

**IN THE MATTER OF THE POLICE ACT, RSBC 1996,
c. 367 (AS AMENDED)
AND IN THE MATTER OF A PUBLIC HEARING INTO
A COMPLAINT AGAINST CONSTABLE GREG SMITH OF
THE VICTORIA POLICE DEPARTMENT**

Reasons for Decision of Adjudicator Robert Bruce Hutchison

PART TWO

On the 28th day of January, 2009, I handed down reasons that held Constable Greg Smith had used unnecessary force in controlling a handcuffed prisoner, Mr. Thomas McKay. The incident took place in the Victoria Police cells booking area on the 22nd/23rd day of April, 2004. At the conclusion of those reasons I made the following observations:

“Having reached the conclusion that Constable Greg Smith in the split second of this event breached S. 10 (b) of *The Code of Professional Conduct* I must leave the question of penalty for “a breach of disciplinary default of abuse of authority” to a further hearing or to written submissions. Counsel can no doubt arrange their choice of the two alternatives at their convenience.”

On September 8th, 2009 counsel appeared before me and argued the question of penalty for Constable Greg Smith’s “disciplinary default” as defined under Section 46.(1) of *The Police Act*.

SUMMARY OF DISCIPLINE ORDER

For the reasons that follow I conclude that Constable Greg Smith should be suspended for three days without pay and ordered to take six hours retraining in takedown techniques on his own time

LEGAL ISSUES

Pursuant to Section 46(i) of *The Police Act* Constable Greg Smith's behaviour constituted a "public trust default" which under the section means conduct that would, constitute a disciplinary default which:

- (a) causes or has the potential to cause physical or emotional harm or financial loss to any person,
- (b) violates any person's dignity, privacy or other rights recognized by law or,
- (c) is likely to undermine public confidence in the police.

For such a default the *Police Act* sets forth the parameters of the punishment that a disciplinary authority (in this case myself acting as adjudicator after a public hearing) may impose discipline pursuant to subsections 19(1)-(4) of the *Code of Professional Conduct Regulation*. The sub sections read as follows:

19(1) 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 counseling;
- (h) written reprimand;

(i) verbal reprimand.

(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 in disrepute.

(3) If the discipline authority considers that one or more disciplinary or corrective measures are necessary, the discipline authority **must** (my emphasis) choose the least onerous disciplinary or corrective measures in relation to the police officers 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.

(4) 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 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.

GENERAL OVERVIEW

Since, the subject of this discipline hearing occurred over 5 years ago it can hardly be said that the organizational effectiveness of the Victoria Police Department will be undermined by my not choosing the least onerous disciplinary

or corrective measure open to me. Accordingly, any discipline order I make that is more than a reprimand must be based on my finding that public confidence in the administration of police discipline would be undermined by a mere reprimand.

Since, both counsel for the Commissioner and the Respondent Constable Greg Smith suggest more severe punishment I do find that a reprimand would undermine public confidence in police discipline.

Counsel for the Police Complaint Commissioner, in summation, suggests I should order a one year demotion of Constable Greg Smith from first class to second class Constable.

Counsel for Constable Greg Smith suggests a two day suspension without pay for two working days. Counsel further argues Constable Greg Smith should subject himself to retraining in use of force on his own time. As well he should prepare a 1,000 word essay on takedown techniques and further discuss when takedowns are appropriate. Finally he should make himself available on his own time to the Use of Force Trainer to lecture at use of force classes for new recruits.

Mr. Waddell and Mr. Falzon both argue that such corrective measures would be of no use and at worse would be harmful.

It is acknowledged by the Commissioner's counsel that Constable Greg Smith had a clean record at the time of the incident in 2004 since joining the force in 1999. While they argued that Constable Greg Smith was taken off his patrol duties it would appear his work was a promotion to the position of School Liaison Officer after 17 months of patrol duty following the McKay incident. It is difficult to see that Constable Greg Smith was somehow down graded by his employers since the takedown of Mr. McKay.

In their brief counsel put it this way:

With respect to s. 19(2) of the *Code*, this is a clear case calling for discipline rather than education. In this case, "use of force" education would be unworkable and serve no meaningful purpose given this officer's previous training and his steadfast position (shared by his own department throughout this matter) that he did nothing wrong. This is a clear case where the credibility of the discipline system depends on the member getting the clear message that the standards for the use of force are ultimately established by the law rather than by the police. Public

confidence in the discipline process requires that the member's conduct be appropriate

ADJUDICATOR'S RESPONSIBILITIES

My duty is to impose discipline on Constable Greg Smith for his unwarranted use of force in the takedown of a handcuffed prisoner. However the remark that the department twice found that the officer did nothing wrong seems to suggest that I must also send a clear message to Constable Greg Smith's departmental superiors. The argument can be construed to suggest that serious discipline, such as demotion of rank for a year, will send a message to the Chief and the Chairman of the Victoria Police Commission. Neither the present Chief, nor Chairman, held such a position in April 2004, when the events I am called on to censure took place.

In any event, I am not prepared to make an example of a subordinate to punish his superiors.

No doubt Mr. Thomas McKay's civil suit and its settlement accomplished some distasteful discipline of the Chief and Commission and certainly caused a change in policies and thinking in police conduct within the local lock up. Having been given the opportunity to read the medical reports supplied by Mr. Considine, Mr. McKay's lawyer, I surmise the fiscal reproof was significant. If the Police Complaints Commissioner wanted a clear message sent to the Police Commission and the Chief I am satisfied that the civil suit has achieved a good deal more than would be achieved by punishing Constable Greg Smith unnecessarily severely. As I found in my original reasons the superiors who failed to heed the warnings of subordinates to install rubber padding in the booking area, as was done in the cells themselves, shared in the catastrophic damages inflicted on Mr. McKay.

I am free of the admonition in sub section 19(3) of the Code of Professional Conduct dictating that I impose the least onerous disciplinary or corrective measures. Such a slap on the wrist would certainly undermine public confidence in the administration of police discipline. In any event the legislation requiring the discipline authority to choose the least onerous disciplinary or corrective measures seems out of place. As one who has heard legislators often criticise the courts for

imposing light sentences it's strange they should chose to admonish police disciplinarians to do just that.

That doesn't mean, however, that Constable Greg Smith should be punished unduly because of poor management of those in charge of the city's lock up. As argued by Mr. Harris, management failed to develop protocols regarding the takedown of handcuffed prisoners when other officers or jailers were present. However, Constable Greg Smith knew the booking area was not protected by rubber matting and took down a young student in a way that used unnecessary force causing a hit to the head inflicting catastrophic damages.

At the hearing I put it to counsel that some punishment was inflicted by the systemic flaws in this case. The Police Complaint Commissioner ordered a public hearing on January 18, 2008 of an incident that occurred almost four years prior. That started a process that is now only a few short months from two years ago. It is now over 5 years since the conduct complained of took place. The administration of police discipline that twice found Constable Greg Smith's conduct not to be at fault left the Commissioner no choice, but the long delay and resulting publicity must have imposed substantial anxiety for Constable Greg Smith. It is interesting to note that B.C.'s police chiefs and senior RCMP officers have very recently said a new independent civilian-led unit is required to investigate misconduct of police officers in order to restore public confidence. One would hope that such an investigative roll would come under the Complaints Commissioner's office rather than setting up another bureaucracy. Certainly, the conduct of Constable Greg Smith's wrongful use of force and the steps taken within his own Department adds weight to the solution suggested by B.C.'s police chiefs.

I am aware that these remarks are a long way from my duty to impose discipline on Constable Greg Smith. However, in their submissions, Commission counsel have stressed issues that should not all be borne by Constable Greg Smith. The Police Act has set up a civilian body to impose discipline on a paramilitary organization. When imposing discipline an adjudicator must bear in mind the conduct and behaviour of the total organization from the top down. The conduct of the officer in question must be viewed as it occurs in the confines of the organization he is a part of. In Constable Greg Smith's case his conduct was tolerated by his superiors in a way it should not have been.

COUNSELS' POSITIONS

The Commissioner's counsel summarized Constable Greg Smith's behaviour as not warranting dismissal, but, as they put it, "does warrant serious denunciation and a response calculated to ensure the credibility and legitimacy of the police discipline process." They then suggest a one year reduction in rank to second class Constable for a period of one year.

Mr. Harris on behalf of Constable Greg Smith put it this way in his brief:

Any breach of s. 10(b) of the *Code* is serious. Nevertheless, there is a range of conduct that serves to increase the seriousness of a particular breach. Constable Greg Smith's conduct and the injuries suffered by Mr. McKay support a finding that a seriousness of the breach is at the mid range.

With this I agree.

Mr. Harris further argued in his brief:

Commission Counsel wrongly suggests that Constable Greg Smith assaulted Mr. McKay. Crown Counsel reviewed this matter and determined that criminal charges were not warranted. A reasonable inference can be drawn that Constable Greg Smith's conduct was not so serious so as to transgress societal rules. Moreover and of significance, is the conduct was so subtle that the breach escaped detection despite there being two internal investigations.

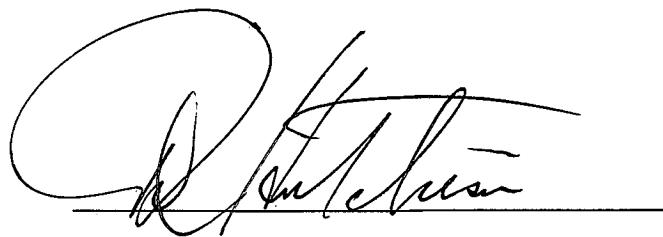
Having heard all of the evidence it is clear that a charge of assault in the circumstances of this case would, in my opinion, fail. The failure of two internal investigations, as I've tried to point out, leaves a great deal to be desired in the hierarchy of the Victoria Police Department. It is not a failure that should visit punishment or discipline on Constable Greg Smith, however.

Further, I find Commissioner's counsel's argument that deceit took place in the testimony of Constable Greg Smith unwarranted. Further I do not ascribe to the argument I should increase discipline because of behaviour, not yet dealt with, that post dates the incident giving rise to the discipline sought in the takedown of Thomas McKay.

Counsel also argued that the consequential extreme injuries should escalate the discipline ordered. From the injuries described in the medical reports, only filed for the first time at the last hearing, counsel suggests Constable Greg Smith intentionally threw Mr. McKay to the concrete floor. It was their view no alternative rational conclusion could be arrived at. If I had come to that conclusion on a balance of probabilities I would have said so in my original reasons. I pointed out it was a gray area since the video failed to capture the event and Mr. McKay did not and could not testify. The medical reports suggest he had no memory of the events at the police cells in any event. It is equally possible that Constable Greg Smith, who testified he didn't know what went wrong, unintentionally failed to cushion the descent and velocity after commencing the takedown by tripping Mr. McKay. That failure led me to find an unwarranted use of force. The Commissioner failed, however, to prove that Mr. McKay was thrown.

DISCIPLINE ORDER

Taking all the submissions and evidence into account I conclude that Constable Greg Smith, pursuant to the *Police Act*, should be disciplined by a three day suspension without pay. Further, I share to some extent the Commissioner's suggestion that retraining, followed by an essay and teaching assistance in use of force, on Constable Greg Smith's own time, would serve no useful purpose. However, I do conclude under Section 19(2) of the *Act* that Constable Greg Smith should, on his own time, take six hours devoted to retraining in takedown techniques.

A handwritten signature in black ink, appearing to read 'R. Hutchison', written over a horizontal line.

Robert Bruce Hutchison, Adjudicator