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 SCOPE OF PUBLIC HEARING

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: October 19, 2020

Introduction

[1] On November 7, 2019, the Police Complaint Commissioner ordered a public hearing into the conduct of Constables Ludeman and Logan in connection with their entry of a Vancouver home on March 13, 2016.

[2] The Notice of Public Hearing identifies 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] The public hearing proceeded before me on March 10 to 13, 2020 and August 18 to 25, 2020. The hearing has been delayed at several points for various reasons including the effects of the global coronavirus pandemic.

[4] Counsel for the members have brought an application requesting that I determine the scope of my authority pursuant to the Notice of Public Hearing before deciding whether further evidence may be called, and before making my decision under Section 143(9) as to whether any misconduct has been proven.

[5] While it is open to me to delineate the scope of my mandate as defined in the Notice and the *Act*, issues pertaining to the authority or intent of the Police Complaint Commissioner in issuing the Notice are outside my jurisdiction[1]. For the following reasons I am of the view that this application raises issues more of the latter type, and I am without authority to accede to it.

[6] In the interest of brevity, I will not set out all of the relevant portions of the *Police Act*, details of the submissions, or the history of the proceedings. I will provide salient quotations or references, as they pertain to this ruling.

Nature of the Application

[7] The argument of members' counsel relates to the interpretation of the second allegation. They submit, firstly, that it was not open to the Police Complaint Commissioner to include Cst. Logan in that allegation in light of retired Judge Neal's finding at the Section 117 stage that the allegation was not substantiated as against Cst. Logan. The second argument they advance is that, because of the course of the proceedings before the Notice of Public Hearing was issued, the allegation is confined to the degree of force used in entering the residence and does not include a consideration of force used after the entry was effected.

[8] Commission Counsel and Public Hearing Counsel take the position that it is open to me to consider both members' conduct during the entire incident, and that it is not open to me to confine the scope of the hearing as requested by the members.

Analysis

1. Inclusion of Cst. Logan in the Second Allegation

[9] I turn first to the statutory framework surrounding the issuance of the Notice, which is found in Sections 138, 143 and 154 of the *Act*. Section 138(1)(d) permits the Police Complaint

[1] *Human Rights Comm. v. Human Rights Tribunal*, 2000 BCSC 1798, at para. 7; *Briggs v. Ministry of Environment*, 2000 BCHRT 38; *Diaz-Rodriguez v. British Columbia (Police Complaint Commissioner)*, 2020 BCCA 221

Commissioner to order a Public Hearing in certain circumstances, including when he "considers that a public hearing or review on the record is necessary in the public interest." Section 143(2) provides that a public hearing is a "new hearing concerning conduct of a member or former member that was the subject of an investigation or complaint under this Division." Section 143(3) provides that, "A public hearing is not limited to the evidence and issues that were before a discipline authority in a discipline proceeding." Section 143(9) directs an adjudicator to "decide whether any misconduct has been proven." And finally, Section 154(1) states, "An adjudicator has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising or required to be determined in respect of a public hearing or review on the record, and to make any order the adjudicator is permitted under this Division to make."

[10] I will say firstly that there is no provision in the portions of the *Act* dealing with the adjudicator's powers and duties on a public hearing suggesting that prior proceedings or decisions in the matter have relevance to the decision I am to make under Section 143. As pointed out by Commission Counsel, while Section 154(1) delineates the power and authority of an adjudicator in relation to questions of law and fact, it provides no suggestion of any kind that I may have some supervisory jurisdiction to inquire behind the Notice of Public Hearing or determine its validity, or scope, in light of the proceedings leading up to its issuance.

[11] The case law cited by Commission Counsel is very clear, and definitive, in holding that as a statutory decision-maker with authority delegated, and delineated, by the Notice of Public Hearing and the applicable legislative framework, I have no jurisdiction to determine whether the Commissioner has exceeded his authority based either on what transpired before the Notice was issued, or on my interpretation of his authority as defined by the provisions of the *Act*.

[12] The second allegation clearly names Cst. Logan. In order to decline jurisdiction in relation to him, I would have to strike his name from the allegation, and either amend the Notice or declare it invalid as it relates to him, based on an extraneous conclusion derived from the path of the prior proceedings. Clearly there is no provision for that in the Act. In this respect, I do not see the questions advanced by members' counsel here as distinguishable from those addressed in the cited cases.

[13] Considering for a moment the merits of members' counsel's argument regarding Section 117, they say that retired Judge Neal's finding in relation to the second allegation, that it was not substantiated as it pertains to Cst. Logan, is "final and conclusive" pursuant to Section 117(11) and that I therefore must find the allegation, as it pertains to him, unlawful. While I do not believe it is open to me to consider whether the Commissioner has properly brought the allegations pursuant to that section, I see some attraction to the interpretation of Section 117(11) advanced by Commission Counsel, joined by Public Hearing Counsel, that it does not apply to

individual findings where the matter of misconduct continues on to a discipline proceeding.

[14] As I read the legislation, Section 117(7) requires a retired judge to particularize the allegations he or she considers only when Section 117(9) applies; which is, when he or she is making a finding that misconduct is substantiated. By contrast, pursuant to Section 117(10), if a retired judge finds that the member's conduct does not constitute misconduct, the retired judge is not required to comply with Section 117(9) by itemizing the allegations; rather, he or she is to include in the notice under Section 117(7) only their reasons for that finding of no misconduct.

[15] The wording of the section is confusing and tortuous, but one available interpretation, that advanced by Commission Counsel and Public Hearing Counsel, is that Section 117(11) applies only when the retired judge finds no misconduct has been established on *any* of the allegations. That is a matter that will need to be determined in a court of competent jurisdiction.

[16] Commission Counsel and Public Hearing Counsel have also provided submissions regarding the character of Section 117(11) as a privative clause, arguing that it is of the weaker variety and is not intended to confine the scope of a public hearing based on matters decided at prior levels. Counsel for the members submit that the wording of the section is strong and definitive and precludes the resurrection of an allegation that has been found not to be substantiated by a retired judge.

[17] Again, the questions of whether those arguments reflect the correct interpretation of the provisions of Section 117, interesting as they may be, are not in my view questions that are open to me to decide. They strike at the heart of the authority of the Police Complaint Commissioner: whether it was open to him, based on what transpired at the prior proceedings, and how the section is worded, to include Cst. Logan in the second allegation when he was not included in it at the discipline proceeding.

[18] The case law is clear that the issue of the Police Complaint Commissioner's intentions in wording the allegation as he did is one that could have been taken up with the Commissioner after the Notice was issued, or that could yet be challenged by way of judicial review. It is, however, not open to me to consider whether he made a mistake, inadvertently exceeded his jurisdiction, or intentionally included Cst. Logan based on his interpretation of Section 117(11). My task in the matter is only to decide the issues defined in the Notice of Public Hearing within the parameters of the applicable sections of the *Act*.

2. Is the Scope of the Second Allegation Restricted to the Force Used to Gain Entry?

[19] In relation to the argument that my consideration must be confined to events that occurred at or close to the time of the officers' entry to the residence, I note firstly that the phrase

"in the course of" may be defined[2] as "during the specified period[3]".

[20] Just as an unlawful entry or break-in within a criminal law context can encompass the intent or events occurring within the premises as well as the manner of entry, one available interpretation of the wording of the second allegation is that it includes the entirety of the events that occurred within the residence. The term "entry" might reasonably refer to the officers' presence for the duration of the time they were there.

[21] I note that as well that the use of the term "in the course of *their* entry," which clearly includes the actions of both officers (strengthening an argument that inclusion of Cst. Logan was intentional), is inconsistent with the conclusion members' counsel urges me to draw, that the issue on the second allegation is confined to the manner of entry. As counsel has pointed out, retired Judge Neal found that Cst. Logan gained entry to the residence without force. In that case, if one is to have reference to the findings below, the force alleged in the second allegation must of necessity refer to something other than that used in effecting the entry.

[22] In addition, by its wording, the phrase, "in the course of their entry," entails something more than the force used to gain entry. More restrictive wording could have been, "using excessive force in obtaining entry" to the residence.

[23] Once it is apparent that the second allegation refers to the use of force beyond that used simply in order to effect the entry, it reasonably encompasses the unfolding narrative of events that ensued after that entry. There is no logical point at which to draw the line between force used in the "course" of the officers' entry and force used during their presence within the residence, achieved by that entry. It might reasonably be considered one continuing transaction.

[24] My interpretation of the second allegation on its face is that it reasonably includes events that occurred during the officers' presence in the residence - a presence accomplished by "their" entry - for the duration of that presence. I should add that, before the issue was raised by members' counsel, my assumption regarding the scope of the hearing as defined by the second allegation was that it covered all of the events in the residence following the entry.

[25] However, members' counsel rely heavily on the fact that two additional allegations, the third and fourth considered by retired Judge Neal, were not included in the Notice of Public Hearing. They submit that I must conclude the Commissioner intended by that omission to exclude from consideration the later events within the residence.

[26] I am not persuaded that is the only available conclusion. Another equally plausible

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[2] Google English Dictionary, provided by Oxford Languages

[3] https://www.google.com/search?q=%22in+the+course+of%22&rlz=1CAHJUL_enCA824&oq=%22in+the+course+of%22+&aqs=chrome..69i57j0l7.3718j0j7&sourceid=chrome&ie=UTF-8

interpretation is that, as with the wording of a criminal indictment, the “counts” dealt with by retired Judge Neal were not mutually exclusive.

[27] Leaving those two allegations out of the Notice does not necessarily entail acceptance by the Commissioner of a decision on the part of the retired judge that excessive force by these members during the later events was not established. For instance, the Commissioner may have believed that the allegations overlapped or that the second allegation encompassed all of the conduct within the premises as it related to these two members. It is of note that the third and fourth allegations included other members, and on one view they may be taken simply to have delineated events that occurred after others attended, but which also included Csts. Logan and Ludeman.

[28] The important point is that it is not for me to say what those allegations may or may not have addressed, what Judge Neal decided about them, or what the Commissioner’s view of that may have been. The analysis that members’ counsel asks me to do entails a review of the decision of retired Judge Neal and its import in relation to the interpretation of the Notice of Public Hearing; an analysis that I find to be outside my jurisdiction. As pointed out by Commission Counsel, “the Members’ request to impose [a] “cut-off’ point erroneously presumes that the Adjudicator must find that the events unfolded in the same manner and sequence as found by retired Judge Neal at the discipline proceeding.” Judge Neal’s decision or reasoning are not part of the record before me and it is not open to me to review them in considering the scope of my authority on the public hearing. Neither is it open to me to determine whether the Commissioner has acted consistently or inconsistently with them in how he has drafted the Notice of Public Hearing.

[29] Based on the plain wording of the second allegation, and without further direction from a higher authority, I am unable to conclude that my jurisdiction in this matter falls short of considering the force used by the officers after their entry to the premises, for as long as they remained there.

3. Fairness

[30] Counsel have made submissions regarding the issue of fairness to the members in my taking an expansive view of the scope of the hearing. I agree with Commission Counsel that any issues of unfairness to the members are addressed by the timing of the application, which has permitted the issues to be fully canvassed during the evidence called by Public Hearing Counsel.

[31] That timing does not suggest any surprise on the part of members’ counsel that the hearing would encompass the entirety of the events. In fact, it appeared to me from the way the evidence unfolded that, like me, all counsel were of that view until the issue was raised at a late stage of the proceeding.

4. Adjournment

[32] In the members' reply submissions they have requested that if I do not limit the scope of the hearing as they request, I consider adjourning these proceedings pending an application for judicial review. It is premature for me to make such a ruling without confirmation of such an application having been made, and without hearing the positions of other counsel.

5. Conclusion

[33] For these reasons, the application to limit the scope of the hearing as requested by members' counsel is dismissed. It is unnecessary for me to decide at this time whether the submissions on behalf of the Vancouver Police Department fall within the role of participant granted to the Chief Constable.

Reasons filed at Vancouver, British Columbia this 19th day of October, 2020.

Carol Baird Ellan, Retired Judge
Adjudicator