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

Reply Submission of the Respondent Officer

Scope Review on the Record

And

Submission on Future Course of the Review on the Record

INTRODUCTION

1. This submission constitutes a reply to the Police Complaint Commissioner's submission on the scope of the Review on the Record under s. 141(10), and a submission on how this Review on the Record should unfold, given the factual submissions the Police Complaint Commissioner has made on the appropriate disciplinary or corrective measures.

2. The Police Complaint Commissioner has made a procedural submission on s. 141(10) of the *Police Act*, and a substantive submission on disciplinary or corrective measures. The Police Complaint Commissioner has not made any submission on whether the facts support a finding of misconduct. In other words, the submissions of the Police Complaint Commissioner assume that the Adjudicator has already found in his favour on the argument under s. 141(10), and that the Adjudicator will not consider whether any misconduct has been proven.

3. With respect to the altered prescriptions, the member did not face allegations of deceit or conduct that amounts to criminal offences. The allegations were framed as discreditable conduct. The test for discreditable conduct is whether a reasonable, well-informed member of the public, fully apprised of facts, would consider the conduct of the member to bring discredit upon the municipal police department. It is submitted that this hypothetical opinion of the reasonable person must be applied both in determining whether the conduct of the member was discreditable, but also in determining the seriousness, or degree of discredit

4. In his submission on penalty, the Police Complaint Commissioner argues that the member should be treated as a common criminal, that the altered prescriptions constitute criminal forgery and fraud, pure and simple. The Police Complaint Commissioner urges the Adjudicator to impose the equivalent of capital punishment in employment law, termination. A police officer who has been terminated from one job is effectively terminated from his career. There could be no greater contrast between the approach of the Discipline Authority, and the approach that the Police Complaint Commissioner urges on the Police Complaint Commissioner. For the altered prescriptions, the Discipline Authority ordered that the member receive a written reprimand, and that he comply with a detailed drug rehabilitation program.

5. The approach that the Police Complaint Commissioner has taken on the facts and the penalty introduces a serious complication. While the Police Complaint Commissioner expressed his opinion that the Discipline Authority's decision on misconduct was correct, his submissions on penalty are not based on the actual findings of the Discipline Authority. To the contrary, it is clearly implicit in the disciplinary or corrective measures that that Discipline Authority ordered, that he was not of the view that a reasonable well-informed member of the public would see the misconduct as equivalent to common crime.

6. The Police Complaint Commissioner asks the Adjudicator to make wholly new findings on a basis wholly distinct from factual approach found by the Discipline Authority. It is evident that the Discipline Authority did not consider the member to be a common criminal. Rather, the Discipline Authority found that the existence and degree of misconduct were deeply informed by the member's innocent addiction.[1]

7. Although the Discipline Authority found that the member committed misconduct when he altered the prescriptions, there are no findings that would suggest that the member's drug seeking behaviour, in the context of a physician-induced addiction,[2] was regarded by the Discipline Authority, or would be regarded by a reasonable well-informed member of the community, to amount common fraud and forgery.

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[1] By innocent addiction, we mean an addiction caused by physician prescribed drugs, as opposed to recreational misuse of drugs.

[2] The evidence disclosed that for a very long time Cst. Young's physicians had been prescribing addictive opioids at many times the recognized safe levels.

8. Ordinarily, when one is making submissions on penalty, one bases the submissions on findings of fact made in the "guilt" phase. Here, the Adjudicator has not made any findings of fact about the nature or seriousness of the conduct, because the Police Complaint Commissioner has attempted to prohibit the Adjudicator from making such findings, despite the mandatory language of s. 141(10). Nor are there findings of fact from the Discipline Authority below that would support the argument of the Police Complaint Commissioner here.

9. This puts the member in an impossible situation in responding to the Review on the Record called by the Police Complaint Commissioner, in two respects. First, the member should have a ruling on whether the Adjudicator will make a determination of whether misconduct has been proven as required by s. 141(10)(a) and, if so, what that ruling is. Second, and related to the first, even if the only determination open to the Adjudicator is the imposition of disciplinary or corrective measures, the member has no guidance as to the factual basis that the Adjudicator will use in determining the disciplinary or corrective measures. Specifically, the member does not know whether his submissions on penalty should be based on a factual finding that he is no better than a common criminal (as argued by the Police Complaint Commissioner), or whether his conduct should be regarded as essentially a public health issue, albeit one that does not provide a full defence to the act of altering prescriptions. The gulf between these positions is vast.

10. It is submitted that the Adjudicator should first determine whether she is required by s. 141(10) to determine whether misconduct has been proven. If she determines that she must decide whether misconduct has been proven, then there should be submissions on whether misconduct has been proven. As noted, the Police Complaint Commissioner has made no submissions on that question.

11. In the course of determining whether misconduct has been proven, the Adjudicator will make findings as to the nature of the conduct, much as the Discipline Authority did in the discipline proceeding below. On the basis of those findings, the parties can make focussed submissions on penalty, based on the facts found by the Adjudicator on the nature of the misconduct.

REPLY TO ARGUMENT ON SCOPE OF THE REVIEW ON THE RECORD

Decisions of other Adjudicators Not "Controlling"

12. The Police Complaint Commissioner argues that the decision of Adj. Oppal is persuasive, but then he implies that it may be more than persuasive: it may even be "strictly controlling."

(Submissions of PCC, para. 5) Elsewhere, the PCC appears to acknowledge that the principle of "judicial comity may not translate exactly in the *Police Act* setting" **(Submissions of PCC, para. 10)**

13. To be clear, decisions of one Adjudicator are not binding on another Adjudicator in the sense of *Re Hansard Spruce Mills*. Decisions of another Adjudicator may be persuasive, but only to the extent that the reasons themselves are persuasive.

14. The member agrees wholeheartedly that decisions of the Honourable Mr. Oppal merit the greatest deference and attention. But one suspects that Mr. Oppal himself would agree that when applying a judicial or quasi-judicial decision, the author is highly relevant, but the decision itself speaks for itself.

Statutory Interpretation

15. The core of the Police Complaint Commissioner's submissions are found in paragraphs 13 and 14. In these paragraphs the Police Complaint Commissioner argues that s. 141(10) is inherently ambiguous. The remainder of his submissions consists of an argument why the supposed ambiguity should be resolved to his benefit.

16. This assertion – that section 141(10) is ambiguous – is critical to the argument of the Police Complaint Commissioner. It is necessary for the Police Complaint Commissioner to get around the mandatory nature of the word "must". The claim that s. 141(10) is ambiguous, on its own or in conjunction with the rest of the *Police Act*, is his attempt to argue that "must" means "must not."

17. If the Adjudicator concludes that s. 141(10) is not ambiguous, then the balance of the Police Complaint Commissioner's argument need not be considered. In particular, if the Adjudicator concludes that the legislature has spoken clearly, then any argument about whether the policy choice the legislature has selected is reasonable, or not, is simply inadmissible. When the legislature has spoken, it is not open to parties, or indeed judges and adjudicators, to question the reasonableness or otherwise of the legislature's choice.

18. There is no ambiguity in s. 141(10). The legislature says the Adjudicator "must" do the three things in s. 141(10).

19. The PCC first cites s. 141(10):

> 141(10) After a review of a disciplinary decision under this section, the adjudicator must do the following:
>
> > (a) decide whether any misconduct has been proven;
> >
> > (b) determine the appropriate disciplinary or corrective measures to be taken in relation to the member or former member in accordance with section 126 [*imposition of disciplinary or corrective measures*] or 127 [*proposed disciplinary or corrective measures*];
> >
> > (c) recommend to a chief constable or the board of the municipal police department concerned any changes in policy or practice that the adjudicator considers advisable in respect of the matter.

20. The Police Complaint Commissioner then attempts to introduce ambiguity by asking this rhetorical question:

> Is the Legislature saying that the adjudicator must do whichever of the three that apply in the circumstances, as seems logical, or that the adjudicator must always do all three things?

21. The simple answer is, the Adjudicator must make all three determinations. The Police Complaint Commissioner says that for s. 141(10) to create a mandatory obligation on the Adjudicator to each of the three things cited in that section, the member must insert an "and" into the list of three items **(Submissions of PCC, para. 39)**. The member says that as a matter of ordinary grammar, when one "must" do things enumerated in a list, it follows that the person "must" do each of the things enumerated in the list. There is no need to write in an "and" in order to convey the message that the message that the list of determinations in s. 141(10) "must" is mandatory. If the legislature intended to make the determinations alternative, as opposed to cumulative, the legislature would have added "or" before subsection (c).

22. In ordinary statutory interpretation, when the legislature intends to give a statutory decision-maker a range of powers, and there is discretion to choose which of the powers is necessary for the decision-maker to carry out his or her duties, the legislature says that that the decision-maker "may" do exercise powers included in a list. Obviously, the legislature here chose "must" not "may".

23. It is the Police Complaint Commissioner who is asking the Adjudicator to write additional words into s. 141. The additional words the Police Complaint Commissioner would have the Adjudicator write in are found in the Police Complaint Commissioner's rhetorical question, quoted

above. The Police Complaint Commissioner would have the Adjudicator write into s. 141(10) the words, "the Adjudicator must 'do whichever of the three that apply in the circumstances'." If the legislature had intended that the mandatory "must" would be so qualified, it knows the language to use. The final words in sub-paragraph 141(10)(c) convey the concept of the Adjudicator making only such recommendations that he she considers advisable. That discretion is expressly confined to the question of recommendations, and does not apply to the duty to determine whether any misconduct has been proven, or to decide the appropriate disciplinary or corrective measures. If the legislature had wished to qualify *all* the duties set out in s. 141(10), the legislature had appropriate language immediately at hand. It could have used the language found at the end of sub-section (c) instead of the word "must" in the opening words of s. 141(10).

24. Even if, contrary to the foregoing, the Adjudicator had the discretion to make only the determinations "that apply in the circumstances", the question remains: *who* decides which of these determinations "apply in the circumstances." The Police Complaint Commissioner assumes that s. 141(10) should be read to mean that the Adjudicator may make only the determinations that he, the Police Complaint Commissioner, has decided apply in the circumstances, *and* the Adjudicator "must <u>not</u>" make the determinations that the Police Complaint Commissioner has forbidden the Adjudicator to make. In other words, the Police Complaint Commissioner argues that he has the power to make the final determination on the merits, despite the fact that his role in the *Police Act* is limited to guiding the process, not making substantive decisions on the merits of an allegation.

25. Even if s. 141(10) were open to the interpretation that there is discretion to decide which determinations will be made on a review on a record, it would not follow that the Police Complaint Commissioner, as opposed to the Adjudicator, would decide which of those three determination are necessary for an effective review. Once a Review on the Record has been convinced, the Adjudicator is in the best place to determine what facts she needs to find in order to carry out her obligations. In some cases, it may be plain and obvious that an officer has committed misconduct, and the seriousness of the misconduct may not be reasonably debatable. In many other cases, however, there is no bright line between conduct and misconduct. For example, there is usually no bright line between a lawful investigative detention and an unlawful detention that constitutes misconduct. The degree to which the conduct in a given case passes the threshold between lawful conduct and misconduct will be important in determining the penalty. A retired judge on Review on the Record who is considering a penalty in such a case would have to make her own determinations of how far the officer's conduct went beyond what is acceptable. In that analysis

the judge may conclude that, in her view, there were grounds for an investigative detention. In such a case, it would be illogical and unfair, both the member and to the Adjudicator, to require the Adjudicator to impose a penalty when she had concluded that there was no misconduct at all. Similar situations can arise when assessing the power to arrest, the degree of force used in situations where an officer was clearly authorized to use force, and in other cases. As will be seen, this case is a clear example where an assessment of the facts that would justify the selection of a penalty cannot be separated from the assessment of whether there is misconduct at all.

26. As noted in the member's principal submission on the scope of the Review on the Record, s. 138 specifies the criteria upon which the Police Complaint Commissioner may order a Review on the Record. There is no language in s. 136 or 138 that provides that the reasons of the Police Complaint Commissioner for calling a Review on the Record limit the duties of the Adjudicator "despite" or "notwithstanding" the "must" in s. 141(10), nor is there language in s. 141(10) that makes that section operation "subject to" a determination of the Police Complaint Commissioner under s. 138.

27. Therefore, even if one were free to ignore the clear policy choice of the legislature, and argue that whether the Adjudicator should make all the determinations set out in s. 141(10) is situation dependent, it does not follow that the Police Complaint Commissioner has the power to dictate to the Adjudicator what facts the Adjudicator must determine in order to conduct and effective review.

28. In summary, s. 141(10), read by itself or in conjunction with the rest of the *Police Act* is not ambiguous. As such, the reasons based on "reasonableness" or "logic" advanced by the Police Complaint Commissioner simply have no place. The legislature has spoken.

Practical and Policy Considerations

29. As noted in the member's principal submission, the language of the *Police Act* is clear enough that it is not necessary to engage in a broader analysis of policy and practice to determine the meaning of s. 141. However, if one were to engage in such an analysis, the submissions of the Police Complaint Commissioner here provide a clear and compelling illustration of why the Adjudicator on a review on the record must be able to find all the facts that may justify a penalty, including both whether the member committed misconduct at all, and if so, the nature and degree of the misconduct.

30. While the Police Complaint Commissioner stated in the Notice of Review on the Record that he considers the Discipline Authority's finding that the member committed misconduct to be correct, in his submission on disciplinary or corrective measures he asks the Adjudicator to make findings of fact that the Discipline Authority did not make, and which are utterly at odds with the entire approach to the evidence taken by the Discipline Authority. Clearly, the Police Complaint Commissioner expects the Adjudicator to undertake a thorough reconsideration and reassessment of the facts, because without such a reconsideration and reassessment there is no basis for the Adjudicator to conclude that the conduct of the member was that of a common criminal. This is not a case where a party cites findings of fact of a judge below, and then asks only that the judge on review consider the legal effect of those facts.

31. It must be emphasized that the allegation concerning the instances where the member altered prescriptions was not deceit, and it was not engaging in conduct that constitutes a criminal offence (s. 77(2)). It was alleged that the member committed discreditable conduct. Discreditable conduct is conduct that a reasonable, well-informed member of the community, would consider brings discredit upon a municipal police department.

32. In many cases conduct of a police officer may be such that an Adjudicator could readily determine that a reasonable, well-informed member of the community would consider the conduct to be discreditable. And, the Adjudicator could easily determine how discreditable such a person would view the conduct. This is not such a case.

33. The principal issue in this case is whether a reasonable, well-informed member of the community would consider drug-seeking behaviour brought on by an innocent addiction, including altering prescriptions, to be the symptom of an illness which requires a nuanced response that focuses on harm reduction and rehabilitation; or, whether such a well-informed person would equate drug-seeking behaviour of an innocent addict with ordinary crime. Up until perhaps five years ago, there was a debate on this question. Today, there is little if any debate. A reasonable person with access to the radio, TV, or newspapers knows that the vast bulk of professional and considered opinion, within the medical community, government policies makers, the criminal justice system, employers, and professional regulators, recognize innocent opioid addiction is a public health crisis, not a black-and-white question of law and order.

34. The Police Complaint Commissioner takes the extreme opposite view. He asks the Adjudicator to find as a fact that reasonable member of the community would be regard the member as a common criminal (**Submissions of the Police Complaint Commissioner, para. 22, 24);** as wilful and ordinary forger and fraudster (**Submissions of the Police Complaint Commissioner, para. 19).** Such findings of fact cannot be found in the findings of misconduct of the Discipline Authority, which the Police Complaint Commissioner says are correct. Indeed, the assertions of fact that underlie Police Complaint Commissioner's submissions are diametrically opposed to implicit or explicit findings that underlie the Discipline Authority's approach to disciplinary or corrective measures.

35. Even if the Adjudicator began by confining her determination to the question of the appropriate disciplinary or corrective measures, she would very soon have to grapple with the question of how serious the member's conduct was – how far into the realm of the discreditable he had strayed. Once the Adjudicator has begun down the path of assessing how discreditable the member's conduct was, she would, before long, be confronted with the question of whether a reasonable, well-informed member of the community would consider it to be discreditable at all. She may conclude, with the vast majority of those who have studied innocent addiction, that it is an illness – it is not a crime; it is not misconduct – and the proper response to drug seeking behaviour like altering prescriptions should focus on harm reduction and rehabilitation, not on harsh punishment.

36.

37. If the Adjudicator were to arrive at that point, it would not be fair to the Adjudicator, to the member, or to development of addictions policy within the police community, for the Adjudicator to be forced to impose a penalty if she concludes that the member did not in fact commit misconduct, when measured through the opinion of a reasonable, well-informed member of the community.

38. In summary, when considering the scope of the Review on the Record, the Police Complaint Commissioner argues that it would be unreasonable for the Adjudicator to consider whether misconduct has been proven in order to carry out her duties under s. 141(10). The Police Complaint Commissioner says that *he* has determined that the finding that the member committed misconduct is correct, so it would be unreasonable to interpret s. 141(10) as permitting or requiring

the Adjudicator to make her own conclusions on a point that the Police Complaint Commissioner has already decided. The member argues that s. 141(10) does not merely allow, it requires the Adjudicator to consider whether misconduct has been proven; in this case, whether a reasonable, well-informed member of the community would consider the member's drug-seeking behaviour to constitute misconduct. The member says that policy arguments are not necessary to interpret s. 141(10). But if policy arguments may be considered, this case exemplifies why an Adjudicator who is required to impose a penalty must have discretion to find the facts upon which the penalty will be based. In many cases, not just this case, the facts that determine the seriousness of the misconduct are not separable from the facts that determine whether misconduct has been proven at all. It would not be reasonable that an Adjudicator who, in making findings of facts concludes that no misconduct has been proven, must nevertheless impose a penalty.

NEXT STEPS

39. It is submitted that the Adjudicator should determine the scope of her duties under s. 141(10) before the parties are called upon to make submissions on the merits (whether misconduct has been proven; if so, what disciplinary or corrective measures are appropriate).

40. If the Adjudicator concludes that she must determine whether any misconduct has been proven, the parties should then make submissions on that issue. In the Adjudicator's ruling on that question she may make findings of fact that either eliminate the need for disciplinary or corrective measures; or if she finds that the drug-seeking behaviour does amount to misconduct, her findings of fact on that issue will provide a basis for submissions on the disciplinary or corrective measures.

ALL OF WHICH IS RESPECTULLY SUBMITTED

17 August 2018.

M. Kevin Woodall