

ONTARIO PROVINCIAL POLICE DISCIPLINE HEARING

**IN THE MATTER OF ONTARIO REGULATION 268/10
MADE UNDER THE *POLICE SERVICES ACT*, RSO 1990,
AND AMENDMENTS THERETO;**

AND IN THE MATTER OF

**THE ONTARIO PROVINCIAL POLICE
AND
PROVINCIAL CONSTABLE DAVID DIONNE, #13490
AND
MR. STEVEN DICK**

CHARGES: NEGLIGENCE OF DUTY and DECEIT

APPLICATION FOR AN ADMINISTRATIVE MISTRIAL

Before: Superintendent Robin D. McElary-Downer
Ontario Provincial Police

Appearances:

Counsel for the Prosecution: Ms. Claudia Brabazon
Legal Services Branch, MCSCS and MAG

Counsel for the Defence: Mr. Vincent Clifford
Ontario Provincial Police Association

Counsel for the Public Complainant: Mr. Robert Houston
Burke-Robertson LLP
Barristers and Solicitors

Hearing Dates: January 30, 2017

This decision is parsed into three parts: PART I: OVERVIEW; PART II: THE APPLICATION; PART III: DECLARATION.

PART I: OVERVIEW

In a decision released on July 7, 2016, Provincial Constable David Dionne, (PC DIONNE), #13490, was found guilty of neglect of duty and deceit following a three-day hearing. Briefly, the circumstances which led to this finding included:

On September 1, 2014, at 6:18 pm, PC DIONNE was dispatched to a 911 call at a home in Casselman. He was negligent in that without lawful excuse, he failed to respond or take any action in response to the call. When he cleared the call with the dispatcher some nine hours later, he implied he had taken some action to confirm there was 'trouble on the line' and that no further action was required. This was not true.

Two days later, OPP officers attended the same residence and discovered the resident, Ms. M■■■■, deceased. The evidence indicated she called 911 two days earlier when she went into medical distress and consequently passed away.

Following the release of my decision in relation to the finding of guilty, newly assigned counsel for the OPP, Ms. Brabazon, informed the tribunal PC DIONNE's right to a fair hearing had been violated. She revealed PC DIONNE's counsel was also counsel for the prosecutor's witness, PC Cunning, who also faced an allegation of misconduct arising from the same matter. She advised counsel's conflict of interest in representing both officers breached the integrity of a fair hearing, procedural fairness and natural justice. In light of this revelation, PC DIONNE's counsel was replaced by Mr. Clifford. Mr. Houston remained as counsel for the public complainant, Mr. Dick, and the late, Ms. M■■■■'s family.

Evident in the teleconferences which followed Ms. Brabazon's revelation, parties held opposing views in regard to whether this tribunal had the authority and jurisdiction to declare an administrative mistrial. The tribunal consequently sought a legal opinion from Mr. Paul Ceyskens, BA, LLB, Ceyskens & Bauchman, Barristers and Solicitors¹; the results of which were shared with the parties on December 9, 2016.

¹ Exhibit 28a: Legal Opinion, Mr. Paul Ceyskens, BA, LLB, Ceyskens and Bauchman, Barristers and Solicitors

PART II: THE APPLICATION

On January 30, 2017, the tribunal reconvened. Mr. Clifford, speaking on behalf of counsels, made a formal application to declare a mistrial. He based the application on the procedural irregularity that had occurred, one which he found highly unusual and unfortunate. He recognized the circumstances created by PC DIONNE's former counsel impacted all parties. Notwithstanding, he believed there was a path to resolution which started with a declaration of a mistrial.

Mr. Clifford pointed to paragraph 9 of Mr. Ceyskens' opinion which referred to the common law duty of procedural fairness. The duty originated from the concept of natural justice and authorized administrative tribunals such as this to imply a set of procedural principles in silent or ambiguous legislation. In an instance such as this, the tribunal has common law jurisdiction. Additionally, jurisprudence existed to declare a mistrial as seen in the case of *College of Nurses of Ontario and Member*, [2005] CanLII 79645, (College of Nurses of Discipline Committee)².

Mr. Clifford submitted that in light of the fact this tribunal possessed the legal ability, authority and jurisdiction to declare a mistrial; he believed it appropriate to give reasons for doing so:

1. PC DIONNE's right was compromised by the fact he was represented by counsel who was acting for two clients, both of who were parties to the same hearings arising from the same circumstances – a highly unusual scenario. Usually one would see a one dimensional conflict, but here there were two. Two people were charged arising out of the same factual circumstances. They were both accused, and both were being called to testify against each other, which created a conflict on two levels. As such, the extent of the procedural irregularity and its sufficiency to grant a mistrial must be examined.
2. The issue this tribunal is being called upon to determine is, 'Was PC DIONNE's right compromised by the conflict which existed and did a significant irregularity occur as a result?' Mr. Clifford submitted there was. Previous counsel was in a position where he had to cross-examine his own client, PC Cunning, and counsel should never be in this position. It was an irregularity when he did so and not permitted in the law of conflict. Moreover, Mr. Clifford asked rhetorically, "How could he (counsel) have challenged PC Cunning? He couldn't have and he

² Exhibit 28b: *College of Nurses of Ontario and Member*, [2005] CanLII 79645, (College of Nurses of Discipline Committee)

shouldn't have even been cross-examining; so he did a very soft cross-examination." This fact demonstrated how the conflict affected the hearing.

3. Looking at the overall allegations PC DIONNE faced, the available inferences from the deceit charge were: 1. PC DIONNE actually misled PC Cunning; or 2. PC Cunning lied to protect DIONNE. Either way, PC Cunning should have been approached in a manner that would have assisted PC DIONNE. It should have been put to PC Cunning during cross-examination that PC DIONNE was not responsible for what Mr. Girvin characterized as a mistaken belief harboured by officers, Croney, Cadieux and St. Clair; the mistaken belief being that PC Cunning had suggested to them PC DIONNE had attended the residence, when in fact we know he did not.

It should be taken into consideration how the hearing was impacted. For example, on page 33 of the decision, the Hearing Officer stated, "I find it logical PC DIONNE would want to continue with the facade in light of the trail of evidence already established. ... Although the evidence points to the fact PC DIONNE had a role in the misrepresentations put forward by PC Cunning, it remains nonetheless fragile and not clear in my mind."

Owing to the way Mr. Girvin approached PC Cunning, the Hearing Officer was left with the impression PC DIONNE had a role in what PC Cunning was saying. Counsel should have put it to PC Cunning that PC DIONNE had nothing to do with any misapprehension which existed. Had this been done the Hearing Officer may not have believed PC DIONNE had some role in it, but because counsel owed a fiduciary duty to both officers and was hamstrung by the conflict, he could not conduct the case in the way that he should. It appears no one knew of the legal conflict which existed.

4. The next point of significance is if PC DIONNE had testified he told PC Cunning he did not go to the residence, clearly there would have been no basis for PC Cunning to make any equivocal statement. If the decision was made for PC DIONNE to get into the box, he would flatly contradict the evidence of PC Cunning. So counsel was conflicted. To allow PC DIONNE to testify would have meant he would have contradicted counsel's other client. Strategically, counsel knew that if PC DIONNE testified and he contradicted Cunning, a conflict in the evidence between his two clients would have been created.
5. Mr. Clifford advised he listened to every piece of the tribunal's audio recording. He understood the decision to whether PC DIONNE would testify or not was made within 20 minutes after the prosecutor's case rested. In his opinion, this

was inadequate. The conversation in regard to whether he should testify should have been ongoing with PC DIONNE throughout the hearing.

In the decision, the Hearing Officer stated on page 28, "Without the benefit of hearing from PC DIONNE, a right which he exercised, this tribunal will not speculate on what PC DIONNE was thinking." This is troubling since it is now known counsel made a decision with his client, knowing strategically there was a downside to having PC DIONNE testify. Further on page 28, the Hearing Officer stated, "Bundling these excerpts into one, it is clear to me that in order to establish deceit, it must be decided whether the misleading statement was made willfully or negligently and this can be determined by the officer's state of mind or actions." Again, the tribunal did not have the benefit of hearing from PC DIONNE and had it, it would have been assistive in finding whether deceit had been proven. It is clear PC DIONNE's decision not to testify was relevant to the tribunal's decision. This was a strategic decision made by PC DIONNE's own lawyer who was hamstrung by conflict.

6. When counsel places himself in a scenario in the specific context of a legal hearing and the decision to call one client impacts another client who strangely enough is also accused with a pending hearing arising out the same facts, it is a spectacular example of a serious irregularity in the conduct of a proceeding. This is the same kind of irregularity Mr. Ceyssens spoke of in paragraphs 5 and 6 of his legal opinion. It is a horrendous example of counsel being blind to his client, both PC DIONNE and PC Cunning.
7. PC DIONNE was not advised of the legal conflict. He was not aware his counsel was in conflict; the appropriateness of the situation was never discussed with him. The only way PC DIONNE knew Mr. Girvin was acting for PC Cunning was because he was told it simply was the case.

Based on the factual background and law before the tribunal, Mr. Clifford asked that a mistrial be declared.

Mr. Houston confirmed the family's support of Mr. Clifford's request for a mistrial. He added the key element in this matter is a question of law and whether the rights of PC DIONNE and advice he received may have been compromised. This should have been reviewed by Mr. Girvin with both his clients and it was not.

Ms. Brabazon advised Mr. Clifford has articulately and completely described the very circumstances which caused her, in the first place, to contact the OPP Association to report one of its lawyers was, in her view, in an irreconcilable conflict of interest in the

PCs Cunning and DIONNE matters. She echoed Mr. Clifford's comments that one cannot possibly cross-examine their own client to benefit their other client. There is a prohibition even in law to represent a former client. To see someone represent a current client – two officers charged with offences from the same scenario is highly irregular.

From the perspective of the governing law, the authority to declare a mistrial derives from section 23 of the *Statutory Powers and Procedures Act*. Further there is governing case law which speaks to conflicts of interest in *R v. Widdifield*, [1995] OJ 2303, *R v Speid*, [1983] OJ No. 2441³ and *R v Brissett*, [2005] OJ No. 343⁴.

Further, the (Lawyers') Rules of Professional Conduct states clients are owed a duty of loyalty and duty of confidentiality. When a lawyer acts in a conflict, they cannot perform or fulfil their sworn duty of loyalty. Obviously Mr. Girvin could not be 100 percent loyal to PC Cuning when making a strategic decision in regard to a plea, nor could he cross-examine his own client, PC Cuning, and act in complete loyalty to PC DIONNE. Similarly the duty of confidentiality was impacted. Each client was entitled to a 100 percent duty of confidentiality so they could confide in regard to the legal strategy of their defence.

The test of an actual conflict, although in this case Mr. Clifford has enunciated several, is any realistic risk of conflict or the appearance of conflict. The public as well are entitled to trust that the system has integrity which is fair to both parties. The minimum requirement in civil proceedings where a potential conflict of interest exists is to provide clients with independent legal advice. This low threshold does not even apply here or in criminal proceedings because individual sanctions can be imposed.

In conclusion, Ms. Brabazon submitted the test deals with any realistic conflict and in this case there is clear evidence of actual conflict. She joined counsel in asking a mistrial be declared.

PART III: DECLARATION

I need not recite the reasons provided by counsels; I found on the face they were compelling, persuasive and entirely consistent with the legal opinion I received. To this end, I accept their position. I have reviewed the entire conduct of the proceedings and recognize how one could conclude PC DIONNE's counsel's conflict of interest resulted in irrevocable unfairness to the officer. I further agree with the legal opinion that should

³ Exhibit 29 c: *R v Speid*, [1983] OJ No. 2441

⁴ Exhibit 29 b: *R v Brissett*, [2005] OJ No. 343

this proceeding continue, it would almost certainly not survive an appeal to the Commission.

As with every subject officer, PC DIONNE had a fundamental right to be fairly heard and represented by competent counsel. I find the impropriety of his former counsel so egregious that for this tribunal to continue would almost certainly bring the administration of justice into disrepute. To stop the manifestation, perpetuation and aggravation of unfairness in which this proceeding is now so acutely infected with, I find there is only one cure. I grant the application and declare a mistrial on my finding of guilty against PC DIONNE for the charges of deceit and neglect of duty.



Robin D. McElary-Downer
Superintendent
OPP Adjudicator

Verbal decision: January 30, 2017
Written decision: February 13, 2017

APPENDIX 'A'

Exhibit 27: Prosecutor's Designation (Ms. Brabazon)

Exhibit 28a: Legal Opinion, Mr. Paul Ceyskens, BA, LLB, Ceyskens and Bauchman,
Barristers and Solicitors

Exhibit 28b: *College of Nurses of Ontario and Member*, [2005] CanLII 79645, (College
of Nurses of Discipline Committee)

Exhibit 29: Book of Authorities

Tab a: *MacDonald Estate v Martin*, Supreme Court of Canada, [1990] 3 SCR
1235

Tab b: *R v Brissett*, [2005] OJ No. 343

Tab c: *R v Speid*, [1983] OJ No. 2441

Tab d: *R v Billy*, [2009] OJ No. 4737