COURT OF APPEAL FILE NO. CA032676

**COURT OF APPEAL**

BETWEEN:

JULIE BERG

APPELLANT

AND:

POLICE COMPLAINT COMMISSIONER,
DIRK RYNEVELD, Q.C.

RESPONDENT

AND:

DAVID BRUCE-THOMAS

RESPONDENT

# FACTUM OF THE INTERVENOR, BC CIVIL LIBERTIES ASSOCIATION


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## CHRONOLOGY OF THE RELEVANT DATES IN THE LITIGATION

The B.C. Civil Liberties Association ("BCCLA") accepts, without relying upon, the relevant dates set out in the Appellant's Factum.

## OPENING STATEMENT

The BCCLA restricts its submissions to two questions that arise as a matter of the interpretation of the *Police Act,* R.S.B.C. 1996 c. 367. The first question concerns the participatory rights of complainants in a hearing called into the disciplinary action taken against a police officer. In particular, the BCCLA says that complainants are owed a duty of fairness, and that this duty includes an opportunity to present evidence and cross-examine witnesses, subject only to reasonable exception.

The second question is with respect to the appropriate standard of proof. The BCCLA says that, although higher standards are sometimes discussed at common law in disciplinary hearings, in the case of hearings under the *Police Act* both a plain reading of the statute, and important policy considerations, indicate that the appropriate standard of proof is the balance of probabilities.

Beyond these submissions, the BCCLA makes no argument with respect to the merits of the underlying complaint nor the final disposition of this Appeal.

## PART 1 - STATEMENT OF FACTS

The BCCLA takes no position with respect to the facts of the underlying Berg Complaint. Otherwise, the BCCLA accepts, but does not rely upon, the facts as set out in paragraphs 2 to 23 of the Appellant's Factum.

## PART 2 –ISSUES ON APPEAL

The BCCLA will confine itself to addressing two aspects of the issues on appeal:

> Should complainants have an opportunity to adduce evidence or cross-examine with respect to hearings under section 61 of the *Police Act?* and
>
> What is the appropriate standard of proof for establishing police misconduct in the complaint process set out in section 61(6) of the *Police Act*?

## PART 3 – ARGUMENT

### *I. Overview of Argument*

1. The BCCLA's argument on this Appeal is twofold. First, it says that complainants ought to have the opportunity to adduce evidence or cross-examine with respect to hearings under section 61 of the *Police Act.* Second, the BCCLA submits that the civil standard of proof in establishing police misconduct in the complaint process set out in section 61(6) of the *Police Act* must be interpreted and applied on a balance of probabilities.

### *II. The Participatory Rights of Parties Before the Adjudicator*

#### *(a) The Statutory Framework*

##### *(i) The Complaint Process*

2. Part 9 of the *Police Act* was enacted in response to the report of the Mr. Justice W. T. Oppal (as he then was), as a Commissioner of Inquiry into Policing in British Columbia. It describes a process that relies heavily upon the participation, indeed the stamina, of complainants for its efficacy.

3. Division 3 of Part 9 is headed "Processing of Complaints". Under it, a person may make a complaint against a municipal constable, a chief constable or deputy chief constable, and about a municipal police department. The Commissioner will then characterize the complaint as a public trust complaint, an internal discipline complaint, or a service or policy complaint.

4. Division 4, "Public Trust Complaints", applies to the case at bar. By s. 54, the discipline authority in the City of Vancouver, that is the chief constable, may summarily dismiss a public trust complaint. But if he does so, by subsection (4) a complainant may apply to the police complaint commissioner for a review of the decision. Otherwise, s. 54, ss. 54.1 and 54.2 and ss. 55, 55.1, 55.2, up to and including s. 59.1, govern the investigation by the police force of the complaint.

5. If, in accordance with s. 57.1, the chief constable determines that disciplinary measures are not warranted and so notifies the complainants, the complainant may press further:

> (3) A complainant who is aggrieved by the determination made by the discipline authority under subsection (1) (b) may file with the police complaint commissioner a written request for a public hearing in accordance with section 60(1)(b) and section 60(2) applies.

6. Then, under 60(3)(b), the commissioner must call a public hearing if

> b)…the police complaint commissioner determines that there are grounds to believe that a public hearing is necessary in the public interest.

7. If a public trust complaint comes to a hearing, then, it is generally through the persistence of the complainant. She must complain, and, if her complaint is summarily dismissed, must appeal; she must bring her evidence to the attention to investigators who are members of the force that may itself be the subject of the complaint[1]; if dissatisfied with the internal investigation, she must press for a public hearing. Unlike in a prosecution, which will proceed if the Crown believes (a) that there is a substantial likelihood of conviction and (b) prosecution would be in the public interest, the factors weighed in deciding whether to proceed with a hearing under the *Police Act* are focused on the complainant and complaint. Section 60 reads:

> (5) In deciding whether a public hearing is necessary in the public interest, the police complaint commissioner must consider all relevant factors including, without limitation, the following factors:
>
> (a) the seriousness of the complaint;
>
> (b) the seriousness of the harm alleged to have been suffered by the complainant;
>
> (c) whether there is a reasonable prospect that a public hearing would assist in ascertaining the truth;

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[1] It should be remembered that public trust complaints may include those against either particular officers, police department officials, or the department itself: s. 52.

(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 of the Code of Professional Conduct was incorrect;

(e) whether a hearing is necessary to preserve or restore public confidence in the complaint process or in the police.

*(ii) The Conduct of Hearings*

8. The *Police Act* sets out the procedures for the conduct of public trust complaint hearings, and the respective roles of commission counsel, complainant and respondent. Section 61(3) says that:

(3) For the purpose of a public hearing, commission counsel may

(a) call any witness who, in commission counsel's opinion, has relevant evidence to give, whether or not the witness was interviewed during the original investigation, and

(b) introduce into evidence any record, including, without limitation, any record of the proceedings concerning the complaint up to the date of the hearing;

9. This section is permissive, but is subject to the general requirement in 62(2) that commission counsel will “present to an adjudicator the case relative to the alleged discipline defaults”. The role of commission counsel is not directly analogous to a prosecutor or Crown counsel; if there is a truly adversarial quality to the proceedings, it is found in the role of those parties who are opposed in interest: the complainant and the respondent.

10. Under 61(4)(a), the respondent has a right to examine or cross examine witnesses. The *Act* is silent on whether the respondent may actually *call* witnesses or otherwise introduce evidence. The adjudicator at the hearing may also summon witnesses (Section 61(8)).

11. Section 61(4) continues:

> (b) the complainant and respondent may make oral or written submissions, or both, after all of the evidence is called, and
>
> (c) the complainant and respondent may be represented by private counsel or an agent who may act on behalf of the complainant or respondent, as the case may be, under paragraphs (a) and (b).

*(b) Public Policy Supports Fuller Complainant Participation*

12. The Intervenor Police Chiefs' Vice President Daniel Maluta says in his Affidavit before this Court (on the Application for Leave to Intervene), that "[t]he Complaint Process plays a vitally important role in encouraging and ensuring police officers perform their duties to the highest standards" and that it is of utmost importance that "allegations of misconduct against police officers must be investigated fully, fairly, and impartially."

Affidavit of Daniel Mulata, at paras. 11 and 13.

13. The BCCLA adopts this point of view, and notes further that the thoroughness of the process is fundamental to the legislative intent of the *Police Act*, as is the important role of complainants in pressing their complaints. Southin J.A. said in *Vancouver (City) Police Department v. British Columbia (Police Complaints Commissioner)*:

> The sections of Part 9 to which I have referred satisfy me that the Legislature intended that the Commissioner should have under s. 60 where there has been a complaint and the complainant continues to complain an overriding power to order a public hearing before an adjudicator so that the whole matter may receive a thorough airing. [emphasis added]

*Vancouver (City) Police Department v. British Columbia (Police Complaints Commissioner)*, 2001 BCCA 446, at para 38.

14. The *Police Act* is the main statutory device for regulating the conduct of police officers in a number of British Columbia communities. It is a complaint driven process; that is, the system depends for its efficacy on the willingness of individual citizens to be prepared to prosecute their complaints through a long, arduous process, in which many

aspects of the investigation may well be conducted by colleagues of the officer who is the subject of the complaint. The complainant must have some confidence that, at some stage of the process, she can present her evidence, and question the evidence against her complaint, before an impartial person.

15. Complaints may eventually end up before the adjudicator in one of two ways; either the respondent officer is dissatisfied with discipline meted out, or the complainant feels that the complaint was unfairly dealt with by the respondent officer's colleagues who were conducting the investigation and determining appropriate discipline. In the latter situation, the point of hearing will be to determine if there are facts that could, notwithstanding those uncovered so far in the police force's own investigation, lead the adjudicator to find in favour of the complainant.

16. The difficulty arises because commission counsel might not place all relevant material before the adjudicator, either through the particular selection of evidence or witnesses or through the questions asked. Counsel for Ms. Berg argues that such is the case at bar.

17. If such were the case, then the complainant before the adjudicator is in an invidious position, unique from other members of the public: it is her 'pleadings' that set the parameters for the complaint, and her efforts and importuning that has led to the hearing. She may, as an interested person, have a right to appeal of the adjudicator’s decision (as in the present case), but she has no control over the factual matrix upon which such an appeal is premised. This appears to be an interpretation difficult to justify on the basis of fairness, and even more so if the complaints process is going to be as effective a method of determining the truth of complaints as it should be.

18. If the Respondent Commissioner's anticipated arguments are accepted, the complainant’s unique interest – that is, in vindicating the merits of the complaint through a demonstration of the facts – risks losing its central place in the statutory regime and becoming peripheral to the process. A process that does not permit a complainant to demonstrate the facts of the underlying complaint can hardly be said to inspire public

confidence that, as the Police Chiefs say, “allegations of misconduct [are] investigated fully, fairly, and impartially.”

19. This is a concern both with respect to respondents and complainants, as each (without a liberal interpretation of the statute) is limited in their ability to present evidence of the facts underlying the case, if commission counsel declines to do so.

20. There is of course a competing concern that, if allowed full participatory rights, complainants will make the process inefficient and may act unreasonably. This is apparently of particular concern to the Police Chiefs, whose Vice President swears (at para. 12) that many of those with whom the police deal “are mentally or emotionally unstable” or “are hostile to the police”. However, the BCCLA submits that this concern over “giv[ing] complainants more control over the Complaint Process” (para. 17) is ameliorated by a number of factors:

- There is no reason to assume that a complainant will behave any more irresponsibly than a respondent in the calling or questioning of witnesses than might a respondent. In particular, there is no evidence that any of the past complainants in matters referred to adjudication have been either "unstable" or "hostile to the police", nor any reason to believe that they will be in the future;
- The concern that vexatious complainants will abuse their right of participation is also reduced by the fact that a public hearing at the request of a complainant can only occur where, under section 60(3)(b), “the police complaint commissioner determines that there are grounds to believe that a public hearing is necessary in the public interest”;
- Particularly when represented by counsel, as was Ms. Berg, a complainant may indeed have a greater interest than any other party in an expeditious process, a point made by Ms. Berg at para. 51 of her Factum; and
- If represented by counsel, professional responsibility will prevent any abuse of process. If the complainant is unrepresented, the adjudicator would have sufficient procedural control to ensure that the rights afforded complainants are not abused.

Affidavit of Daniel Mulata, at paras. 12 and 17.

Factum of Ms. Berg, at para. 51.

21. These factors might go so far as to support the idea that some ability to introduce evidence and examine or cross examine witnesses ought to be a matter of right. The BCCLA does not go so far. Rather, the Association says that the complainant should generally be permitted examination and cross examination of witnesses before the adjudicator (a right equivalent to that of the respondent under s. 61(4)(a)), and that both complainant *and* respondent should have the right to seek leave from the adjudicator to present evidence or summon witnesses that either believes have been overlooked by commission counsel. The BCCLA submits that such requests should be granted unless the adjudicator concludes that to do so will prejudice a fair hearing, that a party has no relevant evidence to adduce, or that it would otherwise be an abuse of process.

22. As pointed out by Ms. Berg at paras. 54-55 of her Factum, fuller participation by the complainant would be consistent both with other police complaints legislation (and in particular the *R.C.M.P. Act* R.S.C. 1985, c. R-9, s.45.45) and the recommendations of the Special Committee to Review the Police Complaint Process. Hearings under the *R.C.M.P. Act* appear to function perfectly well when complainants or their counsel have fuller participatory rights in the proceedings. The Special Committee quoted Oppal J. (as he then was) as follows:

> It's totally unfair that the people in Burnaby be subject to a complaint process which is different from the people in Vancouver. There's no rational reason for the distinction.

Factum of Ms. Berg, at paras. 54-55.

*R.C.M.P. Act,* R.S.C. 1985, c. R-9, s.45.45.

Special Committee to Review the Police Complaint Process,
Second Report; August 2002.

23. The BCCLA appreciates that there is a competing interest in making hearings cost-effective. However, in the Association's view, this consideration should weigh little, if at all, in the context of "public trust" police complaints. It is submitted that the full and

fair resolution of such complaints is so important to the rule of law that objections based on expediency or cost must necessarily be muted.

### *(c) The Duty of Fairness Requires Fuller Complainant Participation*

24. The BCCLA says that the *Police Act* should be interpreted broadly, liberally and purposefully to effect its central mission: the effective oversight of British Columbia's police forces, through a full and fair resolution of complaints. The Association submits that this requires, at the very least, the complainant ought to have a right to apply to adduce evidence and deal with witnesses, and that such should be granted unless the adjudicator concludes that the party has no relevant evidence to offer, or that to do so will prejudice a fair hearing, or otherwise be an abuse of process.

25. The tribunal reviewing a disciplinary decision under the *Police Act* owes a duty of fairness, not just to the respondent, but also to the complainant. The complainant's complaint is filed as of right under the *Police Act*. Once it is filed, she has a legal interest in the appropriate disposition of her complaint, and to the extent that this interest may be imperilled if a legitimate complaint is treated without due care and attention, the complainant's interest is at issue in the proceedings before the adjudicator.[2]

26. In a police complaints context, granting rights of procedural fairness to complainants, as well as respondents, is required also because the outcome of the case may have serious consequences for the reputation – and perhaps even the livelihood – of the complainant if, for instance, a contested arrest is proven to be justified on the basis of the complainant's illegal behaviour. Courts have held that a duty of fairness

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[2] The Supreme Court has recently reinforced the important status of complainants (as distinct from other members of the public) in professional disciplinary hearings, suggesting that a particular duty of care exists between the adjudicative body and complainants before it: *Finney v. Barreau du Quebec* [2004] 2 S.C.R. 17.

was triggered where serious allegations are involved, even if the proceeding itself does not otherwise affect the parties legal interests.

*Ontario (Human Rights Commission) v. House* (1993) 115 D.L.R. (4th) 279 (Ont. Div. Ct.).

27. The duty of fairness is also triggered because a hearing under the *Police Act* has the characteristics of a public inquiry. The authors of *Judicial Review of Administrative Action in Canada*, Brown and Evans, write that:

> Public inquiries go beyond mere investigation of possible wrongdoing. Rather, as both a practical and legal matter they are an end in themselves and are usually established to report on an incident or state of affairs that has caused widespread disquiet and to make recommendations for avoiding the recurrence of similar problems. As well, since an important reason for establishing such inquiries is to restore public confidence, they are usually conducted in public, following which the reports of their findings and recommendations are published.
>
> Accordingly, in each jurisdiction there is legislation which prescribes a relatively formal procedural framework within which many public inquiries are conducted. Commonly, these inquires are carried out by senior members of the judiciary. Moreover, since the conduct of the inquiry takes on a distinctly judicial form, including powers to subpoena witnesses and documents, and to conduct cross-examination, witnesses and other interested persons have the right to be represented by counsel because of the risk of reputational damage inherent in the public nature of the proceedings and reports.

Brown and Evans conclude by observing that the rights of natural justice supplement those procedural rules in the statute:

> [T]hese inquiries are subject to the duty of fairness, and procedural issues that are not specifically dealt with by the statutory code must be resolved within those parameters.

Donald J. M. Brown, Q.C. and The Honourable John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 2004), at pp. 7-61 to 7-63 [Brown and Evans].

28. The authors say these things in the context of inquiries under the *Inquiries Acts*. However, in the BCCLA's submission the "public hearing" described in the *Police Act*, governed by the procedural requirements of that *Act* as well as the *Inquiry Act*, has all

the hallmarks of a public inquiry invoked by Brown and Evans in the passage quoted (public hearing of an essentially judicial form, with public confidence at issue, and reputations at stake) as the basis for the duty.

29. The BCCLA argues that, notwithstanding that rights of fuller participation for complainants are not explicitly set out in the *Police Act*, they may nonetheless be required by the duty of fairness. Brown and Evans say:

> As a matter of statutory construction, nothing short of unequivocal statutory language or necessary implication will suffice to persuade the courts that the legislation authorizes non-compliance with the duty.
>
> Brown and Evans, *ibid*, at p. 7-71

30. The BCCLA is concerned that the Respondent Commissioner apparently takes a very limited view of the complainants' role under the *Police Act*, even going so far as arguing before this Court that it should be interpreted so as to deprive a first-person complainant of the right to launch an appeal such as that at bar. The Commissioner's argument was analogous to that made with respect to participatory rights in the evidentiary phase of the hearing: because the *Act* is silent on the complainant's right of appeal, she must therefore have none.

> Memorandum of Argument of Respondent Police Complaint Commissioner on Leave to Appeal application, paras. 12 and 13.

31. This hostile approach to fuller complainant participation is consistent with the Commissioner's position in the earlier case of *B.C. (Police Complaints Commissioner) v. Vancouver (City) Police Department*. There, the Commissioner sought to exclude complainants from full participation in a judicial review, and also sought the power to prevent a public hearing, once called, over the objection of the adjudicator himself, through unilateral cancellation of a notice of public hearing.

> *B.C. (Police Complaints Commissioner) v. Vancouver (City) Police Department* [2003] B.C.J. No. 399 (S.C.).

32. The BCCLA notes that this Court, through granting leave to Ms. Berg, has already rejected at least this one aspect of the Commissioner's view of complainants' roles under the *Act*, and it encourages this Court to carefully weigh the other aspects of the restrictive interpretation urged by the Commissioner.

### *(d)* *The Duty of Fairness Includes the Ability to Produce Evidence and Cross-Examine Witnesses*

33. What is the content of the duty of fairness when it comes to presenting evidence? Again, Brown and Evans put the common law position clearly:

> As a general rule, the duty of procedural fairness entitles a party to administrative proceedings of an adjudicative nature to present relevant evidence, either through calling witnesses or introducing documentary or other evidence. Correlatively, in adjudicative proceedings, each party is responsible for introducing such evidence as it believes best advances its case, although the decision-maker has some discretion as to what evidence will be heard. Thus an adjudicator may bar the calling of witnesses where he is of the view that the evidence in question is irrelevant or redundant, or he may limit the evidence to be led through a witness. Moreover, if not satisfied with the evidence adduced by the parties on a particular issue, a decision-maker with a power of subpoena may require further witnesses to be called, or have other evidence produced. However, where the exercise of that discretion breaches the duty of procedural fairness by prejudicing a party's right to present its case… the courts will intervene.
>
> Brown and Evans, *supra*, at pp. 10-48 to 10-49.

34. With respect to the cross-examination of witnesses, Estey J. wrote in *Innisfil (Township) v. Vespra (Township)* that:

> [C]ross examination is a vital element of the adversarial system applied and followed in our legal system, including, in many instances, before administrative tribunals since the earliest times… [W]here the rights of a citizen are involved and the statute affords him the right to a full hearing, one would expect to find the clearest statutory curtailment of the citizen's right to meet the case made against him by cross-examination, before it would be precluded.

Brown and Evans conclude:

> [A]lthough administrative agencies are often said to be masters of their own procedure, the duty of fairness will generally require that persons with a right to an oral hearing be afforded the right to cross-examine witnesses, and it has been held that such witnesses be under oath.
>
> *Innisfil (Township) v. Vespra (Township),* [1981] 2 S.C.R. 145 at p.166 [*Innisfil*].

Brown and Evans, *supra*, at pp. 10-79 to 10-80.

35. The BCCLA acknowledges that two decisions of the B.C. Supreme Court have held that complainants in *Police Act* hearings do not have the right to participate in the evidentiary phase of the hearings: *B.C. (Police Complaint Commissioner) v. Vancouver (City) Police Department* and *Berg v. Ryneveld*. To the extent that these decisions stand for that proposition, the BCCLA submits, with respect, that they are at odds with the principles set out by Estey J. in *Innisfil*, *supra*, and by Brown and Evans; namely that such rights exist unless they are ousted by statute.

*B.C. (Police Complaint Commissioner) v. Vancouver (City) Police Department*, *supra*, at para. 89.

*Berg v. Ryneveld* [2004] B.C.J. No. 2634 at paras 8-10.

36. The BCCLA expects that the Respondents will argue that, through statutory amendment in 2002, the right to participate more fully in the evidentiary portion of the hearing was repealed and replaced with the more limited rights set out in the present *Act*. In answer, the BCCLA re-emphasises that the rights of parties to adduce evidence and cross-examine is determined by the common law of the duty of fairness.

37. Had the Legislature in 2002 wished to go further than to remove its imprimatur from fuller and fairer complainant participation in the hearing, and to actually *forbid* it, it would have to do so explicitly as Estey J. described in *Innisfil, supra*. The fact that the Legislature did not do so is indicative, not of a desire to deprive such rights absolutely, but rather to allow the common law duty of fairness to govern and, subject to reasonable control exercised by the adjudicator, to delineate the appropriate degree of participation for complainants.

38. It is significant that, in the 2004 decision in *Berg v. Ryneveld* cited earlier, although the Court (in our submission erroneously) found that the *Police Act* actually precluded fuller participation by Ms. Berg in the hearing, it nevertheless found that curtailment of such participation was either unfair, or at least was perceived to be such:

> [11] Having said that, it is heartening to hear from Mr. Falzon, that apparently the Commissioner has recommended changes to the *Police Act* [to permit fuller participation by complainants]**.** Hopefully these changes will provide more rights for persons like Ms. Berg, to promote a fairer, or at least a perceived fairer, and more transparent public hearing process with respect to complaints made by citizens against police officers.
>
> *Berg* v. *Ryneveld*, *ibid*, at para. 11.

39. In the BCCLA's submission, absent an explicit statutory ouster of participatory rights, it is the very questions of fairness, as the term is understood at common law, that govern the question of complainants' participation. The Court in *Berg* did not consider the role of common law rules of fairness requiring participation in its interpretation of the statute, and assumed that no duty of fairness existed outside that explicitly provided by the *Police Act*. This was clearly a fundamental misapplication of administrative law principles.

40. The BCCLA makes no argument here with respect to whether the requirements of the duty of fairness were met by the adjudicator in the present case. However, the Association submits that such questions are determined in the administrative context as going to the jurisdiction of the adjudicator, are "questions of law" within the meaning of section 62(1) of the *Police Act*, do not fall within the exception set out in section 62(2), and are therefore properly reviewed on the basis of a standard of correctness.

## ***III. <u>The Appropriate Standard of Proof</u>***

41. The second issue addressed by the BCCLA is the appropriate standard of proof to be applied in cases reviewing discipline in public trust complaints. Ms. Berg urges that it should be a simple balance of probabilities; the Respondents and Police Chiefs are expected to say that a higher standard is appropriate. The *Police Act* says:

> 61(6) The adjudicator must decide whether each alleged discipline default respecting the complaint has been proved on the civil standard of proof and may do one or more of the following:
>
> (a) find that all, part or none of the alleged discipline default has been proved <u>on the civil standard of proof</u>… [emphasis added]

*Police Act*, s. 61(6).

42. Prior to the Oppal Commission Report, the standard of proof in police disciplinary hearings was the criminal standard. The Oppal Commission recommended "that… the province…adopt the civil standard of proof for public complaints and public trust disciplines…"

Hon. W.T. Oppal, *Closing the Gap: Policing and Community*, July 31, 1994, at p. 1-71 [*Oppal Commission Report*].

43. There was at the time no question what that meant. Justice Oppal wrote:

> Most submissions to the Inquiry favoured changing to the civil standard, <u>which is proof on a balance of probabilities</u>. [emphasis added]

*Oppal Commission Report*, at p. 1-70.

44. It is true there are cases that have found that before a person is found to have committed professional misconduct, a higher standard of proof, somewhere between a balance of probabilities and 'beyond a reasonable doubt'. Often the term "clear and cogent evidence" is invoked. The higher standard of proof is founded on the decision of the Privy Council in *Bhandari v. Advocates Committee*:

> ...in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities.

*Bhandari v. Advocates Committee*, [1956] 3 All E.R. 742 (P.C.) at 744-45.

45. The "clear and cogent" test has been described as proof by evidence cogent enough to make it safe to uphold the findings with all their consequences for the professionals person's career and status in the community: See for instance *Hirt v. College of Physicians and Surgeons* and *Hanson v. College of Teachers*.

*Hirt v. College of Physicians and Surgeons* (1985), 63 B.C.L.R. 185 (S.C.B.C.) aff'd 10 B.C.L.R. (2d) 314.

*Hanson v. College of Teachers* [1993] B.C.J. No. 2890.

46. In *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, while recognizing that the “clear and cogent evidence” standard was often used, the Supreme Court of Canada fell considerably short of accepting as a general proposition that it was appropriate in all professional discipline cases. At para. 11, McLachlin, C.J. said:

> The Committee had three tasks before it in dealing with the allegations levelled against Dr. Q: first, it had to make findings of fact, including assessments of credibility; second, it had to select the appropriate standard of proof; and, third, it had to apply the standard of proof to be facts as found to determine whether the alleged impropriety had been proven. The Committee applied the standard of "clear and cogent evidence", enunciated in *Jory v. College of Physicians and Surgeons of British Columbia*, [1985] B.C.J. No. 320, (QL) (S.C.) and all parties accepted that this was appropriate. This standard was not challenged in the courts below nor in this Court, and the case law demonstrates that it is routinely used in professional conduct inquiries in the Province of British Columbia. The determination of whether the allegations had been proven to this standard followed irresistibly from the Committee's assessment of the witnesses' evidence, leaving credibility as the main issue before the Committee.
>
> *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] S.C.J. No. 18, 2003 SCC 19.

47. Even if the “clear and cogent evidence” standard is applied in some cases, it does not justify any departure from the “balance of probabilities” test. It is an important distinction that, in the statutes regulating the medical and teaching professions, the Legislature has not explicitly provided for a civil standard of proof. For instance B.C.’s *Medical Practitioners Act* provides only:

> An inquiry committee must find the facts, find whether any charge complaint has been proved and report its finding to the council in writing.
>
> *Medical Practitioners Act* R.S.B.C. 1996 c. 285, s. 60(1).

48. The *Teaching Profession Act* is similarly silent on the question of standard of proof in discipline cases.

> *Teaching Profession Act* R.S.B.C. 1996 c. 449, s. 34.

49. Indeed, the *Police Act* is the only British Columbia statute that explicitly provides for a “civil standard of proof” in such proceedings.

50. Whether or not the professional discipline cases have given rise, at common law, to a higher standard of proof, there is no question that the "civil standard of proof" has been repeatedly confirmed to mean "the balance of probabilities". Lambert J.A., for this Court, held in *B.S. v. British Columbia (Director of Child, Family and Community Services)* that:

> I do not have any doubt that the burden of proof in child protection cases rests on the person who asserts the need for protection. Nor do I have any doubt that the standard of proof is the standard in civil cases, namely, the standard usually called "the balance of probability". Sometimes, in applying that standard, the seriousness of the allegation being made is thought to require a higher and more particularized measure of confidence on the part of the decision maker that the balance of probability test has been met. But the test remains the same. The weight of the evidence must show that it is more probable than not that the assertion being made is correct. [emphasis added]

*B.S. v. British Columbia (Director of Child, Family and Community Services)* (1998) 160 D.L.R. (4th) 264 at para. 26.

51. "Cogency of evidence" may be a factor in determining findings of fact, but it is a mistake to suggest that this imports a higher standard of proof. In *Continental Ins. Co. v. Dalton Cartage Co.* Laskin C.J.C. said:

> Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on the balance of probabilities."

In such cases, Laskin C.J.C. held, reference to "cogency of evidence" requires only that, where serious allegations are made, the trier of fact is entitled to scrutinize the evidence with greater care: *Continental Ins. Co*; see also Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* at p. 155-159.

*Continental Ins. Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 at 170.

Sopinka, Lederman & Bryant, *The Law of Evidence in Canada (2nd)* (Toronto: Carswell, 1999) at p. 155-159.

52. The civil standard was recently discussed in *in re H (Minors) (Sexual Abuse:Standard of Proof)*. Lord Nicholls of Birkenhead said:

> Where the matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. This is the established general principle. There are exceptions such as contempt of court applications, but I can see no reason for

> thinking that family proceedings are, or should be, an exception. By family proceedings I mean proceedings so described in the Act of 1989, sections 105 and 8(3). Despite their special features, family proceedings remain essentially a form of civil proceedings. Family proceedings often raise very serious issues, but so do other forms of civil proceedings.
>
> The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, <u>this does not mean that where a serious allegation is in issue the standard of proof required is higher</u>. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J. expressed this neatly in In re Dellow's Will Trusts (1964) 1 W.L.R. 451, 455: "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.
>
> *in re H (Minors) (Sexual Abuse:Standard of Proof)* [1996] A.C. 563 at 586

53. This passage represents a frank recognition that adjudicators of all types may bring their preconceived (and possibly biased) notions of ‘likelihood’ into the ‘balance of probabilities test’. In the BCCLA’s submission, this is all the more reason to reject any higher standard with respect to police complaints. We have seen in recent years some fantastically “unlikely” episodes of police misconduct found, upon full investigation or unequivocal videotape proof, to have occurred. One such example is the recent case where six Vancouver police officers were investigated after they arrested four individuals and took three of those individuals to Stanley Park, where they were then beaten by the officers. This case went to a public hearing, where the adjudicator confirmed the decision of the chief to dismiss two of the officers. This event illustrates

the point that allegations of police misconduct can be very difficult to prove, given that many citizens would be predisposed to view police conduct of this nature as unlikely, and the circumstances often dictate that there is a lack of independent evidence to prove the allegations. If a complainant were faced with the investigator's (and adjudicator's) preconceptions of 'likelihood', a requirement that the evidence be scrutinized with greater degree of care, *and* a higher standard of proof once the matter went to hearing, appropriate regulation of police conduct through the complaints process might become almost impossible to achieve.

54. It is well within the purview of the Legislature to designate the appropriate standard of proof. Moreover, the BCCLA says that, in the case of police complaints, there are compelling reasons to prefer the civil standard over any higher threshold.

55. The civil standard of proof is considered sufficient in all manner of cases where an adverse finding can result in severe sanctions against an employee, even including dismissal. It is true that some cases have advocated a different standard when professional qualifications are in jeopardy. But unlike the cases involving teachers, doctors and lawyers, the adjudicator of a public trust complaint hearing has no authority to withdraw a police officer's professional qualifications. Under section 61(6) of the *Police Act*, the adjudicator's ability is limited to imposing only those "disciplinary or corrective measures that may be imposed by a discipline authority", with "discipline authority" defined as the chief constable of the relevant force; i.e. the officer's employer. As such, the discipline, and even the dismissal, of a police officer does not legally preclude him from practicing his profession elsewhere in (or out of) the jurisdiction. In this sense the disciplinary powers of the adjudicator are analogous to those of an employer, not a professional regulatory body *per se*, even if the various employers subject to the *Police Act* are bound by the same rules of professional conduct.

56. This is not to say that a respondent officer's rights are – or should be – given short shrift in the process. Evidence of more serious allegations will, as the BCCLA has acknowledged, be more strictly scrutinized. It is also established law that, where an adjudicator could order, among other things, that a police officer be dismissed, a high

level of procedural fairness is required. This may well require that respondent officers in hearings under the *Police Act* be given broader participatory rights than those explicitly provided for, such as the right to call witnesses and present other relevant evidence in their defence. But the procedural rights of the respondent officer is unaffected by fuller participation by the complainant.

*Kane v. Board of Governors of the University of British Columbia,* [1980] 1 S.C.R. 1105

57. At least as important from the policy point of view, though, is the strong interest in ensuring public confidence in the police forces of the province. It would be an astonishing proposition that the public should be reassured by a finding that a respondent officer had (for instance) "probably" unjustifiably beaten a defenceless suspect to death, but that nevertheless no sanction is warranted. Yet that is the general position apparently being urged by Respondent Bruce-Thomas and the Intervenor Police Chiefs, each of whom urge a standard of proof higher than the balance of probabilities.

## PART 4 - NATURE OF ORDER SOUGHT

The BCCLA seeks no Order and takes no position on the appropriate order to be granted, if any.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Dated at Vancouver, British Columbia, January 13, 2006.

Craig E. Jones
Counsel for the Intervener
British Columbia Civil Liberties Association

Rebecca J. Smyth
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## APPENDIX

**Medical Practitioners Act**

*(i) Suspension or erasure from register and other disciplinary powers*

**60** (1) An inquiry committee must find the facts, find whether any charge or complaint has been proved and report its findings to the council in writing.

**Police Act**

**Part Nine, Division 3 — Processing of Complaints**

*(ii) Submission of complaints*

**52** (1) A person may make a complaint under this Part

(a) against a municipal constable,

(b) against a chief constable or deputy chief constable, and

(c) about a municipal police department.

(2) The person may submit the complaint referred to in subsection (1) to any of the following:

(a) the police complaint commissioner;

(b) the discipline authority;

(c) the senior constable of the municipal police department with which the respondent, if any, is employed or about which the complaint is made, who is on duty at the time that the complaint is submitted.

(3) If a complaint is submitted to a person referred to in subsection (2) (b) or (c), the person receiving the complaint must

(a) provide the person submitting the complaint with any assistance that person requires in submitting the complaint,

(b) advise the person submitting the complaint that the complaint may also be submitted to the police complaint commissioner, and

(c) provide any other information or advice to the person submitting the complaint that may be required under the guidelines prepared by the police complaint commissioner under section 50 (3) (d).

(4) A complaint under this Part may initially be submitted orally or in writing but, before the complaint may be processed under Division 4 or 5, the complaint must be committed to writing in the prescribed form and that record of complaint must be lodged with one or more of the persons referred to in subsection (2) of this section.

(5) A person who receives a complaint under subsection (2) must, as required, assist the person submitting the complaint in completing a record of complaint.

(6) Despite section 65.1 and subsection (4) of this section, whether or not a complaint is submitted in writing and whether or not the complaint is made in confidence under section 65.1,

(a) the police complaint commissioner may inform Crown counsel of any allegation in the complaint that could constitute a criminal offence,

(b) a municipal or provincial constable may investigate any allegation in a complaint that a criminal offence was or may have been committed, and

(c) Crown counsel may proceed with criminal charges against the respondent.

(7) If a record of complaint is lodged with the police complaint commissioner or with the senior constable referred to in subsection (2) (c), that person must promptly after receipt provide a copy of that record,

(a) if the complaint appears to be or to include a conduct complaint against a chief constable, to the board by which that chief constable is employed, or

(b) in any other case, to the chief constable of the municipal police department about which the complaint is made or with which the respondent is employed.

(8) If a record of complaint is lodged with a municipal police department, the chief constable for that department must send a copy of that record to the police complaint commissioner within 10 business days after the complaint is lodged.

**Part Nine - Division Four**

Division 4 — Public Trust Complaints

*(iii) Definitions*

**53** In this Division:

**"complainant"** does not include a third party complainant;

**"third party complainant"** means a person who has lodged a public trust complaint but who is not personally adversely affected by the conduct complained of.

*(iv) Application of this Division to third party complainants*

**53.1** (1) Unless expressly provided to the contrary, this Division does not apply to third party complainants.

(2) Without limiting subsection (1), a third party complainant has none of the rights available to complainants under this Division except that if the public trust complaint lodged by the third party complainant results in discipline proceedings or criminal charges, the discipline authority must inform the third party complainant of the results.

*(v) Summary dismissal of public trust complaints*

**54** (1) A discipline authority may summarily dismiss a public trust complaint, whether or not the complainant or third party complainant has filed a notice of withdrawal under section 52.2, if the discipline authority is satisfied that

(a) the complaint is frivolous or vexatious,

(b) there is no reasonable likelihood that further investigation would produce evidence of a public trust default, or

(c) the complaint concerns an act or omission that, to the knowledge of the complainant or third party complainant, occurred more than 12 months before the complaint was made.

(2) Subject to this section, a public trust complaint that has been summarily dismissed under subsection (1) must not be investigated or further investigated under this Division, but nothing in this subsection prevents further action being taken in relation to any internal discipline component or service or policy component of the complaint.

(3) If a discipline authority decides to summarily dismiss a public trust complaint, the discipline authority must, within 10 business days after making that decision, provide to the complainant, the respondent and the police complaint commissioner written notice of the discipline authority's decision, the reasons for it and the recourse that is available to the complainant under this Part.

(4) A complainant may apply to the police complaint commissioner for a review of the decision of a discipline authority to summarily dismiss his or her complaint under this section.

(5) An application for a review under subsection (4) must be filed with the police complaint commissioner within 30 days after the date of the notice provided under subsection (3).

(6) Whether or not an application for a review is filed with the police complaint commissioner in relation to a public trust complaint that is summarily dismissed under this section, the police complaint commissioner must, within 30 days after the date of the notice provided under subsection (3),

(a) examine the discipline authority's decision and the reasons for the summary dismissal, and either

(i) confirm the discipline authority's decision, or

(ii) if the police complaint commissioner concludes that it is in the public interest to investigate the complaint, order the discipline authority to conduct an investigation into the complaint, and

(b) notify in writing the discipline authority, the complainant and the respondent of the outcome of the police complaint commissioner's examination under paragraph (a).

(7) The decision of a discipline authority to summarily dismiss a public trust complaint is final and the complaint is deemed to have been dismissed unless

(a) an application for review is received by the police complaint commissioner under subsection (5), or

(b) the police complaint commissioner makes an order under subsection (6) (a) (ii).

(8) Whether or not, within the time required by this section, an application for review is received under subsection (5) or an order is made under subsection (6) (a) (ii), the police complaint commissioner may at any time order a discipline authority to investigate a public trust complaint that has been summarily dismissed if new information is received that, in the opinion of the police complaint commissioner, requires an investigation.

(9) On receiving new information and ordering a discipline authority to investigate a public trust complaint under subsection (8), the police complaint commissioner must notify in writing the discipline authority, the complainant and the respondent of the nature of the new information and the reasons for ordering the investigation.

(10) The discipline authority to whom an order under subsection (6) (a) (ii) or (8) is directed must conduct the investigation ordered.

### *(vi) Informal resolution*

**54.1** (1) Unless the complaint is summarily dismissed under section 54, the discipline authority must, promptly after receiving a public trust complaint, and may, at any later time, determine whether an informal resolution of the complaint is appropriate.

(2) If an informal resolution is determined to be inappropriate, the discipline authority must proceed with an investigation of the complaint under section 55 or 55.1.

(3) Subject to subsection (4), if an informal resolution is determined to be appropriate, the discipline authority must seek the consent of the complainant and the respondent to informal resolution.

(4) The discipline authority must not proceed with an informal resolution of a complaint referred to in subsection (1) unless the complainant and the respondent consent to that procedure.

(5) The discipline authority may, for the purposes of informally resolving a complaint under this section, do one or both of the following:

(a) use any one or more means of alternate dispute resolution;

(b) enlist the assistance of a neutral and independent person as mediator.

(6) Informal resolution must be pursued in accordance with any guidelines respecting informal resolution that are established by the police complaint commissioner.

(7) Complainants have the right to seek advice before and during an attempt to informally resolve a complaint under this section and the discipline authority must inform the complainant of that right at the time that the complainant's consent to the process is being sought.

(8) The police complaint commissioner must make available a list of support groups and neutral dispute resolution service providers and agencies that may assist complainants with the informal resolution process under this section, and the person with whom a public trust complaint is lodged must provide that list to the complainant when the complaint is lodged.

(9) In the informal resolution process, a complainant may enlist the assistance of a support person of the complainant's choice or may ask the police complaint commissioner to appoint a support person for the complainant.

(10) A support person, enlisted or appointed under subsection (9), may

(a) be present at any interview about the complaint and at any mediation or informal resolution session, and

(b) participate at any of those sessions with the consent of the respondent.

(11) The complainant or respondent may ask the police complaint commissioner to appoint a mediator, if one has not already been enlisted under subsection (5) (b), and the police complaint commissioner may appoint a mediator if the police complaint commissioner considers it appropriate.

(12) No oral or written statement made or given by any person in the course of an attempt to resolve the complaint informally may be used or received as evidence in any civil, criminal or administrative proceeding, including, without limitation, a public hearing.

(13) Without limiting subsection (12), an apology by the complainant or respondent must not be admitted into evidence or construed as an admission of fault at any subsequent civil, criminal or administrative proceeding or in any subsequent proceeding under this Act.

(14) Whether or not a complaint is resolved informally under this section, the discipline authority must notify the complainant, the respondent and the police complaint commissioner of the results of any attempt at informal resolution.

### *(vii) Reaching resolution through informal resolution process*

**54.2** (1) Subject to subsection (3), a complaint is resolved when the complainant and the respondent

(a) sign a letter consenting to the resolution of the complaint in the manner set out in the letter, and

(b) provide that letter to the discipline authority, with a copy to the police complaint commissioner.

(2) Within 10 business days after signing the letter referred to in subsection (1), a signatory to that letter may, by written notice of revocation to the discipline authority or the police complaint commissioner, revoke the signatory's consent to the informal resolution.

(3) If a consent to an informal resolution is revoked under subsection (2),

(a) the resolution is of no effect, and

(b) the recipient of the notice of revocation must, within 10 business days after receiving the notice, provide notice of the revocation to those of the police complaint commissioner, the discipline authority, the complainant and the respondent who are not aware of that revocation.

(4) Unless the complainant or the respondent revokes consent under subsection (2), the informal resolution set out in the letter signed under subsection (1) is final and binding on them after the expiration of the period referred to in subsection (2).

(5) No disciplinary action may be taken against a respondent as a result of an informal resolution of a complaint until the informal resolution has become binding under subsection (4).

(6) A complainant's complaint that is resolved by informal resolution must not be entered in a respondent's service record of discipline, but may be entered in a respondent's personnel file.

(7) A record respecting an informal resolution that is entered in an officer's personnel file may only be opened

(a) for the purposes of deciding whether a subsequent attempt at informal resolution is appropriate, or

(b) for personnel matters unrelated to discipline.

### *(viii) Investigation of public trust complaints*

**55** (1) Subject to sections 54 and 55.1, if a record of complaint in respect of a public trust complaint is lodged under this Part, the discipline authority must promptly initiate an investigation into the complaint if

(a) informal resolution of the complaint is not attempted or is unsuccessful, or

(b) the discipline authority is ordered to conduct an investigation by the police complaint commissioner.

(2) If an investigation is not initiated within 45 days after the record of complaint is lodged, the discipline authority must notify the police complaint commissioner of the reasons for the delay.

(3) Despite any other provision of this Act, the police complaint commissioner may order an investigation into the conduct of a municipal constable, chief constable or deputy chief constable, whether or not a record of complaint has been lodged.

### *(ix) External investigation of public trust complaints*

**55.1** (1) The discipline authority must refer an investigation into a public trust complaint to another municipal police department or to the commissioner if

(a) the discipline authority considers an external investigation is necessary in order to preserve public confidence in the complaint process, or

(b) the police complaint commissioner so orders.

(2) On application by a complainant or a respondent or on the police complaint commissioner's own motion, the police complaint commissioner may make an order under subsection (1) (b) if the police complaint commissioner considers that an external investigation is necessary in the public interest.

### *(x) Investigating officer*

**55.2** (1) Subject to subsection (2), a person employed by the police force or police department that is to conduct an investigation into a public trust complaint may be appointed as investigating officer by

(a) the chief constable of that police force or police department, or

(b) if the investigation is conducted by the provincial police force, the commissioner.

(2) A person must not be appointed as investigating officer under subsection (1) if

(a) the person's rank is not equal to or higher than the rank of the respondent, or

(b) the person has a connection with the complaint.

(3) If the discipline authority requests a report referred to in section 56, the investigating officer appointed to conduct the investigation must promptly provide the discipline authority with any information necessary for the discipline authority to comply with section 56 (1) and (5).

### *(xi) Reports during investigations and extensions of investigations*

**56** (1) Unless subsection (2) applies, the discipline authority must report to the complainant, the respondent and the police complaint commissioner on the progress of an investigation conducted under section 55 or 55.1 by providing to them

(a) an initial report within 45 days after the initiation of the investigation, and

(b) follow-up reports for so long as the investigation continues and at least once every 30 days after the date of the initial report.

(2) Subject to subsection (4), a report must not be sent to the complainant or respondent under subsection (1) if the discipline authority considers that sending the report to that person would hinder the investigation.

(3) If the discipline authority withholds a report under subsection (2), the discipline authority must advise the police complaint commissioner of the withholding and provide reasons for it.

(4) The police complaint commissioner may order the discipline authority to provide a report under subsection (1) to a person referred to in subsection (2) and the discipline authority must, within 10 business days after becoming aware of that order, provide the required report to the person.

(5) In addition to the reports provided under subsection (1), the police complaint commissioner may at any time request a progress report on an investigation and the discipline authority must provide that report to the police complaint commissioner within 10 business days after receiving that request.

(6) Within 10 business days after the conclusion of an investigation, the investigating officer must complete a report of the investigation, including in it his or her findings, conclusions, recommendations and any prescribed matters, and must

(a) provide that final investigation report and any other prescribed records to the discipline authority, and

(b) if the investigation was conducted under section 55.1 or 56.1 (3), provide a copy of that final investigation report and any other prescribed records to the police complaint commissioner.

(7) An investigation into a public trust complaint must be completed within 6 months after the date that the record of complaint is lodged under section 52 (4), unless the police complaint commissioner grants one or more extensions.

(8) For the purpose of subsection (7), an investigation is completed when the discipline authority has reviewed the final investigation report referred to in subsection (6) and has determined what course of action to follow.

(9) The police complaint commissioner may grant an extension under subsection (7) only if

(a) new investigative leads are discovered that could not have been revealed with reasonable care,

(b) the case or investigation is unusually complex, or

(c) the police complaint commissioner considers that an extension is in the public interest.

### *(xii) Role of police complaint commissioner in investigation*

**56.1** (1) The police complaint commissioner may appoint an employee under section 51 as an observer to an investigation under subsection (3) of this section, section 55 or 55.1 if, in the police complaint commissioner's judgment, the appointment is necessary in the public interest.

(2) The person appointed under subsection (1) must prepare for the police complaint commissioner an independent report on the investigation.

(3) The police complaint commissioner may, at any time, order a new investigation or an investigation by another municipal police department or the provincial police force if the police complaint commissioner concludes that the original investigation was inadequate or unreasonably delayed.

### *(xiii) Reassignment or suspension pending an investigation and hearing*

**56.2** (1) If a municipal constable, chief constable or deputy chief constable is being investigated as a result of an allegation that that person committed an offence under a federal or provincial enactment or as a result of a complaint against that person under this Act, the discipline authority for that person may, until the completion of that investigation, reassign or suspend the person with his or her pay, if

(a) the discipline authority considers that

(i) reassignment or suspension of the person is needed to protect municipal constables or other persons from the risk of harm,

(ii) failure to reassign or suspend the person is likely to bring the reputation of the municipal police department as a whole into disrepute, or

(iii) there are grounds to believe that the person is incapable of carrying out his or her regular duties as a constable, and

(b) the discipline authority considers that there is no reasonable alternative available.

(2) During a period of suspension from duty, a municipal constable, chief constable or deputy chief constable must not exercise powers as a municipal constable, chief constable or deputy chief constable and must not wear or use the uniform or equipment of the municipal police department.

(3) At the earliest opportunity, and in any event within 10 business days after the suspension, the discipline authority must decide whether the suspension is to continue in effect or is to be rescinded with or without conditions.

(4) Unless subsection (5) applies, a municipal constable, chief constable or deputy chief constable under suspension for a period within which that person, if not suspended, would have worked one or more days

(a) must receive his or her pay and allowances for the number of days, up to 30, that he or she could have worked during the period of suspension had the suspension not been imposed, and

(b) may, at the discretion of the board, receive his or her pay for any day that he or she could have worked during the period of suspension, after the 30 days referred to in paragraph (a), had the suspension not been imposed.

(5) The board may, at any time, discontinue the pay and allowances of a municipal constable, chief constable or deputy chief constable who is under suspension if the allegation in response to which the suspension was imposed would, if proved, constitute a criminal offence.

(6) Written notice of a decision by the board to discontinue the pay and allowances of a municipal constable, chief constable or deputy chief constable must be given promptly to the municipal constable, chief constable or deputy chief constable, as the case may be, and that person may, within 10 business days after receipt, request a hearing before the board.

(7) Within 30 days after receiving a request under subsection (6), the board must hold a hearing to review the decision to discontinue pay and allowances.

(8) The person who requests a hearing under subsection (6) may appear at the hearing personally or by counsel or agent.

(9) A municipal constable, chief constable or deputy chief constable must receive his or her full pay and allowances for any unpaid period of suspension if

(a) the suspension related to an investigation resulting from an allegation that he or she committed an offence under a federal or provincial enactment,

(b) he or she is acquitted of all charges in proceedings before a criminal court or the charges are withdrawn, stayed or otherwise not proceeded with, and

(c) no disciplinary or corrective measures are imposed on him or her for the acts or omissions that constituted the alleged offence.

### *(xiv) Disclosure of documents*

**57** (1) Within 10 business days after receiving the final investigation report, the discipline authority must provide to the complainant and to the respondent a summary of that report, including

(a) a concise factual account of any incident that brought about the complaint,

(b) a brief account of the investigative steps taken, and

(c) a brief account of the findings, conclusions and recommendations contained in that report,

and the discipline authority may sever from the summary provided any portions of the report that may be excepted from disclosure under the *Freedom of Information and Protection of Privacy Act.*

(2) The discipline authority must promptly after receipt provide the police complaint commissioner with a complete unedited copy of the final investigation report and, subject to subsection (3), provide the police complaint commissioner with any other record that

(a) concerns the complaint and the complainant or the third party complainant, as the case may be, and

(b) is in the custody or control of its municipal police department or, as the case may be, in the custody and control of its municipal police department and of the investigating officer's police force or police department,

including, without limitation,

(c) all related records,

(d) all reasons for imposing or not imposing disciplinary or corrective measures in relation to the complaint,

(e) all written policies or procedures that may have been a factor in the act or omission that gave rise to the complaint, and

(f) the respondent's service record of discipline.

(3) By agreement between a discipline authority and the police complaint commissioner, the requirement imposed on the discipline authority to provide the police complaint commissioner with a record referred to in subsection (2) may be satisfied if unlimited access to, inspection and production of the record is granted by the discipline authority to the satisfaction of the police complaint commissioner.

(4) Within 10 business days after receiving the summary of the final investigation report referred to in subsection (1), the complainant or respondent may apply to the police complaint commissioner for disclosure of all or part of the information that was severed from the copy of the report.

(5) The police complaint commissioner may disclose information requested under subsection (4) if the police complaint commissioner considers that

(a) disclosure is necessary for the applicant to pursue rights granted by this Act, and

(b) disclosure is appropriate having regard to the factors set out in Part 2 of the *Freedom of Information and Protection of Privacy Act.*

### *(xv) Notice to respondent and complainant*

**57.1** (1) Within 10 business days after receiving a final investigation report, the discipline authority must determine if the evidence contained in that report is sufficient to warrant the imposition of disciplinary or corrective measures and must,

(a) if it is determined that disciplinary or corrective measures are warranted, serve notice to that effect on the respondent and send a copy of that notice by registered mail to the complainant, or

(b) if it is determined that disciplinary or corrective measures are not warranted, send notice to that effect by registered mail to the respondent and the complainant, and subsection (4) applies.

(2) A notice provided under subsection (1) (a) must set out

(a) the nature of the complaint in sufficient factual detail to identify the incident,

(b) the alleged discipline defaults, identifying those sections of the Code of Professional Conduct alleged to be breached,

(c) whether the complaint was dealt with as a public trust complaint or as an internal discipline complaint,

(d) whether a prehearing conference will be offered, and

(e) a description of the response proposed by the discipline authority to each alleged discipline default.

(3) A complainant who is aggrieved by the determination made by the discipline authority under subsection (1) (b) may file with the police complaint commissioner a written request for a public hearing in accordance with section 60 (1) (b) and section 60 (2) applies.

(4) Unless the police complaint commissioner arranges a public hearing, a determination made under subsection (1) (b) is final and conclusive and is not open to question or review by a court on any ground.

### *(xvi) Prehearing conferences*

**58** (1) If the discipline authority considers that the evidence contained in a final investigation report is sufficient to justify the imposition of disciplinary or corrective measures against a respondent and the discipline authority has complied with section 57.1 (1) and (2), the discipline authority may offer the respondent a confidential, without prejudice, prehearing conference to determine whether the respondent is willing to admit a public trust default and, if so, what disciplinary or corrective measures the respondent is willing to accept.

(2) A prehearing conference must not be offered if the discipline authority concludes that

(a) the complaint against the respondent is sufficiently serious to warrant dismissal or reduction in rank, or

(b) a prehearing conference would be contrary to the public interest.

(3) If a respondent accepts an offer for a prehearing conference under subsection (1), the respondent may be accompanied at the prehearing conference by one or both of the following:

(a) an agent;

(b) the respondent's counsel.

(4) A discipline authority must use the principles and guidelines set out in the Code of Professional Conduct in proposing and approving any disciplinary or corrective measures under this section.

(5) If disciplinary or corrective measures are accepted by a respondent and approved by the discipline authority at a prehearing conference in relation to any alleged discipline default respecting the complaint lodged, the discipline authority must,

(a) within 10 business days after the prehearing conference, serve on the complainant, or send to the complainant by registered mail, and provide the police complaint commissioner with, a report that sets out

(i) for each alleged discipline default,

(A) any disciplinary or corrective measure accepted and approved, and

(B) any policy change being considered by the discipline authority in respect of the matter,

(ii) the reasons for the proposed measures or policy changes,

(iii) any noted aggravating and mitigating factors in the case, subject to severing those portions of the disposition record that may be excepted from disclosure under the *Freedom of Information and Protection of Privacy Act,* and

(iv) the recourse available to the complainant under this section, and

(b) if the resolution is final and conclusive under subsection (7), record on the respondent's service record of discipline the respondent's admission, any disciplinary or corrective measure approved and the fact that the measure was voluntarily accepted by the respondent.

(6) A complainant who is aggrieved by the resolution of a public trust complaint under this section may file with the police complaint commissioner a written request for a public hearing in accordance with section 60 (1) (c) and section 60 (2) applies.

(7) Disciplinary or corrective measures accepted by a respondent and approved by the discipline authority at a prehearing conference constitute a resolution of the matter and, unless a public hearing in respect of the complaint is arranged by the police complaint commissioner, the resolution is final and conclusive and is not open to question or review by a court on any ground.

### *(xvii) Convening discipline proceedings*

**58.1** (1) Subject to subsection (2), if it is determined under section 57.1 (1) (a) that imposition of disciplinary or corrective measures against a respondent is warranted and a prehearing conference is not offered or held under section 58 or, if held, does not result in a resolution of all alleged discipline defaults respecting the complaint, the discipline authority must

(a) convene and preside at a discipline proceeding,

(b) provide to the complainant at least 15 business days' notice of the discipline proceeding, and

(c) serve the respondent with at least 15 business days' notice, in the prescribed form, of the discipline proceeding.

(2) If at any time a public hearing is arranged by the police complaint commissioner in respect of a matter that is the subject of a discipline proceeding under subsection (1), the discipline authority must cancel the discipline proceeding.

(3) At any time before a discipline proceeding is held under this section, the complainant may make written or oral submissions to the discipline authority respecting the complaint, the adequacy of the investigation and the range of disciplinary or corrective measures that should be considered.

(4) The following persons may attend a discipline proceeding under this section:

(a) the police complaint commissioner or the police complaint commissioner's delegate;

(b) the respondent's agent or counsel, or both.

(5) The following persons must attend a discipline proceeding under this section:

(a) the respondent;

(b) the discipline authority;

(c) the investigating officer.

### *(xviii) Conduct of discipline proceedings*

**59** (1) Each alleged discipline default respecting the complaint, other than those resolved at a prehearing conference held in respect of the matter under section 58, must be read to the respondent at a discipline proceeding, and the respondent must be asked to admit or deny the alleged discipline default.

(2) No witnesses, other than the investigating officer who prepared the final investigation report, may be called at a discipline proceeding and the only records that may be presented are the final investigation report, any separate reports prepared respecting the investigation and any other relevant written records, from which reports and records may be severed any portions that may be excepted from disclosure under the *Freedom of Information and Protection of Privacy Act.*

(3) The respondent is not compellable at a discipline proceeding under this section, but the respondent, or his or her agent or counsel, if any, may

(a) ask questions of the investigating officer who prepared the final investigation report, and

(b) make submissions concerning the complaint, the adequacy of the investigation and the range of disciplinary or corrective measures that should be considered.

(4) A discipline proceeding must be electronically recorded.

(5) At the conclusion of a discipline proceeding under this section, the discipline authority must

(a) in relation to each alleged discipline default under subsection (1), make a finding as to whether the discipline default has been proved on the civil standard of proof,

(b) record those findings in the prescribed form, and

(c) invite and hear submissions from the respondent, or his or her agent or counsel, as to appropriate disciplinary or corrective measures for each discipline default found to be proven under paragraph (a).

(6) Within 10 business days after hearing submissions from the respondent, or his or her agent or counsel, at the conclusion of a discipline proceeding under subsection (5), the discipline authority must

(a) propose disciplinary or corrective measures for each discipline default found to be proven under subsection (5) (a),

(b) record those proposed measures and the date in a disposition record in the prescribed form,

(c) include in the disposition record any aggravating or mitigating factors in the case, and

(d) serve a copy of the disposition record on the respondent.

### *(xix) Review of discipline proceedings*

**59.1** (1) Within 10 business days after the date of the disposition record referred to in section 59 (6), the discipline authority must

(a) serve on the complainant or send to the complainant by registered mail a report setting out

(i) the findings of the discipline authority under section 59 (5) (a),

(ii) any disciplinary or corrective measures proposed by the discipline authority under section 59 (6) (a) and any policy changes being considered by the discipline authority in respect of the complaint,

(iii) the reasons for the proposed measures or policy changes,

(iv) any noted aggravating and mitigating factors in the case, subject to severing those portions of the disposition record that may be excepted from disclosure under the *Freedom of Information and Protection of Privacy Act,* and

(v) the recourse available to the complainant under this section, and

(b) provide the police complaint commissioner with the entire unedited record of the proceedings, an unedited copy of the disposition record and a copy of the report sent to the complainant under paragraph (a).

(2) After receiving the records and report referred to in subsection (1) (b), the police complaint commissioner may

(a) order that the discipline authority provide to the police complaint commissioner further reasons justifying the particular disciplinary or corrective measures imposed, and

(b) provide those further reasons to the complainant and the respondent.

(3) A respondent or complainant who is aggrieved by the disposition of a public trust complaint proposed by a discipline authority in a disposition record may file with the police complaint commissioner a written request for a public hearing in accordance with section 60 (1) (a) or (d), as the case may be, and section 60 (2) applies.

(4) Unless a public hearing is arranged by the police complaint commissioner,

(a) the complainant and respondent referred to in this section are deemed to have accepted the proposed disposition,

(b) any disciplinary or corrective measures proposed under section 59 (6) (a) are final and binding, and

(c) the proposed disposition is final and conclusive and is not open to question or review by a court on any ground.

*(xx) Request for a public hearing*

**60** (1) A written request for a public hearing must be received by the police complaint commissioner,

(a) in the case of a respondent, within 30 days after receiving the disposition record under section 59 (6),

(b) in the case of a complainant seeking a public hearing under section 57.1 (3), within 30 days after the later of

(i) the date on which the complainant received the notice under section 57.1 (1), and

(ii) the date on which the complainant receives the information disclosed by the police complaint commissioner under section 57 (5) or receives the decision of the police complaint commissioner that no further information will be disclosed,

(c) in the case of a complainant seeking a public hearing under section 58 (6), within 30 days after receiving the report provided under section 58 (5) (a), or

(d) in the case of a complainant seeking a public hearing under section 59.1 (3), within 30 days after receiving the report provided under section 59.1 (1) (a).

(2) Despite subsection (1), the police complaint commissioner may extend the period within which a public hearing may be requested if the police complaint commissioner considers that there are reasonable grounds for the delay in making the request.

(3) Promptly after receiving a request for a public hearing within the time limited by subsection (1) or (2), the police complaint commissioner must arrange a public hearing under section 60.1 if

(a) the request for a public hearing is made by a respondent and a disciplinary or corrective measure more severe than a verbal reprimand has been proposed for that respondent, or

(b) in any other case, the police complaint commissioner determines that there are grounds to believe that a public hearing is necessary in the public interest.

(4) The police complaint commissioner may arrange a public hearing without a request from either a complainant or respondent if the police complaint commissioner considers that there are grounds to believe that the public hearing is necessary in the public interest.

(5) In deciding whether a public hearing is necessary in the public interest, the police complaint commissioner must consider all relevant factors including, without limitation, the following factors:

(a) the seriousness of the complaint;

(b) the seriousness of the harm alleged to have been suffered by the complainant;

(c) whether there is a reasonable prospect that a public hearing would assist in ascertaining the truth;

(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 of the Code of Professional Conduct was incorrect;

(e) whether a hearing is necessary to preserve or restore public confidence in the complaint process or in the police.

(6) Within 10 business days after making a decision to arrange or to refuse to arrange a public hearing under this section, the police complaint commissioner must notify the discipline authority, complainant and respondent of that decision.

*(xxi) Ordering public hearings*

**60.1** (1) Public hearings respecting the disposition, proposed by a discipline authority, of a public trust complaint must be conducted before an adjudicator.

(2) If the police complaint commissioner arranges a public hearing under section 60 or orders a public hearing under section 64 (7),

(a) the police complaint commissioner must appoint a retired judge of the Provincial Court, the Supreme Court or the Court of Appeal to preside as an adjudicator at the public hearing, and

(b) the adjudicator appointed must arrange and set the earliest practicable date or dates for that public hearing.

(3) Subject to subsection (4), at least 15 business days before the scheduled date for a public hearing or continuation, the police complaint commissioner must serve the respondent, complainant and discipline authority with written notice of the date, time and place of the hearing.

(4) If, after reasonable effort, service cannot be effected on a complainant under subsection (3), the police complaint commissioner may provide the notice referred to in that subsection by registered mail to the complainant's last address known to, or on record with, the police complaint commissioner.

(5) to (8) [Repealed 1999-39-57.]

### *(xxii) Public hearing procedures*

**61** (1) In this section, **"commission counsel"** means counsel appointed by the police complaint commissioner under subsection (2).

(2) The complaint commissioner must appoint counsel to present to an adjudicator the case relative to the alleged discipline defaults respecting a public trust complaint.

(3) For the purpose of a public hearing, commission counsel may

(a) call any witness who, in commission counsel's opinion, has relevant evidence to give, whether or not the witness was interviewed during the original investigation, and

(b) introduce into evidence any record, including, without limitation, any record of the proceedings concerning the complaint up to the date of the hearing;

(4) For the purpose of a public hearing,

(a) the respondent may examine or cross examine witnesses,

(b) the complainant and respondent may make oral or written submissions, or both, after all of the evidence is called, and

(c) the complainant and respondent may be represented by private counsel or an agent who may act on behalf of the complainant or respondent, as the case may be, under paragraphs (a) and (b).

(5) A public hearing must be open to the public unless, on the application of the complainant or respondent, the adjudicator orders that some or all of the hearing be held in private to protect a substantial and compelling privacy interest of one or more of the persons attending the hearing.

(6) The adjudicator must decide whether each alleged discipline default respecting the complaint has been proved on the civil standard of proof and may do one or more of the following:

(a) find that all, part or none of the alleged discipline default has been proved on the civil standard of proof;

(b) impose any disciplinary or corrective measures that may be imposed by a discipline authority;

(c) affirm, increase or reduce the disciplinary or corrective measures proposed by the discipline authority.

(7) Within 10 business days after reaching a decision under subsection (6), the adjudicator must provide notice of that decision to the complainant, respondent, discipline authority and police complaint commissioner.

(8) In conducting a public hearing, the adjudicator has the protections, privileges and powers of a commissioner under sections 12, 15 and 16 of the *Inquiry Act.*

### *(xxiii) Compellability*

**61.1** (1) A respondent who is subject to a public trust complaint is not compellable to testify as a witness at a discipline proceeding, or at a public hearing, in respect of that complaint, but an adverse inference may be drawn from the respondent's failure to testify at the discipline proceeding or at the public hearing.

(2) Subject to the law of privilege, all witnesses, including, without limitation, municipal constables other than the respondent, are compellable at proceedings under this Part.

(3) Municipal constables, chief constables and deputy chief constables may be compelled to make statements

(a) in internal discipline proceedings, and

(b) at public hearings and inquiries under this Act.

(4) Nothing in this Act limits the rights of any person to the protection provided by the *Canadian Charter of Rights and Freedoms* against the use of voluntary or compelled statements in subsequent criminal or civil proceedings.

### *(xxiv) Appeal*

**62** (1) An appeal on a question of law lies to the Court of Appeal, with leave of a justice of the Court of Appeal, from a decision of an adjudicator under section 61 (6).

(2) Technical errors as to form, failure to file or to give notice on time and other procedural errors of a minor nature do not go to jurisdiction and may not be appealed to the Court of Appeal on any ground, unless the error prejudiced a fair determination of the issues at the public hearing.

**R.C.M.P. Act**

**Commission -- s. 45.45(1)**

**45.45** (1) For the purposes of this section, the member or members conducting a hearing to inquire into a complaint are deemed to be the Commission.

**Notice -- s. 45.45(2)**

(2) The Commission shall serve a notice in writing of the time and place appointed for a hearing on the parties.

**Sittings of Commission -- s. 45.45(3)**

(3) Where a party wishes to appear before the Commission, the Commission shall sit at such place in Canada and at such time as may be fixed by the Commission, having regard to the convenience of the parties.

**Powers of Commission -- s. 45.45(4)**

(4) The Commission has, in relation to the complaint before it, the powers conferred on a board of inquiry, in relation to the matter before it, by paragraphs 24.1(3)(a), (b) and (c).

**Rights of persons interested -- s. 45.45(5)**

(5) The parties and any other person who satisfies the Commission that the person has a substantial and direct interest in a complaint before the Commission shall be afforded a full and ample opportunity, in person or by counsel, to present evidence, to cross-examine witnesses and to make representations at the hearing.

**Representation of witnesses -- s. 45.45(6)**

(6) The Commission shall permit any person who gives evidence at a hearing to be represented by counsel.

**Appropriate officer -- s. 45.45(7)**

(7) In addition to the rights conferred by subsections (5) and (6), the appropriate officer may be represented or assisted at a hearing by any other member.

**Restriction -- s. 45.45(8)**

(8) Notwithstanding subsection (4), the Commission may not receive or accept

(a) subject to subsection (9), any evidence or other information that would be inadmissible in a court of law by reason of any privilege under the law of evidence;

(b) any answer or statement made in response to a question described in subsection 24.1(7), 35(8), 40(2), 45.1(11) or 45.22(8);

(c) any answer or statement made in response to a question described in subsection (9) in any hearing under this section into any other complaint; or

(d) any answer or statement made in the course of attempting to dispose of a complaint under section 45.36.

**Witness not excused from testifying -- s. 45.45(9)**

(9) In a hearing, no witness shall be excused from answering any question relating to the complaint before the Commission when required to do so by the Commission on the ground that the answer to the question may tend to criminate the witness or subject the witness to any proceeding or penalty.

**Answer not receivable -- s. 45.45(10)**

(10) Where the witness is a member, no answer or statement made in response to a question described in subsection (9) shall be used or receivable against the witness in any hearing under section 45.1 into an allegation of contravention of the Code of Conduct by the witness, other than a hearing into an allegation that with intent to mislead the witness gave the answer or statement knowing it to be false.

**Hearing in public -- s. 45.45(11)**

(11) A hearing to inquire into a complaint shall be held in public, except that the Commission may order the hearing or any part of the hearing to be held in private if it is of the opinion that during the course of the hearing any of the following information will likely be disclosed, namely,

(a) information the disclosure of which could reasonably be expected to be injurious to the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities;

(b) information the disclosure of which could reasonably be expected to be injurious to law enforcement; and

(c) information respecting a person's financial or personal affairs where that person's interest or security outweighs the public's interest in the information.

**Return of documents, etc. -- s. 45.45(12)**

(12) Any document or thing produced pursuant to this section to the Commission shall, on the request of the person producing the document or thing, be released to that person within a reasonable time after completion of the final report under subsection 45.46(3).

**Expenses -- s. 45.45(13)**

(13) Where the Commission sits at a place in Canada that is not the ordinary place of residence of the member or other person whose conduct is the subject-matter of the complaint, of the complainant or of the counsel of that member or other person or that complainant, that member or other person, complainant or counsel is entitled, in the discretion of the Commission, to receive such travel and living expenses incurred by the member or other person, complainant or counsel in appearing before the Commission as may be fixed by the Treasury Board.

**Interim report -- s. 45.45(14)**

(14) On completion of a hearing, the Commission shall prepare and send to the Minister and the Commissioner a report in writing setting out such findings and recommendations with respect to the complaint as the Commission sees fit.

**Definition of "parties" -- s. 45.45(15)**

(15) In this section and section 45.46, "parties" means the appropriate officer, the member or

other person whose conduct is the subject-matter of a complaint and, in the case of a complaint under subsection 45.35(1), the complainant.

**Teaching Profession Act**

*(xxv) Action after hearing*

**34** The council or the discipline committee, if authorized by the bylaws made under section 23, may after a hearing, and for the purpose of determining whether to take action in respect of the member under section 35,

(a) dismiss the citation,

(b) determine whether a member has been guilty of professional misconduct or other conduct unbecoming a member of the college,

(c) determine whether a member has incompetently carried out duties undertaken by the member in his or her capacity as an employee of a board or an authority, or

(d) make any other report to the council respecting the citation that it considers proper.

LIST OF AUTHORITIES

Other References