PH 2016-01
OPCC File 2012-8138; 2011-6657

6 February 2018

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, C. 367, as amended

AND

IN THE MATTER OF A *POLICE ACT* PUBLIC HEARING INTO ALLEGATIONS AGAINST CONSTABLE EDGAR DIAZ AND FORMER CONSTABLE MICHAEL HUGHES SOUTH COAST BRITISH COLUMBIA TRANSPORTATION AUTHORITY

Reasons of Adjudicator on application for particulars and dismissal

Public Hearing Counsel:	B. Hickford
Commission Counsel:	G. DelBigio Q.C.
Counsel for Constable Diaz:	D.G. Butcher Q.C.
Counsel for former Constable Hughes:	M.K. Woodall

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1. On June 17, 2017 the Police Complaint Commissioner (PCC) directed a public hearing in this matter and appointed me, Ronald McKinnon, as the adjudicator to conduct same pursuant to s. 142(2) of the *Police Act*.

2. Counsel for Constable Diaz and former Constable Hughes brought motions for various relief including the issuance of summonses, discovery of documents, and my recusal as adjudicator, all of which I have dismissed in judgments filed separately. This

judgment deals with the two remaining issues: 1. That I direct that Public Hearing Counsel (PHC) and/or Commission Counsel (CC) provide particulars of the deceit alleged; and 2. Dismissal of the misconduct allegation on the grounds that the allegation of recommending criminal charges is "unknown to law".

Particularization of the deceit allegation

3. The complaint here is that the members face an unfair process because neither the PHC nor CC have adequately specified the allegation of deceit. They ask, if we are said to have been dishonest, point us to the page or statement where something we said is false.

4. In response, the PHC and CC argue that they have conveyed the theory of this deceit allegation and that there is no unfairness to the members. They rely both on their outlines of the allegation in their submissions, and on a document authored by Mr. Mark Jetté when he was CC, which sets out the relevant pages and passages said to involve dishonest statements by the members. (This document is included at Exhibits "E" and "F" to the Affidavit of Cait Fleck sworn on 26 September 2017, filed on this application.)

5. I turn first to consider whether an adjudicator has the power to make an order for "particularization" as sought by the members

6. A *Police Act* adjudicator is a creature of statute. He or she is not a permanent tribunal or person appointed on an ongoing basis, but rather the Act allows for retired judges to be appointed for individual cases. As a starting point, the adjudicator has those powers set out in the Act, in relation to the process that is underway (be it a public hearing or review on the record). To state the obvious, an adjudicator does not have any inherent jurisdiction, as a superior court judge would. Nor can it be said that an adjudicator would have an ancillary or inherent procedural jurisdiction the way a Provincial Court Judge may (see for instance: *R. v. Henley*, 2012 BCPC 71, at paras. 21-28, and the cases cited therein).

7. However, as Mr. Butcher points out in his reply submissions for Cst. Diaz at para. 10, an administrative tribunal must control its own procedures so long as they comply with fairness and natural justice. In advancing this argument he appears to acknowledge the question is whether the power that is invoked is one that belongs to the decision-maker or tribunal, "by necessary implication" (para 11).

8. This then gives rise to the question, is the power to order further particulars of an allegation a power that a one-time Police Act adjudicator has by necessary implication?

9. I have concluded that no such power rests within the mandate of an adjudicator. I accept that an adjudicator could and should encourage PHC or CC to do more to spell out the basis for an allegation, in an appropriate case, but I am unable to accept that he or she has the ability to make an order for same.

10. This situation may be contrasted with another type of power that does arise by necessary implication, the power to permit or disallow a question put to a witness. The Act provides for the adjudicator to preside over a public hearing at which participants have evidentiary and witness-examination powers, and in that context it is necessarily implied that the adjudicator has the power to rule on an objection.

11. Under the statute, it falls to the PHC to advance the case relative to the misconduct allegation (s. 143(4)). In most cases the member will have a very clear picture of what is said to constitute misconduct. In other cases, the misconduct allegation may arise from a theory of liability that is less clear. This may occur in a case that is not purely "transactional", but involves a more complex or subtle allegation of improper conduct.

12. As I understand the PHC's approach, the case at bar does not involve a specific single instance of dishonesty. I believe his theory is that the members set themselves on a course that was intended to or allowed for the machinery of the criminal justice system to see Mr. Riby-Williams face a criminal charge and be restricted by bail conditions. In advancing this theory, both PHC and CC do not point to a single

utterance but rather to the cumulative effect of various statements, documents and conduct.

13. This may prove to be too vague and general a theory to support a finding of misconduct at the end of the day. But it is a tenable theory of improper conduct. Dishonesty may arise in an obvious way (i.e., "he lied on page 22, line 17") or in an opaque way (combining statements and conduct made at different points, appreciating what information the person had at that point, for example, and concluding the person misled others). As Mr. DelBigio says, there are many aspects of this case that are clear and obvious (name, identities, the incident, etc.). If, as is argued, this is a "cumulative effect" or "seen in totality" case, that does not mean it is an unfair case. No member is entitled to avoid review for potential misconduct only because the conduct at issue was complex and not transactional.

14. Insofar as the "particularization" argument is concerned, I am unable to accept that an adjudicator under the *Police Act* has the power to order particulars, because such a power does not arise by necessary implication for a retired judge presiding over a public hearing. Even assuming, for the sake of analysis, that the adjudicator could order particulars of the allegation, on the facts here, I do not see this as being required. The members are right to complain that the PHC and CC cannot fall back on a "we don't know what evidence will emerge" type of argument. The members should, as a matter of fairness, be told what is said to constitute misconduct. But here, they have been told. They do not like the fact that it is an allegation based on the entirety of their conduct and statements (as opposed to any single statement). That feature of the allegation makes it complex, but not unfair. As the public hearing unfolds it may be that the PHC presents the case in a manner that seems unfair or problematic, in which case I could address that issue.

The "unknown to law" complaint

15. The members' second complaint is that the allegation of misconduct by "recommending charges" is one that is unknown to law. As an invalid allegation, the members ask that it be dismissed at the outset before the hearing commences.

16. Much of what I concluded under the first issue of particularization has application to this issue as well. What the members want is akin to striking an allegation or invalidating a charge. They do so here, however, not before a trial court or court of inherent jurisdiction, nor before any continuing tribunal with established rules of procedure. Instead, they appear before a *Police Act* adjudicator whose task under the Act is to determine "whether any misconduct has been proven" (s. 143(9)). The Act provides for no intermediate or screening type mechanism that would allow for early assessment of the merits of an allegation of misconduct.

17. I am unable to accept that an adjudicator has such power by necessary implication. He or she must have powers to receive the evidence to make a determination about misconduct, but it does not follow that the adjudicator must have a power to put an early end to the whole process in a contested case, before one participant (PHC) has had the opportunity to present the evidence as the statute envisages.

18. Even assuming the adjudicator had the authority to dismiss the complaint, the argument advanced in support is extremely weak. Mr. Woodall says that s. 77 of the *Police Act* does not contain a type of misconduct called "recommending charges", and it cannot be read into the provision.

19. Statutory interpretation principles provide the answer, which accords with logic. Section 77(3) refers to "abuse of authority" in an open and non-restrictive way. The Act says that "abuse of authority" is "oppressive conduct towards a member of the public", and goes on to say that it includes, "without limitation", a number of specific types of oppressive conduct.

20. This is a classic example of a non-exhaustive list. The items listed are illustrations of what amounts to an abuse of authority, and they may be used to understand what the legislature intended to capture under this term. It cannot be that a form of misconduct is improper or untenable merely because it is not one of the examples in that subsection.

21. The particular allegation here is that the members embarked on a course of conduct that gave rise to an innocent person facing a criminal charge. Putting it at its highest, this is akin to wrongful convictions, and as various public inquiries into such cases have emphasized, the public and all justice system participants are gravely concerned to avoid miscarriages of justice. While it remains to be seen what the evidence in this case proves, as a generic matter, it seems obvious that deliberate steps by police to cause a citizen to be charged improperly meets the definition of "abuse of authority". Such conduct would be inarguably "oppressive" to a member of the public, and it would bring disrepute upon the police.

22. The submission by Mr. Woodall, fixating on the "authority" an officer has, misses the mark. It need not be that the officer has final "authority" to approve a criminal charge, for him to abuse the powers he has. If an underling had a lower power to do something, it is still a power to do something. In our system, front-line police officers conduct the bulk of investigations and submit most of the information that goes to Crown counsel to consider criminal charges. An officer involved in that process may lack final authority, but he or she has the authority to refer or not refer a case, to articulate recommended charges, and to outline the evidence. Those are very real powers that are uniquely available to police officers.

23. It cannot be said that a hypothetical officer who deliberately set out to frame a suspect, charging him or her with fictitious crimes, could avoid a finding of misconduct on the basis that such conduct falls outside s. 77(3).

24. For these reasons, I conclude that both aspects of this application must be dismissed. To the extent these generalized complaints bear upon the determination of

misconduct in the public hearing, they may of course be made again at the conclusion of the evidence. Indeed, that is likely the proper place for consideration of the basic complaints that (1) the officers have not been proved to have deceived, and (2) what is put forward as misconduct is not actually oppressive and is not an abuse of authority.

"*R. McKinnon*"
Ronald A. McKinnon
Adjudicator