In the matter of the *Police Act*, R.S.A. 2000, c. P-17 and
In the matter of the *Police Service Regulation*, Alta. Reg. 356/1990

And in the matter of a complaint and disciplinary proceedings against
Regimental Number 2190 Constable Michael ZACHARUK

Decision

Procedural background

On May 29, 2007, Constable Zacharuk was charged with the following two counts of disciplinary misconduct:

> *Count #1*
>
> *It is alleged that on or about April 28, 2004, in the City of Edmonton, in the province of Alberta, you utilized excessive force in the course of your involvement with P.*S. [P.S. is a young person and is therefore identified by his initials), *where such force was unlawful or unnecessary, thereby committing Unlawful or Unnecessary Exercise of Authority contrary to Section 5(2)(i)(ii) of the Police Service Regulation.*
>
> *Count #2*
>
> *It is alleged that on or about April 28, 2004, in the City of Edmonton, in the Province of Alberta, you used profanity by telling P. S. "I don't have time for fucking punks like you", and "Don't ever fucking do that again", thereby engaging in Discreditable Conduct by using profane, abusive or insulting language to any member of the general public contrary to Section 5(2)(e)(iii) of the Police Service Regulation.*

On June 7, 2007, he was served with the Notice and Record of Disciplinary Proceedings. The disciplinary hearing began on June 29, 2007. Inspector Brian Nowlan attended as the Presenting Officer. The Constable and his agent Staff Sergeant Peter Ratcliff were also present. The Constable entered a plea of 'not guilty'. The hearing was adjourned until August 21, 2007.

The following exhibits were submitted in the course of these proceedings:

1. A memorandum over the signature of the Chief of Police appointing me as the Presiding Officer
2. A memorandum over the signature of the Chief of Police appointing Inspector Nowlan as the Presenting Officer
3. Notice and Record of Disciplinary proceedings
4. Seven consecutive Orders of Extension of time limits as issued by the Edmonton Police Commission
5. A faxed copy of a treatment chart in the name of P.S. from the Westgrove medical clinic
6. A faxed copy of a letter from Westmount Dental Centre describing a chip to a lower tooth of P.S.

Application to stay the disciplinary proceeding because of undue delay

When the disciplinary hearing resumed on August 21, 2007, Staff Sergeant Ratcliff applied to have the charges against Constable Zacharuk dismissed (or, more correctly, the proceeding stayed) because of undue delay. His argument was exceptionally well-framed and was presented orally and in writing. The dates relevant to the application appear as follows:

1. April 28, 2004 – date of the incident
2. April 29, 2004 – receipt of the complaint
3. January 21, 2006 – criminal investigation file completed
4. February 13, 2006 – file sent to the Calgary Crown office for opinion on possible criminal charges
5. November 7, 2006 – file returned from Calgary
6. March 21, 2007 –Constable Zacharuk notified that an investigation under the *Police Act* would be conducted
7. June 7, 2007 – notice of hearing served on the Constable
8. June 29, 2007 – disciplinary hearing begins

This span of time, encompassing a criminal and then a service investigation, amounts to a sufficient delay to draw an inference of prejudice and the consequent breach of natural justice. To support this arm of his argument, Staff Sergeant Ratcliff points to the sections in the *Police Act* and the *Police Service Regulation* where timelines are not only given, but are also quite short. For example, section 43(12) of the *Act* has a 30 day limitation to make a request for a review of the decision to dismiss a complaint by the police commission. Section 44(3) refers to the same period of time, but this time in the context of complaints about policies or services of a police service. Sections 44(11), 45(7), and 46(7) of the *Act* refer to a requirement to provide complainants with updates on investigations of their complaints every 45 days. Pursuant to section 48, appeals to the Law Enforcement Review Board must be filed within 30 days after the complainant or

the affected police officer has been advised of the outcome of the disciplinary process. In the *Regulation*, section 7 contains a reference to a three-month period for the charging of a police officer, and the conduct of the consequent disciplinary hearing. Precise and short limitation periods are also seen in section 8 in relation to a police officers' relief from duty. Neither the *Act* nor the *Regulation* refers to a limitation period longer than three months. Consequently, it is argued, legislative drafters clearly intended to have all disciplinary matters disposed of in an expeditious fashion.

Staff Sergeant Ratcliff concedes that the legislation does not provide a Presiding Officer with jurisdiction to dismiss charges based on undue delay, but says that rules of natural justice still permit the same result.

The Staff Sergeant also refers to a part of promotional policy (dated March 14, 2007) that speaks about discipline-related promotional eligibility considerations as standing for the proposition that the Service itself finds timeliness of the disciplinary process important. It is therefore difficult to see how the long delay in the processing of the file at hand through the Internal Affairs Section and then the office of the Crown Counsel in Calgary could be justified.

From a somewhat different perspective, it is submitted that witnesses would have difficulties recalling the relevant events after more than three years. Not only were the complainant and his friends in the very early teens at the time the Constable dealt with them, they were also high on drugs.

Staff Sergeant Ratcliff also refers to *Lang v. Ramsay* ((1992) 11 O.R. (3rd) 190 (Div. Crt.)) and *Cote v. Desmoreaux* ((1990) 61 C.C.C. (3rd) 560 (Que. C.A.)) as being helpful to his position.

While this argument is indeed of high quality, it cannot succeed. The reason is simple. Only grossly excessive delays will, on their own, be enough to stay the proceedings. Otherwise, there is a need to show proof of tangible prejudice to the cited Constable. This was not done. I acknowledge the comment that the Constable may have been precluded from progressing in the promotional process if he had applied, but he never did. It is therefore open to speculation what effect, if any, these disciplinary charges might have had if Constable Zacharuk had put himself in the pool of the candidates for a promotion to the next rank. Speculation in the absence of evidence on point cannot form a foundation for a decision to stay the proceedings. The excerpt of the promotional policy is not on point and can therefore be of no help to the Constable. The decision on the ability of witnesses to recall the relevant events would have to wait until the hearing itself. Finally, it also cannot be said that the delay was so inordinately long that it became oppressive to the point of tainting the disciplinary hearing.

Case law gives strong support to this conclusion. See, for example, *Watson v. Regina Police Service* ((2005) 37 Admin. L.R. (4th) 288 (Sask. Q.B.)). In this case, Sergeant Watson pointed to reassignment to a different position, inability to return to patrol duty, loss of pay because of the reassignment, a number of medical difficulties, and problems

at home as well as work as evidence of prejudice created by the delay. He succeeded in his application to quash his disciplinary conviction.

Blencoe v. British Columbia (Human Rights Commission) ([2000] S.C.C. 44) provides the most definitive and authoritative explanation of what is needed to warrant a stay of proceedings. Considering that the Edmonton Police Association may consider more applications for a stay of proceedings in the future, I have included a lengthy excerpt from the case to assist them in assessing if such applications should indeed be made. In any event, here are the most relevant paragraphs from the decision (most of them are also found in the *Watson* case):

> *100 The question to be addressed in this section is whether the delay in this case could amount to a denial of natural justice even where the respondent's ability to have a fair hearing has not been compromised.*
>
> *101 In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: R. v. L. (W.K.), [1991] 1 S.C.R. 1091, at p. 1100; Akthar v. Canada (Minister of Employment and Immigration), [1991] 3 F.C. 32 (C.A.). In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.*
>
> *102 There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy (D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at p. 9-67; W. Wade and C. Forsyth, Administrative Law (7th ed. 1994), at pp. 435-36). It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied (see, for example, J. M. Evans, H. N. Janisch and D. J. Mullan, Administrative Law: Cases, Text, and Materials (4th ed. 1995), at p. 256; Wade and Forsyth, supra, at pp. 435-36; Nisbett, supra, at p. 756; Canadian Airlines, supra; Ford Motor Co. of Canada v. Ontario (Human Rights Commission) (1995), 24 C.H.R.R. D/464 (Ont. Div. Ct.); Freedman v. College of Physicians & Surgeons (New Brunswick) (1996), 41 Admin. L.R. (2d) 196 (N.B.Q.B.)).*

107 The respondent contends that the delay in the human rights proceedings constitutes a breach of procedural fairness amounting to a denial of natural justice and resulting in an abuse of process. The question is whether one can look to the psychological and sociological harm caused by the delay rather than merely to the procedural or legal effect, namely, whether the ability to make full answer and defence has been compromised, to determine whether there has been a denial of natural justice. This issue is a difficult one and there is no clear authority in this area.

108 In cases where the Charter was held not to apply, most courts and tribunals did not go further to decide whether the stress and stigma resulting from an unacceptable delay were so significant as to amount to an abuse of process. On the other hand, where courts did go further, they most often adopted a narrow approach to the principles of natural justice. For example, in Nisbett, supra, the Manitoba Court of Appeal concluded that delay may amount to an abuse of process that the law will remedy only where "on the record there has been demonstrated evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing" (p. 757). In Canadian Airlines, supra, the Federal Court of Appeal followed Nisbett, concluding that the prejudice must be such "as to deprive a party of his right to a full and complete defence" (p. 641). In the case at bar, Lowry J. for the British Columbia Supreme Court, found that unless there was prejudice to hearing fairness, the type of personal hardship and psychological prejudice suffered by Mr. Blencoe could not give rise to a breach of natural justice (at para. 31):

> *... it cannot be said that the personal hardship Mr. Blencoe has suffered, albeit protracted by the time the administrative process has taken, gives rise to any Charter considerations. To my mind, it then becomes difficult to see how it can nonetheless be said to be a prejudice giving rise to a denial of natural justice. If it were, there would have been no need for the Kodellas court to resort to section 7 of the Charter. And, having rejected the applicability of section 7, the Nisbett court would have been bound to consider whether the personal hardship in that case constituted a prejudice that supported the prerogative relief sought.*

112 The Court of Appeal found that Misra's ability to defend himself would likely be impaired and that he had already been punished by virtue of the five-year suspension (at pp. 492-93). It is clear, however, that in Misra the court felt that it is only in exceptional cases that delay will amount to unfairness. Moreover, in Misra, an essential part of the prejudice suffered was the result of the lengthy suspension. Finally, the

court also concluded that there was prejudice to Misra's right to a fair hearing due to the passage of a five-year period.

113 In Ratzlaff v. British Columbia (Medical Services Commission) (1996), 17 B.C.L.R. (3d) 336, Hollinrake J.A. for the British Columbia Court of Appeal agreed with the appellant that, "where the delay is so egregious that it amounts to an abuse of power or can be said to be oppressive, the fact that the hearing itself will be a fair one is of little or no consequence" (para. 19). At issue in Ratzlaff was a lengthy delay in processing disciplinary charges against a physician that had affected how the physician arranged his finances. In not restricting abuse of process to procedural unfairness, Hollinrake J.A. stated, at paras. 22-23:

> *Abuse of power is a broader notion, akin to oppression. It encompasses procedural unfairness, conduct equivalent to breach of contract or of representation, and, in my view, unjust delay. I should add that not all lengthy delays are unjust; regard must be had to the causes of delay, and to resulting reasonable changes of position.*
>
> *Where a party in the position of the appellant relies on delay as amounting to an abuse of power it is incumbent on that party to demonstrate a resulting change of position. In my opinion, the very fact that the appellant continued with his practice as he did and throughout the whole period of time in issue is sufficient to establish such a change of position.*

115 I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. The difficult question before us is in deciding what is an "unacceptable delay" that amounts to an abuse of process.

120 In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the

> *administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, supra, at p. 9-68). According to L'Heureux-Dubé J. in Power, supra, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (Power, supra, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.*
>
> *121 To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate (Brown and Evans, supra, at p. 9-68). There is no abuse of process by delay per se. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While I am prepared to accept that the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, I am not convinced that the delay in this case was "inordinate".*
>
> *122 The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.*

The cases cited by Staff Sergeant Ratcliff are distinguishable from this proceeding and do not provide sufficient support for the application at hand.

Consequently, then, the application for the stay of proceedings involving Constable Zacharuk was not put in the necessary and sufficient factual background, and cannot succeed. The same result also obtains through the abuse-of-process analysis. The delay admittedly came close to being inordinate (although not grossly excessive). However, considering the nature of the complaint, involving contact between a police officer and a number of youths just on the other side of ten years of age, and an allegation of excessive use of force on one of them, it may be equally as possible to say that the need to know what really happened mandated the hearing to proceed and therefore would not offend the community’s sense of fair play.

Evidence

According to the Presenting Officer, the Service intended to call four witnesses. One could not be found, but the other three were served on July 9 and July 17. Only one of them, J. L., appeared (as a young person on the date of the incident and the disciplinary hearing as well, he is identified only by his initials).

Testimony of J.L.

Examination by the Presenting Officer On April 28, 2004 at about 11:30 hours, J.L. and three of his friends stood beside an apartment building near the Highlands Junior Highschool. They were between 12 and 13 years old. They smoked tobacco and marihuana. When Constable Zacharuk drove by in a police car, they assumed that their illegal activity was not noticed. The Constable came back a very short time later and asked them what they were up to. One of the four, P.K., (identified in the disciplinary charge as P.S.) immediately became confrontational. He refused to give his name. He insisted on keeping his hands in his pockets. The Constable grabbed him by the lapels of his jacket and threw him against the wall. The back of his head hit the wall and he went limp for some 30 seconds. The Constable had to hold P.K. up and, while he was doing so, he asked the rest of the group for their names. J.L. described the Constable's language as authoritative, not friendly, but not rude either.

> *Question (Inspector Nowlan): And what words did he say that would lead you to believe that he may have been rude?*
>
> *Answer: Just the tone of voice he was kind of using.*
>
> *Q: So what kind of words was he saying?*
>
> *A: I really don't remember.*
>
> *Q: Do you remember any profanity?*
>
> *A: No.* (p. 41 and 41 of the transcript)

When P. K. regained his faculties, the Constable let him go and started taking the names of the other youths. He also smashed a pipe that he had found in P.K.'s pocket and seized a pipe with all the associated drug paraphernalia from another youth.

J.L. said that, as a result of being pushed against the wall, P.K. ended up with a 'big lump' on the back of his head. P.K. did not complain of any other injuries.

It was at this point that the Presenting Officer tendered Exhibits No. 5 and 6 into evidence. More will be said about the content of these exhibits later.

While not much turns on the identification of the Constable by the witness, it is nevertheless worthwhile noting this exchange:

> *Q:* *… That police officer that you're referring to, do you see him here today?*
>
> *A:* *Maybe him. I don't know.* (p. 39)

Examination by the agent for the Constable On the date of the incident, J.L. was 11 years old and a student at Highland Junior Highschool. J.L. confirmed that one of the youths had a pipe, but said that P.K. actually had a bong. He described P.K. as refusing to listen to the Constable, and would not take his hands out of his pockets. He …*just continued saying , "You're a cop. I don't need to do this for you."* (p. 48). He was belligerent and swearing. The rest of the group cooperated. After he was pushed into the wall, he was no longer 'lippy' or 'cocky'. Interestingly, P.K. did not complain about any of his injuries

In a reply to several questions from me, J.L. said that he and his friends started smoking marihuana some five to ten minutes before the Constable arrived.

> *Q (Presiding Officer): Okay. And what effects would you have noticed on yourself and seen on the other kids that were with you after you had smoked for 5 to 10 minutes as you've just said? Any effects?*
>
> *A:* *We were just starting to get high.*
>
> *Q:* *And how do you show that?*
>
> *A:* *Paranoid.* (p. 52)

Testimony of Constable Zacharuk

Examination by the agent for the Constable The Constable has been with the Service for eight years. In April of 2004, he was working as a neighbourhood foot patrol officer (beat officer) for the 118 Avenue corridor. He was aware of the problems at Highlands Junior Highschool and, on April 28, responded to the area during the lunch break to show police presence. As he was driving his patrol car past 6008 – 118 Avenue, he noticed four or five youths standing at the east side of an apartment building. One had a marihuana pipe and passed it around. The Constable circled around, parked the patrol car close to the group, exited, and identified himself as a police officer. A smell of marihuana was still in the air. One of the youths placed the pipe in his pocket. The smell, the smoke, and the pipe convinced the Constable that the group possessed a narcotic substance. He placed them under arrest, and explained the reasons for that. Three of the youths cooperated with the Constable. They answered his questions and produced identification. But one was of exactly the opposite mind. Worse yet, he encouraged his friends … *not to give the cop anything, not to give them his name* (sic),

not to identify himself, that I had no right to speak with them or anything (p. 58). He was identified as P.K. As the Constable's conversation with the group continued, P.K.'s obscenity-laden verbal aggressiveness against the Constable became even worse. P.K. continued to refuse to take his hands out of his pockets. This is how the Constable described the conversation:

> *A: When he refused to take his hands out of his pockets, I informed him that, you know, if he did not follow my verbal directions, if he did not follow instructions, I informed him that I didn't know who these boys were. I said, "I don't know who you are and I don't know if you guys, you know, if they're from the school, but you have your hands in your pockets. I don't know if you have any knives or weapons on you, right. In this day in age* (sic) *I'm alone. I'm a lone officer. This is why I need you to take your hands out of your pockets."*
>
> *He replied, you know, "Fuck you, pig. I don't have to do anything you tell me. I can call a lawyer and then I can do what my lawyer tells me." And it just continued that he was in a way obstructing my duties as an officer.*
>
> …
>
> *I informed him that if it continued, he could also be looking at a charge of obstruction or obstructing a peace officer in duties and then I proceeded to explain that to him. He still refused to take his hands out of his pockets and continued, "If you touch me, I'll fucking sue you. I'll have your fucking job", so forth.* (pp. 61, 62)

The Constable then approached P.K. and took hold of one of his arms. P.K. pulled away. Another attempt was made, but P.K. again put his hand back in his pocket. While the hand was out, the Constable noticed something metallic in P.K.'s pocket. He asked him what that was, but received another … *Fuck you. I ain't telling you nothing*. (p. 62). The Constable did not know what effect P.K.'s increasing defiance would have on the rest of the group and decided to place him in handcuffs. Upon being told to put his hands behind his back, P.K. refused.

> *He* (P.K.) *started to struggle. He pulled away again so with my right hand I grabbed his right arm that was in his pockets, took him by the shoulder, and pulled his arm out of his pocket, turned him around to face the wall and placed him in the handcuffing position. I pulled his right arm behind his arm and pulled his other hand out behind him. He's struggling while he's doing this, so as far as the position, it's my hand was on his right shoulder, him facing away. And in order to hold him there, I continued to hold his right arm with my right arm and then reached around to pull his other arm out and then placed him into handcuffs.* (p. 63)

P.K.'s verbal aggressiveness did not change, but the Constable could finally search his pockets and discovered that that the metallic object he had seen before was actually a bong, a somewhat larger pipe to smoke marihuana.

As to the injuries, the Constable said that P.K. never complained of any specific injuries. When teachers or supervisors from the school came by, P.K. said that he was assaulted by the Constable. He said that his mouth was sore. One of the teachers looked, but apparently could find no injuries. Constable Zacharuk did not see any injuries either.

The Constable did not lay any criminal charges. The quantity of marihuana was just too small.

Cross-examination by the Presenting Officer Constable Zacharuk is used to dealing with young people. He has been volunteering with Londonderry Junior Highschool for some nine years, instructing outdoor education, survival, and firearms. As a beat officer, working alone, he also knew that he would have to show his 'gift of gab' when he spoke to P.K.'s group. Furthermore, he knew that an overly aggressive approach would elicit a reaction opposite from what he wanted. In any event, when he first approached the group, the Constable thought that the youths might be skipping school. He wanted to identify them so that he would have names that he could associate with any problems in the neighbourhood. Driving by and then speaking with the youths, the Constable quickly discovered that P.K.'s group was actually engaged in criminal activity. His voice became more authoritative, but he did not yell, nor did he ever use any profanity. The object in P.K.'s pocket was of particular concern. It was not small enough to be dismissed as just a marihuana pipe. Additionally, it was metallic in appearance and could therefore be a weapon of some sort. It was necessary for P.K. to cooperate and take his hands out of his pockets. If he did not, the Constable would have to do that for him.

While Constable Zacharuk spoke with the youths, he more or less faced P.K., but at an angle. They were some 24" apart. When the Constable pushed P.K. against the wall to handcuff him, P.K. had already been turned around. Consequently, it was his face that contacted the wall. The contact was not strong – there were no injuries, nor did P.K. ever complain of any directly to the Constable. The greatest degree of force was used to turn the youth rather than to push him against the wall. On a scale of one to five, the Constable thought he had applied no more than one to place P.K. in the handcuffing position and then put the handcuffs on his wrists. All this aside, P.K.'s body never went limp, nor was he ever lifted off the ground. And, as already mentioned, P.K. did complain about an injury to his mouth, a broken tooth, to one of the teachers that came to the location where the Constable and the youths were. However, once the teacher looked in P.K.'s mouth, he remarked that there was nothing there, and the matter was dropped.

Analysis

As set out above, Constable Zacharuk was charged with two disciplinary misconducts. For ease of discussion, the second will be addressed first.

Count No 2

In summary, the Constable is alleged that, on April 28, 2004, he directed a stream of profanities at P.K. and thereby engaged in Discreditable Conduct contrary to section 5(2)(e)(iii) of the *Police Service Regulation*. This count was not supported by any evidence whatever. The sole witness, J.L., did not recall any profanities, and the Constable unequivocally denied ever having uttered any either. I hasten to say that other witnesses, that had been properly summoned, would most likely have something to say in this regard. But they never appeared. I find this regrettable especially in so far as the complainant is concerned. He initiated the complaint but never followed through the process even though he was specifically called to attend the hearing. He has therefore precluded this disciplinary hearing from attaining a more comprehensive picture of the events. Conversely, and just as importantly, he has denied the Constable an opportunity to face him, fully test his complaint, and then in turn, give full answer and defence.

Count No. 2 has not been proven.

Count No. 1

This count alleges that, on April 28, 2004, the Constable resorted to excessive force in the course of dealing with P.K. and that he thereby committed a disciplinary misconduct of Unlawful or Unnecessary Exercise of Authority contrary to Section 5(2)(i)(ii) of the *Police Service Regulation.*

The analysis of this count must follow these steps:

1. Did Constable Zacharuk have authority to arrest the youths?

Section 495 (1) of the *Criminal Code* in part provides that:

> ***495 (1)*** *A peace officer may arrest without a warrant*
>
> > *(b) a person whom he finds committing a criminal offence;*

Section 4 (1) of the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19) reads as follows:

> ***4 (1)*** *Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II, or III.*

Cannabis or marihuana is included in Schedule II.

The Constable noticed the youths passing a marihuana pipe when he initially drove past them. When he walked up to them, a smell of marihuana was still in the air. At the hearing, J.L. confirmed that he and his friends had indeed been smoking the illegal substance for some five to ten minutes before the Constable appeared. I am prepared to

say that, based on the Constable's years of service and his assignment in 2004, he was more than capable of recognizing the smell of marihuana. I am similarly prepared to say that, if for no other reasons than their age, the youths were not authorized to be in possession of marihuana (pursuant to section 4 of the *Act*). The Constable found the youths committing a criminal offence and had the power of arrest.

2. Did Constable Zacharuk have the right to search the youths and P.K. in particular?

Jurisprudence relating to this issue is crystal clear. Consider, for example, the seminal case of *Cloutier v. Langlois* ([1990] 1 S.C.R. 158). Only the most relevant paragraphs are reproduced below.

> *59 A "frisk" search incidental to a lawful arrest reconciles the public's interest in the effective and safe enforcement of the law on the one hand, and on the other its interest in ensuring the freedom and dignity of individuals. The minimal intrusion involved in the search is necessary to ensure that criminal justice is properly administered. I agree with the opinion of the Ontario Court of Appeal as stated in Brezack, Morrison and Miller, supra, that the existence of reasonable and probable grounds is not a prerequisite to the existence of a police power to search. The exercise of this power is not however unlimited. Three propositions can be derived from the authorities and a consideration of the underlying interests.*
>
> *60 1. This power does not impose a duty. The police have some discretion in conducting the search. Where they are satisfied that the law can be effectively and safely applied without a search, the police may see fit not to conduct a search. They must be in a position to assess the circumstances of each case so as to determine whether a search meets the underlying objectives.*
>
> *61 2. The search must be for a valid objective in pursuit of the ends of criminal justice, such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused. The purpose of the search must not be unrelated to the objectives of the proper administration of justice, which would be the case for example if the purpose of the search was to intimidate, ridicule or pressure the accused in order to obtain admissions.*
>
> *62 3. The search must not be conducted in an abusive fashion and in particular, the use of physical or psychological constraint should be proportionate to the objectives sought and the other circumstances of the situation.*

The Constable arrested the youths because he saw them committing a criminal offence. He properly informed them of the reasons for arrest. This, in and of itself, gave him authority to search in accordance with the excerpt from the *Langlois* case (above). He had an even greater authority to search P.K. because of P.K.'s verbally aggressive behaviour and his unwillingness to follow the Constable's instructions. Furthermore, and for very good safety-related reasons, the nature of the metallic object the Constable had seen in P.K.'s pocket also had to be determined quickly.

Part 1, Chapter D, Section 5 of the Edmonton Police Service Policy and Procedure Manual says that search incidental to arrest needs to comply with the following:

> ***(A)*** *Members have a limited common law right to search an arrested person, articles carried by them and, to a certain extent, their immediate surroundings provided that:*
> *(1) the arrest is lawful,*
> *(2) the search is based on the arrest, not the arrest on the search,*
> *(3) the search is reasonably required for security, protection, identification and/or evidentiary purpose with respect to the offence for which the arrest is made, and*
> *(4) no more force is used than is reasonably necessary to accomplish the search.*

The Constable had the right to search P.K. pursuant to common law and the policy of the Service.

3. Did Constable Zacharuk use excessive force in searching P.K.?

Part 1, Chapter B, Section 1 of the Edmonton Police Service Policy and Procedure Manual addresses the general principles relative to the use of force in the conduct of their duties as follows:

> ***G)*** *To assist members to meet legal requirements in deciding the level of force appropriate in various circumstances, the following guidelines are established:*
> *(1) members shall not resort to the use of force unless such use is necessary in the execution of their duties as peace officers and this purpose cannot reasonably be accomplished by less violent means,*
> *(2) the decision as to whether force is to be used, and the amount to be applied, shall rest solely with the member who is personally involved at the scene,*
> *(3) although decisions may have to be made instantly, in each case the decision shall be based on as reasonable an assessment of the circumstances as possible under conditions prevailing, and*
> *(4) members shall not use any more force than is necessary under the circumstances to accomplish their lawful objectives.*

While it is acknowledged that paragraph (2) immediately above seems to be less than informative, the other paragraphs do provide a solid objective check to any subjectivity that paragraph (2) might seem to condone. What, then, can be said about the facts that led to the application of force in the instant case?

The description of P.K.'s behaviour before the handcuffing comes from J.L. and the Constable.

I have no hesitation saying that J.L. was not a credible witness. In April of 2004, he was not quite 12 years of age. Worse than that, according to his own version of events, he and his friends smoked marihuana for some five to ten minutes before Constable Zacharuk appeared. J.L. provided a most tentative (and therefore insufficient) identification of the Constable even though there was no other uniformed member in the hearing room. He had difficulties recollecting what P.K. had been wearing although he did say that the Constable grabbed P.K. by the lapels of his jacket. When asked what rude words the Constable said, he could not recall. He did, on the other hand, agree with the agent for the Constable that P.K. was belligerent and swearing at Constable Zacharuk. He also agreed that the Constable did ask P.K. to take his hands out of the pockets, but could not say if the request was made more than once. He was unequivocal that P.K. ended up with a large bruise on the back of his head, and that he did not complain about any other injuries.

J.L.'s evidence must be viewed with caution and given weight only when corroborated by other testimony.

Having said this, I am prepared to accept from J.L. that P.K. was verbally aggressive to the Constable and that he did not follow the Constable's instructions. I am also prepared to accept that, at some point, the Constable pushed P.K. against the wall. However, for the reasons given below, I cannot accept that it happened in the fashion J.L. described at the hearing.

Constable Zacharuk provided a coherent sequence of events that was, in several parts, consistent with that of J.L. In several instances, the Constable quoted the language P.K. was using when he refused to follow the Constable's instructions and when he encouraged his friends to do likewise. As a result of this, the Constable ended up talking directly to P.K., but P.K. remained entirely uncooperative and even more verbally volatile. Not even a caution about more possible charges had any effect. Having had no success with words, the Constable then pulled P.K.'s hands out of his pockets, but P.K. quickly put them back in. It was at this time that the Constable noticed a metallic object that raised concerns. He explained his next steps as follows:

> *When he was – at first he would be considered an active resister, actively resisting control. When I had observed an item in his pocket, which I don't know what the item was, at that time when he's resisting, being belligerent, and aggressive, he was bordering on that line in my opinion as an assailant which could go from an active resister to, you know,*

> *displaying a weapon at any time which is why I wanted to get the subject into handcuffs, to search him safely without having anything displayed or place myself at risk with the other individuals that were present with him.* (p. 67)

The Constable already had the right to search the youths incident to arrest, but the discovery of the object in P.K.'s pocket gave the matter just that much more urgency. He advised P.K. again that he was under arrest and told him to put his hands behind his back. P.K. refused. The Constable had to turn him around to apply the handcuffs, and even then, P.K. struggled. The pockets were searched and the water pipe discovered. According to the Constable, the handcuffing did not result in any injuries.

J.L. said that the Constable grabbed P.K. by the lapels of his jacket and threw him, back first, against the wall and that P.K. also ended up with a large bruise on his head. I find that I cannot accept this version of events. According to the Constable, P.K. complained of a sore tooth when Highland Junior Highschool teachers or supervisors appeared on the scene. The injury to the front of the face and the back of the head quite simply could not have happened at the same time. Since P.K. was handcuffed with the hands behind his back, and the Constable himself said that he pushed him, face first, against the wall, the injury to the back of the head could not have happened. Nothing in J.L.'s testimony suggested that the Constable initially slammed P.K. against the wall back first and then turned him around, and pushed him face first into the wall. I find that the handcuffing happened as the Constable described it.

What should be made of Exhibits No. 5 and 6? Exhibit No. 6 is dated February 22, 2005 and describes P.K.'s attendance at the Westmount Dental Centre. I find that I can put no weight on this Exhibit. Firstly, it is a faxed copy of a document that has not been properly authenticated. Secondly, even though the document does seem to confirm that P.K. did attend the Dental Centre on April 28, 2004, and that he did present with a chipped lower tooth, it also says that … *The etiology of the chip was not discussed and it was relatively small in size*. The document does not make it clear whether there was a nexus between the events at the Highlands Junior Highschool and the chipped tooth.

Exhibit No. 6 is also a faxed copy of a document from Westgrove (Medical Clinic?). It purports to be dated April 29, 2004 and appears to confirm that, on that date, P.K. was examined, by a physician. It contains a number of notes, possibly made by the attending physician. However, the authorship of the notes and even more so the meaning of several abbreviations remain unknown. What does appear legible says that P.K. (this can only be presumed) stated that he was assaulted by police, grabbed by the front of his shirt and slammed twice, back first, against a concrete wall. The document says that there was no direct injury. There was no bruising or swelling on the scalp. For the reasons already identified, I can place no weight on Exhibit No. 6.

Based on the evidence, I conclude that Constable Zacharuk:

1. did use force in the execution of his duties,

2. had sufficient grounds to be concerned about the metallic object in P.K.'s pocket,
3. resorted to the use of force because P.K. refused to follow the Constable's instructions,
4. used only as much force as was necessary to handcuff P.K.

Count No. 1 has not been proven.

Disposition

There was no evidence in support of the charge of Discreditable Conduct (Count No. 2). There was insufficient evidence in support of the charge of Unlawful or Unnecessary Exercise of Authority (Count No. 1). Neither of these two charges has been proven.

Mark Logar
Superintendent
Hearing Officer

Presenting Officer: Inspector Brian Nowlan
Agent for the cited member: Staff Sergeant Peter Ratcliff

Issued in the City of Edmonton, September 18, 2007