Date Stamped November 22, 2001

IN THE MATTER OF
THE PUBLIC HEARING PURSUANT TO THE POLICE ACT
INTO THE COMPLAINT AGAINST
CONSTABLE RONALD ALEXANDER BRODA
OF THE SAANICH POLICE DEPARTMENT

BEFORE J.S. de VILLIERS Q.C. Sidney, B.C.

ADJUDICATOR November 14, 2001

Kevin J. Gillett for the Police Complaint Commissioner
Christopher M. Considine Q.C. for Constable Broda

Introduction:

The Police Act, R.S.B.C. 1996, c. 367 was amended a few years ago, with a view to providing a limited degree of civilian oversight of the conduct of municipal police forces in this province. As part of the reforms the office of Police Complaint Commissioner (hereafter called "the Commissioner") was created. The Commissioner is an officer of the Legislative Assembly, independent of the Government. He is given wide powers of investigation of complaints and in certain circumstances of reviewing internal disciplinary proceedings of police forces. Amongst other things, the Commissioner can arrange for public hearings to be conducted into alleged misconduct of police officers. Such hearings must be conducted before retired judges, appointed by the Commissioner, and called "adjudicators."

The function of an adjudicator is to conduct a hearing in public into the conduct of a police officer, to decide whether such police officer is, on the balance of probabilities, guilty of the misconduct alleged against her or him, and, if so, what an appropriate penalty should be, which can range from a verbal reprimand to dismissal.

The intent of the Act, and the manner in which it has been administered by the Commissioner, is to attempt resolution of complaints of police misconduct, where appropriate, by mediation, and in other cases by internal discipline. Only in the

more serious cases, where such resolution is not appropriate or where the Commissioner is not satisfied with the manner in which the discipline has been handled internally by the police department or where he otherwise believes that it is in the public interest to hold a public hearing will he exercise his discretion and arrange a public hearing. There is, however, one situation where the Commissioner has no discretion, and that is where a constable has been subjected to internal disciplinary proceedings, has been found guilty and has been given a penalty more severe than a verbal reprimand. In such a situation, if the constable feels aggrieved he or she may demand that a public hearing be arranged before an adjudicator, who must then decide whether the constable was in fact guilty of the misconduct alleged. If so, the adjudicator may impose a penalty. That penalty may be more severe or less severe than that imposed in the first instance, or it may be the same.

This is such a case.

The facts:

On November 14, 2000 Constable Broda, a member of the Saanich Police Department, was required to attend court, to give evidence for the prosecution in a traffic ticket case. He did not show up. The case was brought to a conclusion without his evidence. Nevertheless the Crown succeeded in getting a conviction.

Because Constable Broda had neglected to do his duty, disciplinary proceedings were instituted against him and, on March 23, 2001, the Chief Constable of the Saanich Police Department found him guilty of the "disciplinary default" of "neglect of duty," contrary to the *Code of Professional Conduct Regulation*, made pursuant to the Police Act, R.S.B.C. 1996, c. 267, and punished him by imposing a written reprimand. That punishment, described in the Act as a "disciplinary or corrective measure," was moderate. Of the nine alternative measures available to the Chief Constable, only one would have been less severe, a verbal reprimand.

Constable Broda felt aggrieved by the disposition, and decided to avail himself of his right to a public hearing. On May 4, 2001, within the applicable time limit, he wrote to the Commissioner, and requested such a public hearing. I have not been told whether his grievance related to the fact that he had been found guilty or whether he felt that the punishment meted out was too severe.

Acting upon Constable Broda’s request, pursuant to Section 60(3)(a), the Commissioner, on May 29, 2001 arranged a public hearing, to commence on July 19, 2001, and appointed me as adjudicator, with directions that the hearing was to commence on July 19, 2001.

On July 19, 2001 the public hearing was convened and I was sworn in as an adjudicator.

In the normal course of events the hearing would then have proceeded on that day and, after hearing evidence, I would have been required at the end of it to determine whether, on a balance of probabilities, Constable Broda had indeed been guilty of a disciplinary default, and if so, to assess a proper penal disposition. Alternatively I could have found that he had not been guilty of any disciplinary default, in which event the disciplinary penalty imposed by the Chief Constable would have been erased from his record. However, at the commencement of the proceedings, immediately after I had been sworn in as adjudicator, I was informed by Mr. Gillett, counsel for the Commissioner, that the Commissioner had received a letter from Constable Broda, reading as follows:

> "I have reconsidered this matter and no longer wish to proceed with a public hearing. I do not wish to waste the Police Complaint Commission's time or resources any further with this matter. Please cancel the hearing set for July 19, 2001."

Mr. Gillett, counsel for the Commissioner, invited me to "essentially cancel the hearing." Constable Broda's agent concurred in that invitation, and in response to a question from me as to whether Constable Broda wished to tell me the reason for his change of mind, said:

> "No. I think, Mr. Adjudicator, I think it's just fair to say, suffice to say, that we have had a change of heart in relation to this matter and choose not to move forward with it at this time."

I then delivered a written ruling in which I held that I had no power to terminate the public hearing before its conclusion, and directed that the public hearing must proceed. At that stage Constable Broda was not represented by counsel. No proceedings have since been instituted under the Judicial Review Procedure Act to prohibit me from continuing.

When the hearing resumed on November 14, Mr. Considine, on behalf of Constable Broda, and supported by Mr. Gillett for the Commissioner, made a submission *in limine* that I had lost jurisdiction to commence or proceed with the public hearing as soon as Constable Broda had withdrawn his request for a public hearing. Although, arguably, the matter was *res iudicata* because of my previous ruling, I let counsel proceed with their submissions in the interests of justice. If I am persuaded that my previous ruling was wrong, it is not too late to reverse it. This time counsel have submitted authorities to me and made new arguments in their joint submission, which I have found helpful, but I did not have the benefit of contrary submissions by any *amicus curiae*. This requires me to take special care to arrive at the correct decision in the public interest.

I was informed that Constable Broda's solicitors had written to the Commissioner on November 5, 2001, and I quote that letter in full:

> "We act as legal counsel to Constable Ronald A. Broda regarding his complaint lodged pursuant to the Police Act regarding the conduct of the Saanich Police Department.
>
> Pursuant to Section 52.2, we hereby advise that our client wishes to withdraw his complaint. Indeed, our client advises that he advised the Complaint Commissioner's office of this decision a number of months ago and we are merely confirming in writing his decision to do so.
>
> As Mr. Broda's legal counsel, we confirm that our client is under no duress in making this withdrawal notice.
>
> We therefore ask that the Commissioner confirm that this complaint has been withdrawn by the complainant and advise the Adjudicator, Mr. J.S. deVilliers, that there is no longer any complaint for which a public hearing is required.
>
> It is our opinion that where the only ground for holding a hearing is a request of the applicant, that applicant can halt the proceedings at any time by withdrawing the application. We refer you to the case of St. Basil's Parish Centre Bingo v. Liquor and Gaming Authority (Sask.) et al, 122 Sask. R. 73, a copy of which is enclosed herein for your reference and use.
>
> Thank you for your attention to this matter."

Mr. Considine informed me that his reference to Section 52.2 was in error; he had intended Section 60(1)(a).

Issue:

Once the Commissioner has arranged a public hearing and appointed an adjudicator pursuant to Section 60(3)(a) of the Police Act, does that adjudicator, after being sworn at the commencement of a public hearing, lose jurisdiction to proceed with that public hearing as soon as the proposed respondent at that hearing purports to "withdraw" his request, and, if so, what procedure must be followed to abort the hearing?

Mr. Considine in his written argument, on which he elaborated orally, submits that the only jurisdiction for holding a public hearing in this case was the request of Constable Broda, and that Constable Broda can "halt the proceedings at any time by withdrawing the application."

In considering this issue it must be borne in mind that the nominal "respondent" at the proposed public hearing is really the applicant for the hearing, and I will treat him as having the status of applicant.

The legislation:

The relevant provisions of the Police Act that set in motion the train of events that resulted in the present proceedings are:

(a) Section 52(1), which enables any person (including presumably, a chief constable or other member of a police department) to make a complaint against a municipal constable;

(b) Section 52.1(1), which requires the person who receives the complaint to characterize it as a public trust complaint, an internal discipline complaint or a service or policy complaint and to begin to process the complaint;

(c) Section 52.2, which enables a complainant to withdraw a complaint, if the withdrawal is not under duress, but authorizes the Commissioner nevertheless to direct that the investigation proceed and the complaint to be processed;

(d) Section 57.1, which requires the discipline authority to determine whether the evidence in a final investigation report is sufficient to warrant the imposition of disciplinary or corrective measures;

(e) Section 58.1, which requires the discipline authority in certain circumstances to convene and preside at a discipline proceeding;

(f) Section 59, which provides for the conduct of discipline proceedings and for the imposition of disciplinary or corrective measures where a "discipline default" has been proven and for the disposition record to be served on the respondent;

(g) Section 60(1), which enables either a respondent or a complainant to make a written request for a public hearing within certain prescribed time limits; and Subsections (3) to (5), which read:

> (3) Promptly after receiving a request for a public hearing within the time limited by subsection (1) or (2), the Commissioner must arrange a public hearing under section 60.1 if
>
> (a) the request for a public hearing is made by a respondent and a disciplinary or corrective measure more severe than a verbal reprimand has been proposed for that respondent, or

(b) in any other case, the Commissioner determines that there are grounds to believe that a public hearing is necessary in the public interest.

(4) The Commissioner may arrange a public hearing without a request from either a complainant or respondent if the Commissioner considers that there are grounds to believe that the public hearing is necessary in the public interest.

(5) In deciding whether a public hearing is necessary in the public interest, the Commissioner must consider all relevant factors including, without limitation, the following factors:

(a) the seriousness of the complaint;

(b) the seriousness of the harm alleged to have been suffered by the complainant;

(c) whether there is a reasonable prospect that a public hearing would assist in ascertaining the truth;

(d) whether an arguable case can be made that

(i) there was a flaw in the investigation,

(ii) the disciplinary or corrective measures proposed are inappropriate or inadequate, or

(iii) the discipline authority's interpretation of the Code of Professional Conduct was incorrect;

(e) whether a hearing is necessary to preserve or restore public confidence in the complaint process or in the police;

[Emphasis added]

(h) Sections 61 and 62, which provide for the procedure of public hearings and the appointment of an adjudicator.

The jurisprudence:

In support of his submission Mr. Considine relied on the *St. Basil* case, a decision of the Saskatchewan Court of Queen's Bench, and the English court decisions considered in that case, all of them addressing the issue of whether a party who has sought a review of a statutory decision by a statutory reviewing tribunal may prevent that review from proceeding by purporting to withdraw the

request for such review, in the absence of express legislative provision permitting such withdrawal. Mr. Gillett also assisted me with a review of the English cases and part the United Kingdom legislation upon which they were based. I am assured by counsel that, in spite of diligent research, they could find no other recent Canadian jurisprudence on the topic.

The earliest case cited is *Rex v. Hampstead and St. Pancras Rent Tribunal; Ex parte Goodman* (1951) 1 K.B.541. That case concerned the application of a statute, which provided for the imposition of rent controls. It enabled either a landlord or a tenant to apply to a tribunal to determine what is a reasonable rent. Once that rent was fixed it displaced the agreed rent, and attached to the premises notwithstanding a change of landlord or tenant. Unless and until rent was fixed by the tribunal the landlord and tenant could freely fix the rent by agreement, and alter their agreement from time to time.

The tenant filed such an application. After doing so he and the landlord settled their dispute, and informed the tribunal that the application was withdrawn. The tribunal held that the application could not be withdrawn. An application for prohibition to the Court of King's Bench was successful. Lord Goddard C.J. said:

> "... is there any reason why we should construe the section as meaning that when once an application, in the sense of the filling in of forms, has been made, the tribunal must go on to fix a rent which will adhere to the premises forever? I think that the section must mean that there must be a subsisting application at the time when the tribunal are to determine the rent, and that we must read the words of s. 1(b) as meaning: "*On any such application made and not withdrawn the tribunal shall determine that rent ...*"

[I have underlined the words that Goddard C.J. purported to add to the words of the statute.] He added, at p. 545:

> "The tribunal have [sic] to determine the rent on application, but their right to determine it seems to me to depend on the application's subsisting at the time when the tribunal consider it. In my opinion, if the parties choose by consent to withdraw an application, the tribunal are not under any duty to, and, indeed, cannot, proceed with the hearing; ..."

Hilbery J., in a concurring judgment, said, at p. 546:

> "The right given is a personal right to the landlord and to the tenant to make an application ...

> "The jurisdiction of the tribunal is, therefore, a jurisdiction given to them to determine a matter that is brought to them for decision as the result of the exercise of personal rights by certain persons: ..."
>
> [Emphasis added]

The next case cited was *Boal Quay Wharfingers Ltd. v. King's Lynn Conservancy Board* (1971) 1 W.L.R. 1558, a decision of the English Court of Appeal. It involved complex legislation, intended to protect the interests of casual dockyard labourers. Suffice it to say that the statute provided for applications for licences to be made, and the issue was whether an applicant for a licence had the power to withdraw the application before it was dealt with by the licensing authority. The applicable section of the Act provided:

> "The licensing authority *shall* consider every application for a licence made to the authority and *shall* make a decision on every such application ... "

After noting the mandatory language of the above, Lord Denning M.R. said, at p. 1566:

> "But I think those words only apply to an application which is still a subsisting application when the time comes for decision. An applicant has the right to withdraw it at any time before the decision is given. If an application is withdrawn, the licensing authority are [sic] under no duty, and have no power, to hear or determine the application. They cannot refuse it, because there is no subsisting application for them to refuse. There is nothing left of the application."

Hanson v. Church Commissioners for England (1978) 1 Q.B. 823 was another case involving rent controls. A rent officer fixed the rent at £800 a year. The tenant objected. As required by the statute, the rent officer referred the matter to a rent assessment committee. A week before the hearing the tenant's agents wrote, saying that he would not "place" his objection before the panel at its upcoming hearing. The landlord was not informed of this, and the hearing continued in the tenant's absence, with the result that the rent was raised to £900 a year.

On appeal Lord Denning said in the Court of Appeal, at p. 832:

> "The legal position as shown by the cases is that in the ordinary way where there is a dispute before a tribunal in a civil matter, either party has a right to withdraw his application or objection, as the case may be, at any time before the decision is given. That is shown by [*Boal Quay*] .

> But when the dispute is one in which there is a public interest involved, it may not be permissible for one of the parties to withdraw without the assent of the other; and, even if they both agree, he may not be able to withdraw unless the tribunal consents. It all depends on the construction which the courts place on the statute setting up the tribunal." [Emphasis added]

Roskill J., in his concurring judgment, said, at p. 836:

> "I have already said that I agree that there can be no unilateral withdrawal whereby one party can prejudice the other. That seems clear enough, but I can find nothing in the statute which prevents both parties agreeing to withdraw provided that that withdrawal is sanctioned by the committee. I think one must add the qualification that the committee must sanction the withdrawal because otherwise there is no safeguard of what I have described as the public interest." [Emphasis added]

Lawton L.J. expressed much the same idea as follows at p. 839:

> "The tribunal, however, is the guardian of the public interest and must decide for itself whether withdrawal will prejudice that interest. In general I should have thought that the public interest would best be served by letting the parties decide for themselves what they want; but there may be special circumstances known to the tribunal or brought to its attention which indicate otherwise."

All the above cases were reviewed in the *St. Basil's Parish* decision, referred to in Mr. Considine's letter. Scheibel J. applied the *Hampstead* and *Boal Quay* decisions, but declined to follow the *Hanson* decision, which, in his opinion, was wrongly decided on the public interest issue. The case before him concerned the right of a person whose lottery licence was suspended to have the Liquor and Gaming Authority's decision reviewed by the Liquor Gaming and Licensing Commission, and whether the Commission could proceed with a hearing where the applicant for review attempted to withdraw his application on the morning of the hearing and to accept the suspension imposed on him. He held that the applicant had the unilateral right to withdraw its own application and there was no jurisdiction in the Commission to hold the review.

With respect, I disagree with Scheibel J., and hold that *Hanson* correctly states the law as it ought to be applied in British Columbia. Each statute ought to be analyzed in order to determine whether a purported withdrawal of an application for a statutory review or of an appeal a) requires the consent of the other party to the proceeding and b) whether the public interest is engaged.

I hold that where a public hearing has been sought by a respondent who has been disciplined under the provisions of the Police Act, and that respondent wishes to withdraw from the proceedings, he requires the consent of the Commissioner. If that consent is given before the Commissioner has arranged a public hearing and appointed an adjudicator, it has the effect of bringing the proceedings to a conclusion, without prejudice to the Commissioner's right to order that a public hearing be conducted pursuant to Section 60(4) of the Act, but where the "arrangement" of a public hearing has reached the stage where an adjudicator has been appointed and a public hearing has been set down for hearing, both parties must also convince the adjudicator that it is in the public interest to conclude the public hearing without a disposition.

Analysis:

The public hearing is not an "appeal" as that term is normally understood, that is to say a review of the record of the proceedings so as to determine whether the decision maker made a mistake of fact or law. Nor is it a judicial or quasi-judicial review of the correctness of the proceedings for the purpose of deciding whether there was a violation of the rules of natural justice or procedural fairness. It comes close to but is not a hearing *de novo* in which the same case is presented to a superior tribunal, which then makes a decision, based on the evidence and arguments presented to it, which may or may not have been the same as that presented to the inferior tribunal. The reason why it is not a hearing de novo is because the procedure of conducting a public hearing is different from that which applies when a Chief Constable or other "discipline authority" conducts a "discipline proceeding" under the Act. In short, it is a proceeding *sui generis*, governed by the rules set out in the Act. For all these reasons it is wrong to refer to Constable Broda as an appellant. He is not appealing anything in the legal sense of that term.

A constable who avails himself of the right given under Section 60(1)(a) of the Act to make a written request for a public hearing is not required to state whether it is the finding of misconduct or the penalty imposed for it that he is aggrieved by.

The public hearing, whether initiated by a police officer, as in this case, or by the Commissioner, is conducted in the same manner under section 61. At the conclusion of the public hearing the adjudicator must be convinced on the civil standard of proof that there was a breach of the Code of Professional Conduct, called in the definition section of the Act a "disciplinary default" and elsewhere a "discipline default." If so, then an appropriate "disciplinary or corrective measure" must be imposed. If not, no penalty may be imposed. The adjudicator is free to impose a measure that is different from that proposed by the discipline authority.

Even where there is no request for a public hearing from a respondent or from a complainant under Section 60, the Commissioner may still arrange a public

hearing under Subsection (4) where he considers that there are grounds to believe that a public hearing is necessary in the public interest. Subsection (5) states all the relevant factors to be considered in determining the public interest. It is clear that the Legislature has vested the Commissioner with considerable discretion in determining the public interest.

I do not think that the fact that the Commissioner did not in this case exercise his right to call a public hearing under Subsection (4) is significant. There is no time limit for doing so. If he had not received a request from Constable Broda within 30 days, he could still have done so later himself. On the other hand, if it can be argued that Constable Broda had the unilateral right to withdraw his request, the Commissioner could still have proceeded under Subsection (4) and arranged a public hearing in the public interest. For that reason I think the better view is that Constable Broda could not effectively have withdrawn his request at any time without the consent of the Commissioner. But it is now clear that he does have the consent of the Commissioner, even if the position taken by counsel for the Commissioner on the first day of the proposed public hearing was ambivalent.

All that is now left for me to decide is whether in my opinion it would be in the public interest to allow Constable Broda to withdraw his request with the consent of the Commissioner. I hold that in arriving at my decision I must consider the public interest. Unlike the situations dealt with in the English cases where the interests at stake were primarily of a private nature, the Police Act clearly emphasizes the public interest throughhout. It is in the public interest that the police conduct themselves properly. It is also in the public interest that the public know that where police conduct deserves public scrutiny, the Commissioner will not hesitate to have it scrutinized in public, and there will no doubt be occasions where the Commissioner may deem it necessary to conduct a public hearing if only to allay suspicions on the part of the public that police conduct in a particular situation was not above reproach, and thus restore confidence in the police.

For the following reasons I have concluded that it would be in the public interest to allow the request:

1. There is no suggestion that Constable Broda’s failure to attend the trial was wilful. I infer from the finding of "neglect of duty" that it was simply negligent.

2. There was no "victim" or complainant in the normal sense of the word. The victim was an abstraction: the administration of justice.

2. The corrective measure, although at the low end of the scale, is still more than a slap on the wrist. The written reprimand will be on his personnel record, and will no doubt be taken into account if he is considered for promotion or if he is found guilty of a discipline default in the future.

3. Most importantly, the Commissioner does not consider it in the public interest to proceed, and, in my opinion, considerable deference ought, normally, to be given to his views, especially when the Legislature has invested him with the discretion to decide whether it is in the public interest to arrange a public hearing in other circumstances.

Conclusion:

In all the circumstances set out above, it is in the public interest to allow Constable Broda to withdraw his request for a public hearing at this late stage, and I declare the public hearing terminated. It follows that the disposition of the discipline authority, the Chief Constable, namely, a written reprimand, is confirmed.

Dated at Victoria, B.C. this 19th day of November, 2001

"Jakob S. de Villiers Q.C."
Adjudicator