

**IN THE MATTER OF THE
PUBLIC HEARING INTO THE COMPLAINT AGAINST
CONSTABLE RYAN O'NEILL
CONSTABLE BRIAN ASMUSSEN
OF THE VICTORIA POLICE DEPARTMENT**

**RULING OF
ADJUDICATOR ALAN E. FILMER, Q.C., P.C.J. (Ret.)**

AdjudicatorAlan E. Filmer, Q.C., P.C.J. (Ret.)

Counsel for the Office of the Police Complaints Commissioner. Bradley L. Hickford

Counsel for the Respondents David G. Butcher

The Issue:

The issue before this tribunal is the effect of the new Police Act on these proceedings. I have received well-argued submissions from the Respondents' Counsel and from Counsel acting on behalf of the Police Complaints Commissioner (PCC).

The old Act and Regulations were repealed and replaced on March 31, 2010, by a new Police Act pursuant to recommendations by Josiah Wood, Q.C. The effect of the new Act was to isolate a number of matters which had been commenced under the provisions of the old Act, but which had not been concluded. The Legislature dealt with these matters by referring to them as "transitional" matters.

Both parties have agreed that the new Act applies procedurally to all transitional matters.

Position of the Respondents:

The Respondents argue that because of the presumption against retroactivity/retrospectivity, the new Act should affect only procedural matters and not substantive ones. They submit this presumption is a strong one, and should be ousted only by express statutory language or by necessary implication.

The Respondents say that the new Act in the transitional section provides for procedures, but that the old Act substantive provisions respecting penalties and punishments survive.

The Respondents say that the sister bill (Bill 7) passed at the same time as the new Police Act has a clearly worded clause, including a retroactive effect, whereas the new Police Act does not contain a similar provision. They argue that the only reasonable conclusion is that the Legislature did not intend the substantive provisions of the new Act to have retroactive or retrospective effect.

The Respondents further claim that a retrospective reading of the new Act would interfere with the "vested rights" of affected persons. They therefore argue that the presumption has not been rebutted and, in fact, has been expressly confirmed, and that to read this new Act as argued by Counsel for the PCC would affect the Officers' crystallized vested rights.

Position of Counsel for the PCC:

Counsel for the PCC respond that there is no common law rule against the retrospective application of legislation. The common law rule against retroactive application is rebuttable by clear evidence of legislative intent, or by express words that carry a necessary implication of this intent.

Counsel for the PCC agree that the presumption against retroactive application is strong if “vested rights” are involved, but argue that police members do not have such “vested rights” to be subject only to the penalties in the old Act.

They say that, in essence, the new Act is clear in its intent and that both procedures and substantive matters are to be dealt with under the new Act in all transitional matters.

Reply of the Respondents to the Position of the Counsel for the PCC:

In reply to the submissions of the PCC, the Respondents agree that the new Act provides a new procedural framework.

Counsel for the Respondents reiterate their position that the presumption against retroactivity applies. They also argue this presumption is strong and can be rebutted only if the legislation is clear. They further argue that where S. 11 refers to “proceedings and procedures”, it therefore does not permit the PCC to apply substantive change retroactively to transitional complaints.

The Respondents point out comments made by the Attorney-General relative to “retroactivity” to support their argument. The Respondents contend that the presumption has not been rebutted.

Ruling of Adjudicator:

Both submissions focus on the retrospective/retroactive effect of the new Police Act. I accept the definition of “retrospective” and its effect on the law as set out on page 3 of the argument of Counsel for the PCC.

“Retrospective applications” are defined in Driedger as “applications that would change only the future effects of a past situation”. This definition was explicitly approved by the Supreme Court of Canada in Brenner v. Canada (Secretary of State). The new Police Act provisions, including provisions respecting new penalties, are retrospective and not retroactive in effect. They will only take effect in respect of future events, that is, in the course of disciplinary decisions made after the “in-force” date. They will change the future legal effect of past conduct, but they will only operate forward; they will only be applied in the future – but look backward – and potentially, attach new legal consequences to an event that happened before the in-force date. The amended Police Act does not reach back in time and change non-culpable behaviour into culpable behaviour. There is no rule of construction that such retrospective provisions should be given anything but full effect.

The effect of retrospectivity in this matter would be to allow the new Act to govern future disciplinary decisions to be applied to past conduct, but not to change the definition of past conduct contained in the old Act.

One must therefore examine the new Act to see if it is clear in its intent. The Legislature obviously foresaw that the new Act would create a number of matters which had been submitted under the old Act, but which had not been dealt with before the effective date of the new Act. These matters were entitled transitional complaints and were dealt with in S. 11.

The Police Complaints Commissioner was given specific powers to facilitate the operational transition of proceedings and procedures from the old Act to the new Act.

The powers of the PCC are limited by the Statute and are basically to assist complainants and others, to determine the stage in the complaint process, to waive or modify a prerequisite, and to waive or extend the time limit. His determination as to the stage of a transitional complaint under this section is final.

Once the complaint has been placed under the provisions of the new Act, the matter proceeds. The new Act then specifies that “the new enactment applies in respect of a transitional complaint”.

I have considered the arguments advanced, together with the legislation. It is my view that the old Act provides the basis for a complaint, but that for transitional matters, the new Act governs procedurally and substantively. In this matter, it is my view that the intent of the Legislature is clear.

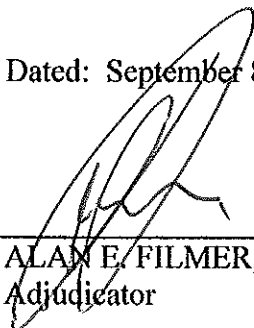
Further Observations:

The comments of the Attorney-General to Mr. Farnsworth referring to the need to be cautious about endeavouring to legislate retroactively were, of course, made relative to an amendment proposed which would have provided penalties for retired officers, whereas previously they would not have been subject to a penalty. The Attorney obviously saw the potential effect on an officer who had left his employment and might still be pursued by a further penalty under the new Act.

Counsel for the PCC raises the issue of an unfair application of the new Act relative to potential penalties. I would suggest that where an increased penalty contained in the new Act, e.g. "suspension without pay for 30 days" is proposed, that for some offences the Adjudicator may wish to constrain himself/herself to the 5 day limit contained in the old Act.

In the public interest, an Adjudicator may also consider "specific treatment" or that the member participate in a "specified program or activity". These are new provisions, and if ordered without the agreement of the officer involved, are unlikely to be effective. The Adjudicator may well wish to seek the assistance of counsel when considering these new provisions.

Dated: September 8, 2010



ALAN E. FILMER, Q.C., P.C.J. (Ret.)
Adjudicator