

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, c. 367, s. 141

AND

IN THE MATTER OF THE REVIEW ON THE RECORD INTO THE ORDERED
INVESTIGATION AGAINST CONSTABLE SAMUEL CHEUNG
OF THE VANCOUVER POLICE DEPARTMENT

TO: Constable Samuel Cheung
Vancouver Police Department

AND TO: Gregory P. DelBigio, K.C.
Counsel for the Police Complaint Commissioner

AND TO: Claire E. Hatcher
Counsel for Constable Cheung

AND TO: Prabhu Rajan
Police Complaint Commissioner

AND TO: Chief Constable Adam Palmer
Vancouver Police Department

AND TO: Superintendent Trevor Burmachuk
Vancouver Police Department

Review Hearing: December 6, 2024; March 11, 2025
Vancouver, B.C.

Decision Date: March 19, 2025

REASONS FOR DECISION

Introduction

[1] This matter concerns the disciplinary action to be taken in regard to Constable Samuel Cheung of the Vancouver Police Department ("VPD"), who, while off-duty, and after consuming several beers, rear-ended another vehicle;

his blood alcohol level was in excess of the legal limit. In the course of VPD internal-discipline proceedings Constable Cheung was found to have engaged in one act of "discreditable conduct", namely, driving with a blood alcohol level in excess of the legal limit. He was given a five-day suspension without pay. Being of the view that suspension did not adequately address the seriousness of Constable Cheung's conduct, the Police Complaint Commissioner ordered a review on the record and appointed me to conduct that review.

[2] On this review, Constable Cheung admits to two acts of disreputable conduct: (i) driving with a blood alcohol level in excess of the legal limit; and (ii) attempting to dispose of a beer can following the accident.

[3] For the reasons that follow, I have concluded that for the first act, Constable Cheung should be suspended without pay for ten days and required to take stress management and / or substance misuse counselling. For the second act, he should be suspended without pay for an additional two days.

Relevant Provisions of the *Police Act*

[4] Section 77 of the *Police Act*, R.S.B.C. 1996, c. 367 ["PA"] contains a comprehensive definition of "misconduct" / "disciplinary breach of trust". In this matter, the following portion of s. 77 is relevant:

(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

- (h) "discreditable conduct", which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department, ...

[5] Section 126 deals with the imposition of disciplinary or corrective measures:

(1) After finding that the conduct of a member is misconduct and hearing submissions, if any, from the member or the member's agent or legal counsel, or from the complainant under section 113, the discipline authority must, subject to this section and sections 141(10) and 143(9)

propose to take one or more of the following disciplinary or corrective measures in relation to the member:

- (a) dismiss the member;
- (b) reduce the member's rank;
- (c) suspend the member without pay for not more than 30 scheduled working days;
- (d) transfer or reassign the member within the municipal police department;
- (e) require the member to work under close supervision;
- (f) require the member to undertake specified training or retraining;
- (g) require the member to undertake specified counselling or treatment;
- (h) require the member to participate in a specified program or activity;
- (i) reprimand the member in writing;
- (j) reprimand the member verbally;
- (k) give the member advice as to the member's conduct.

(2) Aggravating and mitigating circumstances must be considered in determining just and appropriate disciplinary or corrective measures in relation to the misconduct of a member of a municipal police department, including, without limitation,

- (a) the seriousness of the misconduct,
- (b) the member's record of employment as a member, including, without limitation, the member's service record of discipline, if any, and any other current record concerning past misconduct,
- (c) the impact of proposed disciplinary or corrective measures on the member and on the member's family and career,
- (d) the likelihood of future misconduct by the member,
- (e) whether the member accepts responsibility for the misconduct and is willing to take steps to prevent its recurrence,
- (f) the degree to which the municipal police department's policies, standing orders or internal procedures, or the actions of the member's supervisor, contributed to the misconduct,
- (g) the range of disciplinary or corrective measures taken in similar circumstances, and
- (h) other aggravating or mitigating factors.

(3) If the discipline authority considers that one or more disciplinary or corrective measures are necessary, an approach that seeks to correct and educate the member concerned takes precedence, unless it is

unworkable or would bring the administration of police discipline into disrepute.

[6] A review on the record is governed by s. 141:

(1) In this section and section 143, "disciplinary decision", in relation to a discipline proceeding under section 124, means any of the matters described in section 133(1)(a)(i) to (iv) including any further reasons provided under section 128(3).

(2) Subject to section 143(1) if the police complaint commissioner determines, in respect of a disciplinary decision, that a public hearing or review on the record is necessary in the public interest, the police complaint commissioner may appoint an adjudicator under section 142 to conduct a review on the record of the disciplinary decision under this section.

(3) For the purposes of a review on the record, the record of a disciplinary decision consists of

- (a) the final investigation report of the investigating officer, any supplementary reports or investigation reports under section 132 and all records related to the investigation and the discipline proceeding,
- (b) the records referred to in section 128(1),
- (c) the report referred to in section 133(1), and
- (d) in the case of a review on the record initiated under section 139, any record relating to the new evidence referred to in that section.

(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.

(5) The member or former member concerned is not compellable at a review on the record, but the member or former member or the member's or former member's agent or legal counsel, if any, may make submissions concerning the matters under review.

(6) In addition to the member or former member concerned or the member's or former member's agent or legal counsel, the police complaint commissioner or the police complaint commissioner's commission counsel may also make submissions concerning the matters under review.

(7) The adjudicator may permit the following persons to make submissions concerning the matters under review:

- (a) the complainant, if any, or the complainant's agent or legal counsel;
 - (b) the discipline authority or the discipline representative.
- (8) The adjudicator may permit submissions under subsection (5), (6) or (7) to be oral or written.
- (9) In a review proceeding under this section, the standard of review to be applied by an adjudicator to a disciplinary decision is correctness.
- (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.
- (11) Within 10 business days after reaching a decision under subsection (10), the adjudicator must provide notice of the decision, together with written reasons, to the following:
- (a) the complainant, if any;
 - (b) the member or former member whose conduct is the subject of the review;
 - (c) a chief constable or chair of the board of the municipal police department with which the member is employed or former member was employed at the time of the conduct of concern;
 - (d) the discipline authority involved in the matter, if different than a chief constable or chair of the board referred to in paragraph (c);
 - (e) the police complaint commissioner.

Background

The Accident and Non-Police Act Proceedings

[7] The accident occurred in Delta, British Columbia, shortly after 11:15 p.m. on July 2, 2022. The parties are in general agreement with respect to what occurred. Where facts were disputed, what follows incorporates my findings.

[8] Constable Cheung had been at home in Vancouver, British Columbia. After his wife and children went to bed, he consumed three to four beers. He

was under some stress relating to a pending move to a new position, wondering how it would affect his career going forward.

[9] At approximately 10:45 p.m., Constable Cheung decided to go for a drive in his sedan, to listen to music and clear his head. He took two cans of beer with him and drank from one while driving. His route took him into Delta, where he rear-ended a mini-van containing eight passengers, including several children. The collision occurred after the vehicle in front of the mini-van made an abrupt left turn. Neither Constable Cheung nor any of the occupants of the mini-van were seriously injured. Both vehicles had to be towed. Constable Cheung's vehicle was written-off because its driver's-side airbag had deployed.

[10] Members of the Delta Police Department ("DPD") attended at the scene. They located an unopened can of beer underneath Constable Cheung's vehicle and an empty can in the bushes off the road on the passenger side of the vehicle. There was fresh beer spattered inside the vehicle, including on the windshield and dashboard in front of the driver's seat.

[11] Constable Cheung had alcohol on his breath and was given an approved screening device ("ASD") demand that resulted in a "Fail". He was then given a breathalyzer demand and transported to the North Delta Public Safety Building. He provided two breath samples that resulted in readings of 110 mg and 100mg of alcohol in 100 ml of blood; the legal limit is 80 mg. Constable Cheung was released after being given a 24-hour driving prohibition, a 90-day administrative driving prohibition, and an undertaking to appear in court. In connection with the 90-day prohibition, he later paid approximately \$1,400 in fines and was required to participate in an eight-hour responsible driver program.

[12] Constable Cheung was charged with impaired driving (*Criminal Code*, R.S.C. 1985, C-46, s. 320.14(1)(a)), and driving with a blood alcohol level in excess of the legal limit (s. 320.14(1)(b)). On March 21, 2023, those charges were resolved when the Crown accepted a plea of guilty to a charge of driving without due care and attention, contrary to s. 144(1)(a) of the *Motor Vehicle Act*,

R.S.B.C. 1996, c. 318. I note here, parenthetically, that *R. v. Garnett* (1995), 15 M.V.R. (3d) 198 (B.C.S.C.), stands for the proposition that under s. 606(4) of the *Criminal Code*, the Crown, in dealing with federal charges, can accept a guilty plea to a provincial offence arising out of the same transaction.

[13] On the driving-without-due-care-and-attention charge, Constable Cheung was fined a total of \$1,150 and prohibited from driving for three months, except between 6 am and 9 pm. The exception permitted him to drive for work. His legal fees in connection with the charges were approximately \$10,000.

Police Act Proceedings

[14] Following the accident the DPD notified the VPD which, in turn, notified the Office of the Police Complaint Commissioner. On July 18, 2022, acting pursuant to s. 93(1) of the *PA*, the former Commissioner ordered an investigation into Constable Cheung's conduct. Due to the then ongoing criminal investigation into that conduct, the *PA* investigation was suspended. The suspension was lifted on April 18, 2023, following the disposition of the *Criminal Code* charges.

[15] Sergeant Tyler Dodds, a VPD professional standards investigator, conducted an investigation into Constable Cheung's conduct. That investigation included interviews with Constable Cheung and members of the DPD. In his interview, Constable Cheung admitted to drinking and driving and took responsibility for what had occurred. He acknowledged he had made a stupid decision and was thankful no one had been hurt. He said he tossed a beer can into the bushes in the heat of the moment.

[16] Sergeant Dodds prepared a Final Investigation Report ("FIR"), which was reviewed by A/Inspector Jen Danial of the VPD, acting as a discipline authority under s. 112 of the *PA*. On November 2, 2023, A/Inspector Daniel found that an allegation of discreditable conduct appeared to be substantiated against Constable Cheung, namely, that he had operated a motor vehicle with a blood alcohol level in excess of the legal limit.

[17] As provided for in the PA, A/Inspector Daniel convened a prehearing conference on November 21, 2023, for the purpose of discussing a resolution of the matter. At that hearing, Constable Cheung agreed to the imposition of certain disciplinary measures. Those measures were not disclosed to me.

[18] On November 14, 2023, the former Commissioner rejected the agreement reached at the prehearing conference and directed the matter be determined by a new discipline authority.

[19] Superintendent Trevor Burmachuk of the VPD acted as the new discipline authority. He found Constable Cheung culpable on a single allegation of discreditable conduct, namely operating a motor vehicle with a blood alcohol level in excess of the legal limit. He considered the beer cans found at the scene to be an aggravating factor, stating (at para. 14):

Constable Cheung's conduct at the collision scene which included removing two beer cans from his vehicle in apparent [*sic*] attempt to hide evidence of his drinking.

[20] Superintendent Burmachuk noted that Constable Cheung had admitted to the allegation of misconduct and that the evidence in the FIR was clear and compelling. Having heard Constable Cheung testify, Superintendent Burmachuk stated that:

- (a) "Constable Cheung has been significantly adversely impacted by this incident, personally, financially, and professionally. His actions were both humiliating and embarrassing for him on a personal and professional level": para. 18;
- (b) As a result of the 90-day driving prohibition, Constable Cheung was transferred to non-operational duties. This was not only embarrassing but adversely affected his ability to earn extra pay: para. 19; and

- (c) Constable Cheung "has taken responsibility for his actions" and "deeply regrets his decision to drive after consuming alcohol":
para. 20.

[21] In concluding his discussion with respect to what disciplinary action was appropriate, Superintendent Burmachuk stated:

27. As stated in paragraph 13, I have reviewed a number of cases of members involved in similar misconduct. In similar incidents, discipline has been imposed in the range of 3 to 5 days for a substantiated allegation of discreditable conduct for driving while impaired by alcohol.

28. I find that Constable Cheung has accepted responsibility, suffered significant financial loss, professional consequences and has already completed an alcohol Responsible Driving Program. I conclude that the consequences of Constable Cheung's behaviour have been significant and have already served to correct and educate. Therefore, I conclude a 5-day suspension without pay is the appropriate discipline. This penalty reflects the serious nature of his actions and is on the higher range than the majority of precedents of similar misconduct.

[22] Being of the view that a five-day suspension did not adequately address the seriousness of Constable Cheung's conduct the current Commissioner, on May 10, 2024, ordered a review on the record: *PA*, s. 138(1). On July 24, 2024, the Commissioner appointed me as the adjudicator to conduct that review: *PA*, s. 142(1).

[23] On August 26, 2024, I convened a case-management conference with counsel for the Commissioner and counsel for Constable Cheung. A hearing was set for November 4, 2024, along with a schedule for filing submissions. Later, as a result of counsel requiring additional time to consider their positions, that hearing was cancelled.

[24] Counsel subsequently informed me they wished to file a joint submission. A date for filing of that submission was set and a hearing scheduled for December 6, 2024.

[25] In the joint submission, Constable Cheung accepted he engaged in not one, but two acts of discreditable conduct: (i) operating a motor vehicle with a

blood alcohol level in excess of the legal limit; and (ii) attempting to dispose of a beer can following the accident. In the fact section of that submission there is no mention of the beer spattered inside Constable Cheung's vehicle nor his drinking while driving. With respect to what disciplinary action is appropriate, the parties submitted that: (i) for the first act Constable Cheung should be suspended without pay for eight days; (ii) for the second act he should be suspended without pay for an additional two days; and (iii) he be required to complete eight hours of stress management and / or substance misuse counselling within six months.

[26] Relying on the decision of Arbitrator Arnold-Bailey in *Thaper*, RR 23-02, OPCC File No. 2022-22450, counsel submitted I should accept their proposed disciplinary action rather than independently reach my own conclusion as to what is appropriate. They said the approach an arbitrator should take when presented with a joint submission is that set out in para. 58 of *Thaper*, namely:

In disciplinary proceedings under the *Police Act* an adjudicator should accept a joint submission unless the proposed disposition would be viewed by reasonable and informed persons as a breakdown in the maintenance of high policing standards, the proper administration of police discipline, and the proper functioning of the police as an integral part of the administration of justice

[27] In *Thaper*, Arbitrator Arnold-Bailey referred to two judgments of the Supreme Court of Canada in which the approach to be taken by trial judges in dealing with a joint submission following a guilty plea entered on the basis of a "plea bargain" is set out, i.e., when the Crown agrees to a particular sentence in exchange for that plea: *R. v. Anthony-Cook*, 2016 SCC 43, [2016] 2 S.C.R. 204; *R. v. Nahanee*, 2022 SCC 37, 418 C.C.C. (3d) 417. In the latter case, Justice Moldaver stated (in para. 1), that a sentencing judge should only reject a plea-bargained joint submission "where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system."

[28] Arbitrator Arnold Baily also referred to a Law Society of British Columbia rule that prohibits a discipline panel from imposing disciplinary measures different

from those agreed to by the Law Society and lawyer involved, unless those measures are "contrary to the public interest in the administration of justice"; Rule 5-6.5(3)(b). There is no equivalent provision in the *PA*.

[29] At the outset of the December 6, 2024 hearing, I indicated I had reservations in regard to the approach set out in *Thaper*, in light of the fact that s. 141(9) of the *PA* states that "the standard of review to be applied by an adjudicator to a disciplinary decision is correctness." I also noted that in *Gill*, RR 22-02, OPCC File No. 2020-18945, Arbitrator Arnold-Bailey said this in the section of her reasons addressing s. 141(9):

68. Therefore, a review on the record under s. 141 of the Act requires the adjudicator to conduct the review to a standard of correctness, which requires the adjudicator to conduct a new review of the record and come to his or her determination of correctness without according deference to the prior determination. This means that I am to carefully analyze all the evidence and come to my own conclusion in this case as to an appropriate disciplinary or corrective measure.

However, *Gill* did not involve a joint submission.

[30] It was clear in the discussion that followed that counsel had come to the hearing assuming that I would impose their agreed upon disciplinary measures. I advised them I was prepared to hear argument on whether to follow *Thaper* and that I had not formed a view as to what disciplinary action would be appropriate.

[31] Commissioner's counsel suggested the best course was for the hearing to be adjourned to give the parties an opportunity to consider how they wished to proceed; Constable Cheung's counsel agreed. I acceded to their request.

[32] At a case-management conference on January 24, 2025, counsel advised me they no longer wished to rely on *Thaper* and the joint submission. A filing schedule for separate submissions was set and a March 11, 2025 hearing date fixed.

Commissioner's Submissions

[33] The Commissioner's submissions, for the most part, echo those in the joint submission. In the fact section there is no mention of the beer spattered inside Constable Cheung's vehicle nor his drinking while driving. *Thaper* is not mentioned and *Gill* is cited in regard to the standard of review being correctness. The Commissioner's position with respect to disciplinary action is identical to that in the joint submission.

[34] The only new factual matter advanced by the Commissioner is a reference to a DPD officer having seen an empty beer can inside Constable Cheung's vehicle, i.e., the Commissioner asserts three beer cans were found at the accident scene.

Constable Cheung's Submissions and Affidavit

[35] Constable Cheung admits he engaged in two acts of discreditable conduct and submits the disciplinary action proposed by the Commissioner is appropriate. He substantially agrees with the Commissioner's statement of facts, save with respect to there being an open beer can in his vehicle.

[36] It is convenient to state here, as I did at the hearing, that I am not prepared to find there was an empty beer can in Constable Cheung's vehicle. The only evidentiary support for this is found in the statement Sergeant Dodds took from a DPD constable nearly a year after the accident. That officer said that when he looked inside the vehicle at the scene of the accident, he saw an empty beer can on the passenger side. However, the officer who took photographs at the scene told Sergeant Dodds that while he could smell the odour of beer coming from Constable Cheung's vehicle, he was unable to locate a beer can inside that vehicle. The FIR contains photographs of the beer cans located under Constable Cheung's vehicle and in the bushes. I have no doubt that if there had been a beer can inside that vehicle, then it would have been photographed.

[37] At the first hearing, I had raised the question of what, if any, inference could be drawn from the beer spattered inside Constable Cheung's vehicle. In response to this, Constable Cheung swore an affidavit that I admitted into evidence and marked as an exhibit at the second hearing without objection from the Commissioner: *PA*, s. 141(4). The significant aspects of that affidavit are Constable Cheung's statements that: (i) he had been drinking from the can found in the bushes while driving; and (ii) he did not place the can found underneath his vehicle in that location and believes it fell from the vehicle when he got out.

[38] Constable Cheung also refers to a letter he wrote to the occupants of the mini-van on November 24, 2024, apologizing for his actions and taking full responsibility for them. His counsel delivered that letter to the Commissioner's office shortly after it was written, expecting it to be forwarded to the occupants of the mini-van. However, due to a misunderstanding, that letter was only recently forwarded.

Constable Cheung's Personal Circumstances

[39] Constable Cheung is in his mid-40s. His wife is a teacher. They have two young children. He currently earns \$570 per shift. Their monthly mortgage payment is several thousand dollars. He volunteers at school events and is involved in Little League Baseball.

[40] Constable Cheung has been a police officer since 2006. Since 2022 he has worked in the Property Crime-General Investigation Section, acting at times as a lead investigator. He has been awarded a number of VPD unit citations.

[41] Constable Cheung has no discipline record.

Analysis

Standard of Review

[42] By virtue of s. 141(9) of the *PA*, the correctness standard applies on this review: In addition to the quotation from *Gill* set out above, the following from

Arbitrator Threlfall's decision in *Gateley*, RR 22-01, OPCC File No. 2021-19733, is apposite:

(27) In completing my Review on the Record, I am required to consider all aggravating and mitigating circumstances to determine the just and appropriate disciplinary or corrective measures in relation to the misconduct of the Member.

(28) If I determine that one or more disciplinary or corrective measures are necessary, section 126(3) of the *Police Act* provides that an approach that seeks to correct and educate the Member concerned takes precedence, unless it is unworkable or would bring the administration of police discipline into disrepute.

(29) Further guidance is found in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 54:

[54] When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: [*Dunsmuir v. New Brunswick*, 2008 SCC 9] at para. 50. While it should take the administrative decision maker's reasoning into account—and indeed, it may find that reasoning persuasive and adopt it—the reviewing court is ultimately empowered to come to its own conclusions on the question.

(30) Accordingly, in a Review on the Record, the Adjudicator does not need to show deference to the Discipline Authority's reasoning process. While the Discipline Authority's reasoning should be taken into account, and may be adopted, the Adjudicator is empowered to independently analyze and reach conclusions on the matters under review. The Adjudicator's reasoning and conclusions will be substituted for those of the Discipline Authority where they differ.

[Emphasis added.]

Disciplinary Action

[43] Drinking and driving is a serious matter deserving of denunciation. The Supreme Court of Canada has said this about such conduct and the impact it has on society:

- *R. v. Bemshaw*, [1995] 1 S.C.R. 254 at para. 16:
Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country.

- *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para. 1, [2015] 3 S.C.R. 250;

The devastating consequences of impaired driving reverberate throughout Canadian society. Impaired driving renders roads unsafe, destroys lives, and imposes costs throughout the health care system.

More recently, in *R. v. McColman*, 2023 SCC 8, 423 C.C.C. (3d) 423, the Court referred to impaired driving as a "scourge": at para. 74.

[44] That there is a need to deter police officers from engaging in such conduct is evident. In this regard, the decision of the Ontario Civilian Police Commission in *van Straalen v. Ontario Provincial Police*, 2017 ONCPC 17, is pertinent. In that case, an off-duty first-class constable stopped in a roadside check-stop was given a breathalyzer demand that resulted in readings of 128 mg and 116 mg. She was convicted of driving with a blood alcohol content in excess of 80 mg, fined \$1,000, and prohibited from driving for one year. In subsequent discipline proceedings she was found to have engaged in discreditable conduct and demoted to second-class constable for 21 months. On her appeal from that demotion, the Commission began its analysis by stating:

9. The Commission acknowledges that there is no doubt that impaired driving is a serious offense that causes much harm to the community. The public interest is served by eliminating such conduct. Impaired driving is especially serious in the case of police officers who are sworn to uphold the law and whose duties may include upholding the very law that they have violated. As a result, police services are justified in disciplining officers who are convicted of criminal offenses such as this because the conviction may have a negative effect on the occupational requirements of the police service, the ability of the police officer to fulfil his or her duties and the reputation of the police service in general. The Commission accepts that alcohol-related driving offenses are serious and must be deterred. Nothing in this decision should be taken as minimizing the importance of such sanctions.

[Emphasis added.]

The last sentence relates to the fact that, in the end, the Commission reduced the demotion to 12 months.

[45] In the present case there is no longer a joint submission but, rather, two almost identical submissions with respect to what discreditable conduct I should find and what disciplinary action I should take. That there were two acts of discreditable conduct is clear. I agree with the parties that a two-day consecutive suspension without pay for throwing a beer can into the bushes is appropriate. While I accept that Constable Cheung acted in the heat of the moment, he did so in an effort to hide the fact he was drinking while driving. Any action by a police officer to hide evidence of their own involvement in illegal activity is deserving of disapprobation. As for the second beer can, I accept Constable Cheung's statement that he did not attempt to hide it under his vehicle.

[46] The critical question before me is what disciplinary action should be taken with respect to drinking and driving. In considering this question I am mindful of the fact Constable Cheung has accepted responsibility for his actions, is remorseful, has no prior discipline record, and the conduct in issue is unlikely to be repeated. I am also mindful of the fact that the loss of income resulting from a suspension will have an impact on him and his family.

[47] By virtue of s. 126(2)(g) of the *PA*, consideration must be given to "the range of disciplinary or corrective measures taken in similar circumstances". As evinced by the discipline decisions referred to by Superintendent Burmachuk and those provided to me by counsel, in British Columbia a suspension without pay is the usual disciplinary action taken when an off-duty officer drinks and drives. Accordingly, the suspensions imposed in other cases is an important consideration.

[48] I have reviewed the decisions referred to by Superintendent Burmachuk and those provided to me by counsel; the only common one being OPCC File No. 2015-10904, a decision of Arbitrator Pitfield. While some are the considered reasons given by arbitrators on reviews, for the most part they are merely short summaries of internal-discipline proceedings found on the Office of the Police Complaint Commissioner's website.

[49] In his reasons, Superintendent Burmachuk stated the decisions he reviewed involved "similar misconduct" to that of Constable Cheung and resulted in suspensions in the range of three to five days. While I agree with his assessment of the range reflected in those decisions, I do not agree they involved "similar misconduct" to that of Constable Cheung. Most involved an off-duty officer stopped individually or in a check-stop, whose ASD readings were "Fail" or "Warn". In some of the summaries, no readings are indicated.

[50] In OPCC File No. 2015-10904, the suspension was determined on a review. That case involved an off-duty officer whose ASD reading was "Fail" following a check-stop. In finding a four-day suspension appropriate, Arbitrator Pitfield said:

[18] In my opinion, verbal or written reprimands and minimal suspensions for operating a motor vehicle while off duty and under the influence of alcohol sufficient to result in a "Fail" reading on an ASD are woefully inadequate and the disciplinary authority rightly decided the sanction should be greater. In my opinion, given the serious consequences associated with drinking and driving, the important role played by police in reducing the incidence of drinking and driving, and the public expectation that police officers will respect the laws they themselves enforce, suspension should be the rule rather than the exception, the minimum should be not less than 3 days, and the maximum, in the range of 7 to 10 days. It follows that the 4-day suspension resulting from the prehearing conference in this instance was within what I would suggest is the reasonable range without regard for any aggravating circumstances.

[Emphasis added.]

[51] The parties submit the decisions they rely on indicate a range of three to ten days. The decisions at the lower end involve "Fail" ASD readings. The decision in which a ten-day suspension was imposed—*McLaughlin*, RR 16-03, OPCC File No. 2015-11200—involved a check-stop and a "Fail" ASD reading. Of significance, is that the officer had received a one-day suspension for similar conduct five months before the incident in issue.

[52] The facts in the present case are more egregious than those in which an off-duty officer is stopped and registers an ASD "Fail" or "Warn". Constable Cheung not only drove after drinking several beers, he continued to drink while

driving, was involved in an accident, and had a blood-alcohol level in excess of 80 mg. By continuing to drink, he heightened the risk he might cause death or serious injury that existed when he got behind the wheel. His actions were both reckless and dangerous. They demonstrate a lack of judgment not in keeping with the expectations of someone sworn to uphold the law. It is fortunate no one was seriously injured as a result of his lack of judgment.

[53] I consider general deterrence and public denunciation to be of paramount importance in this matter. For that reason, I have concluded a ten-day suspension without pay is warranted.

[54] What remains is the submission that a counselling requirement be imposed. At the hearing, I questioned whether such a requirement is necessary given the passage of time and the absence of any evidence of on-going alcohol-related issues. In response, the Commissioner submitted counselling would assist Constable Cheung in dealing with the stresses of his job and in continuing to moderate his use of alcohol. Constable Cheung agreed, stating he believes he would benefit from counselling. In light of these submissions, I will include a counselling requirement.

Conclusion

[55] The following disciplinary action is imposed on Constable Cheung:

- (a) driving with a blood alcohol level in excess of the legal limit: (i) a ten-day suspension without pay; and (ii) complete eight hours of stress management and / or substance misuse counselling by September 19, 2025; and
- (b) attempting to dispose of a beer can: an additional two-day suspension without pay.



S. David Frankel, K.C.