PH 2018-01
OPCC File No. 2017-13492

IN THE MATTER OF
THE POLICE ACT R.S.B.C. 1996 c. 367 AS AMENDED
AND
IN THE MATTER OF A PUBLIC HEARING
INTO AN ALLEGATION AGAINST
INSPECTOR JOHN DE HAAS
OF THE VANCOUVER POLICE DEPARTMENT

ADJUDICATOR'S DECISION ON REQUEST FOR WITNESS SUMMONSES

Introduction

[1] Inspector De Haas (the member) faces a single allegation of discreditable conduct arising from an alleged interaction with a female Special Constable in April of 2017. A public hearing has been set to commence on July 25, 2018.

[2] The member has applied to call as witnesses three police officers: Deputy Chief Constable Steven Rai of the Vancouver Police Department, Chief Constable Dave Jones of the New Westminster Police Department, and Constable Tom Stamatakis of the Vancouver Police Department, who were involved, in various capacities, in the investigation of the allegation prior to the point when the Police Complaint Commissioner ordered the public hearing.

[3] The member submits that the evidence of the three witnesses, if permitted, would be directed to the issue of "the investigation of misconduct and the administration of police discipline" as they relate to the conduct that is the subject of the allegation. He also requests that I deem these issues appropriate for examination at the public hearing. In the case of two of the witnesses, he also submits that they may have evidence that is relevant to the substantive issues as outlined below.

[4] At the time the member made his initial request he was not represented by counsel, and his application was based, in part, on a desire to canvass how the manner in which the proceedings had been conducted had prejudiced his ability to obtain representation under the relevant collective bargaining agreement. Counsel has now been appointed, so that aspect has been addressed.

[5] The member nonetheless has pursued his application, reiterating, in his reply to the submissions of Public Hearing Counsel and Commission Counsel, that the scope of a public hearing includes "the administration of police discipline". In relation to the bulk of the evidence the member appears to be seeking, that is the crux of the issue: whether complaints regarding fairness of the process followed before the commencement of the public hearing have any potential relevance, within the hearing.

Background

[6] On June 1, 2017, the Police Complaint Commissioner received notice from Deputy Chief Rai of the disciplinary matter pertaining to the member. It related to an incident alleged to have occurred on April 4, 2017. On June 6, 2017, the Police Complaint Commissioner appointed Chief Constable Jones as an external discipline authority.

[7] Inspector Todd Matsumoto conducted an investigation and delivered a Final Investigation Report on December 6, 2017. Chief Constable Jones ordered a discipline proceeding on December 12, 2017 and conducted a hearing. On February 12, 2017, Chief Constable Jones confirmed the misconduct had been proven and made recommendations as to disciplinary or corrective action.

[8] On March 1, 2018, the member filed a request for a review on the record under Section 117. The Police Complaint Commissioner responded on March 29, 2018 by ordering a public hearing. The time limits under the Act for each of those steps is 20 business days.

[9] In the Notice of Public Hearing[1] the Police Complaint Commissioner stated as follows:

> 14. On March 1, 2018, our office received a request from Inspector de Haas that the Police Complaint Commissioner exercise his authority to arrange a Review on the Record pursuant to the Police Act. Within the request, Inspector de Haas raised concerns with respect to the adequacy of the investigation and bias on behalf of the Discipline Authority. It is noted that Inspector de Haas did not raise these concerns earlier in the proceedings.
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> 15. After reviewing the proceedings, the only witness who has provided testimony was Inspector de Haas. The Discipline Authority did not have the benefit of hearing evidence from other material witnesses, including the [officer] directly affected. Pursuant to the Police Act, unless the member whose conduct is the subject of the proceeding initiates a request to call witnesses to testify in the proceeding, there is no other mechanism to allow for the participation of material witnesses. In this case, Inspector de Haas did not exercise his right to request permission to question witnesses.

[1] https://opcc.bc.ca/decisions/public-hearings/

> 16. In my view, accountability of the disciplinary process and the ability to search for the truth have been hampered. In addition, as the member's request indicates that the record is inadequate, a Review on the Record is not the appropriate form of adjudicative review for this matter but rather a Public Hearing. During a Public Hearing, Inspector de Haas can introduce evidence, examine/cross-examine witnesses and make submissions, which will allow him the opportunity to address his concerns with the prior proceedings.

Submissions

[10] The member submits, in his initial request to call these witnesses and expand the focus of the hearing, that the oversight of policing in the province should be conducted with transparency and accountability. He relies on paragraphs 16 & 18 of the Notice, and refers to Section 143 of the Act which states: that the public hearing is not limited to the evidence and issues in the prior proceedings, that the member may call any witness with relevant evidence to give and introduce any record or report concerning the matter, and that the adjudicator may accept any evidence that they consider relevant, necessary and appropriate. He points to Section 154 that provides the adjudicator with "exclusive jurisdiction to inquire into and determine all matters and questions of fact and law arising or required to be determined in respect of a public hearing… He refers to the duty of the investigator under Section 98 to provide his assessment of the evidence and analysis of the facts.

[11] The member concludes with the submission that the requested witnesses had key roles in "the investigation of misconduct and the administration of police discipline" as stated in the Notice, and "... have raised questions over bias and requisite knowledge". He then relates the areas in which the witnesses may have relevant evidence to give.

[12] In relation to Deputy Chief Rai, he states that he provided the initial information to the Police Complaint Commissioner, and submits that it is not clear whether he verified it. He notes that Deputy Chief Rai was present with a witness who has been called, when the member was served with documents, and that he may have equally relevant evidence to give in relation to that event. He also suggests that Deputy Chief Rai may have provided information to Chief Constable Jones that figured into his decision-making, including a decision to transfer the member before the investigation.

[13] In relation to Chief Constable Jones the member points to the fact that he made the decision to transfer the member before the investigation and that he confirmed his own decision in relation to the investigation after conducting the discipline hearing.

[14] In relation to Cst. Stamatakis, he submits that he received the first or one of the first

complaints from the female officer.

[15] Public Hearing Counsel Mr. Hickford submits that he has a duty to ensure that only evidence that is relevant to the misconduct is placed before the adjudicator. He submits that none of the three witnesses proposed by the member have evidence that is relevant to whether misconduct occurred. He also submits that issues with the prior process may be fully canvassed with the investigating officer, Constable Matsumoto, who will attend the hearing.

[16] Commission Counsel Mr. Underhill also opposes the calling of these witnesses and the requested expansion of the scope of the public hearing. He submits that the scope of the hearing is the alleged misconduct and that the hearing stands in the place of the prior proceeding. He submits that the provision for a trial de novo under Section 143(2) permits the canvassing of issues of bias and/or impropriety that may have occurred in the prior process. He submits that an adjudicator does not have the statutory jurisdiction to inquire into the adequacy of the prior process or the reasons for the decision to report the complaint to the Police Complaint Commissioner. Similarly to Public Hearing Counsel, he submits that the member may canvass any issues he has with the prior process through the investigator. He says that relevance must be assessed in light of the purpose of the hearing, which is the adjudication of the alleged misconduct.

[17] In his reply, the member states that he had submitted to the Police Complaint Commissioner (in requesting a review) that the record below did not raise a *prima facie* case. He submits that in ordering a public hearing rather than a review on the record, the Police Complaint Commissioner specifically declined to limit the scope of the inquiry at this stage to the record below, and based on that, he challenges counsel's submission that the evidence should be limited to only that which is relevant to the misconduct. He points to the wording of Section 142(b) which specifies as one of the criteria for the Police Complaint Commissioner to order a public hearing, the following:

> (b) in the police complaint commissioner's opinion, a public hearing of the matter under this section is required to preserve or restore public confidence in the investigation of misconduct or the administration of police discipline.

[18] The member elaborates in his reply on the potential relevance of each of the witnesses. He reiterates his submission that Deputy Chief Rai has similar evidence to that of Superintendent Chow, who is already under summons, as both were present when the member was served with documents and provided a response. (The inference is that if one has relevant evidence on that event, the other does as well.) The member states that Deputy Chief Rai was "deeply involved," and took two months to report the subject incident to the Police Complaint Commissioner despite a "statutory reporting requirement." (The inference being that his motives in submitting the

report, or delaying, have relevance.)

[19] In relation to Constable Stamatakis, the member submits that he received a statement from the complainant which he relayed to Deputy Chief Rai and notes (again) that others who received complaints from her are already under summons.

[20] In relation to Chief Constable Jones the member reiterates his involvement in transferring the member before acting as disciplinary authority, and refers to concerns regarding his role that are raised in the Notice of Public Hearing. I will say that in respect to the latter, I note no such concerns, apart from the observation that the only witness called at the disciplinary hearing was the member. This is a concern often expressed by the Police Complaint Commissioner which stems from the inability of a discipline authority under the Act to hear from witnesses other than those requested by the member. It does not reflect negatively on the conduct of the discipline authority; rather on the design, under the *Act*, of the discipline proceeding.

Analysis

[21] I will consider firstly whether the issue of "the investigation of misconduct and the administration of police discipline" as they relate to the conduct that is the subject of the allegation is one that may properly be canvassed on a public hearing under the *Act*.

[22] The wording of subsection 142(b) referred to by the member and set out above suggests that if a prior proceeding has been inadequately conducted, the inadequacy may be rectified through the mechanism of a public hearing. Much has been written about the reasons behind the process provided for in the *Act*, to create a public trust aspect to proceedings and remove the cloak of secrecy from internal processes.

[23] The concern was that self-regulation might tend or be seen to tend toward leniency in relation to complaints against the police. The basis on which the member now seeks to challenge the prior process would appear to be the opposite: that it has operated unfairly against him in the finding or the outcome. The question, to my mind, is what relevance unfair or erroneous decisions in the prior process, in and of themselves, could have during the public inquiry into whether or not misconduct can be proven.

[24] I will consider, for instance, a situation where the evidence disclosed that individuals involved in the prior process operated out of negligence, malice or for improper motives. Perhaps an unfounded decision was made regarding the presence of misconduct. The member is aggrieved, and requests a review. The Police Complaint Commissioner considers the request, and as is open to him by the wording of the relevant section, instead orders a public hearing. He

may well have done so on the basis that he agrees with the member that the process below was flawed. The public hearing is essentially a clean slate: the question being, was there or was there not misconduct.

[25] Do the flaws in the prior process have relevance to the current one? Does it matter that the persons conducting the investigation below or making the finding of misconduct may have had improper motives? Given the nature of the public hearing, under the *Act*, it is difficult to understand the argument that the issue of how the investigation was administered has any general relevance. A trial de novo is a new beginning, and, unless the manner in which the prior proceeding unfolded bears in some fashion on the potential outcome at the public hearing, I cannot see how it matters at all what transpired to bring it to this point.

[26] As to whether an adjudicator may consider issues of process giving rise to a public hearing, the issue was considered in *B.C. Police Complaints Commissioner v. Murphy et al.* 2003 BCSC 279, in which an adjudicator disagreed with the Police Complaint Commissioner's decision to withdraw a notice of public hearing. The Supreme Court held that the adjudicator had neither the evidentiary foundation nor the legislative mandate to make such a decision.

[27] In another case dealing with process issues, *Dickhout v. The Police Complaint Commissioner*, 2011 BCSC 880, the B.C. Supreme Court considered the issue of whether the Police Complaint Commissioner was required to give reasons for ordering a public hearing. The court observed that the decision itself does not attract a high level of procedural fairness, as opposed to the hearing (para. 35). From that it may be reasoned that the decision to order a public hearing is not one of the things that may properly be canvassed at the hearing itself. The inference, as well, is that the hearing is intended to rectify any prior issues with process, and as a result, those issues become irrelevant at the hearing. It is notable that the challenge to the process in that case was initiated in the Supreme Court, and not before the adjudicator (as best I can determine.[2]) Similarly, here, if the member wishes to challenge the process followed by the Police Complaint Commissioner, he may do so by judicial review.

[28] The only potential basis on which the prior process might arguably have relevance would be if it somehow hampered the public hearing process, such as by creating undue delay, destruction of evidence, or some other kind of actual prejudice. The argument pertaining to the ability to obtain representation in this matter may have been such an issue, but as it turns out, it has been rectified. In relation to the timeliness of the process, it would seem to be unassailable. In any event, no issue of actual prejudice or hampering of the public hearing process was raised in the member's submissions.

[2] https://opcc.bc.ca/wp-content/uploads/2017/04/10-03_Pitfield_Decision_Part_1-1.pdf

[29] Having determined that the scope of the public hearing should not be expanded to include the issue of "the investigation of misconduct and the administration of police discipline" as they relate to the conduct that is the subject of the allegation, I will turn to consider whether any of the requested witnesses may have evidence to give that is relevant to the issue of whether the misconduct occurred.

[30] In relation to Deputy Chief Rai, I understand the suggestion to be that he received the first complaint or statement from the female officer, or one of them. If that is the case, he may well have evidence to provide on the issues of credibility and/or prior consistent or inconsistent statement. It is also suggested that he has evidence similar in nature to Superintendent Chow regarding the service of documents and possibly a statement by the member. It is suggested that Constable Stamatakis also may have received one of the early statements from the female officer.

[31] I am hampered by not having "will say" statements or a summary of their involvement. Subject to canvassing that with counsel at an upcoming pre-hearing teleconference, I would be inclined to accede to the member's request for summonses for Deputy Chief Rai and Constable Stamatakis, and to permit them to give evidence within the narrow scope I have just outlined, if indeed the member still wishes to have them on that limited basis.

Conclusion

[32] The issues to be canvassed at the hearing will not include "the investigation of misconduct and the administration of police discipline" in relation to the conduct of the prior proceedings.

[33] Subject to confirmation by counsel that Deputy Chief Rai and Constable Stamatakis have the evidence suggested by the member in relation to statements by the female officer or the member, I am at present inclined to allow the application in relation to those two witnesses.

[34] The request for a summons for Chief Constable Jones is denied.

Dated at Sechelt, British Columbia this 3rd day of July, 2018.

Carol Baird Ellan, Retired Judge
Adjudicator