In the matter of a *Police Act* Review on the Record

into

**the Complaint against Constable #1438 Jay Johns
of the Vancouver Police Department**

SUBMISSIONS OF THE POLICE COMPLAINT COMMISSIONER

AUTHORITY

1. The Police Complaint Commissioner (the "Commissioner") makes the following submissions to the Adjudicator pursuant to section 141(6) of the *Police Act* (the "Act").

SCOPE OF REVIEW ON THE RECORD

2. On March 9, 2012, the Commissioner ordered that a Review on the Record be arranged on the sole matter of the discipline proposed by the Discipline Authority in his December 22, 2011 Disciplinary Disposition Record (Form 4) and to determine one question:

> "Whether or not the disciplinary measures proposed by the Discipline Authority are appropriate in light of all the circumstances."
>
> **Notice of Review on the Record, March 9, 2012 ("Notice"), at page 4 of 5**

3. In his October 19, 2011 Notice of Findings (Form 3), the Discipline Authority found that one count of discreditable conduct against Cst. Johns was proven and another count of deceit was not proven.

4. On December 7, 2012, the Discipline Authority received submissions on appropriate disciplinary or corrective measures from Kevin Woodall, counsel for Cst. Johns. The Discipline Authority's Disciplinary Disposition Record considered Mr. Woodall's submissions, as well as mitigating and aggravating circumstances and a number of discipline precedents. The Discipline Authority concluded that a three-day suspension without pay is the appropriate discipline measure for the 26 instances of Cst. Johns breaching the conditions of an Undertaking to Appear.

5. In Mr. Woodall's Review on the Record submissions, Cst. Johns submits that his admitted conduct does not amount to discreditable conduct. The Commissioner respectfully submits that:

a) given the scope of the Commissioner's Notice, the question of whether Cst. Johns misconducted himself is not before the Adjudicator and the Adjudicator is solely to determine the appropriate disciplinary or corrective measure to be taken;

b) the facts of Cst. Johns' conduct were not contested in the Discipline Proceeding and, in his Review on the Record submissions, Cst. Johns admits he had contact with his ex-spouse while the no-contact condition of the Undertaking to Appear was in force; and

c) Mr. Woodall's submissions on why Cst. Johns believes there was no discreditable conduct - namely, that a well-informed reasonable member of the public would have excused Cst. Johns in his breach of his Undertaking to Appear - was already ably dealt with by the Discipline Authority who concluded that:

> "A reasonable, fully informed member of the public would find it inexcusable for an off-duty police officer – someone held to a higher standard – to knowingly and intentionally violate a court order irrespective of whether the breaches grew out of a deteriorating relationship. In fact, I submit that the sense of public revulsion towards violating court orders may be greater in matters of domestic

> violence, which the Undertaking was predicated upon, despite the disputed nature of events".
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> **Form 3, page 5 of 6**

DISCIPLINARY AND CORRECTIVE MEASURES

6. The Commissioner submits that the Discipline Authority was correct in deciding that a three-day suspension without pay was the appropriate disciplinary response to Cst. Johns' discreditable conduct.

7. Cst. Johns' submissions that the appropriate measures in his case would be limited to advice as to future conduct or an oral reprimand can be summarized as follows:

a) no risk of repetition – there is no real risk that Cst. Johns will be required in the future to give an undertaking such as the one in this case and, even if he was, his experience in this case would tell him to seek to alter the conditions of the Undertaking rather than breach it;

b) financial impact – as the Undertaking required Cst. Johns to give up his firearm, he was able to work full-time, but unable to accept "most" overtime assignments from July to December 2009; and

c) the Discipline Authority imposed a three-day suspension as a punitive measure – while the Discipline Authority was statutorily required to give education and correction precedence over punishment.

8. With respect to Cst. Johns' first two bases, the Commissioner submits that they do not support the diminished measures Cst. Johns says would be appropriate in these circumstances.

9. First, it is not clear from all of Cst. Johns statements that there is no risk of repetition or that the whole matter sufficiently educated Cst. Johns such that no disciplinary measure is appropriate. Indeed, Cst. Johns was clear that he knew at the time of the breaches that there were legal options to his breach of the Undertaking. Cst Johns has also persisted, including up to his current submissions, that there was nothing "discreditable" in his breach of the Undertaking, despite acknowledging that it constituted an offence.

10. Second, the financial consequences that Cst. Johns describes flow solely from his arrest and being issued an Undertaking to Appear. They do not result from the *Police Act* proceeding. Further, Cst. Johns did not challenge the Undertaking or seek relief against the condition that prohibited him from possessing a firearm so that he could accept more overtime shifts.

11. The third basis of Cst. Johns' submissions is that the Discipline Authority misinterpreted and misapplied section 126 of the Act. The Commissioner respectfully disagrees. A fair reading of the Discipline Authority's decision provides no basis to conclude, as Cst. Johns does, that the Discipline Authority "treated the direction in section 126(3) to be something the Discipline Authority may choose to accept, or may choose to reject" **(Cst. Johns, at page 11)**.

12. The direction in section 126(3) is that "An approach that seeks to correct and educate the member concerned takes precedence, unless it is unworkable or would bring the administration of police discipline into dispute" **(Act, s. 126(3))**.

13. The Commissioner submits that, rather than ignoring the direction, the Discipline Authority put it at the centre of his reasoning, having already heard submissions on it from Mr. Woodall. The Discipline Authority held that:

> "In my view, to impose the measures that seek to educate and correct as recommended by Mr. Woodall, rather than punitive measures, would in fact bring the administration of police discipline into disrepute. For a police officer – an individual held to a higher standard – compliance with such orders is an institutional fundamental. No one should

> know better than a serving police officer, the consequences – both legal and ethical – of breaching such an order"
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> **(Form 4, page 4).**

14. Cst. Johns further submits that the Discipline Authority erred in reasoning, attributing to the Discipline Authority the view that "since there was no real need for education…punishment must be in order." **(Cst. Johns, at page 11).** The Commissioner submits that Cst. Johns submission stretches the Discipline Authority's reasoning beyond recognition.

15. The Discipline Authority did find that Cst. Johns was not in need of education "with respect to the purposes and meaning of an Undertaking to Appear, or the release conditions therein." **(Form 4, at page 4).** However, the Discipline Authority did not go from there to say that corrective measures were inadequate and, therefore, punishment called for. Rather, the Discipline Authority - finding his basis fully within section 126(3) – held that, in light of all the circumstances, education or corrective measures would bring the administration of police discipline into disrepute.

CONCLUSION

16. The Commissioner respectfully submits that the Adjudicator should reject Cst. Johns' submissions that his breach of an Undertaking to Appear should attract no more than education or corrective measures.

17. Parliament provided a process in the *Criminal Code*, the benefit of which enures to a person arrested without warrant, by which the individual may be released from custody rather than first having to appear before a justice or judge.

18. An officer-in-charge issued the Undertaking to Appear in question - with conditions, as permitted in s. 503(2.1) of the *Code*. The Undertaking contained, as required by s. 501(2), a warning that failure to appear may result in Cst. Johns' arrest (s.

502) and that breach of the conditions carries a penalty (see ss. 145(3) and 145(5.1)); notably, the same penalty as breach of conditions ordered by a justice or judge. Parliament provided the same penalty for breaches of conditions set by a police officer as for breaches of conditions ordered by the court – clearly signaling that both breaches are equally serious.

19. Cst. Johns' conduct was as serious as if he had breached an order of the court. In addition, his conduct was contrary to the British Columbia Police Code of Ethics – a code endorsed by both his employer and his union. The Code of Ethics identifies the rule of law as a fundamental principle and recognizes the public's expectations that police officers will enforce the law and be responsible and accountable to the public for what they do.

20. For all of the foregoing reasons, the Commissioner submits that the Discipline Authority correctly decided that a three-day suspension was an appropriate disciplinary measure in light of Cst. Johns' discreditable conduct. The Commissioner submits that the Discipline Authority's decision should be upheld.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of May, 2012.

JOHN S. HEANEY
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