IN THE MATTER OF THE POLICE ACT, RSBC 1996, c. 367 (AS AMENDED)

AND IN THE MATTER OF A PUBLIC HEARING INTO A COMPLAINT AGAINST CONSTABLE GREG SMITH OF THE VICTORIA POLICE DEPARTMENT

Reasons for Decision of

Adjudicator Robert Bruce Hutchison

Commission Counsel John D. Waddell, Q.C.

Frank A.V. Falzon, Q.C.

Respondent's Counsel Reginald P. Harris

This public hearing was conducted pursuant to the January 18, 2008 Notice of Public Hearing issued by Police Complaint Commissioner Dirk Ryneveld, Q.C. under section 60(4) of the *Police Act*, R.S.B.C. 1996, c. 367:

> 60(4) The Police Complaint Commissioner may arrange a public hearing without a request from either a complainant or respondent if the police complaint commissioner considers that there are grounds to believe that the public hearing is necessary in the public interest

HEARING OPENING

Evidence was called June 16th through June 19th after pre-trial conferences on April 11th and May 30th 2008. Unfortunately the case failed to complete on June 19th and was adjourned over to October 23rd when it was hoped that Mr. Thomas McKay, the young man who, while hand cuffed in the Victoria Police jail booking area, was severely injured when taken to the floor by the Respondent, Constable. Gregory Smith. The injuries suffered at the time by Mr. McKay made his ability to appear before the hearing impossible. Nonetheless the hearing went on for the next two days, October 23rd and 24th, was then adjourned to January 6th and 7th 2009, for argument, almost five years after the event took place on April 22nd and 23rd, 2004.

The issue central to the hearing was whether the respondent, Greg Smith (PC #41) committed the disciplinary default of "abuse of authority" contrary to s. 10(b) of *The Code of Professional Conduct* B.C. Reg. 205/98 by using unnecessary force on the person of Mr. Thomas McKay:

> 10. For the purposes of section 4(1)(f), a police officer commits the disciplinary default of abuse of authority if the police officer:
>
> (b) uses unnecessary force on a person.

FACTUAL OVERVIEW

The evidence showed that the use of force at issue occurred in the secure surroundings of the Victoria

Police Department Jail, directly in front of the booking area, constructed on a concrete floor. The location was viewed by the parties and the Adjudicator on June 16th, 2008 prior to the hearing commencing. The area on that date was identical to the evening of April 22nd 2004, save for a change to the floor, which was padded soon after the event. The padding, at the time in question, was in all the surrounding jail cells.

The hearing heard that Mr. McKay, had been arrested and handcuffed for drunk and disorderly behaviour about a half block from the Victoria Police Station. Both Mr. McKay's hands were cuffed behind his back at the scene, and he remained handcuffed when he entered the jail, which was at that time in the charge of two jailers, James Moore and Lisa Wickstrom. Mr. McKay was accompanied by the two arresting officers, Constable Mike Niederlinski and the Respondent Constable Smith, both of whom were, as can be seen in the Video filed as Exhibit 3B, appreciably larger than Mr. McKay, even though the officers might have appeared larger since they were in full uniform including body armour.

The force used against Mr. McKay, alleged to be in violation of Regulation 10 (b), *supra,* was described as a "takedown" initiated and employed by the Respondent Constable Smith. The evidence revealed that when he did so Mr. McKay thereafter required emergency brain surgery and suffered tragic and permanent brain injury from his unprotected head hitting the jail's concrete floor.

Thus the critical issue for the Adjudicator is judging whether the takedown was necessary within the meaning of the Regulation and the case law. If so, was the force used in carrying it out excessive and

therefore an abuse of authority within the meaning of the Regulation.

OVERALL REVIEW OF THE EVIDENCE

A quick review of Exhibit 1, an agreed statement of facts, reveals that on the evening of April 22, 2004 Thomas McKay, who had just completed his final exams at Camosun College decided to visit his friend Kerry Westmore, a resident of an apartment near the Quadra and Hillside intersections in Victoria. They were joined there by Dean Amantea. Testimony revealed that the three were drinking Vodka and after some discussion and the end of the Vodka, the three decided to go into the down town core of the city. Their evidence of what occurred down town is somewhat misty. Suffice it to say I am satisfied that there was further consumption of alcohol. Because of subsequent events and a blood alcohol reading of Mr. Thomas McKay, I am able to conclude that he probably had more to drink than his friends. Certainly his subsequent behaviour when approached by the two police officers indicated that he was considerably under the influence. Perhaps this was in part due to his diagnosed condition of Attention Deficit Hyperactivity Disorder, which is known to have a disinhibiting effect on those under the influence of alcohol.

After a few hours on the town, the three friends decided to walk home. They were seen first on the East side of Quadra Street South of Caledonia Avenue by officers Smith and Niedelinski. They were engaged in some high jinks such as moving traffic cones set up near the middle of Quadra Street to guide traffic around some road work being undertaken there. They were

also carrying on with high pitch shouting, which the officers found had brought nearby residents to their street side windows to see what the commotion was all about.

The two officers circled their police vehicle from its Southerly direction on Quadra Street and approached the three young men from the South, passed them, and then by doing another U-turn they stopped the three youths on the West side of Quadra Street, to which they had jaywalked, North of Caledonia Avenue, only about a half block from the Police Station. Both Westmore and Amantea when asked, produced I.D. for the officers and while obviously somewhat intoxicated, were polite and subservient. On the other hand, McKay was belligerent and obstructive. He asked the police why he needed to produce I.D. and carried on in language laced with four letter Anglo Saxon words coupled with the words "pigs" and "Nazis". His behaviour did not endear him to the officers and they arrested him for being in a state of intoxication in a public place.

I am satisfied that their arrest was justified and that the officers were behaving in a professional manner. While in their evidence, neither Westmore nor Amantea added much about McKay's behaviour, my conclusion is their memory was diminished by alcohol and friendship for McKay. Amantea did testify that his friend McKay was acting "in his usual argumentative way". He and Westmore inquired of the officers what they were going to do to McKay and were told that he would be kept until he sobered up and was no longer acting up. These comments by the officers and their quick release of the Amantea and Westmore, satisfied me that there was no overstepping of authority or

professionalism on the part of the officers, at the time McKay was detained.

Shortly after McKay was arrested he was driven the half block to the sally port of the nearby police station. From that point the evidence was a mixture of the officers' memory sharpened by the police video cameras. The pictures from video cameras spread around the booking area were transferred to a CD and filed as Exhibits 2A and 2B.

When viewing the tapes it must be kept in mind that they do not show continuous action as might be expected from a video camera but a series of pictures from cameras at different angles taken one second apart. The continuous, or real time, action video cameras take a shot at the rate of 60 images per second. In this case, such a real time camera would have relieved the Adjudicator of necessary speculation since the action at the centre of this hearing happened in less than a second. In that split second I am asked whether the force used by Constable Smith was excessive and therefore open to discipline.

Tab 2 of Exhibit 2 is a report by Mr. Brett Hallgren of Worldwide Forensic Video Concepts Inc. Mr. Hallgren was asked to locate video footage that showed the subject's (Mr. McKay's) head make contact with the floor and police positioning in relation to the contact. His reply makes clear the dilemma facing the Adjudicator. His response was as follows:

"Between the indicated times of 00:36:54 to 00:36:56 inclusive, Mr. McKay is on the ground. Because of the low refresh rate, the writer did not observe any images that would indicate conclusively that Mr. McKay's head struck, or did not, strike the floor. The first image to indicate that Mr. McKay's

head is touching the floor is from the "property locker" camera angle at indicated time of 00:36:58."

Of course it is obvious that Mr. McKay's head struck the floor when the totality of the evidence is considered. What exactly caused his head to hit the concrete floor is a more difficult conclusion to come to. Was he thrown or did he squirm and the proper soft landing technique dictated in such a takedown, fail?

The most graphic evidence given by Jailer James Moore described the sound of Mr. McKay's head hitting the concrete. He said: "It was a hollow sound of something hollow hitting a hard surface." He agreed he'd never heard anything like that before and that it remained a vivid memory even today. He testified that Mr. McKay went down quickly and he didn't see exactly what occurred. However, he felt compelled to call for an ambulance and paramedical assistance, since he felt, from the noise of the fall, significant damage might well have resulted.

At the hearing, the first witness called was Mark McArthur from B.C. Ambulance Service who was a licensed paramedic and had been since 1989. He described Mr. McKay as sitting on a bench when he arrived and that he was complaining about the tightness of the handcuffs. He said he was swaying back and forth all over the place and cursing. He was bleeding from the nose. There was apparently discussion of whether he should be taken to the hospital and the paramedics were not sure he needed to go. However both Jailer Moore and Constable Niederlinski urged that Mr. McKay be taken to hospital to be checked out. They both, obviously, had heard the sound of Mr. McKay's head hitting the concrete and were alarmed by it. Accordingly, Mr. McArthur and his partner Gregory Greenwood did take Mr. McKay directly

to the Jubilee Hospital. Both testified to the fact that Mr. McKay was upset, swearing, struggling and complaining.

From the evidence of Dr. Stuart Cameron I gathered that Mr. McKay was subsequently taken to the Victoria General Hospital at a time and by a means not explained in the evidence. However, he was operated on by Dr. Cameron at the V.G.H. around 4:30 a.m. on April 23, 2004 to relieve an extradural hematoma. Though not wanting to downplay the excellent work of Dr. Cameron, there is no need to detail his evidence pertaining to the right frontal craniotomy which he performed. Suffice it to say Mr. McKay was fortunate to have had excellent medical care once his fractured skull was diagnosed and treated.

The only testimony of Dr. Cameron which needs consideration in making the findings I must come to, is to be found in his cross examination by Mr. Harris. The question asked was "An individual can sustain this type of injury by landing on concrete, falling on concrete and landing on that orbital area? Dr. Cameron's answer was as follows:

> "Yes. But can I qualify that a bit? The simple fall on the head just---just a fall would not---in my opinion it would take a little more than just a fall. For instance, I would expect that the head was travelling at a higher velocity and striking the concrete floor than just a simple fall."

When judging the use of force question that answer is significant.

That is a summary of the evidence related to me over the course of the Hearing, save for the expert testimony on the use of force. The experts' evidence

will be considered when I deal with the seminal issue surrounding the split second "takedown" performed by Constable Smith. The full case law sited to me in argument must be carefully considered before coming back to the findings which I must make.

THE RELEVANT CASE LAW

Both counsel filed extensive case law and argument, which in the interests of brevity I will do my best to analyse but do justice to their excellent briefs.

Both were at pains to steer me in the right direction on the onus of proof required in hearings under the Police Act. Both Mr. Falzon and Mr. Harris agreed that the law in this area was clarified recently by the Supreme Court of Canada in F.W. v. McDougall, [2008] S.C.J. No. 54.

Mr. Falzon took me through the changed jurisprudence and in paragraphs 14 and 15 of his brief wrote as follows:

> 14. The Court rejected all four alternatives, stating as follows:
>
> I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected... paragraph

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. (para.49).

15. In helping to understand how this standard is to be applied, the Court stated:

> [45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

Mr. Harris took the same quotes from Rothstein J.'s judgment. He stresses that the evidence establishing the allegation of abuse of authority by using unnecessary force on a person must be clear, convincing and cogent.

Mr Falzon summarizes the law of onus in paragraphs 16 and 17 of his brief and I have no reason not to accept his argument. His brief is a follows:

16. The only question for the trier of fact is whether, after scrutinizing the evidence with care, the evidence satisfies the balance of probabilities test, described as "51% probability" or "more likely than not": *McDougall*, paragraph. 43.

17. *McDougall* recognizes that the evidentiary record will rarely be perfect. Despite an imperfect record and conflicting evidence, justice requires that the trier of fact make a decision. That decision will be informed by evidence that is sufficiently clear on the record, together with the common sense inferences the trier of fact may appropriately draw based on the inherent probability or improbability of events: *McDougall*, 47, 48.

THE TAKEDOWN

Having been carefully instructed on the evidentiary burden I turn to the critical question of findings necessary to judge the conduct of Constable Smith in the circumstances of this case.

Mr. Falzon summarized the test in his brief as follows:

> 21 Section 10(b) obviously cannot depend on whether the officer subjectively believed the force was necessary. The test is whether the use of force and amount of force employed were necessary in all the circumstances when evaluated from the perspective of a reasonable police officer in the position of the respondent.
>
> 22 This objective test requires a fair and sensitive assessment of all the circumstances facing the

> officer. However, the respondent cannot himself be the ultimate judge of whether the force used was necessary. The word "unnecessary" clearly and specifically imports and requires objective evaluation. The test is ultimately that of a reasonable police officer in the position of the respondent.
>
> 23 The respondent's subjective intention is relevant, but not conclusive. For a respondent to suggest for example that "I believed the force I used was necessary", or "I perceived a grave risk", can hardly be a defence to a use of force that is objectively determined to have been unnecessary in all the circumstances. That kind of approach to the use of force would make nonsense of both professional standards and the independent civilian oversight of police conduct in a free and democratic society.

The difficulty for the Adjudicator is the overwhelming thought that there should be no need for a handcuffed prisoner in the booking area of the Victoria Police Station to be "taken down", particularly when there are two jailers and two police officers in the area. However, to paraphrase the commissioner's argument, the Adjudicator's subjective intention is relevant, but not conclusive, and indeed may be irrelevant. As argued, the test is to evaluate the action taken from the perspective of a reasonable police officer in the position of Constable Smith. I must take into account police training and the police culture or milieu. In this regard I have the evidence of two Use-of-Force experts: Sergeant Christopher Butler of the City of Calgary Police Department and Corporal Gregg Gillis, of the R.C.M.P.

USE OF FORCE EXPERTS

In his reports filed as Tab 12 Corporal Gillis deals at length with the rationale of the use of force by officers in controlling subjects. After dealing with the video pictures he arrives at the following conclusions:

> "The use of an unsupported takedown technique on a handcuffed prisoner is an open hand control tactic hard. The behaviour of Mr. McKay was active resistive with no information to indicate the contrary. Constable Smith's perceptions are not clearly articulated in the material provided. The situational factors discussed previously in combination with the subject behaviour do not support the use of a Physical control Hard tactic in the opinion of Cpl. Gillis based on the information provided for review.
>
> As a result Cpl. Gillis cannot form an opinion that supports the actions of Constable Smith as being a reasonable use of force.

Page 14 and 15 of the written report of Staff Sergeant Chris Butler, filed as tab 13 is as follows:

> The officer's techniques, from verbal commands, office presence, handcuffing and soft empty hand physical control (including the leverage takedown)was consistent with the national framework and in accordance with the manner in which the officers were trained and reasonable under the circumstances.

With these two conflicting views and their respective testimony, I must instruct myself on the relevant case law and then come to a difficult

conclusion on the way Constable Smith conducted his takedown of Mr. McKay.

Mr. Harris put a number of questions to Cpl. Gillis during his testimony that to some degree, qualified his conclusions. Without dealing extensively with a great deal of sparring between the two protagonists, suffice it to say that Cpl. Gillis suggests that if Mr. McKay grabbed or pinched and squeezed Constable Smith's fingers, it would be reasonable to resort to a takedown, provided it was performed according to protocol. His testimony went as follows:

Q But let's switch the coin now.
Mr. McKay is, if you accept the grabbing of the fingers, the pulling away and starting to turn, those are soft physical control techniques in essence that he's using on Constable Smith if you accept that?
A If we accept that, yes.
Q And in order for Constable Smith to defeat that, you expect him to use something higher than soft physical control techniques?
A You could expect that you use a technique that is higher than the force you're being met with so that you can overcome it and counter it.
Q Such as maybe a hard physical control technique?
A Something potentially in the realm, but, again, it has to be di-- we have to look at and it has to be kept in context of the environment and

situational factors.

Q Okay. Well, let's talk about the environment and situational factors. As long as Constable Smith does not perceive this fellow to be a stumbling, falling down drunk, as long as Constable Smith keeps hands on and controls rate of deceleration, as long as he does those thing, it would be reasonable to use that

A The other issues that have to taken into consideration as well though are is that it is occurring in the police cellblock, so the risk -- a lot of the external risk factors are removed, and there is the presence of ano-- of other parties there that can assist.

Q Again, those other parties there, you're not advocating an officer stand by and wait until I get assaulted until people transverse acro-- until he says, "Help," they look up, they say, oh, he's in trouble, I better get over there and assist. You expect an officer to react right away to put a stop it?

A I expect an officer to react, I think the word you used earlier, reasonably to control. So, counter the measure that they're under on the receiving end of, so in this case the finger grab, to counter that, and then, as you've stated, to take steps to prevent a follow-up technique by the person they're dealing with.

Q And in this case in those circumstances, provided he controls the rate of descent taken to the ground even in the cellblock with other officers around is reasonable?

A Taking him to the ground would be reasonable, yes.

From this evidence it can be concluded that according to police training and protocol a takedown inside the police station can become necessary in the appropriate circumstances.

Put another way, a police officer could reasonably conclude that a takedown was necessary given the contemplated risks and the surrounding circumstances, even if the prisoner is handcuffed and in a cell block.

That seems to be the conclusion that two internal investigations of the incident came to, prior to the Police Complaints Commissioner ordering a public hearing.

THE FINGER GRABBING INCIDENT

The incident that prompted the takedown was Mr. McKay's grabbing of Constable Smith's fingers. As Adjudicator I must, of course, be satisfied that in fact the finger grabbing incident took place before I can conclude that objectively, Constable Smith was reasonable in performing a takedown.

I have reviewed the evidence with care and concern and I conclude on the balance of probabilities that Constable Smith did get his fingers "grabbed" by Mr. McKay. I take this from his original notes made at the time and before he became aware of the dreadful results of his takedown and from his testimony. As well, the video clearly shows he was applying a wrist lock to produce pain to Mr. McKay who, no doubt, would do what he could to stop this procedure and did so. The video pictures show Mr. McKay leaning over to escape the pain being administered by Constable Smith just prior to the takedown. Of course, the only person who could throw light on this incident was Mr. McKay himself but who was unable to testify.

The grabbed fingers being so, I can conclude that under the relevant question I have to answer, it would be appropriate to a reasonable police officer to takedown a handcuffed prisoner inside the police lock up area and such a move was necessary. I take that from the evidence of Corporal Gillis quoted *supra*. That having been said, as an aside, I would hope that the Chief and Victoria Police Commission would look carefully at the police protocol on takedowns of handcuffed prisoners in the cell block when other officers and jailers are present. While it was appropriate that the cement flooring in the booking area was, as in the cells themselves, changed to a padded floor, I opine that is no reason to encourage officers to resort to takedowns to enforce discipline of prisoners in handcuffs. As I have already alluded to, subjectively, I don't think such takedowns are very often necessary, particularly if only one prisoner is in the cell block and there is more than one officer present.

My finding on the first test leaves the more important question of whether Constable Smith, in the words of the *Code of Professional Conduct* Regulation 10(b), used unnecessary force in carrying out the takedown. The relevant tests were well put by Mr. Falzon in his final submissions and I quote from his argument:

19. The language of section 10(b) of the *Code* is straightforward and uncomplicated. Police officers are allowed to use force, but they are not allowed to use unnecessary force.

20. Thus, if it is demonstrated that Constable Smith intended to use force (or was reckless about whether he intended to do so), it becomes the adjudicator's role to evaluate whether that use of force was necessary or unnecessary. In this case, that issue raises two questions:

a. Was it unnecessary for Constable Smith to take Mr. McKay to the ground at all in the circumstances?

b. If so, did Constable Smith employ unnecessary force in taking Mr. McKay to the ground?

If either question is answered "yes", then a finding of unnecessary force follows.

Paragraphs 21 through 23 (*supra*) bear repeating:

21. Section 10(b) obviously cannot depend on whether the officer subjectively believed the force was necessary. The test is whether the use of force and amount of force employed were necessary in all the circumstances when evaluated from the perspective of a reasonable police officer in the position of

the respondent.

22. This objective test requires a fair and sensitive assessment of all the circumstances facing the officer. However, the respondent cannot himself be the ultimate judge of whether the force used was necessary. The word "unnecessary" clearly and specifically imports and requires objective evaluation. The test is ultimately that of a reasonable police officer in the position of the respondent.

23. The respondent's subjective intention is relevant, but not conclusive. For a respondent to suggest for example that "I believed the force I used was necessary", or "I perceived a grave risk", can hardly be a defence to a use of force that is objectively determined to have been unnecessary in all the circumstances. That kind of approach to the use of force would make nonsense of both professional standards and the independent civilian oversight of police conduct in a free and democratic society.

From these submissions I apprehend that the test I must look to is whether Constable Smith in taking Mr. McKay to the ground employed unnecessary force.

In his brief Mr. Falzon makes the following submission:

40. The standard that governs whether a police officer used unnecessary force under s. 10(b) of the *Code of Professional Conduct* must be consistent with the standard of conduct the law imposes on police officers whenever an objective assessment of their conduct is in play. The governing test is nicely captured in *Hill v. Hamilton-Wentworth Regional Police Services Board*,

2007 SCC 41, where the Supreme Court of Canada helpfully outlined the proper approach to an objective assessment of police conduct (paragraph 71):

> … The nature and importance of police work reinforce a standard of the reasonable officer in similar circumstances. Police conduct has the capacity to seriously affect individuals by subjecting them to the full coercive power of the state and impacting on their repute and standing in the community. It follows that police officers should perform their duties reasonably. It has thus been recognized that police work demands that society (including the courts) impose and enforce high standards on police conduct (Cory Report, at p. 10). This supports a reasonableness standard, judged in the context of a similarly situated officer. A more lenient standard is inconsistent with the standards that society and the law rightfully demand of police in the performance of their crucially important work.

See also *Berketa v. Niagara (Regional Municipality) Police Services Board*, [2008] O.J. No. 260 (OCJ) at paragraph 73: "I nevertheless consider that the force he did use as being excessive and that it was not objectively reasonable in light of the circumstances faced by him".

Both counsel in their submissions cited cases under S. 25 and 32 of the *Criminal Code*. The jurisprudence under these sections is certainly helpful but is not particularly applicable in dealing with an incident taking place within a cell block and the test to be used under S. 10 of the *Code of Professional Conduct Regulation*.

Mr. Falzon put the appropriate tests in paragraphs 37 and 38 of his brief this way:

> 37. The proper test in a case involving s. 10(b) of the *Code of Professional Conduct Regulation* can be concisely stated. It is whether the force that was used - both in its nature and its application - was necessary in all the circumstances when viewed from the perspective of a reasonable police officer in the position of the respondent
>
> 38. The test must be applied based on the particular circumstances facing a police officer, and cannot be based purely on hindsight. The test requires the person evaluating the police conduct to make proper allowances for the exigent circumstances faced by police officers and the reality that officers facing legitimate threats cannot be expected to measure force to a nicety: *Anderson v. Port Moody (City) Police Department*, [2000] B.C.J. No. 1628 (S.C.), paragraph 51; *Allarie v. Victoria (City)*, [1993] B.C.J. No. 1592 (S.C.).

Put another way, as a former colleague used to say: detached reflection cannot be expected in the presence of an upturned knife.

This is just another way of suggesting that a police officer must measure the risk parameters in every case and react to them sometimes more quickly than others. Here the risk factors were lessened by the surroundings and the available help of another officer and two jailers.

HEIGHTENED RISK FACTORS

I have already found that Constable Smith was acting reasonably under police protocol in taking down Mr. McKay

in all the circumstances as they evolved in this case. I so hold despite my subjective view that it was unnecessary.

I have not dealt with Mr. Harris' extensive submissions on the heightened risks that he submits could be inferred by the clenched fist, said to have occurred at the scene. Whether such action by Mr. McKay took place or not I can't find from the video evidence and the officers' testimony, that it had a great deal of affect on either of them. I say this because the video pictures taken in the sally port and at the booking desk don't reveal a threatening prisoner, only a 150 pound young, but intoxicated, truculent, and foul mouthed student. The sole question for determination by me is whether Constable Smith, in carrying out the takedown of Mr. McKay, used excessive force and thus failed the second test posed by the case law under S. 10 (b) of the *Code Of Professional Conduct*.

FINAL CONCLUSIONS

In making my findings I must take into account the area in which the takedown took place, as well as all the surrounding circumstances. Those circumstances include Constable Smith's knowledge of the concrete floor and the likelihood of injury to a prisoner in handcuffs being

injured in a takedown. As well, the nearby and readily available assistance of Constable Niederlinski and two jailers, whose assistance could have made a takedown unnecessary.

I have reluctantly found that the actions of Mr. McKay justified a takedown if carried out appropriately. I have concluded, despite the able arguments of Mr. Harris, it was not.

A soft takedown as described by Corporal Gillis, taking care to cushion the descent and its velocity, was in order. The operative word is a "controlled" takedown. Unfortunately that did not take place.

After long and anxious consideration, I conclude that Constable Smith used more force than was necessary in the takedown which took place in less than a second. His instinctive physical reaction from his fingers being grabbed by Mr. McKay, was not in keeping with his training and the professional demeanour shown in the video pictures up to that point. In making this finding, I take into account and draw inferences from, Dr. Cameron's evidence that the injury suffered would take more than a fall. As well, the sound described by the witnesses when Mr. McKay's head hit the cement floor is significant. In my observations of Constable Smith and his demeanour, I am

satisfied that he has little clear recollection of how the incident occurred. He acted instinctively and without much forethought. Mr. Falzon quotes the testimony of Constable Smith in his addendum to paragraphs 5 and 6 of his brief:

> That passage will be relevant to the remarkable exchange between Mr. Waddell and the respondent on October 24, 2008 (T, p. 1195, ll. 11-13):
>
> Q. If this was a takedown with control, what went wrong?
>
> A. I don't know

The passage he refers to is a quotation from *R. v. Lederman,* {204] O.J. No. 5120 OCJ) at paragraph 3 where the learned Judge says:

> ...that officers are told, young recruits are told, that they have to be in a position to justify what they do. They cannot take actions without being able to subsequently articulate why they did it, and when they do so, that is to say, take those actions, they have to have that thought in mind. Mr. Lawrence is of the same view I suspect, as I am, and that is that when persons who are vested with authority to use force in fact use it, that is subject to very careful scrutiny.

Having reached the conclusion that Constable Smith in the split second of this event breached S. 10 (b) of *The Code of Professional Conduct,* I must leave the question of penalty for "a breach of disciplinary default of abuse of authority" to a further hearing or to written submissions. Counsel can no doubt arrange their choice of the two alternatives at their convenience.

I have mention the split second that Constable Smith strayed from what appears in the video to be highly professional demeanour. His transgression is not a case of police brutality. It was an instantaneous lapse which, for an ordinary citizen, would have taken place far more quickly, but probably with less restraint. While the ultimate result was disastrous, I can only add that the officials who, until after the event, disregarded previous warnings concerning the concrete floor, share in that result.

The public interest represented by the Police Complaints Commissioner however, must be ever vigilant at the straying, even for a split second, from proper police behaviour. There is far too much violence taking place in our society these days and there is no need for it to permeate police culture, even in brief and isolated occurrences.

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A COMPLAINT AGAINST CONSTABLE GREG SMITH OF

THEVICTORIA POLICE DEPARTMENT

Reasons for Decision of Adjudicator Robert Bruce Hutchison

PART TWO

On the 28th day of January, 2009, I handed down reasons that held Constable Greg Smith had used unnecessary force in controlling a handcuffed prisoner, Mr. Thomas McKay. The incident took place in the Victoria Police cells booking area on the 22nd/23rd day of April, 2004. At the conclusion of those reasons I made the following observations:

> "Having reached the conclusion that Constable Greg Smith in the split second of this event breached S. 10 (b) of *The Code of Professional Conduct* I must leave the question of penalty for "a breach of disciplinary default of abuse of authority" to a further hearing or to written submissions. Counsel can no doubt arrange their choice of the two alternatives at their convenience."

On September 8th, 2009 counsel appeared before me and argued the question of penalty for Constable Greg Smith's "disciplinary default" as defined under Section 46.(1) of *The Police Act.*

SUMMARY OF DISCIPLINE ORDER

For the reasons that follow I conclude that Constable Greg Smith should be suspended for three days without pay and ordered to take six hours retraining in takedown techniques on his own time

LEGAL ISSUES

Pursuant to Section 46(i) of *The Police Act* Constable Greg Smith's behaviour constituted a "public trust default" which under the section means conduct that would, constitute a disciplinary default which:

> (a) causes or has the potential to cause physical or emotional harm or financial loss to any person,
>
> (b) violates any person's dignity, privacy or other rights recognized by law or,
>
> (c) is likely to undermine public confidence in the police.

For such a default the *Police Act* sets forth the parameters of the punishment that a disciplinary authority (in this case myself acting as adjudicator after a public hearing) may impose discipline pursuant to subsections 19(1)-(4) of the *Code of Professional Conduct Regulation.* The sub sections read as follows:

> 19(1) After finding that a disciplinary default has occurred, the discipline authority may impose one or more of the following disciplinary or corrective measures in relation to the police officer concerned:
>
> (a) dismissal;
> (b) reduction in rank;
> (c) transfer or reassignment;
> (d) suspension without pay for not more than 5 scheduled working days
> (e) direction to work under close supervision;
> (f) direction to undertake special training or retraining;
> (g) direction to undertake professional counseling;
> (h) written reprimand;

(i) verbal reprimand.

(2) If the discipline authority considers that one or more disciplinary or corrective measures are necessary, an approach that seeks to correct and educate the police officer concerned takes precedence over one that seeks to blame and punish, unless the approach that should take precedence is unworkable or would bring the administration of police discipline in disrepute.

(3) If the discipline authority considers that one or more disciplinary or corrective measures are necessary, the discipline authority **must** (my emphasis) choose the least onerous disciplinary or corrective measures in relation to the police officers concerned unless one or both of the following would be undermined:

(a) organizational effectiveness of the municipal police department with which the police officer is employed;
b) Public confidence in the administration of police discipline.

(4)Aggravating and mitigating circumstances must be considered in determining just and appropriate disciplinary or corrective measures for a breach of this Code by a police officer of municipal police department, including, without limitation,

(a) the seriousness of the breach;
(b) the police officer's record of employment as a police officer, including, without limitation, his or her service record of discipline, if any, and any other current record concerning past discipline defaults;
(c) the impact of proposed disciplinary and corrective measures on the police officer and on the police officer's career and family;
(d) the likelihood of future breaches of this Code by the police officer;
(e) whether the police officer accepts responsibility for the breach and is willing to take steps to prevent a recurrence of the breach;
(f) the degree to which the municipal police department's policies, standing orders or internal procedures or the actions of the police officer's supervisor contributed to the breach;
(g) the range of disciplinary or corrective measures imposed in similar circumstances, if known, and
(h) other aggravating or mitigating factors.

GENERAL OVERVIEW

Since, the subject of this discipline hearing occurred over 5 years ago it can hardly be said that the organizational effectiveness of the Victoria Police Department will be undermined by my not choosing the least onerous disciplinary

or corrective measure open to me. Accordingly, any discipline order I make that is more than a reprimand must be based on my finding that public confidence in the administration of police discipline would be undermined by a mere reprimand.

Since, both counsel for the Commissioner and the Respondent Constable Greg Smith suggest more severe punishment I do find that a reprimand would undermine public confidence in police discipline.

Counsel for the Police Complaint Commissioner, in summation, suggests I should order a one year demotion of Constable Greg Smith from first class to second class Constable.

Counsel for Constable Greg Smith suggests a two day suspension without pay for two working days. Counsel further argues Constable Greg Smith should subject himself to retraining in use of force on his own time. As well he should prepare a 1,000 word essay on takedown techniques and further discuss when takedowns are appropriate. Finally he should make himself available on his own time to the Use of Force Trainer to lecture at use of force classes for new recruits.

Mr. Waddell and Mr. Falzon both argue that such corrective measures would be of no use and at worse would be harmful.

It is acknowledged by the Commissioner's counsel that Constable Greg Smith had a clean record at the time of the incident in 2004 since joining the force in 1999. While they argued that Constable Greg Smith was taken off his patrol duties it would appear his work was a promotion to the position of School Liaison Officer after 17 months of patrol duty following the McKay incident. It is difficult to see that Constable Greg Smith was somehow down graded by his employers since the takedown of Mr. McKay.

In their brief counsel put it this way:

> With respect to s. 19(2) of the *Code*, this is a clear case calling for discipline rather than education. In this case, "use of force" education would be unworkable and serve no meaningful purpose given this officer's previous training and his steadfast position (shared by his own department throughout this matter) that he did nothing wrong. This is a clear case where the credibility of the discipline system depends on the member getting the clear message that the standards for the use of force are ultimately established by the law rather than by the police. Public

confidence in the discipline process requires that the member's conduct be appropriate

ADJUDICATOR'S RESPONSIBILITIES

My duty is to impose discipline on Constable Greg Smith for his unwarranted use of force in the takedown of a handcuffed prisoner. However the remark that the department twice found that the officer did nothing wrong seems to suggest that I must also send a clear message to Constable Greg Smith's departmental superiors. The argument can be construed to suggest that serious discipline, such as demotion of rank for a year, will send a message to the Chief and the Chairman of the Victoria Police Commission. Neither the present Chief, nor Chairman, held such a position in April 2004, when the events I am called on to censure took place.

In any event, I am not prepared to make an example of a subordinate to punish his superiors.

No doubt Mr. Thomas McKay's civil suit and its settlement accomplished some distasteful discipline of the Chief and Commission and certainly caused a change in policies and thinking in police conduct within the local lock up. Having been given the opportunity to read the medical reports supplied by Mr. Considine, Mr. McKay's lawyer, I surmise the fiscal reproof was significant. If the Police Complaints Commissioner wanted a clear message sent to the Police Commission and the Chief I am satisfied that the civil suit has achieved a good deal more than would be achieved by punishing Constable Greg Smith unnecessarily severely. As I found in my original reasons the superiors who failed to heed the warnings of subordinates to install rubber padding in the booking area, as was done in the cells themselves, shared in the catastrophic damages inflicted on Mr. McKay.

I am free of the admonition in sub section 19(3) of the Code of Professional Conduct dictating that I impose the least onerous disciplinary or corrective measures. Such a slap on the wrist would certainly undermine public confidence in the administration of police discipline. In any event the legislation requiring the discipline authority to choose the least onerous disciplinary or corrective measures seems out of place. As one who has heard legislators often criticise the courts for

imposing light sentences it's strange they should chose to admonish police disciplinarians to do just that.

That doesn't mean, however, that Constable Greg Smith should be punished unduly because of poor management of those in charge of the city's lock up. As argued by Mr. Harris, management failed to develop protocols regarding the takedown of handcuffed prisoners when other officers or jailers were present. However, Constable Greg Smith knew the booking area was not protected by rubber matting and took down a young student in a way that used unnecessary force causing a hit to the head inflicting catastrophic damages.

At the hearing I put it to counsel that some punishment was inflicted by the systemic flaws in this case. The Police Complaint Commissioner ordered a public hearing on January 18, 2008 of an incident that occurred almost four years prior. That started a process that is now only a few short months from two years ago. It is now over 5 years since the conduct complained of took place. The administration of police discipline that twice found Constable Greg Smith's conduct not to be at fault left the Commissioner no choice, but the long delay and resulting publicity must have imposed substantial anxiety for Constable Greg Smith. It is interesting to note that B.C.'s police chiefs and senior RCMP officers have very recently said a new independent civilian-led unit is required to investigate misconduct of police officers in order to restore public confidence. One would hope that such an investigative roll would come under the Complaints Commissioner's office rather than setting up another bureaucracy. Certainly, the conduct of Constable Greg Smith's wrongful use of force and the steps taken within his own Department adds weight to the solution suggested by B.C.'s police chiefs.

I am aware that these remarks are a long way from my duty to impose discipline on Constable Greg Smith. However, in their submissions, Commission counsel have stressed issues that should not all be borne by Constable Greg Smith. The Police Act has set up a civilian body to impose discipline on a paramilitary organization. When imposing discipline an adjudicator must bear in mind the conduct and behaviour of the total organization from the top down. The conduct of the officer in question must be viewed as it occurs in the confines of the organization he is a part of. In Constable Greg Smith's case his conduct was tolerated by his superiors in a way it should not have been.

COUNSELS' POSITIONS

The Commissioner's counsel summarized Constable Greg Smith's behaviour as not warranting dismissal, but, as they put it, "does warrant serious denunciation and a response calculated to ensure the credibility and legitimacy of the police discipline process." They then suggest a one year reduction in rank to second class Constable for a period of one year.

Mr. Harris on behalf of Constable Greg Smith put it this way in his brief:

> Any breach of s. 10(b) of the *Code* is serious. Nevertheless, there is a range of conduct that serves to increase the seriousness of a particular breach. Constable Greg Smith's conduct and the injuries suffered by Mr. McKay support a finding that a seriousness of the breach is at the mid range.

With this I agree.

Mr. Harris further argued in his brief:

> Commission Counsel wrongly suggests that Constable Greg Smith assaulted Mr. McKay. Crown Counsel reviewed this matter and determined that criminal charges were not warranted. A reasonable inference can be drawn that Constable Greg Smith's conduct was not so serious so as to transgress societal rules. Moreover and of significance, is the conduct was so subtle that the breach escaped detection despite there being two internal investigations.

Having heard all of the evidence it is clear that a charge of assault in the circumstances of this case would, in my opinion, fail. The failure of two internal investigations, as I've tried to point out, leaves a great deal to be desired in the hierarchy of the Victoria Police Department. It is not a failure that should visit punishment or discipline on Constable Greg Smith, however.

Further, I find Commissioner's counsel's argument that deceit took place in the testimony of Constable Greg Smith unwarranted. Further I do not ascribe to the argument I should increase discipline because of behaviour, not yet dealt with, that post dates the incident giving rise to the discipline sought in the takedown of Thomas McKay.

Counsel also argued that the consequential extreme injuries should escalate the discipline ordered. From the injuries described in the medical reports, only filed for the first time at the last hearing, counsel suggests Constable Greg Smith intentionally threw Mr. McKay to the concrete floor. It was their view no alternative rational conclusion could be arrived at. If I had come to that conclusion on a balance of probabilities I would have said so in my original reasons. I pointed out it was a gray area since the video failed to capture the event and Mr. McKay did not and could not testify. The medical reports suggest he had no memory of the events at the police cells in any event. It is equally possible that Constable Greg Smith, who testified he didn't know what went wrong, unintentionally failed to cushion the descent and velocity after commencing the takedown by tripping Mr. McKay. That failure led me to find an unwarranted use of force. The Commissioner failed, however, to prove that Mr. McKay was thrown.

DISCIPLINE ORDER

Taking all the submissions and evidence into account I conclude that Constable Greg Smith, pursuant to the *Police Act,* should be disciplined by a three day suspension without pay. Further, I share to some extent the Commissioner's suggestion that retraining, followed by an essay and teaching assistance in use of force, on Constable Greg Smith's own time, would serve no useful purpose. However, I do conclude under Section 19(2) of the *Act* that Constable Greg Smith should, on his own time, take six hours devoted to retraining in takedown techniques.

Robert Bruce Hutchison, Adjudicator