Gabriel M. Somjen
T 604-640-4013
F 604-622-5930
gsomjen@blg.com

Borden Ladner Gervais LLP
1200 Waterfront Centre
200 Burrard St, P.O. Box 48600
Vancouver, BC, Canada V7X 1T2
T 604.687.5744
F 604.687.1415
blg.com

Borden Ladner Gervais

File No. 550959/000061

October 24, 2014

BY COURIER

The Honourable Wally Oppal, Q.C., Adjudicator
c/o Sylvia Sangha, Registrar
Office of the Police Complaint Commissioner
5th Floor, 947 Fort Street
PO Box 9895 Stn Prov Govt
Victoria, BC V8W 9T8

Dear Mr. Adjudicator:

Re: Constable Taylor Robinson – OPCC #2010-5401: Public Hearing #2013-05

We are counsel for the Vancouver Police Union ("VPU") and make the following submission pursuant to your direction in the hearing on this matter on October 17, 2014. We will limit our submission to two issues:

1. Section 126(1)(c) of the B.C. *Police Act*, R.S.B.C. 1996 c. 367, as amended (the "*Police Act*"), (changed from maximum suspension of 5 days to 30 days).

2. The role of the Police Complaint Commissioner (the "Commissioner") in this and other public hearings on the issue of outcome (extent of discipline).

Section 126(1)(c) of the *B.C. Police Act* (changed from maximum suspension of 5 days to 30 days)

1. All parties agreed in the hearing on October 17, 2014 that it was appropriate for the VPU to address this issue.

2. There were a number of disciplinary measures contained in Section 19 of the former B.C. *Code of Professional Conduct Regulation* under the *Police Act* which were available to a disciplinary authority but with respect to the range between suspension and dismissal, there was: "suspension of the member without pay for not more than 5 scheduled working days", "reduction in rank" or "dismissal".

(VPU Book of Authorities, Tab 1)

3. The current version of the *Police Act* maintains the option of dismissal or reduction of a member's rank, but has expanded under Section 126(1)(c) the number of scheduled working days for which a member can be suspended without pay to not more than 30 scheduled working days.

(VPU Book of Authorities, Tab 2)

What is the effect of this amendment?

4. We understand that in the current hearing, counsel for the Commissioner argued that this change under Section 126(1)(c) of the *Police Act* to allow for a maximum of 30 scheduled working days' suspension without pay means that cases such as the one before you should attract a greater amount of discipline merely because the maximum length of suspension that may be imposed has increased. We submit that is not correct.

5. We submit that this amendment to the maximum days suspension without pay that may be imposed as discipline under the current *Police Act* was not intended to increase the amount of discipline (short of a reduction in rank or a dismissal) to be imposed in cases similar to those decided under the B.C. *Code of Professional Conduct Regulation* and former *Police Act*. Rather, we submit that the impact of this amendment to a maximum of 30 scheduled working days' suspension without pay was intended to protect police officers and provide more flexibility to discipline authorities in those more extreme cases where the misconduct is very egregious and clearly a suspension without pay of 5 scheduled working days' would not be appropriate, but the misconduct does not warrant a reduction in rank or dismissal. Prior to this recent amendment under Section 126(1)(c), in those types of cases the disciplinary

authority was sometimes faced with a conundrum. While wanting to impose significant discipline in those extreme cases, the only choices were reduction in rank or dismissal.

6. The following excerpts from the *Report on the Review of the Police Complaint Process in British Columbia*, by Josiah Wood, Q.C., released in February 2007 (the "Wood Report") clearly support this conclusion:

> 347. A frequent comment by discipline authorities and professional standards officers we interviewed was that the gap from suspension without pay for not more than five scheduled working days to reduction in rank or dismissal was too great and does not provide sufficient flexibility to impose appropriate disciplinary measures in some cases. An example offered was the recent case involving several Vancouver police constables who were given consecutive five day suspensions without pay in respect of several substantiated discipline defaults, notwithstanding that no apparent authority exists in s. 19 to impose consecutive disciplinary or corrective measures.
>
> 348. In my view, the authority to impose both multiple and consecutive disciplinary or corrective measures is implicit in s. 19. Thus, for example, an officer who is found to have committed more than one discipline default can quite properly receive a suspension without pay on each, the cumulative total of which could properly exceed five scheduled working days. Similarly, an officer who is found to have committed only one discipline default, which evidences a need for both corrective and disciplinary measures, could, for example, be required to undergo counselling or training in addition to any disciplinary measure imposed. That said, I accept the unanimous view point expressed by those who spoke to us on the matter, that s. 19(1)(d) should be amended to provide for suspension without pay for up to, but not more than, 30 scheduled working days, and I so recommend. [emphasis added]
>
> (VPU Book of Authorities, Tab 5 at page 87)

7. It is clear from the Wood Report that the basis upon which the recommendation to increase the maximum suspension from 5 scheduled working days without pay to 30 scheduled working days without pay was to provide for flexibility in the range of discipline available in certain cases where the actions of a member require disciplinary measures more severe than unpaid suspension of 5 scheduled working days but not severe enough to warrant reduction in rank or dismissal.

8. In the legislative debate regarding Bill 7 – Police (Misconduct, Complaints, Investigations, Discipline and Proceedings) Amendment Act, 2009 (Debates of the Legislative Assembly of British Columbia (Hansard), vol. 5, no. 5, October 22, 2009 (Afternoon Sitting), at page 1462, the Honourable Mike de Jong, then Attorney-General of B.C. stated that: "The new legislation follows the principles of the recommendations made by Judge Josiah Wood in his report, which examined the police complaint process in British Columbia."

(VPU Book of Authorities, Tab 6 at page 1462)

9. We submit that it is clear from Section 126(1)(c) of the current *Police Act* that the change in maximum suspension from 5 scheduled days to 30 scheduled days without pay was one of the recommendations from the Wood Report that was adopted in the legislation.

The effect of each day of suspension

10. While the VPU will not comment on what the appropriate level of suspension in the Taylor Robinson case should be, we submit that any suspension and the process of going through a discipline authority hearing, followed by discipline, and then a public hearing on the same issue is in itself very difficult for any respondent. A suspension of 2 scheduled working days without pay would still bring home to any member the significance of their misconduct, the importance of correcting the misconduct as well as meeting any other goal that a suspension would serve. We submit that a longer suspension, particularly longer than 5 scheduled working days without pay, would not increase the corrective or educational goals of discipline and would only mean that the officer suffers more financially than with a shorter suspension.

11. It should also be noted that most police officers working for the Vancouver Police Department work 10 or 11-hour days and therefore the financial impact of a 2 or 3 day suspension without pay is significant in itself and would in fact be equivalent to a 3 or 4 day suspension for a worker who works a normal 8-hour day. A longer suspension, such as 10 days, would have the same financial impact as a 12 or 13 day suspension without pay for a regular 8-hour per day worker. Since most Vancouver Police Department police officers are working 15 or 16 days per month because of these 10 or 11-hour days, the effect of a 15 day

suspension without pay is equivalent to a 1 month suspension without pay and a 30 day suspension is equivalent to a 2 month suspension without pay. Therefore, any suspension is already a significant financial punishment.

The purpose of suspensions

12. It is also important to note section 126(3) of the current *Police Act* which states:

> 126(3) If the discipline authority considers that one or more disciplinary or corrective measures are necessary, an approach that seeks to correct and educate the member concerned takes precedence, unless it is unworkable or would bring the administration of police discipline into disrepute. [emphasis added]
>
> (VPU Book of Authorities, Tab 2)

13. The underlying purpose behind any discipline under the *Police Act* is to correct and educate. Any other purpose of discipline would take precedence only in the rare case where it is unworkable or would bring the administration of police discipline into disrepute: we submit those cases would be exceptional, not the norm.

14. In summary, we submit that the change to the maximum unpaid suspension under Section 126(1)(c) of the *Police Act* was not intended to require a general increase in the length of suspension imposed, but rather was intended to give a discipline authority discretion and flexibility in extreme cases to impose discipline greater than 5 scheduled working days' unpaid suspension without having to default to reduction in rank or dismissal.

The role of the Commissioner in this and other public hearings on the issue of outcome (extent of discipline)

Why should you hear from the VPU on this issue?

15. It was anticipated in this case that because the member admitted the defaults, the hearing would be relatively straight forward and the only issue would be the appropriate amount of discipline for Cst. Robinson. As soon as the VPU 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 discipline authority, the

VPU sought to participate in this hearing on the important question of whether the Commissioner should be making submissions on the actual outcome on discipline.

16. Although we recognize it is late in the proceedings, the VPU was not aware the Commissioner was taking a position on discipline until it was argued. None of the other parties to the hearing prior to October 17, 2014 raised this important policy question.

17. As you heard on October 17, 2014, it has been the practice of the Commissioner in past cases under the current *Police Act* to refrain from making submissions on the degree of discipline. It appears that this is a case of first instance where the Commissioner has sought to actively influence the outcome on discipline in a public hearing under the current *Police Act*.

18. We submit that it is appropriate you hear from the VPU on this important issue of the proper role of the Commissioner in these types of proceedings because the VPU represents all police officers of the VPD and it will be helpful not only to you and the other parties in this case but helpful for the discipline authorities and other parties in future cases. All municipal police officers in British Columbia as well as the B.C. Police Association have an interest in the issues we raise and will benefit from clarity on the role of the Commissioner in such cases.

What is the Role of the Commissioner?

19. The role of the Commissioner has been recognized as overseeing complaints and ensuring that the proper process is being followed, but not of actually imposing discipline. Newbury J.A. in the B.C. Court of Appeal decision of *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92 stated the following:

> Section 177(1) of the Act states that the PCC is "responsible for overseeing and monitoring complaints, investigations and the administration of discipline" under Part XI. 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.
>
> (VPU Book of Authorities, Tab 7 at para. 2)

20. In that same paragraph, Newbury J.A. also accepted counsel for the Commissioner's submission 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." We submit that the labour relations aspect is an important point to recognize here.

(VPU Book of Authorities, Tab 7 at para. 2)

21. In determining what the role of the Commissioner is in these types of cases, it is important to look at the whole scheme of the legislation. We submit it involves discipline of police officers, which is essentially labour relations but is covered by statute as opposed to the collective agreement in this case because of the public interest component. The public interest component is where the role of the Commissioner comes in – it is the "gatekeeping" or "supervisory" role.

22. The Court of Appeal in *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92 approved the following excerpt from the chambers judge in that case who also accepted this view of the Commissioner's role in relation to complaints:

> At the outset of his analysis, the chambers judge noted that individual sections of the Act are not to be read in isolation. He characterized the role of the PCC in relation to complaints as follows:
>
> > The role of the PCC in relation to complaints can be described as that of a supervisor. The PCC does not make final decisions about whether misconduct has or has not been proven, nor does it impose disciplinary measures where misconduct is found to have occurred. Instead, it has responsibilities that include ensuring that records and evidence are preserved, that complainants and members of police in respect of whom complaints are made are informed, and that processes are followed. The PCC does not become directly involved in the investigations of complaints, but the Act does give it various tools and powers to ensure the adequacy of those investigations (examples include ss. 82, 87, 92, 93, 96-99, 109 and 135). [At para. 19.]

(VPU Book of Authorities, Tab 7 at para. 22)

23. If the Commissioner believes the degree of discipline imposed by a disciplinary authority is inadequate, he has the authority to arrange a public hearing under Section 138(1)(c)(ii) of the *Police Act*. In doing so, he also has the authority to appoint the adjudicator and to appoint public hearing counsel and commission counsel. Based on these roles the Commissioner has wide control over the process and, for this reason we submit that he cannot be seen as

sufficiently independent to then be making submissions on the particular outcome of the case. We submit that this is more properly the role of public hearing counsel.

(VPU Book of Authorities, Tab 3)

24. The former version of the *Police Act* provided for hearings akin to the public hearing process in the current *Police Act*, but there was no provision for public hearing counsel as there is now. The statute now specifically provides at Section 143(4) that "public hearing counsel must present to the adjudicator the case relative to each allegation of misconduct against the member or former member concerned." (emphasis added) Under the *Police Act* the public hearing counsel, and not the Commissioner, is required to present the case. We submit this was not done here, where the submissions on outcome were made by the Commissioner, and not public hearing counsel.

(VPU Book of Authorities, Tab 4)

25. We submit that this specific role specified in the *Police Act* makes it clear that it is public hearing counsel who acts as an impartial advocate in presenting the case, and it is he who in doing so can properly make submissions to the adjudicator with respect to the particular outcome on discipline in such a case. There is a level of independence on behalf of public hearing counsel that is necessary for a fair process and that is not shared by the Commissioner who has the role in calling the public hearing and choosing public hearing counsel and appointing the adjudicator who makes the ultimate decision.

26. The Court of Appeal has supported this view in previous jurisprudence on the role of the Commissioner in public hearing matters. In the very recent case of *Lowe v. Diebolt*, 2014 BCCA 280, the Court of Appeal expressed obvious concern with the role the Commissioner was taking and set out comments to guide the Commissioner in his role in discipline matters. Although that case involved an adjudicator under a different section of the *Police Act* we submit the same principles should apply in respect of public hearings.

27. In that case the Commissioner disagreed with the outcome of a decision by an adjudicator under s. 117 of the *Police Act* and sought judicial review which was denied and then

ultimately appealed that decision to the Court of Appeal. Groberman, J.A. for the Court of Appeal concluded:

> It is unclear, on the other hand, what importance can be ascribed to this case from the point of view of the Commissioner. His role, under the statue, is to ensure that the complaints against the police are dealt with in accordance with the statutory regime. He has a strong interest in ensuring that the procedures set out in the statute are respected, and in ensuring that his own directives are followed. He 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. Indeed, as I have noted, the Court had sufficient doubts as to the interest of the Commissioner in this matter as to require submissions on his standing. [emphasis added]
>
> (VPU Book of Authorities, Tab 8 at para. 67)

28. He then went on to make the following statements:

> As I have indicated, we heard submissions by the parties on the standing of the Commissioner to bring these judicial review proceedings. I have no doubt that the Commissioner may bring judicial review proceedings concerning the procedures undertaken in the police complaint process, and also concerning compliance with his own directions and orders. Such matters are properly within the sphere of the Commissioner's direct concerns under the statute. The arguments raised in these proceedings, however, are directed at the substantive correctness of the retired judge's conclusions; the factum filed by the Commissioner takes an adversarial position against Cst. Burridge, and potentially raises concerns over the neutrality of the Commissioner in complaint proceedings. Given my conclusions on the issue of delay, it is unnecessary to reach any final conclusion on the issue of standing. I am, in any event, reticent to do so, as it was not an issue considered by the chambers judge. Accordingly, I would leave open the question of whether the Commissioner may bring judicial review proceedings to challenge, on substantive grounds, decisions of a retired judge appointed as a discipline authority under s. 117 of the *Police Act*.
>
> (VPU Book of Authorities, Tab 8 at para. 74)

29. Once again, the Court of Appeal emphasizes that the Commissioner's concerns should be with respect to the procedures undertaken in the police complaint process and compliance with the Commissioner's own directions and orders but clearly disapproves of arguments by the Commissioner that are "directed at the substantive correctness of the retired judge's conclusions" or "...takes an adversarial position against Cst. Burridge, and potentially raises concerns over the neutrality of the Commissioner in complaint proceedings."

30. We submit that these strong statements clearly indicate that while the Commissioner has a role to ensure that complaints against police are dealt with in accordance with the statutory regime and to ensure that procedures in the statute are respected, he does not have a role in actively arguing the outcome of a complaint or in the substantive disposition of complaints. He is to be a "neutral party in the administrative regime" without any real interest in the outcome. The references by the Court of Appeal questioning the Commissioner's attempt to play a more active role and pointing out that the role of the Commissioner in the complaint process is intended to be "neutral" are equally applicable to the case before you.

31. We recognize that under Section 143(5) of the *Police Act*, both public hearing counsel and commission counsel have procedural rights including examining or cross-examining witnesses and making oral submissions after evidence has been presented. However, we submit that 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.

32. The difficulty in interpreting the *Police Act* and particularly Part 11 has been recognized before. The Court of Appeal in *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92 set this out as follows:

> 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. Nevertheless, the meaning of s. 143(1)(b) must and can be resolved by reference to the longstanding principle that statutory provisions must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the Legislature]." (*Rizzo & Rizzo Shoes Ltd. (re)* 1998 Can LII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21) I turn first to that context.
>
> (VPU Book of Authorities, Tab 7 at para. 6)

33. The role of public hearing counsel was not contemplated in the Wood Report and there was no debate of this role in the Hansard reports. We submit that the legislature appears to have not considered the issues we are facing now and the procedural issues contemplated including examination and cross-examination may have been held over from the previous

Police Act when there was no role of public hearing counsel. We submit that it cannot have been the intention of the legislature to create duplicate roles. In a case such as this, public hearing counsel who was not involved in the appointment of the adjudicator can clearly make submissions in respect of the appropriate outcome as can counsel for the complainant. 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. The lawyers themselves in this hearing even recognized the unfairness in having all three of them make submissions on the appropriate discipline.

34. The Commissioner's role is to ensure the discipline process under the *Police Act* is fair and the public interest is protected, but it must also be fair to the member being disciplined. The Court of Appeal in *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92 stated:

> Part XI of the *Police Act*, complicated and dense as it is, represents a concerted attempt by the Legislature, acting on the advice of many stakeholders and various commissioners, to balance the interests of the public and the interests of police officers whose conduct must be scrutinized.
>
> (VPU Book of Authorities, Tab 7 at para. 61)

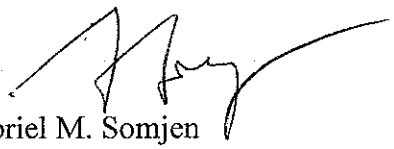
35. The appearance of the Commissioner arguing for further penalties when the public hearing counsel can make these arguments and the appearance of taking an interest in the amount of discipline is not consistent with this. It is also not consistent with the requirement of independence and the express contemplation in the *Police Act* that there is public hearing counsel who must present the case (Section 143(4)).

36. We ask that you take these submissions by the VPU into account in your consideration of this matter.

All of which is respectfully submitted.

Yours truly,

Borden Ladner Gervais LLP

By: 

Gabriel M. Somjen

/ed

c.c. Mark Jetté, Public Hearing Counsel
Sutherland Jetté
Suite 201-128 West Pender Street
Vancouver, BC V6B 1R8

c.c. Mike Tammen, Counsel for the OPCC
Michael Tammen Law Corporation
506-815 Hornby Street
Vancouver, BC V6Z 2E6

c.c. Doug King, Counsel for the Complainant Sandy Davidsen
Pivot Legal Society
121 Heatley Avenue
Vancouver, B.C. V6A 3E9

c.c. E. David Crossin, Q.C., Counsel for Cst. Taylor Robinson
Sugden, McFee & Roos LLP
700 – 375 Water Street
Vancouver, BC V6B 5C6

c.c. David G. Butcher, Q.C., Counsel for VPD
Wilson, Butcher
400 – 744 West Hastings Street
Vancouver, BC V6C 1A5