

IN THE MATTER OF THE REVIEW ON THE RECORD
INTO THE ORDERED INVESTIGATION OF
CONSTABLE RAVINDER (ROB) THANDI OF
THE ABBOTSFORD POLICE DEPARTMENT

1. On September 21, 2016, Stan T. Lowe, Police Complaint Commissioner directed a review on the record in respect to the noted matter pursuant to sections 137(2) and 141 of the *Police Act*, R.S.B.C. 1996, c 367. I, Ronald A McKinnon, was appointed Adjudicator pursuant to section 142(2) to conduct that review.

2. This case involves Abbotsford Police Department (“APD”) Constable Ravinder (Rob) Thandi. A discipline proceeding was conducted before the Discipline Authority (“DA”), APD Chief Constable Bob Rich, who found that Constable Thandi had committed misconduct under the *Police Act* on 13 specified allegations. The DA imposed discipline including dismissal. I am now charged with conducting a review on the record in this matter.

3. The present application is brought by Constable Thandi; he seeks to lead additional evidence before me, specifically his own testimony, as outlined below. This application has been brought through extensive written submissions by Constable Thandi and commission counsel, including a “willsay” statement of the evidence sought to be led by Constable Thandi before me.

4. The standard of review in respect to a disciplinary decision is “correctness” as per section 141(9). The record consists of:

141(3)(a) the final investigation report of the investigating officer, any supplementary reports under section 132 [*adjournment of discipline proceedings for further investigation*] and all records related to the investigation and the discipline proceeding,

(b) the records referred to in section 128(1) [*disciplinary disposition record*], [and]

(c) the report referred to in section 133(1)(a) [*review of discipline proceedings*].

5. The Act also allows for a discretion to consider additional evidence beyond that set out in section 141(3). The Act provides, in s. 141 (4):

141(4) Despite subsections (2) and (3) of this section and section 137(2)(a) [*circumstances when member or former member concerned is entitled to public hearing*], if the adjudicator considers there are special circumstances and it is necessary and appropriate to do so, the adjudicator may receive evidence that is not part of either of the following:

- (a) the record of the disciplinary decision concerned;
- (b) the service record of the member or former member concerned.

6. As I read the *Police Act*, and in particular s. 141, in the context of Part 11 of the Act, a review on the record permits for an independent review of a disciplinary decision. It is — as the name suggests — a review that is to be undertaken based on the record of the disciplinary decision. What s. 141(4) conveys is that this record may be supplemented by additional evidence, “if the adjudicator considers that there are special circumstances and it is necessary and appropriate to do so”. That is the test set in the Act. It is the test I must apply in the present application.

7. Mr. Derek C. Creighton, counsel for Constable Thandi, applied, pursuant to those provisions, to call “new” evidence which he described in his application as follows:

1. Updated information on Constable Thandi’s current condition and the denial of disability benefits which may be relevant to any remedy as the adjudicator may propose. The dismissal for cause complicates Constable Thandi’s ability to access his disability benefits.

2. Evidence regarding his recollection and judgment when in a hypomanic state (application for benefits) or severely depressive state (as experienced post termination and arrest for criminal charges).

8. Counsel for the Office of Police Complaint Commissioner (OPCC), Mr. Mark Jetté, opposes the application for the following reasons:

1. No “special circumstances” exist.

2. The inability to access disability benefits flows naturally from dismissal.

3. Constable Thandi’s proposed new evidence in respect to his recollection and judgment when in a hypomanic state is inconsistent with what he has said in prior statements and testimony and is premised on his failure to recall.

4. As a matter of law it would be an abuse of process to re-litigate the fraud convictions in these proceedings

9. In his Reply, Mr. Creighton submitted that:

1. To ensure a determination based upon “correctness” the new evidence would provide “a more nuanced understanding of the whole of the evidence led at the hearing”.

- 2 “Special circumstances” can be found in the “nature of the evidence (sought)”, which “raises significant challenges for counsel attempting to lead evidence of an individual suffering from two well documented mental disorders”.

- 3 The evidence sought is not a “second kick at the can” but rather would be led to establish Constable Thandi’s thought processes during the period he was not taking his medications.
- 4 Much of commission counsel’s submissions “goes beyond the narrow application brought and is effectively an attempt to get into the merits of the appeal”.
- 5 There is no “abuse of process” if one considers Constable Thandi’s mental state against the test set out by Justice Arbour in *Toronto (City) v. C.U.P.E. Local 79*, 2003 SCC 63, at para. 53.

10. I appreciate Mr. Creighton’s concern that some aspects of Mr. Jetté’s submissions go to the merits of the Review and not the “narrow” application to permit new evidence. However, the same could be said of Mr. Creighton’s Reply which devotes pages to his opinions regarding mental disorders and why Constable Thandi acted as he did.

11. To the extent the submissions delved into argument, opinion and comments upon the “merits” of the Review, I have ignored these when assessing the issue at hand which is, does the proposed new evidence establish “special circumstances” so as to permit new evidence? In my respectful view it does not. It cannot be said that such special circumstances exist and that it is “necessary and appropriate” to received extra-record evidence in this case.

12. In his Reply, Mr. Creighton makes the following observations (quoting from his submission):

- Virtually all of [the OPCC’s] submissions relate to attempting to support the reasoning of DA Rich instead of addressing the relevance, nature and probative value of the evidence sought to be admitted.
- There will be very detailed submissions [by Constable Thandi’s counsel] on the extent to which DA Rich completely failed to answer the simple question as to whether there was a nexus between Constable Thandi’s mental illness and the impugned behaviour.
- Both hypomania and depression impact frontal lobe function, which is the centre of executive and moral thinking. Bipolar II disorder is also characterized by a lack of impulse control and a manic belief in the correctness of one’s actions. This impairment affects the ability of an individual to appreciate the consequences of their actions, including the appropriateness of embarking upon

a high risk intimate relationship as was the case here.

- The inability to reflect on one's decisions and make accurate logical and moral judgments is also the core of the disorder. Proper medication can entirely reverse this condition. Unlike Bipolar I where an individual can have psychotic episodes, Bipolar II disorder is largely characterized by depression and occasional hypomania which is often seen as normal state
- Significant stressors such as divorce, car accidents and unwarranted investigations (as was the case here) can serve as triggers for the hypomanic state which may be followed by a decision to cease taking medication given that they are feeling so well.
- It is very difficult for legal counsel, raised on the premise that a person intends the natural consequences of their actions, to understand the profound yet subtle ways by which mental illness can impact judgment and moral reasoning. The definition of Bipolar II is, in substance, defined by out of character behaviour of engaging in "high-risk activities which have the likelihood of turning out poorly". By definition, this is a disorder which impacts judgment while providing the individual with profound feelings of confidence which further impair their ability to reflect on the command their decisions [sic].
- Constable Thandi's problems were the result of a series of stressful life events which led to a hypomanic episode and his decision to go off his medication. Since hypomanic episodes are rare in bipolar II disorder they are not readily recognized by the individual experiencing them or even their psychiatrist as they can simply appear to be a period of wellness.
- Constable Thandi's current long-standing profound depression was largely the result of the APD's failure to deal with this matter as an employment issue. The APD chose to expose him to the humiliation of criminal charges, press releases regarding the fraud charges (without explanation), years of unemployment, and finally, the termination of his compensation which resulted in overwhelming financial stress given his denial of disability benefits.
- Constable Thandi's evidence at [the] hearing was largely limited to impugned decisions and did not pursue the extent to which he was generally able to reflect upon routine decisions made.
- Constable Thandi was asked about specific recollection of the various events and he had no recollection, or only limited recollection of some of those events. In addition, he was interrogated several times and prepared for a hearing so he had a general recognition of a basic timeline. What was not pursued by counsel

as carefully as it could have been (had counsel understood the scope of challenge more completely), is the fact that Constable Thandi generally had no recollection of engaging in the type of reflective thought processes that one would have when entering into a relationship with a younger woman with a profoundly dysfunctional background, thinking of the consequences of becoming a caretaker to her child, expending large amounts of money on her, and preparing to bring her into his mother's house. While none of these are unlawful actions, they certainly demonstrate Constable Thandi's profoundly impaired judgment.

- Similarly, while he generally addressed specific breaches of the no-contact orders and his impaired functioning, Constable Thandi was not asked to address the extent to which he was able to reflect on decisions made in other areas of his life over the post-suspension period.
- It is respectfully submitted that this evidence would permit the adjudicator to understand the broader impact of the disorder and how his judgment was impaired, which demonstrates more clearly that he was suffering from hypomania. This evidence would also allow the adjudicator to appreciate the difficulty of a witness attempting to piece together an understanding of conduct that he or she engaged in when suffering from two psychiatric disorders. The psychiatric evidence led by Dr. ██████ indicated that Bipolar II fueled his OCD [obsessive compulsive disorder], a disorder which was largely something that he had controlled and managed well for decades.

13. I assume that the foundation for the conclusions Mr. Creighton has advanced in respect to his many references to mental illness can be found in the evidence of Dr. ██████. Assuming the correctness of these assertions, it appears that the thrust of the "new" evidence is to demonstrate (to me) that because Constable Thandi engaged in high-risk behaviour and given that he was not on his medications, he would have to have been in a hypomanic state at the time of these "offences", and thus not morally/criminally responsible, notwithstanding his guilty pleas.

14. As Mr. Jetté pointed out in his submissions, this was the central issue before DA Rich. In his findings dated June 14, 2014 he stated:

As stated above, Constable Thandi has admitted the conduct elements of all of the allegations. His counsel submitted that his mental illnesses provide a complete defence to all allegations. By this I understood him to mean that Constable Thandi's mental illnesses prevented him from forming the necessary mental intent for each allegation...my primary task at this point is to analyze the fault element required for each of the allegations and determine whether the fault element, in addition to the conduct element, is satisfied.

15. Constable Thandi testified at some length at his discipline proceeding, and Dr. [REDACTED] proffered expert opinion in respect to the illnesses he suffered and how they impacted upon his actions. It seems to me that Mr. Creighton knew that his task was to persuade DA Rich that Constable Thandi was in a hypomanic state when he made the decisions he did. That he was unsuccessful in that task is the reason for the review before me. Mr. Creighton may well persuade me that DA Rich was indeed not “correct” in that conclusion but the proposed “new” evidence would add nothing to what is already in the record.

16. There is no issue that Constable Thandi, at the relevant times, suffered from an obsessive compulsive disorder and a Bipolar II disorder. He was prescribed medication for these conditions but for a period of almost two years (during which time the “offences” occurred) he did not take the medications. Failure to take the medication can lead to a hypomanic state and impairment of judgment.

17. The thrust of the “new evidence” is the conclusion of Constable Thandi that he must have been in this hypomanic state when he made decisions leading to the “offences” because it otherwise makes no sense. His willsay statement contains the following: “I have absolutely no recollection whatsoever that I was doing something immoral or wrong”. The statement goes on to describe that he has no “recollection” about committing any culpable act.

18. That the officer may have a different present recollection as to his knowledge of wrongdoing, as opposed to when he gave evidence, is not a sufficient basis to grant this application and expand the review. The proposed new evidence proffers his present view of his past conduct and judgment and awareness. It is significant, in my respectful view, that this is *not* a case of new evidence that clearly contradicts earlier findings of fact. In this respect, it may be contrasted with other “new-evidence” scenarios, such as the emergence of a videotape depicting an incident, which was not previously available. It is, instead, a present or updated view on past events — potentially no more than a gloss, offered in support of a different result on review. I am not persuaded, in these circumstances, that the *Police Act* review on the record process requires that I expand the record to receive such evidence.

19. In his Reply, Mr. Creighton says that the evidence sought to be admitted now is extremely limited, and relates largely to Constable Thandi’s recollection over the period he was off his medication, about his thought processes generally and not specifically in relation to contentious issues which were canvassed at the discipline hearing.

20. I am unable to accept that recalling Constable Thandi to tell me that he has no recollection of consciously doing something “wrong or immoral” could fall within the realm of “special circumstances”. As I commented earlier in these reasons, the issue of

diminished responsibility or no responsibility due to mental illness was fully before DA Rich. My task is to determine whether or not he was “correct” in his conclusions and to that extent Mr. Creighton has the right to make full argument criticising same.

21. I would add that the record here appears to be extensive, and I have not been persuaded it is necessary and appropriate to receive the additional evidence put forward in light of the record already available. Furthermore, the focus on this process under the *Police Act* is on police discipline; the denial of benefits issue is a side-issue that is not the focus of my responsibility.

22. In my respectful opinion, the proposed “new” evidence fails to meet the test set by s. 141(4) of the *Police Act*; I cannot say that “there are special circumstances and it is necessary and appropriate” to permit the admission of this additional evidence.

23. The application to call new evidence is dismissed.

Ronald A. McKinnon, Retired Judge