DECISION ON REVIEW ON THE RECORD

Pursuant to section 141 Police Act, R.S.B.C. 1996, c.267

In the matter of the Review on the Record into the Conduct of Constable Marlene Batiuk of the South Coast British Columbia Transportation Authority Police

To: Constable M. Batiuk

And to: B. Kross, Chief Officer, SCBCTAPS

And to: Mr. Stan T. Lowe, Police Complaint Commissioner

And to: Mr. Kevin Woodall, Counsel for Constable Batiuk

And to: Mr. Joe Doyle, Commission Counsel

And to: Inspector MacDonald, the Discipline Authority

Review on the Record

On November 18, 2015 the Police Complaint Commissioner ordered a review on the record pursuant to sections 137(2) and 141 of the *Police Act*, to determine the correctness of the following decision of a Discipline Authority under the *Act* in relation to Constable Marlene Batiuk, a member of the South Coast British Columbia Transit Authority Police Service:

> That Constable Batiuk committed Neglect of Duty, pursuant to section 77(3)(m)(ii) of the Police Act when she failed to provide evidence to the Surrey RCMP of the assault of Transit Police Constable Leaver on April 27, 2014.

The standard to be applied in relation to the review of a discipline decision under section 141 is correctness: *Section 141(9) Police Act*. The test for the standard of correctness supplied by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, para. 50, requires the reviewer to undertake a fresh analysis of the case, and substitute their view of the correct answer for the original decision, without requiring deference to the reasons of the decision maker[1]. The burden of proof is the balance of probabilities, which requires evidence that is sufficiently clear, convincing and cogent.[2]

Background

On April 27, 2014, Constable Batiuk and her partner, Constable Leaver, both members of the South Coast British Columbia Transportation Authority Police [hereafter referred to as the Transit Police] became involved in an interaction with an individual, Christopher Nash, at Gateway Skytrain Station in Surrey. During the interaction Nash engaged in a physical altercation with Constable Leaver. Nash then got into his car and backed toward Constable Batiuk, in response to which she discharged her firearm twice. The incident was captured on video.

---

[1] *Gomes* Review, June 26, 2015, Adjudicator A. Filmer

[2] *Dickhout* Public Hearing, March 9, 2012, para. 37, Adjudicator I. Pitfield

As per protocol under the *Police Act* due to the use of the firearm, on the date of the incident the Independent Investigations Office (IIO) asserted jurisdiction, discontinuing their involvement when it became apparent there were no injuries, and the Police Complaints Commissioner opened a "monitor file".

The Surrey RCMP commenced an investigation of Nash for an assault of Constable Leaver. Constables Batiuk and Leaver both provided an oral description of the incident to a Surrey RCMP officer who attended the scene.

In May 2014, Corporal Ali Mirza of the Surrey RCMP asked Constable Batiuk to attend an interview to provide a witness statement pertaining to the assault. Through her lawyer, Constable Batiuk asked that she be permitted to view the available video footage of the incident before providing a statement. Corporal Mirza declined to permit her to do so until after she had provided her statement, citing departmental "practice". He offered to accept a written statement approved by her counsel. Constable Batiuk indicated that she was willing to cooperate but asserted through her counsel that she wished to view the video before providing a statement.

No further formal actions were taken nor demands made by the Surrey RCMP or Transit Police; it appears the matter simply ended in an impasse. Constable Batiuk was not ordered or compelled by her superiors or RCMP officials to attend the RCMP interview. Corporal Mirza concluded his investigation without a statement from Constable Batiuk. Nash was not charged.

Constable Batiuk had sought and received from Transit Police officials an extension of time for completing her duty report and a report in connection with the use of her firearm described as a "Subject Behaviour Officer Response Report" [SBORR], until the RCMP investigation was over. She was permitted to view the video footage before she filed them.

In September 2014 the Office of the Police Commissioner was notified that Constable Batiuk had not provided evidence to the RCMP, and the Commissioner issued an Order for Investigation under section 93(1) of the *Police Act*. Staff Sergeant Doug Fisher of the Transit Police conducted an investigation of four allegations. He issued his Final Investigation Report on April 15, 2015. The Discipline Authority, Inspector Brian MacDonald of the Transit Police, issued his Notice of Decision on April 23, 2015, He ordered a discipline proceeding on two of the allegations, including the one at issue in this review. Following the discipline proceeding, on September 10, 2015, Inspector MacDonald found that the two allegations were substantiated.

The Commissioner accepted the finding on one of the allegations but ordered a review on the record on this one on the basis that the "Discipline Authority was correct in finding that Constable Batiuk had a duty … to assist the RCMP's investigation by providing evidence and that Constable Batiuk neglected that duty… [but that] it is uncertain whether there exists sufficiently clear, convincing and cogent evidence that, based on legal advice and without the protection of her statement being compelled by order from a supervisor, Constable Batiuk did not have good and sufficient cause to not provide evidence to the Surrey RCMP without first refreshing her memory from the video."

Legislation and Policy Pertaining to the Officer's Duty to Provide Evidence

The duty in relation to assistance by the Transit Police of other police agencies is found in Transit Police Patrol Responsibilities Policy OC010, Section 8:

> When the Jurisdictional Police Department (JPD) assumes responsibility for an investigation, the [Transit Police] will support and assist the JPD as requested, and liaise with the JPD until the case is concluded.

In addition to the above policy, Staff Sergeant Fisher referred to a Memorandum of Understanding between the Transit Police and Jurisdictional Police which imposes a responsibility on a member "receiving or possessing facts or information relative to a suspected criminal offence" to "make such information available either to the immediate Supervisor or to the JPD without delay."

Section 77(3)(m)(ii) of the *Police Act* defines "neglect of duty" as neglecting, without good or sufficient cause to "promptly and diligently do anything that it is one's duty as a member to do."

Issues

Two issues arise from the record in respect of the disciplinary decision in this case. The first is whether Constable Batiuk neglected her duty by failing to provide a statement to the RCMP. The second is whether, if so, she had good and sufficient cause.

Both Staff Sergeant Fisher as Investigator and Inspector MacDonald as Discipline Authority concluded that Constable Batiuk had a duty to provide evidence to the Surrey RCMP, that she had failed to do so, and that she did not have good and sufficient cause.

Mr. Doyle, counsel for the Commissioner, and Mr. Woodall, counsel for Constable Batiuk, both take the position that the disciplinary decision was incorrect in the finding that Constable Batiuk had breached her duty and the finding that she did not have good and sufficient cause to do so.

Under the law cited above relating to the standard of correctness, I am not directed to review the reasons of the Disciplinary Authority (or the investigator), rather to consider the issue afresh. I will state, however, that both Inspector MacDonald's reasons and the Final Investigation Report provided by Staff Sergeant Fisher were comprehensive and thoughtful. The thoroughness of the disciplinary process to this point affords an ample record for review, and easily justifies the Commissioner's decision not to require a public hearing in this matter. I have also found both reports to be instructive in considering the issues to be determined here.

Did Constable Batiuk Have a Duty to Provide Evidence to the Surrey RCMP?

Both counsel take the position that the neglect of duty at issue here, the failure to "provide evidence to the Surrey RCMP", pertains only to Constable Batiuk's failure to attend the interview with Corporal Mirza and provide an oral statement.

Counsel point out that at the Section 112 (*Police Act*) stage, prior to his ordering the disciplinary proceeding, Inspector MacDonald dismissed another allegation, of "failing to write, in a timely manner, a police report in regards to the shooting incident of April 27, 2014." They argue that he had already decided the issue of failure to provide a police report, and he ought not to have reconsidered that issue in connection with the alleged failure to provide evidence. They also argue, as I understand it, that in light of the dismissal of the allegation relating to the police report and the absence of policy requiring an officer to provide an oral statement, the issue of duty has already been dealt with in a manner favourable to the officer, i.e. she cannot be said to have neglected her duty in declining to attend to provide evidence without her precondition being met.

Despite the fact that both counsel take the position that Constable Batiuk did not breach a duty, I am not convinced that I am precluded by the course of the proceedings from considering the extent of the duty to provide evidence, whether written or oral, and whether it has been breached.

Firstly, in reviewing Inspector MacDonald's reasons, it is apparent to me that he based his decision that the police report allegation was unsupported on the fact that Constable Batiuk had provided her SBORR and duty reports after being granted an extension to do so, following completion of the RCMP investigation. Transit Police policy required that the SBORR be filed before the end of the relevant shift, or "as otherwise directed by the Member's Supervisor." Inspector MacDonald found that Constable Batiuk met the requirements of that policy and hence had not neglected to write a police report in a timely manner in the context of her Transit Police and Police Act obligations.

Inspector MacDonald's decision in relation to the allegation of failure to "provide evidence" to the RCMP was that the allegation was substantiated by Constable Batiuk's failure to produce a report *prior to the conclusion of the RCMP investigation*. While I agree that in parts of his reasons he referred, perhaps erroneously, to note-taking duties; in particular, in his application of the case law; I do not read his decision on this allegation as having been erroneously confined to the issue of providing a written report.

In addition, the difference in wording between the two allegations and the manner in which they were dealt with on the record separate them in both time and context. The previously dismissed allegation referred to a "police report in regards to the shooting incident" as opposed to "evidence… of the assault of... Constable Leaver." That difference in wording alone is sufficient to establish that the Discipline Authority had not dealt with any aspect of the allegation of failure to provide evidence pertaining to the assault of Constable Leaver and was therefore not confined to considering only a duty to provide an oral report to the RCMP, as argued by counsel. Moreover, as I read the record, on the dismissed allegation both Staff Sergeant Fisher and Inspector MacDonald were considering Constable Batiuk's obligations to provide a report *to the Transit Police in connection with the shooting*. On the substantiated allegation, they considered her obligations to provide a report or a statement *to the Surrey RCMP in connection with the assault investigation*.

The facts indicate that, apart from her brief on-scene oral statement, Constable Batiuk did not produce any written report or witness statement about the alleged assault to the RCMP prior to the conclusion of their criminal investigation. She declined to cooperate despite being asked to do so.

While counsel both submit that Inspector MacDonald focussed erroneously on Transit Police policy pertaining to note-taking and the provision of reports, and that Constable Batiuk was never asked to provide a written report, I note that Corporal Mirza in his statement says that he asked Constable Batiuk if she would prefer to provide a written statement, and she declined. He had been asking from the outset for a witness statement, and had never confined his request to her attendance for an interview.

The fact that in his application of the case law, the Discipline Authority mischaracterized the officer's duty as an obligation to make notes is not determinative of the issue of how to define the duty for the purpose of this review. The review must in my view encompass the whole question of whether Constable Batiuk breached a duty by declining to comply with Corporal Mirza's request that she provide a witness statement to assist with his investigation of the assault charge. I do not propose to narrow the issue, as I understand counsel to be suggesting, to whether Constable Batiuk was required to attend an interview to provide an oral statement, simply because the wording adopted by the Discipline Authority in his decision may have intersected with the wording of another allegation.

In any event, because the issue I am directed to consider is that of correctness of the decision that Constable Batiuk breached her duty to provide evidence to the RCMP, and in light of the legal requirement that I consider the issue afresh without deference to the Discipline Authority's reasons, I am not persuaded that Inspector MacDonald's reasoning in relation to this or another allegation can be taken as binding in relation to the breadth of the issue now before me.

Finally, I note that the Notice of Review on the Record directs me to consider not whether Constable Batiuk had a duty to provide evidence, rather whether a request to refresh memory from available video footage afforded her good and sufficient cause for declining to do so. The Commissioner takes the view that "the Discipline Authority was correct in finding that Constable Batiuk had a duty pursuant to section 8 of Transit Police Policy OC010 to assist the RCMP's investigation by providing evidence and that Constable Batiuk neglected that duty."

Whether or not the framing of the Notice of Review on the Record precludes me from finding, as counsel urge, that no duty was breached, I have separately arrived at the view that Constable Batiuk had a duty to provide a statement to Corporal Mirza in the context of the criminal investigation to which she was clearly a material witness.

Mr. Woodall argued that the written policies relied upon by the Discipline Authority do not create a duty on an individual officer to provide a report to an outside agency, and I understand Mr. Doyle to have accepted that argument. The argument is that Section 8 of Transit Police Policy OC010, requiring that "[Transit Police] … support and assist the JPD as requested…" vests the obligation, and authority, to assist with the department, not the individual officer. Counsel both submit that in the absence of a direction by her superiors, Constable Batiuk had no *duty* to provide a statement to the RCMP. They further submit that, absent a compulsion by her superiors, Constable Batiuk's cooperation with the RCMP could place her in jeopardy of having her statement used against her in later criminal proceedings, and that therefore, it was not a breach of duty for her to decline.

With respect, in my view this line of argument conflates the issues of duty, and good and sufficient cause. Moreover, I do not read the Transit Police policy as requiring that in each case, the Transit Police endorse or confirm a jurisdictional police agency's request for evidence or a report from a Transit Police officer who has material evidence to give. There is, as a matter of common sense, and based on the Memorandum of Understanding referred to by Staff Sergeant Fisher, a duty on the part of a Transit Police officer whose investigation has been assumed by a jurisdictional police department, to provide a report of her evidence to that agency, as she would have provided it to her own.

I would add, again, that the Order for Review on the Record is premised on the existence of a duty created by Policy OC010, and it may well not be open to me to entertain an argument to the contrary. Nonetheless, I have found that Constable Batiuk clearly had a duty to provide her evidence, in the form of a witness statement, whether oral or written, to assist the RCMP in their criminal investigation.

I turn to the issue of good and sufficient cause.

Did Constable Batiuk Have Good and Sufficient Cause for Failing to Provide Evidence to the RCMP of the Assault of Transit Police Constable Leaver?

1. Self-Incrimination

I will state at the outset that it is common ground between counsel that there was potential for Constable Batiuk's statement to the RCMP to place her in criminal or *Police Act* jeopardy, and I agree. The fact that there may not have been a "live" investigation at the time of the interview is not determinative. As pointed out by both counsel, there remained a potential for criminal investigation after the fact, perhaps even *based on* what she said to Cst. Mirza, and particularly if what she said was inconsistent with the video: *R. v. Shipley & Wong*, unreported, May 29, 2015, *R. v. Bentley*, 2015 BCCA 251. In any event, the Commissioner had a file open from the outset, and this proceeding ensued.

The basis for Constable Batiuk's decision not to provide evidence was the refusal of her request to view the video footage of the incident before she did so. She made that request on counsel's advice; in fact, through her counsel, and it was confirmed by a second lawyer.

Constable Batiuk's use of her firearm was not the focus of the RCMP investigation, and Corporal Mirza went as far as agreeing that her account could stop short of the shooting, in an effort to overcome her concerns about self-incrimination. It was nonetheless reasonable to assume that whatever she said would become relevant when her use of the firearm was subjected to scrutiny.

Accordingly there is an initial issue as to whether Constable Batiuk's right against self-incrimination was engaged by Corporal Mirza's request that she provide a witness statement. As I understand Inspector MacDonald's analysis, he decided that the issue did not arise, because there was not an adversarial relationship between Constable Batiuk and the state, based on *R. v. Fitzpatrick*, [1995] 4 SCR 154. It is on this point that Inspector MacDonald mischaracterized the officer's duty as one pertaining to the obligation to make notes. *Fitzpatrick*, and the other case relied upon by both Inspector MacDonald and Staff Sergeant Fisher, *Wood v. Schaeffer,* 2013 SCC 71, dealt with note-taking, not the provision of evidence.

In this situation, the facts support a conclusion that Constable Batiuk had reason to believe that any statement she made to Corporal Mirza would be scrutinized in connection with a review of her use of her firearm. Her relationship with the "state" was sufficiently adversarial to engage her right against self-incrimination. The reasonableness of her request to view the video footage may be considered in that context, but I am not entirely convinced it must be confined to it.

Counsel raised the issue of whether, if Constable Batiuk chose to comply with Corporal Mirza's request in the absence of a direction by her superiors, she would be subjecting herself to potential incrimination, based on the case law dealing with use immunity. They contrast this situation with the duty to cooperate in a disciplinary investigation under section 101 of the *Police Act*. Under the *Act*, an officer is specifically provided with immunity from use of her statement in subsequent criminal proceedings (apart from perjury charges).

Mr. Doyle refers in his submissions to the case of *R. v. White*, [1999] 2 S.C.R. 417, which deals with "use immunity". Both counsel submit that it is incongruous that Constable Batiuk would have less protection in complying with Cpl. Mirza's request than she would in providing a statement under section 101 of the Police Act, because the absence of a direction by a superior or by legislation negates the characterization of her statement as "compelled". Both submit that in the absence of a statutory duty or direction, Constable Batiuk

would have no “use immunity” and therefore would stand in jeopardy of having her statement used against her in subsequent proceedings.

I have found that Constable Batiuk did have a duty under Section 8 of Transit Police Policy OC010 and the Memorandum of Understanding to provide a statement to Cpl. Mirza in connection with the criminal investigation. Under the reasoning in *R. v. White*, her statement could arguably be considered to be legally compelled and therefore might not be admissible against her in subsequent proceedings, with or without a statutory exclusion.

The authorities that permit police notes to be admitted as evidence in disciplinary proceedings, as I read them, pertain to notes made contemporaneously with events or as a duty shortly thereafter, and may not apply in these circumstances. *R. v. Fitzgerald*, above; *R. v. Scherzer*, 2007 CanLII 38577 (ONSC) and *R. v. Wight*, [2003] O.J. No. 2611 (O.C.J.). See also *R. v. Bentley*, 2013 BCSC 1124. If there is a statutory, or written, duty to cooperate, in the absence of contemporaneity between the incident and the duty, and in the presence of potential disciplinary jeopardy, it seems likely use immunity would flow from that even without statutory protection.

The issue here however is not whether Constable Batiuk would or would not be afforded use immunity if she complied with Cpl. Mirza’s request, but whether she was on firm ground in declining to fulfill her duty in the absence of permission to refresh her memory from the available video footage. The fact that she may not have had use immunity, while it may have informed her counsel’s advice, was not the direct reason provided for her decision not to comply.

In my view, the issue of use immunity is not squarely engaged here, and I prefer not to offer an opinion as to whether, absent the video “disclosure” issue, the officer would be excused from providing evidence simply because she had not been overtly directed to do so and was therefore deprived of use immunity.

I prefer to consider the question of self-incrimination as one of context. Whatever the correct legal result, it had not been established for Constable Batiuk’s benefit at the relevant time that her statement would be protected, and that is the context in which the issue of the reasonableness of her request to be permitted to view the video should be considered.

2. Request to View the Video

Considered in context, the issue in relation to the video is the reasonableness of Constable Batiuk’s request for pre-interview “disclosure” of real evidence in the possession of her interviewer that would permit her to reliably refresh her memory and/or know the case against her.

It is important to note that as a device for refreshing memory, viewing a video is not like speaking with other witnesses or lawyers, colluding, or undergoing hypnosis (as in some of the cases dealing with refreshing memory), or anything else that might arguably interfere with or taint the officer’s recall of the events. It is a question of enhancing her recall with a reliable depiction of the actual incident. For that reason, the case of *Wood v. Schaeffer* referred to by the Discipline Authority, which dealt with officers’ entitlement to speak to counsel before making notes in cases engaging disciplinary issues, does not assist.

I have not been provided with any case law dealing with the use of real evidence to refresh memory prior to or during testimony. However, common sense dictates that the use of such reliable evidence to refresh memory is unassailable. Even if, in the rare case, it permits an otherwise untruthful witness to tailor their evidence to ally with the facts, it cannot be said to detract from the truth. I fail to see any public interest in

requiring an officer who has undergone a stressful incident to exhaust her memory, only to later compare the accuracy of her recollection to an available record of the incident.

An officer's notes would be no more reliable than a video, but I would think there would be no question that the officer could use them, before or during an interview, to refresh her memory.

In this case, however, it is not simply a case of the officer asking to view the video in order to refresh her memory. Mr. Woodall refers to it as "limited disclosure." In the context of potential disciplinary liability, the request can be additionally justified on a fairness basis. Given that Corporal Mirza's focus was on the criminal investigation of Nash, and not on Constable Batiuk's use of her firearm, he could have no conceivable interest in unnecessarily setting her up for inconsistencies by having her speak from memory before viewing the video. And indeed, as pointed out by counsel, even if his investigation had encompassed the disciplinary aspect, the practice seems to be that of permitting the officer to view video footage.

Mr. Woodall submits that other police departments invariably permit officers to view video footage before requiring them to provide statements. There was no evidence on the record to this effect, other than the fact that Constable Batiuk was permitted to view the video in this case before providing her reports or statements under the Transit Police Policy and *Police Act*.

Withholding the video until after Constable Batiuk's statement served no obvious investigative purpose. The practice, if it is one, may harken back to the old rule requiring police witnesses to exhaust their memory before using notes to refresh it, a rule that has to some extent fallen by the way, and which may easily be distinguished from preventing an officer who faces potential scrutiny from viewing real evidence of the subject incident.

Counsel have also pointed out that the Designated Authority had no evidence showing a policy basis for the RCMP decision not to permit Constable Batiuk to review the video, and I agree. The only reference to this as "policy" was that contained in Cpl Mirza's statement (he did not testify at the disciplinary proceeding) that "as per Surrey RCMP's practices I would allow her to view the video footage but only after I had obtained her account." As noted by Mr. Woodall, Inspector MacDonald found that there was no evidence before him "on whether" disclosing the video would have hampered the RCMP investigation, but he assumed there was a valid reason for them not to do so.

This is not a situation of an individual officer providing "self-justification" before following a departmental policy as it was characterized by the Discipline Authority, rather an apparent impasse between the interviewing officer, or perhaps his superiors, and the subject officer, regarding the appropriate, or fair, process to follow in conducting the criminal investigation. As counsel point out, the fact that Constable Batiuk's request to view the video was based on the advice of two lawyers supports its reasonableness and the existence of good faith on her part. Her good faith was also supported by Corporal Mirza's assessment of her motivation and her initial cooperation with the attending officer.

Moreover, because the position taken by Corporal Mirza, and perhaps his department, potentially operated unfairly toward Constable Batiuk, and the converse was not shown to be the case, there would appear to be no reason or basis for Corporal Mirza, or the Surrey RCMP, to take the position that they did. At least, there was no evidence led in the proceedings to justify the policy in a manner that would remove Constable Batiuk's cause to question it.

I believe that Inspector MacDonald applied the onus of proof erroneously against the officer rather than in her favour, since there was not clear and cogent evidence supporting the existence of a justifiable policy prohibiting her from viewing the video footage. He presumed the validity of the policy without evidence to support it, and went on to decide that it was not open to the officer to question it, without considering the reasonableness of her position.

The proper application of the burden raises the question of whether there is clear, cogent and convincing evidence to show that Constable Batiuk had good and sufficient cause for declining to provide her evidence in the circumstances in which she found herself. Those circumstances were:

(a) the real potential of a *Police Act* investigation of her role in the incident,
(b) available video footage of the incident,
(c) a duty compelling her to make a statement outside the context of the *Police Act,*
(d) advice from counsel that she should be permitted to view the video before making a statement,
(e) a refusal of permission to view the video,
(f) no established policy reason for the refusal, and
(g) no assurance that her statement would be protected by use immunity.

In the circumstances it was reasonable for Constable Batiuk to ask to view the video footage before providing evidence to the Surrey RCMP pertaining to the assault of Transit Constable Leaver. The refusal to allow her to do so was not shown to be reasonable.

There was accordingly clear, cogent and convincing evidence before the Discipline Authority supporting a conclusion that Constable Batiuk's decision not to fulfill her duty was made for good and sufficient cause.

Conclusion

I find that the disciplinary decision was incorrect.

Counsel and the Discipline Authority are invited to make submissions as to any recommendations that may flow from this result. Counsel agreed in advance that Chief Officer Kross of the Transit Police should be invited to consider making submissions at this stage. I also invite counsel to consider and provide submissions as to whether in the circumstances the Surrey RCMP might be eligible under the *Act* to be invited to make submissions regarding recommendations.

I direct that all submissions be provided in writing unless any of the participants seek and receive permission to have them provided orally. I am in counsel's hands regarding an acceptable schedule and order for the filing of submissions and suggest that we resolve that question by email through the registrar.

Dated at Vancouver, British Columbia, this 26th day of January, 2016.

Carol Baird Ellan, Retired Judge of the Provincial Court
Adjudicator