PH: 2016-01
OPCC File: 2012-8138

IN THE MATTER OF THE POLICE ACT, R.S.B.C. 1996, c. 367 AS AMENDED

AND

IN THE MATTER OF THE PUBLIC HEARING INTO THE CONDUCT OF CONSTABLE DIAZ AND FORMER CONSTABLE HUGHES OF THE SOUTH COAST BC TRANSPORTATION AUTHORITY POLICE SERVICE

ADJUDICATOR'S DECISION ON APPLICATION TO ADMIT EVIDENCE

PUBLIC HEARING COUNSEL:	Bradley Hickford
COMMISSION COUNSEL:	Greg DelBigio, QC
COUNSEL FOR CST. DIAZ:	David Butcher, QC

[1] This is my decision on an application brought by Cst. Edgar Diaz to have certain evidence admitted in this public hearing. Cst. Diaz is one of two individuals whose conduct while serving in the South Coast British Columbia Transportation Authority Police Service ("SCBCTAPS") is at issue in this public hearing. The other is former Cst. Michael Hughes, who is no longer a member of SCBCTAPS, and who is no longer attending or participating in these proceedings.

[2] The evidence Cst. Diaz seeks to have admitted is the sworn evidence former Cst. Hughes gave at prior discipline proceeding in relation to this matter, before the current public hearing was arranged.

Background

[3] This matter has a lengthy procedural history, ultimately dating back to an incident on August 10, 2011. On that date, Cst. Diaz and former Cst. Hughes used force against Mr. Charles Riby-Williams in the course of arresting him. Proceedings ensued under the *Police Act* relating to the members' use of force against Mr. Riby-Williams, the subsequent reporting about the incident, and the recommending of certain charges against Mr. Riby-Williams. Following an investigation and a number of procedural steps under the *Act* that need not be set out in detail here, a discipline proceeding was convened before the Honourable Ian Pitfield, who was then the discipline authority with respect to some of the allegations against Cst. Diaz and former Cst. Hughes.

[4] On March 1, 2017, former Cst. Hughes testified under oath in the discipline proceeding before DA Pitfield. This testimony was not compelled. He was questioned by his own counsel in direct examination and cross-examined by counsel for Cst. Diaz. It appears to be common ground that Cst. Diaz and former Cst. Hughes were essentially aligned in interest at the discipline proceeding. There were no participants in the discipline proceeding who were adverse in interest to the members or serving in a prosecutorial type of role.

[5] DA Pitfield ultimately found that the allegations before him were not substantiated.

[6] On June 15, 2017, the Police Complaint Commissioner arranged a joint public hearing into all allegations against Cst. Diaz and former Cst. Hughes in this matter, including those that had been dismissed by DA Pitfield, and appointed me as the Adjudicator.

[7] The public hearing began on February 13, 2018. Cst. Diaz and former Cst. Hughes appeared with their counsel. On February 15, 2018, Mr. Riby-Williams completed his testimony at the public hearing.

[8] On June 19, 2018, following a petition by Cst. Diaz in the Supreme Court of British Columbia, a stay of proceedings was ordered in respect of the public hearing, and on September 27, 2018, the PCC's decision to arrange the public hearing was quashed: 2018 BCSC 1642. On July 30, 2020, the Court of Appeal for British Columbia set aside the decision quashing the arrangement of the public hearing and restored the June 15, 2017 notice of public hearing: 2020 BCCA 221.

[9] The public hearing was reconvened on September 7, 2021. Neither former Cst. Hughes nor his counsel attended that day. Months earlier, his counsel had notified the other parties and myself that he had not spoken with his client for a long time and had been trying without success to obtain instructions as to whether his client intended to participate in the public hearing going forward. No appearances or submissions have been made by or on behalf of former Cst. Hughes since the public hearing was reconvened.

Law and Positions on the Application

[10] Cst. Diaz seeks to have former Cst. Hughes' March 1, 2017 testimony before DA Pitfield entered into evidence in the public hearing. He relies on ss. 143(5)(c) and 143(6)(a) of the *Act*.

[11] Section 143(5)(c) provides:

> (5) Public hearing counsel, the member or former member concerned, or her or his agent or legal counsel, and commission counsel may
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> ...
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> (c) introduce into evidence any record or report concerning the matter...

[12] Section 143(6)(a) provides:

> (6) The adjudicator may

> (a) receive and accept information that the adjudicator considers relevant, necessary and appropriate, whether or not the information would be admissible in any court ...

[13] Cst. Diaz submits that, as a matter of straightforward statutory interpretation, former Cst. Hughes' evidence before DA Pitfield is clearly a "record...concerning the matter" before me in this public hearing. It is part of the record in the discipline proceeding before DA Pitfield, relating to the same matter that is now before me. Cst. Diaz further submits that, in any event, s. 143(6)(a) affords broad discretion to consider any relevant, necessary, and appropriate information. Cst. Diaz submits that former Cst. Hughes gave key evidence at the discipline proceeding about his observations of Mr. Riby-Williams, and dealings with Mr. Riby-Williams, leading up to the arrest and use of force.

[14] Cst. Diaz also relies on the principled exception to the hearsay rule in seeking to have the evidence admitted for the truth of its contents. The principled exception to the hearsay rule is well known. Hearsay refers to a statement made out of court that is tendered in court to prove the truth of its contents. Such evidence is presumptively inadmissible in court because of the dangers it poses to trial fairness and the integrity of the truth-seeking process, due to the lack of opportunity to test the evidence through cross-examination. Under the principled exception, such evidence may be admitted if it is necessary and meets the criteria for threshold reliability: see *R. v. Bradshaw*, 2017 SCC 35.

[15] Threshold reliability may be established if it can be shown that there are "adequate substitutes for testing truth and accuracy of the statement (procedural reliability)", or that there are "sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability)": *Bradshaw*, at para. 27. These factors may work in tandem to establish threshold reliability, but the standard remains high, and a hearsay statement will only be admitted under this exception if it is shown to be "sufficiently reliable to overcome the specific hearsay dangers it presents": *Bradshaw*, at para. 32.

[16] Cst. Diaz submits that the evidence he seeks to admit is necessary, since former Cst. Hughes is not participating in these proceedings and cannot be compelled to attend and give evidence by virtue of s. 151(1) of the *Act*.

[17] Section 151(1) provides:

> A member or former member whose conduct is the subject of a public hearing or review on the record is not compellable to testify as a witness at the public hearing or review on the record, but an adverse inference may be drawn from the member's or former member's failure to testify at that public hearing or review on the record.

[18] Cst. Diaz submits that the evidence also meets the standard of threshold reliability. The evidence was given under oath before a retired judge in a formal proceeding; the questioning was proper, even if not undertaken in a traditional adversarial context; and DA Pitfield had the right to, but did not, question former Cst. Hughes.

[19] Public hearing counsel is opposed to the application. He submits that the evidence is not captured by s. 143(5)(c) of the *Act*. On this point, public hearing counsel notes that the evidence was not generated during the investigation phase of the proceedings under the *Act*. Public hearing counsel also submits that the reliability of the evidence is questionable, because former Cst. Hughes was not subject to cross-examination by a party who was adverse in interest at the discipline proceeding.

[20] Public hearing counsel further submits that the admission of this evidence would be contrary to s. 151(1) of the *Act*. Public hearing counsel submits that former Cst. Hughes is still subject to these proceedings, notwithstanding his apparent decision to stop participating in them, and since he is not a compellable witness his statement cannot be introduced by Cst. Diaz in the manner proposed.

[21] Commission counsel takes no position on whether the evidence should be admitted, but made submissions on the appropriate framework to apply in considering the application. First, commission counsel submits that the language of s. 143(5) is permissive, and accordingly even if I find that the evidence is a "record or report

concerning the matter," it does not necessarily follow that it must be admitted. Commission counsel submits that if the evidence is captured by s. 143(5)(c), then I retain a gatekeeping function and should consider whether the probative value of the evidence outweighs its prejudicial effect.

[22] Further, commission counsel submits that if the proposed use of the evidence is for it to be considered for the truth of its contents, then the laws of evidence around hearsay are engaged. Commission counsel made submissions regarding the factors to consider in assessing necessity and reliability. Regarding necessity, commission counsel notes that former Cst. Hughes cannot be compelled to testify, although some of the evidence sought to be adduced via his earlier testimony may be available from other sources, including Cst. Diaz himself. In terms of reliability, commission counsel notes the evidence was given under oath, and it was cross-examined upon, but not by all the parties represented at this public hearing.

[23] Finally, commission counsel submits, without taking a firm position on the issue, that I should consider whether the admission of this evidence would undermine the purpose of s. 151(1) of the *Act* or otherwise be unfair to former Cst. Hughes.

[24] In response to the concerns raised regarding s. 151(1) of the *Act*, Cst. Diaz submits it is relevant that former Cst. Hughes' testimony before Adjudicator Pitfield was given voluntarily. By contrast, he notes that public hearing counsel has proposed to tender a number of statements made by former Cst. Hughes in the investigation of this matter that were compelled under the *Act*. Public hearing counsel confirmed in his submissions that he wishes for those compelled statements to be admitted and considered for the truth of their contents. He submits those statements are captured by s. 143(5)(c) of the *Act*, but maintains that Cst. Hughes' sworn evidence before DA Pitfield is not. Cst. Diaz submits that if anything it is public hearing counsel's approach that violates former Cst. Hughes' right not to be compelled against himself.

[25] In addition to the provisions and submissions discussed above, there is another section in the *Act*, s. 131(1)(a), that I was not referred to but that I consider relevant to my analysis. Section 131(1)(a) provides:

> 131 (1) Evidence given by a witness in a discipline proceeding, including the member or former member concerned, is inadmissible in evidence in court or in any other proceeding, except in
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> (a) a public hearing or review on the record under this Part...

Discussion

[26] I begin with s. 143(5)(c) of the *Act*. The phrase "record or report concerning the matter" is not defined in the *Act*. The scope of this phrase must therefore be interpreted having regard to the words used in the provision, read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the legislation, and the intention of the legislature: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

[27] I agree with Cst. Diaz that former Cst. Hughes' evidence before DA Pitfield at the discipline proceeding is, in the grammatical and ordinary sense of the words, a record concerning this matter. *The Concise Oxford Dictionary of Current English*, 8th ed., defines the noun "record" as meaning "a piece of evidence or information constituting an (esp. official) account of something that has occurred, been said, etc." or "a document preserving this." The relevant definition of the noun "matter" is "an affair or situation being considered, esp. in a specified way". Cst. Hughes' evidence before DA Pitfield was audio recorded and transcribed. The resulting transcript is a document preserving the evidence and information given by Cst. Hughes, which in turn constitutes an account of at least part of what occurred in the affair or situation being considered in this public hearing.

[28] Turning to other parts of the *Act*, I find that s. 131(1)(a) supports the admissibility of the evidence. In that section, a public hearing is specifically listed as an exception to

the general rule, in s. 131(1), that evidence given in a discipline proceeding, including by a member or former member concerned, cannot be admitted in evidence in court or any other proceeding. The *Act* clearly contemplates that evidence given by a subject member in a discipline proceeding may be admitted in a public hearing.

[29] I note that there is a similar provision in s. 102 of the *Act* relating to the use of statements made to investigating officers by members and former members. I am unable to find anything in the language of the *Act*, its scheme or object, or the apparent intention of the legislature that would support public hearing counsel's position that statements made during an investigation are captured by s. 143(5)(c) and are thus admissible, while evidence given in a discipline proceeding is not.

[30] Moreover, I do not find that s. 151(1) represents a bar to the admission of the evidence. That section provides that a "member or former member whose conduct is the subject of a public hearing... is not compellable to testify as a witness at the public hearing..." (emphasis added). On its face, this provision applies narrowly to prevent a subject member from being called, against their will, to give evidence as a witness within a public hearing. It does not prevent the admission of evidence previously given by a subject member as a witness in a discipline proceeding. This is particularly so given s. 131(1)(a) of the *Act*.

[31] For these reasons, I find that the evidence given by former Cst. Hughes in the discipline proceeding before DA Pitfield on March 1, 2017 is a "record... concerning the matter" under s. 143(5)(c), and may be introduced into evidence by Cst. Diaz.

[32] This finding does not end the analysis, however. I agree with commission counsel that there remains a discretion to exclude evidence that is captured by s. 143(5)(c) – or at least a discretion to determine whether or not such evidence can be considered for a hearsay purpose.

[33] In determining the permissible use of this evidence, I find that s. 143(6)(a) is instructive. That provision permits adjudicators in public hearings to receive and accept

information that would not be admissible in court, provided the information is considered relevant, necessary, and appropriate. In my view, this section of the *Act* applies to the receipt and acceptance of information contained in records and other evidence that may be adduced in a public hearing. Such information may be received and accepted even if it would not be admissible in court under the usual rules of evidence.

[34] Evidentiary rules may, however, still be useful in determining whether information is sufficiently relevant, necessary, and appropriate to be received and accepted. The rules governing the admissibility of hearsay evidence have been carefully developed in our jurisprudence to assist the truth-seeking process and ensure that proceedings are fair. Accordingly, I will consider the proper use of this evidence through the lens of the principled exception to the hearsay rule, although in my opinion the standards involved may be relaxed, given the language of s. 143(6)(a).

[35] I find that the evidence in question is necessary. Former Cst. Hughes is not participating in these proceedings. He cannot be compelled to testify. There is no reason to believe he will attend voluntarily and give evidence. As Cst. Diaz points out, there are aspects of former Cst. Hughes' testimony relating to the interaction with Mr. Riby-Williams that only former Cst. Hughes would be in a position to give evidence about. This includes evidence about Cst. Hughes' perceptions and state of mind in dealing with Mr. Riby-Williams.

[36] With respect to threshold reliability, I find that there are indicia of procedural reliability. Former Cst. Hughes testified under oath. He was before a retired judge sitting as a discipline authority, in a formal discipline proceeding under the *Police Act*. His evidence was recorded. He was cross-examined by counsel for Cst. Diaz, but not by anyone else. It was open to DA Pitfield to ask questions of him, but that did not occur.

[37] Public hearing counsel and commission counsel did not identify any specific hearsay concerns raised by Cst. Hughes' evidence before DA Pitfield, other than pointing to the lack of cross-examination by a party who was adverse in interest. The usual dangers of hearsay evidence relate to "difficulties in assessing the declarant's perception,

memory, narration, or sincerity": *Bradshaw*, at para. 26. It appears to me that the specific dangers with respect to Cst. Hughes' evidence relate to memory and sincerity – the reliability and credibility of his evidence concerning the encounter with Mr. Riby-Williams, and his perceptions and state of mind during that encounter, cannot be tested through cross-examination in this public hearing.

[38] I am satisfied that these concerns can be overcome on a relaxed application of the principled exception to the hearsay rule, which I find is the appropriate approach having regard to s. 143(6)(a) of the *Act*. In light of the indicia of procedural reliability mentioned above, and in the absence of any specific hearsay concerns being raised with respect to the substance of the evidence, I find that threshold reliability is established, such that the evidence may be admitted and considered for the truth of its contents. I am satisfied this will not unduly compromise the truth-seeking function or procedural fairness in this public hearing.

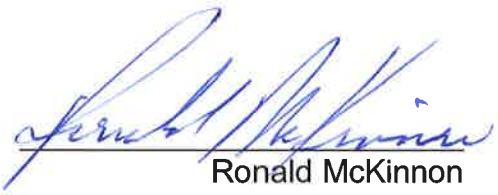
[39] As a final point regarding the appropriateness of receiving the evidence for a hearsay purpose, I do not consider that admitting the evidence for this purpose would be unfair to former Cst. Hughes or that it would undermine the purpose of s. 151(1) of the *Act*. As discussed, s. 151(1) of the *Act* does not operate to prevent the admission, in a public hearing, of evidence that was given by a subject member in an earlier discipline proceeding. To the contrary, the *Act* contemplates this exact scenario in s. 131(1)(a). Former Cst. Hughes testified at the discipline proceeding voluntarily. He had the assistance of counsel. He could not reasonably have expected that this evidence would be inadmissible in a subsequent public hearing concerning his conduct, in light of provisions such as ss. 131(1)(a) and 143(5)(c) of the *Act*.

Conclusion

[40] For these reasons, I am satisfied that the evidence given by former Cst. Hughes in the discipline proceeding before DA Pitfield on March 1, 2017 is admissible and may be considered for the truth of its contents. The transcript of the evidence is a record concerning this matter within the meaning of s. 143(5)(c), and the information it contains

is relevant, necessary, and appropriate to consider for its truth. Of course, the weight to be given to this evidence and the information it contains will fall to be determined at a later date. This decision concerns only the admissibility and permissible use of the evidence.

Dated at Vancouver, British Columbia, this 23 day of February, 2022.



Ronald McKinnon
Adjudicator