PH 2019-01
OPCC File No. 2016-12210

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 COMPLAINT AGAINST
CONSTABLE ERIC LUDEMAN AND CONSTABLE NEIL LOGAN
OF THE VANCOUVER POLICE DEPARTMENT

Before: Adjudicator C. Baird Ellan

REASONS FOR RULING ON APPLICATION TO PARTICIPATE BY CHIEF CONSTABLE ADAM PALMER OF THE VANCOUVER POLICE DEPARTMENT

Public Hearing Counsel	Brad Hickford
Commission Counsel	Mark Underhill
Counsel for Cst. Ludeman	Claire Hatcher
Counsel for Cst. Logan	Kevin Woodall
Counsel for Chief Constable Palmer	Marino Sveinson

Date of Ruling:	March 10, 2020
Reasons Filed:	March 12, 2020

Introduction

[1] Constables Ludeman and Logan are the subjects of a public hearing pursuant to Section 137(1) and 143(1) of the *Police Act* in response to a complaint filed by Vladimir Tchaikoun regarding their conduct in an incident on March 13, 2016.

[2] In response to the complaint, the Police Complaint Commissioner issued a Notice of Public Hearing on November 7, 2019, identifying the following allegations:

(i) That on March 13, 2016, Constable Ludeman and Constable Logan committed Abuse of Authority pursuant to section 77(3)(a) of the Police Act by engaging in oppressive conduct towards a member of the public; specifically, that the members unlawfully

entered the complainant's residence.

(ii) That on March 13, 2016, Constable Ludeman and Constable Logan committed Abuse of Authority pursuant to section 77(3)(a)(ii)(A) of the Police Act by intentionally or recklessly using unnecessary force in the course of their entry into the home of the complainant.

[3] Arising out of several case management teleconferences on the record and an exchange of emails with Public Hearing Counsel, Commission Counsel, Counsel for Cst. Ludeman and Counsel for Cst. Logan, on December 12, 2019, the public hearing was set to proceed on March 10 - 13, 2020 with potential continuation dates during the weeks of May 25, 2020 and June 22, 2020, inclusive. Despite the public interest in proceeding with a matter such as this in an expeditious fashion, these were the earliest dates on which all counsel could find dates in common.

[4] Members of the Vancouver Police Department inquired in early December, 2019 about making an application pursuant to Section 144(1) to participate at the hearing. Section 144(1) provides as follows:

(1) A person, other than public hearing counsel, commission counsel and the member or former member concerned, may apply to be a participant in a public hearing by applying to an adjudicator in the manner and form the adjudicator requires.

[5] In response to the inquiry, I invited the department to make an application in writing by email. After a further inquiry from the department in February, 2020, Counsel for the Chief Constable provided written submissions in favour of the application on February 24, 2020. At my request, Public Hearing Counsel, Commission Counsel, Counsel for Cst. Logan and Counsel for Cst. Ludeman all kindly provided written submissions prior to the hearing date.

[6] The matters for consideration in relation to an application to participate are set out in Section 144(2):

(a) whether, and to what extent, the person's interests may be affected by the findings of the adjudicator;
(b) whether the person's participation would further the conduct of the public hearing; and
(c) whether the person's participation would contribute to the fairness of the public hearing.

[7] Section 145 provides that the adjudicator may circumscribe the role of a person granted the right to participate, essentially as the adjudicator sees fit, throughout the proceedings.

[8] The matters that an adjudicator must address at the conclusion of a public hearing are enumerated under Section 143(9) and include the following:

> (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.

Submissions

[9] Counsel for the Chief Constable submitted, in part based on the findings of the discipline authority on the prior discipline proceeding in this matter, that the allegations against the members put directly in issue the training received by them in relation to entering premises and use of force, as well as the policies and practice of the Vancouver Police Department.

[10] In particular, Counsel for the Chief Constable's submission was that in prior proceedings relating to these allegations, the members had taken the position that they conducted themselves in accordance with their training and departmental policy, and that this position had been accepted or at least not refuted in some respects in prior discipline decisions in the matter.

[11] The Chief Constable submitted that because I am required to consider making recommendations in relation to departmental policy or practice under Section 143(9)(c), the Chief Constable's interests, or more broadly, the department's, may be at stake, because the Chief Constable has responsibility under Section 34(1) of the *Act* for general supervision and control over the police department. An adverse finding in relation to the adequacy of training or application of policy may result in a duty on the part of the Chief Constable to make changes in relation to training, policy or practice. In addition, he submits, it might create vicarious civil liability on the part of the Chief Constable, or the City of Vancouver, as employer of the officers.

[12] It was also submitted that in order for reasonable recommendations to be made under Section 143(9)(c), the evidence in relation to current training, policy and practice must be complete and accurate, therefore a representative of the department should be present at the hearing and have the ability to call evidence if needed. Finally, Counsel for the Chief Constable pointed to publicity surrounding the incident in question and submitted that the public interest requires that the department be permitted to defend its reputation.

[13] Public Hearing Counsel and Commission Counsel opposed the application. Public Hearing Counsel referred to the decision of Adjudicator R. McKinnon, retired BC Supreme Court Justice, in Lobel and Hoang, PH 19-01[1]. He submitted that this matter differed from that case in that the officers have not here argued that their training in relation to the issues affords them a lawful excuse. He also submitted that, if that issue were engaged, similarly to the Lobel

[1] https://opcc.bc.ca/wp-content/uploads/2018/04/11766-2018-07-12-Lobel-Hoang-Reasons-Application-by-VPD.pdf

and Hoang decision, the participation of representatives of the department should be limited to asking questions about training, not policy and practice, and should not include the ability to call evidence.

[14] On behalf of the Commissioner, Commission Counsel firstly raised an issue in relation to ambiguity of the identity of the applicant for standing, being the Chief Constable, the City of Vancouver or the Vancouver Police Board, and took the position that the Vancouver Police Department did not have legal standing to bring the application to participate in the proceeding.

[15] Commission Counsel also submitted that the issue of training has not arisen in this matter, and in any event that as representative of the Police Complaint Commissioner, it is Commission Counsel's responsibility to ensure that all evidence relevant to the matters to be determined is tendered. He submitted that additional parties are not required in order to achieve the statutory objectives of determining the truth and upholding public confidence in police administration. Finally, he submitted that the interests of the Chief Constable were not directly engaged in the matters under consideration, in that there are no proceedings against him, any recommendations arising from this hearing would be non-binding, and that in any event it would be the responsibility of the Police Board to carry them out.

[16] Counsel for the members supported the application, primarily on the basis that the department is in the best position to provide evidence relating to departmental policies and procedures. In brief, Counsel for Cst. Logan made the point that recommendations in relation to policy arising from the hearing may relate to the important question of balancing the interests of a suspected victim of domestic violence with those of the occupants of a private residence, and that it is important to have a thorough and accurate picture of what current policies are in relation to these issues. Counsel for Cst. Ludeman took issue with the suggestion of Public Hearing and Commission Counsel that it would be speculative to conclude that the issues of training and policy will arise in the hearing, and pointed to indications from the proceedings at prior levels that the issues were engaged.

[17] I heard brief oral submissions at the commencement of the hearing in response to the written submissions. Counsel for the Chief Constable clarified that the application is brought on behalf of the Chief Constable and that he is the intended participant in the proceedings, but took issue with the suggestion that the department could not be granted status as a participant. Commission Counsel maintained his opposition to the application for participatory status for the Chief Constable, submitting that it was premature to decide the issue given that no evidence has yet been tendered in the hearing. His concern, on behalf of the Commissioner, was that (although he took the position that decisions of adjudicators in matters such as this were not binding on other adjudicators) if "standing" was granted to the department (or Chief Constable) at the outset of this hearing, it could create a presumption of standing for any department that may be subject

to a recommendation under Section 143(9)(c).

[18] Commission Counsel suggested I grant Counsel for the Chief Constable a watching brief until such point as Counsel for the Chief Constable found it necessary to apply to participate either by questioning or calling evidence, at which point the issue of their participation could be considered in light of the issues as they unfolded at the hearing.

[19] Mr. Woodall in his oral submissions at the hearing supported the Chief Constable's application on the basis that the Police Complaint Commissioner had two representatives at the public hearing and that it would not be contrary to the public interest for the members' department to be represented, in addition to the members having representation. He submitted as well that it was not reasonable for an applicant for participation not to know the status of his application at the outset of the hearing, and that it would be helpful for all of the participants if Counsel for the Chief Constable were able to assist in eliciting evidence that may pertain to whether the actions of the members accorded with the department's interpretation of its policy and practice, as the evidence unfolded.

Ruling

[20] At the close of oral submissions I ruled that in the interests of ensuring that the hearing progressed in an orderly fashion it would be preferable to grant the Chief Constable the right to participate under Section 144 with respect to issues of training, policy and practice at the outset, than to revisit the issue at a later stage. I ruled that the extent of that participation would be addressed as the hearing progressed, and as Counsel for the Chief Constable sought to question witnesses or call evidence. It was my view that the suggestion of a watching brief as opposed to a right of participation is a distinction without a difference, and that to have Counsel for the Chief Constable present as a participant from the outset would be, in the circumstances of this case, less disruptive than to have him relegated to a watching brief with the need to renew his application at some later stage in the proceedings.

[21] I indicated at the hearing that I would provide further written reasons for my ruling, which follow.

[22] In relation to the issue of the appropriate party to an application under Section 144 on behalf of a police department, I find that, as was done in this case, it may be made by the Chief Constable, who has the duty of supervision over the department under Section 34(1) and to whom will fall the responsibility of considering whether to implement any recommendations in relation to policy or practice made under Section 143(3)(9) that may arise from the hearing. It must be borne in mind that the adjudicator's duty to consider making such recommendations is mandatory under that section.

[23] As to who is the "person" who will participate under Section 144, in practicality, I expect

that in addition to Counsel for the Chief Constable, representatives of the department who are responsible for training and interpretation of policy and practice will attend and monitor the evidence at the hearing, and instruct counsel. Certainly it is not contemplated that the Chief Constable himself will attend. While legally the Vancouver Police Department is a sub-entity of the City of Vancouver, it is convenient to refer to it as the "department" as if it were an entity, as is done in many places within the *Police Act* [e.g. Section 77(1)(h).]. I do not find it necessary to decide in this case whether the department itself has status as a "person" to request participation under Section 144, since the application in this case has been made by the Chief Constable. As I have said, in practical result, I expect it will be members of the department, through counsel, and not the Chief Constable or the Police Board, that will be the "participant".

[24] I have reviewed the decision in the *Lobel and Hoang* matter. I find that it is arguably binding on me by virtue of comity[2], but in any event it is persuasive in relation to the issues raised in this application. In *Lobel and Hoang*, potential policy and practice issues arose in respect of the training the members received in relation to powers of search on an investigative detention. The issue of training was specifically raised by the officers at prior levels of the proceedings. They relied on the case of *Lowe v. Diebolt*[3].

[25] I am mindful of the fact that, as pointed out by Commission Counsel, whether or not questions of policy and practice were engaged in prior proceedings relating to this matter, this hearing has not commenced and there is no evidence and no record before me, apart from the Notice of Public Hearing. In general, adjudicators will not have an opportunity to review the record of proceedings at prior levels relating to the allegations at issue on the hearing. The hearing is intended to be a trial *de novo* [see Sections 143(2) and (3)]. I would expect that applications under Section 144 will often fall to be determined without reference to the record or without a concrete indication that a party will raise or rely on issues of training, policy or practice.

[26] Nonetheless it will in some cases be possible for an adjudicator to assess the factors enumerated in Section 144(2) based on what is known about the matter from the Notice of Public Hearing and the allegations identified by the Commissioner. In this case, in my view, training and policy issues are likely to be engaged in relation to the issues of lawful excuse, wilfulness or recklessness that naturally arise on the allegations as articulated in the Notice of Public Hearing.

[27] In past matters I have observed that intent in relation to allegations of abuse of authority under Section 77(3)(a) must be assessed from the perspective of an officer's training, and that

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[2] United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170 v British Columbia (Information and Privacy Commissioner), 2018 BCSC 1080 (CanLII), <http://canlii.ca/t/hst30>, retrieved on 2020-03-09

[3] 2013 BCSC 1092 (aff'd 2014 BCCA 280)

expert evidence in relation to that subject may be of assistance[4]. In order to determine whether an officer in a matter is relying on a reasonable interpretation of his training or of departmental policy and practice, it will be necessary to have a full and accurate picture of what that policy is, from the department's perspective. That evidence may or may not benefit the members, but will clearly assist in an objective assessment of their actions.

[28] In addition, given the mandate of the adjudicator under Section 143(9)(c), the department's perspective on those matters of policy and practice may become essential. While it is impossible to ascertain in advance of hearing evidence at what point the department's participation and perspective may become relevant, in my view there is no downside to affording participatory status to a department at the outset of the matter, where issues of training and policy potentially will arise. The natural "governor" on a proliferation of applications on the part of departments will be the departments' own assessment of whether their interests may be at stake, and whether the issues that arise justify providing the resources necessary to monitor and provide input into the proceeding.

[29] If there are potential issues of policy and practice such that recommendations under Section 143(9)(c) may arise, either because a department perceives that those issues are engaged or because they flow objectively from the allegations, my view is that more and earlier information relating to training and policy afforded to the public, in a public hearing, is clearly better. It is clearly in the public interest to have evidence pertaining to the standards expected of members of the particular department, when considered in light of the ultimate goal of upholding confidence in the administration of police discipline. As put by Adjudicator McKinnon, "Everyone benefits from full disclosure."

[30] To my mind, the above observations address the factors enumerated in Section 144(2) such that in this case, participatory status should be granted to the department (acting through counsel and on behalf of the Chief Constable), with the extent of that participation to be determined during the hearing in accordance with Section 145. In particular, I am satisfied that the department's interests may be affected, potentially significantly, by virtue of Section 143(9)(c); and that the department's participation from the outset will further the conduct of the hearing and contribute to its fairness.

[31] Nonetheless, this decision that the Chief Constable may participate in this proceeding can be confined to the facts of this case and will be circumscribed by those facts as the evidence unfolds. It is not a standing decision, and it does not make the Chief Constable a party to the proceedings nor afford an automatic right of participation. It affords a participatory role under Section 144 based on the issues raised on the allegations and the department's own assertion that

[4] https://opcc.bc.ca/wp-content/uploads/2017/04/2014-02_Adjudicator_Baird_Ellan_Decision.pdf, pp. 15 -16

its interests may be at stake; a role that is yet to be precisely defined.

[32] Possible outcomes in this matter include a finding that any training, policy or practice issues that arise are confined within the proceedings or to the facts of the case; are unsubstantiated; or disclose systemic issues that need to be addressed. None of those possible outcomes would conclusively provide to this or another department a right to participate in future matters; nor would they define the extent of that participation.

[33] Commission Counsel took the position that rulings at this level in matters such as these do not serve as precedents; an argument that will be left for another day. For these purposes it suffices to say that this ruling is not intended to have any broader application than to the immediate circumstances of the case at hand, as it unfolds and as issues of policy and practice become relevant, if they do.

Reasons filed at Vancouver, British Columbia this 12th day of March, 2020.

Carol Baird Ellan, Retired Judge
Adjudicator