IN THE MATTER OF THE POLICE ACT, RSBC 1996, c. 367 (as amended)

AND IN THE MATTER OF THE PUBLIC HEARING INTO THE COMPLAINT AGAINST CONSTABLE DUNCAN GEMMELL and CONSTABLE GABRIEL KOJIMA OF THE VANCOUVER POLICE DEPARTMENT

Adjudicator D.L. Clancy, Q.C.

Appearances:

D. Ryneveld, Q.C., Commission Counsel
D. Butcher, Counsel for Constable Gemmell
D. Crossin, Q.C., Counsel for Constable Kojima
G. Somjen, Counsel for Vancouver Police Union
D. McWhinnie, Counsel for Vancouver Police Department
P. Rankin, Counsel for the Complainants

Hearing Dates:

June 15, 21, 22 and 23, 2005

PART TWO

Constable Duncan Gemmell and Constable Gabriel Kojima (the Respondents) were suspended without pay for committing certain discipline defaults. The *Police Act* (the Act) defines a disciplinary default as "a breach of the Code of Professional Conduct (the Code)". Chief Constable Graham of the Vancouver Police Department (the VPD) after conducting a disciplinary hearing proposed that both of the Respondents be dismissed from the VPD. The Respondents considered themselves aggrieved by the proposals of the Chief Constable and requested a public hearing. That hearing was held before me and, at the request of counsel, it was divided into two parts. In Part One of the hearing, I considered the nature and extent of the discipline defaults and released Part One of my decision on June 15, 2005.

Part Two will consider what disciplinary or corrective measures should be imposed on the Respondents.

Before Chief Constable Graham and again during this hearing, Constable Gemmell admitted that he had committed the discipline default of abuse of authority by assaulting the Complainant Barry Lawrie and the discipline default of deceit in filing a false, misleading and inaccurate General Occurrence Report. Both before the Chief Constable and before me, Constable Kojima admitted the default of abuse of authority for the assault of the Complainant Grant Wilson and the default of discreditable conduct for his overall conduct. It was by reason of those defaults that Chief Graham proposed their dismissal from the VPD.

Before Chief Graham and again before me, Constable Gemmell admitted the additional discipline defaults of abuse of authority for the assault on the Complainants Jason Desjardins and Grant Wilson and discreditable conduct for his overall conduct. Constable Kojima further admitted the defaults of abuse of authority for the assault of Barry Lawrie and for the assault of Jason Desjardins.

For the additional defaults admitted, Chief Graham proposed reductions in rank, suspension without pay and a requirement that each constable work under supervision for a period of time. The Respondents do not take issue with those proposals.

In Part One of this decision, I decided that, apart from their admissions, the evidence established that the Respondents had both committed all of the discipline defaults alleged. Particulars of my findings are found in Part One.

The Issues

Section 61(6) of the Act provides:

> The adjudicator must decide whether each alleged discipline default respecting the complaint has been proved on the civil standard of proof and may do one or more of the following:
>
> > (a) find that all, part or none of the alleged discipline default has been proved on the civil standard of proof;
> >
> > (b) impose any disciplinary or corrective measures that may be imposed by a discipline authority;
> >
> > (c) affirm, increase or reduce the disciplinary or corrective measures proposed by the discipline authority.

Having decided that the disciplinary defaults were committed by the Respondents, the remaining issue before me is what are the appropriate disciplinary or corrective measures to be imposed.

Preliminary Matters

Before deciding on the sanctions to be imposed, it is necessary to resolve certain preliminary matters. The first of these is whether it is appropriate, when dealing with corrective measures, to consider adverse findings as to credibility reached during this hearing.

I did not accept the version of events put forward by all of the officers including the Respondents. I found that their evidence was self serving and unsatisfactory. I specifically rejected the testimony of Constable Gemmell that some statements in his General Occurrence Report were mistaken and that he had left out damaging particulars of misconduct in that report because he was ordered to do so. I found that Constable Kojima was not credible particularly in denying that he had made threats and unprofessional comments and in denying that he had struck Mr. Wilson with his police baton.

It seems self evident that, during discipline proceedings, if an officer is not truthful when explaining his conduct, that is a matter to be taken into account when disciplinary or corrective measures are considered. That is particularly so where the untruthful testimony bears directly on the misconduct alleged.

The second preliminary matter to be addressed was raised by counsel for the Police Complaints Commissioner. The question is whether it is proper for me to consider the conduct of the other four officers involved and decide whether the discipline imposed on them was appropriate. That is said to be important as a factor during a consideration of whether all six officers should be treated in the same manner.

Counsel suggested that if the penalties imposed on the officers other than the Respondents were less severe than they should have been, that is a factor to consider on the question of whether there should be consistency of treatment when disciplinary or corrective measures are imposed.

Findings in that area would require me to reach factual conclusions as to the conduct of the other officers. The disciplining of those officers is not before me. I considered their conduct when assessing credibility but I am satisfied I should not consider the level of corrective measures imposed on them.

The third and final preliminary matter to be determined is whether in imposing discipline on the officers, I am limited by the measures available under the Act or if I have the power to impose discipline not provided for in the statute. As a creature of statute, the adjudicator can only exercise the authority specifically granted by the Act. I have no greater power to impose discipline than the discipline authority. The adjudicator is not a "discipline authority". The Act provides that that position is held by the Chief Constable or his delegate. Section 61(6)(b) allows me to impose any measures that the discipline authority may impose. Section 61(6)(c) authorizes the adjudicator to adopt or vary the measures proposed by the discipline authority.

I find that Section 61(6) of the Act confines the adjudicator to the sanctions available to the discipline authority. The power to vary the measures proposed by the discipline authority can

relate only to a different sanction authorized under the Act.

The Code - Section 19

The disciplinary or corrective measures I am able to impose are found in Section 19(1) of the Code which provides:

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

Sections 19(2) and 19(3) of the Code provide:

> (2) If the discipline authority considers that one or more disciplinary or corrective measures are necessary, an approach that seeks to correct and educate the police officer concerned takes precedence over one that seeks to blame and punish, unless the approach that should take precedence is unworkable or would bring the administration of police discipline into disrepute.
>
> (3) If the discipline authority considers that one or more disciplinary or corrective measures are necessary, the discipline authority must choose the least onerous disciplinary or corrective measures in relation to the police officer concerned unless one or both of the following would be undermined:
>
> (a) organizational effectiveness of the municipal police department with which the police officer is employed;
>
> (b) public confidence in the administration of police discipline.

Since Sections 19(2) and 19(3) involve decisions as to appropriate sanctions to be imposed, consideration must also be given to Section 19(4) of the Code. That section provides:

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

In considering Section 19(4), I have come to the following conclusions:

(a) Seriousness of the breach: The breaches committed must be considered to be among the most serious examples of misconduct which can be committed by police officers. The assaults were not a single event but a series of events combined with other unacceptable conduct which I find to be aggravating factors. Defenceless members of the public were assaulted without provocation. That they were persons of undesirable character is not a factor which diminishes or mitigates the responsibility of the officers.

In addition to the specific discipline defaults committed, the aggravating factors include the participation of both Respondents in covering up what had occurred, the fact that no notes were taken, both Respondents were less than truthful in describing their actions during this hearing and both officers failed to follow the breach of the peace policy of the VPD when they assaulted the Complainants.

(b) Record of employment: Constable Gemmell's record of employment contains no

serious past discipline defaults. On the contrary, he appears to have been a conscientious and dedicated officer in the eyes of his superiors and members of the public. Constable Kojima's record is also free of serious past discipline defaults. He has had the confidence of his superiors and others and has been commended for bravery in the conduct of his duties.

(c) Impact of proposed measures: A letter from Constable Gemmell's wife shows that the effect of his proposed dismissal on his family has been devastating. I have no doubt the same is true of Constable Kojima. Both officers have been unsuccessful in finding satisfactory alternative employment. Both wish for nothing more than an opportunity to repair the damage to their careers. Dismissal would inevitably have a serious adverse impact on their lives.

(d) Future breaches: It is probable that neither officer would be involved in future breaches of this nature although, given their conduct during this incident, the possibility cannot be completely discounted. Both have shown a susceptibility to engage in unacceptable behaviour. Both have demonstrated a lack of self control, which is of concern.

(e) Acceptance of responsibility: To their credit, each officer has accepted responsibility for his actions and shown a willingness to engage in rehabilitative efforts.

(f) Impact of policies, procedures and the actions of supervisors: Counsel for the Respondents and the VPU submit that the breach of the peace policy then in place was flawed. They referred to the report of the Police Complaint Commissioner, **PIVOT Complaints Against VPD** (June 1, 2005). In his report, the Police Complaint Commissioner expressed "serious concerns about Vancouver's breaching policy and the way that it is apparently being utilized". He also questioned whether the policy is lawful. Those concerns may well be valid but they are for another body to consider. My task is to consider the degree to which the policy and its implementation, whether flawed or not, contributed to the breach of the Code by the Respondents.

The alleged flaws in the policy are not a major factor in any event. It was not seriously suggested that flaws in the policy itself should be considered in mitigation. The thrust of the arguments put forward by the Respondents related to the implementation of the policy.

Two arguments were made. First, counsel contend that the only limitation on points of release of arrested persons is the "department's territorial jurisdiction". The suggestion therefore is that Stanley Park was an appropriate area in which to release the Complainants. Third Beach is within the park and it was therefore acceptable to transport the Complainants to that area.

Chief Graham found that Stanley Park was a location within the policy and permitted by law. He did not deal with the selection of Third Beach as the release point within the park. In Part One of this decision, I found that Third Beach was an inappropriate release location. I said that the policy could not have contemplated, "release in a deserted, remote area…" I remain satisfied that decision was correct. The policy must be read in its entirety. It is not enough to cite that part of the policy which

authorizes release within the territorial jurisdiction. Before selecting a release point, consideration must also be given to the other criteria listed in the policy such as the well-being of the prisoners and their vulnerability. Any sensible interpretation of the policy would not have included Third Beach as a release point simply because Stanley Park is within the territorial jurisdiction of the VPD. The suggestion that the selection of Third Beach was within the policy and therefore a factor to take into account in mitigation cannot be accepted.

The second argument relates to the requirement that police officers must follow the orders of their superiors. Acting Sergeant Kenney was the NCO on duty at all relevant times. If he gave an order that resulted in a contribution to breaches of the Code by the Respondents, that would require consideration as a mitigating factor. Acting Sergeant Kenney did not specifically authorize the selection of Third Beach as a release point. He was present when the choice was made however. I accept that his acquiescence in the selection could possibly have been seen by the Respondents as an approval of that location, although neither officer said so. I find that Acting Sergeant Kenney's actions in failing to reject Third Beach as a release point did contribute to the breaches of the Code. The selection of a remote location provided a greater opportunity for assaults to take place undetected. His tacit approval of the release point did not however, contribute directly to the decision to participate in the assaults. As a mitigating factor, Acting Sergeant Kenney's approval of the site was minimal.

Similarly, it is argued that by not interceding and ordering a stop to the assaults, Acting Sergeant Kenney could be seen to implicitly approve the conduct of the officers. That was never suggested by them while testifying and I do not accept that contention. The officers knew full well their actions in assaulting the Complainants was a breach of the Code. Acting Sergeant Kenney's passive presence and his failure to order that the assaults be stopped cannot be said to have caused the assaults nor to be a mitigating factor.

A further suggestion was that Constable Gardner, as the officer present with the longest period of service, should be treated as a supervisor and his actions considered. I decline to so. Section 19(4)(f) refers specifically to the police officer's supervisor.

Constable Gemmell also said during his testimony that misstatements and omissions in the General Occurrence Report filed by him were the result of his compliance with the orders of Acting Sergeant Kenney who allegedly said at the debriefing that what had occurred should not be discussed other than with squad members. That suggestion could not have been taken as an order. I did not accept Constable Gemmell's testimony that he believed that it was. Acting Sergeant Kenney was not acting in a supervisory capacity when he discussed that subject. It was clear that the statements were simply part of a discussion among the officers as to what should be done.

A related argument has somewhat more force. The evidence was to the effect that the specific provisions of the breach of the peace policy were not always followed. Breaches were implemented on a routine basis. No consideration was given to the policy requirement that arrest for breaches or anticipated breaches should only be made as a last resort. The Respondents say that the routine use of the breach policy was condoned by senior staff. They should therefore be found to have contributed to the conduct of the officers and that should be considered as a mitigating factor.

I find it probable that a relaxed attitude toward the implementation of the breaching policy had developed within the VPD. That relaxed attitude did not extend to approval of criminal misconduct. If there was any contribution by supervisors to the conduct of the officers, it had to have been some sort of expectation that supervisory staff would approve discipline defaults in order to get the job done. That was alluded to in the evidence. It was stated that officers were told by senior staff to be creative, to use any means to get the job done and that intimidation was acceptable. Senior staff were not given an opportunity to respond to that suggestion. I therefore make no finding as to what instructions were given. I do accept that at least some of the officers understood that they were not always required to act in accordance with the strict terms of the policy. That understanding must have come from something said by superiors.

I am satisfied that the understanding may have contributed in some way to the conduct of the officers, including the Respondents. Whether instructions were misinterpreted or were flawed is not important. Senior staff either gave improper advice or failed to make themselves clear. In either case, the actions of the supervisors may have contributed to an expectation that such conduct as intimidating actions would be overlooked.

I accept the understanding of the officers as a mitigating factor in considering the seriousness of the Respondents' failure to follow the breach of the peace policy of the VPD as it related to the selection of the point of release. The officers could well have been led to believe they would not be criticized for taking the Complainants to Third Beach.

The understanding could not be said to mitigate the actions of the Respondents in assaulting the Complainants. The allegations against the Respondents did not allege abuse of authority in failing to follow the VPD breach of the peace policy. No discipline can be imposed for that failure. It is however an aggravating factor to be taken into account in imposing appropriate measures for the assaults and for the default of discreditable conduct.

(g) Measures imposed in similar circumstances: Both Mr. Butcher and Mr. Crossin submitted that more or less similar conduct must attract more or less similar treatment in order to preserve the fairness and integrity of the process. Mr. Somjen on behalf of the VPU agreed that the maintaining of public confidence required consistency of treatment.

The suggestion of counsel was that it would be appropriate to impose similar measures on the Respondents to those imposed on the four other officers by the Chief Constable. That argument presupposes that the treatment of those officers by the Chief Constable was appropriate. All counsel were agreed that no deference was owed to the Chief Constable in respect of his decision to dismiss the Respondents. He heard no viva voce testimony. The evidence on which he relied was not tested on cross-examination. Counsel were unanimous in submitting that I am required by the legislation to reach independent conclusions.

If I were to fashion corrective measures similar to those imposed on the four other officers I would, in effect, be deferring to the expertise of the Chief Constable in respect of their punishment. That cannot be correct. Deference cannot be owed in respect of some measures and not in respect of others. The fact that Chief Graham did

not impose the same sanctions on all of the officers illustrates the fallacy inherent in that argument. I am satisfied I am obliged to consider the sanctions imposed on the other officers only in the sense of considering whether the sanctions imposed on them would be fair and appropriate when imposing discipline on the Respondents for their misconduct as proven during this hearing.

I find that the conduct of Constable Kojima was sufficiently dissimilar to that of his fellow officers to make consideration of the corrective measures imposed on those other officers of little value. Like the other officers, he participated in the assaults but he also acted independently. He was the only officer to employ a police baton. That decision seems unlikely to have been made in the heat of the moment. Even if group mentality played a part in the decision, his action was dissimilar to the actions of all of the other officers. It required conscious thought. The baton was not employed for any lawful purpose. The threats and unprofessional remarks he made were made at a time removed from the happening of the assaults. It cannot be said that at that time he was part of a group and reacted to group or mob mentality. His actions were significantly different from those of his fellow officers.

Similarly, the conduct of Constable Gemmell differed substantially from that of the other officers. It was he who struck the first blow to Mr. Desjardins after which the violence escalated. His deceit in filing the General Occurrence Report occurred many hours after the events in Stanley Park. The heat of the moment had long passed.

I find the corrective measures imposed on the other officers would not be fair and appropriate measures to impose on the Respondents. Those measures do not reflect the seriousness of the misconduct of the Respondents. Consistency of treatment does not require me to follow Chief Constable Graham.

Mr. Butcher also cited Ontario cases where the circumstances did not lead to dismissal. I did not find them to be of particular assistance. For example, in ***Favretto v. OPP,*** OCCPS, September 2001 at 31, the officer after being provoked, pointed his revolver at a fellow constable.

In ***Andrews v. Midland Police Service,*** OCCPS, November 12, 2002 and ***Gregg v. Midland Police Service,*** OCCPS**,** October 2, 2001, two off-duty officers became involved in a physical altercation in a bar after which they were untruthful in providing information and failed to submit a report.

In ***Sterling v. Hamilton-Whitworth Regional Police Service,*** OCCPS, April 28, 1999, the officer involved investigated a break-and-enter at the residence of a woman and remained at the residence overnight. He made no reference to his conduct after that.

In ***Stitt v. York Regional Police Service,*** OCCPS, July 8, 1996, the constable fell asleep on duty and later denied his misconduct.

In the ***Appropriate Officer "E" Division v. Cst. KPM***, The Adjudication Board Pursuant to Part Four of the *Royal Canadian Mounted Police Act,* 2002, the officer used a police vehicle while under the influence of alcohol and engaged in sexual activity with a female in the vehicle after which he made a false report.

None of those authorities dealt with misconduct as serious as that of the Respondents. None involved physical assaults on members of the public at a time when the use of physical force was clearly not required. The different circumstances in the Ontario authorities cited do not persuade me that a sanction other than dismissal is

to be preferred on the basis of consistency of treatment. I do not view those authorities as factors to be taken into account in mitigation.

I note as well that in ***R v. Robillard,*** 1996 BCJ, No. 3147, BCCA at p. 15, the Court recognized that where different judges are involved in different trials, consistency cannot always be achieved.

(h) Other factors: The Respondents have given undertakings that, if reinstated, they will not seek to recover wages lost during suspensions. Those undertakings are said to be mitigating factors I can consider. They are an attempt to address perceived inadequacies in Section 19(1) of the Code which limits the suspension period available to five working days for each discipline default. If the officers are reinstated and the undertakings enforced, the result would be an extension of the period of suspension without pay to approximately 17 months.

I attach very little weight to the mitigating effect of the undertakings. Since the City of Vancouver is not involved and no consideration was given for the undertakings, they have no contractual effect. I could order that they be accepted as valid but I decline to do so. There is no statutory provision which authorizes me to impose that form of discipline. The City of Vancouver, which is not a party to these proceedings, may well decline to follow such an order.

The undertakings are not enforceable. I have no doubt they were put forward in good faith but if they have no legal effect, they cannot be accepted in mitigation in any real sense. The only mitigating effect which I attribute to them is that they demonstrate a desire on the part of the officers to assure me that they intend to act properly if they are reinstated.

After a consideration of all of the aggravating and mitigating circumstances, I conclude that the aggravating factors discussed outweigh the mitigating circumstances. The disciplinary or corrective measures imposed must reflect that conclusion.

Sections 19(2) and 19(3) of the Code

Dismissal is a sanction which must be considered. Dismissal does not involve measures that seek to correct and educate, (s. 19(2)), nor is it the least onerous measure available (s. 19(3)). Therefore before dismissal can be considered, it is necessary to decide whether the imposition of corrective or educational measures is unworkable or would bring the administration of police discipline into disrepute. If not, the Act must be followed. Dismissal would not be available as a disciplinary measure.

Similarly, if the measures adopted would not undermine organizational effectiveness or public confidence in the administration of police discipline, the least onerous measure must be adopted and dismissal would not be appropriate.

In Section 19(2), the phrase "into disrepute" must surely imply disrepute in the eyes of the public. All counsel are agreed that an appropriate test for consideration of whether the administration of police discipline has been brought into disrepute and whether public confidence in the administration of police discipline has been undermined is an objective one.

I agree with counsel that the language of the Code is analogous to the language considered in ***R v. Collins*** [1987] SCJ No. 15 at 33. There the Court was concerned with whether the admission of certain evidence would bring the administration of justice into disrepute.

In *Collins* and in many other authorities, the test considered was whether "in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case…" the administration of justice would be brought into disrepute. Like many other legal fictions, the reasonable man test is easy to articulate but difficult to apply.

The public generally are not fully apprised of the circumstances although many may take the trouble to inform themselves. Some members will not be dispassionate and even among those capable of taking an objective view of the circumstances, opinions may vary. The media cannot be said to embody the view of the reasonable man. All of the circumstances are not reported, editorial views may influence reporting. In addition to providing information, the media is in the business of entertaining and selling advertising. The views expressed are not always dispassionate and fully informed.

In *Collins*, MacIntyre J (dissenting on other grounds) recognized the difficulty. He referred to **The Exclusion of Evidence under the Canadian Charter of Rights and Freedoms: What to Do and What Not to Do.** (1984) 29 McGill, L.J. 521, at p.538, where the author Yves-Marie Morissette wrote:

> A convenient and longstanding legal fiction exists for the purposes of judicial dialectics: the reasonable man, whether it be the man on the Clapham omnibus or, perhaps today in Canada, the career-woman on the Voyageur bus. One commendable feature of this concept is its coherence. Judges may disagree among themselves on what the reasonable man would do in any given case, but in the end the courts never disagree with the reasonable man. They are, in reality, the reasonable man.

Adjudicators appointed under the Act are not judges but I am satisfied the law requires that the adjudicator accept the role of expressing the view of a reasonable person.

In order to undertake the inquiry mandated in Sections 19(2) and (3) of the Code, it is therefore necessary for me to objectively reach a conclusion from the standpoint of the reasonable person fully apprised of the circumstances.

If the officers are reinstated, the imposition of sanctions that seek to correct and educate might well have an adverse impact on the operations of the VPD. Special duties may be necessary for a period of time. There may be concerns over the ability of the Respondents to persuade the Courts to accept their testimony in contested cases. Those concerns could not be said to make a correctional and educational approach unworkable but a normal working relationship may take some time to achieve.

Of more concern is whether such an approach would bring the administration of police discipline into disrepute. I find that a reasonable person aware of the circumstances would be critical of a decision to impose only corrective or educational sanctions. The actions of

Constable Gemmell and his fellow officers have had an impact on the entire force. The reputation of the VPD has been adversely affected. Constable Gemmell's misconduct was not in the nature of a single incident which could be overcome by rehabilitative efforts without further adversely affecting the reputation of the force. The adoption of sanctions designed to educate and assist him would be seen by a reasonable person aware of the circumstances to condone serious misconduct and to further diminish the VPD in the eyes of the public. Reasonable persons, including other officers, would find that course of action would bring the administration of police discipline into disrepute.

A consideration of the actions of Constable Kojima leads to the same conclusion. To impose corrective and educational measures would be seen by a reasonable person to condone completely unacceptable conduct. It would lead to further diminishment of the reputation of the VPD and inevitably lead to the bringing of the administration of police discipline into disrepute.

The probability of reform or rehabilitation is a factor which must be considered. If the prospects for reform are good, a reasonable person may find that police discipline would not be brought into disrepute or undermined. Reform is not always a major consideration however. As was stated in ***Favretto v. Ontario Provincial Police***, supra, where it was held at page 15:

> The community has a significant investment in every police officer and before an officer is dismissed, every attempt should be made to consider whether or not rehabilitation is possible. This is of significant importance when the subject officer has had a clear record and good performance evaluations. Unless the offence is so egregious and unmitigated, the opportunity to reform should be a significant consideration.

Where, as here, unprovoked assaults are perpetrated on citizens, the conduct of the officers is so egregious that the prospect for reform becomes a minor consideration.

In ***R v. Munson*** [2001] S.J. No. 735 1 Sask. Q.B. Scheibel J. dealt with the police dropping off a citizen in a deserted area in freezing temperatures. He held that their conduct "…demonstrated a flagrant disregard for the life, safety and well being of the Complainant. In doing so, they abused their position of trust to a high degree, thereby creating aggravating circumstances which militate against a conditional sentence."

I am not dealing with criminal charges but the principle is of assistance. The officers here also abused their position of trust. Their conduct militates against accepting rehabilitation as a mitigating factor which would make appropriate a correctional and educational approach and the adoption of the least onerous corrective measures.

To answer the question posed by Section 19(2) of the Code, a reasonable person apprised of the circumstances, including the mitigating and aggravating factors discussed previously, would find a correctional and educational approach would not reflect the seriousness of the misconduct of the Respondents. Police discipline would be seen as inappropriate and ineffective and would be brought into disrepute. That approach should not take precedence

over one that seeks to blame and punish.

The answer to the question posed by Section 19(3) of the Code must be answered in the same way. The adoption of the least onerous corrective measures would be perceived by a reasonable person as undermining both the organizational effectiveness of the VPD and public confidence in the administration of police discipline.

The available sanctions therefore include the full spectrum of measures included in Section 19(1) of the Code, including dismissal.

That does not mean that dismissal is required in the circumstances before me. Other disciplinary measures may be imposed that do not give priority to corrective or educational measures and do not involve choosing the least onerous measures. The question that must be answered is whether dismissal is an appropriate sanction to be imposed on the Respondents.

There has, unfortunately, been no previous attempt in this province to define a standard against which the conduct of the officers can be measured. Before deciding on whether the Respondents should be dismissed, counsel have urged, and I accept, that an appropriate standard should be established.

The Standard for Dismissal

Counsel for the Vancouver Police Union (the VPU) and both Respondents urge the adoption of the standard established in Ontario. In that province, there are no applicable statutory provisions but a considerable body of jurisprudence exists. In the first instance, discipline matters in that province are heard by hearing officers appointed under the *Police Services Act*, RSO 1990, c.p. 15. Appeals from those decisions are taken to the Ontario Civilian Commission on Police Services (OCCOP). Further appeals may be taken to the Superior Court of Justice and then to the Court of Appeal for Ontario. Members of the OCCOP have different backgrounds. They are not necessarily lawyers. Commission decisions have no binding effect but they do provide insight into the views of civilians charged with the oversight of police disciplinary matters in Ontario.

Mr. Somjen, counsel for the VPU, fairly summarized the principles emerging from the OCCOP decisions. In Ontario, a police employer seeking to dismiss an officer must establish that the officer is not fit to remain an employee. In deciding that issue a "usefulness" test is employed. That test emphasizes three factors, the nature and seriousness of the misconduct, the ability to reform or rehabilitate the officer and the damage to the reputation of the police force that would occur if the officer remained on force.

Paul Ceyssens, Legal Aspects of Policing, Earls Court Legal Press Inc. 1994 at 5-13725-138; ***Guenette v. Ottawa-Carlton Regional Police Service***, OCCPS, July 1998; ***Andrews v. Midland Police Service***, OCCPS, November 12, 2002 (affirmed [1999] OJ No. 3039, Ontario Superior Court of Justice, Divisional Court.)

There are problems with applying those principles in British Columbia because of our statutory

framework but the Code permits taking all of those factors into account. The Code further emphasizes public confidence in the administration of police discipline as a factor to be considered.

I do not accept the further submission of counsel who urge the adoption of the following passage from ***Favretto v. OPP***, supra:

> A penalty must be tailored to both punish and deter while not causing undue or excessive hardship. The penalty of dismissal is the ultimate penalty. It should be reserved for the most serious offences committed by a police officer where there is no hope for rehabilitation, there are no significant mitigating factors and where the police officer is of no further value to the police service or the community in general.

To suggest that before an officer can be dismissed, the evidence must show there is no hope for rehabilitation goes well beyond any provision in the Code. Here rehabilitation is one factor to be considered. Neither does the Code require that it be shown that an officer is of no further value to the force. I am satisfied that no such absolute test is contemplated.

Even more unacceptable is the suggestion that the officer be shown to be of no value to the community in general. Individuals may be unfit to act as police officers and yet be valuable and productive members of society. That observation undoubtedly applies to most citizens. Most of us would be unsuited for police work by reasons of temperament, physical limitations and other factors, yet we can make a contribution to the community.

The standard adopted in British Columbia must take into account Sections 19(2), (3) and (4) of the Code.

The Code requires that, in determining the effect of those sections, there must be consideration of the three factors emphasized in the Ontario usefulness test: the nature and seriousness of the breach (Code Section 19(4)(a)), the prospect for reform or rehabilitation (Code Sections 19(4)(d) and (e)) and damage to the reputation of the force if the officer remains on the force (Code Sections 19(2) and 19(3)).

The Ontario standard requires that before an officer can be dismissed, it must be established that he or she is unfit to remain an employee. In Saskatchewan, the requirement is more specific. In that province, there is a statutory standard established. The *Police Act* provides for dismissal if an officer:

> 60(1)(b) conducted himself or herself in a manner that, despite remedial efforts, renders the member unsuitable for police service or establishes the member as incompetent for police service.

That section was considered in ***Saskatoon City Police Association v. Saskatchewan Police Commission*** [2000] S.J. No. 477, 2000 SKQB 339, Q.B. No. 2662 of 1999 J.C.S. Goldenberg

J. held at page 17:

> In my view, remedial efforts, as described in Section 60 of the Act are only required where reasonably appropriate. Some acts of serious misconduct or commission of crime require peremptory dismissal of a police officer not only by reason of the nature of the misconduct or crime committed, but because the actions of the member clearly demonstrate a lack of suitability for the position of police officer. In these circumstances, I do not believe the legislature intended that a Chief of Police be required to attempt remedial efforts and assess remedial efforts prior to forming the opinion that a member is unsuitable.

I would adopt the test found in the Saskatchewan legislation in defining a standard for dismissal in this province in preference to the more general lack of fitness finding required in Ontario.

I conclude that in order to justify dismissal of an officer in this province, a two-part inquiry must be undertaken. First, Sections 19(2) and 19(3) of the Code must be considered. Before dismissal can be considered, the evidence must objectively establish:

1. (a) That the degree of seriousness of the breach or breaches of the Code of Professional Conduct is such that an approach that seeks to correct and educate the officer is unworkable or brings the administration of police discipline into disrepute (Code Section 19(2)) and;

   (b) That the degree of seriousness is such that the imposition of less onerous measures would undermine organizational effectiveness or public confidence in the administration of police discipline (Code Section 19(3));

   A determination of the questions raised by Sections 19(2) and 19(3) of the Code must include consideration of Section 19(4) of the Code, the nature and seriousness of the breach, the probability of reform or rehabilitation and damage to the reputation of the force if the officer remains on the force.

   Only if measures designed to correct and educate and are less onerous are rejected can a discipline authority or an adjudicator consider dismissal. If both are rejected, dismissal is justified if the evidence establishes:

2. (a) That there has been a serious breach or a series of serious breaches of the Code which make the officer unsuitable or incompetent for police service. In determining unsuitability or incompetence, the probability of reform or rehabilitation is again an important factor which must be considered except where the actions of an officer clearly demonstrate a lack of suitability for the position of a police officer and;

   (b) That, after consideration of the aggravating and mitigating factors set out in Section 19(4) of the Code, dismissal is a just and appropriate disciplinary measure.

Conclusion

There is no dispute over the seriousness of the misconduct of both officers. Serious breaches of the Code were committed by both. Constable Gemmell abused his authority by assaulting or being a party to the assaulting of all three Complainants. He committed the further default of deceit. I have found his conduct to have been discreditable, which by definition is conduct prejudicial to the maintenance of discipline or likely to discredit the reputation of the VPD (Code Section 5). Constable Kojima also committed the disciplinary default of abuse of authority in assaulting all three Complainants and in employing his police baton while assaulting Mr. Desjardins and Mr. Wilson. His conduct was discreditable in committing those defaults. In addition, his actions were discreditable when he threatened Mr. Wilson, when he made unprofessional comments and when he discouraged other officers from disclosing misconduct.

The seriousness of their misconduct is exacerbated by the aggravating circumstances discussed in the review of Section 19(4) of the Code, including the failure of both officers to take notes, to properly inform their superiors of criminal conduct, their misguided decision to tell less than the full truth when testifying under oath and their participation in failing to follow the breach of the peace policy of the VPD by assaulting the Complainants.

In imposing discipline, I take into account all of the misconduct of the Respondents rather than considering only the commission of the defaults for which dismissal has been proposed. That approach seems preferable to considering each allegation in isolation as was done by Chief Constable Graham. The defaults for which dismissal was proposed and which provided the basis for the arranging of this hearing must be considered in context. I am unable to deal with the sanctions imposed in respect of the other defaults alleged since they are not before me but that does not mean I cannot consider them when reaching a conclusion as to the seriousness of the misconduct of the Respondents.

Returning to the standard for dismissal I have adopted, I conclude:

1. (a) In the circumstances before me, a corrective and educational approach should not take precedence over an approach that seeks to blame and punish and;

   (b) The adoption of the least onerous corrective measures is not required. Dismissal is a disciplinary measure that may be considered.

2. (a) The discipline defaults committed by the Respondents were serious and inexcusable. On the question of whether their conduct makes them unsuitable or incompetent for service, I do not doubt that both officers are contrite and recognize that their behaviour was unacceptable. While suspended, Constable Kojima has taken courses designed to improve his performance as a police officer. Constable Gemmell has been even more active in seeking to rehabilitate himself. He has consulted a psychologist. She opined that he is "likely to remain cooperative and eager to do what he can to facilitate a complete rehabilitation". He volunteers with a charity in his spare time.

Taking those factors and the comments in letters from senior officers and others produced on behalf of the Respondents, I have no difficulty in finding that Constable Gemmell is not incompetent for police service. There is less evidence favourable to Constable Kojima but his efforts to improve himself and the letters filed in his support persuade me that he too is not incompetent for police service.

Little evidence was adduced as to the conduct expected of a police officer. **The Appropriate Officer E-Division and Cst. K.P.N.** October 13, 2001 sets out what is expected of RCMP officers. That decision was provided to me for different reasons but it is instructive when considering police conduct and the suitability for service of the Respondents.

The adjudication board held at page 27:

> As members of the Force, we are expected to act in an exemplary manner and, at all times, our conduct must be beyond reproach. The Board directs Constable M's attention to the fact that the nature of our profession, as peace officers, demands that we set ourselves a much higher standard of conduct than what is expected of a member of the general public, and that we are willing to live by a much stricter code of self-discipline. We must be mindful that our everyday actions, both on the job and in private life, are judged by the public in our role as peace officers. Former Commissioner Inkster, in his decision found at 3 AD (2nd) 62, at page 68, expressed his philosophy regarding the high standards that he expects our members to meet.
>
> In that decision the Commissioner recognized that a decision regarding dismissal is a task of which only Solomon is worthy. We agree. The consequences of failure of our judgment can lead to an erosion of the cornerstone of our organizational values. Society expects and deserves a high standard of honesty, trustworthiness, and integrity from its police officers. The Commissioner also noted that we must endeavour to treat our members equitably, affording them the benefit of an open mind, enlightened by a modern understanding of human psychology. A police officer is a person occupying a position of trust, and has a special role and status in the community which confers upon him or her elevated levels of power and authority. A breach of the contract of trust loses society's confidence, and impairs the ability of our Forces to effectively function within the community.

When determining unsuitability for service, factors such as the nature and seriousness of the breaches, damage to the reputation of the force and the prospect for reform or rehabilitation should again be taken into account. The breaches are extremely serious. I am satisfied that to continue the employment of the Respondents as police officers would further damage the reputation of the force. Reduction in rank was suggested as an alternative form of discipline that would satisfy the need to punish or blame. I disagree. That result would not reflect the seriousness of the breaches.

In considering Sections 19(2) and 19(3), I found that it is probable that both of the Respondents can be reformed but rehabilitation or reform is not always a major factor. That conclusion is equally applicable on the question of unsuitability. Both of

the Respondents may respond well to rehabilitative measures. To some extent, they have demonstrated that to be so. That does not persuade me they should not be dismissed. Their reformation is not the principal concern. Of far greater importance is the preservation of the rule of law.

The testimony of Mr. Saul Del Angel illustrates the importance of compliance with the law by police officers. He was the caretaker at a restaurant located near Third Beach and he encountered the Complainants after their release. They told him they had been beaten by the police. He said he could not believe it and when asked why, he replied that he was from Mexico where citizens are used to that kind of treatment by the police. He said he came to Canada because of the security and the respect for civilians and the law.

It is not an exaggeration to suggest that if egregious misconduct such as occurred here is seen to be tolerated, other officers may be encouraged to decide which laws to obey. Respect for the law in this country may be endangered. The police are not above the law. They must not be seen to be able to act improperly and yet escape suffering the full consequences of their illegal or inappropriate conduct. No matter how frustrating dealing with criminal conduct becomes, police officers must respond with actions within the law. Attempts to cover up misconduct are unacceptable. Discipline imposed must reflect those principles. To paraphrase the philosophy of Commissioner Inkster, failure to demand a higher standard of conduct from police officers can lead to an erosion of public confidence in our police forces.

I find that the misconduct of both of the Respondents was such that they are unsuitable for service as police officers.

3. The final requirement of the standard I have adopted is a consideration of aggravating and mitigating factors set out in Section 19(4) of the Code. I undertook that review when considering Sections 19(2) and 19(3) of the Code. It is unnecessary to review those factors further. I am satisfied there are no mitigating factors that make dismissal an inappropriate sanction to be imposed.

I regretfully conclude that Constable Gemmell and Constable Kojima must be dismissed. If not, there is a danger that, in the public mind, all police officers will be seen to be permitted to behave inappropriately. That has not been my experience nor was any evidence introduced at the hearing to suggest that there is a widespread problem within the VPD. On the contrary, Constable Peters testified that since the events of January 14, 2003, he has not observed any conduct by the police towards citizens similar to that seen in Stanley Park. He also testified that, for the most part, since that time, he has been well-treated by management, the union and his fellow officers.

Disposition

Chief Constable Graham imposed discipline for each discipline default as he was required to do under Section 59(6) of the Code. Section 61(6) provides that I "may"..."impose any disciplinary or corrective measures that may be imposed by a disciplinary authority…" There is nothing in Section 59(6) nor in Section 19(1) of the Code that requires consideration only of the circumstances of the specific default for which sanctions are imposed. As stated earlier, I

am satisfied I am able to consider all of the circumstances relating to the misconduct alleged. Those circumstances not directly related to the discipline default alleged may be treated as aggravating circumstances. I have reached the following conclusions:

1. Considering all of the circumstances including his assaults upon Jason Desjardins and Grant Wilson, his failure to disclose the events of January14, 2003 to his superiors, his failure to take notes recording the incidents, his commission of the discipline defaults of deceit and dishonourable conduct and his failure to be completely honest in testifying at this public hearing, for the discipline default of assaulting Barry Lawrie, I order that Constable Gemmell be dismissed from the Vancouver Police Department;

2. Taking into account his assault of Barrie Lawrie and the other circumstances described, for the discipline default of deceit, I order that Constable Gemmell be dismissed;

3. Considering all of the circumstances including his assaults upon Barrie Lawrie and Jason Desjardins, his improper use of his police baton, his threats directed to Grant Wilson, his unprofessional comments to other officers, his failure to take notes, his failure to disclose the events to his superiors, his lack of honesty in testifying at this public hearing and his commission of the discipline default of discreditable conduct, for the assault of Grant Wilson, I order that Constable Kojima be dismissed from the Vancouver Police Department;

4. Taking into account his assault of Grant Wilson and the other circumstances described, for the discipline default of discreditable conduct, I order that Constable Kojima be dismissed.

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D.L. Clancy, Q.C.
July 27, 2005