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 3414 Constable Taufiq SHAH

Decision from an Application pursuant to section 7 of the *Police Service Regulation*

Procedural and factual background

On January 16, 2007, Constable Shah was cited for the following disciplinary misconducts:

1. Discreditable conduct as defined by section 5 (2)(e)(iii) of the *Police Service Regulation* – using profane, abusive or insulting language to any member of a police service or to any member of the general public
2. Discreditable conduct as defined by section 5 (2)(e)(viii) of the *Police Service Regulation* – doing anything prejudicial to discipline or likely to bring discredit on the reputation of the police service
3. Breach of confidence as defined by section 5 (2)(a)(iii) of the *Police Service Regulation* – without proper authorization from a superior police officer or in contravention of any rules of the police service of which he is a member, communicating to the news media or to any unauthorized party any matter connected with the police service
4. Breach of confidence as defined by section 5 (2)(a)(v) of the *Police Service Regulation* – signing or circulating a petition or statement in respect of a matter concerning the police service, except through the proper official channel or correspondence or established grievance procedure
5. Insubordination as defined by section 5 (2)(g)(ii) of the *Police Service Regulation* – omitting or neglecting, without adequate reason, to carry out a lawful order, directive, rule or policy of the commission, the Chief of Police or other person who has the authority to issue or make that order, directive, rule or policy

These alleged misconducts spanned from October 1, 2004 to May 31, 2005. The Constable was said to have ...

1. *contributed to and participated in the creation of an internet website that used insulting language to a member or members of the Calgary Police Service* (Count No. 1, Exhibit 1),
2. *contributed to and participated in the creation of an internet website that used insulting language to a member or members of the Calgary Police Service* (Count No. 2, Exhibit 2),
3. [been] *in breach of a lawful order, directive, rule or policy of the Calgary Police Service, by communicating to the news media and/or unauthorized persons about a matter or matters connected with the Calgary Police Service* (Count No. 3, Exhibit 3),
4. *contributed to and participated in the creation of an internet publication, and circulated a statement or statements in respect of matters concerning the Calgary Police Service, without going through the proper official channels or correspondence or established grievance procedure* (Count No. 4, Exhibit 4),
5. *provided information to the public by giving several unauthorized interviews to members of the media, which were published, contrary to policy that had been read to you by a senior officer of the Calgary Police Service. Additionally,* [he] *ignored an order given to* [him] *by that senior officer in relation to these matters* (Count No. 5, Exhibit 5)

The open disciplinary hearing began on February 2, 2007. The Constable, his counsel Mr. David Bates, and the Presenting Officer Mr. David Steel were present. A plea of 'not guilty' was entered and the hearing adjourned until February 20, 2007.

At the first and subsequent hearings, the following exhibits were entered into evidence:

1. Exhibits 1 to 5 (inclusive), counts of disciplinary misconduct, set out immediately above
2. Exhibit 6 – a memorandum dated January 16, 2007 over the signature of Inspector Ken Marchant, Calgary Police Service, informing me that I have been appointed Presiding Officer
3. Exhibit 7 – three separate requests for time limit extensions, dated February 9, 2006, June 9, 2006, and September 8, 2006 from Calgary Police Service to Calgary Police Commission
4. Exhibit 8 – a letter from Insp. Marchant to Mr. Rod Pantony, Constable Shah's counsel, dated March 30, 2006, giving him a status report on the investigation
5. Exhibit 9 – a letter from Insp. Marchant to Mr. Pantony, dated April 26, 2006, clarifying allegations of misconduct against the Constable
6. Exhibit 10 – a letter from Insp. Marchant to Constable Shah, dated May 29, 2006, giving him a status report on the investigation

7. Exhibit 11 – a letter from Mr. Pantony to Insp. Marchant, dated May 31, 2006 commenting on the time-related issues relative to the alleged disciplinary misconducts
8. Exhibit 12 – June 29, 2006, a file status update from Insp. Marchant to Mr. Pantony
9. Exhibit 13 – July 11, 2006, a file status update from Insp. Marchant to Constable Shah
10. Exhibit 14 – a memorandum from Chief of Police Beaton to Constable Shah, dated November 7, 2006 containing information on the number of disciplinary misconduct counts
11. Exhibit 15 – a letter, dated March 15, 2007, from Mr. Steele informing me that, as instructed by the Chief of Police, the disciplinary hearing would henceforth be conducted in private
12. Exhibit 16 – a decision from the Court of Queen's Bench reversing the direction of the Chief of Police, declaring the hearing to be open, dated May 18, 2007
13. Exhibit 17 – transcript of a motion by the Calgary Police Commission relative to time limit extensions pursuant to section 7 of the *Police Service Regulation*, dated February 25, 2003
14. Exhibit 18 – a five-page copy, various dates, of the minutes of the Calgary Police Commission granting time limit extensions in the investigation involving Constable Shah
15. Exhibit 19 – a redacted letter from Mr. William Barker to Mr. Bates, dated February 20, 2007
16. Exhibit 20 – a two-page report from Detectives Ron Ho and John Gibb to the Chief of Police containing recommendations relative to the investigation involving Constable Shah, dated June 6, 2006

Application by the counsel for the Constable

The counsel for the Constable began his submission relative to the issues arising out of section 7 of the *Police Service Regulation* at the second hearing on February 20, 2007. He was of the view that the Police Service failed to obtain time limit extensions as dictated by the *Regulation* and that the disciplinary charges against the Constable therefore ought to be declared invalid. The alleged misconducts happened in the period between October 1, 2004 and May 31, 2005. The complaint against the Constable was made on September 20, 2005. On February 9, 2006, the Police Service made the first application for a time limit extension with the Police Commission. This, according to the counsel, was manifestly wrong. The *Regulation* mandates that disciplinary charges be laid within a three month period after a complaint has been received. If that cannot happen, the necessary extension of time limit has to be obtained within the same three month period of time. According to the counsel, by quoting from section 7 (1) of the *Regulation*, the Police Service acknowledged that fact on the very face of the application to the Police Commission. In addition to this deficiency, the reason for extension also appeared inadequate since it amounted to nothing more than a statement that the investigation was continuing. The

specified reason for the second extension also failed to be sufficiently informative; it merely referred to the fact that the file was under review and that extension was needed in the event of any necessary follow-ups. This lack of substantiation for time limit extensions clearly ran contrary to the somewhat recent decision of the Alberta Court of Appeal in the *Manyfingers* case (*Manyfingers v. The Chief of Police and the Law Enforcement Review Board*, (2006) ABCA (Can LII)). To compound all these problems even more, the same lack of informational content was also evident in the letters the Police Service's Professional Standards Branch was mailing to the Constable to update him on the status of the investigation.

Having received additional disclosure from the Police Commission, the Constable's counsel continued with his submissions on May 29, 2007. His argument can be broken down into two streams:

1. Considering the inappropriate time limit extensions before the disciplinary charges had been laid, I, as the Presiding Officer, have no jurisdiction to proceed with the disciplinary hearing.
2. The Police Commission failed to give Constable Shah notice of applications for time limit extensions; this rendered the entire process fatally unfair.

Submissions under point (1)

This submission can be divided into two parts. The first has to do with the process, or more specifically, the timing of applications for time limit extensions. The second addresses my ability to 'look behind' the Police Commission's granting of time limit extensions.

Timing of applications for extensions Both sides agreed on the date of the complaint. On February 21, 2006, the Police Commission granted the first time limit extension. This was well outside the requisite three month period as required by section 7 (1) of the *Regulation*. The Constable's counsel noted that Exhibit 17, the February 23, 2003 motion of the Commission's on time limit extensions, purported to extend the three month limitation period for the laying of disciplinary charges from three to six months. But he also strongly argued that such a motion quite simply could not survive since it failed to meet the clear provisions of the *Regulation*. The motion was not only prospective in nature, but was also of general application (i.e., attaching to all rather than only individual disciplinary investigations). As a result of the motion having been passed, all subsequent first applications for extensions of time limits were not made in accordance with the *Regulation* or the Alberta Court of Appeal decision in the *Manyfingers* case. Furthermore, the Commission's policy also flew in the face of the Alberta Court of Queen's Bench decision in *Skyline Roofing Ltd. V. Alberta (Workers' Compensation Board)* ([2001] A.J. No. 985).

Looking behind the granting of extensions The Constable's counsel suggested that, while I certainly could not consider the substance or merits of the Police Service's applications

for extensions, I should nevertheless look at the underlying process. This way, he said, I would not sit in an appellate capacity *vis-à-vis* the decision of the Police Commission regarding the three time limit extensions, but would still be in a position to decide whether the disciplinary charges had been properly issued and were valid. This issue had to be decided because it spoke directly to my jurisdiction over the disciplinary hearing. The Law Enforcement Review Board expressed the same opinion in the *Manyfingers* case (*Manyfingers v. The Calgary Police Service,* L.E.R.B., No. 010-2004).

Submissions under point (2)

The manner of applications for extensions failed to measure up to the reasonable standards of fairness. Firstly, since no member of the Police Service seems to have known about the general extension of the limitation period from three to six months, no one has been able to challenge this significant impropriety. Secondly, Constable Shah should have been notified of the applications for time limit extensions. Cases like *Rogers v. McCarthy* ((1991) N.S.J. No. 597) and *Baker v. Canada (Minister of Citizenship and Immigration)* ([1999] 2 S.C.R. 217) were applicable. Thirdly, as set out in the Alberta Court of Appeal decision in the *Manyfingers* case, the Commission needed to put its mind to the demonstrated need for extensions in the investigation involving Constable Shah. Based on the record, this quite simply did not happen.

Reply by the counsel for Calgary Police Service

The two counsel agreed that September 20, 2005 was the date of the complaint and that Constable Shah was served the form titled Notice and Record of Disciplinary Proceedings on January 16, 2007. Contrary to the opposing side, the counsel for the Service was of the view that the Police Commission granted all time limit extensions properly. Section 7 (4) of the *Regulation* gave the Police Commission authority to grant extensions in the manner it did. If the *Manyfingers* case established the Police Commission's right to grant retroactive extensions, prospective applications should also be possible. The Police Service provided the Police Commission grounds for applications and the Police Commission, in turn, granted the requested extensions. As the Presiding Officer, I would have no jurisdiction to find that the Commission erred. In the *Manyfingers* case, the Law Enforcement Review Board held that it could not overturn the Commission's decision on the granting of extensions. The same reasoning was also applicable in this hearing. Consequently, I should accept the Police Commission's decision, proceed with the hearing and then have the Law Enforcement review Board hear the appeal if it should come to that.

As far as notice of extension applications was concerned, there was no statutory or regulatory provision mandating that. The Constable could also not claim that he did not know the case he had to meet. Having received a notice of the service investigation, he most certainly knew the substances of the complaints against him and could respond.

Analysis

The facts

This part of the decision begins with a chronology of the relevant events and dates:

1. On February 25, 2003, the Police Commission adopted the motion extending ... *the time limit for laying a charge to 6 months from the day the complaint is made.*
2. The complaint against Constable Shah was made on September 20, 2005. This, coincidentally, is also the date when the Chief of Police ordered a service investigation into the allegations of discreditable conduct, breach of confidence, and insubordination.
3. On February 10, 2006, the Police Service made its first application for a time limit extension to the Police Commission.
4. On February 21, 2006, the Police Commission approved the extension. It was to run until June 21, 2006.
5. The second application was made on June 12, 2006.
6. The extension was granted on June 20, 2006 and was to run until September 20, 2006.
7. The third application was made on September 12, 2006.
8. It was approved on September 25, 2006 and was to run until January 31, 2007.
9. Constable Shah was served his Notice and Record of Disciplinary Proceeding on January 16, 2007, well before the expiry of the third time limit extension.

The first Request for Time Limit Extension (Exhibit 7) is an interesting document. It is dated February 9, 2006, but the application itself occurred on February 10, 2006. The following appears on the front of that document.

1. The heading Particulars contains a very brief history of the complaint:

   On 2005 September 20, Chief Beaton ordered a Service Investigation into the conduct of Constable Taufiq Shah #3414 into allegations of Discreditable Conduct, Breach of Confidence, and Insubordination.

2. The heading Reason for Extension contains this text:

   The internal investigation is continuing. The time allowed to complete the investigation, as prescribed in the Police Service Regulation, will expire on 2006 March 18.

3. Section 7 (1) of the *Regulation* is reproduced under the heading Reference Section.

The second Request for Time Limit Extension (third page of Exhibit 7), made on June 12, 2006, and granted on June 20, 2006, shows the following:

1. The text under the heading Particulars is the same as that submitted for the first time limit extension.

2. The heading Reason for Extension has two subheadings. The first, Extension 1, is the same as reproduced above. The second, Extension 2, reads as follows:

   The Police Service Regulation [sic] *has been completed; and the file is currently under review by Professional Standards Section. The file will then be reviewed by the Office of the Chief. The extension is requested in the event that issues arise during the review process. The time allowed to complete the investigation, as prescribed in the Police Service Regulation, will expire on 2006 June 21.*

3. Section 7 (1) of the *Regulation* again appears in the Reference Section.

The third Request for Time Limit Extension (page 5 of Exhibit 7), made on September 12, 2006 and granted on September 25, 2006, repeats the text under the headings Particulars and Reference Section. The text under sub-headings Extension 1 and Extension 2 is the same as reproduced above. In addition, under subheading Extension 3, the following appears:

> *The file is currently under review by the Executive Office. The extension is requested in the event that issues arise during the review process. The time allowed to complete the investigation, as prescribed in the police Service Regulation, will expire on 2006 September 20. As there is no Commission meeting in December, an extension to January is being requested.*

The law

Police Act and *Police Service Regulation* Part 5 of the *Act* provides the statutory background for processing complaints against police officers in this province. For the purpose of this discussion, several of the most directly applicable sections must be mentioned. There is no need to discuss complaints against the Chief of Police or complaints against the policies of a police service.

Under section 43 (1) of the *Act*, [a]*all complaints with respect to a police service or a police officer, other than the chief of police, shall be referred to the chief.* If, pursuant to section 43 (4), the Chief of Police determines that a complaint, or a portion thereof, refers to the actions of a police officer, the complaint needs to be disposed of in accordance with sections 45 to 48 of the *Act*. Significantly, the processing of a complaint remains the same even where the complainant is the Chief of Police. See section 43 (6) of the *Act*. For instances of serious disciplinary misconducts, section 45 (3) directs as follows:

> ***45 (3)*** *Where the chief of police is of the opinion that the actions of a police officer constitute a contravention of the regulations governing the discipline or the performance of duty of police officers, the chief, or a police officer designated by the chief, shall conduct a hearing into the matter as it relates to that contravention.*

Section 47 provides a broad outline of the process for disciplinary hearings. The section, for example, mandates a notice in writing of time, place, and purpose of the hearing (section 47 (1)(a)), directs that the notice must be served 10 days before the hearing (section 47 (1)(b)), establishes that the presiding officer (in matters relating to witnesses) possesses the same powers as a justice of the Court of Queen's Bench (section 47 (1)(c)), provides that rules of evidence do not apply (section 47 (1)(e)), allows adjournments (section 47 (1)(i)), and gives the charged police officer the right to appear before the presiding officer, be represented by a lawyer, and make representations (section 47 (1)(j)).

Jurisdiction of the presiding officer As always, I need to consider if I have jurisdiction over the charged police officer. There can be no doubt that Constable Shah is subject to the disciplinary process under the *Police Act* and the *Police Service Regulation.* He is a member of the Calgary Police Service. The charging documents, the five Notices and Records of Disciplinary Proceedings, contain all the necessary elements: name of the charged officer, full reference to the disciplinary misconduct as set out in the *Regulation*, a brief summary of the misconduct, as well as the date, time and place of disciplinary hearing, and the signature of the Chief of Police. See exhibits 1 – 5. The content of the Notices allows the Constable to make full answer and defence.

In assessing the validity of charging and appointment documents, I can rely on the presumption of regularity that must be evident on the face of such documents. This presumption of regularity does, however, come to an end if a document or documents are challenged by the cited police officer. I will say more on this later.

My appointment complies with the section 45 of the *Act* and section 13 of the *Regulation.* Section 45 (5) provides as follows:

> ***45 (5)*** *If a police officer is the subject of an investigation or hearing, the chief of police or the commission may request the chair of the commission to make arrangements for another police service to provide the necessary police officers to conduct the investigation, present the case or preside at the hearing, or perform any combination of those functions, as the case may be, if in the opinion of the chief of police or of the commission,*
>
> *(a) there is not a police officer in the chief's police service who has sufficient rank and experience to carry out the functions, or*
>
> *(b) it would be in the public interest to have one or more police officers of another police service carry out the functions.*

Section 13 of the *Regulation* says that:

> *13(1) The presiding officer at a hearing*
> *(a) must be a police officer who is senior in rank to the cited officer, and*
> *(b) must not be*
> *(i) the immediate supervisor of the cited officer,*
> *(ii) the officer who conducted the service investigation leading to the charge under section 5, or*
> *(iii) in the case of an internal complaint, the officer who filed the complaint.*
> ***(2)** A police officer who has direct knowledge of the investigation of the complaint is not eligible to be appointed to preside at a hearing arising from that investigation.*

With one notable exception, fully discussed below, I find that the Police Service fully complied with all the applicable statutory provisions. All of the aforementioned therefore satisfies me that the test in *Harris v. Law Society (Alberta)* ([1936] 1 D.L.R. 401 (S.C.C.)) has been met:

> *The rule of law is correctly stated, I think, in Craies' Statute Law at p. 355, in this sentence: 'when a statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with.'* (p. 402)

Statutory interpretation As will be seen below, this application requires some statutory interpretation. I will do so with reference to *Maxwell on Interpretation of Statutes* (P. St. J. Langan, 12th ed. (London: Sweet & Maxwell)). To preclude any potential disagreements, I will also look at the more modern approach as set out in *Construction of Statutes,* (E.A. Driedger, 2nd ed. (Toronto, Butterworth's)).

On pages 245 and 246, *Maxwell* offers this instructive comment:

> *... statutes dealing with jurisdiction and procedure are, if they relate to the infliction of penalties, strictly construed: compliance with procedural provisions will be stringently exacted from those proceeding against the person liable to be penalized, and if there is any ambiguity or doubt it will, as usual, be resolved in his favour. This is so, even though it may enable him to escape upon a technicality.* (p. 245)
>
> *The effect of the rule of strict construction might be summed up by saying that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the*

> *benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself.* (p. 246)

It is acknowledged that these two excerpts appear in the chapter on construction of penal statutes. Nevertheless, considering that the chapter also discusses regulatory offences and that the principles quoted above seem to be just as applicable in the context of a disciplinary proceeding where the anticipated penalty may well be very significant, I place great weight on these quotes. I am very mindful of cases like *R. v. Wigglesworth* ((1987) 37 C.C.C. (3d) 385 (S.C.C.)) which stand for the proposition that police disciplinary hearings do not amount to a true penal process and therefore do not attract certain protections under the *Canadian Charter of Rights and Freedoms*. But I am also of the view that *Wigglesworth* does not preclude me from applying strict statutory interpretation to the sections under consideration here. I incline in favour of this approach in the belief that charged police officers need to be assured that they will be subjected to the disciplinary process in a consistent and predictable way that can only flow from a strict interpretation of the *Act* and the *Regulation*.

It is possible to say that the *Maxwell* approach to statutory interpretation may, occasionally, show its age. In fact, this argument was tried, unsuccessfully, in *Cameron v. Law Society (British Columbia)* ((1991) Can LII 1148 (B.C.C.A.)):

> *Furthermore, the rule of construction applied by the chambers judge is said to have been superseded by a more modern rule, succinctly stated in E.A. Driedger,* ***Construction of Statutes****, 2nd ed., 1983, p. 87, and adopted by the Supreme Court of Canada in* ***Stubart Investments Ltd. v. Her Majesty The Queen****, 1984 CanLII 20 (S.C.C.), [1984] 1 S.C.R. 536 at p. 578, per Estey, J.:*
>
> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

In *Cameron*, *Maxwell* and *Driedger* came to the same result. I am quite prepared to say that the same would happen here as well.

With the preliminary matters out of the way, attention must now be directed to the argument relative to the limitation periods under section 7 of the *Regulation*. The section reads as follows:

> *7(1) A police officer shall not be charged with contravening section 5 at any time after 3 months from the day that a complaint is made in accordance with section 43 of the Act.*
> *(2) Subject to section 47(2) and (3) of the Act, where a hearing is to be held under the Act, the hearing shall be commenced no later than 3 months from the day that a police officer is charged with contravening section 5.*

> *(3) Where a hearing is commenced under the Act it shall, subject to section 47(1)(i) of the Act, be completed within a reasonable time and without undue delay.*
> *(4) Notwithstanding that time limits are prescribed under this section, the commission may, if it is of the opinion that circumstances warrant it, extend any one or more of those time limits.*

Section 7 (1) of the *Regulation*, reproduced above, is clear. No disciplinary charges may be laid any time after three months from the day that a complaint has been made. However, under section 7 (4) of the *Regulation*, the Police Commission may extend that limitation period. The Police Service and the Constable disagree on the interpretation and application of the section. In my view, section 7, in its entirety, expresses an unambiguous legislative direction that police disciplinary process ought to proceed with certain defined expediency. Subsections (1) and (2) impose a clear limitation period of three months to bring disciplinary investigations to a close through the laying of charges (where applicable) and to then proceed to a disciplinary hearing with the same dispatch. This direction is unmistakable. The two subsections speak in clear and direct terms. Phrases like [A] *police officer shall not be charged...* and *... the hearing shall be commenced...* are mandatory in their meaning and leave nothing to doubt, confusion, or fanciful interpretation. I acknowledge that the same cannot be said about the date *... that a complaint is made ...*(see subsection 7 (1)). As an example of three possible dates when a complaint might be deemed to have been made, consider the following: Is a complaint made when it is signed by the complainant, received by anyone in the Service, or when it is referred to the Chief? However, since both sides agreed that, in this case, the complaint was made on September 20, 2005, I need not resolve this potential issue of interpretation.

In any event, I am prepared to conclude that the drafters of subsections (1) and (2) framed the language with thought and with intention to correct a void in the predecessor to the current *Regulation*. Section 5 (1) of the *Municipal Police Disciplinary Regulations* (Alta. Reg. 179/74) contained no limitation periods either for the laying of disciplinary charges or for the holding of hearings. The section merely provided that complaints must be promptly investigated:

> *5 (1) All complaints brought against members of the force by private persons or another member of the force shall be promptly and thoroughly investigated and the facts established to safeguard the interests of the force, its members, the complainant and the public and all reports and statements shall be brought to the attention of the chief of police.*

While an amendment in 1978 (Alta. Reg. 79/78) acknowledged that complaints could be informally resolved, nothing changed with respect to limitation periods (or rather the absence thereof). Consequently, the *Regulations* in existence prior to 1990 failed to provide for a regime in which investigations and disciplinary hearings required timely attention. How does one define 'promptly' with any degree of certainty? The *Regulations*

also did not provide for any external supervision of the Police Service or its Chief to make certain that disciplinary matters were indeed attended to with sufficient dispatch.

Contrary to the past state of affairs, section 7 of the current *Regulation* sets out not only two limitation periods where there had been none before, it also gives Police Commissions exclusive authority and responsibility for decisions relative to time limit extensions where, for legitimate reasons, such limits cannot be met. Note section 25 of the *Regulation*:

> ***25*** *The commission may authorize the chief of police to carry out any duty or function of the commission under this Regulation other than the duties or functions of the commission as set out in section 4(6), 7(4), 8(11), (12) and (13), 23 and 24.*

Perhaps somewhat surprisingly but not unexpectedly, it has already been suggested that the attempted regulatory 'fix' went too far. In the *Vanovermeire* case (*Vanovermeire v. Edmonton (City) Police Commission* [1993] A.J. No. 347), an argument was made that, because of the imperative language in subsection (1), subsection (4) ought to be given no force or effect. The Justice hearing the application offered the following comments in reply:

> *To my mind, these sections are not in conflict. If section 7 (4) were struck down it would mean that, in some circumstances, the police service would be obliged to either proceed or drop the matter based on incomplete information and this would not be in anyone's interest including the administration of justice. What the legislators have done is to take the discretion to extend the time away from the police service who may have a conflict of interest and give it to an interested but independent body, namely, the Police Commission which has public members serving on it, to make the final decision. Under the circumstances this approach seems to be a fair compromise and does not offend the principles of natural justice.* (p. 7)

Furthermore, and contrary to the argument put forth by Constable Vanovermeire's counsel, the Court also confirmed that the Commission did not engage in a mere 'rubber-stamping' of the extension requests (which, of course, would be wrong). By implication, other Commissions were also expected to hear the reasons for extensions and then exercise their discretion in a manner consistent with the *Regulation*.

The *Vanovermeire* excerpt therefore stands for the proposition that subsection (4) meets a valid public interest, that subsections (1), (2), and (4) can indeed co-exist, and that subsection (4) applies to individual complaints and investigations.

It is somewhat noteworthy that, in the *Manyfingers* case, the Alberta Court of Appeal offered no comment with respect to the soundness of subsection (4), but instead focused

solely on the ability of Police Commissions to extend limitation periods retroactively. I suppose this is not surprising considering that the question put to the Court was simply whether the Commission had the power to extend the time to lay a disciplinary charge after the three month limitation period had lapsed. While it is clear that the *Manyfingers* case was fact-specific, it is worthwhile to note the Court's view on how Police Commissions should decide on the issue of retroactive extensions:

> *One cannot assume that the Commission will grant such an application mechanically without thought, nor should it. It has to act impartially, weighing all the circumstances. The fact that the period had expired would doubtless be relevant and a factor for the Commission to weigh before extending time. Other circumstances suggested by the appellant's counsel, such as prejudice to the accused constable, would also have to be weighed. Conversely, waiver or estoppel of a time period would be a powerful factor to weigh, but one which the appellant's interpretation would bar the Commission from even looking at.* (pp. 4,5)

This case is used here only to confirm the proposition that the Commission needs to assess the reasons for a request to extend time limits past the three months. Based not only on this case, but the plain reading of section 7 (4) of the *Regulation* as well, such an assessment must happen regardless of whether the application for extension appears to be prospective or retroactive.

Motion to extend time limits On February 25, 2003, the Police Commission adopted the following motion on time limit extensions:

> *Whereas the Calgary Police Commission (the Commission) has found the time limit (3 months) set in section 7(1) of the Police Service Regulation (PSR) does not provide the Calgary Police Service (CPS) with adequate time from the day a complaint is made to complete most Service and Public Complaint Investigations, it is MOVED by Commissioner Montgomery, SECONDED By Commissioner Heasman that:*
>
> *Pursuant to section 7(4) of the PSR and for the purposes of all such investigations, the Commission extends the time limit for laying a charge to 6 months from the day the complaint is made. Any extensions of time required by the CPS after this initial 6 month period must be requested as per the established procedure and according to section 7 of the PSR.*
>
> *AGREED.* (Exhibit 17)

Counsel for the Police Service suggests that I have no jurisdiction to look at the motion or extensions of time limits. I have to leave both alone. Counsel for the Constable takes the opposite view.

As I pointed out above, I am quite prepared to rely on the presumption of regularity when it comes to the documents that go to my jurisdiction as the Presiding Officer. But once a document has been challenged, the presumption falls by the wayside. I have no option but to decide the matters having to do with my jurisdiction. No one else can do that for me. If my decision is wrong, there may be recourse to the Court of Queen's Bench on an application for a judicial review or the Law Enforcement Review Board if section 48 of the *Act* is engaged. Consider the comments from the *Montgomery* case:

> *The Applicant* [detective Montgomery) *asks that the Court deal with another issue going to the jurisdiction of the Presiding Officer, being whether jurisdiction was even acquired as no evidence proving that the time extensions within which to lay the charge were obtained from the Commission. In my view this is clearly an interlocutory issue for which the court should not exercise its discretion to enter into judicial review at this stage. The Applicant submits that issues going to jurisdiction shall be dealt with by the court at a preliminary stage. I reiterate my previous conclusion that this is not so, the court still retains a discretion as to whether to entertain judicial review, and this is determined by considering all relevant factors.*
>
> *The issue relating to the charge has not been raised before the Presiding Officer. There is no indication that he would be precluded from hearing evidence on this issue, especially in light of the fact that the hearing on the merits has not yet commenced. Again, this is an issue that may be decided before the LERB if necessary.* (p. 20)

In the *Manyfingers* decision, the Law Enforcement Review Board expressed a similar sentiment:

> *The Board considers that it not only has the right but also has a duty to satisfy itself that it has jurisdiction to hear and decide any matter before it. Similarly, the Board considers that the jurisdiction of the Presiding Officer, an issue which was squarely put before the Presiding Officer by the appellant, is a matter for the Presiding Officer to determine.* (p. 6)

A clearer statement of the need and duty to determine jurisdictional issues by Presiding Officers would be hard to find.

How far into the Police Commission's decision to grant the six month time limit extension can I look? Again, there is a disagreement between the two counsel. The Constable's counsel invites me to examine the process, and leave the substance of the application for the extension alone. The counsel for the Police Service says I have no authority to consider the decision at all. I find this excerpt from *Manyfingers* instructive:

> *While the Board is satisfied that it had the right, and the duty, to consider the issue of the jurisdiction of the Presiding Officer and the Board (which goes to the validity of the proceedings after March 19, 2002) in relation to this issue, the Board has also concluded that it does not have the jurisdiction to overturn a decision of the Commission with respect to any extension granted by it within its jurisdiction, whether granted in advance of or retroactively after the time limit. That is, to the extent that the issue relates to jurisdiction, the Board may consider the issue of extensions. However, it is the Commission that has the sole jurisdiction to determine whether circumstances warrant the granting of an extension in a particular circumstance. Therefore the Board need not, and concludes that it has no jurisdiction to, consider whether any or all of the extensions granted by the Commission in connection with the investigation of the appellant's conduct were appropriate in the circumstance.* (decision of the Law Enforcement Review Board, p. 8)

I agree with these comments. Much like the Law Enforcement Review Board, my existence as the Presiding Officer also comes from the *Act*. I have no authority to look at decisions of the Police Commission that have been granted within its jurisdiction. The substance of such decisions is clearly beyond my reach. However, when it is argued, as it has been here, that the Police Commission approved a request for a time limit extension outside of its jurisdiction and that that error then affects my jurisdiction to proceed with the hearing, I need to step in. Only valid disciplinary charges give me jurisdiction to proceed. Were this not the case, the hearing would proceed notwithstanding the fact that a successful appeal was a virtual certainty. Such waste of time would inexcusably importune witnesses and unnecessarily prolong the process. This scenario cannot find support in law or common sense.

The motion of the Police Commission runs into three difficulties. Firstly, the motion clearly falls outside of section 7 of the *Regulation*.

1. As discussed above, section 7 of the current *Regulation* addresses a gap that was evident in the previous *Regulation*. The previous *Regulation* contained nothing more than a vague reference to 'prompt' investigations. This had to be replaced by something more tangible, something that the Chief of Police (as the chief disciplinarian in the Police Service) could be held accountable for following. The legislators determined that the three month limitation period provided that missing certainty and that the period was reasonable in the context of disciplinary investigations, charges, and hearings. The language in section 7 (1) and (2) cannot be more clear in that regard. Acknowledging that some investigations would take longer than three months, the legislators gave Police Commissions authority to decide whether circumstances necessitated extensions of either or both limitation periods.

2. This granting of authority to extend limitation periods cannot be taken as something entirely unfettered:
    a. The right to extend limitation periods in general would fly in the face of the apparent wish of the regulatory drafters to expedite investigations through an imposition of a three month limitation period, except where otherwise approved by Police Commissions.
    b. Section 7 (4) of the *Regulation* imposes an obligation on Police Commissions to see that disciplinary investigations are completed in a timely fashion and that Police Chiefs are accountable for any delays. A general extension of limitation periods quite simply voids that responsibility for Police Commissions and eliminates any accountability on the part of Chiefs of Police.
3. Furthermore, the Police Commission is obligated to come to an ... *opinion that circumstances warrant* ... any extensions. This phrase compels consideration of circumstances. It requires Police Commissions to put their mind to the issue and conclude that, not only do the circumstances exist to extend a limitation period, but that they are sufficient enough to actually warrant such an extension. It is entirely impossible to see how this analysis and weighing of facts and considerations can be done in the abstract and without reference to a specific investigation. It is even more difficult to see how such an abstract exercise could have any reasonable application over time.
4. General extensions under section 7 (4) of the *Regulation* also seem to be inconsistent with the remainder of the section. Section 7 (1), (2), and (3) address the instances of **an** individual police officer, **an** individual complaint against him or her, **a** hearing after that police officer has been charged, and the need to proceed with **the** hearing without undue delay. From this perspective as well, the change from specific to general also does not appear to have been intended by the legislators.
5. Paragraphs (1) to (4) inclusive are very much in line with the *Driedger* approach to statutory interpretation. Alternatively, if there is some ambiguity in section 7 (4) of the *Regulation*, it should be, according to the *Maxwell* approach to statutory interpretation, resolved in favour of the Constable.
6. It is clear that the motion effectively resulted in something entirely impermissible: a re-write of section 7 (4) of the *Regulation*.

Secondly, arguments that the motion amounts to nothing more than an expression of the Commission's ability to pass policies also cannot do any good. I agree with the following comments by our Court of Queen's Bench in *Skyline Roofing Ltd. V. Alberta (Workers' Compensation Board),* (2001) ABQB 624:

> *... it is appropriate to highlight that there are two different kinds of policy recognized by law. Almost all administrative tribunals will have various internal directions, precedents, policies, discussion papers, and other materials that indicate the general approach they take to various issues that*

> *come before them on a regular basis. These materials may or may not be designated as "policies" but I will refer to them as "informal policies". A second type of policy is a policy that is authorized or sanctioned by the enabling legislation. Section 3.1 of the Workers' Compensation Act ... is an example of an express power granted to administrative tribunal to adopt policies. Both informal policies and policies authorized by statute must be consistent with the underlying statute, unless a specific power is given to enact policies beyond the scope of the statute.* (p. 25; emphasis added)

The reference to administrative tribunals in the excerpt and a mention of a different piece of legislation are of no importance in the context of this case. The principles are equally as applicable. In any event, no matter how well-intentioned the motion might have been, it should fall within the four corners of section 7 of the *Regulation*. It does not. And there is nothing in the *Act* or the *Regulation* allowing the Police Commission to extend any of its policies past the scope of the two pieces of legislation.

Thirdly, any attempt to invoke public policy arguments in defence of policies or even interpretation of the law can be precarious at best. In *R. v. Doliente* ((1996) AJ No. 554)) the Alberta Court of Appeal offered the following:

> *I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; - it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.*
>
> *In Fender v. St. John-Mildmay, [1938] A.C. 9 (H.L. (E.)), Lord Atkins said at p. 10:*
>
> *[B]ut I propose in the first instance to say something upon the doctrine of public policy generally. My Lords, from time to time judges of the highest reputation have uttered warning notes as to the danger of permitting judicial tribunals to roam unchecked in this field. The "unruly horse" of Hobart C.J. is commonplace. I will content myself with two passages both of which have the authority of the approval of Lord Halsbury. In Janson v. Driefontein Consolidated Mines (I), he cites this passage from Marshall on Marine Insurance: "To avow or insinuate that it might, in any case, be proper for a judge to prevent a party from availing himself of an indisputable principle of law, in a Court of justice, upon the ground of some notion of fancied policy or expedience, is a new doctrine in Westminster Hall, and has a direct tendency to render all law vague and uncertain." "Public policy", said Parke B. in Egerton v. Brownlow (2), "is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean 'political expedience', or that which is best for the common good of the*

> *community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a around of judicial decision, would lead to the greatest uncertainty and confusion.* (paragraphs 74 and 75)

It is immediately acknowledged that this comment arose in the context of a criminal trial and, because of that, was expressed in a tone that might not have been necessary in the context of civil proceedings. Nevertheless, while the language may be strong for a disciplinary hearing, the principle is just as applicable. Vague allusions to some nebulous or undefined public policy should never be allowed to take precedence over statutory provisions. The tenor of purported public policies is far too often entirely dependent on the number of people propounding them. Is the law not the ultimate expression of public policy? Is there something wrong with *Maxwell* and *Driedger*?

In deciding the issue of the extension of time limits in this case, I conclude that:

1. I am entitled and obligated to look at the process the Police Commission followed in granting the extension. I have not considered the substance of the application.
2. I am entitled and obligated to consider if the Police Commission acted within its jurisdiction when it granted the extension. This analysis is based solely on the interpretation of section 7 of the *Regulation* and the dates as set out in exhibit 7. I also note that, based on the evidence, it is entirely impossible to view the first application for extension of time limit as retroactive in nature.
3. The challenge to the presumption of the validity of charges made it necessary for me to examine how they came to be.
4. Proper, or rather lawful extensions of time limits preserve the validity of disciplinary charges. Improper extensions of time limits have the opposite effect.
5. Jurisdiction over the Constable is dependent on valid disciplinary charges.
6. Having found that the Police Commission granted an improper extension of the first time limit, I must conclude that the disciplinary charges against Constable Shah cannot survive. In fact, they were a nullity from the very beginning since they had been laid contrary to section 7 of the *Regulation*.

Miscellaneous arguments Counsel for the Constable raised other arguments relative to the manner in which the second and third time limit extensions had been sought. See pages four and five of this decision. Since I have decided that the first extension proved fatal to the disciplinary charges, I need not review how the latter ones had been obtained. I am also prepared to say that such an examination would have taken me in the direction I specifically said I would not go. The arguments around the latter applications call for an examination of the substance of the applications.

The Constable's counsel argued that the Constable should have received notice of all applications for extensions of time limits. He cited the case of *Rogers v. McCarthy* ([1991]

N.S.J. No. 597) in support. I am not at all prepared to say that the *Rogers* case applies in this province as well. The *Police Act* of Nova Scotia is materially different from our *Act*; this makes it of no use to Constable Shah. Be that as it may, the *Vanovermeire* case from this province specifically decided that notices of application for extensions of time limits did not have to go to the affected members. I do not take the decision in *Manyfingers* to have changed *Vanovermeire* in the least. Again, however, because of my decision that the charges against Constable Shah amounted to a nullity, I need not elaborate further on this point.

Obiter

I will conclude my decision with these comments.

Firstly, I am well aware of the fact that there is much public interest in the matters involving Constable Shah. The citizens of Calgary undoubtedly have the right to follow this hearing and be informed about its ultimate resolution. Notwithstanding this right, however, I have an obligation to make certain that the disciplinary process follows the path as laid out by the *Police Act* and the *Police Service Regulation*. That path has been lost quite some time ago. This hearing can no longer proceed on it.

Secondly, in *Manyfingers*, the Court of Appeal established that retroactive applications for extension of time limits are possible. Considering the cases like *Sterzik v. Beattie* ((1986) 22 Admin. L.R. (3d) 1 (C.A.)) and *Cameron v. Law Society (British Columbia)*, it falls to the Police Service to decide if it wishes to explore the possibility of reviving these proceedings. I will say nothing more on this point since it was not argued before me and is entirely outside of the scope of this decision in any event.

Thirdly, my decision is not binding on other disciplinary proceedings. It falls to the Police Commission and the Police Service to decide what, if anything, they wish to do in the context of future applications for extensions of time limits.

Order

All five disciplinary charges against Constable Shah are found to be a nullity. I have no jurisdiction to proceed with the disciplinary hearing.

Mark Logar
Superintendent
Presiding Officer

Mr. David Steele, Presenting Officer
Mr. Michael Bates, Counsel for the Constable

Issued in the City of Calgary, July 3, 2007