PH File No. 2013-05
OPCC File No. 2010-5401

PUBLIC HEARING
(Pursuant to Section 137(1) *Police Act*, R.S.B.C. 1996, c. 267)

In the matter of a
Public Hearing into the complaint against
Constable Taylor Robinson #2777 of the Vancouver Police Department

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SUBMISSIONS OF COMMISSION COUNSEL

A. OVERVIEW

1. On October 6, 2014, the first date scheduled for a public hearing into the conduct of Constable Taylor Robinson, the respondent member accepted responsibility for two counts of misconduct under the *Police Act*, namely abuse of authority and neglect of duty.

2. There were then submissions by the parties with respect to the appropriate disciplinary or corrective measures to be imposed in this matter. Both Commission counsel and counsel for Pivot Legal Society submitted that, pursuant to s. 143(9)(c), the adjudicator should consider making a recommendation to the Vancouver Police Board with respect to training and minimum years of service for members assigned to patrol the Downtown Eastside. By agreement of all parties, the matter was adjourned to October 17, 2014 for the sole purpose of providing the Vancouver Police Department ("VPD") and/or Chief Constable Chu ("Chief Constable") with an opportunity to make submissions or provide information with respect to that issue. Specifically, the adjudicator wished to learn if, subsequent to the incident in question, changes in policy or procedure had been effected by the VPD in that regard.

3. Prior to October 17, 2014, both the Vancouver Police Union ("VPU") and the Chief Constable applied for participant status pursuant to s. 144 of the *Police Act*.

4. The Application for Standing filed by the Chief Constable did not set out the extent of the participation which he sought. The application and subsequent letter filed by the VPU sought standing to make submissions on three issues, namely:

   I. Policy issues relating to policing in Vancouver's Downtown Eastside;

   II. The effect of the changes to the *Police Act* with respect to the maximum allowable suspension;

   III. The role of the Police Complaint Commissioner in public hearings.

5. In oral submissions on October 17, 2014, counsel for the Chief Constable stated that he wished to be permitted to make a submission on the role of the Police Complaint Commissioner ("Commissioner") in public hearings, effectively joining in the submission of the VPU that Commission counsel should not have made a submission as to appropriate disciplinary or corrective measures. Counsel for the Chief Constable submitted that the submission of Commission counsel should be disregarded by the adjudicator.

6. Public hearing counsel and Commission counsel agreed that the VPU should be granted standing to make submissions on the policy issues related to policing on the Vancouver Downtown Eastside and on the effect of changes to the *Police Act* with respect to maximum suspension. Public hearing counsel and Commission counsel opposed standing being granted to both the VPU and the Chief Constable to make submissions about the appropriate scope of submissions of Commission counsel.

7. The adjudicator requested that the parties file written submissions to address the issues which remained contentious as of October 17, 2014. On October 24, 2014, both the VPU and the Chief Constable filed written submissions pursuant to the aforementioned request. The forgoing represents the response to those submissions of Commission counsel.

B. RESPONSE TO SUBMISSIONS OF CHIEF CONSTABLE

8. It is noteworthy that the Chief Constable does not advance in written submissions the position taken by counsel in oral submissions, namely that the submission of Commission

counsel on penalty should be disregarded. Indeed, the submission of the Chief Constable is silent on that point. In addition, the submission does not really expand upon the letter filed by the Chief Constable as Appendix 'B'. The letter speaks for itself and should be considered by the adjudicator in determining whether or not to make any recommendations to the Police Board. It certainly appears from the letter of the Chief Constable that the VPD is alive to the issues raised by Commission counsel and is making efforts to ensure that officers have some minimum level of meaningful experience prior to deployment on the Downtown Eastside. With respect to what level of training is appropriate or adequate in that regard, we must defer to the Chief Constable.

9. At paragraph 12, the Chief Constable acknowledges that an error was made by the inspector then in charge of the Professional Standards Section with respect to reporting this matter to the OPCC. The balance of paragraph 12 seeks to place that acknowledgement of responsibility in context.

10. Paragraph 13 of the Submissions of the Chief Constable is, with respect, gratuitous and unhelpful. In response to the point made about senior judges of the Provincial Court versus "retired judges", Commission counsel merely points out the obvious: the *Act* is clear in both ss. 117(4) and 142(1) that the PCC only appoints a retired judge after consultation with the Associate Chief Justice, who recommends one or more retired judges. The Associate Chief Justice is the keeper of the list of eligible retired judges, not the Commissioner. The Associate Chief Justice recommended the senior judge in question, having previously placed him on a list of retired judges suitable for recommendation pursuant to the *Act*.

11. As to the balance of paragraph 13, specifically the references to two Supreme Court decisions, Commission counsel fails to see the relevance of those submissions and cases to the points at issue here. Indeed, the entirety of paragraph 13 appears to be "surplus to requirements," particularly given the narrow issue upon which this tribunal invited input from the Chief Constable.

12. In response to paragraphs 14 and 15, we take a different view of the manner in which Ms. Davidsen's complaint was handled and viewed by the VPD. Attached as Appendix 'A'

to this submission is a transcript of the initial statement of Ms. Davidsen. It was taken by two members of the Professional Standards Section ("PSS"), Officers Johnson and Wall. Ms. Davidsen advised those officers that she believed she had been assaulted and would like the officer to be charged "for that" (page 6). The PSS members advised Ms. Davidsen that they were investigating a complaint against the officer (as opposed to a criminal assault) (page 7). It is clear that the VPD did not investigate this matter as a potential criminal charge, but simply as a disciplinary complaint.

13. The PSS members offered Constable Robinson's apology to Ms. Davidsen (page 10) and then provided her with information about the OPCC website for the purpose of making a complaint (page 13). When another individual, Jacob Shroeder, who was present with Ms. Davidsen, advised that her understanding was that she had already made a complaint, Officers Johnson and Wall responded that Ms. Davidsen had not initiated a formal complaint and at this point, the police were investigating the matter "informally" (page 14).

14. Both officers then reiterated that in order to make a formal complaint, Ms. Davidsen must fill out an online form and that they (VPD PSS) would only then investigate "formally, as opposed to the informal process." (Page 15).

15. Sections 78 and 80 of the *Police Act* are clear that the PSS investigators, having decided to treat the matter as a disciplinary complaint, rather than a criminal investigation, had a positive duty to document the complaint of Ms. Davidsen and forward to the PCC a copy of the record of the complaint. Those officers should not have simply referred Ms. Davidsen to a website, nor erroneously advised her that she needed to fill out a form in order to make a formal complaint; certainly, they should not have embarked upon an "informal" investigation.

16. Appendix 'B' is the investigative log of Sergeant Johnson and Staff Sgt. Newman of the PSS. That log notes that on June 10, 2010, Sgt. Johnson reviewed a transcript of Ms. Davidsen's statement with his supervisor, Staff Sgt. Newman. The log then reads as follows:

> "Ordered investigation not anticipated; prefer internal discipline route if possible, but depends on response\decision of Ms. Davidsen".

17. The next log note is dated June 22, 2010 and reads in part as follows:

> "no complaint has been received by our office to date. Direction from S\Sgt. Newman is to have the member draft a letter of apology, which I will then deliver to Ms. Davidsen, along with a reminder of the complaint process."

18. Thus, it is clear that Sgt. Johnson did not consider the statement which he took from Ms. Davidsen to be a complaint under the *Act*. Obviously, he should have considered it to be such. Moreover, the totality of the investigative log to that point reveals that the VPD did wish to deal with the matter either "informally" or by way of internal discipline as opposed to the formal complaint process under the *Police Act*. In a telephone discussion on July 23, 2010 between Staff Sgt. Newman and Deputy Commissioner Brown, when queried about the delay in notifying the OPCC, Staff Sgt. Newman advised Mr. Brown and documented in his log that, in the first instance, the VPD "were attempting to resolve this on an informal basis". That clear statement from a Staff Sergeant in the PSs is strong contemporaneous evidence that indeed the VPD were attempting to resolve Ms. Davidsen's complaint informally at the outset. Likewise, the entirety of the investigative log speaks to an attempt to treat this matter as an internal complaint as opposed to a public trust complaint under the *Police Act*.

19. In response to paragraph 16 of the submission of the Chief Constable, Commission counsel offers one observation: the issue of "drilling" is not before this tribunal for consideration. Therefore, we make no submission on that point.

C. REPLY TO SUBMISSIONS OF VANCOUVER POLICE UNION

1) Statutory Amendment/Length of Suspension

20. In response to paragraph 4 of the VPU's submission, Commission counsel wishes to repeat and clarify the submission which was made orally. That submission was not as blunt and basic as that which is set out at paragraph 4 of the VPU submission. In essence, the position of Commission counsel is as follows:

- Discipline authorities must recognize that, unlike the former Act, if a suspension is to be imposed for cases involving conduct after March 31, 2010, that suspension can exceed five working days.

- In deciding what discipline is appropriate, discipline authorities must always consider the aggravating and mitigating factors set out at s. 126(2), and must as well be guided by the considerations in s. 126(3).

- Once a discipline authority has determined that a suspension is required, he or she has already determined that an approach which seeks to "correct and educate" is unworkable. Thus, the discipline authority is left to determine what is the appropriate "punishment" for the misconduct.

- Once the discipline authority has determined that a suspension is the appropriate disciplinary or corrective measure, he or she should impose a suspension, within the allowable duration (i.e.: one to 30 days) which reflects the gravity of the misconduct, always bearing in mind the public interest in seeing that serious misconduct by police officers is adequately punished.

- Because the maximum allowable suspension increased six fold, from five days to 30 days, suspensions for abuse of authority under the old regime are of limited or no precedent value.

- Inevitably, under the new regime, some serious cases of misconduct which constitute abuse of authority will attract suspensions of greater duration than five days.

- Senior police officers, acting as discipline authorities under the *Police Act*, have been slow to move outside of what had been a more or less established range for abuse of authority cases, namely one to three day suspensions. Thus, retired judges acting as adjudicators should, in appropriate cases, set suspensions within a range that recognizes the seriousness of the breach of public trust and which adequately protects the public interest in the administration of police discipline.

21. In response to paragraph 5 of the VPU Submission, Commission counsel agrees that <u>one</u> of the reasons for the increased maximum potential suspension was to allow for a lengthy suspension in cases where reduction in rank or dismissal were also legitimate possible outcomes. However, Commission counsel disagrees that this was the *only* reason for the increase in maximum allowable suspension. The increase from five to 30 days also recognizes that in serious cases of misconduct, which clearly do not require dismissal, a suspension of five days may be inadequate. In short, the broader and longer range of

possible suspension represents a refinement of that which is available to discipline authorities in the proverbial disciplinary "toolbox".

22. To the extent that the VPU takes the position, as set out in paragraph 5, that the sole purpose of the increase was "to protect police officers", Commission counsel disagrees. Protection of the public and the public interest in the administration of police discipline is the primary rationale for that amendment. Indeed, at paragraph 348 of his report, Josiah Wood, Q.C. refers to "the unanimous view point expressed by those who spoke to us on the matter" that the potential length of suspension should be increased. It was not solely the view expressed by discipline authorities which led to that recommendation. Indeed, the *Police Act* in various sections, including s. 126(3), requires DA's to have in mind the "repute of the administration of police discipline".

2) VPU Submission on Staffing and Training on Downtown Eastside

23. Counsel for the VPU made a very brief submission in this regard on October 17, 2014, but the VPU's written submission is silent on the issue.

24. As earlier stated, Commission counsel does not oppose limited participant status for the VPU. Specifically, Commission counsel agrees that the VPU should be permitted to make submissions on the policy issues related to policing in the Downtown Eastside and the effect of changes to the *Police Act* suspension provisions. With respect to the first of these, the VPU has declined to make a submission. That is noteworthy insofar as that was the only issue upon which submissions had not been completed on October 6, 2014. Pursuant to s. 144, the adjudicator must consider, among other factors, whether the VPU's participation "would further the conduct of the public hearing". In assessing that question, this tribunal should bear in mind that, subject to the one issue about recommendations to the Vancouver Police Board, the adjudicator's decision was effectively on reserve at the time of the VPU's application for standing. That application very much looks like the proverbial "Trojan Horse", particularly in light of the VPU's silence in its written submissions on the only outstanding issue respecting staffing on the Downtown Eastside. This implies that the VPU sought to utilize the one live issue in the

proceedings for the sole purposeof advancing submissions on an entirely new issue, about which none of the parties at the hearing expressed concern on October 6, 2014.

3) Standing of VPU

The threshold interpretive issue – does section 144 give the adjudicator discretion to grant participant status at any stage of the public hearing process

25. The application by the VPU to participate in the public hearing proceedings to address the role of Commission counsel raises the threshold issue of whether section 144 of the *Police Act* is reasonably interpreted to give the adjudicator discretion to grant participatory status to a person at any stage of the public hearing process, including after the parties' submissions on appropriate penalty are complete. This is a question of pure statutory interpretation of general application which must be correctly decided.

26. The proper approach to statutory interpretation is well-established and easily stated. That approach is to "seek the intent of Parliament by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and objects of the statute": *R. v. Jarvis*, 2002 SCC 73; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42; *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 (relied on in *Florkow v. British Columbia (Police Complaint Commissioner),* 2013 BCCA 92); E.A. Driedger, *Construction of Statutes* (2nd ed., 1983) at p. 87; *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8. There is also a well-established rule that statutes ought to be interpreted so as to avoid an absurd result: *Rizzo v. Rizzo Shoes*, at p. 43 ("It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences").

27. Section 143 of the *Police Act* governs public hearings. Among other things, section 143 provides that public hearing counsel must present the case relative to each allegation of misconduct against a member. Section 143(5) of the *Police Act* provides that:

> (5) Public hearing counsel, the member or former member concerned, or his or her agent or legal counsel and commission counsel may
>
> (a) call any witness who has relevant evidence to give, whether or not the witness was interviewed during the original investigation or called at the

> discipline proceeding,
> (b) examine or cross-examine witnesses,
> (c) introduce into evidence any record or report concerning the matter, and
> (d) make oral or written submissions, or both, after all of the evidence is called.

28. "Public hearing counsel" is defined in section 76 to mean "in relation to a public hearing, legal counsel appointed by the police complaint commissioner under section 138(7) for the purposes of that public hearing". "Commission counsel" is also defined in that section:

> "commission counsel" means legal counsel representing the police complaint commissioner.

29. Section 143(7) speaks to a complainant's (or complainant's representative) participatory rights in a public hearing. If the public hearing concerns conduct that was the subject of an admissible complaint, the complainant "may make oral or written submissions, or both, after all of the evidence is called".

30. Section 144 gives the adjudicator discretion to allow a person "other than public hearing counsel, commission counsel and the member" to be a participant in a public hearing taking into account three specific factors.

31. If the adjudicator grants an applicant participant status under section 144, the adjudicator may (under section 145) make an order restricting the manner and extent of that person's participation and the rights and responsibilities of the person.

32. Section 154 of the *Police Act* provides in part:

> 154(1) An adjudicator has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising or required to be determined in respect of a public hearing or review on the record, and to make any order the adjudicator is permitted under this Division to make…
> (3) An appeal on a question of law lies to the Court of Appeal, with leave of a justice of the Court of Appeal from a decision of an adjudicator under section 143(9)….

33. By implication, the VPU interprets section 144 to mean that a person can apply to be a public hearing participant at any stage of the public hearing process, including after

having heard any evidence adduced during the hearing and even after hearing final submissions by the parties on the question of appropriate penalty. In the circumstances here, the VPU is effectively seeking to interject itself into the proceedings after-the-fact to speak to an issue (the "role" of the Commissioner in public hearings) that no party raised.

34. Section 144 is silent as to when such participant applications may be made. However, when ss. 143, 144, 145 and 146 are read together, s. 144 is most reasonably interpreted as requiring them to be made at the outset of a public hearing, rather than at any stage during the public hearing process. For example, s. 143 defines who is able to participate in a public hearing as a party and what participatory rights those parties have in respect of the giving or evidence, the calling of witnesses, the examination or cross examination of witnesses, and the making of oral or written submissions (or both) once all of the evidence is called.

35. S. 144 speaks only to an adjudicator's discretion to grant or decline a person participant status, taking into account the factors set out in s. 144(2)(a) to (c). S.146 speaks to a participant's rights in a public hearing. The rights that must be afforded a person granted participation status under s. 146 are these:

- The right to participate or be represented by counsel or (with the adjudicator's approval) by an agent
- The right to the same immunities as a witness who appears before the court
- The right to be considered to have objected to answering any question that might incriminate the participant in a criminal proceeding or establish the participant's liability in a civil proceeding

36. Additionally, s. 146(3) provides in part that:

> (3) Any answer provided by a participant … before an adjudicator must not be used or admitted in evidence against the participant … in any trial or other proceedings, other than a prosecution for perjury in respect of the answer provided.

37. The adjudicator may (subject to s. 146) make certain orders respecting a participant's participation, and in particular, the manner and extent of that participation and the participant's rights and responsibilities for public hearing purposes.

38. All of these provisions point to a decision about participant status being made before the public hearing commences and not at any stage of the public hearing process. An analogy may be drawn between a person seeking intervener status in a court proceeding; such applications are made prior to the commencement of that proceeding. Moreover, to interpret s. 144 differently would lead to an absurd result and could unduly and unnecessarily complicate proceedings and lead to a disorderly and unfair hearing process.

39. For these reasons, the Commissioner respectfully submits that, properly interpreted, applications for participant status must be made before the public hearing commences.

If the adjudicator interprets section 144 to mean applications for participant status can be brought at any stage of the public hearing process, should the adjudicator exercise his discretion in favor of doing so based on section 144(2) considerations?

40. The VPU, who represents the member whose conduct is at issue here, says it sought to participate as soon as it "heard that counsel for the Commissioner took a strong position in the hearing on the amount of discipline that should be awarded and in favour of significantly more discipline than had been given by the disciplinary authority". The VPU acknowledges that "none of the other parties to the hearing prior to October 17, 2014, raised this important policy question". It further argues that, because it represents all police officers (not just the member), "it will be helpful" to the adjudicator, the parties and future parties, to hear from the VPU on this point. It is not clear what independent interest the VPU purports to represent that is different from that of its member, Constable Robinson, which has already been the subject of representation by counsel.

41. In any event, the *Police Act* directs the adjudicator to consider three specific factors when deciding whether to grant participant status, none of which have been addressed by the VPU in its submissions. Those factors are:

- whether (and to what extent) the applicant VPU's interest may be affected by the findings of the adjudicator
- whether the VPU's participation would further the conduct of the public hearing
- whether that participation would contribute to the fairness of the public hearing

42. There is nothing that would suggest that the VPU has a particular interest that will be affected by the adjudicator's findings, as is the case with the member and the

complainant. The VPU's participation does nothing to further the conduct of the public hearing, which but for the VPU's late application was substantially complete. It certainly does not contribute to public hearing fairness as it raises new legal issues after the completion of submissions by the parties who are, by statute, permitted to participate. Returning to the intervener analogy, it is a well-recognized principle that interveners may not participate to redefine or take the issues away from the parties.

43. Additionally, to the extent the adjudicator's decision on the VPU's participation application has precedential value for purposes of future such applications, it is not advisable. Permitting the VPU to participate at his juncture sends a message that, if a police union does not like what it hears about what Commission counsel has argued in a public proceeding, it can independently insert itself into the process to take a contrary position or challenge Commission counsel's authority to make certain submissions.

44. Finally, the Notice of Hearing, which was directed to the Chief of the VPD and the member, was issued in November 2013, 11 months before the public hearing commenced, and the VPU was aware of it. The *Lowe v. Diebolt* decision was released in the summer of 2014, months before the public hearing commenced. If the VPU felt it was important to have the question of Commission counsel's role addressed as an issue in the public hearing it should have appropriately applied for participant status before the hearing commenced. In this way, if granted such status, the issue would have been properly and fairly addressed as a threshold issue at the outset, as would the issue of the appropriateness of the VPU participating independent of its member. Instead, the VPU apparently seeks to have the adjudicator now disregard aspects of Commission counsel's arguments already made in closing submissions.

45. In sum, s. 144 is specific about what factors must be considered and it is an exclusive, rather than an inclusive, list. It does not include, as a factor appropriately taken into account, circumstances where an applicant raises legal issues not raised by any of the parties. As noted, none of the factors the adjudicator is required to consider in deciding whether to grant participation status is present here. That being the case, there are no

factors which would militate in favour of the adjudicator exercising discretion under s. 144 to grant the VPU participatory status.

4) VPU's Submission on Role of the Commissioner

Does Commission counsel have the authority to make submissions on the question of appropriate discipline?

46. The question of whether Commission counsel has any authority to make submissions on the question of appropriate discipline in a public hearing context is a question of statutory interpretation rather than an "important policy question" as has been suggested by the VPU.

47. Section 143 is clear and unambiguous in that it gives full and equal participatory rights to Commission counsel as are granted to the member and the public hearing counsel. There is nothing in s. 143 which would infer that Commission counsel's participatory rights are somehow limited, nor are there any other provisions in the *Police Act* which explicitly (or implicitly) restrict those participatory rights. If the Legislature had intended to restrict Commission counsel's role it could have easily done so, as it did in respect of complainants in s. 143(7) and as it gave authority to the adjudicator to do in respect of s. 144 participants in s. 145 of the Act.

48. However, relying primarily on the cases of *Lowe v. Diebolt*, 2014 BCCA 280 and *Florkow v. British Columbia (Police Complaint Commissioner),* 2013 BCCA 92, the VPU argues that the role of Commission counsel in public hearings is confined:

> 31. We recognize that under s. 143(5) of the *Police Act*, both public hearing counsel and commission counsel have procedural rights including examining and cross-examining witnesses and making oral submissions after evidence is presented. However, we submit this does not mean that the Commissioner should be permitted to argue for a particular outcome on discipline. The Commissioner should be a "keeper of the process" but should remain neutral as to the outcome…
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> 33 … To add a third counsel (Commissioner's) to make a further argument in respect of the outcome is not only unseemly and creates an imbalance against the respondent member, but it is inconsistent with the neutral role that the Court of Appeal has expressly delineated for the Commissioner ….

49. These types of arguments are mere policy ones which play no part in the statutory interpretation analysis. The argument in paragraph 33 concerning legislative intent is pure speculation.

50. In any event, *Lowe v. Diebolt* must be considered in its proper context, which is an appeal by the Commissioner of a decision of an adjudicator, appointed by him, in the context of a review under s. 117 of the *Police Act*. The role of Commission counsel in respect of the public hearing provisions of the *Police Act* were not at issue or discussed by the Court. Additionally, the remarks of the Court were directed to question of whether the Commissioner had standing to bring an appeal challenging the correctness of an adjudicator's decision. It is common ground that the Commissioner is not a party to the disciplinary authority review process under s. 117; rather the Commissioner's role is to appoint an adjudicator to conduct such a process in certain circumstances. It is in this sense that the Court observed the Commissioner is "not given a role in the substantive disposition of complaints, and, as a neutral party in the administrative regime, can have no legitimate interest in the outcome of a complaint proceeding".

51. Justice Groberman, speaking for the Court, ultimately concluded (at paragraph 74) that it was unnecessary to reach any final conclusion on the issue of standing and the Court expressly left open the question of whether the Commissioner could bring judicial review proceedings to challenge, on substantive grounds, the correctness of a retired judge's conclusions in respect of s. 117 proceeding. That of course is not a question which arises squarely here and the VPU has not produced any authority to support the idea that the full participatory rights granted clearly and unambiguously by the Legislature under s. 143(5) of the *Police Act* must be limited by virtue of what the Court had to say (in *obiter*) in respect of an issue not before that Court, and not before the adjudicator in this case.

52. A final and related point concerns what the Court of Appeal had to say in *Florkow*. The Court there described the Commissioner's role very broadly this way:

> 2 … counsel for the Police Complaints Commissioner ("PCC") suggested that the *Police Act* is "highly specialized labour relations legislation dealing with the employment of police officers and the protection of the public by means of the disciplinary tools provided by the statute". I see no reason to disagree with this

> description but the focus of this appeal is the role of the PCC under Part XI. S. 177(1) of the Act states that the PCC is "responsible for overseeing and monitoring complaints investigation and the administration of discipline". The PCC thus has what is often described as a "gatekeeper" or "supervisory" role that does not involve deciding complaints on their merits, but ensuring that misconduct on the part of police is appropriately dealt with in the public interest and in accordance with the Act.

53. The full participation by the Commissioner in public hearing proceedings is not inconsistent with what the Court had to say in *Florkow*, nor is it inconsistent with the Commissioner's general responsibilities and functions as provided for in s. 177. The Commissioner is not adjudicating any disciplinary matter; rather the Commissioner participates through Commission counsel to ensure that "misconduct is appropriately dealt with in the public interest and in accordance with the Act". Such participation may, as is the case here, involve submissions on what the Commissioner sees as the appropriate disciplinary measures that should be taken to satisfy that public interest given all of the particular circumstances. This is consistent with one of the main reasons for holding a public hearing under s. 143(1)(b); namely, "to preserve or restore public confidence in the investigation of misconduct and the administration of police discipline".

54. S. 177(1) of the *Police Act* reads as follows:

> The Police Complaint Commissioner is generally responsible for overseeing and monitoring complaints, investigations and the administration of discipline and proceedings under this part, and ensuring that the purposes of this part are achieved. (Emphasis added)

55. The Commissioner must always have in mind the public interest in ensuring that complaints against police officers are adequately investigated and, if misconduct is found, that appropriate disciplinary or corrective measures are imposed. That is the essence of independent oversight of police agencies, and a large part of the raison d'être of the current *Police Act*, Part 11.

56. It is accepted that a primary role of the Commisioner under the *Police Act* is a supervisory, oversight one. It is also the case that the Commissioner has no ultimate decision-making authority on the central questions of whether or not misconduct has

occurred, and if so, what discipline should be imposed. However, on that second question, the Commissioner has an important role in ensuring that any disciplinary disposition is not contrary to the public interest.

57. Thus, under s. 120(4), the Commissioner has discretion to permit a case of serious misconduct to be resolved by way of pre-hearing conference if, in his opinion, this is not contrary to the public interest. Conversely, if the outcome of a pre-hearing conference and the specific disciplinary or corrective measures accepted by a member at that conference are not approved by the Commissioner, the complaint must proceed to a disciplinary proceeding (s. 120(16)). That is exactly what occurred in this case. In short, in any case where the discipline authority and respondent member reach agreement as to proposed discipline at a pre-hearing conference, the Commissioner has the power to reject that disposition and insist that there be a full discipline proceeding.

58. After a discipline proceeding is held under s. 124, if misconduct is found, the discipline authority must, after hearing submissions from the member, impose discipline under s. 126. That, too, is what occurred in this case. Section 138 of the *Act* governs circumstances in which the Commissioner may order either a review on the record or public hearing following a discipline proceeding. Section 138(2) contains a lengthy list of relevant factors which the Commissioner must consider in determining whether a public hearing or review on the record "is necessary in the public interest". Among the factors set out therein are the following:

> b) the nature and seriousness of harm or loss alleged to have been suffered by any person as a result of the conduct of the member or former member, including without limitation, whether: …
>
> iii. the conduct has undermined, or would be likely to undermine, public confidence in the police, the handling of complaints or the disciplinary process…
>
> d)
>
> ii. The disciplinary or corrective measures proposed are inappropriate or inadequate….

59. It is abundantly clear from the forgoing statutory provisions that the Commissioner must consider, in determining whether to order a public hearing or review on the record, the effect of the underlying conduct on public confidence in the police and the disciplinary process, and as part of that consideration, the adequacy of the disciplinary or corrective measures proposed by the discipline authority. It is noteworthy that both ss. 126(1) and 138 refer to "proposed" disciplinary or corrective measures on the part of the discipline authority. That is, the discipline authority is not "imposing" disciplinary or corrective measures at that stage. The "proposed" discipline only becomes final and conclusive if no public hearing or review on the record is ordered by the Commissioner (s. 133(6)). In essence, if disciplinary or corrective measures proposed in a particular case are inappropriate or inadequate from the perspective of the Commissioner, he may order a review on the record or public hearing. Such a hearing could also be ordered if, in the PCC's opinion, the disciplinary or corrective measures were "inappropriate", either because they were too punitive or outside the scope of what is permitted under the *Act*.

60. If the Commissioner orders a review on the record, pursuant to s. 141(6) the only party other than the respondent member who has a right to be heard, either in person or through counsel, is the Commissioner. There is no role for public hearing counsel at a review on the record.

61. Thus, if a review on the record was ordered on the basis that disciplinary or corrective measures were inadequate, the only party able to make that submission to the adjudicator would be the Commissioner or Commission counsel.

62. It is perhaps noteworthy, in general response to the VPU's assertion that the Commissioner must at all times remain "neutral", that in *Gemmell and Kojima*, a decision of Adjudicator Clancy under the previous *Police Act* regime, then Commissioner Dirk Ryneveld, Q.C. appeared to address the issue of whether the two members should be dismissed from the VPD. The Chief Constable, the VDP and the VPU all participated in that proceeding and took no issue with the Commissioner's participation.

63. As between review on the record and public hearing, s. 143(1)(b) mandates that the Commissioner must order a public hearing if such is required "to preserve or restore

public confidence in the investigation of misconduct or the administration of police discipline".

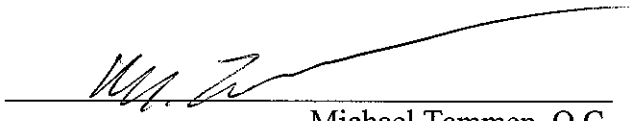
64. As noted above, if the Commissioner orders that a public hearing be held, the *Act* envisages that three parties will enjoy full participant status, namely public hearing counsel, Commission counsel, and the respondent member or her or his agent or legal counsel. Section 143(5) makes no distinction among public hearing counsel, Commission counsel and counsel for the member as regards such things as calling evidence, cross examining witnesses, and making oral and written submissions.

65. In summary, the *Police Act* clearly empowers the Commissioner to order a public hearing following a discipline proceeding in which a discipline authority, after finding misconduct which is likely to undermine public confidence in the police, proposes discipline whichthe Commissioner views to be inadequate. At the ensuing public hearing, the Commissioner is entitled to participate through Commission counsel, who enjoys full participant status, including the ability to make final submissions. If one of the reasons for the public hearing being ordered was inadequacy of the proposed discipline, it makes perfect sense that the Commissioner, through counsel, be permitted to make a submission as to what disciplinary measures would restore public confidence in the police and the disciplinary process.

66. Finally, Commission counsel respectfully reminds the adjudicator that, like the Commissioner, he is a creature of statute and as such has only such power and authority as is granted adjudicators under their constituent statute, the *Police Act*. The adjudicator's public hearing powers are primarily those set out in section 143 of the Act, which gives the Commissioner full participatory status or standing in public hearings. Here, the VPU invites the adjudicator to disregard Commission counsel's submissions, yet points to no source of statutory authority which would empower the adjudicator to do so.. In the absence of such language, the adjudicator is governed by the clear and unambiguous language in section 143(5) which expressly gives Commission counsel unrestricted authority to make submissions at the conclusion of the evidentiary portion of the hearing.

67. For all of the reasons given, it is maintained that: (1) section 144 does not authorize an adjudicator to grant participant status other than at the outset or prior to the commencement of a public hearing; (2) in the alternative, the three factors the adjudicator must consider under section 144 when deciding whether to grant the VPU such status are not engaged and this militates against the adjudicator exercising discretion in favour of granting the VPU status; and (3) in the further alternative, as there is nothing in the Police Act which restricts or authorizes the restriction of Commission counsel's participatory rights at a public hearing, the VPU's "standing" submissions should be dismissed.

All of which is respectfully submitted



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Commission Counsel

This 31st Day of October, 2014