

IN THE MATTER OF THE *POLICE ACT*

Cst. FELIPE GOMES
DELTA POLICE DEPARTMENT

SUBMISSIONS OF COUNSEL FOR Cst. GOMES
REVIEW ON THE RECORD

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1. FACTS

1.1 MISCONDUCT ADMITTED

1. Cst. Gomes admitted to allegations 1-4 and 6 in the Form 2 – Amended Notice of Discipline Hearing dated 24 October 2014 (**Ex. 17**).
2. The essence of the misconduct is that on two occasions Cst. Gomes created police notes that he misrepresented as having been made contemporaneous to the dates on the notes; and that Cst. Gomes later gave false and misleading statements to the PSS investigators about when he made the notes.
3. Cst. Gomes has also admitted to neglect of duty, by leaving blank pages in his notebooks, contrary to departmental policy.
4. The background to the investigation, and the findings, are summarized in the FIR, pages 1-11. Cst. Gomes does not take issue with the facts outlined therein.
5. The evidence and conclusions of the investigators has been summarized in the *S. 98 Supplemental FIR* submitted 31 January 2014 (931 pages), pages 4-25. Cst. Gomes does not take issue with the facts set out therein.

1.2 CST. GOMES' BACKGROUND

6. Cst. Gomes is 33 years old. He is married, and has one infant son. Cst. Gomes and his wife are expecting a second child in late June or early July.
7. As a result, Cst. Gomes' wife, a registered nurse, will be going on maternity leave shortly.

1.3 CST. GOMES' WORK HISTORY

8. Cst. Gomes has been a member of the Delta Police Department since 2004. He has worked in a variety of assignments, primarily in patrol, and as an officer seconded to the

Combined Forces Special Enforcement Unit (“CFSEU-BC”). Within the CFSEU he worked in the Gang Task Force (“GTF”).

9. Cst. Gomes has met or exceeded the standards required of him throughout his career. In his annual Performance Management Appraisals he has consistently been praised for his integrity, excellent work ethic, and for being a team player. The following are examples of typical comments: **Performance Appraisals, pages:**

- 12
- 29
- 30
- 47
- 48
- 61
- 62

10. Of particular importance are Cst. Gomes’ reviews for the time he was seconded to the CFSEU. They are of special importance because they are relatively recent, and because they reflect well on the Delta Police Department within this outside policing unit that is composed of members from several different police agencies. **See *Performance Appraisals*, pages:**

- 61-64
- 71-72
- 75-76
- 80

11. Cst. Gomes has earned a very enviable reputation among his superiors, peers, and more junior officers within the Delta Police Department. He has received more than thirty letters of support from co-workers and members who know him by reputation. **See Ex. 18.** He is repeatedly referred to as hard working, reliable, honest, and a strong mentor.

1.4 MERITORIOUS SERVICE

12. In 2008 Cst. Gomes was awarded the Provincial Police Meritorious Service Medal, by the Lieutenant-Governor of British Columbia. This is British Columbia’s second highest honour for a police officer. Recipients receive a silver military-style medal and decoration, and a certificate. The award is described on the Provincial policing website as follows:

Meritorious Service

This is exemplary performance that enhances the image of police officers in British Columbia. It is awarded to police officers who clearly demonstrated that they acted in a manner significantly beyond the standard normally expected.

Only a very small handful of police officers in British Columbia are awarded the Meritorious Service medal in their policing career.

13. Cst. Gomes was awarded the medal for his role in ensuring the safe evacuation of a senior's residence under threat of a natural gas explosion. An air conditioning unit on a senior's residence had exploded, and the roof was on fire. Cst. Gomes and his squad-mates entered the building and ensured that everyone was evacuated safely.

14. As noted below, when considering the measures that should be imposed for misconduct, an approach that seeks to correct educate must take precedence over purely punitive measures, unless that would bring the administration of police discipline into disrepute. It is submitted that fair minded people would agree that when one is considering whether a police officers should be dismissed because of the discredit that his actions may bring upon policing or a police department, one should also consider the other acts of the same police officer that have enhanced the credit, repute and image of policing. Simply put, would a well-informed member of the public say that Cst. Gomes career and livelihood should not be tossed aside because of his errors in this case, when the same officer has put his life (and his family's livelihood) on the line in the service of his community. Cst. Gomes was awarded the medal for Meritorious Service because of his, "exemplary performance that enhances the image of police officers in British Columbia."

1.5 PRIOR DISCIPLINARY RECORD

15. Cst. Gomes does not have any prior findings of misconduct for deceit or dishonesty.

16. Prior to the Pabla complaint, which was at the root of the investigation that led to the present finding of misconduct, Cst. Gomes had three substantiated complaints of misconduct. He has never received a sanction more serious than a written reprimand.

17. The facts that underlie that allegations in the *Singh* complaint (2009-03), the *Hulme* complaint (2009-13), and the *CPIC-PRIME* complaint (2012-48) have not been disclosed in the

record. However, it is evident that the misconduct was not serious, as the sanctions ranged from managerial advice (which is not truly disciplinary at all) to written reprimand.

18. It may also be noted that the principle of progressive discipline does not justify leaping from mere verbal or written reprimands all the way to dismissal.

1.6 DIAGNOSIS OF ATTENTION-DEFICIT / HYPERACTIVITY DISORDER

19. When Cst. Gomes' practices in keeping notes became the subject of investigation, Cst. Gomes sought the assistance of a psychologist, Dr. James Roche. (See FIR, p. 1435 to p. 1446) (The PSS investigator thought it suspicious that Cst. Gomes would see a psychologist only after the allegations came to light. A more enlightened view would recognize that it is a regrettable but common fact that people with learning deficits, behavioural, psychological or psychiatric problems often do not seek help until the problem reaches the point of crisis.)

20. Dr. Roche has been a practicing clinical psychologist for twenty years. He is a registered psychologist in British Columbia, New York and California.

21. Dr. Roche conducted a battery of standard psychological tests, including tests to determine the validity of Cst. Gomes' self-reported answers. He determined that:

Cst. Gomes' history and assessment scores are well within the range for a diagnosis of Attention-Deficit / Hyperactivity Disorder, Combined Type. His areas of strength include overall memory, areas of weakness include impulsivity, complex attention, reaction time and overall cognitive flexibility. Memory is a different issue from focus and attention and should not be confused. (FIR, p. 1440)

22. He described ADHD as follows:

WHAT IS ATTENTION-DEFICIT / HYPERACTIVITY DISORDER?

Attention-Deficit/Hyperactivity Disorder (ADHD) is the current term for a specific developmental disorder seen in both children and adults that comprises of deficits in behavioural inhibition, sustained attention and resistance to distraction, and the regulation of one's activity level to the demands of a situation. This disorder has had numerous labels over the past century including hyperactive child syndrome, minimal brain dysfunction and attention deficit disorder (ADD) with and without hyperactivity. (Dr. Russell Barkley) *It is a recognized mental health disorder found in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) of the American Psychiatric Association.*

ADHD can cause problems in a number of different life functions including response inhibition, working memory, self-regulation of affect, sustained attention, task initiation, planning, organization, time management, goal directed persistence, cognitive flexibility and metacognition. It may effect different areas of these skills, and change from time to time as life and work requirements change. It has high co-morbidity with other disorders such as anxiety and depression.

(FIR p. 1440, emphasis added)

23. Dr. Roche also explained, based on current understanding of ADHD how it could go undiagnosed into adult-hood **(FIR, p. 1440)**

24. Dr. Roche was asked how ADHD might explain the practice that Cst. Gomes developed of leaving blank pages in his notebooks, contrary to the policy (or best practice) that no blank pages should be left. He said this:

WHY MIGHT CST. GOMES HAVE ADOPTED A PRACTICE OF LEAVING BLANK PAGES? COULD THIS HAVE BEEN A RESULT OR A SYMPTOM OF ADHD, OR A MECHANISM FOR COPING WITH ADHD?

It is not possible to speak with any medical/psychological accuracy as to the reason Cst. Gomes may have left blank pages in his notebooks. I can say that this would be typical behaviour for many individuals with ADHD. An inability to focus or keep up with the activities around him. He reports overall difficulty with goal directed persistence (staying on task) and has difficulty with *complex* attention. Often individuals start to develop methods to get around their cognitive deficits. These are sometimes good ideas, and sometimes they are not. Expecting to go back in just a minute...to fix things is a typical plan for someone with ADHD. They then become distracted and never pull the task back together. This is the type of behaviour I often see patients for, and it is a common symptoms that interferes with their work success or with personal relations. Things started in good faith are not completed, and understanding the severity of the consequences of behaviour is difficult. Unhelpful behaviours often become a habit because they reduce anxiety. Planning deficits are common place in ADHD.

(FIR p. 1141 – Emphasis in Original)

1.6.1 Relevance of Diagnosis

25. Before turning to the reasons this diagnosis is relevant, I should emphasize what the diagnosis is not being used for. The diagnosis is not offered as an excuse for the deceit that Cst. Gomes has admitted to when he created the false notes, or when he claimed in the PSS interviews that they were originals created contemporaneously with the events they describe.

When Cst. Gomes' defective and improper note taking became an issue, he should have owned up to the defects and gaps in his notes, and taken the consequences. (In all likelihood, the consequences to Cst. Gomes of the alleged misconduct that he covered up with the false notes would have been very minor, as it in fact was for the Pabla complaint. If it was determined that the problems in his note-taking were the result of a learning or behavioural deficit, that could have been addressed at the time.) Instead, Cst. Gomes gave misleading statements which created a great deal of unnecessary work for the investigators.

26. The diagnosis of ADHD is, however, relevant in the broader picture. In the final analysis, the fundamental question the Adjudicator must answer is the following: Do Cst. Gomes' acts of dishonesty establish that he has a character that falls below the standards of integrity and honesty that society demands of its police officers; or were these acts of dishonesty errors –serious errors deserving of rebuke, but errors all the same – by a person who is otherwise honest, hard-working and well intentioned? If the former, clearly Cst. Gomes should be dismissed. If the latter, the jurisprudence established under the *Police Act* suggests that he should be given another chance. The diagnosis and background provided by Dr. Roche will assist the Adjudicator in answering these most difficult but pressing questions.

27. The root cause of Cst. Gomes' misconduct was the fact that he did not prepare notes of the Pabla and Lakhan incident on the evening that the incidents occurred. When he was being investigated for minor misconduct in relation to those incidents, he created notes that falsely stated they were made on the relevant dates, and then Cst. Gomes claimed in interviews that they were made contemporaneously. Therefore, a fundamental question is why Cst. Gomes did not prepare the notes at the time of the incidents? Given the repeated commendations for hard work that Cst. Gomes has received from supervisors and co-workers alike, and given the pride he has shown in all other aspects of his work, it is evident that Cst. Gomes' deficient note-taking cannot be put down to laziness or lack of interest in doing a good job. To the contrary, the invariable opinion of Cst. Gomes' superiors and co-workers is that he is a hard-working and "go-to" police officer.

28. Dr. Roche described how it is typical that persons who have ADHD fail to maintain focus on the job in front of them, and can be diverted to other things or tasks before completing the

first task. He also described how persons with ADHD develop mechanisms to cope with the difficulty in maintaining the focus necessary to complete tasks. Some of these mechanisms are good ideas; others are not. When one considers this evidence together with the picture of Cst. Gomes as an unusually hard working police officer, the picture of a dedicated police officer who nevertheless frequently fails to complete files in a step-by-step manner –with the final step being the creation of notes – is realistic and easy to understand.

29. It is also easy to understand how a person whose work habits show him to be an otherwise exemplary employee would be embarrassed by the deficiencies in his note-taking. The many blank pages in Cst. Gomes' notebooks suggest that this problem is one of long standing. People who are embarrassed sometimes do very stupid things, even dishonest things, to cover up their embarrassment. There is a fundamental difference between a basically good person who has done a dishonest thing to cover up embarrassment, and a person whose history and character demonstrates a basic unconcern with honesty and integrity.

30. One of the issues that an Adjudicator must consider is the extent to which practices of the member's police department had a role to play in the misconduct. In most police departments policies and practices are in place under which members notebooks and PRIME reports are regularly reviewed by senior police officers to ensure that they are being completed in a timely manner, in accordance with department policy, to the required quality standards. Officers whose notes are deficient are coached. The deficiencies are brought to their attention, and they are monitored to ensure that they are achieving the applicable standards. There is no evidence that any superior ever examined Cst. Gomes' notebooks prior to the investigation. Given how far back in time Cst. Gomes' practice of leaving blank pages went on without comment from a supervisor, it is evident that the Delta Police Department did not give Cst. Gomes any assistance or coaching in this area. This, of course, does not shift Cst. Gomes misconduct onto the department but, as noted, it is a factor that the *Police Act* obliges the Adjudicator to take into account.

2. THE LAW

2.1 THE *POLICE ACT* MANDATES CORRECTION OVER PUNISHMENT

31. The essential principle of discipline under the *Police Act* is stated as follows:

(3) If the discipline authority considers that one or more disciplinary or corrective measures are necessary, an approach that seeks to correct and educate the member concerned takes precedence, unless it is unworkable or would bring the administration of police discipline into disrepute.

32. Reading paragraph 126(3) and 126(2)(c) together, the Adjudicator must assess whether the educational and corrective goals of the *Police Act* can be met by disciplinary or corrective measures that are not unduly punitive.

33. Therefore, when the Adjudicator is considering what measures are needed to accomplish the corrective and educational objective, he should begin by asking himself this question: given the corrective and educative effect of *Police Act* proceedings themselves, what in addition, if anything, is necessary to meet the corrective and educational objective? If something more is necessary to educate and correct the member, the Adjudicator must not shrink from imposing the necessary measures. But the Adjudicator must also ensure that the consequences on the member of his or her misconduct do not go beyond what is reasonably necessary for correction and education, so that the disciplinary or corrective measures take on an excessively punitive aspect.

34. It is critical to note that this philosophy or analysis applies to the assessment of the fit and proper measures for a finding of deceit just as it does to other findings of misconduct. The *Police Act* does not set deceit into a special category where punishment presumptively trumps correction or education. Much less does the Act create a presumption that the penalty for deceit must be dismissal. However, many chief constables in British Columbia have approached the imposition of penalty as if there were a presumption, if not a hard and fast rule, that every finding of deceit must result in dismissal. I will return to this point below.

35. The *Police Act* recognizes only two circumstances where punishment may be given priority over correction: (1) where a corrective approach would be “unworkable”; and (2) where correction without punishment would “bring the administration of police discipline into disrepute.” The first condition is not met merely because a corrective approach would create

some inconvenience for the police department. The test is whether the corrective approach would be “unworkable”.

36. The test that a corrective as opposed to punitive approach would bring the administration of police discipline into disrepute is high. Further, it is an analysis that considers all the facts of each case, individually.

37. Since the amendment of the *Police Act* in 2010, retired judges have decided five cases involving findings of deceit in circumstances as serious, or more serious, than the present. In none of these cases was the respondent police officer dismissed. They received lengthy suspensions ranging from five days to twenty-five days. In one case, the member was demoted in addition to receiving a suspension.

WB (New Westminster Police Service), 27 December 2012 per Ian H. Pitfield, Discipline Authority

Constable Adam Page of the Abbotsford Police Department 17 April 2013, I.H. Pitfield, Adjudicator

Constable GP of the Abbotsford Police Department January 2013, D. Overend, Discipline Authority

Constable K. Jansen of the South Coast British Columbia Transportation Authority, C. Lazar, Adjudicator

Cst. C. Charters (31 October 2014) per W. Smart, Adjudicator

38. In all of these decisions, the police officer committed some form of underlying misconduct, and then gave a version of what occurred that was found to be untrue. In most of these cases, the officer gave the untruthful account several times. As just noted, however, not one of these police officers was dismissed.

2.2 CONSTABLE K. JANSEN OF THE SOUTH COAST BRITISH COLUMBIA TRANSPORTATION AUTHORITY, C. LAZAR, ADJUDICATOR

39. The case most similar to the present case is *Constable K. Jansen of the South Coast British Columbia Transportation Authority, C. Lazar*. In that case, retired judge the Honourable C. Lazar found that a member (not the one facing discipline proceedings) had used a Taser unnecessarily on a civilian. Cst. Jansen prepared notes in which he both exaggerated the threat posed by the civilian, omitted mention of injuries that the civilian had sustained, and omitted a description of how the injuries had been sustained, to make it appear that the officer who used the taser was justified. The Adjudicator found that the member's notes were, to the member's knowledge, "false and misleading." These "misrepresentations" (as Retired Judge Lazar's called them) were repeated in a PRIME report on 1 May 2010. The PRIME report was, to the member's knowledge, "false and misleading." The "false and misleading" story was repeated again in PRIME report on 6 May 2010. The PRIME report was also, to the member's knowledge, "false and misleading." The misstatements were repeated again in a duty report. The duty report was, to member's knowledge, "false and misleading." The misleading story was repeated again in an oral statement to PSS investigators. The oral interview was, to the member's knowledge, false and misleading. Finally, it appears that the member repeated the false and misleading story in his evidence at the discipline proceeding. Therefore, the member created four false and misleading reports (the notes, the two PRIME reports, and the duty report), and gave a false and misleading story orally three times (once to the investigators, and twice in testimony). The member was not dismissed.

2.3 WB (NEW WESTMINSTER POLICE SERVICE)

40. In *WB (New Westminster Police Service)* the member was investigated for entering an apartment without a warrant, and for making an arrest without good or sufficient cause. During the investigation, the member claimed that the door to the apartment was open "a smidge", but enough to allow her to see inside. She claimed that that justified a "consent" entry. On the basis of what she claimed to see through the open door, the member entered the apartment, and arrested one of its occupants. The member repeated the story that the door had been open in two PSS interviews. The member then testified under oath at her discipline proceeding. Again, she repeated the story about the door being open. The retired judge, The Honourable Mr. Pitfield

QC, found that the member's statements to the investigator to be deceitful. By necessary implication, he also found her testimony before him to be untruthful. In other words, the member had committed the underlying misconduct of improperly entering the premises and making an illegal arrest, and also committed deceit on three different occasions by telling an investigator and the discipline authority a deliberately false story about what occurred. The latter instance was under oath.

2.4 CONSTABLE ADAM PAGE OF THE ABBOTSFORD POLICE DEPARTMENT 17 APRIL 2013, I.H. PITFIELD, ADJUDICATOR

41. In *Constable Adam Page of the Abbotsford Police Department 17 April 2013, I.H. Pitfield, Adjudicator* the member was accused of assaulting a civilian during an arrest. The member was found guilty criminally, and was found to have committed misconduct under the *Police Act*. Following the assault, the member prepared and submitted a duty report in which he claimed that the civilian had been aggressive, justifying the members' use of force. The adjudicator found that the statement was "replete with factual inaccuracies." The member repeated the inaccuracies during an interview with PSS. The adjudicator found that:

In my opinion, the exculpatory explanations offered by Const. Page on both occasions [the duty report and the interview] were contrived and intended to mislead others so that they would believe his use of force was justified in the circumstances. Both the duty report and Const. Page's statements in the course of the interview are so seriously contradicted by the audio-visual recording of the officer's conduct and actions that they have to be seen as unbelievable. Nothing but intent to mislead can explain the contradictions.

42. There was a discipline proceeding. The member testified. He again told the story he had earlier told in the duty report and the interview. This time he was under oath.

43. The police complaint commissioner ordered a public hearing. The member testified, again on oath. Again, the member told the story he had been telling throughout.

44. In other words, the member committed underlying misconduct of a criminal nature, he created a false record to justify his criminal misconduct, he gave a deceitful statement to PSS, and he gave false evidence, under oath, not once but twice. Adjudicator Pitfield did not dismiss the member.

**2.5 CONSTABLE GP OF THE ABBOTSFORD POLICE DEPARTMENT JANUARY 2013, D. OVEREND,
DISCIPLINE AUTHORITY**

45. In *GP (Abbotsford Police Department)* the member improperly accessed CPIC to obtain information about a construction contractor who was doing work at the house of his girlfriend (also a police member). During the investigation the member gave a deceitful statement about the circumstances under which he ran the name of the contractor, to make it appear that he was acting within the scope of his duties. He testified under oath at the discipline proceeding,, and told the same story. Retired Judge D. Overend found that the member committed deceit. In other words, the member committed the underlying misconduct related to CPIC, he gave a deceitful explanation to cover up the misconduct, and he gave deceitful evidence under oath. He was not dismissed.

2.6 Cst. C. CHARTERS(31 OCTOBER 2014) PER W. SMART, ADJUDICATOR

46. In *Cst. C. Charters (31 October 2014) per W. Smart, Adjudicator* the member was involved in pursuit a suspected stolen vehicle. It was alleged that the police car and the stolen car collided twice: once at an area called School Avenue; and once at a later stage of the pursuit. The member was found not to have committed deceit with respect to the School Avenue part of the pursuit.

47. During the later stage pursuit the member said over the radio that the civilian he was pursuing “tried to ram me.” The civilian testified that he (the civilian) did not ram or try to ram Cst. Charters, but Cst. Charters had instead rammed him. Thus it was alleged that Cst. Charters had lied over the radio when he claimed that the civilian tried to ram him in order to deflect responsibility for the fact that Cst. Charters himself had actually rammed the civilian. (There were other allegations of deceit that were dismissed.)

48. Cst. Charters gave statements to PSS. He testified at a discipline proceeding. He testified at the public hearing. In all cases he said that his car did not in fact hit the civilian’s car. He also testified that when he said that “he [the civilian] tried to ram me” he was honestly trying to describe the unfolding situation.

49. The retired judge, W. Smart QC, did not accept Cst. Charters' testimony at the public hearing. By necessary implication, he also did not accept Cst. Charters' statement to PSS or his evidence at the same points. Adjudicator Smart did not dismiss Cst. Charters.

2.7 NO CASES DECIDED BY RETIRED JUDGE FOR DISMISSAL FOR DECEIT

50. There are no cases under the present *Police Act*, decided by retired judges during s. 117 reviews, or in public hearings, where a member has been summarily dismissed for a first offence of deceit.

51. In most of the cases cited above, chief constables have upheld dismissals, or made submissions before retired judges that the member must be dismissed: that no other penalty was consistent or compatible with the department's "core values." As appears to be a widely held belief among chief constables in British Columbia that whenever a member is found guilty of deceit, he or she must be dismissed. The authorities cited above demonstrate a clear difference of opinion between the retired judges who have heard cases of deceit since the amendment of the *Police Act*, and many chief constables within British Columbia. It is submitted that the consensus of the retired judges is more persuasive than the views of the chief constables. Whether a retired judge is sitting as a Discipline Authority under s. 117, or as an Adjudicator in a review on the record or public hearing under s. 142ff, the retired judge performs a quasi-appellate function. The legislature no doubt had good and sufficient reasons for providing that retired judges, rather than other chief constables, would perform this quasi-appellate function.

3. CONCLUSION

52. It is therefore submitted that a suspension in the order of 20 to 30 days for each of the counts of deceit, and a suspension in the order of 10 days for the finding of neglect of duty, is appropriate.

Dated 4 May 2015.



M. Kevin Woodall
Counsel for Cst. Gomes