OFFICE OF THE
POLICE COMPLAINT COMMISSIONER

British Columbia, Canada

# REASONS FOR DECISION – CONSTABLE R.C. EVELEIGH
# PUBLIC HEARING

## Background

On July 30 and August 10, 2001, Chief Constable Andersen of the Oak Bay Police Department provided information to then Police Complaint Commissioner Don Morrison alleging conduct by Constable R.C. Eveleigh which, if proved, would constitute a Public Trust default as defined in section 46 of the *Police Act*. On August 14, 2001 Mr. Morrison confirmed the characterization of the complaint as Public Trust, ordered an investigation into the complaint, and authorized pursuant to section 52.1(3) the withholding of the Notice of Complaint from the Respondent officer for a reasonable period pending the criminal investigation into the complaint by the RCMP. The Commissioner also suspended the investigation under the *Police Act* until the conclusion of the criminal proceedings pursuant to section 65(4).

On the 6th of August 2002 Chief Constable Andersen referred the *Police Act* matter to Inspector (then Sergeant) Green of the Saanich Police Department for external investigation upon conclusion of the criminal investigation. On December 20, 2002, Inspector Green was advised by RCMP Sergeant Boucher that Crown Counsel were not proceeding with criminal charges against Constable Eveleigh in this matter and that the criminal investigation was therefore concluded.

Inspector Green then commenced the *Police Act* investigation into the allegation that during the spring of 2000, Constable Eveleigh, of the Oak Bay Police Department, released confidential police computer information to an unauthorized individual and in so doing violated Section 8 (a)(i) of the *Code of Professional Conduct Regulation* of the *Police Act*. More specifically, it was alleged that the Oak Bay Police Department had received information from the RCMP Island District Drug Section that they had become aware that an Oak Bay female police officer had provided information to the target of one of their investigations. Furthermore, it was alleged that the officer had advised the target that he was under investigation by the Combined Law Enforcement Unit and that the information had come from police data banks. It is also alleged by the RCMP that subsequent to the information being provided to the target, his behaviour changed.

Notification to the Respondent of the discovery of the alleged improper conduct was held in abeyance pursuant to the *Police Act*, to avoid compromising an ongoing RCMP drug importation investigation. Ultimately, on 19 July 2002, a copy of the Notice of Complaint was forwarded to Constable Eveleigh by Chief Andersen. Within a month, on 19 August 2002, Constable Eveleigh went on medical leave. Further details of the specifics of both the alleged conduct and the investigation will not form part of these Reasons for Decision, in light of the fact that there will be a full and thorough airing of the admissible facts, subjected to cross-examination, at the Public Hearing that I will be arranging in this matter.

## The *Police Act* Complaint Process

Inspector Green conducted a thorough *Police Act* investigation into the allegation and completed his Investigation Report on 21 May 2003. The Report contained some 78 findings that led Inspector Green to conclude that the allegation was proved according to the standard applicable to *Police Act* disciplinary matters and recommended that the allegation be substantiated.

In the normal course of events, that report would have gone to Chief Andersen of the Oak Bay Police Department who would have acted as the Discipline Authority (DA) over members of his department. Chief Andersen determined that in the unique circumstances of this case, it would be in the interest of ensuring public confidence in the objectivity of the decision making process that he recuse himself from sitting as the DA and thus referred the matter to an external DA for decision. He selected Deputy Chief Clayton Pecknold of the Central Saanich Police Department to act as the external DA. Deputy Chief Pecknold is a highly respected and legally trained member of the Central Saanich Police Department and was well qualified to act in the role of external DA.

## Decisions of the External DA

### *A. Substantiation of the Complaint*

After receiving and reviewing the May 21 2003 Investigation Report, Deputy Chief Pecknold determined that the Report contained sufficient evidence to warrant the imposition of discipline and corrective measures against the Respondent. He concluded that the complaint was sufficiently serious to warrant dismissal and therefore, no pre-hearing conference would be offered. Pursuant to the applicable provisions of the *Police Act*, the next step would be to go to a discipline hearing. However, a number of procedural matters transpired involving the Respondent officer's agent and her counsel, culminating in the DA's finding that there was evidence that the Respondent officer was unable to participate in a discipline proceeding.

It was not until June 2005 that the Respondent officer's counsel advised the DA that the Respondent was now capable of participating in a discipline proceeding. Those proceedings were scheduled for 26 September 2005 at which time the investigator Inspector Green was cross-examined by the Respondent's counsel, Dennis Murray Q.C. Thereafter the matter was adjourned to enable Mr. Murray to make written submissions relating to the issue as to whether the default was proven. The DA received those submissions on 13 October 2005. The DA released his Decision concerning the issue of whether or not the complaint had been substantiated on 14 November 2005. He found that the discipline default had been proved. He concluded by

inviting Mr. Murray to make submissions as to the appropriate disciplinary or corrective measures to be imposed, pursuant to section 59(5)(c) of the *Police Act*. The DA did not have the benefit of formal submissions from either the investigating officer or the Oak Bay Police Department concerning the employer's position on the appropriate discipline to be imposed.[1]

### *B. Proposed Discipline*

The DA received written submissions from Mr. Murray on behalf of the Respondent Constable Eveleigh on 12 December 2005. On 20 January 2006, Deputy Chief Pecknold rendered his Decision regarding proposed disciplinary or corrective measures. He did so on the basis that he had found that the Respondent's conduct was reckless, as opposed to inadvertent.

After discussing the particulars of the officer's employment history, the DA concluded that he did not accept the Respondent counsel's submissions that the Respondent had taken "early and full responsibility for her actions". He found that she instead sought to minimize and avoid responsibility, both during the course of the investigation and before the DA at the hearing.

That said, the DA took other mitigating circumstances into account and considered the context in which the conduct took place. He considered a number of authorities that had been supplied to him by Respondent's counsel and also had the benefit of legal advice from his own counsel. In his decision, he indicated that he relied on the Supreme Court of Canada decision of *McKinley vs. BC Tel*, [2001] 2 S.C.R. 161, an employment law case addressing the legal test for "just cause" for dismissal in the general employment law context when an allegation of dishonesty is made.

Applying the principle of proportionality referred to in *McKinley*, Deputy Chief Pecknold noted that the Respondent had served 21 years as a police officer in both the Vancouver Police Department and the Oak Bay Police Department. He noted that she "had no prior record of discipline and based upon the information before him, performed her duties well." He considered her medical evidence and the fact that she had suffered significant emotional and mental stress over the past 3 ½ years.

Given all of the circumstances, including the requirements of section 19 of the *Code of Professional Conduct Regulation*, DA Pecknold chose not to dismiss the Respondent, but imposed the following measures (paraphrased):

1. That the Respondent be reprimanded in writing for the reckless and unprofessional conduct in leaking highly sensitive information;

2. That the Respondent be reduced in rank to that of second class constable for one year, with reinstatement being subject to ongoing professional psychiatric or psychological counselling and remedial training; and

3. That the Respondent be ordered to work under close supervision by another member as determined by her employer.

[1] Although DA Pecknold requested relevant information, statutory provisions under the *Police Act* prevented him from receiving such submissions. The reasons for this will be discussed in more detail below.

**The Respondent's Request for a Public Hearing**

Pursuant to the provisions of section 60 of the *Police Act*, a Respondent officer may, within 30 days after receiving the disposition record under section 59(6), make a written request to the Police Complaint Commissioner for a public hearing. DA Pecknold's Disposition Record was dated 20 January 2006. On 17 February 2006, the Office of the Police Complaint Commissioner received a request in writing for a public hearing on behalf of the Respondent Constable Eveleigh.

Section 60(3) of the *Police Act* provides that, upon receipt of a request by Respondent for a public hearing in a circumstance such as this (where the proposed discipline is more severe than a verbal reprimand), the Police Complaint Commissioner must arrange a public hearing, and must do so in any other case if the Commissioner determines that there are grounds to believe that a public hearing is necessary in the public interest. As drafted, this section is somewhat ambiguous as to whether I may order a public hearing as a matter of my own judgment about the public interest, where a Respondent has already requested one. The practical purpose of such an order would of course be to ensure that a public hearing would not be disrupted, delayed or unduly complicated if, for some reason, a Respondent were to withdraw a public hearing request made earlier, thus requiring me to issue a further public hearing order at a later date.

While I do not find it necessary on these particular facts to resolve that legal question, I do believe it to be in the interests of transparency and accountability to explain the reasons why, even if the Respondent had not requested a public hearing in this case, I would have ordered one on my own initiative, pursuant to the considerations referred to in section 60(5) of the *Police Act*.

The misconduct alleged in the present case is very serious. The nature of the misconduct alleged goes to the heart of the relationship of trust and confidence required by persons entrusted to act as police officers. This, in turn, pertains to the need to preserve public confidence in the police. In this context, there is an arguable case that "the disciplinary or corrective measures proposed by Deputy Chief Pecknold are inappropriate and inadequate" (s.60(5)(d)(ii) *Police Act*). As noted above, Deputy Chief Pecknold's analysis was informed by the general employment law principles governing "just cause" as set out in *McKinley vs. BC Tel* (supra). There are, however, other cases and authorities his decision did not refer to, arising specifically in the police discipline context, which speak both to the proper analytical approach governing the imposition of police discipline, and to the serious consideration that must be given to dismissal in cases involving the disclosure of confidential information that adversely affects an ongoing police investigation. These include *Fox v. Royal Newfoundland Constabulary Chief of Police* (1995), 127 Nfld & P.E.I.R. 340 (S.C.); *Read v. Canada (Attorney General),* [2005] F.C.J. No 990 (T.D.); *Gemmell and Kojima* (July 27, 2005, Clancy Adj.) and a number of RCMP dismissal decisions.

The foregoing comments are not intended to be a criticism of the diligent and thorough work undertaken by both the investigating officer and Deputy Chief Pecknold. The discipline process under the *Police Act* is unfortunately subject to rigid statutory strictures, which limit participation in the discipline hearing to the respondent officer, the DA and the investigating officer (s.59 *Police Act*). Section 59 does not appear to accommodate the "home police department" making representations in a unique case such as this where both an external investigator and an external DA

have been appointed. The result was that Deputy Chief Pecknold effectively found himself in a position where he had to make his decision while only hearing "one side".[2]

The public hearing that the Respondent has requested (which hearing I would have independently ordered even without such a request) will allow for the important discipline question arising in this case to be fully aired. Pursuant to the public hearing procedures, both sides of the case will be fully argued before an independent adjudicator. Commission Counsel will exercise the statutory function of "presenting the case relative to the alleged discipline default". The Respondent will have the right to examine and cross-examine witnesses, and make submissions pursuant to section 61 of the *Police Act*. The Adjudicator will in this process be in a position to arrive at a fully informed decision as to the proper discipline in the circumstances of this case.

**Decision**

Whereas Respondent Constable Eveleigh has requested a public hearing pursuant to section 60(1)(a) of the *Police Act*, and whereas that request automatically triggers a public hearing pursuant to section 60(3)(a) of the *Police Act*, I hereby order a public hearing into this matter.

Dated this 14th day of March 2006 at Victoria, British Columbia

**Dirk Ryneveld, Q.C.**
Police Complaint Commissioner

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[2] In the usual case, the perspectives of the "home police department" as to penalty are conveyed through the participation of the investigating officer. The difficulty in this case, of course, was that the investigating officer was also an external investigator, and as such would have been understandably reluctant to be seen as taking "instructions" from Oak Bay management.