OPCC File No. 2015-11249

In the matter of the Review on the Record into the Ordered Investigation against Constable Geoffrey Young of the Delta Police Department

Submission of the Respondent Officer

Evidence Under s. 141(3) of the *Police Act*

1. Section 141(4) of the *Police Act* provides as follows:

> (4) Despite subsections (2) and (3) of this section and section 137 (2) (a) if the adjudicator considers that there are special circumstances and it is necessary and appropriate to do so, the adjudicator may receive evidence that is not part of either of the following:
>
> (a) the record of the disciplinary decision concerned;
>
> (b) the service record of the member or former member concerned.

2. The member is applying pursuant to this subsection to be permitted to give testimony,

3. The special circumstances that warrant this application are as follows.

4. The Discipline Authority found the member to have committed the misconduct of discreditable conduct by altering prescriptions for hydromorphone, and when he was asked by RCMP officers whether he had tried to use an altered prescription, he was not truthful.

5. The Discipline Authority found that the appropriate disciplinary or corrective measures should be a written reprimand and an order that the member comply with a drug rehabilitation program for the altered prescriptions, and a suspension of four days for the statement to the RCMP officers.

6. The Police Complaint Commissioner called this Review on the Record. The Police Complaint Commissioner chose not to order a public hearing, at which the member would have had a right to give testimony and call evidence.

7. In his submissions the Police Complaint Commissioner argues that only one penalty should be considered: dismissal.

8. Section 126 of the *Police Act* provides that when considering disciplinary or corrective measures an Adjudicator must consider correction and educational measures in priority over purely punitive sanctions. A penalty of dismissal has no corrective or educational component. It is purely punitive.

9. The essence of the Police Complaint Commissioner's argument is that the member is a person of bad character, that he should be treated like a common criminal, and that he lacks a moral compass. Given the position of the Police Complaint Commissioner that the member should be punished with dismissal rather than being corrected or educated, he submissions of the Police Complaint Commissioner amount to an argument that the member is incorrigible: that he is unable to learn from the past.

10. None of these propositions was put to the member at the discipline proceeding. The member did not face an allegation that he had committed conduct that amounted to a criminal offence (s. 77(2) of the *Police Act*). The discipline representative did not cross-examine the member on the theory that he was a person of bad character, that he lacked a moral compass, that he was no better than a common criminal, that he was incorrigible and unable to learn from the experience.

11. It is submitted that fundamental fairness requires that the member be given an opportunity to address these direct and implicit allegations. The member cannot rely on the record because, as noted, he was not questioned on the theory that he lacks a moral compass, or that he is incorrigible. Therefore, this Review on the Record risks being fundamentally unfair to the member if he is denied an opportunity to address these issues in testimony.

12. These circumstances are "special" within the meaning of s-s. 141(4). Indeed as far as the member is aware, they are unprecedented. The Police Complaint Commissioner arranged for the decision of the Discipline Authority to be reviewed on the record, instead of being the subject of a public hearing where testimony and evidence would be considered. The Police Complaint Commissioner has chosen to base his submissions on a factual basis that was not part of the case against the member at the discipline proceeding. By choosing to call a Review on the Record rather than a public hearing, the Police Complaint Commissioner has prevented the member from leading evidence on the Police Complaint Commissioner's new factual theory. At a public hearing the member would have been entitled to give evidence both personally, and through other

witnesses. The member is aware of no case from any domain of law where a statutory decision-maker in the position of the Police Complaint Commissioner can order a review of a decision made after a hearing, can make allegations against a person that were not part of the case against the person in the original hearing, and can then prevent the person from leading evidence to contradict the new theory.

13. Further, the member is aware of no case where the Police Complaint Commissioner has proposed a punishment that is so extreme a departure from the disciplinary or corrective measures imposed by the Discipline Authority. The submissions of the Police Complaint Commissioner focus, as they must, on the altered prescriptions. Decided cases under the *Police Act* would not justify dismissal solely on the basis of the member's statement to the RCMP. The Discipline Authority ordered a written reprimand and a drug rehabilitation program for the altered prescriptions. The Police Complaint Commissioner is arguing for dismissal.

14. If the member is not permitted an opportunity to respond to the allegations made, for the first time, by the Police Complaint Commissioner in his submissions, it will be the submissions of the member that the Adjudicator must not consider those submissions, on principles similar to the "rule" in *Browne v. Dunn* (1893), 6 R. 67 (H.L.).

ALL OF WHICH IS RESPECTFULLY SUBMITTED

5 September 2018.

M. Kevin Woodall