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

IN THE MATTER OF PART 11 OF THE *POLICE ACT*, R.S.B.C. 1996, C. 367
AND IN THE MATTER OF THE PUBLIC HEARING
INTO THE CONDUCT OF CONSTABLE TAYLOR ROBINSON

Submissions of Chief Cst. Jim Chu and the Vancouver Police Department

A. INTRODUCTION

1. Chief Cst. Jim Chu ("Chief") and the Vancouver Police Department ("VPD" or "Department") wish to accept the invitation of the Adjudicator to address issues raised by counsel for the Police Complaint Commissioner ("PCC") and by Pivot Legal Society ("Pivot"), on behalf of the complainant, Ms. Davidsen, on October 17, 2014. They have also formally applied for participant status pursuant to s. 144 of the *Police Act*, to address other related issues. A notice was filed with the Registrar on October 15, 2014, and is attached as Appendix "A". A letter from the Chief, and a report entitled "VPD Initiatives in the DTES - Partnering with the Community" are attached as Appendices "B" and "C". We ask that these be marked as the next exhibits in this hearing.

2. The Adjudicator's role at this stage in the proceedings is defined by s. 143(9) of the *Police Act*:

> (9) The adjudicator must do the following:
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> [...]
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> (b) determine the appropriate disciplinary or corrective measures to be taken in relation to the member or former member in accordance with section 126 [imposition of disciplinary or corrective measures] or 127 [proposed disciplinary or corrective measures];

(c) recommend to a chief constable or the board of the municipal police department concerned any changes in policy or practice that the adjudicator considers advisable in respect of the matter.

3. The Chief acknowledges that the actions of the member were regrettable and takes this opportunity to apologize once again personally and on behalf of the Department. He takes no position, in this case, on the appropriate disciplinary or corrective measures, but has provided helpful information about factors that should be considered by the Adjudicator (see Appendices B and C). The Chief does not consider it appropriate for any recommendations to be made about policy or practice matters because:

a) There is no evidence in this case about systemic problems or the need to make policy changes. This case is a disciplinary hearing respecting a single incident that lasted for less than one minute and involved a single, very junior, officer. The case has proceeded by way of, effectively, a "guilty plea", and no evidence has been called respecting the incident that is the subject of the admitted misconduct. This proceeding is very different from a public inquiry in which a Commissioner may hear lengthy evidence about systemic problems that need to be addressed.

b) The submissions made by the PCC and Pivot respecting recommendations were made without any evidence presented by them on those matters, and with no basis at all to suggest that they had <u>any knowledge</u> of <u>any</u> of VPD's policing practices in the Downtown Eastside ("DTES"). The recommendations were made in a complete void.

c) The Chief's letter and VPD report contain information about the steps being taken by VPD in the DTES. The letter and report were prepared

hurriedly to meet the Adjudicator's deadline, and should not be considered exhaustive. Notwithstanding the brief time frame, the letter and report clearly demonstrate that VPD is very proactively engaged in community policing in the DTES. The VPD constantly strives to be fully aware of, and responsive to, the needs of this community.

B. FACTS AND SUBMISSIONS THAT MAY ASSIST THE ADJUDICATOR IN DETERMINING THE APPROPRIATE DISCIPLINARY AND CORRECTIVE MEASURES

4. Section 126(2) of the *Act* requires the Adjudicator to take aggravating and mitigating circumstances into consideration in determining just and appropriate disciplinary or corrective measures. Subsection (f) provides that one such factor is "the degree to which the municipal police department's policies, standing orders or internal procedures, or the actions of the member's supervisor, contributed to the misconduct."

5. The Chief's letter documents the extraordinary demographics within VPD at the time of the incident. VPD undertook a large recruitment campaign in order to ensure that it was at full strength for the Winter Olympics of 2010, hiring 151 new officers in 2008 and 2009. When Cst. Robinson graduated from the Justice Institute, 31% of patrol constables had less than one year's experience, and 40% had less than two years'.

6. VPD recognizes that the DTES is a challenging policing environment, and has for a long time preferred not to post recruits to foot patrol in that area. In this period, however, "needs must" dictated that some new recruits, including Cst. Robinson, were posted there.

7. Cst. Robinson joined the VPD at the age of 21, some six and a half years younger than the average recruit. At the time of this incident, he had only eight months experience.

The Chief has acknowledged that an officer of his youth and inexperience should not have been assigned to the DTES, and requests that the Adjudicator take that into account in assessing the appropriate disciplinary or corrective measures.

C. DELAYS AND PROCEDURAL ISSUES IN THIS CASE

8. It is self-evident that no discipline case should take more than four years to be completed, and that there was an inappropriate delay in reporting this matter to the PCC.

9. The delays, however, must be understood in context. Section 101 of the *Act* compels a subject member to provide statements, and s. 106 makes it an offence to "knowingly hinder, delay, obstruct or interfere with an investigating officer". These provisions were new in the 2010 amendments to the *Act*. The fact that statements, and derivative evidence, can be compelled and admitted into evidence in discipline proceedings means that it is critical to separate *Police Act* and criminal investigations to ensure that the latter are not contaminated by compelled evidence. In order to protect the criminal process, it is common for the PCC to suspend *Police Act* investigations pending the outcome of a parallel criminal case. At least 10 months (from May 2011 to March 2012) of the delay in this case is attributable to such a delay. The Final Investigation Report in this case was not completed until June 26, 2012, more than two years after the incident, in part because of the PCC's suspension of the file.

10. Another delay of almost a year (from August 2012 to July 2013) flowed from adjournments in the Discipline Hearing, requested by Cst. Robinson's counsel to allow for completion of another parallel proceeding before the Human Rights Tribunal, and to accommodate counsel's calendar.

11. Finally, a further 11 month delay (from November 2013 to October 2014) has occurred between the ordering of the public hearing and the hearing date. As public hearing counsel has acknowledged, all of the delays are accounted for, and very little has been caused by the VPD.

12. The brief delay of 19 days in initially reporting the matter to the OPCC flowed from an error by Insp. Cumberworth, who has acknowledged responsibility. Because of the new *Police Act*, VPD now has three Inspectors doing the job that Insp. Cumberworth was handling at that time. That delay also has to be put in context of the timing of the incident. The March 2010 amendments to the *Police Act* had been in force for just more than two months. They are 100 pages long. It is clear that the incident did not meet the threshold of a "reportable injury" which must be reported to the OPCC pursuant to s. 89 of the *Act*. In ***Florkow v. British Columbia (Police Complaint Commissioner)***, 2013 BCCA 92, Madam Justice Newbury politely, and perhaps with understatement, said at para. 6:

> Part XI of the Act is dense, complicated and often confusing. Its provisions are hedged round with exceptions, qualifications and limitations that are often located in other sections not in close proximity. One must frequently follow cross-references to other sections, and few provisions can be said to stand alone. It is not a model of clarity.

13. On a number of occasions, retired judges appointed under the *Act*, or the courts, have rejected the PCC's interpretation of the statute. In two early discipline proceedings under the 2010 amendments, retired judges rejected the PCC's assertion that he had a free-standing right to order a public hearing. In one such proceeding, the PCC appointed sitting Provincial Court senior judges as s. 117 reviewers and adjudicators, asserting, incorrectly, that they were "retired judges". In ***British Columbia (Police Complaint Commissioner) v. Bowyer***, 2012 BCSC 1018, Punnett J. rejected the PCC's position on the procedure to be followed when some allegations are substantiated by the discipline authority and others are not. In ***Lowe v. Diebolt***, 2013 BCSC 1092, aff'd 2014 BCCA

280, Myers J. rejected the PCC's view of the statutory definition of "abuse of authority". These cases are referenced simply to support the submission that the *Act* is complicated; that the PCC himself has struggled to interpret its provisions correctly; and that, accordingly, in all of the circumstances, no legitimate criticism can be made of Insp. Cumberworth for the delay in reporting.

14. It is also important to emphasize that the delay in reporting did not affect the investigation in any way. The Chief says (Appendix B, p. 2):

> Ms. Davidsen's complaint was treated with the utmost consideration and concern. Constable Robinson's Patrol Sergeant attended to the scene that day. The file was quickly assigned to Sergeant Jeremy Johnson in the Professional Standards Section. Ms. Davidsen was contacted immediately and informed of the VPD's regret and disappointment in Constable Robin[s]on's actions. It is clear that Sergeant Johnson advised Ms. Davidsen of the OPCC complaint process during his interview of her two days after the incident. I note as well that Constable Robinson wrote a letter of apology very shortly after the incident.
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> In summary, the VPD regrets the failure to inform the OPCC of the incident immediately, but I am asserting that the investigative response after learning about it was immediate and appropriate.

15. It is also important to note that the Chief says that VPD did not improperly characterize this matter as an internal complaint or improperly try to resolve it informally. Any procedural errors that may have occurred arose from misunderstandings of the new provisions.

16. Finally, the Chief addressed the allegation of "drilling". He says (Appendix B, p. 2):

> I understand that the phrase was used by a witness officer, a former DTES constable who had developed a personal friendship with Ms. Davidsen. This witness officer's comments were inaccurate and misunderstood. Not only were the comments completely unsupported by any evidence in this case, but I can advise that I am not aware of a single officer who has heard

of that term or practice, nor am I aware of a single complaint alleging such misconduct. I support the findings of Superintendent Hobbs and submissions of Mr. Crossin on this point.

D. ARE ANY RECOMMENDATIONS RESPECTING POLICY OR PRACTICE NEEDED?

17. The Chief and VPD say that it would be inappropriate to make recommendations in this case, given the brevity of the material before the Adjudicator.

18. Perhaps more importantly, however, they say that it is unnecessary to make such recommendations, because VPD has already addressed some of the specific concerns raised by this case (such as not deploying new recruits to the DTES), and is actively supporting significant community liaison and engagement initiatives. These are set out in detail in the Chief's letter (Appendix B at pages 3-4) and attached report (Appendix C). It is not necessary to repeat them in detail in these submissions.

19. VPD is striving continuously to meet the "model of community policing" standard recognized by the Adjudicator as applying to the VPD Sex Work Enforcement Guideline in his Report of the Missing Women Commission of Inquiry.

20. Simply put, the efforts of the VPD documented in the materials are exemplary. There is no need for recommendations because VPD is already addressing the issues head-on. There is no evidence that Pivot or the PCC were aware of, or took into account, these initiatives when making their submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: October 23, 2014

DAVID G. BUTCHER, Q.C.
Counsel for Chief Cst. Chu and
Vancouver Police Department