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

Scope Review on the Record

1. The purpose of this submission is to address the scope of the review on the record.

The Mandatory Language of s. 141 is Clear and Unambiguous

2. Section 141(10) of the *Police Act* provides as follows:

> (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 or 127;
> >
> > (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.

3. This provision is clear on its face, and requires no further interpretation. The Adjudicator *must* determine whether any misconduct has been proven. With these words the legislature imposed a duty on Adjudicators, and simultaneously conferred jurisdiction to carry out that duty.

4. The Police Complaint Commissioner has purported to limit the powers of the Adjudicator in this case to determining disciplinary or corrective measures, but not whether any misconduct has been proven. In so doing, the Police Complaint Commissioner simultaneously prevents the Adjudicator from carrying out the duty imposed by the legislature, and purports to limit the jurisdiction that the legislature has conferred on Adjudicators.

5. The attempt by the Police Complaint Commissioner to restrict the powers of the Adj. is inconsistent with his limited role as gatekeeper. As the Court of Appeal observed in *Florkow v. Police Complaint Commissioner* 2013 BCCA 92 at para. 2:

> Section 177(1) of the Act states that the PCC is "responsible for overseeing and monitoring complaints, investigations and the administration of discipline" under Part XI. The PCC thus has what is often described as a "gatekeeper" or "supervisory" role that does not involve deciding complaints on their merits, but ensuring that misconduct on the part of police is appropriately dealt with in the public interest and in accordance with the Act.

The legislature has decided that at first instance a Discipline Authority must determine whether misconduct has been proven. The legislature has also decided that on a review on the record, the Adjudicator "must" determine whether misconduct has been proven. Section 141(10) confers jurisdiction upon the Adjudicator. It is not open to the Police Complaint Commissioner to limit the jurisdiction that the legislature conferred upon the Adjudicator or, in effect, to make the decision whether misconduct has been proven.

6. Given the clarity of the language, it is not necessary to attempt to explain it through policy arguments. It cannot reasonably be maintained that when the legislature said the Adjudicator "must … determine whether any misconduct has been proven" it really meant, "the Police Complaint Commissioner may order that that the Adjudicator "must not" determine whether misconduct has been proven.

Section 138

7. In an earlier case, the Police Complaint Commissioner relied no s. 138 of the ***Police Act***. On its face, s. 138 does not provide the Police Complaint Commissioner with the power to call a public hearing or review on the record on sanction, but not on misconduct. Nor are the powers and duties created by the legislature in s-s. 141(10) qualified or limited by s. 138.

8. Section 138 states in material part:

> S. 138(1) … the police complaint commissioner must arrange a public hearing or review on the record if the police complaint commissioner
>
> (c) considers that there is a reasonable basis to believe that
>
> > (i) the discipline authority's findings under section 125 (1) (a) *[conclusion of discipline proceeding]* are incorrect, or

(ii) the discipline authority has incorrectly applied section 126 *[imposition of disciplinary or corrective measures]* in proposing disciplinary or corrective measures under section 128 (1) *[disciplinary disposition record]*, or

(d) otherwise considers that a public hearing or review on the record is necessary in the public interest.

…

(2) In considering whether a public hearing or review on the record is necessary in the public interest, the police complaint commissioner must consider all relevant factors including, without limitation, the following factors:

…

(d) whether an arguable case can be made that

(i) there was a flaw in the investigation,

(ii) the disciplinary or corrective measures proposed are inappropriate or inadequate, or

(iii) the discipline authority's interpretation or application of this Part or any other enactment was incorrect.

…

(5) If the police complaint commissioner determines, in respect of a request referred to in subsection (1) (a), that there are ***insufficient grounds*** to arrange a public hearing or review on the record under this section, the police complaint commissioner must give written reasons for that determination in the notification under subsection (4).

(6) A determination under subsection (5) is final and conclusive and is not open to question or review by a court on any ground.

(7) If the police complaint commissioner

(a) determines that there are sufficient grounds to arrange a public hearing under this section, or

(b) arranges a public hearing under section 137 *[circumstances when member or former member concerned is entitled to public hearing]*,

the police complaint commissioner must, for the purposes of the public hearing under section 143, appoint legal counsel to present to the adjudicator the case relative to each allegation of misconduct against the member or former member concerned.

9. Section 138 establishes the criteria that the Police Complaint Commissioner must apply in determining whether to arrange a review on the record or public hearing. If the Police Complaint Commissioner does arrange a review on the record or public hearing, the duties and jurisdiction of an Adjudicator within those procedures are set out elsewhere in the act. In the case of a review on the record, they are set out in s. 141.

10. Nowhere does s. 138 state that the Police Complaint Commissioner's reasons for arranging a public hearing or review on the record amount to a limitation on the broad power and duty imposed on the Adjudicator in s. 141(10). More narrowly, s. 138 does not grant the Police Complaint Commissioner the power to limit the jurisdiction of the Adjudicator as granted by the legislature.

11. If the legislature had intended that the Police Complaint Commissioner acting under s. 138 limited the power to circumscribe the jurisdiction of the Adjudicator under s. 141(10), the legislature would have had to do two things: first, it would have expressly granted the Police Complaint Commissioner with the power to call a review on the record or public hearing only on sanction but not on misconduct; and second, the legislature would have had to state that that power operates "notwithstanding" or "despite" s. 141, or state that s. 141 operates "subject to" the power of Police Complaint Commissioner to order a public hearing or review on the record on sanction alone. Section 138 does not grant the power to the Police Complaint Commissioner to limit the jurisdiction of the Adjudicator; and, s. 138 does not operate "notwithstanding" or "despite" s. 141, nor is s. 141 "subject to" s. 138.

12. Subsections 138(6) and (7) deal with the consequences of, respectively, a decision not to call a public hearing or review on the record (s-s. (6)), and a decision to call a review on the record or public hearing (s-s. (7)). Subsection 6 provides that a decision not to call a public hearing or review on the record is final and conclusive. By contrast, s-s. (7) does not provide that the determinations that the Police Complaint Commissioner made *en route* to calling a public hearing are final and conclusive. Sub-section (7) does not state that a determination by the Police Complaint Commissioner that the Discipline Authority was correct in a finding of misconduct is final and conclusive. If such a determination in a Notice of Review on the Record was final and conclusive, the ***Police Act*** would have to say so explicitly, and the legislature would have to say that that determination operates "notwithstanding" or "despite" s. 141(10), or that s. 141(10) operates "subject to" such a hypothetical final and conclusive clause.

13. It should be observed that s. 138 deals with both the power to arrange a review on the record and the power to arrange a public hearing. If the reasons that the Police Complaint Commissioner gives for calling a review on the record have the effect of limiting the scope of the review on the record, his reasons for calling a public hearing would similarly limit the scope of a public hearing. That would be unworkable and would undermine the entire purpose of having a public hearing: to provide a full, fresh and public consideration of all the facts, and the legal consequences of the facts.

14. Therefore, it is submitted that s. 138 provides the criteria that the Police Complaint Commissioner must consider when deciding whether to arrange a review on the record. Section 141 states what the Adjudicator must do within a review on the record. The opinions of the Police Complaint Commissioner that led him to call the review on the record or public hearing are not final or conclusive. There is no language in s. 138 that could be seen as limiting the jurisdiction of the Adjudicator, conferred by the legislature, in s. 141.

The Decision in *Bunderla and O'Rourke*

15. The present issue arose in a review on the record in the case *Constables Bunderla and O'Rourke* (hereinafter, *Bunderla*). The Honourable Wally Oppal, QC, concluded that the Police Complaint Commissioner could restrict the jurisdiction of the Adjudicator in the same way that the Police Complaint Commissioner has purported to do in this case.

16. A decision of a retired judge in one review on the record does not constitute authority that is binding on another retired judge. An earlier decision may, of course, constitute persuasive authority (as distinct from binding authority), but only to the extent that it is actually persuasive.

17. With the greatest of respect, it is submitted that Adj. Oppal's reasoning is not persuasive.

18. It the first stage of Adj. Oppals' reasoning he cited the canon of statutory interpretation that words in an enactment must be construed in the context of the enactment as a whole, citing *In Re Rizzo and Rizzo Shoes* [1998] 1 SCR 27 at par. 21 (see *Bunderla,* para.11). The member here relies on the same principle. The member argues that within the ***Police Act*** as a whole, the Police Complaint Commissioner is a gatekeeper, not the ultimate decision-maker.

19. Further, the passage from *Rizzo* sets out two principles, not just the one Adj. Oppal relied on. The second and equally important principle is that the disputed words must be construed "in their grammatical and ordinary sense…"

> Today there is only one principle or approach, namely, ***the words of an Act are to be read*** **[1]** ***in their entire context and*** **[2]** ***in their grammatical and ordinary sense*** harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (emphasis and numbers added)

Here, the disputed words of the act could not be clearer: "the Adjudicator *must* … decide whether any misconduct has been proven." Adj. Oppal did not address the grammatical and ordinary sense of the word, "must … decide whether any misconduct has been proven." In particular, Adj. Oppal did not address the mandatory nature of the word, "must".

20. Adj. Oppal then observed that in *Florkow* the court of appeal note that the ***Police Act*** is sometimes difficult to interpret:

> Part XI of the Act is dense, complicated and often confusing. ***Its provisions are hedged round with exceptions, qualifications and limitations that are often located in other sections not in close proximity.*** One must frequently follow cross-references to other sections, and few provisions can be said to stand alone. It is not a model of clarity. [Emphasis added]

21. The general comment that the ***Police Act*** was not well drafted does not assist Adj. Oppal's argument. Indeed, the italicized portion contradicts Adj. Oppal's argument. These words invite one to look within s. 138 and s. 141 to see whether the legislature did stipulate exceptions, qualifications, or limitations on the powers conferred on the Adjudicator in s. 141. As noted earlier, if the legislature had intended to grant the Police Complaint Commissioner with the power to limit the Adjudicator's jurisdiction conferred in s. 141(10), one would expect to see language to that effect, as well as explicit qualifications and limitations in s. 141(10), expressed by saying either that the Police Complaint Commissioner's (hypothetical) power to limit the jurisdiction of the Adjudicator operates "despite" or "notwithstanding" s. 141, or that s. 141(10) is "subject to" such a hypothetical power. Therefore, the passage Adj. Oppal cited emphasises the absence of any restrictions or limitations or qualifications on the words, "must … decide whether any misconduct has been proven."

22. Unfortunately, Adj. Oppal did not also take notice of the passage from *Florkow* cited earlier, that emphasises that limitations on the Police Complaint Commissioner's jurisdiction, being confined to the role of gatekeeper, rather than ultimate decision-maker.

23. Adj. Oppal then turned to the historical context of the Act, focussing on the *Wood Report*. Two related points deserve notice. First, nothing in the *Wood Report* came close to addressing the issue before the Adjudicator in this case; namely, the jurisdiction of a retired judge in a review on the record under s. 141(10). That is not surprising, because Mr. Wood did not recommend a review on the record by a retired judge. Rather, where one Discipline Authority committed an error, Mr. Wood recommended a discipline proceeding *de novo* by a Discipline Authority in another department: see *Florkow*, (the end of the passage from the *Wood Report* cited in paragraph 48). Second, even if the *Wood Report* had made recommendations about the jurisdiction of the Adjudicator, that would not be decisive, because what governs at present is the Act, not the *Wood Report*. The fact that the legislature did not accept Mr. Wood's recommendation as just mentioned illustrates that point, should illustration be necessary.

24. The nub of Adj. Oppal's reasoning is then found in his paragraph 16. He states that "[t]he officers here rely on s. 141(10) an in particular, the words 'decide whether any misconduct has been proven.'" Actually, the officers there (and here) rely on the words "the Adjudicator *must* … decide whether any misconduct has been proven." Adj. Oppal's reasoning does not address the import of the word, "must", or its mandatory nature.

25. In the balance of paragraph 16 Adj. Oppal made two arguments. First, that in s. 138 the ***Police Act*** draws a distinction between misconduct and sanctions. That is true, but it does not advance his argument. Sub-sections 138(c)(i) and (ii) provide that the Police Complaint Commissioner may order a public hearing or a review on the record if he is of the view that the Discipline Authority made a mistake on either misconduct or sanctions but, as noted, those are merely the criteria for calling a review on the record or public hearing, and do not constitute a power in the Police Complaint Commissioner to limit the jurisdiction of an Adjudicator granted in such clear and express language in s. 141(10).

26. Adj. Oppal's second argument in para. 16 is that it would be illogical for the legislature to require a retired judge to consider both misconduct and sanctions if one or the other were not at issue. The first answer is that any argument about what would be good policy cannot operate to

overturn the legislature's express and clear choice. As noted earlier, Mr. Wood made sound policy recommendations, but the legislature exercised its own and different judgment.

27. Adj. Oppal then wrote, "The legislative intent of the section makes it clear that where the only dispute relates to sanctions, it would be illogical to require an adjudicator to embark on a new assessment of the findings of misconduct." Unfortunately, other than s. 138(1)(c)(i) and (ii), Adj. Oppal did not cite any language from the Act that supports the view that the legislature accepted his (Adj. Oppal's) view of what would be logical. For the reasons set out above, s-s. 138(c)(i) and (ii) do not support Adj. Oppal's argument about legislative intent, and Adj. Oppal's interpretation of s. 138 does not address the mandatory word "must" in s. 141(10). More fundamentally, whatever one might think of the logic or illogic of requiring a judge to make a determination of misconduct where misconduct is *not* in issue, that was not the question before Adj. Oppal, and it is not the question here. The whole reason the issue was raised before Adj. Oppal, and is being raised again here, is that misconduct *is* in issue. Saying what would be logical or illogical in case that is the diametrical opposite of the case under consideration is of no assistance. Finally, in a hypothetical case where misconduct was not at issue, that Adjudicator's efforts would not be "wasted" by determining an unnecessary issue because, under that hypothesis the member would admit the misconduct before the Adjudicator, and then the real work would focus on sanction.

28. The other supposedly illogical hypothetical Adj. Oppal considered was where misconduct was at issue, but there had been a "joint submission" on sanction at the discipline proceeding. It is not clear what Adj. Oppal meant by "joint submission" in this context. At a discipline proceeding the only parties who makes a submission on penalty are the member and possibly the complainant. The parties at a review on the record include a new party who was not present at the discipline proceeding: commission counsel. At a public hearing, there is an additional new party, public hearing counsel. There is nothing illogical in permitting new parties, who were not present at the discipline proceeding, to make their own submission on penalty. Even in a case where all the parties are in agreement on penalty, there is nothing illogical about giving the Adjudicator jurisdiction the power and the duty to come to her own independent conclusion about a fit and proper penalty despite a joint submission. In criminal courts, judges give deference to joint submissions but they are not bound by joint submissions. That is not considered illogical. To the contrary, the jurisdiction of judges to disregard a joint submission is considered inherent to judicial independence.

29. It is submitted that if policy arguments were of assistance, in the face of the clear and explicit language of s. 141, the policy arguments strongly favour giving the Adjudicator the widest latitude to determine all the relevant facts before determining fit and proper disciplinary or corrective measures. This includes the most important issue of mixed fact and law, whether misconduct has been proven.

30. Section 141(10) provides that the Adjudicator must "determine the appropriate disciplinary or corrective measures…". The standard of review for both the question of whether misconduct has been proven, and the disciplinary or corrective measures, is correctness: s. 141(9). This means that, unlike a criminal sentence appeal, the Adjudicator does not owe deference the Discipline Authority. Taking s-s. (9) (the correctness standard) and s-s. 10 ("must determine") together, the Adjudicator does not merely consider whether the Discipline Authority's decision was reasonable; rather, the Adjudicator must "determine" all issues of fact, law, and mixed fact and law, independently.

31. This includes the most fundamental question: do the facts support a finding of misconduct. If the member disputes that he or she committed misconduct, and the Adjudicator comes to the conclusion that misconduct has not been proven, the Adjudicator would be put into the impossible position of imposing a penalty where he or she has concluded that no penalty is justified.

32. Such a situation could not arise in a criminal case. If the Crown appealed a sentence that it considered unfit, the accused would have the absolute right to appeal the guilty verdict. The appeal court may determine that the accused is not guilty, in which case there would be no need to determine sentence. Or, the appeal court could determine that the accused is guilty after finding the facts upon which guilt was established. With such a basis of fact, the court would then determine a fit and proper sentence. If, on the other hand, the accused did not appeal guilt, that would constitute a formal admission that the facts as found by the trial judge were correct. The appeal court would never be in the position of having to decide a sentence appeal where issues of fact, or mixed fact and law, were formally disputed, without also having the power to resolve those disputes. This is no mere accident of procedure. Where issues of mixed fact and law are in dispute, the judge who is being asked to impose as fit penalty must be able to determine the facts upon which the penalty will be based.

33. In summary, Adj. Oppal's policy arguments are not of assistance in light of the clear and express language the legislature chose in specifying the jurisdiction and duties of the Adjudicator. In the alternative, if policy arguments are relevant, there are strong policy arguments why an Adjudicator should not be prohibited from finding facts that are contested, when those facts are necessary for her decision on disciplinary or corrective measures. This includes the facts alleged in support of a finding of misconduct.

34. Therefore, with the greatest of respect, it is submitted that Adj. Oppal's reasoning should not be adopted by the Adjudicator in this case.

Conclusion

35. It is submitted that the language of s. 141(10) could not be clearer or more express: a retired judge "must … decide whether any misconduct has been proven." The ordinary interpretation of these words is consistent with the overall context and structure of the ***Police Act***, in which the Police Complaint Commissioner is a gatekeeper, not the ultimate decision-maker.

36. On its face, s. 138 does not provide the Police Complaint Commissioner with the power to call a public hearing or review on the record on sanction, but not on misconduct. Section 138 does not operate "notwithstanding" or "despite" s. 141, and s. 141 does not operate "subject to" s. 138.

37. With the greatest of respect, the decision of Adj. Oppal in *Bunderla* should not be followed, for the reasons set out above. Adj. Oppal failed to address the word "must" in s. 141(10). Whatever weight may be given to his policy arguments, those arguments cannot displace the clear and unambiguous intent of the legislature. Further, when one considers policy arguments, those arguments support the plain, grammatical, interpretation of s. 141(10), that when the legislature

said that the Adjudicator "must … decide whether any misconduct has been proven", that is exactly what the legislature intended.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 26, 2018.

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