my own opinion on that issue.

The *Act* is silent on the issue of whether the standard of proof of the disciplinary default is the criminal standard of guilt beyond a reasonable doubt or whether proof on the balance of probabilities is sufficient. I note that the Mayor applied the "balance of probabilities" test. That is probably the correct standard, but it does not really matter in this case, for even if the "proof beyond a reasonable doubt" test is applied, the outcome must be the same since the facts are not in dispute.

Section 17 of the Code provided that:

*"Unless otherwise specified in this Code, a police officer commits a disciplinary default if the police officer intentionally or recklessly committed the act or omission constituting the disciplinary default."*

The concept of recklessness in criminal law was defined in the Supreme Court of Canada case of *Sansregret* [1985] 1 S.C.R. 570, cited by Mr. Hern, as *"recklessness involves knowledge of a danger or risk that the prohibited result will occur..."*.

Whatever the standard of proof may be, Chief Graham has admitted making the remarks attributed to him, and does not seriously dispute the fact that he was on duty when he addressed his audience and made those remarks. He had been invited there in his capacity as Victoria City Police Chief and attended in that capacity. I find that he was on

duty. I note, though, that, even if he was off duty, Section 16 of the repealed *Conduct Regulation* provided that a police officer who, while off duty, acted in a manner likely to discredit the reputation of the municipal police department with which he was employed, committed the disciplinary default of improper off-duty conduct.

As a very experienced police officer Chief Graham must have known beforehand that his remarks, made on this occasion by him in his capacity as Chief of the City of Victoria Police, would be taken as literally true by his audience, in the absence of a disclaimer by him. That was the "danger" or "risk" that he must have foreseen and that, I find, he therefore either intended or was indifferent to. That was the "knowledge of the danger or risk that the prohibited result would occur," the risk having been that his audience would believe, not only the mere allegation that an undercover operator had been engaged by the police to spy on the "protestors," but also the identity of the alleged spy, namely a "cop".

During the disciplinary hearing Chief Graham offered two excuses for having made his remarks. First, he said that his comments at the meeting were:

”*intended to be humorous, to poke fun at the organizational efforts by certain protest groups. I was trying to paint this picture of a group of protestors on a bus, all with their placards jammed on a bus, coming to disrupt an event, making it extremely easy for police surveillance to watch them and see what they're going to do. I drew some humour in that, and in an attempt to expand the humour, I made reference to the fact that well we were probably, there was probably an undercover operator driving the bus. And it got laughter on the audience and it was intended simply as an attempt at humour."*

But this evidence is at variance with the transcript of his actual remarks, which, he admits, is correct. His statement to his audience, as transcribed, and quoted above, did not contain the qualifying adverb "probably." He had actually said: "*And there was a cop drivin' the bus."* That was a bald and credible statement of fact, with no indication to his audience that he meant to convey something different from what he had literally said or that he was not serious. As an invited speaker Chief Graham had had time to prepare his address and to consider the implications and consequences of any of his remarks or statements.

Next, he has testified that he had been unaware of the fact that there was or were news reporters attending the meeting, and that he did not intend or expect his remarks to be publicized. I have no hesitation in rejecting this latter excuse. Even if he was unaware of the presence of news reporters he must, as a matter of common sense, have realized that, with over 80 persons in his audience, his sensational remarks would not be kept in confidence, especially when he had not asked for that to be done. If his remarks were

improper it makes little difference whether or not they were conveyed directly to the news media. He knew that he was addressing a large audience.

I accept that he intended to ridicule the protestors to his audience, but note that he did not express himself in a manner that conveyed the mere possibility of a "cop" being the driver, as a matter of speculation. While he no doubt intended to mock the protestors, he stated as a fact, not as a mere possibility, that the driver was a "cop." Nobody in his wide audience had any reason to doubt that he literally meant what he said, even if his remarks were intended to be amusing at the expense of the "protestors", by mocking them, and he must have known that. He must also have known that anybody in his audience with experience of undercover operations would have expected covert operations to have taken place, and that the notion of a bus driver being an undercover police agent would have seemed credible and plausible.

When interviewed by the RCMP officer Chief Graham said:

*"I would be amazed if there didn't include covert operations. I assumed for the RCMP to take care of what they had to take care of."*

He had no reason to believe that his audience would not take his remarks seriously and literally when he alleged that the driver was acting undercover and that the protestors did not know it and when he implied that they had been made fools of. He was, at the least, reckless within the meaning of Section 17 of the *Code*, applying the standard of proof enunciated in *Sansregret,* whether or not his act in making the statement had the intentional objective of making a disclosure of a fact. He knew that his audience had no reason to assume that he was in jest when he made the bald statement that the driver was a "cop." The statement was presented as a fact and it was plausible. He was reckless of the consequences of his statement.

Mr. Hern refers to Chief Superintendent Taylor's acknowledgment that Chief Graham's statement was properly characterized as "inadvertent." Although I respect the Chief Superintendent's opinion it does not bind me to arrive at the same conclusion. His opinion is not a statement of fact, and I do not accept that Chief Graham's allegation was inadvertent or spontaneous.

The driver of the bus was not interviewed and did not give evidence. He may or may not in fact have been a "cop."

Whatever the consequences to the driver and his employer might have been, Chief Graham's audience would inevitably have understood him to have made an improper disclosure of a secret, undercover, police activity and he must have foreseen that some of them might have talked afterwards to the news media, even if he did not know or suspect that there were reporters in his audience. He certainly did not ask his large

audience to keep his purported disclosure of the driver's involvement confidential. He was reckless of the truth and reckless of the consequences to the reputation of the City of Victoria Police Department of his immature conduct.

Counsel for Chief Graham takes the position that the Mayor had failed to consider the mental element that is required to establish the discipline default, and that for that reason his decision should be set aside and substituted with a dismissal. Whether or not the Mayor erred in his analysis and approach, I must draw my own conclusions. I have concluded that Chief Graham did have the mental element required to prove his misconduct.

I repeat that I find that Chief Graham's conduct, whether or not his ultimate intention was to be simply humorous, was, at the least, a reckless act within the meaning of Section 17 of the *Code of Professional Conduct*, quoted above, and thus a "disciplinary default" within the meaning of the *Code*, as it applied at the material time, even if some of his audience might indeed have thought that he was being funny.

It is plain from the statements made by various experienced police officers, interviewed in this matter, that they were embarrassed and upset by these reckless and foolish remarks. Chief Graham, as a senior police officer with a very long record of service, ought to have known and foreseen, not only that he would likely embarrass his colleagues by his conduct but that it was wrong for him to have misled his audience by making his allegations, to have smeared the reputation of the driver and to have mocked the passengers, who appear to have been law abiding citizens, whether or not they were "protestors".

I find that the Mayor did not err in his assessment of Chief Graham's conduct or in his conclusion, but I hold that, whether or not the Mayor erred in his assessment of the evidence and in his application of the law, I have both the power and the duty, under Section 141(10) of the *Police Act,* to consider and decide myself whether any misconduct has been proven on the record and, if so, to determine the appropriate disciplinary measure. For the reasons stated above, I find that misconduct on the part of Chief Graham has indeed been proven beyond a reasonable doubt, because his conduct was, foreseeably, likely to have discredited the reputation and undermined the efficacy of the City of Victoria Police Department, and thus to have constituted the disciplinary default of discreditable conduct, contrary to the provisions of Section 5(a)(ii) of the *Code of Professional Conduct Regulation*, then in force.

DISPOSITION:

As indicated above, the provisions of Section 77 of the *Police Act* were not in effect at the time of the alleged misconduct. Accordingly, I correct His Worship's finding, only to the extent of substituting a finding that Chief Graham's conduct constituted a

"disciplinary default of discreditable conduct" under the provisions of Section 5(a)((ii) of the now repealed *Code of Professional Conduct Regulation*.

I am now required by Section 141(10)(b) of the *Act* to determine and impose the appropriate disciplinary measure for this disciplinary default.

Chief Graham's counsel has made no submissions on the issue of punishment, no doubt taking the position that this issue is academic since his client's conduct, in his submission, did not constitute a disciplinary default. Mr. Dean, on the other hand, takes the position that a more severe penalty ought to have been imposed, because, according to him, Chief Graham had a record of three previous instances of misconduct. That may be so, but no evidence of such previous misconduct or previous penalties was put before the Mayor or forms part of the record that I am required to review. The failure to probe the validity or otherwise of Mr. Dean's allegations of proven previous misconduct is regrettable. If the allegation of such misconduct was without foundation it leaves a cloud over Chief Graham's reputation, which could easily have been removed if found to be untrue. On the other hand, if there was in fact a foundation for the allegation of previous misconduct and that misconduct was not taken into account in assessing the penalty, then he has probably been dealt with more leniently than he deserved.

Mr. Dean's allegations should have been taken seriously and should have been the subject of further investigation. However, based on the record of admissible evidence that I have reviewed, I am obliged to treat Chief Graham as an officer with an unblemished and lengthy record of service, without any previous indiscretions. An aggravating factor, however, is that, in his capacity as an experienced senior police officer, with over 40 years of service, he should have clearly foreseen that his facetious and untruthful conduct would bring embarrassment to senior members of his Police Department, as it did in fact do, according to their statements to the investigating officer, and possibly also to the driver and owner of the bus. It was also gratuitously and deliberately insulting to those citizens who were on their way to the ceremonies, with the possible intention of making their lawful protests heard. It has set a bad example to all those serving under him, although, to his credit, he has apologized to his senior staff. It is highly improbable that he will repeat his indiscretion.

His Worship, the Mayor, imposed on him the penalty of a written reprimand. Of the nine possible disciplinary or corrective measures provided for in the *Code* only one would have been more lenient, namely a verbal reprimand. Such a reprimand would not, in my opinion, have been sufficient.

Weighing these considerations, including the fact that the disciplinary measures provided for under the amended Act are substantially the same as under the repealed Regulation, and that I am not sitting on appeal from the Mayor`s disposition, but must

make my own disposition, I nevertheless take the view that the appropriate disciplinary measure for me to impose, on the basis of the admissible evidence before me, is that which His Worship has already in substance imposed and implemented, namely a written reprimand pursuant to Section 19(1)(h)of the *Code* (equivalent to Section 126(1)(i) of the *Police Act*.) This is necessary, both to bring home to Chief Graham that an officer in his senior and responsible position has a duty to behave publicly in a manner that does not gratuitously bring embarrassment to the members of the police department of which he is the Chief, or in any manner subvert their ability to execute their duties discreetly and effectively, with dignity and without fear of embarrassment, either to themselves or to persons engaged by the police as undercover agents, and also to assure the public that conduct of this nature will not be tolerated or condoned.

I accordingly hereby affirm and repeat the said written reprimand of His Worship, the Mayor.

I have no recommendation to make to the Victoria Police Board, pursuant to Section 141(10)(c) of the *Police Act*, (relating to policy or practice).

JAKOB S. de VILLIERS Q.C.
Adjudicator