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Self-Incrimination Immunity and Professional Misconduct

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Case Commented On: *Toy v Edmonton (Police Service)*, 2018 ABCA 37 (CanLII)

In *Toy v Edmonton (Police Service)*, the Alberta Court of Appeal dismissed former Constable Elvin Toy's appeal of a 2015 ruling that led to his discharge from the force. That year, the Law Enforcement Review Board upheld a Presiding Officer's decision convicting Toy of deceit and misconduct in the course of fabricating evidence at an earlier proceeding. Toy argued that the Board failed to apply the appropriate standard of review to correct the Presiding Officer's error in law, which resulted in admitting involuntary testimony that offended his privilege against self-incrimination.

Facts

At an appeal regarding a separate Edmonton Police Service (EPS) disciplinary hearing in 2009, the Board's assistant secretary and two members caught Toy, who at the time was not a party, reading from opposing counsel's materials during a lunch-time adjournment. At the resulting investigation, Toy denied the incident in a compelled written sworn statement which he maintained in his oral testimony at a disciplinary hearing in 2012. On July 15, 2012, the Board rejected Toy's account, found him guilty of discreditable conduct and imposed a 50-hour suspension.

In 2015, following complaints regarding Toy's false testimonies, the EPS further charged and convicted him in deceit and misconduct under section 17(1) of the *Police Service Regulation*, Alta Reg 356/1990, and dismissed him from the force. Toy appealed the result to the Board, which upheld the Presiding Officer's decision as reasonable.

The Court of Appeal

Toy appealed this result to the Alberta Court of Appeal, arguing in part that the Board erred in the appropriate standard of review and failed to correct the Presiding Officer's mistake of admitting self-incriminating evidence (at para 3). On the first point, the Court of Appeal concluded that the Board had appropriately selected and applied a reasonableness standard of review, and that its decision should in turn be reviewed on the standard of reasonableness – there was no "extricable question of law" that fell outside of the Board's legitimate mandate that rebutted the presumption of reasonableness (at paras 14, 19). However, while the Court disagreed that the appropriate standard of review was correctness, it proceeded by assuming otherwise and found the Presiding Officer's decision both correct in law and within the range of reasonable outcomes (at para 45).

Toy argued that the law on admissibility not only was an interpretation of the *Police Act*, [RSA 2000, c P-17], the Presiding Officer and Board's home statute, but also an interpretation of the *Alberta Evidence Act*, [RSA 2000, c A-18]; therefore, following recognised administrative law principles, the Court was in as good or better a position to decide on such matters of general importance (at para 25). In the alternative, Toy advanced the argument that the Presiding Officer acted contrary to section 51 of the *Police Act*, section 10(3) of the *Police Service Regulation* and section 6(2) of the *Evidence Act* regarding the admissibility of involuntary written and oral statements supplied from separate hearings and investigations (at para 26).

The Presiding Officer at the disciplinary hearing had justified the decision to admit Toy's statements using section 47(1)(e) of the *Police Act*, which reads: "the person conducting the hearing may receive any evidence presented that the person considers relevant to the matter being heard and is *not bound by the rules of law respecting evidence* applicable to judicial proceedings" (emphasis added). He noted that the provision signalled an intention not to extend immunity to evidence of officer misconduct, as that would offend public policy and fail to deter such misconduct (at para 28).

The Presiding Officer also considered the provisions of the above legislation and concluded that they did not preclude the admissibility of self-incriminating evidence when the subject-matter of the proceedings is the act of lying under oath (at para 29). The relevant text is as follows:

> *Police Act*
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> **51** Where a police officer . . . gives evidence during
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> (a) a hearing under this Act, or
>
> (b) an appeal under this Act . . . ,
>
> that evidence . . . if it tends to incriminate him or her . . . shall not be used or received against the police officer . . . in any civil proceeding or in any proceeding *under any other Act*, *except in a prosecution for or proceedings in respect of perjury or the giving of contradictory evidence*.
>
> *Police Service Regulation*
>
> **10(3)** Where
>
> (a) a police officer in respect of whom an investigation is being carried out is directed by the investigator to provide an explanatory report . . . setting out the police officer's version of the subject-matter of the complaint, and
>
> (b) pursuant to that direction the police officer provides an explanatory report , that explanatory report shall be regarded as an involuntary statement and shall not be admissible in evidence in any proceedings carried out under the Act against him, *except to prove that the statement is false*.

Alberta Evidence Act

> **6(2)** A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, *except in a prosecution for perjury or for giving of contradictory evidence*. (emphasis added by the Court of Appeal)

The Court agreed with the essence of the Presiding Officer's analysis (at para 32). Firstly, the Court approved the reasons specifying that, in conjunction with section 47(1)(e) of the *Police Act*, which gave the Presiding Officer an unrestricted reach to admit evidence, section 51 of the *Police Act* barred protection from self-incrimination (at para 33). By using the language "any other Act" in section 51, the Legislature made an explicit statement that the self-incrimination immunity applied everywhere except to an action related to the *Police Act* itself: "[i]f the Legislature had intended for [the immunity] to apply to all Acts [...] it would have done so instead of wording section 51 as it did" (at para 32).

Secondly, section 10(3) of the *Regulation* stated, using plain language, that parties in proceedings challenging the truthfulness of compelled reports may use them as evidence (at para 34). As Toy did not argue for the veracity of the statements, the Court disagreed that the provision precluded their admissibility as the purpose of the allegations was to prove their falsity (at para 34).

Finally, according to the Presiding Officer, section 6(2) of the *Evidence Act* did not apply if the provision conflicted with the *Police Act* and if the proceeding fell outside of criminal law (at para 35). The Court agreed that the former point applied, reasoning that the narrow scope of the *Police Act* prevailed (at para 36). It cited the Alberta Court of Appeal decision in *Alberta (Securities Commission) v Brost*, 2008 ABCA 326 (CanLII), where the Court decided that "the specific provision [of the *Securities Act*] overrides the general [section 6(2) of the *Evidence Act*]" (at para 36).

However, the Court chose not to comment on the latter point (at para 37). Instead, it explained that the breadth of the section 6(2) immunity exception ("in a prosecution . . . for giving of contradictory evidence") could include proceedings related to an officer's false testimony under oath (at para 37). The Court reasoned that an umbrella immunity to such actions would offend the very object of the *Police Act*: to ensure "adequate and effective policing" and to protect the administration of justice from disrepute (at paras 38-40, 43).

To illustrate the principle, the Court cited (at para 42) the Saskatchewan Court of Appeal decision in *R v Staranchuk*, 3 DLR (4th) 574, 1983 CanLII 2402 (SK CA), where the Court permitted the use of prior false, sworn statements to incriminate the accused pursuant to an offence under the *Bankruptcy Act*. In its judgment affirming the SKCA decision, the Supreme Court explained that the courts must demarcate between sworn, true statements disclosing evidence of prior offences and sworn, false statements ([1985] 1 SCR 439, 1985 CanLII 73 (SCC) at para 1). The latter type, the Court concluded, is admissible in subsequent cases where "the very essence of the offence, and its *actus reus*, is the giving of the false testimony" (*Staranchuk* SCC at para 1). In these cases, even if the protection against self-incrimination in

section 13 of the *Charter* applies — which provides that "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence" — the SKCA held that prior false statements are admissible where the deceit is the substance of the offence, regardless of whether it was "incriminating evidence" or related to "perjury or for the giving of contradictory evidence" (*Staranchuk* SKCA at para 5).

Commentary

While I agree that the Presiding Officer's decision was correct in law and within a range of reasonable outcomes, this case raises concern that the Court's broad application of the self-incrimination immunity exception to one class may have adverse effects on the public.

With respect, it is a stretch to interpret section 51 of the *Police Act* to mean that the Legislature intended to omit the *Police Act* itself from its self-incrimination immunity. The conjunction "or" serves to separate "civil proceedings" from "any proceeding under any other Act"; "any other Act" is not, on plain reading, a qualifier for both items in the list. Therefore, on the contrary, the self-incrimination provision under section 51 should shield this case due to its civil nature. By providing an explicit self-incrimination provision in section 51, the Legislature may not have intended for section 47(1)(e) to exclude the spirit of section 6(2) of the *Evidence Act.* In the event that I am wrong, section 51 would be too ambiguous to resort to the plain meaning approach to statutory interpretation.

Consequently, the Court explained that a purposive approach to the *Police Act* would support using evidence of lying under oath for subsequent disciplinary proceedings. To ensure "[a]dequate and effective policing" throughout the province, public policy demands the admission of self-incriminating evidence. But did this go too far?

The Court reasoned that the reputation of the policing system outweighs self-incrimination protections in the case of police officers (at para 39). The egregious wrongdoings in this case required specific attention to the *Police Act* that the general tone of the *Evidence Act* did not provide for (at para 40).

Indeed, the Court accepted a broad interpretation of "giving of contradictory evidence" in section 51 of the *Police Act* to include disciplinary level misconduct rather than confining the exceptions to serious cases of perjury and contradictory evidence under sections 131 and 136 of the *Criminal Code*, RSC 1985, c C-46 (at para 37). Considering this, I question the purpose of specifying "except in a prosecution for perjury or for giving of contradictory evidence" in section 51 if *Staranchuk* affirmed that similar words were meaningless in section 13 of the *Charter* in cases involving deceit (*Staranchuk* at para 5). Using the Presiding Officer's reasoning (at para 32), if the Legislature had intended to bar the immunity from the entire category of offences that include lying as an *actus reus* rather than only perjury and for giving contradictory evidence, it would have worded the section differently.

Nonetheless, I agree with the Court of Appeal's decision. In light of the specific wording in section 17(1) of the *Police Service Regulation* — which states that "[w]here *at a hearing* it is

determined that a cited officer is guilty of [deceit]" (emphasis added) — the section would prevail pursuant to the doctrine of *lex specialis* had there been any immunity under the aforementioned Acts. Such precision was also present in *Staranchuk*, where the accused was charged for submitting false, sworn written and oral testimony to the official receiver under the *Bankruptcy Act*. The relevant sections read ([1983] 2 WWR 145, 1982 CanLII 2670 (SK QB) at para 15):

> **169** Any bankrupt who . . .
>
> (c) refuses or neglects to answer fully and truthfully all proper questions put to him *at any examination held pursuant to this Act*;
>
> (d) makes a false entry or knowingly makes a material omission in a statement or accounting; . . .
>
> is guilty of an offence. (emphasis added)

Without the language in section 17(1) of the *Regulation* and section 169 of the *Bankruptcy Act* distinguishing the offences, I doubt that I would have been satisfied with the Presiding Officer's arguments. A broad interpretation with exclusive dependence on public policy rationales treads into a dangerous encroachment of a police officer's immunity from self-incrimination that may bleed into our own.

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