Office of the
Police Complaint Commissioner

British Columbia, Canada

REQUEST FOR LEGISLATION

2019

Presented to the Special Committee to Review the Police Complaint Process

Legislative Assembly of British Columbia

October 28, 2019

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October 28, 2019

Ms. Rachna Singh, MLA
Chair of the Special Committee to Review the Police Complaint Process
c/o Parliamentary Committees Office
Room 224, Parliament Buildings
Victoria, BC V8V 1X4
Canada

Dear Ms. Singh,

The March 31, 2010, amendments to the *Police Act* significantly changed the police complaint process in British Columbia. We have now had the benefit of working within the new regime for almost ten years and have learned much about the strengths of the legislation and where improvements are necessary.

The enclosed submissions focus on four priority amendments to the police complaint process, which I and my staff have identified as critical for the Office of the Police Complaint Commissioner to fulfill its mandate to ensure transparent and accountable investigations. These recommendations are aimed at reducing delay, creating consistency in investigations across the province and allowing the OPCC to work proactively to prevent or reduce the recurrence of complaints and investigations into misconduct.

I have also appended to these recommendations the prior legislative submissions that remain a priority for this office.

Thank you for your consideration.

Sincerely,

Clayton Pecknold
Police Complaint Commissioner

Attachments

cc: Mr. Mike Morris, MLA, Deputy Chair
Ms. Susan Sourial, Clerk of the Committee

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D. OPCC Information Bulletin #14 – Accountable and Transparent Investigations Pursuant to the *Police Act*

E. September 7, 2018, Submission to Minister of Public Safety and Solicitor General by Police Complaint Commissioner Lowe

Recommendation 1: Police Complaint Commissioner's Power to Arrange a Public Hearing

- **Amending the *Police Act* to provide the Commissioner with power to arrange a public hearing at any stage of the process.**

Current Status

The discretion to call a public hearing is a key mechanism for the Police Complaint Commissioner to fulfill his mandate to oversee and monitor complaints, investigations and the administration of discipline and proceedings under Part 11, and ensure the purposes of that Part are achieved. However, under the current system, the Police Complaint Commissioner must await the conclusion of lengthy proceedings before arranging a public hearing, which creates unnecessary delay and redundancy in the system.

A public hearing is a "new hearing" into the conduct of a member that was the subject of an investigation. It requires the calling of evidence and examination of witnesses. The Police Complaint Commissioner must arrange a public hearing if, in the police complaint commissioner's opinion, a public hearing of the matter is required to preserve or restore public confidence in the investigation of misconduct or the administration of police discipline.

The Police Complaint Commissioner must also arrange a public hearing if the findings of a discipline authority are incorrect, or if doing so is in the public interest. The Act lists several factors that must be considered when assessing the public interest. In these circumstances, the Police Complaint Commissioner also has the option of arranging a review on the record instead of a public hearing. However, a review on the record is limited to the evidentiary record, which, in many cases, is insufficient to ensure an adequate review of the matter or satisfy the public interest.

Delay and redundancy in the system exist due to a lack of clarity in the legislation regarding when the Police Complaint Commissioner can arrange a public hearing. In 2011, the BC Supreme Court determined that the Police Complaint Commissioner has broad discretion to arrange a public hearing (*Dickhout v. The Police Complaint Commissioner* 2011 BCSC 880), but subsequently determined that the Police Complaint Commissioner does not have the authority to arrange a public hearing until after an investigation and discipline proceeding have concluded (*Florkow v. British Columbia* (Police Complaint Commissioner) 2013 BCCA 92).

As a result, the Police Complaint Commissioner must await the conclusion of lengthy and costly investigations and discipline proceedings before calling a public hearing even when, at an earlier stage in the process, a public hearing is necessary in the public interest, or is necessary to preserve or restore public confidence in the investigation of misconduct or the administration of police discipline. There have been several such matters under the current system.

Issues

- At minimum, it takes 11 months for an investigation and discipline proceeding to conclude if all procedural timelines are met. However, few matters conclude within that timeframe. In many cases, delays in investigations and discipline proceedings have resulted in a 2 to 4 year delay before the Police Complaint Commissioners could call a public hearing.
- The average time to complete an investigation over the past 5 years has been 193 days and the average time to complete discipline proceeding over that same period has been 217 days. The shortest discipline proceeding took 51 days and the longest 646 days.
- Adjournments of discipline proceedings are a major cause of delay in the system and the Police Complaint Commissioner has no authority to address delays during the discipline proceeding process.
- The current system requires the expenditure of resources even when, early in the process, the public interest factors listed in the Act for calling a public hearing are satisfied or a public hearing is necessary to preserve or restore public confidence in the administration of police discipline.
- Further, the expenditure of those resources does not expedite or simplify a public hearing. Rather, as a "new hearing" of the matter, all evidence relating to the allegations must be presented to the Adjudicator, rendering much of the prior proceedings redundant. Apart from the unnecessary financial cost, the strain on members and complainants is substantial due to delay and the requirement to provide evidence multiple times.
- The unnecessary costs and delays that arise based on this system are most commonly related to the most serious matters, for which the public interest demands a timely and thorough examination of the issues.

Other Authorities

- The previous Act expressly provided the Police Complaint Commissioner the power to arrange a public hearing at any stage of a complaint proceeding.
- In his 2007 Report on the Review of the Police Complaint Process in British Columbia, the Honourable Josiah Wood, Q.C. stated that public hearings should be supplemented, not eliminated, as a means of determining complaints.[1]
- The Attorney General also expressed in Committee Stage of debate on the new Act, that section 143(1)(b) gives the Commissioner authority to arrange a public hearing when needed in the public interest and not just at the end of a complaint proceeding.

Other Jurisdictions

The statutory regimes in other Canadian jurisdictions differ significantly in terms of process and powers of the heads of oversight and no similar provisions exist.

[1] *Report on the review of the police complaint process in British Columbia* by Josiah Wood. (Victoria: Minister of Public Safety and Solicitor General, 2007).

OPCC Recommendation

There have been several examples of matters that have been significantly delayed due to lengthy discipline proceedings, despite it being clear earlier in the process that a public hearing was required both in the public interest and to preserve or restore public confidence in the investigation of misconduct or the administration of police discipline. The corresponding impact on parties and expenditure of resources could be avoided, in many cases, by providing the Police Complaint Commissioner the discretion to arrange a public hearing earlier in the process.

The matter of the public hearing into the conduct of Constable Taylor Robinson of the Vancouver Police Department (PH 2013-5401) provides a cogent example. That file concerned the officer's actions in pushing to the ground Ms. Sandy Davidson, who was significantly disabled due to cerebral palsy. Those actions were captured on video and received significant media attention. There were concerns about the manner in which the incident was initially handled by the police, the length of time the discipline proceedings took and appropriateness of the outcomes. The incident occurred on June 9, 2010, but the investigation was not completed until June 26, 2012, in part due to the matter being suspended for a criminal investigation. It was not until October 7, 2013, that the discipline proceeding process concluded – over 15 months after the investigation concluded. The discipline proceeding convened only for one day during that period (**see Appendix B, Notice of Public Hearing**).

Another example is *The matter of the public hearing into the complaint against Constable Edgar Diaz and Former Constable Hughes of the South Coast BC Transportation Authority Police Service* (PH 2016-01), which relates to an August 10, 2011, incident that drew media attention for the force used against then UBC Football player Charles Riby-Williams during the investigation of a fare violation, including several blows to the head with a baton. That matter involved a criminal investigation, which led to a guilty plea by Constable Diaz for assault causing bodily harm, and three separate discipline proceedings. Once the criminal proceedings concluded and the corresponding suspension of the *Police Act* investigation lifted on June 29, 2016, it took until April 6, 2017, to complete the three discipline proceedings, in large part due to applications brought by counsel for the respondents. As the various proceedings concluded at different times, the Police Complaint Commissioner sought to join all matters into one hearing. The respondents sought judicial review to quash the proceedings due to delay. The BC Supreme Court allowed that Petition and the matter is now before the BC Court of Appeal (**see Appendix C, Notice of Public Hearing**).

The OPCC recommends that the Act be amended to provide the Police Complaint Commissioner the authority to arrange a public hearing at any stage of the process when the public interest demands it or when a public hearing is required to preserve or restore public confidence in the investigation of misconduct or the administration of police discipline. The OPCC further recommends that the Act clearly provide the authority to join related matters into one proceeding as a further means of eliminating unnecessary delay and redundancy.

Relevant *Police Act* Provisions

Sections 138 and 143

Recommendation 2: Expanded Powers for Systemic Reviews

- **Amending the *Police Act* to expand the Police Complaint Commissioner's powers to compel information for systemic reviews and make recommendations to relevant agencies.**

Current Status

The Police Complaint Commissioner currently lacks the authority to conduct meaningful reviews of broader systemic issues or policing policies and practices that impact police conduct and public trust. Additionally, the Act does not provide sufficient authority to compel the necessary information or issue recommendations. The Police Complaint Commissioner, therefore, has limited ability to proactively work to reduce complaints and investigations into misconduct.

The Police Complaint Commissioner can engage in or commission research on any matter relating to Part 9 (the Office of the Police Complaint Commissioner) or Part 11 (Misconduct, Complaints, Investigations and Discipline Proceedings) of the *Police Act.* The Commissioner may also prepare and provide informational reports.

The Police Complaint Commissioner has a narrow authority to require statements or interviews from Discipline Authority's, chief constables, deputy chief constables and chairs of municipal police boards in relation to the Commissioners functions. However, those entities cannot be compelled to produce, or provide access to, documents or other information necessary to facilitate meaningful review of systemic issues.

Issues

- When conducting research, the Police Complaint Commissioner is limited to data compiled from complaints or investigations. Such restrictive data is insufficient and of limited value. For example, in 2017 the Commissioner conducted research into the collection and use of citizens' identifying information via street checks and Barwatch/ Restaurant Watch. However, the data was too limited to draw any reliable conclusions. No subsequent research has been conducted due to these limitations.
- When the Commissioner identifies trends in police conduct, or when there is a widespread public concern about police-related issues, the Police Complaint Commissioner currently has insufficient powers to independently review and report on those matters, or make recommendations to the necessary entities that might reduce or prevent misconduct.

Other Jurisdictions

Ontario Office of the Independent Police Review Director (OIPRD)

The OIPRD has the authority to examine and review issues of a systemic nature and may make recommendations respecting such issues to the Solicitor General, Attorney General, Chiefs of Police, Police Boards, or any other person or body. Pursuant to the Ontario *Public Inquiry Act*, the OIPRD has the power to compel testimony or documentation from any person or organization.

To date, the OIPRD has issued four reports on systemic reviews, including:

1. Breaking the Golden Rule: A review of Police Strip Searches in Ontario;
2. Broken Trust: Indigenous People and the Thunder Bay Police Service;
3. Casting the Net: A review of Ontario Provincial Police Practices for DNA Canvasses; and
4. Policing the Right to Protest: G20 Systemic Review Report.

BC Director of Police Services

The Director has the discretion to engage in studies and inquiries pursuant to the *Police Act,* but also has the authority pursuant to section 40(3) of the *Police Act* to inspect records, operations and systems of administration of any policing or law enforcement operation.

The Director is responsible for superintending policing and law enforcement functions in British Columbia. Whereas the director is responsible for how policing services are delivered in British Columbia, the Police Complaint Commissioner's mandate is the oversight of conduct-related issues by members of Municipal Police Departments. While there may be some overlap in those roles, the issues that the Police Complaint Commissioner seeks to conduct systemic reviews on are more specific to the matters related to Part 11 of the Act.

BC Coroner's Service

The mandate of the Coroner's service includes recommendations aimed at preventing deaths in certain circumstances. When the Coroner's Service Identifies trends in common causes of death, the agency may conduct additional review and studies for the purpose of creating prevention measures. The BC Coroner Service's has broad powers to compel and interview witnesses and to order disclosure of documents pursuant to the *Coroner's Act*.

Other Authorities

In the 2007 Report on the Police Complaint Process in British Columbia, The Honourable Josiah Wood, Q.C. reported that his review identified trends in repetitive incidents of certain types of complaints, including use of force. His report recommended that OPCC staff "keep an eye out for such phenomena and take whatever steps necessary to bring it to the attention of whatever level of authority can address the issue." The Honourable Josiah Wood, Q.C felt that the legislation should, therefore, place a duty on the Police Complaint Commissioner to conduct

reviews in order to identify trends and make whatever recommendations are necessary in the circumstances.[2]

In his 2017 Report of the Independent Police Oversight Review, The Honorable Justice Michael Tulloch of the Ontario Court of Appeal recommended that the OIPRD's systemic review powers be further expanded. He wrote: "There is demonstrable public interest with respect to a number of policing issues that would greatly benefit from independent civilian inquiry" rather than leaving it to the police or the Ministry responsible for policing. Justice Tulloch made two specific recommendations: that the OIPRD be required to issue a report on systemic reviews and that the OIPRD have the authority to compel Chiefs of Police to report back regarding the implementation of the recommendations contained in those reports.[3]

OPCC Recommendation

Justice Tulloch wrote that certain policing issues "often merit deep and sensitive inquiry into the policing rationale for certain policies and practices as well as the real-life impact of these policies and practices on the public."[4] If the Police Complaint Commissioner had the authority to compel information, systemic reviews would be a useful mechanism to look beyond the issues in a given complaint to determine whether systemic issues exist and, if so, to identify potential changes to policies or practices to address those issues. Similarly, when observing repetitive incidents or trends, the Commissioner could conduct a review aimed at making recommendations to minimize future complaints/investigations, as the Honourable Josiah Wood, Q.C. envisioned.

The OPCC recommends amendments to the *Police Act* to provide the Police Complaint Commissioner the authority to compel records from municipal police departments and police boards, as well as the power to interview any member of police department or police board for the purpose of conducting systemic reviews. It is also recommended that the Police Complaint Commissioner have the authority to make recommendations to Municipal Police Departments, Police Boards and government regarding the results of those reviews. As Justice Tulloch recommended for Ontario, the authority to require Police Chiefs and Police Boards to report back on the Police Complaint Commissioner's recommendations from systemic reviews is an appropriate accountability mechanism.

With those expansions to the Police Complaint Commissioner's authorities, he will be able to respond to trends and systemic issues to provide meaningful proactive recommendations aimed at preventing misconduct.

Relevant *Police Act* Provisions

Sections 177(4), 177(5)

[2] *Ibid*, at paragraph 49.
[3] *Report of the Independent Police Oversight Review* by the Honorable Justice Michael Tulloch (Toronto: Ministry of Attorney General, 2017) at paragraphs 247 to 255.
[4] *Ibid* at paragraph 249.

Recommendation 3: Expanded Authority to Issue Binding Guidelines

- **Amending the *Police Act* to expand the Police Complaint Commissioner's guideline-making authority, not otherwise provided for within a specific provision of the Act, to include binding guidelines in relation to the exercise of his duties and functions on any matter.**

Current Status

The Police Complaint Commissioner is responsible for ensuring that the purposes of Part 11 of the Act (Misconduct, Complaints, Investigations, Discipline and Proceedings) are achieved. In the 2007 Report on the Review of the Police Complaint Process, Judge Wood recommended that that Police Complaint Commissioner have the power to issue guidelines with respect to matters not covered by the provisions of the Act, in order to fulfill that responsibility.[5]

That recommendation was based on an understanding that no statutory scheme can ever account for every circumstance and that guidelines are necessary to fill any gaps, as well as to standardize practices across departments. The necessity of binding guidelines was further evidenced by the fact that the Police Complaint Commissioner at the time had tried to standardize investigational practices via directives; however, the legislation did not provide that authority, and that departments frequently challenged those directives.

The current legislation provides the Police Complaint Commissioner the authority to issue guidelines in a few select areas. The scope of those authorities is too narrow to achieve consistency across the province in how investigations are conducted, or ensure that best investigational practices are followed. The legislation does not provide the broad authority to issue guidelines that the Honourable Josiah Wood, Q.C. recommended. Rather, the Police Complaint Commissioner has the narrow authority to establish guidelines with respect to:

a. the receipt and handling of misconduct complaints, complaints about department policies or services and questions/concerns about police officers;
b. informal resolution and mediation; and
c. the criteria to be applied by a chief constable in determining whether an injury constitutes serious harm for the purposes of mandatory external investigations.

The Police Complaint Commissioner may require an investigator to keep and provide records relating to an investigation in the form and manner Commissioner requires. The Commissioner may also provide investigative advice and direction. However, those powers must be exercised on a case-by-case basis.

Issues

- Across the 14 departments that are subject to the *Police Act,* there are inconsistencies with respect to the conduct of investigations, adherence to best investigational practices and the extent to which the confidentiality of investigations is ensured.

[5] *Supra* note1, at paragraph 54.

- The Police Complaint Commissioner has attempted via "Information Bulletins" to communicate best practices to departments in areas where he currently lacks the jurisdiction to make guidelines, but given the non-binding nature of those Bulletins, adoption has been inconsistent.
- Fairness concerns have arisen relating to several issues that go directly to the transparency and accountability of investigations. For example, the Police Complaint Commissioner identified fairness concerns regarding the manner in which evidence is gathered from respondents and police witnesses, versus complainants and civilian witnesses. The Commissioner issued an Information Bulletin entitled "Accountable and Transparent Investigations" (Bulletin 14 – **see Appendix C**) in an effort to address concerns that concern, as well as others, but acceptance has been inconsistent.
- Even in areas where the commissioner may dictate form and manner of reports, non-compliance is common, leaving OPCC staff to attempt to correct non-compliance on a case by case basis, with varying success.
- Procedural gaps that exist in the legislation, particularly during the discipline proceeding phase, have created confusion and inconsistencies.
- Mediation has had limited success since the Act was revised in 2010. Issues with mediation include the cost, restrictive procedures and that there are no mechanisms for the Police Complaint Commissioner to review the mediation process or the outcome of mediated files.

Other Jurisdictions

The Ontario Office of the Independent Police Review Director possesses broad powers to create procedural rules "related to the powers duties and functions of the Director" as well as practice directives and guidelines "for the handling by police chiefs and boards the complaints made by members of the public"(*Police Services Act,* section 56). In July 2016, the Director issued Rules of Procedure, covering a wide range of procedural aspects for receiving and investigating complaints into both member conduct and department policies.

Other Authorities

The Honourable Josiah Wood, Q.C. recommended that the Police Complaint Commissioner have broad guideline-making powers so that gaps in the legislative scheme could be addressed and that consistency across departments could be achieved. The only limit the Honourable Josiah Wood, Q.C. envisioned was that no guidelines could be inconsistent with the provisions of the Act.[6]

OPCC Recommendation

The Police Complaint Commissioner requests that the *Police Act* be amended to broaden his authority to make guidelines in any area not covered by the legislation. Authority to make binding guidelines will enhance the Police Complaint Commissioner's ability to fulfill his mandate pursuant to ensure the objectives of Part 11 are achieved. Binding guidelines will also promote clarity for parties to investigations regarding the process and their rights/obligations.

[6] *Ibid.*

They will also enhance consistency in the conduct of investigations across jurisdictions, which engenders public trust and faith among police officers that they will be treated fairly.
With further discretion to issue binding guidelines, the Police Complaint Commissioner could enhance the use of informal mechanisms for resolving complaints.

Relevant *Police Act* Provisions

Sections 177(1), 177(2), 156, 97(1)(b), 107, 89(5)

Recommendation 4: Amending the Definition of Discipline Authority

- **Amending the definition of "discipline authority" pursuant to section 76 the *Police Act* to include persons appointed pursuant to regulations and approved by the Police Complaint Commissioner.**

- **Further amending that definition by removing chairs of municipal police boards as discipline authorities in relation to investigations concerning the conduct of chief constables and deputy chief constables so that in all cases, a retired judge presides as discipline authority.**

Current Status

The Act defines "discipline authority" as the chief constable of a municipal police department where the investigation concerns the conduct of a member who is not a chief constable or deputy chief constable. The chief constable may also delegate his or her duties as discipline authority to another senior officer in the municipal police department, or in an external police department. The Police Complaint Commissioner also has the authority to designate a senior officer in an external police department as the discipline authority, if the Police Complaint Commissioner determines doing so is in the public interest.

In the case of an investigation into the conduct of a chief constable or deputy chief constable, the Act defines "discipline authority" as the chair of the board by which the member is employed. Each municipal police board is chaired by the mayor. The Police Complaint Commissioner may designate a retired judged in the public interest to be the discipline authority in such matters.

The Police Complaint Commissioner has the authority, in certain circumstances, to attempt to address deficiencies in discipline authority decisions by appointing a retired judge to conduct an adjudicative review.

Issues

- Fulfillment of duties as a discipline authority detract from important operational duties that senior officers must fulfill. Discipline authority responsibilities can dominate weeks or months of a senior officer's schedule.
- Police officers possess expertise in conducting investigations. Chief constables, senior police officers and chairs of police boards generally do not have training or experience in adjudicative decision-making. This sometimes leads to the misapplication of relevant legal principles, incorrect substantive findings and inadequate remedial measures in serious matters.
- Significant time and resources are expended to remedy incorrect substantive findings or ensure adequate remedial measures. The corresponding delay has a negative impact on members who are under investigation and creates disillusionment and apathy for complainants.

- Chairs of police boards, as elected officials, may be in a real or perceived conflict of interest when acting as discipline authorities because findings of misconduct on the part of the chief constable may conflict with their public/elected duties.
- Respondents are invariably represented by experienced legal counsel at discipline proceedings, which have, correspondingly, become legally complex. Some discipline authorities retain legal counsel to assist in dealing with complex applications and arguments presented by counsel.
- Public mistrust may arise in serious matters because of the perceived bias of a system in which police both conduct the investigations and act as the decision-makers.

Other Jurisdictions

- Ontario Civilian Police Commission (OCPC)

The mandate of the OCPC is to hear appeals from first instance disciplinary hearings related to complaints about police conduct. Those hearings are presided over by chief constables or senior police officers. OCPC members are legally trained and have adjudicative experience as arbitrators or tribunal members.

- Judicial Justice of the Peace, British Columbia

In British Columbia, Judicial Justices of the Peace (JJP) are appointed to exercise authority over various regulatory matters and less complex criminal/quasi criminal matters, but do not preside over *Charter* applications or matters that may result in imprisonment. Their role alleviates pressures on the judiciary.

To be appointed as a JJP, an applicant satisfy several criteria and competencies, including at least 5 years of legal practice, a good reputation and experience in decision-making.

Other Authorities

In his 2017 Report of the Independent Police Oversight Review, The Honorable Justice Michael Tulloch of the Ontario Court of Appeal wrote that virtually all stakeholders, including civilians and police, felt the way decisions are made with respect to public complaints needs to be changed. He wrote: "There are serious concerns about real or apparent bias when public complaints are prosecuted and adjudicated by people selected by the chief of police. A fair and effective public complaints adjudication system demands greater independence and impartiality."[7] There were further concerns expressed by Chiefs of police about the lack of legal expertise to handle difficult legal issues and that appeals to correct legal errors consume resources.

Justice Tulloch recommended that the OCPC be tasked with the first instance hearings of public complaints, rather than acting as an appeal body.

[7] *Supra*, note 3 at paragraph 69.

In his 2018 report on the investigation into a chief constable,[8] former Police Complaint Commissioner, Stan T. Lowe, highlighted several issues with respect to the appointment of mayors as discipline authorities for *Police Act* investigations, including lack of necessary training and expertise and a perceived conflict of interest. After his review of the entire proceedings, Police Complaint Commissioner Lowe determined that until legislative amendments occur, he would appoint a retired judge to preside over any matter involving a chief constable. Former Police Complaint Commissioner Lowe also submitted a request to the Minister of Public Safety and Solicitor General for legislative change (**see Appendix E**).

OPCC Recommendation

Discipline Authorities pursuant to the *Police Act* need experience with adjudicative decision-making to navigate the procedural and legal complexities of serious matters. For matters concerning the conduct of members who are not a chief constable or deputy chief constable, the OPCC recommends amending the definition of discipline authority to include persons appointed pursuant to regulation. Regulations would delineate the necessary adjudicative qualifications, to act as discipline authorities as required.

With that amendment, the default discipline authority would remain the chief constable, subject to the discretion of the chief constable or the Police Complaint Commissioner to designate persons appointed pursuant to regulations to act as discipline authority in a particular matter. This will allow the system to maintain sufficient flexibility so that appropriate matters to remain with the chief constable, or his/her delegate, while other matters may be directed to persons with adjudicative expertise.

The OPCC recommends that retired judges be the only option for discipline authority with respect to investigations concerning the conduct of chief constables or deputy chief constables. Such appointments would ensure adequate handling of the matter and would remove of any perception of conflict of interest. It is also commensurate with the seriousness of an investigation into a public official of that status.

Relevant *Police Act* Provisions

Sections 74, 76, 117, 120, 134, 135, 138

[8] Stan T. Lowe, "Summary Informational Report: Review of the Investigations and Disciplinary Process Concerning Frank Elsner (26 September 2018), online: The Office of the Police Complaint Commissioner <https://opcc.bc.ca/wp-content/uploads/2018/10/2018-09-26-Summary-Informational-Report.pdf>

Appendix A: Prior Legislative Submissions

1. Time limits related to discipline proceedings.
2. Addressing the problem of bifurcation after section 117 reviews by retired judges.
3. Expungement periods for members' service record of discipline.
4. Police Complaint Commissioner discretion to resolve reportable injuries via informal resolution or mediation.
5. Expanded compliment of judges available for appointment.
6. General changes to legislative time limits.
7. Expanding how written notice can be provided under the Act.
8. Reporting Requirements of Mediator's Reports Following Mediation.
9. Clarifying who may sit as the Prehearing Conference Authority when a retired judge has been appointed pursuant to section 117 of the Act.
10. Legislating the Police Complaint Commissioner's standing at Judicial Reviews and Appeals.
11. Providing discipline authorities the power to call witnesses at a discipline proceeding.
12. Expungement of Members' Service Records of Discipline (*new)

Time Limits Relating to Discipline Proceedings

The Honourable Josiah Wood, Q.C. took the opportunity at several places in his report (2007) to underline his concern that *Police Act* processes should be completed as quickly as possible, subject to the goals of thoroughly and effectively investigating allegations of police misconduct. The Act currently provides that the commissioner may grant an extension to the 40 business days following a discipline authority's receipt of an FIR within which, if the discipline authority decides that there appears to be misconduct, the discipline authority must convene a discipline proceeding. The commissioner submits that, absent unique circumstances, it is not unreasonable to expect that a discipline proceeding can be both convened and concluded within 40 business days of a discipline authority's receipt of the FIR.

Further, the commissioner submits that the Act's current provisions on prehearing conference timelines are likely resulting in needless delay. A prehearing conference cannot be held before the 10 business days have expired from the time the discipline authority has decided that further steps must be taken during which a member may exercise the right to request that witnesses appear at the discipline proceeding (s.119), and the complainant has exercised the right to make submissions to the discipline authority (s.113). However, if no complainant submissions are received in the 10 business days, the prehearing conference authority must re-notify the complainant of their right and, presumably grant them a further 10 business days in which to reply. The commissioner submits that the Act should be amended to avoid circumstances where a prehearing conference cannot be held earlier than 20 business days after the discipline authority's section 112 decision.

Section	Current Wording	Proposed Changes
118(1)	(1) A discipline authority required to convene a discipline proceeding under section 112 (3) [*discipline authority to review final investigation report and give early notice of next steps*], 116 (3) [*discipline authority to review supplementary report and give notice of next steps*] or 117 (9) [*appointment of new discipline authority if conclusion of no misconduct is incorrect*] must convene the discipline proceeding within 40 business days after receiving the investigating officer's final investigation report or supplementary report, or a notification of misconduct under section 117 (8) (d), as the case may	(1) A discipline authority required to convene a discipline proceeding under section 112 (3) [*discipline authority to review final investigation report and give early notice of next steps*], 116 (3) [*discipline authority to review supplementary report and give notice of next steps*] or 117 (9) [*appointment of new discipline authority if conclusion of no misconduct is incorrect*] must convene and conclude the discipline proceeding hearing within 40 business days after receiving the investigating officer's final investigation report or supplementary report, or a notification of misconduct under

	be, unless the police complaint commissioner grants one or more extensions under this section.	section 117 (8) (d), as the case may be, unless the police complaint commissioner grants one or more extensions under this section.
123(1)	(1) Subject to subsections (3) and (4), if a prehearing conference is not offered or held under section 120 or, if held, does not result in a resolution of each allegation of misconduct against the member or former member concerned, the discipline authority must (a) hold and preside over a discipline proceeding in respect of the matter within the time period required under section 118 [*discipline proceeding to be convened within 40 business days after receiving investigation report or police complaint commissioner's notification*] unless an adjournment is granted under subsection (10) of this section, (b) at least 15 business days before the discipline proceeding and in accordance with the regulations, if any, under section 184 (2) (g) [*regulations under Parts 9 and 11*], serve notice of the discipline proceeding.	Add provision to the effect that a prehearing conference must be held no earlier than 20 days and no later than 40 business days following receipt of the FIR and that notification of the discipline proceeding should not be delayed, but given, even if a prehearing conference has not been concluded - on the proviso that notification of the discipline proceeding will be deemed to be withdrawn in the event a resolution reached by a member and a prehearing conference authority is also approved by the commissioner.

Remedy: Bifurcated Proceedings Subsequent to a S. 117 Review

The role of the retired judge "reviewer" in a section 117 review is two-fold. The reviewer must first comes to his or her own decision as to whether or not, based on a review of the FIR and related evidence, a member's conduct appears to constitute misconduct. If the reviewer considers that there does not appear to be misconduct, this decision concludes the matter. However, if the reviewer considers that the member's conduct appears to constitute misconduct, then the reviewer becomes a discipline authority in respect of the matter and must convene a discipline proceeding, subject to the provisions providing for the possibility of resolution by way of a pre-hearing conference.

In the 2012 decision in *British Columbia (Police Complaint Commissioner) v. Bowyer* 2012 BCSC 1018, our Supreme Court provided an interpretation of section 117 as it applies to cases of "mixed decisions" delivered by a discipline authority under section 112. A mixed decision is one where a complaint involves multiple allegations of misconduct and the discipline authority deciding the matter at first instance holds that some of the allegations are substantiated and others are not. While the Court may have correctly interpreted the legal effect of the words chosen by the Legislature, its decision has created significant issues of fairness and efficiency where, as in *Bowyer*, the Commissioner considers that one or more of the discipline authority's decisions not to substantiate an allegation is incorrect and requires a review by a section 117 retired judge.

According to the Court's ruling, when a discipline authority delivers a mixed decision, that discipline authority maintains jurisdiction over any of the allegations that he or she substantiates and presides over the required discipline proceeding. If a section 117 reviewer decides, in respect of one or more of the allegations is not substantiated by the discipline authority, that the member's conduct appears to constitute misconduct, then, the section 117 reviewer becomes the discipline authority in respect of the allegation or allegations and will preside over a separate discipline proceeding. This is true even if the different allegations arise from the same transaction or are inextricably linked – there will be two separate discipline proceeding hearings and the potential for two separate pre-hearing conferences. Further, in the event that both discipline authorities determine from the discipline proceeding that there was misconduct, both discipline authorities must separately put forward proposals for discipline or corrective measures for the matters they had before them and then finally decide on a disciplinary or corrective measure, having separately received the member's submissions on the possible measures. In this decision, Honourable Mr. Justice R. Punnett stated the following regarding the implications of the wording contained in s. 117:

> *The possibility of bifurcation, delay, and the possibility of inconsistent findings and outcomes arise from the wording of the legislation. Given the clear wording of the Act such possible outcomes cannot be avoided. Indeed, in this case if all three members originally involved were the subject of one complaint and investigation and the Police Complaint Commissioner had made a s. 117 appointment of any counts that were not substantiated even greater bifurcation could have occurred [para. 91].*

The Commissioner submits that the Act should be amended to avoid the division of one complaint into proceedings before two separate discipline authorities. The current interpretation of the Act unnecessarily and unfairly subjects a member to two separate hearings, creates the potential for different findings of fact and adjudicated outcomes on the same evidence, leads to decisions on appropriate discipline or corrective measures that are taken in isolation from each other and is unnecessarily cumbersome and expensive to administer.

The Commissioner submits that these undesirable outcomes can be avoided by amending the Act to provide that, in the event a section 117 reviewer upholds a discipline authority's decision not to substantiate an allegation, the discipline authority has jurisdiction over the entire complaint, namely the substantiated allegations and, when a reviewer decides that the member's conduct related to the previously unsubstantiated allegation appears to constitute misconduct, that retired judge has jurisdiction over the whole complaint as described in the Commissioner's attached Information Bulletin #7.

The Commissioner also notes that this proposal has the salutary effect of moving the matter to a civilian adjudicative forum and not leaving jurisdiction with a decision–maker whom, in respect of this complaint, had already had his or her decision not to substantiate questioned by the Commissioner and effectively overruled by the retired judge.

Section	Current Wording	Proposed Changes
117	Silent	See Appendix "A" – Information Bulletin #7

Commissioner Discretion to Determine when Reportable Injury Complaints Lend Themselves to Informal Resolution or Mediation

Reportable Injuries and ADR:

It has been the Commissioner's experience with reportable injury files that some complaints involve injuries that are relatively minor but involve parties who are motivated to engage in alternative dispute resolution. Due to the wording in the Act, they are precluded from doing so. The Commissioner submits that the Act should permit the informal resolution or mediation of reportable injury complaints where the Commissioner consents to those processes being used.

Section	Current Wording	Proposed Changes
156(1)	The police complaint commissioner may issue guidelines providing for the resolution, by mediation or other informal means, of admissible complaints under Division 3 *[Process Respecting Alleged Misconduct]* other than the following: (a) complaints concerning a death or the suffering of serious harm or a reportable injury described in section 89 (1) *[reporting of death, serious harm and reportable injury, and mandatory external investigation in cases of death and serious harm]*;	The police complaint commissioner may issue guidelines providing for the resolution, by mediation or other informal means, of admissible complaints under Division 3 *[Process Respecting Alleged Misconduct]* other than the following: (a) complaints concerning a death or the suffering of serious harm ~~or a reportable injury~~ described in section 89 (1) *[reporting of death, serious harm and reportable injury, and mandatory external investigation in cases of death and serious harm]*; (b) Complaints concerning a reportable injury as described in section 89(1) may be resolved by mediation or other informal means with the consent of the Police Complaint Commissioner.

Expand Complement of Judges appointed under the Act

The Commissioner has the discretion to appoint a retired judge in a number of circumstances under the Act: following a review of a discipline authority's decision under section 112 or section 116 if the commissioner considers there is a reasonable basis to believe the decision is incorrect; for the purposes of conducting a Public Hearing or Review on the Record; or in cases where an investigation has been initiated against a chief constable or deputy chief constable to exercise the powers and perform the duties of a discipline authority in substitution of a chair of the board of the municipal police department.

Retired judges are appointed by the Commissioner to make quasi-judicial decisions determining whether a member committed misconduct and if so, determine appropriate corrective/disciplinary measures. In cases of public hearings or reviews on the record, retired judges may be also asked to make recommendations for changes to policy or practices in place at a police department.

The Commissioner submits that the use of only retired judges, who are recommended by the Associate Chief Justice of the Supreme Court, is 'thin' in terms of an available reserve of retired judges to rely upon for appointment under the Act. The horizon is often short for retired judges and acting as an adjudicator in this forum is difficult due to the lack of support often enjoyed while employed in the judiciary. The additional use of both senior provincial court judges and supernumerary judges will broaden the Commissioner's options in appointing a judge under the *Police Act*. The Commissioner would still rely on the Associate Chief Justice of the Supreme Court to make recommendations to the Commissioner on judges who would qualify and be appropriate for appointment under the Act.

Section	Current Wording	Proposed Changes
117	(1) If, on review of a discipline authority's decision under section 112(4) [*discipline authority to review final investigation report and give early notice of next steps*] or 116(4) [*discipline authority to review supplementary report and give notice of next steps*] that conduct of a member or former member does not constitute misconduct, the police complaint commissioner considers that there is a reasonable basis to believe that the decision is incorrect, the police complaint commissioner may appoint a retired judge under subsection (4) of this section…	Include discretionary language that would allow the Police Complaint Commissioner to appoint Senior Provincial Court and Supernumerary judges, in addition to retired judges.

(4) The police complaint commissioner must request the Associate Chief Justice of the Supreme Court to
   (a) Consult with retired judges of the Provincial Court, the Supreme Court and the Court of Appeal, and
   (b) Recommend one or more retired judges for the purposes of this section.

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(2) At any time after an investigation is initiated under this Part into the conduct of a member or former member of a municipal police department who is or was a chief constable or deputy chief constable at the time of the conduct of concern, if the police complaint commissioner considers it necessary in the public interest that a person other than the chair of the board be the discipline authority for the purposes of one or more provisions of this Division,
   (a) The police complaint commissioner must request the Associate Chief Justice of the Supreme Court to
      i. Consult with retired judges of the Provincial Court, the Supreme Court and the Court of Appeal, and
      ii. Recommend one or more retired judges to act as discipline authority for the purposes of those provisions, and

(b) The police complaint commissioner must appoint one of the retired judges recommended to exercise the powers and perform the duties of a discipline authority under the applicable provision, in substitution of the chair of the board of the municipal police department.

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(1) In circumstances described in section 137 [*circumstances when member or former member concerned is entitled to public hearing*] or when the police complaint commissioner determines that there are sufficient grounds to arrange a public hearing or review on the record under section 138 [*determining whether to arrange public hearing or review on the record*] or 139 [*reconsideration on new evidence*], the police complaint commissioner must request the Associate Chief Justice of the Supreme Court to

(a) Consult with retired judges of the Provincial Court, the Supreme Court and the Court of Appeal, and

(b) Recommend one or more retired judges to act as adjudicator for the purposes of section 141 [*review on the record*] or 143 [*public hearing*], as the case may be.

(2) The police complaint commissioner must appoint one of the retired judges recommended as adjudicator for the public hearing or review on the record.

General - Legislated Time Limits

A. It is unclear in the Act whether the six-month timeline from initiation of an investigation to delivery of an FIR also counts from the day an investigation is ordered by the Commissioner, although it has been the Commissioner's practice to impose such a deadline on the latter investigations, subject to the extensions available under the Act. Codifying this practice would remove any potential ambiguity.

Section	Current Wording	Proposed Changes
99(1)	(1) An investigation into the conduct of a member or former member must be completed within 6 months after the date the investigation is initiated, unless…	(1) An investigation into the conduct of a member or former member must be completed within 6 months from the date the investigation is initiated, or the date the Commissioner has issued an order for investigation pursuant to section 93, unless…

B. The Commissioner may direct a Professional Standards Investigator to take further investigative steps, but the Act provides no express power to impose time limits on completion of those steps. The Commissioner submits that further investigative steps should be grounds for possible time extensions which would both reflect the reality of investigations and give the Commissioner control over how much additional time is given.

Alternatively, as noted earlier, the Act could be amended to include a provision giving the Commissioner discretion to give relief against any of the Part 11 time restrictions when he considers that the circumstances of a matter make it in the public interest to do so.

Section	Current Wording	Proposed Changes
99(2)	(2) The police complaint commissioner may grant an extension under this section only if the police complaint commissioner is satisfied that one or more of the following applies: (a) new investigative leads are discovered that could not have been revealed with reasonable care; (b) the case or investigation is unusually complex; (c) an extension is in the public interest.	(2) The police complaint commissioner may grant an extension under this section only if the police complaint commissioner is satisfied that one or more of the following applies: (a) new investigative leads are discovered that could not have been revealed with reasonable care; (b) further investigative steps have been directed under section 98(9);

		(c) the case or investigation is unusually complex; (d) an extension is in the public interest. Alternatively, Despite any other provision of this Part, the Commissioner may extend any time limit proscribed by the Act, where the Commissioner considers an extension is necessary in the public interest.

C. The Act should operate to promote the efficient investigation and resolution of complaints; however, as written, the timelines for the involved parties to do so are vague and creates the potential for complaints to fall into "black holes", delaying the process.

The Commissioner submits that the Act should provide a Chief Constable with a defined time period to initiate an investigation. Currently, section 90 of the Act prescribes that the Chief Constable must "promptly" initiate an investigation and appoint an investigating officer to conduct this investigation. The use of the word promptly should be replaced with a more defined period of time. The Commissioner submits that a reasonable time limit to initiate an investigation is 10 business days.

Section	Current Wording	Proposed Changes
90	(1) Subject to sections 89 [*reporting of death, serious harm and reportable injury, and mandatory external investigation in cases of death and serious harm*], 91 [*external investigation of chief constables*] and 92 [*external investigations when in public interest*], if an admissible complaint against a member or former member of a municipal police department is not resolved under Division 4 [*Resolution of Complaints by Mediation or Other Informal Means*], a chief constable of that municipal police department must promptly	(1) Subject to sections 89 [*reporting of death, serious harm and reportable injury, and mandatory external investigation in cases of death and serious harm*], 91 [*external investigation of chief constables*] and 92 [*external investigations when in public interest*], if an admissible complaint against a member or former member of a municipal police department is not resolved under Division 4 [*Resolution of Complaints by Mediation or Other Informal Means*], a chief constable of that municipal police department must ~~promptly~~ within

	(a) initiate an investigation into the matter or notify the police complaint commissioner of the reasons for any delay in initiating an investigation, (b) appoint a constable of the municipal police department as investigating officer in the investigation, and (c) notify the police complaint commissioner of the appointment under paragraph (b).	10 business days of receiving notification of an admissible complaint (a) initiate an investigation into the matter ~~or notify the police complaint commissioner of the reasons for any delay in initiating an investigation~~, (b) appoint a constable of the municipal police department as investigating officer in the investigation, (c) notify the police complaint commissioner of the appointment under paragraph (b), and

D. In order to ensure fairness to both the member and the Investigating Officer, the Commissioner's decision whether an investigation continues despite the complainant's withdrawal of an admissible complaint should not be prolonged any longer than necessary. A reasonable time limit for this decision and notification is 10 business days.

Section	Current Wording	Proposed Changes
94(3)	(3) the police complaint commissioner must notify the following of the withdrawal of a complaint under this section and whether an investigation will be ordered or continued under subsection (2): … (No time limits for review provided)	(3) the police complaint commissioner must notify the following of the withdrawal of a complaint under this section and whether an investigation will be ordered or continued under subsection (2): … (f) such notification must be provided within 10 business days of receipt of the complainant's withdrawal.

E. The Commissioner submits that it is more practical for all time limits relating to discipline proceedings (including pre-hearing conferences, if available in the circumstances) start from the date of the discipline authorities section 112 or section 116 decision that the member's conduct appears to constitute misconduct and requires further steps. This a firm date, rather than an ambiguous date of "receipt of the FIR".

An example is set out below of a provision affected by having timelines run from the discipline authority's decision

Section	Current Wording	Proposed Changes
118(1)	(1) A discipline authority required to convene a discipline proceeding under section 112 (3) [discipline authority to review final investigation report and give early notice of next steps], 116 (3) [discipline authority to review supplementary report and give notice of next steps] or 117 (9) [appointment of new discipline authority if conclusion of no misconduct is incorrect] must convene the discipline proceeding within 40 business days after receiving the investigating officer's final investigation report or supplementary report, or a notification of misconduct under section 117 (8) (d), as the case may be, unless the police complaint commissioner grants one or more extensions under this section.	(1) A discipline authority required to convene a discipline proceeding under section 112 (3) [discipline authority to review final investigation report and give early notice of next steps], 116 (3) [discipline authority to review supplementary report and give notice of next steps] or 117 (9) [appointment of new discipline authority if conclusion of no misconduct is incorrect] must convene the discipline proceeding within 40 business days after ~~receiving the investigating officer's final investigation report or supplementary report~~, the date of the notification of the next applicable steps pursuant to s.112(3), s. 116(3) or a notification of misconduct under section 117(8)(d), as the case may be, unless the police complaint commissioner grants one or more extensions under this section.

Expanding How Written Notice may be Given

The Commissioner respectfully submits that, in light of the almost ubiquitous use of electronic document transmission in the public section and professions, the Act should be updated as set out below to expand the means by which notice and documents required to be delivered may be delivered and when they are deemed to be received.

Section	Current Wording	Proposed Changes
73(1)	(1) A notice required under this Act must be (a) in writing, and (b) served or mailed by registered mail.	(1) Ordinary service of a document is to be effected in any of the following ways on a complaint, member or former member, (a) by leaving the document at the person's last known address; (b) by mailing the document by ordinary mail to the person's last known address (c) if a fax number is provided by the person, by faxing the document to that fax number together with a fax cover sheet; (d) if an e-mail address is provided by the person, by e-mailing the document to that e-mail address **When service by delivery is deemed to be completed** (2) A document served by leaving it at a person's address for service is deemed to be served on the person as follows: (a) if the document left at the address for service at or before 4 p.m. on a day that is not a Saturday or holiday, the document is deemed to be served on the day of service;

(b) if the document is left at the address for service on a Saturday or Holiday or after 4 p.m. on any other day, the document is deemed to be serviced on the next day that is not a Saturday or holiday.

When service by mail is deemed to be completed

(3) A document sent for service by ordinary mail under this rule is deemed to be served one week later on that same day of the week as the day of mailing or, if that deemed day of service is a Saturday or holiday, on the next day that is not a Saturday or holiday.

When service by fax or email is deemed to be completed

(4) A document transmitted for service by fax or e-mail under this rule is deemed to be served as follows:

(a) if the document is transmitted before 4 p.m. on a day that is not a Saturday or Holiday, the document is deemed to be served on the day of transmission;

(b) if the document is transmitted on a Saturday or holiday or after 4 p.m. on any other day, the document is deemed to be served on the next day that is not a Saturday or holiday.

Reporting Requirements of Mediator's Reports Following Mediation

One of the fundamental principles of mediation is the expectation of confidentiality that allows the participants to freely and candidly discuss the issues while attempting to resolve them. The Act reflects this principle by limiting the information a mediator is required to report to the Commissioner: whether all issues were resolved, if no agreement could be reached and whether the member accepted any disciplinary or corrective measures. However, the Commissioner submits that, in order to fulfill his general responsibilities to oversee and monitor proceedings and ensure the purposes of Part 11 are met, he requires further information from the mediator's report which, even when in the Commissioner's custody, would be protected from further disclosure by the confidentiality and FOI exemptions in the Act. The Commissioner submits that the Act should be amended to provide that the mediator's final report contain a summary of the mediation, similar to the agreement reduced to writing at an informal resolution, so the Commissioner may, if necessary:

- conduct a review of Part 11 mediation as a process and seek improvements where required, and
- ensure that the purposes of Part 11 are being met.

Section	Current Wording	Proposed Changes
163(1) & (2)	(1) A mediation is completed when (a) all issues are resolved in accordance with the guidelines, or (b) the mediation session is completed and there is no agreement to continue. (2) The mediator must promptly notify the police complaint commissioner of (a) completion of mediation described in subsection (1) (a) or (b), and (b) if the outcome is as described in subsection (1) (a), the disciplinary or corrective measures accepted by the member or former member	(1) A mediation is completed when (a) all issues are resolved in accordance with the guidelines, or (b) the mediation session is completed and there is no agreement to continue. (2) The mediator must promptly notify the police complaint commissioner of (a) completion of mediation described in subsection (1) (a) or (b), and (b) a summary of the issues resolved and the agreement(s) reached by the parties, and (c) if the outcome is as described in subsection (1) (a), the disciplinary

		or corrective measures accepted by the member or former member

Prehearing Conferences Following s. 117 Reviews and Prehearing Conference Authorities

When a retired judge has been appointed under section 117 of the Act and he or she determines that the conduct of the member (or former member) appears to constitute misconduct, one of the requirements under section 117(8) is for the retired judge to make a determination of whether or not a prehearing conference will be offered to a member under section 120 (see section 117(8)(d)(ii)). The definition of a prehearing conference authority under section 120(1) does not contemplate a retired judge acting in the capacity of a prehearing conference authority. In addition, a prehearing conference authority cannot act the discipline authority if the matter goes to a discipline proceeding.

The Act is unclear in how the appointment of a prehearing conference authority is made following a section 117 decision. In cases of section 117 review, the Commissioner submits that the prehearing conference authority definition should be expanded to include retired judges. Further to this, in cases of section 117 reviews the Act should be amended to allow for the Commissioner to refer matters where a prehearing conference is offered to an external discipline authority or a different retired judge than the judge who was the reviewer under s. 117. This would leave the original section 117 retired judge in the position to sit as the discipline authority should the matter go to a discipline proceeding.

Section	Current Wording	Proposed Changes
120(1)	In this section, "prehearing conference authority", in relation to a member or former member of a municipal police department, means (a) a chief constable, a deputy chief constable or a senior officer of the municipal police department, or (b) a chief constable, a deputy chief constable or a senior officer of another municipal police department	Add subsection to include retired judge as an option for prehearing conference authority when a retired judge has been appointed under s. 117.
123(4)	If a prehearing conference was held under section 120 in respect of the same conduct that is the subject of a discipline proceeding under this section, the discipline authority presiding over the discipline proceeding must be a chief constable, deputy chief constable or senior officer other than the chief constable, deputy chief constable or senior officer who acted as the prehearing	Add reference to retired judge appointed for the purposes of s. 117 as an option for a prehearing conference authority. Add ability for the Commissioner to appoint a new retired judge to act as the discipline authority for the discipline proceeding if a retired judge appointed under s. 117 sat as the prehearing conference authority.

conference authority under section 120.

Standing for Judicial Reviews and Appeals

Section 15 of the *Judicial Review Procedure Act,* RSBC 1996, c. 241, grants standing to the Commissioner to appear as a party in judicial reviews of decisions made by the Commissioner.

Notice to decision maker and right to be a party:

> 15(1) For an application for judicial review in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power
>
> (a) must be served with notice of the application and a copy of the petition, and
>
> (b) may be a party to the application, at the person's option.

Currently, the *Police Act* does not provide an enabling statute that explicitly grants the Commissioner standing to appear as a party during judicial review proceedings arising from matters considered under the Act. There have been a total of 12 judicial reviews since amendments were made to the *Police Act* in 2010. Eight of those have been initiated by the police union and four by this office. In one such judicial review, *Lowe v. Diebolt*, 2014 BCCA 280, the issue of standing of this office was questioned by Justice Groberman. In this particular judicial review, it was the Commissioner's view that the retired judge appointed under section 117 erred in law by concluding that a strip search was justified and that the retired judge's reliance on good faith was misplaced. Ultimately, Justice Groberman dismissed this appeal on the basis of delay and left open the question of whether the Commissioner could bring a judicial review proceeding to challenge the substantive decisions of retired judges appointed under section 117.

The Commissioner submits that she/he should be allowed to make a full range of submissions on any appeal or judicial review application. Other police oversight bodies in Canada, specifically Manitoba and Ontario, have legislated provisions entitling these oversight bodies with standing when their decisions go to appeal. Furthermore, section 177(1) states that the police complaint commissioner is generally responsible for overseeing and monitoring complaints, investigations and the administration of discipline and proceedings under this Part, and ensuring that the purposes of this Part are achieved. It is implicit in this section that the Commissioner would have standing in all matters arising out of part 11of the *Police Act*.

One of the independent officers of the Legislative, the Chief Electoral Officer, has express language in his or her enabling statute providing for party status on an application arising out of that legislation. Specifically, section 150 of the *Election Act*, RSBC 1996, c. 106, provides that the right of an elected candidate to take office or the validity of an election may be challenged in the Supreme Court, and subsections 150(7) and (8) state:

> (7) The individual making the application must serve the petition on the chief electoral officer, the district electoral officer and the individuals who were candidates in the election.
>
> (8) The individuals referred to in subsection (7) are entitled to be parties to the application.

Other than officers of the Legislature, various statutes provide that other administrative decision makers are parties to appeals pursuant to their enabling statutes. For example, subsection 242.4(2) of the *Financial Institutions Act*, RCBC 1996, c. 141 provides that the Financial Institutions Commission is a party to an appeal to the Supreme Court of British Columbia of a decision of the commission. The Securities Commission is similarly a respondent to an appeal of a decision made by the Commission, pursuant to section 167(5) of the *Securities Act*, RCBC 1996, c. 418. Similar provisions are found with respect to the decisions of registrars made pursuant to the *Manufactured Home Act*, SBC 2003, c. 75, s. 35(2); the *Business Corporation Act*, SBC 2002, c. 57, s. 406(4); the *Cooperative Association Act*, SBC 1999, c. 28, s. 207(3); and the *Society Act*, RSBC 1996, c. 433, s. 96(4).

Section	Current Wording	Proposed Changes
177	N/A	(8) The Police Complaint Commissioner may bring, and is entitled to be a full party to, any appeal or judicial review of a decision made under this Part.

Discipline Proceeding - Discipline Authority's Discretion to Call Witnesses & Expanded Role of Discipline Representative

The section 112 decision of a discipline authority or section 117 reviewer is determined following a review of existing evidence contained in the final investigation report and the materials referenced in that report. A decision of substantiation at this stage serves only as a gateway as the discipline authority can only make a finding of misconduct if the conduct of the member "appears to constitute misconduct". Unless the matter is resolved at a pre-hearing conference, the initial decision triggers a requirement that the complaint allegation or allegations be subject to further adjudication in a discipline proceeding, the purpose of which is to determine the truth of the matter through an examination of the evidence, including *viva voce* evidence if warranted in the circumstances. Currently, the Professional Standards investigator is a witness at every discipline proceeding hearing and is subject to cross examination by the member or his or her agent or counsel. The member may choose not to testify at the hearing. Further, the member has the right to set in motion the process by which other witnesses may be required to testify. Whenever a member opts not to testify and does not request that any witnesses be summonsed, the Professional Standards investigator testimony will be the only evidence that is examined or cross-examined. The Commissioner submits that the current provisions do not give a discipline authority the tools needed to get at the truth of a matter and submits that the Act should be amended to give a discipline authority unfettered discretion to summons material witnesses on his or her own initiative to address the issues and allegations before him or her as the Discipline Authority.

Where witnesses other than the Professional Standards Investigator or member will be testifying at a discipline proceeding, the discipline authority may appoint a "discipline representative" – either another member or a lawyer - to examine and cross-examine witnesses, essentially on behalf of the discipline authority. The Commissioner submits that, even where additional witnesses are not required to testify, a discipline authority should nevertheless have the discretion to appoint a discipline representative, allowing the discipline authority to just hear the evidence and rule, without having to prepare and conduct the examination and cross-examination of the Professional Standards Investigator and respondent member.

Section	Current Wording	Proposed Changes
123	Silent	Inclusion of the following subsection: (#) The discipline authority may, on his or her own initiative, call a witness who is referenced in the Final Investigation Report, to be examined or cross-examined at the discipline proceeding.
123	Silent	Inclusion of the following subsection: (#) The discipline authority may on his or her own initiative appoint a discipline representative to present the case relative to the alleged misconduct of the member or former member at a discipline proceeding.

Expungement of Members' Service Records of Discipline (*New)

The overall aim of the *Police Act* is remedial, as evidenced by the language relating to the provision of disciplinary or corrective measures:

> Section 126(3) *If the discipline authority considers that one or more disciplinary or corrective measures are necessary, an approach that seeks to correct and educate the member concerned takes precedence, unless it is unworkable or would bring the administration of police discipline into disrepute.*

However, if a discipline authority determines that training, counselling or engaging in a specified activity is necessary to achieve correction and education, the expungement period is three years. On the other hand, advice to future conduct, verbal reprimand and written reprimands are expunged after two years.

It is antithetical to a system that seeks to educate for there to be a longer expungement period for training. Further, members see longer expungement period as a greater penalty and, therefore, are reluctant to agree to training at a prehearing conference.

The OPCC recommends, therefore, that the language of section 180 of the *Police Act*

Section	Current Wording	Proposed Changes
180(8)	Records referred to in subsection (1) (a) to (f) in relation to a member must be expunged from the member's service record of discipline if any of the following apply: (a)subject to subsection (9), no other complaint made against the member is determined to be admissible under section 82 and no other investigation has been initiated concerning the conduct of the member under this Part within the 2-year period immediately following the last disciplinary or corrective measures recorded in the service record of discipline in respect of the	(a)subject to subsection (9), no other complaint made against the member is determined to be admissible under section 82 and no other investigation has been initiated concerning the conduct of the member under this Part within the 2-year period immediately following the last disciplinary or corrective measures recorded in the service record of discipline in respect of the member, and those measures consist of nothing more than a written or verbal reprimand, advice as to future conduct directions to work under close supervision, to undertake specified training or retraining, to undertake counselling or treatment,

member, and those measures consist of nothing more than a written or verbal reprimand or advice as to future conduct;

(b)subject to subsection (9), no other complaint made against the member is determined to be admissible under section 82 and no other investigation has been initiated concerning the conduct of the member under this Part within the 3-year period immediately following the last disciplinary or corrective measures recorded in the service record of discipline in respect of the member, and those measures

(i)consist of one or more directions to work under close supervision, to undertake specified training or retraining, to undertake counselling or treatment, or to participate in a program or activity, and

(ii)do not include dismissal, reduction in rank, suspension or transfer or reassignment;

or to participate in a program or activity, and

(ii)do not include dismissal, reduction in rank, suspension or transfer or reassignment

~~(b)subject to subsection (9), no other complaint made against the member is determined to be admissible under section 82 and no other investigation has been initiated concerning the conduct of the member under this Part within the 3-year period immediately following the last disciplinary or corrective measures recorded in the service record of discipline in respect of the member, and those measures~~

~~(i)consist of one or more directions to work under close supervision, to undertake specified training or retraining, to undertake counselling or treatment, or to participate in a program or activity, and~~

~~(ii)do not include dismissal, reduction in rank, suspension or transfer or reassignment;~~

(b)subject to subsection (9), no other complaint made against the member is determined to be admissible under section 82 and no other investigation has been initiated concerning the conduct of the member under this Part within the 5-year period

(c)subject to subsection (9), no other complaint made against the member is determined to be admissible under section 82 and no other investigation has been initiated concerning the conduct of the member under this Part within the 5-year period immediately following the last disciplinary or corrective measures recorded in the service record of discipline in respect of the member, and those measures

(i)consist of one or more of

(A)reduction in rank,

(B)suspension, or

(C)transfer or reassignment, and

(ii)do not include dismissal;

immediately following the last disciplinary or corrective measures recorded in the service record of discipline in respect of the member, and those measures

(i)consist of one or more of

(A)reduction in rank,

(B)suspension, or

(C)transfer or reassignment, and

(ii)do not include dismissal;

Appendix B: Notice of Public Hearing in the matter of the Public Hearing into the Complaint against Constable Taylor Robinson #2777 of the Vancouver Police Department

Office of the
Police Complaint Commissioner

British Columbia, Canada

PH:2013-05
OPCC File: 2010-5401

NOTICE OF PUBLIC HEARING

(Pursuant to section 137(1) *Police Act*, R.S.B.C. 1996, c.267)

In the matter of the
Public Hearing into the complaint against

Constable Taylor Robinson #2777 of the Vancouver Police Department

TO:	Ms. Sandy Davidsen c/o Mr. Scott Bernstein	(Complainant)
AND TO:	Constable Taylor Robinson #2777 Vancouver Police Department	(Member)
AND TO:	Chief Constable Jim Chu Vancouver Police Department	(Discipline Authority)

WHEREAS:

Incident Summary:

1. On June 9, 2010, at approximately 3:30 pm, Sandy Davidsen was walking eastbound on East Hastings Street in the Downtown Eastside of Vancouver. Ms. Davidsen suffers from cerebral palsy and multiple sclerosis, which causes her to be unsteady on her feet and walk with a noticeable gait. Three members of the Vancouver Police Department (VPD) Beat Team, Constables Robinson, Thiara and Hill were walking three abreast in the opposite direction along East Hastings. As Ms. Davidsen and the three officers approached each other, a gap was created between the officers and Ms. Davidsen was able to walk through. During the course of passing between Constable Robinson and Constable Thiara, Constable Robinson turned slightly and pushed Ms. Davidsen. The force used

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Police Complaint Commissioner

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was sufficient to cause Ms. Davidsen to fall to the ground. At approximately the same time, Constable Robinson stated, "don't touch a police officer's gun." Constable Robinson stood over Ms. Davidsen while she was attended to by a female civilian witness. Constables Thiara and Hill stood nearby.

2. When challenged about his actions by another female witness, Constable Robinson advised that Ms. Davidsen had grabbed or attempted to grab his police duty pistol. Approximately 20 seconds after Ms. Davidsen fell to the ground, all three members eventually turned and continued walking west on the sidewalk. Seconds later, Ms. Davidsen was assisted to her feet by the female witness and she carried on to her hotel.

3. That same evening, employees of the Lux Hotel learned of the incident and discovered that the incident had been captured by the building's exterior cameras. At approximately 10:14 pm that evening, VPD Communications received a call from an employee of the Lux Hotel, reporting that Ms. Davidsen had been assaulted by VPD members. VPD supervisors attended the Lux Hotel and viewed the video, obtained initial information and notified the Duty Officer and VPD's Professional Standards Section (PSS) of the incident and complaint.

4. On June 11, 2010, PSS members interviewed Ms. Davidsen at the Lux Hotel. Ms. Davidsen reported that she had been assaulted and despite being unsteady on her feet at the time, she did not understand why Constable Robinson would believe she would try to grab his gun.

Complaint Process and Investigation

5. After becoming aware of this incident, no attempt was made by the VPD to notify the Office of the Police Complaint Commissioner (OPCC) that a criminal complaint of assault involving one of its members had occurred. The explanation provided by PSS investigators for failing to notify the OPCC was that they were engaged in an "informal investigation." This explanation is lacking merit: police do not respond to criminal complaints against their members by engaging in informal investigations.

6. The conduct of VPD PSS members is concerning, as it appears that the seizure of the video, the subsequent interviews, and the failed attempt to informally resolve the matter was undertaken without jurisdiction. Furthermore, no attempt was made by VPD PSS to facilitate Ms. Davidsen's desire to lodge a formal complaint with the OPCC, nor to notify our office of the incident. The OPCC first received notice of this incident 19 days later, when Ms. Davidsen filed a complaint with our office on June 28, 2010. Ms. Davidsen's complaint was deemed admissible by our office.

7. Following consultation with our office on July 27, 2010, Chief Constable Chu of the Vancouver Police Department, requested the matter be investigated by an external police agency, and New Westminster Police Service (NWPS) PSS assumed conduct of the external *Police Act* investigation and conducted a criminal review. On November 10, 2010, the New Westminster Major Crime Unit submitted a report to the Criminal Justice Branch recommending a charge of assault contrary to s.266 of the *Criminal Code* against Constable Robinson. The Branch approved one count of common

assault and on May 9, 2011, the *Police Act* proceedings were suspended pending the outcome of the criminal proceedings in the matter.

8. A Stay of Proceedings on the assault charge was entered by Crown Counsel on February 29, 2012. The *Police Act* investigation suspension was lifted on March 5, 2012. The Final Investigation Report which had been submitted on April 29, 2011, was rejected by the Discipline Authority Inspector Steve Eely of the VPD, as he directed further investigation.

9. The Final Investigation Report was resubmitted on June 26, 2012, and was accepted as filed. In addition to the allegations of Abuse of Authority and Neglect of Duty, the investigator recommended that the Discipline Authority turn his mind to deceit as an additional misconduct committed in this case.

Discipline Authority Decision and Proposed Discipline

10. The Notice of Discipline Authority's Decision dated July 10, 2012, was received by our office July 13, 2012. Inspector Eely determined that the evidence appeared to support the allegations of misconduct against Constable Robinson for Abuse of Authority and Neglect of Duty; however, he did not find that Constables Hill or Thiara committed any misconduct pursuant to the *Police Act*. In addition, Inspector Eely determined there was no evidence to support a finding of deceit by Constable Robinson, involving the allegation that Constable Robinson made a false or misleading statement by reporting that Ms. Davidsen touched or grabbed his firearm.

11. On September 14, 2012, based upon my review of the evidence available at that time, I concluded that there was not clear, convincing and cogent evidence establishing on a balance of probabilities that Constable Robinson wilfully or negligently made a false or misleading statement regarding Ms. Davidsen touching or grabbing his gun. I also concluded that Inspector Eely appropriately determined that the conduct of Constables Thiara and Hill did not constitute misconduct. Accordingly, I did not appoint a retired judge to review this matter pursuant to s. 117 of the *Police Act*.

12. Inspector Eely offered Constable Robinson a Prehearing Conference which was completed on August 10, 2012. On August 13, 2012, the Prehearing Conference Agreement Report was rejected by this office noting that the proposed discipline of one-to-one training with VPD's Force Option Training Unit, advice to Constable Robinson's conduct, and a one eight-hour day suspension without pay did not adequately reflect or address the seriousness of Constable Robinson's misconduct. The matter was remitted to a Discipline Proceeding.

13. On August 16, 2012, Chief Constable Jim Chu delegated Superintendent Andy Hobbs of the Vancouver Police Department as the Discipline Authority to preside over the discipline proceeding in this matter. An extension to convene the discipline proceeding was requested by Inspector Mike Serr to allow time for Superintendent Hobbs to review records comprising the investigation

prior to convening the discipline proceeding. An extension to convene the discipline proceeding was granted until October 5, 2012.

14. A number of delays resulted between the time the discipline proceeding was first commenced to when it was concluded. The discipline proceeding first convened on October 4, 2012. The hearing was brief and no substantive matters were discussed. On November 23, 2012, an application was brought by Constable Robinson's counsel to delay the proceeding until sometime in April 2013. Counsel submitted that he was not available due to an unrelated criminal trial and that the discipline proceeding should be adjourned until the conclusion of the Human Rights Tribunal involving Constable Robinson scheduled to proceed in April 2013. It was argued that while other counsel could represent Constable Robinson, it would take time to bring new counsel up to speed on the matter. In addition, Constable Robinson's counsel suggested that the results of the *Police Act* proceeding could be used against Constable Robinson and have an adverse impact on him in the Human Rights Tribunal.

15. On December 19, 2012, Superintendent Hobbs provided a written decision granting the requested adjournment and set the dates of April 25 and 26 for the discipline proceeding to continue. On April 18, 2013, Superintendent Hobbs informed the OPCC by way of letter that counsel for Superintendent Hobbs had withdrawn and that new counsel for him had been appointed. The discipline proceeding could not proceed on the agreed date of April 25 as counsel required time to familiarize himself with this matter. On July 9, 2013, nine months after the discipline proceeding was first convened, submissions relating to this matter were made.

16. At the Discipline Proceeding, Constable Robinson denied the allegation of Abuse of Authority for intentionally or recklessly using unnecessary force on Ms. Davidsen. He admitted to the allegation of Neglect of Duty for failing to assist Ms. Davidsen after she was pushed to the ground.

17. Based on our review of the Discipline Proceedings, several issues and concerns arise based on the manner in which the Discipline Proceeding was allowed to proceed. Ms. Davidsen and material witnesses were denied the opportunity to participate in the proceeding, as there was no request for their attendance by the member. Only two police witnesses testified at the Discipline Proceeding, Constable Robinson and the external Investigator responsible for conducting the criminal and *Police Act* investigation. New evidence in terms of a supplemental Use of Force expert report retained by the member was submitted and accepted by Superintendent Hobbs. Superintendent Hobbs was clearly critical of the investigation into this matter, but did not take steps to direct further investigation to remedy his concerns. Instead he engaged in his own background investigation of the external Investigator completely outside the jurisdiction of the proceeding. In my view, the accountability of the proceedings and the search for the truth were significantly compromised.

18. On August 20, 2013, Superintendent Hobbs issued his decision substantiating the allegations of Abuse of Authority and Neglect of Duty. On October 7, 2013, Superintendent Hobbs proposed a one-day suspension for each of the allegations.

Decision

19. Upon review of the circumstances of this matter, there is no question that there have been significant delays. A delay of eleven months to conduct a one-day Discipline Proceeding and a further three months to issue a decision on discipline was entirely unnecessary and unacceptable. I am troubled by the lack of accountability and fairness observed in the discipline process in this matter. In my view, a competent and thorough investigation was carried out by the New Westminster Police Service for both the criminal proceedings and the *Police Act*. A finding was made by two separate Discipline Authorities substantiating the allegations of Abuse of Authority and Neglect of Duty for Constable Robinson. The discipline proposed by the Vancouver Police Department at both the Prehearing Conference and the Discipline Proceeding are inadequate to address the seriousness of this incident.

20. The process in which the discipline proceeding unfolded, including the delay, has served to undermine the public's confidence in the police discipline process. Decisions made by the Vancouver Police Department in this matter have failed not only Ms. Davidsen but also Constable Robinson and the public at large.

21. In addition to my review of this matter, on November 4, 2013, this Office received submissions from Mr. Scott Bernstein of the Pivot Legal Society, counsel for Ms. Davidsen, articulating reasons why a Public Hearing should be ordered in this matter.

22. Pursuant to section 138(1)of the *Police Act*, the Police Complaint Commissioner must arrange a Public Hearing or Review on the Record if it there is a reasonable basis to believe that the Discipline Authority's findings at the conclusion of a discipline proceeding are incorrect or it is otherwise necessary in the public interest.

23. Having reviewed the investigation, and the Discipline Proceeding and determinations, pursuant to s.138(1)(c)(ii) of the *Police Act*, I have determined that a public hearing is required as I am of the view there is a reasonable basis to believe that the Discipline Authority has incorrectly applied s. 126 in proposing disciplinary or corrective measures.

24. Furthermore, pursuant to s. 138(1)(d), I have determined that a public hearing is necessary in the public interest. In arriving at this decision, I have considered several relevant factors; including but not limited to the following:

    a) The complaint is serious in nature as the allegations involve a significant breach of public trust;

    b) The conduct has violated, or would be likely to violate, a person's dignity, privacy or other rights recognized by law;

c) It is necessary to examine or cross-examine witnesses and receive evidence that was not part of the record at the discipline proceeding, in order to ensure that procedural fairness and accountability is maintained;

d) There is a reasonable prospect that a public hearing will assist in determining the truth;

e) A public hearing is required to preserve or restore public confidence in the investigation of misconduct and the administration of police discipline.

It is therefore alleged that Constable Robinson committed the following disciplinary default pursuant to section 77 of the *Police Act*:

a) **Abuse of Authority**: contrary to section 77(3)(a)(ii)(A) of the *Police Act* – that on or about June 9, 2010, Constable Robinson committed the disciplinary default of Abuse of Authority by intentionally or recklessly using unnecessary force on Ms. Sandy Davidsen.

b) **Neglect of Duty**: contrary to section 77(3)(m)(ii) of the *Police Act* – that on or about June 9, 2010, Constable Robinson committed the disciplinary default of neglect of duty by failing to assist Ms. Davidsen after she was pushed to the ground.

NOW THEREFORE:

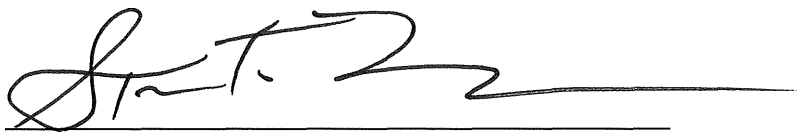
25. A public hearing is arranged pursuant to section 138 of the *Police Act*.

26. Upon the recommendation of the Associate Chief Justice of the British Columbia Supreme Court, former BC Court of Appeal Justice Wally Oppal, Q.C., is appointed to preside as Adjudicator in these proceedings, pursuant to s. 142(2) of the *Police Act*.

TAKE NOTICE that all inquiries with respect to this matter shall be directed to the Office of the Police Complaint Commissioner:

#501, 947 Fort Street, PO Box 9895 Stn Prov Govt, Victoria, BC V8W 9T8
Telephone: (250) 356-7458 / Facsimile: (250) 356-6503

DATED at the City of Victoria, in the Province of British Columbia, this 12th day of November, 2013.



Stan T. Lowe
Police Complaint Commissioner
for the Province of British Columbia

Appendix C: Notice of Public Hearing in the matter of the Public Hearing into the Complaint against Constable Edgar Diaz and Former Constable Hughes of the South Coast BC Transportation Authority Police Service

Office of the
Police Complaint Commissioner

British Columbia, Canada

PH: 2016-01
OPCC File: 2011-6657/2012-8138

NOTICE OF PUBLIC HEARING
Pursuant to section 138(1) *Police Act*, R.S.B.C. 1996, c.267

In the matter of the Public Hearing into the complaint against Constable Edgar Diaz and Former Constable Hughes of the South Coast BC Transportation Authority Police Service

To:	Mr. Charles Riby-Williams	(Complainant)
And to:	Constable Edgar Diaz (#151) David Butcher, Q.C. – Counsel	(Member)
And to:	Former Constable Mr. Michael Hughes Kevin Woodall – Counsel	(Former Member)
And to:	Chief Constable Dave Jones c/o New Westminster Police Department Professional Standards Section	(Discipline Authority)
And to:	The Honourable Ian. H Pitfield Retired BC Supreme Court Justice	(Discipline Authority)
And to:	Chief Officer Doug LePard c/o South Coast BC Transportation Authority Police Service Professional Standards Section	

WHEREAS:

Investigation

1. On August 18, 2011, the Office of the Police Complaint Commissioner (OPCC) received information from the South Coast BC Transportation Authority Police Service (SCBCTAPS)

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requesting this office order an investigation into an August 10, 2011, altercation that Constable Diaz and former Constable Hughes had with Mr. Riby-Williams.

2. SCBCTAPS Police Professional Standards investigator, Staff Sergeant Kent Harrison, conducted an investigation into allegations of Abuse of Authority against both Constable Diaz and former Constable Hughes. On September 10, 2012, Inspector MacDonald as Discipline Authority, made a finding in relation to the allegations against Constable Diaz and former Constable Hughes.

3. On November 23, 2012, in order to address concerns with Inspector MacDonald's decision, the Police Complaint Commissioner ordered an external investigation to be conducted by the New Westminster Police Department (NWPD). Sergeant Andrew Perry of NWPD was assigned as the external investigating officer. In addition, the Police Complaint Commissioner appointed Chief Constable Jones of the NWPD to perform the duties of Discipline Authority with respect to all matters related to the actions of Constable Diaz and former Constable Hughes.

Section 112 Decision by Chief Constable Jones

4. On July 22, 2013, after completing his investigation, Sergeant Andrew Perry submitted the Final Investigation Report (FIR) to Chief Constable Jones. On July 26, 2013, Chief Constable Jones determined that the evidence appeared to substantiate the following four allegations against former Constable Hughes:

    - That on or about August 10, 2011, at or near the City of Vancouver, British Columbia it is alleged that former Constable Hughes committed the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a)(i) of the *Police Act* by intentionally or recklessly making an arrest [upon Mr. Riby-Williams for Obstructing a Peace Officer] without good and sufficient cause.

    - That on or about August 10, 2011, at or near the City of Vancouver, British Columbia it is alleged that former Constable Hughes committed the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a)(ii)(A) of the *Police Act* by intentionally or recklessly using unnecessary force on any person.

    - That on or about August 10, 2011, at or near the City of Vancouver, British Columbia it is alleged that former Constable Hughes committed the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a)(i) of the *Police Act* when he intentionally or recklessly recommended that Constable Diaz issue Mr. Riby-Williams a violation ticket for Drunkenness in a Public Place contrary to section 41 of the *Liquor Control and Licensing Act* without good and sufficient cause.

- That on or about August 10, 2011, at or near the City of Vancouver, British Columbia it is alleged that former Constable Hughes committed the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a)(i) of the *Police Act* when he intentionally or recklessly arrested and recommended charges against Mr. Riby-Williams for Causing a Disturbance contrary to section 175(1)(a)(ii) of the *Criminal Code*.

5. Chief Constable Jones also determined that the following two allegations against Constable Diaz appeared to be substantiated:

    - That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, it is alleged that Constable Diaz committed the disciplinary default of *Abuse of Authority,* contrary to section 77(3)(a)(ii)(A) of the *Police Act* by intentionally or recklessly using unnecessary force on any person.

    - That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, it is alleged that Constable Diaz committed the disciplinary default of *Abuse of Authority,* contrary to section 77(3)(a)(i) of the *Police Act* when he intentionally or recklessly issued Mr. Riby-Williams a violation ticket for Drunkenness in a Public Place, contrary to section 41 of the *Liquor Control and Licensing Act* without good and sufficient cause.

6. Chief Constable Jones also determined that five allegations against Constable Diaz and four allegations against former Constable Hughes did not appear to be substantiated.

Section 117 Review by Retired Judge Ian H. Pitfield

7. On August 26, 2013, after reviewing Chief Constable Jones' decision, the Police Complaint Commissioner determined that there was a reasonable basis to believe that Chief Constable Jones' findings were incorrect with respect to the allegations that he determined did not appear to be substantiated. As a result, pursuant to section 117(4) of the *Police Act*, the Police Complaint Commissioner appointed Honourable retired Supreme Court Justice Ian H. Pitfield, as a retired judge, to review the unsubstantiated allegations and arrive at his own decision.

8. On October 9, 2013, retired Judge Pitfield completed his review recommending that the evidence appeared to substantiate the following allegations:

    - That on or about August 10, 2011, **Constable Diaz,** at or near the City of Vancouver, British Columbia, committed the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a)(i) of the *Police Act* when they intentionally or recklessly arrested and recommended charges against Mr. Riby-Williams for Causing a Disturbance contrary to section 175(1)(a)(ii) of the *Criminal Code* without good and sufficient cause.

- That on or about August 10, 2011, **Constable Diaz and former Constable Hughes,** at or near the City of Vancouver, British Columbia, committed the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a)(i) of the *Police Act* when they intentionally or recklessly arrested and recommended charges against Mr. Riby-Williams for Assaulting a Police Officer contrary to section 270(1)(b) of the *Criminal Code* without good and sufficient cause.

- That on or about August 10, 2011, **Constable Diaz and former Constable Hughes,** at or near the City of Vancouver, British Columbia, committed the disciplinary default of *Deceit* contrary to section 77(3)(f)(i)(A) or (B) of the *Police Act* when they issued a violation ticket to Mr. Riby-Williams for Drunkenness in a Public Place contrary to section 41 of the *Liquor Control and Licensing Act* that to their knowledge was false or misleading.

- That on or about August 10, 2011, **Constable Diaz and former Constable Hughes,** at or near the City of Vancouver, British Columbia, committed the disciplinary default of *Deceit* contrary to section 77(3)(f)(i)(A) or (B) of the *Police Act* when they arrested and recommended charges against Mr. Riby-Williams for Causing a Disturbance contrary to section 175(1)(a)(ii) of the *Criminal Code* that to their knowledge was false or misleading.

- That on or about August 10, 2011, **Constable Diaz and former Constable Hughes,** at or near the City of Vancouver, British Columbia, committed the disciplinary default of *Deceit* contrary to section 77(3)(f)(i)(A) or (B) of the *Police Act* when they arrested and recommended charges against Mr. Riby-Williams for Assaulting a Police Officer contrary to section 270(1)(b) of the *Criminal Code* that to their knowledge was false or misleading.

9. At that point, the allegations in relation to this matter became bifurcated, thereby proceeding separately and independently of each other. Chief Constable Jones retained the allegations that he determined appeared to be substantiated and retired Justice Pitfield became Discipline Authority with respect to the allegations that he determined appeared to be substantiated.

Chief Constable Jones Discipline Proceeding – former Constable Hughes

10. On January 9, 2014, Chief Constable Jones convened a discipline proceeding for the allegations against former Constable Hughes pursuant to section 124 of the *Police Act.* Former Constable Hughes did not attend so the hearing proceeded in his absence pursuant to section 130 of the *Police Act*.

11. On January 15, 2014, pursuant to section 133 of the *Police Act,* Chief Constable Jones issued the Disciplinary Disposition Record with respect to former Constable Hughes. Chief

Constable Jones determined the following with respect to substantiation and disciplinary/corrective measures:

- *Abuse of Authority* contrary to section 77(3)(a)(i) of the *Police Act* by intentionally or recklessly making an arrest [upon Mr. Riby-Williams for Obstructing a Peace Officer] without good and sufficient cause: **Substantiated.**

  Disciplinary/Corrective measure: 2 x 11 hour days' suspension from duty, without pay consecutive.

- *Abuse of Authority* contrary to section 77(3)(a)(ii)(A) of the *Police Act* by intentionally or recklessly using unnecessary force on any person: **Substantiated.**

  Disciplinary/Corrective measure: 5 x 11 hour days' suspension from duty, without pay consecutive.

- *Abuse of Authority* contrary to section 77(3)(a)(i) of the *Police Act* when he intentionally or recklessly recommended that Constable Diaz issue Mr. Riby-Williams a violation ticket for Drunkenness in a Public Place contrary to section 41 of the *Liquor Control and Licensing Act* without good and sufficient cause: **Substantiated.**

  Disciplinary/Corrective measure: 1 x 11 hour days' suspension from duty, without pay consecutive.

- *Abuse of Authority* contrary to section 77(3)(a)(i) of the *Police Act* when he intentionally or recklessly arrested and recommended charges against Mr. Riby-Williams for Causing a Disturbance contrary to section 175(1)(a)(ii) of the *Criminal Code*: **Substantiated.**

  Disciplinary/Corrective measure: 1 x 11 hour days' suspension from duty, without pay consecutive.

12. These allegations involving former Constable Hughes have been concluded by this office.

Suspension of *Police Act* Proceedings

13. On January 23, 2014, the Police Complaint Commissioner suspended this matter pursuant to section 179(4) of the *Police Act* after the NWPD advised they would be recommending criminal charges against Constable Diaz and former Constable Hughes.

14. On June 29, 2016, the Office of the Police Complaint Commissioner lifted the suspension of this matter after the NWPD advised that Crown Counsel had entered a stay of proceedings against former Constable Hughes and that Constable Diaz pleaded guilty to Assault

Causing Bodily Harm on May 31, 2016. Constable Diaz was sentenced to 12 months' probation on June 24, 2016.

Chief Constable Jones Discipline Proceeding – Constable Diaz

15. On September 19, 2016, following the discipline proceeding held by Chief Constable Jones, and after considering the available evidence and submissions, Chief Constable Jones made the following determinations in relation to the allegations against Constable Diaz:

    - That on or about August 10, 2011, at or near the City of Vancouver, British Columbia Constable Diaz, **committed** the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a)(ii)(A) of the *Police Act* by intentionally or recklessly using unnecessary force on any person.

      Disciplinary/Corrective Measure – Suspension from duty, without pay for five working days, based on a 10.5 hour shift, and training on use of force techniques and policy applications.

    - That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, Constable Diaz **did NOT commit** the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a)(i) of the *Police Act* by intentionally or issuing Mr. Riby-Williams a violation ticket for Drunkenness in a Public Place contrary to section 41 of the *Liquor Control and Licensing Act* without good and sufficient cause.

Notice of Public Hearing Chief Constable Jones' Decision

16. On November 29, 2016, I issued a Notice of Public Hearing pursuant to sections 138(1) and 143(1) of the *Police Act* on the basis that there was a reasonable basis to believe that the Discipline Authority's findings under section 125(1) were incorrect. With respect to the substantiated allegation, I considered that Chief Constable Jones had incorrectly applied section 126 of the Police Act and that the disciplinary measures imposed were inadequate and not commensurate with the seriousness of the conduct. With respect to the unsubstantiated allegation, I considered that he erred in his interpretation and application of Part 11 of the *Police Act.*

17. Pursuant to the recommendation of the Associate Chief Justice of the Supreme Court of British Columbia, the Honourable Ronald McKinnon, retired Supreme Court Justice, was appointed to preside as Adjudicator in these proceedings, pursuant to section 142(2) of the *Police Act*. My decision to issue a Notice of Public Hearing is presently the subject of judicial review proceedings brought by Constable Diaz. The Public Hearing is being held in abeyance pending the results of those proceedings.

Discipline Proceeding before Discipline Authority Pitfield

18. On October 3, 2016, Discipline Authority Pitfield heard an application by Constable Diaz and former Constable Hughes to summarily dismiss the proceedings against them and to join the two proceedings.

19. On October 17, 2016, Discipline Authority Pitfield issued his reasons for decision in respect of the preliminary application. He agreed that the two proceedings should be joined. He also found that the three allegations of *Deceit* against Constable Diaz and former Constable Hughes should be dismissed because in his view, making an arrest and issuing a ticket cannot be construed as *Deceit* for *Police Act* purposes. Discipline Authority Pitfield added that "a different result may have ensued had these allegations of misconduct been framed as *Discreditable Conduct*."

20. From February 28 to March 2, 2017, Discipline Authority Pitfield convened a joint discipline proceeding for Constable Diaz and former Constable Hughes, but limited that proceeding to the following allegations:

    - *It is alleged that on or about August 10, 2011, Constable Diaz and former Constable Hughes at or near the City of Vancouver, British Columbia committed the disciplinary default of Abuse of Authority contrary to section 77(3)(a)(i) of the Police Act when they intentionally or recklessly arrested and recommended charges against Mr. Riby-Williams for assaulting a police officer contrary to section 270(1)(b) of the Criminal Code without good and sufficient cause.*
    - *It is alleged that on or about August 10, 2011, Const. Diaz at or near the City of Vancouver, British Columbia committed the disciplinary default of Abuse of Authority contrary to section 77(3)(a)(i) of the Police Act when he intentionally or recklessly arrested and recommended charges against Mr. Riby-Williams for causing a disturbance contrary to section 175(1)(a)(ii) of the Criminal Code without good and sufficient cause."*

21. On March 16, 2017, Discipline Authority Pitfield found that both allegations of *Abuse of Authority* were not substantiated. In that decision, Discipline Authority Pitfield noted that both allegations referred to "arresting *and* recommending" charges and agreed with submissions by counsel that neither officer arrested Mr. Riby-Williams for assaulting a peace officer until after this arrest for another substantive offence and so these allegations were not substantiated because both elements (arresting and recommending) had not been substantiated. Discipline Authority Pitfield also found that the allegations could not be substantiated because Mr. Riby-Williams assaulted Constable Diaz and/or Constable Hughes by resisting arrest.

22. With respect to the allegation that Constable Diaz arrested and charged Mr. Riby-Williams for causing disturbance, Discipline Authority Pitfield found that the circumstances did not support that charge. He also rejected Constable Diaz's assertion that he was not aware of the elements of the offense at the time. However, Discipline Authority Pitfield found the allegation to be unsubstantiated on the basis that there was no arrest for causing a disturbance. Discipline Authority Pitfield wrote:

> [53] …*If the allegation of arrest is not combined with the making of a recommendation, then the evidence persuades me that the post-incident recommendation was subject to review and approval by a senior officer within SCBCTAPS before a report recommending charges went forward to Crown. With some reluctance, if making a recommendation should be separated from arrest, I would conclude that Const. Diaz's recommendation to his superiors should not be regarded as misconduct for which discipline is warranted. The*

blame for allowing the recommendation to go forward must be attached to the superior officer who approved the report that ultimately went forward to Crown. Simply stated, the recommendation should never have been approved.

23. Former Constable Hughes and Constable Diaz were provided with Discipline Authority Pitfield's findings in relation to each allegation of misconduct at the discipline proceeding. The Disciplinary Disposition Record pursuant to section 133 of the *Police Act* was provided to Mr. Riby-Williams on April 6, 2017, wherein Mr. Riby-Williams was informed that if he was aggrieved by either the findings or determinations he could file a written request with the Police Complaint Commissioner to arrange a Public Hearing or Review on the Record.

24. To date, the OPCC has not received a request for a Public Hearing or Review on the Record from Mr. Riby-Williams.

Decision

25. Section 133(6) of the *Police Act* provides that, in the absence of a request for a Public Hearing or Review on the Record by a complainant, member or former member (made in accordance with section 136(1), a Disciplinary Authority's section 125 determination is not open to question or review by a court unless a Public Hearing or Review on the Record is arranged by the Police Complaint Commissioner. Section 138 governs determinations as to whether to arrange a Public Hearing or Review on the Record. On expiration of the time limit for making a section 136(1) request, the Police Complaint Commissioner must arrange a Public Hearing or Review on the Record in one of three circumstances. One of those circumstances (section 138(1)(d)) is where the Police Complaint Commissioner considers that a Public Hearing or Review on the Record is necessary in the public interest.

26. Based on my review of the proceedings before Discipline Authority Pitfield in the context of all of the information before me, I consider that a Public Hearing is necessary to ensure confidence in the fairness and integrity of *Police Act* disciplinary processes.

27. It is important to note that the *Police Act* gives the Police Complainant Commissioner a very limited oversight role in respect of discipline proceedings undertaken by a Discipline Authority. In this case, my role was triggered by a request for an Order to Investigate made by SCBCTAPS Staff Sergeant Kent Harrison, which I granted. From that point forward, my involvement was limited to designating an employee under section 123(8) of the *Police Act* to observe the discipline proceeding, and receiving various interim reports, FIRs and discipline-related decisions. The *Police Act* does not authorize the Police Complaint Commissioner to direct the course of a discipline proceeding other than limited discretion to grant extensions where requested and necessary under sections 118 and 128 and determine the location of a discipline proceeding under section 123(6) of the *Police Act*. The Police Complaint Commissioner does not have any input into the articulation of misconduct allegations by the investigating officer in any FIR. It is only when discipline proceedings have concluded that the Police Complaint Commissioner may direct that, based on all of the totality of the information culminating in the section 125 discipline

decision and for public interest reasons, a Public Hearing into the conduct of concern be conducted.

28. In considering whether a Public Hearing is in the public interest, I am directed to take into account all of the relevant factors, including those set out in section 138(2) of the *Police Act*. The first is the nature and seriousness of the complaint or alleged misconduct. The second is the nature and seriousness of harm or loss alleged to have been suffered as a result of the alleged misconduct. In this case, I consider the alleged misconduct involves a significant breach of public trust and that the harm suffered by Mr. Riby-Williams to be particularly serious.

29. The allegations against Constable Diaz and Constable Hughes include striking Mr. Riby-Williams numerous times with their police-issue batons. Close-circuit cameras depict some of those strikes making contact with Mr. Riby-Williams' head, a lethal force target when deploying a baton. In his decision pursuant to section 128 of the *Police Act* regarding discipline/corrective measures for the substantiated allegation of *Unnecessary Force* against Constable Diaz, Chief Constable Jones stated as follows with respect to this portion of the incident:

> "The details contained within the FIR and subsequent criminal court proceedings describe very vividly and clearly a set of circumstances wherein Constable Diaz acted in an assaultive manner, by striking the victim Mr. Riby Williams, numerous times with his police issued baton, effectively causing injury to Mr Riby Williams. The available video clearly shows an incident that is both inappropriate, and shocking to many individuals who have observed it."
>
> "Constable Diaz described himself as losing control and the video depicts a police officer that does not appear to be in control of his actions during the incident, which is a concern with any police officer who works in an unpredictable environment."

30. Mr. Riby-Williams was a 22 year old university student at the time. As a result of the incident he received lacerations and abrasions to his head, hands, legs and back in the process. He was transported to hospital where he received four sutures for his head injury. He was then transported to Vancouver cells and arrested for Obstruction, Assault of a Police Officer, and Causing a Disturbance by being Drunk. The charges were subsequently either dropped or stayed by Crown counsel.

31. Returning to the section 132(2) factors, I consider the conduct at issue, if not subjected to a Public Hearing, would likely undermine public confidence in "the police, the handling of complaints or the disciplinary process" and that a hearing is required in order to restore that public confidence. In this case, the only evidence heard by Discipline Authority Pitfield was that of former Constable Hughes, Constable Diaz and Sergeant Perry, who conducted the investigation. This is typical of such proceedings because only the member or former member whose conduct at issue has discretion to call (or not to call) witnesses. There is no adjudication in the usual sense because there is no other party to that

proceeding and consequently there is no ability to independently call witnesses, no cross-examination of witnesses called and no submissions made other than those made on behalf of the subject of the discipline. Additionally, in this case, Discipline Authority Pitfield made a preliminary determination, based only on legal submissions, to summarily dismiss some of the allegations even though section 117(9) directed him to conduct a discipline proceeding in accordance with sections 123 and 124 of the *Police Act*.

32. In this case, and in addition to Mr. Riby-Williams, Constable Bentley and Constable Smith, there were a number of independent civilian witnesses to the incident. It is my view that, in all of the circumstances here, a full and *de novo* Public Hearing is warranted to assure police accountability and to assist in determining the truth. There are varying versions of what occurred including civilian witness versions and those of Mr. Riby-Williams that contradict those of Constable Diaz and former Constable Hughes. Pursuit of the truth would benefit from all testimony being tested by cross-examination and associated assessments of credibility by the Adjudicator with legal submissions on the merits by Discipline Authority counsel, Public Hearing counsel, in addition to counsel for Constable Diaz and former Constable Hughes.

33. I am also directed by section 132(2)(d) of the *Police Act* to consider whether an arguable case can be made that, among other things, the Discipline Authority's interpretation or application of Part 11 of the *Police Act* was incorrect. It is my view that such an arguable case can be made. The bifurcation of the disposition proceedings has resulted in inconsistent verdicts whereby Chief Constable Jones substantiated an allegation of *Abuse of Authority* against former Constable Hughes for charging Mr. Riby-Williams with Causing a Disturbance, whereas Discipline Authority Pitfield unsubstantiated the same allegation against Constable Diaz. In saying this, I am mindful of my comments in my November 29, 2016 Order for Public Hearing about *British Columbia (Police Complaint Commissioner) v. Bowyer*, 2012 BCSC 1018. The Court's observations in that case reference the possible outcomes of bifurcated discipline proceedings as being inconsistent, as in this case. The fact that there have been two different outcomes based on essentially the same facts supports my view that an arguable case can be made that Discipline Authority Pitfield's interpretation and application of the *Police Act* was incorrect.

34. Pursuant to section 143(2), a Public Hearing is a new hearing concerning the conduct of a member or former member that was the subject of an investigation or complaint under Part 11, Division 3 of the *Police Act.*

35. Pursuant to section 143(3), a Public Hearing is not limited to the evidence and issues that were before a Discipline Authority in a discipline proceeding.

36. I have noted that the Public Hearing I ordered on November 29, 2016, arising out of the proceedings before Discipline Authority Jones, has not yet convened. Based on sections 143(2) and 143(3) of the *Police Act,* and for reasons akin to those of Discipline Authority Pitfield in granting the application by Constable Diaz and former Constable Hughes to join

the discipline proceedings, I am of the view that all allegations arising from this matter should be joined in a single Public Hearing. I am also of the view that these allegations should be heard by Adjudicator McKinnon together with those matters currently the subject of my November 29, 2016, Notice of Public Hearing in respect of Constable Diaz.

37. It is therefore alleged that Constable Diaz and former Constable Hughes committed the following disciplinary defaults, pursuant to section 77 of the *Police Act*:

(i) That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, it is alleged that Constable Diaz and former Constable Hughes committed the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a) of the *Police Act,* which is oppressive conduct towards a member of the public, by recommending charges against Mr. Riby-Williams for Assaulting a Police Officer without good and sufficient cause.

(ii) That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, it is alleged that Constable Diaz and former Constable Hughes committed the disciplinary default of *Deceit* contrary to section 77(3)(f)(i)(a) or (B) by knowingly making false or misleading written statements and/or false or misleading entries into official documents, based on false or misleading statements to support charges against Mr. Charles Riby-Williams in SCBCTAPS General Occurrence file 2011-11318.

38. It is therefore alleged that Constable Diaz committed the following disciplinary default, pursuant to section 77 of the *Police Act*:

(iii) That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, it is alleged that Constable Diaz committed the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a) of the *Police Act,* which is oppressive conduct towards against a member of the public, by recommending charges against Mr. Riby-Williams for Causing a Disturbance without good and sufficient cause.

(iv) That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, it is alleged that Constable Diaz committed the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a)(ii)(A) of the *Police Act* by intentionally or recklessly using unnecessary force on any person.

(v) That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, it is alleged that Constable Diaz committed the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a)(i) of the *Police Act* when he intentionally issued Mr. Riby-Williams a violation ticket for Drunkenness in a Public Place, contrary to section 41 of the *Liquor Control and Licensing Act* without good or sufficient cause.

39. Pursuant to section 143(9)(a), the Adjudicator is not limited to the above listed allegations, but must decide whether any misconduct has been proven.

40. Pursuant to section 143(5) of the *Police Act*, Public Hearing counsel, commission counsel, Constable Diaz and former Constable Hughes, or their legal counsels may:

    a) call any witness who has relevant evidence to give, whether or not the witness was interviewed during the original investigation or called at the discipline proceeding;

    b) examine or cross-examine witnesses;

    c) introduce into evidence any record or report concerning the matter; and

    d) make oral or written submissions, or both, after all of the evidence is called.

41. Pursuant to section 143(7) of the *Police Act*, Mr. Riby-Williams, or her or his agent or legal counsel, may make oral or written submissions, or both, after all of the evidence is called.

THEREFORE:

42. A Public Hearing is arranged pursuant to section 138(1) and 143(1) of the *Police Act*.

43. Pursuant to the recommendation of the Associate Chief Justice of the Supreme Court of British Columbia, the Honourable Ronald McKinnon, retired Supreme Court Judge, is appointed to preside as Adjudicator in these proceedings, pursuant to section 142(2) of the *Police Act*. Dates for the Public Hearing have not yet been determined.

44. This Notice replaces the Notice of Public Hearing issued on November 29, 2016.

TAKE NOTICE that all inquiries with respect to this matter shall be directed to the Office of the Police Complaint Commissioner:

501 - 947 Fort Street, PO Box 9895 Stn Prov Govt, Victoria, BC V8W 9T8
Telephone: 250-356-7458 • Toll Free: 1-877-999-8707 • Facsimile: 250-356-6503

DATED at the City of Victoria, in the Province of British Columbia, this 15th day of June, 2017.

Stan T. Lowe
Police Complaint Commissioner

Appendix D: OPCC Information Bulletin #14 – Accountable and Transparent Investigations Pursuant to the *Police Act*

OFFICE OF THE POLICE COMPLAINT COMMISSIONER

Integrity
Independence
Excellence

Information Bulletin #14- revised

To: All Municipal Police Chief Constables

And to: All Professional Standards Officers

From: Office of the Police Complaint Commissioner

Date: December 7, 2018

Re: Accountable and Transparent Investigations pursuant to Part 11 of the *Police Act*

BACKGROUND

In a process in which police conduct the investigation of complaints against police, the transparency and accountability of such a process has a direct impact on public confidence. As the custodians of the public interest in this process, the role of the OPCC includes the promotion of accountability and transparency through the independent oversight of investigations completed by the police.

Obtaining statements from involved members and other witnesses is an important component of a truth-seeking process where the investigator's professionalism and the quality of investigative steps undertaken by the investigator directly impacts the ability to uncover the truth. Each investigator should embody the attributes of objectivity and impartiality and should endeavor to treat all witnesses equitably when conducting investigations pursuant to the *Police Act*.

Each investigator has an obligation to protect the public interest by exercising his or her authorities pursuant to the *Police Act* to ensure timely, transparent and accountable investigations. Public confidence in the process is eroded when investigations are delayed, are inadequate, or lack transparency in a legislative scheme specifically designed to eliminate these issues.

Similarly, the Police Complaint Commissioner has a legislated duty to ensure that the objectives of the *Police Act* are achieved[1] and has been provided specific authorities to fulfill that duty. Based on the provisions of the *Police Act*, it is clear that one of the objectives of the *Police Act* is to ensure that police officers cooperate with investigating officers.[2] Another objective is cooperation with the Police Complaint Commissioner and staff at the OPCC.[3]

[1] See section 177(1) of the *Police Act*, RSBC 1996 ch. 367
[2] See section 101 of the *Police Act, ibid.*
[3] See sections 97 and 178 of the *Police Act, supra.*

Challenges to the duty to cooperate have resulted in recent decisions from the BC Supreme Court[4] and the Supreme Court of Canada[5] that have confirmed police officers' duty to cooperate fully with investigating agencies, whether it be agencies mandated to conduct criminal investigations into police officers' conduct or agencies mandated to conduct professional misconduct investigations. These decisions have made it clear that a member's duties and responsibilities to cooperate are rooted in both common law and statute and that members have no discretion to determine the bounds of their cooperation.

PURPOSE

The OPCC has observed inconsistencies in the approach to conducting investigations under the *Police Act*. Pre-statement disclosure of materials to members has varied in the past as well as the manner in which statements are obtained and interviews are carried out. We have also observed delays in conducting interviews which has led to the need for extensions. As a result, clarification is needed to ensure a consistent and accountable approach to investigating matters that fall under the *Police Act*.

This Bulletin should serve as a guide for best practices as it pertains to disclosure of materials to respondent and witness members, and obtaining statements in relation to investigations conducted under the *Police Act*. Although this Information Bulletin is not designed to remove, or interfere with investigative discretion in the investigative methods used during *Police Act* investigations, this discretion is still subject to the provisions of the *Police Act* and the oversight powers of the Police Complaint Commissioner.

A. PRE-STATEMENT DISCLOSURE OF MATERIALS

The *Police Act* does not provide that members have a right to disclosure prior to providing a statement to an investigating officer. The decision of what information may be disclosed and when disclosure is to take place is within the discretion of the investigator, unless statutorily prohibited or required. This exercise of discretion will be influenced by the investigative strategy undertaken by the investigator, and may include withholding disclosure until the time of the interview. The goal in disclosing appropriate materials is to ensure witnesses are able to provide the best evidence possible and to refresh their memory if significant time has lapsed. Respondent or witness members, complainants and other civilian witnesses may use the information disclosed to them to assist in recalling details of their involvement and observations of an incident.

The manner and nature of the disclosure is an important consideration in terms of oversight by the OPCC in assessing the accountability of the process. In order to protect the integrity of the investigation from allegations of investigational bias, investigating officers ought to consider whether their pre-statement disclosure decisions would garner perceptions of affording police preferential treatment in the complaints process. For instance, in ensuring

[4] *Independent Investigations Office of British Columbia v. Vancouver (City) Police Department*, 2018 BCBC 1804; *Kyle v. Stewart*, 2017 BCSC 522

[5] *Wood v. Schaeffer*, 2013 SCC 71

impartiality in the complaints process, disclosure considerations should also include the complainant and other civilian witnesses, if appropriate. It may be worthwhile to remind investigators that the duty of fairness owed to members is minimal at the investigative stage of the complaints process: *Kyle v. Stewart*, 2017 BCSC 522, at para. 89.

Recommended Process

While the *Police Act* does not provide specific guidance concerning what materials should be provided to members who are either named as a witness or a respondent in a *Police Act* investigation, the Act is clear that when a complaint has been made admissible, the respondent member is to be notified that a complaint has been made. This is to include the nature of the complaint and the name of the complainant.[6] When an investigation has been ordered into an incident, the Act also notes that the member, whose conduct is the subject of the investigation, is to be notified that the Police Complaint Commissioner has ordered an investigation.[7]

For admissible complaints and ordered investigations, the respondent member is typically provided a copy of the *Notice of Admissibility* or *Order for Investigation* authored by the OPCC; in cases of admissible complaints, the *Notice of Complaint/Initiation of Investigation* document authored by the investigating agency is also typically provided to the respondent member.

As various departmental practices have developed, the OPCC has noted an inconsistency in terms of what additional materials may be provided to members. Agencies differ in their disclosure of materials to witness and respondent members, and to other witnesses, which includes but is not limited to: the oral or written complaint; audio and video records; police records; and statements or other evidence collected during the *Police Act* investigation.

The report by the Honourable Josiah Wood, Q.C. in 2007 ("the Wood Report") following his audit of the police complaints process, provided valuable guidance as to what materials should be provided to respondent members prior to the provision of a statement.

> *While we accept that a Respondent should be given proper notice of the nature of the complaint before being called upon to make a statement, this could be done by providing the Respondent with a copy of the complaint and sufficient particulars to permit the Respondent to identify the incident underlying the complaint. We are less convinced of the appropriateness of providing Respondents with complete copies of all statements and evidence emanating from the Complainant during the course of the investigation of a complaint, before Respondents are required to provide their own statements.*

The disclosure of materials to persons involved in *Police Act* investigations can directly impact the evidence they will subsequently provide. There exists a need to balance the privacy rights of complainants and the ability of members to adequately address the allegations contained in a complaint. In addition, there is a need to protect against the impression of an investigative bias, either real or perceived, by departing from best practices and allowing members to view the

[6] See section 83(3) of the *Police Act*
[7] See section 93 of the *Police Act*

entire investigative file prior to providing a statement or providing specific questions to members, their agents or any other support person in advance of the interview.

Upon the initiation of an investigation, the police agency should privatize the PRIME file to preserve the evidence and control access to the material. The investigator will provide members only those portions of the PRIME file that they authored. This practice is currently in place in a number of departments, but was one area in which we observed an inconsistent approach.

Permitting members to refresh their memory by viewing video footage prior to providing a statement under the *Police Act* is within the discretion of the investigator. There should be some obvious investigative purpose or justification to withhold the review of video where a person is depicted prior to providing a statement. Complainants and civilian witnesses should have the same opportunity as provided to respondent or witness members to view any audio or video recordings for the purposes of refreshing their memory prior to providing a statement.

Specific questions should not be provided to either respondent members or other witnesses prior to the commencement of the interview; however, the investigating officer may identify the issues or themes that will be canvassed during the interview if is not clear from the registered complaint or the *Notice of Complaint/Initiation of Investigation*.

Respondent Members:

✓ ***May be disclosed***

- Record of original Complaint
- Notification of Admissibility
- Notice of Order for Investigation
- Notice of External Investigation
- Notice of Mandatory External Investigation
- Any and all police records that the member created related to the incident
- Any and all audio or video records that the member is depicted in or participated in at the time of its creation.

X ***Should not be disclosed***

- Other members' oral or written statements
- Police records created by other members
- Audio or video records, or portions thereof, that the member did not experience or participate in at the time of creation
- Any personal information related to the complainant or other members of the public
- Any other evidence collected during the *Police Act* investigation
- Specific questions that will be asked during the *Police Act* interview

Witnesses (police members and civilian witnesses):

✓ ***May be disclosed***

- Notification of Admissibility
- Notice of Order for Investigation
- Notice of External Investigation
- Notice of Mandatory External Investigation
- Any and all records that the witness created in relation to the incident
- Any and all audio or video records that the person is depicted in or participated in at the time of its creation.

X ***Should not be disclosed***

- Other oral or written statements from witnesses, including the subject officer
- Police records created by others
- Audio or video records that the party is not depicted or heard in, or present for
- The oral or written complaint
- Any personal information of the members, the complainant or any other members of the public
- Any other evidence collected during the *Police Act* investigation
- Specific questions that will be asked during the *Police Act* interview

Respondent or witness members should not automatically receive disclosure of the listed items but rather the investigator should consider disclosure on a case by case basis depending on the investigative strategy for that file.

Any delays that are caused in order to offer disclosure of evidence to respondent members and witnesses should be carefully weighed in consideration of the potential erosion of memory and the investigative need to obtain statements while the evidence is fresh in the mind of the respondent or witness.

B. DUTY OF CONFIDENTIALITY

Confidentiality of investigations and information arising from *Police Act* investigation must not be revealed to anyone unless specifically authorized by the Act.

Specifically, section 51.01(5) of the Act states,

> The Police Complaint Commissioner, any person employed, retained or designated by the Police Complaint Commissioner, and every investigating officer must, except as specifically authorized under this Act, maintain confidentiality in respect of all matters that come to her or his knowledge in the exercise of powers or performance of duties under this Act. (emphasis added).

Professional Standards Investigators must maintain confidentiality with respect to all information that comes to their knowledge pursuant to the *Police Act*. One of the reasons for this need for confidentiality is to prevent the contamination of evidence and to ensure the integrity of the investigation is maintained.

Members also have a duty to maintain confidentiality upon request by the investigator, as specified in section 101 of the Act:

> 2) …at any time during an investigation under this Part and as often as the investigating officer considers necessary, the investigating officer may require a member to do one or more of the following, and the member must fully comply with the request:
>
> a) Answer questions in respect of matters relevant to the investigation and attend at a place specified by the investigating officer to answer those questions;
> b) Provide the investigating officer with a written statement in respect of matters relevant to the investigation;
> **c) Maintain confidentiality with respect to any aspect of an investigation, including the fact of being questioned under paragraph (a) or being asked to provide a written statement under paragraph (b).**
>
> (emphasis added).

In addition, any third party who is privy to aspects of the *Police Act* investigation ought to maintain confidentiality. This extends to any support persons who attend an interview with a Complainant or union agents representing respondent or witness members.

Recommended Process

In order to prevent the contamination of evidence and to ensure confidentiality of *Police Act* investigations, any third party who is present during an interview, other than retained legal counsel, should be asked to sign a confidentiality agreement. The third party will be permitted to discuss the information disclosed during the interview with the interviewed party but will be restricted from conveying any of that information to anyone, including, but not limited to other witness or respondent members involved in that incident. See appendix A for a recommended template of this agreement that should be used for this purpose. This signed agreement should form part of the evidentiary record.

In addition, there should be a documented reason why a third party is required to be present at the interview and that confidentiality will be maintained by the parties present.

Similarly, any third party who provides support or advice with respect to a written statement, other than retained legal counsel, should be asked to sign a confidentiality agreement.

Members should also be asked by the investigator to maintain confidentiality with respect to any aspect of an investigation, pursuant to section 101(2)(c) of the *Police Act*.

C. DUTY TO COOPERATE

Amendments to the *Police Act* in 2010 imposed a statutory duty on members to cooperate with an investigating officer. These amendments were introduced as a result of the conclusions set out in the Wood Report following his review of the complaints process. It was determined that the previous legislation failed to provide investigators with the necessary powers to ensure that complaints could be thoroughly investigated.

Section 101 of the *Police Act* specifically deals with a member's duty to cooperate with an investigating officer, answer questions and provide written statements.

Section 101

(1) A member must cooperate fully with an investigating officer conducting an investigation under this Part.

(2) Without limiting subsection (1), at any time during an investigation under this Part and as often as the investigating officer considers necessary, the investigating officer may request a member to do one or more of the following, and the member must fully comply with that request:

   a) answer questions in respect of matters relevant to the investigation and attend at a place specified by the investigating officer to answer those questions;

   b) provide the investigating officer with a written statement in respect of matters relevant to the investigation;

   c) maintain confidentiality with respect to any aspect of an investigation, including the fact of being questioned under paragraph (a) or being asked to provide a written statement under paragraph (b).

(3) A member requested to attend before an investigating officer must, if so requested by the investigating officer, confirm in writing that all answers and written statements provided by the member under subsection (2) are true and complete.

(4) Unless the Discipline Authority grants an extension under subsection (5), the member must comply with any request under subsection (2) within 5 business days after it is made.

(5) If satisfied that special circumstances exist, the Discipline Authority may extend the period within which the member must comply with a request under subsection (2).

The current legislation lays out the expectation placed on members to cooperate fully with investigating officers. Section 101 imposes a statutory duty on members to cooperate fully and comply fully with a request made by an investigating officer. Investigators have express authority to request a member to do the things as set out under section 101.[8] The legislation does not provide that members must receive pre-interview disclosure or be accompanied by a lawyer and/or union representative to an interview. Nor does the legislation provide that the investigator must accommodate the member's work schedule or the schedule of their

[8] *Kyle v. Stewart*, 2017 BCSC 522

legal counsel and/or union representative. This is particularly clear considering that the member has five business days to comply with a request made by the investigating officer.

A duty to cooperate under the *Police Act* is absolute and it is the investigating officer who determines the statement/interview conditions and parameters.[9] Pursuant to the provisions of Part 11 of the *Police Act*, however, that discretion is subject to the oversight of the Police Complaint Commissioner and the duty to ensure that the objectives of the *Police Act* are achieved.

The Supreme Court of Canada has also affirmed that legislation intended to investigate and adjudicate police disciplinary matters are a complete code for handling police complaints, investigations and the administration of discipline and proceedings.[10] The Honourable Justice MacNaughton in *Kyle v. Stewart*, 2017 BCSC 522 determined that "the clear statutory language of s. 101 does not leave room for employment or labour relations policies to modify the mandatory obligation" of members to cooperate with investigating officers. Justice MacNaughton held that the role of an investigating officer during the investigative stage of the complaints process is "investigative" and not "adjudicative" in nature; therefore, any duty of fairness owed to the member, if it exists, will be minimal.

A member's duty to cooperate also extends to the Police Complaint Commissioner and the staff at the OPCC.

Section 178

> A member has a duty to cooperate with the Police Complaint Commissioner in the Police Complaint Commissioner's exercise of powers or performance of duties under this Act and with any Deputy Police Complaint Commissioner or other employee of the Police Complaint Commissioner who is acting on behalf of the Police Complaint Commissioner.

The legislators sought fit to consider the contravention of a provision under the *Police Act* or a regulation, rule or guideline made under the Act as misconduct. Members should be aware that failure to follow the legislative requirements of the Act may result in an investigation under the Act, despite acting on advice of legal counsel or union representative.

D. OBTAINING A STATEMENT FROM POLICE MEMBERS AND OTHER WITNESSES, INCLUDING THE COMPLAINANT

Statements from involved members and witnesses are the cornerstone to every *Police Act* investigation. The dominant purpose of obtaining statements is to ensure that a full understanding of all the relevant events giving rise to the complaint and subsequent allegations of misconduct are obtained. We have seen a variety of approaches to obtaining statements and have observed a spectrum in terms of the quality of these statements in not only the thoroughness but the manner in which the statement was obtained or the interviews conducted.

[9] *Independent Investigations Office of British Columbia v. Vancouver (City) Police Department*, 2018 BCSC 1804
[10] *Regina Police Assn. v. Regina Police Commrs., [2000] 1 S.C.R.*

In our view, in-person interviews are the best avenue to address allegations under investigation compared to duty statements that are obtained from respondent and witness members. Most duty statements do not thoroughly address material aspects of the allegation(s). Interviews allow for additional probing by the investigator to fully understand the rationale and grounds for the members' actions and their observations.

This practice is supported in the review conducted by the Honourable Josiah Wood, Q.C. (2007) where it was revealed that there was a reliance on prepared statements from involved members and instances where investigators did not take the necessary steps to pursue significant points or inconsistencies in the evidence. In addition, statements often did not include issues regarding lawfulness of the officer's actions that may have given rise to the complaint. As a result, the reliance on duty reports, which lack sufficient detail, can have a negative impact on the quality of the investigation and subsequent decisions from Discipline Authorities.

Furthermore, the review of duty statements by union agents has become a concern with this office due to the delay created by such a process and because this practice undermines the accountability of the complaint process. There have been examples where duty statements have taken in excess of two months to obtain, with follow up interviews often being conducted towards the end of an investigation. Moreover, our review of these investigations indicates that both respondent and witness members consult union agents during the preparation of their duty statements. This consultation includes providing draft statements to agents for review and feedback, including matters in which the same agent represents multiple members. This has resulted in cases where duty statements from two different members are almost identical or very similar in terms of content.

The statements of the Supreme Court of Canada in *Wood v. Schaeffer* regarding consultation with legal counsel prior to complying with a duty to take notes are worthy of note. The Court found that consultation with counsel at the note-taking stage is antithetical to the dominant purpose of the legislative scheme because it risks eroding the public confidence that the SIU process was meant to foster."[11] Similarly, the current duty statement regime, which includes consultation with, and input from, union agents is antithetical to public confidence in the *Police Act* process because the scope and content of that consultation, including its influence on the evidence that is created, is hidden from the oversight body.

Delays in obtaining statements from respondent members and other witnesses can directly affect the quality of the investigation. According to the Honourable Josiah Wood, Q.C.(2007),

> *A duty to provide a statement or submit to an interview must be complied with promptly if the quality of the investigation is to be maintained. The investigative audit revealed a number of instances where a requested duty report or statement was provided only after a lengthy delay. In some cases, usually those involving allegations of excess force, the delay exceeded six months, leading to the inference that the delay was deliberately related to the six month limitation period associated with a charge of common assault under the Criminal Code.*

[11] 2013 SCC 71 at para. 47

Josiah Wood, Q.C. (2007) received information from police regarding the delay issue which prompted the imposition of a five day deadline. This deadline was included in the amendments to the *Police Act* and was meant to be used as a tool to prevent any undue delays with the investigation.

The concern surrounding delay has also been echoed in the results of the statutory audit undertaken by a Special Committee of the Legislature in 2012 where it was determined that less than half of the investigations were completed within the six month time frame. While the number of investigations requiring an extension has decreased since then, approximately one quarter of investigations still require at least one extension of the six month time limitation period.

Another area that could potentially impact the quality of information arising from statements is the presence of audio or video recordings. These recordings may serve as an aide memoire for the witness or respondent members if they are depicted in such recordings.

For these reasons, it is our view that duty statements should not be obtained from police witnesses or respondent members.

Recommended Process

Obtaining statements and conducting other investigative steps for the purposes of *Police Act* investigations should be conducted in an equitable manner which does not afford any party preferential treatment unless there is an articulable rationale for doing so. For instance, if there is relevant video or audio recording which may serve as an aide memoire, the decision to show such information to a member should also extend to that of a civilian witness or complainant, if they are depicted in such recordings.

We have noted a practice amongst some municipal police agencies whereby interviews of complainants and civilian witnesses are audio and video recorded but interviews of members are only audio recorded. In our view, subject to a legitimate investigative purpose, the manner in which statements are obtained from members and civilians ought to be consistent.

As memories fade over time, statements from police members and other witnesses should be obtained in a timely manner in order to obtain the best evidence possible of what occurred. Section 101 of the *Police Act* lays out the member's duty to cooperate with the investigating officer, which includes answering questions. Section 101(4) of the *Police Act* stipulates that unless an extension is granted by the Discipline Authority, the member must comply with an investigating officer's request for a statement within five business days. While it may not be practical for a member to comply with an investigator's request for a statement within the five business day time limit, this is a tool that can be used by investigating officers to ensure the timely receipt of statements and attendance of interviews under the *Police Act*.

If a police officer is unable to provide a statement in the time frame provided, pursuant to section 101(5) of the *Police Act,* it is the responsibility of the Discipline Authority to review the matter to determine whether special circumstances exist to grant an extension.

Investigative best practices recommend that all witnesses provide in-person recorded interviews as part of the investigation. By obtaining a pure version statement from the member or other witnesses, the investigator will be in the best position to immediately ask follow-up questions and to probe material areas requiring additional information. There is little value in obtaining duty statements first prior to conducting an interview; this practice has unnecessarily introduced an additional layer of delay in obtaining a fulsome statement from the member.

Moreover, the current practice of preparing duty statements, where members are creating evidence of what they observed or heard, and/or actions they took, includes a review and consultation process by union agents that is not the subject of oversight by this office. This is a process which undermines the transparency and accountability of the police complaints system.

As a result, it is our position that interviews of all relevant parties should be obtained early in the investigation to mitigate the effect of fading memories. While we understand that there may be a preference to obtain evidence from all witnesses prior to interviewing a respondent, such an approach should not be the default as it may create a significant delay in obtaining evidence from respondents. Written statements should only be obtained in circumstances in which the investigating officer and OPCC analyst agree that a written statement, created solely by the witness/respondent member without input from third parties, would adequately address the material issues in the investigation.

We understand the role of union agents to be one of support and advocacy for members. While it is acceptable for a respondent or witness to receive advice prior to an interview or during the course of the investigation, union agents and other representatives should not play a role in the giving of evidence. Such a role undermines the accountability of *Police Act* investigations.

Therefore, the role of an agent, counsel or other representative does not extend to participating in the interview alongside the member, by either introducing evidence on the record, asking questions or participating in the creation of evidence through a member's written statement. The interview room is managed by the investigator. If there is a need for the union agent or legal counsel to ask a question, the conversation should be held outside the room between the union agent and the investigator to discuss the need for such a question. It is the investigator's discretion whether to ask or probe the additional areas as suggested by union agent/counsel. The investigator should explain, on the record, the area (or areas) that the union agent or counsel has suggested, what the investigator has decided regarding the relevance of that suggestion and why. Then the investigator should proceed as appropriate.

The most prudent approach is to establish with the assigned OPCC Investigative Analyst a mutual understanding of the material issues requiring investigation, the witnesses requiring a statement and the manner in which that statement should be obtained. The default should be an audio recorded interview that is obtained from all material witnesses, including the respondents, as early in the investigation as practicable. This will assist in preventing delays

in the investigation and will ensure that all relevant material issues have been canvassed in a timely manner.

Section 97(1)(c) and (d) of the *Police Act* provide the authority of the OPCC to provide advice and direction to the investigating officer or Discipline Authority. Any issues that cannot be resolved between the analyst and investigator will result in a direction from the Police Complaint Commissioner as the circumstances require.

I hope this Bulletin will assist in ensuring an accountable and consistent approach when PSS investigators disclose materials to subject and witness officers in the preparation of *Police Act* statements.

Stan T. Lowe
Police Complaint Commissioner

Appendix: Recommended Confidential Agreement Template

Appendix E: September 7, 2018, Submission to Minister of Public Safety and Solicitor General by Police Complaint Commissioner Lowe

Office of the
Police Complaint Commissioner

British Columbia, Canada

September 7, 2018

The Honourable Mike Farnworth
Minister of Public Safety and Solicitor General
Attorney General for British Columbia
PO Box 9044 Stn Prov Govt
Victoria, V8W 9E2

Dear Minister Farnworth,

Re: 2018 Submission on Amendment to the *Police Act*

The March 31, 2010, amendments to the *Police Act* significantly changed the police complaint process in British Columbia. We have now had the benefit of working within the new regime for over eight years. In 2015, I submitted a number of amendments to the government at the time for suggested improvements to the police complaint process, specifically part 11 of the *Police Act*.

Our office is in the process of reviewing those previous submissions. In the near future, I will submit an update of those issues previously submitted and include newly identified areas for improvement. In the meantime, I am submitting a recommendation for consideration that arose from my office's review of the investigation into allegations of misconduct involving the former Victoria Police Department Chief Constable Frank Elsner.

Sincerely,

Stan T. Lowe
Police Complaint Commissioner

Enclosure

cc: Honourable David Eby – Attorney General
Mark Sieben – Deputy Solicitor General
Clayton Pecknold – Assistant Deputy Minister & Director of Police Services, Policing and Security Programs Branch

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Police Complaint Commissioner

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Proposed Amendment to the *Police Act*

ISSUE: BC municipal Mayors acting as Discipline Authorities under the *Police Act*

The Commissioner submits that considering the nature of the relationship between the police board generally and more specifically, the Mayor, as chair of the board, it is the Commissioner's view that the Chair should not act as the Discipline Authority at any time, for matters involving the Chief Constable or Deputy Chief Constable. Government has recognized that as chair of the board and Mayor of the municipality there is an inherent conflict of interest particularly as it pertains to budget. This same inherent conflict of interest exists in terms of the appointment of a Chief Constable and the close working relationship which exists between Mayor and Chief which arises in the role of Discipline Authority under the *Police Act*. Politicians are not naturally versed in quasi-judicial decision making, and legal advice can be seen as delegating the role. We are of the view that the Discipline Authority in these cases should always be delegated to a retired judge appointed under the *Police Act*.

Current legislation:

Definitions and interpretation
Section 76
"Discipline Authority" means the following:
…

b) in relation to a complaint or an investigation under Division 3 concerning the conduct of a member who is a Chief Constable or Deputy Chief Constable,
   i. the chair of the board by which the member is employed, unless section 117 (9) or 135 (2) applies,
   ii. if section 117 (9) [*appointment of new Discipline Authority if conclusion of no misconduct is incorrect*] applies, the retired judge appointed under that section, or
   iii. if section 135 (2) [*power to designate another Discipline Authority if in public interest*] applies, a retired judge appointed under that section as Discipline Authority by the Police Complaint Commissioner;

Power to designate another Discipline Authority if in public interest
Section 135

(1) Subject to subsection (2), at any time after an investigation is initiated under this Part into the conduct of a member or former member of a municipal police department, if the Police Complaint Commissioner considers it necessary in the public interest that a person other than a Chief Constable of the municipal police department, or her or his delegate, be the Discipline Authority for the purposes of one or more provisions of this Division, the Police Complaint Commissioner may designate a senior officer of another municipal police department to exercise the powers and perform the duties of a

Discipline Authority under the applicable provision, in substitution of the Chief Constable or the delegate, as the case may be.

(2) At any time after an investigation is initiated under this Part into the conduct of a member or former member of a municipal police department who is or was a Chief Constable or deputy Chief Constable at the time of the conduct of concern, if the Police Complaint Commissioner considers it necessary in the public interest that a person other than the chair of the board be the Discipline Authority for the purposes of one or more provisions of this Division,
   a. the Police Complaint Commissioner must request the Associate Chief Justice of the Supreme Court to
      i. consult with retired judges of the Provincial Court, the Supreme Court and the Court of Appeal, and
      ii. recommend one or more retired judges to act as Discipline Authority for the purposes of those provisions, and
   b. the Police Complaint Commissioner must appoint one of the retired judges recommended to exercise the powers and perform the duties of a Discipline Authority under the applicable provision, in substitution of the chair of the board of the municipal police department.

(3) The Police Complaint Commissioner may make a designation under subsection (1) or an appointment under subsection (2)
   a. on application by
      i. a Chief Constable of the municipal police department with which the member is employed or former member was employed at the time of the conduct of concern, or
      ii. the chair of the board of the municipal police department with which the member is employed or former member was employed at the time of the conduct of concern, or
   b. on the Police Complaint Commissioner's own motion.

(4) The Police Complaint Commissioner must notify all of the following, as applicable, of the designation or appointment:
   a. the complainant, if any;
   b. the member or former member;
   c. a Chief Constable of the municipal police department with which the member is employed or former member was employed at the time of the conduct of concern;
   d. the investigating officer;

e. the board of the municipal police department with which the member is employed or former member was employed at the time of the conduct of concern.

(5) The Police Complaint Commissioner must provide the designated or appointed Discipline Authority with copies of all reports under sections 98 [*investigating officer's duty to file reports*], 115 [*if member's or former member's request for further investigation is accepted*] and 132 [*adjournment of discipline proceeding for further investigation*] that may have been filed with the Police Complaint Commissioner before the designation or appointment.

Division 6 – Internal Discipline Matters Definition
Section 174
"Internal Discipline Authority" means the following:
…

b) in relation to an internal discipline matter concerning the conduct or deportment of a member who is Chief Constable or deputy Chief Constable, the chair of the municipal police department with which the member is employed.

BACKGROUND:

When a public trust complaint involves a municipal constable, the Chief Constable of that police department will be the "Discipline Authority" directly involved in handling the complaint (unless the Police Complaint Commissioner exercises his authority appoint a Discipline Authority from an external police department, or the Chief Constable delegates his/her responsibility to the deputy chief or senior officer).

In cases where an allegation of police misconduct involves a Chief Constable or former Chief Constable, or a Deputy Chief Constable, the chair of the board of that municipal police department becomes directly involved in the complaints process and will act as the Discipline Authority for that matter.

In B.C., police boards are mandated by the BC *Police Act* to provide civilian oversight. They perform four main governance functions:

1. Employer of all sworn and civilian members of the department;
2. Provide financial oversight for the department;
3. Establish policies that set the direction for the department; and
4. Act as the authority for policy and service complaints, with the Chair being responsible for discipline matters related to the Chief Constable and Deputy.

(BC Police Board, Resource Document on Roles and Responsibilities under the *Police Act*, 2015).

Section 23(1) of the *Police Act*, requires that the municipal police board consist of the mayor, who is designated as chair, one person appointed by the municipal council and not more than seven persons appointed by the Lieutenant Governor in Council. Police boards perform both governance and oversight functions. They are not responsible for the operations of a police department; that is the function of the Chief Constable.

The Chief Constable operates under the direction of the municipal police board and as the highest ranking member of the police department, is responsible for the general supervision and command of the department on a day-to-day basis.

There are a number of key responsibilities of the designated chair, which includes taking a leadership role in supporting the work of the Chief Constable, sworn members and civilian staff of the police department. Arguably, one of the most important tasks that a police board will undertake is the hiring, evaluation and support of the Chief Constable. Considerable time and effort are invested in the hiring process for a Chief Constable as careful planning and a clear understanding of the needs of the department and community need to be accounted for. Given the close nature of the relationship between a Mayor and Chief Constable, a strong arguable case can be made that there exists an inherent conflict of interest with a Mayor acting in the role of Discipline Authority

The nature of the relationship between the Chief Constable and the police board, including the chair of that board has been summarized by the Ministry of Justice, Policing and Security Branch Police Services Division. According to the BC Police Board, Resource Document on Roles and Responsibilities under the *Police Act*, 2015, pg. 4

> As the chair of a municipal police board is also the mayor of the municipality, there is an inherent conflict of interest, particularly with respect to the budget.

And at pg. 32

> Although the tone and language of legislation and regulations are formal and directive, in reality the relationship between the municipal police board and the Chief Constable is much more collaborative. The relationship is similar to that of a board of directors of a company in relation to the Chief Executive Officer. The board's role is to set general policies, to establish a vision regarding how and what policing services are provided in the municipality and to be ultimately accountable to the community for the provision of police services. The Chief's role is to manage the department on a daily basis to ensure that the board's vision and direction are put into action and to bring high-level policy issues to the attention of the board.

The nature of the relationship between members under investigation and senior officers, deputy Chief Constables or Chief Constables as Discipline Authorities is much different. Depending on the size of the department, they typically will have very little involvement with the member under investigation and will not be in a supervisory or direct reporting relationship with that member. This office often receives requests from chiefs of smaller departments to appoint a

Discipline Authority from a different department due to a perception of bias or a conflict of interest in acting as the Discipline Authority.

The mayor of a municipality is an elected politician who is significantly involved in the recruitment of a Chief Constable. Mayors and Chief Constables must work closely together and develop trusting and loyal relationships in order for their work to be successful. Mayors of municipalities receive no training *Police Act* process and procedures. Furthermore, Mayors are not trained in quasi-judical decision making and administrative law principles; they are not required to hire legal counsel for advice, which to some degree would constitute a delegation of responsibility. It is a very serious occasion when a Chief Constable becomes the subject of a *Police Act* investigation, due to the very nature of the position as the Chief Constable of the police department. It makes little sense to entrust the responsibilities of a Discipline Authority to a person or persons who have had no training, and little to no understanding of the complex system that is the complaints process.

This concern was recently highlighted by the Victoria Police Board's handling of allegations of misconduct against the former Chief Constable of the Victoria Police Department. As a result of the police board's handling of an internal discipline matter involving the former Chief Constable, it was not only appropriate but necessary that the commissioner order a public trust investigation following a review of the internal investigation and Discipline Authority decision by the co-chairs.

The Commissioner found that the internal process and procedures in this matter did not meet the level of procedural fairness, accountability and transparency contemplated by the *Police Act*. He identified a number of additional allegations of misconduct which were subsequently investigated by the RCMP and Vancouver Police Department. As a result of the issues identified in the review of the board's handling of the internal matter, the Police Complaint Commissioner considered it in the public interest to appoint a retired judge to exercise the powers and perform the duties as Discipline Authority. The appointed retired judge found the conduct of the former Chief Constable serious enough to warrant dismissal. This is a drastic difference to the disciplinary action imposed by the co-chairs, which was a letter to his personnel file.

PROPOSED AMENDMENTS:

The Victoria Mayors' handling of the matter involving the Former Chief Constable of the Victoria Police Department is demonstrative that an inherent conflict of interest and a propensity of bias exists given the nature of the close relationship between the Chief Constable and the Chair of the Police Board.

Considering the initial handling and the resulting outcome of this matter, it is the Commissioner's view that the Chair should not act as the Discipline Authority at any time for matters involving the Chief Constable. Not only does this place the Mayor in a conflict of interest in acting as a Discipline Authority, the Mayor is at a significant disadvantage due to the lack of experience and knowledge of the *Police Act*. It is unfair to place a Mayor in this difficult

position, particularly considering the overlapping interests in ensuring the needs of the police department and community are met.

Furthermore, it is not fair to Chief Constable or deputy Chief Constable as respondent members in the process or to the public. The complaints system is one that must be accountable, professional, and impartial.

In the Commissioner's view, it will always be in the public interest to appoint a retired judge to act as the Discipline Authority where there are allegations of misconduct involving the Chief Constable or deputy Chief Constable. Part 11 of the *Police Act,* specifically section 76 should be amended to remove the designation of the chair of the police board acting as the Discipline Authority in matters where the conduct concerns a Chief Constable or deputy Chief Constable.

The Commissioner submits that retired judges are in the best position to act as the Discipline Authority in these cases. They are completely independent from the board and the Chief Constable or deputy Chief Constable, and have the benefit of significant legal training and judicial decision making. In addition, as the Commissioner can appoint a retired judge for the purposes of an adjudicative review under the *Police Act*, these retired judges have been entrusted as independent, quasi-judicial decision makers under the *Police Act*.