## IN THE MATTER OF THE POLICE ACT, R.S.B.C. 1996, c. 367

#### **AND**

# IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT AGAINST



### **NOTICE OF DECISION**

TO:		· 自在基础是,但是自己的特殊。
		(Complainants)
AND	TO:	c/o Police Department Professional Standards Section
AND	TO:	Police Department Professional Standards Section
AND	то:	
AND	TO:	Mr. Stan T. Lowe, Police Complaint Commissioner
INTRODUCTION		
1.		of the Police Department is
	allege	d to have committed one count of misconduct. It is alleged specifically that
		committed "discreditable conduct" through his involvement

in a submission to an Adjudicator that was found not to provide balanced, fair, complete and accurate information.

2.	The submission arose in r	relation to a separate police	e-disciplinary proceeding
	involving	, whic	h was heard and decided by
	Adjudicator	The submission	was made by way of a letter
	to the Adjudicator by	Chief Constable	which advocated for
	Constable to be	dismissed (the "Letter", the	e final version of which is
	signed and dated	).	was involved in the
	preparation of the Letter.	It is a submission letter tha	t is at the heart of this
	matter.		

3. My review analyzes whether, based on the written material before me, s conduct appears to constitute misconduct.

#### THE LEGAL ISSUE

- 4. The decision I must make, must comply with s. 117 of the *Police Act*, R.S.B.C. 1996, c. 367, as am (the "Act"). That provision states that it is my duty to determine whether "the conduct of the member... appears to constitute misconduct" (*per* s. 117(9)), based on a review of the report, evidence and records supplied to me. In this context I do not to hear live witnesses nor consider additional evidence or submissions from the participants. Instead, I am to conduct a paper-based review. That is what I have done.
- 5. As I read s. 117 and more generally Part 11, Division 3 of the *Police Act*, I must make clear that I am not sitting on appeal from any previous finding that a misconduct allegation was not substantiated. My focus is not on the correctness of an earlier finding, but rather I am to reach my own conclusion about whether the materials support a finding of apparent misconduct. I note that s. 117(1)(b) says that the retired judge conducting the review is to "make her or his own decision on the matter."

## **BACKGROUND**

6.	The misconduct allegation involving relates to his
	involvement in the Letter, which was a submission made by Chief
	Constable to an Adjudicator who was addressing the penalty phase of a
	Police Act public hearing.
7.	The background which gave rise to the public hearing involving  is as follows. On Constable  was on duty as a member. In the early morning hours he was involved in arresting a man who had stolen a Jeep Cherokee and driven dangerously through the streets of Constable who found
	misconduct on two counts:
	Count One:  Deceit, section 77(3)(f)(i)(A) of the <i>Police Act</i> — That on or about , at or near British Columbia, it is alleged Constable committed the disciplinary default of Deceit by making false or misleading oral statements regarding: the details of a police involved collision at and Street, the denials that he was engaged in a pursuit and the claim that the suspect, was attempting to "ram" his police vehicle.
	Count Three:
	Neglect of Duty, section 77(3)(m)(ii) of the <i>Police Act</i> — That on or about at or near British Columbia, it is alleged Constable committed the disciplinary default of Neglect of Duty when he engaged in an unauthorized pursuit, failed to broadcast and clarify essential information for responding members and the supervisor and continued to pursue the suspect driver post-collision.

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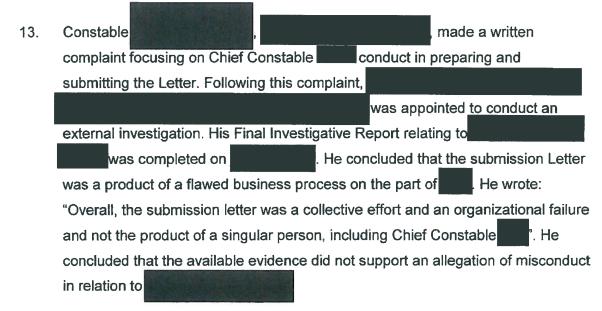
8. Adjudicator reached these findings on the second of the public hearing was then adjourned for a penalty hearing. It is somewhat before and during this adjournment period that the Letter was prepared.

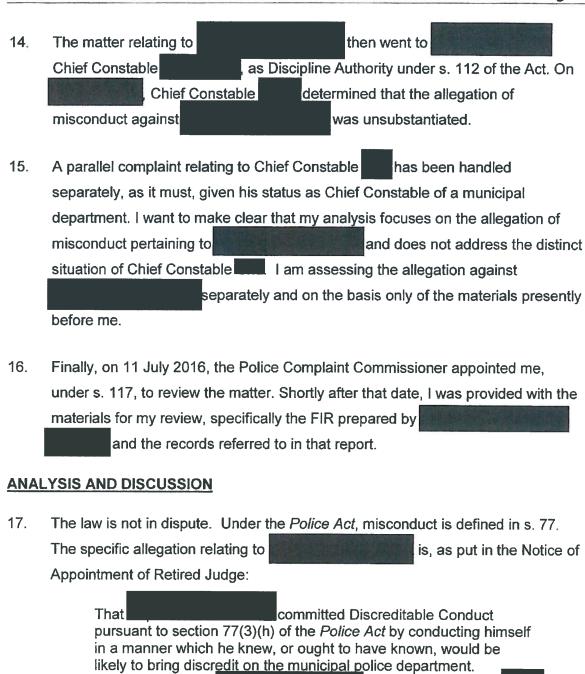
- 9. I have reviewed revisions of the Letter as it went through the drafting process, along with emails enclosing revisions and offering comments on the Letter. It began as a legal submission to be made by counsel for the Chief Constable, but soon evolved to a letter from the Chief Constable addressed to the Adjudicator. There were many revisions of the Letter, often with the "track changes" feature showing who suggested what. The Letter was the subject of review and commentary by a number of senior members within the Department.
- 10. According to the Final Investigative Report ("FIR") prepared by
  the draft Letter was revised no less than 18
  times, with over a dozen people contributing to it in some fashion. According to
  the FIR,
  as I discuss below.
- 11. The final Letter, as filed with the Adjudicator at the public hearing, was seven pages long. It is conveyed in the strongest possible terms that Constable should be dismissed. It read:

Based on his previous record of disciplinary defaults, a history of ethically deficient decisions, a sub-standard work history, and the seriousness of the latest breaches of policy and the *Police Act*, I do not believe corrective measures are appropriate. They have not worked in the past and to consider them again in such a serious circumstance would bring the administration of police discipline into serious disrepute. The potential outcome would be damage to the reputation of the public, and impairment of the ability of the to be effective in the community. In my view, these consequences are unacceptable. The only choice for me is to ask for termination of Constable employment.

12.	When the public hearing on the penalty resumed, not surprisingly, Con	stable
	raised serious objections to its contents. Chief Constable	then
	provided a further clarifying letter dated	
	, Adjudicator disagreed with the Chief Constable's submiss	ion that
	this was an appropriate case for dismissal and instead, imposed a 40-	lay
	suspension. It appears that Adjudicator was troubled by the cor	itents of
	the letter. As a postscript to his reasons on discipline, the Adjudicator	wrote as
	follows:	
	68 The oninion of a Chief Constable and the evidence he	

- 68. The opinion of a Chief Constable and the evidence he or she may be able to present at a disciplinary hearing can provide valuable assistance to an adjudicator. Doing so also ensures that an adjudicator appreciates the impact their decision may have on that Police Department. It is self-evident, however, that any opinion and evidence from a Chief Constable is expected to be balanced, fair, complete and accurate.
- 69. The letter provided by the Chief Constable is this case failed to meet those expectations. Its preparation was delegated to others. This is understandable given the Chief Constable's many other responsibilities. My criticism is not directed at the Chief Constable personally but rather at the Department and is meant to encourage the Department to exercise more care in the future.





18. The subsection referred to, s. 77(3)(h), identifies one specific type of "disciplinary breach of public trust", defined as follows:

in their written submission to the Adjudicator, failed to provide

balanced, fair, accurate and complete information.

Specifically, when

"discreditable conduct," which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know,

and Chief Constable

would be likely to bring discredit on the municipal police department, including, without limitation, doing any of the following:

- Acting in a disorderly manner that is prejudicial to the maintenance of discipline in the municipal police department;
- (ii) Contravening a provision of this Act or a regulation, rule or guideline made under this Act;
- (iii) Without lawful excuse, failing to report to a peace officer whose duty it is to receive the report, or to a Crown counsel, any information or evidence, either for or against any prisoner or defendant, that is material to an alleged offence under an enactment of British Columbia or Canada.
- 19. As I understand the misconduct allegation here, it is not a contravention of paras (i)-(iii). Instead, the alleged misconduct arises in preparing the Letter in a manner that the member knows, or ought to know, would be likely to bring discredit on the likely likel

#### The accuracy and fairness of the Letter

- 20. As complainants under the *Police Act*, the raised concerns about the lack of balance with the Letter. Based on my review of the Final Investigative Report and the evidence and records referenced in that report, there appear to be instances in which the Letter describes matters in a potentially misleading way.
- 21. The Letter gives a number of examples of what are said to be ethical or professional failings on the part of Constable This includes the officer's previous misconduct in police pursuits, mishandling of firearms, and poor job

performance. It paints the picture of a deeply flawed member, lacking any redeeming qualities.

- When one compares the Letter to the underlying or source information, there are some discrepancies. As an example, the Letter refers to Constable having a "history of engaging in unauthorized pursuits", and indicates that he had been "interviewed/cautioned on two separate occasions for his failure to follow the procedure governing pursuits" (emphasis added). Yet, the Letter went on, he chose again to engage in high-risk conduct that was contrary to policy. This description was elaborated on in another part of the Letter, referring to when "Constable pursued a vehicle without activating his lights and sirens and without authority to engage in the pursuit".
- These words left the impression that Constable was the driver, just as in the case. In fact, in the incident, he was the passenger not the driver. While this may not relieve him of responsibility completely, it is an important fact that should have been made plain in the Letter.
- 24. In his clarifying letter of the was aware that Constable was the passenger, not the driver, in the pursuit matter, but maintained the relevance was that Constable had been spoken to about his conduct in relation to two prior pursuits.
- As a further example, the Letter paints a negative picture about Constable s low-volume work while serving on the Telephone Response Team, going so far as to set out statistics for the number of calls he handled and the number of reports he prepared. More generally, the Letter focuses on the negatives, in making the case for dismissal. This negative portrayal was unleavened by any positive information, despite the fact that performance appraisals for Constable had indicated he was meeting or exceeding expectations; the FIR described that the officer's "performance appraisals were very positive". In addition Constable files contained approximately 21

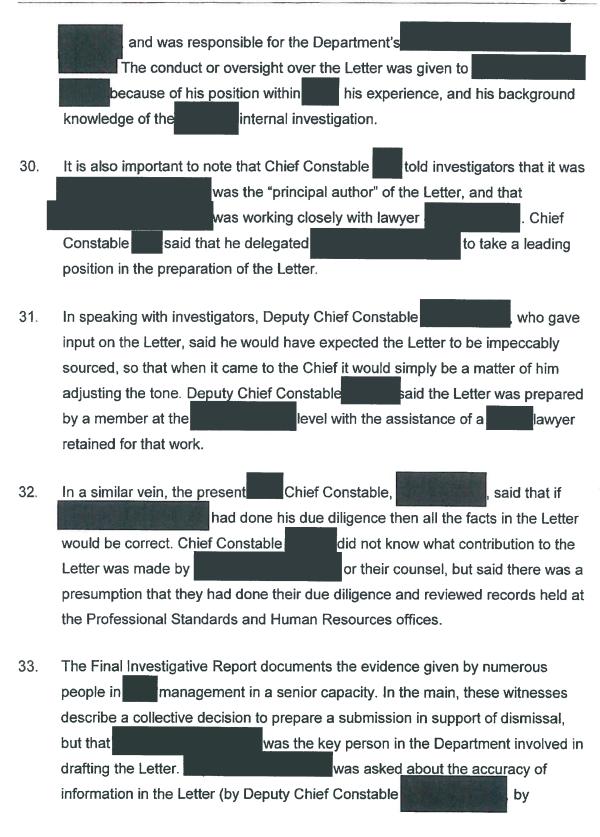
letters of appreciation and recognition about his positive performance. It cannot be said that the Letter was fair, balanced or accurate.

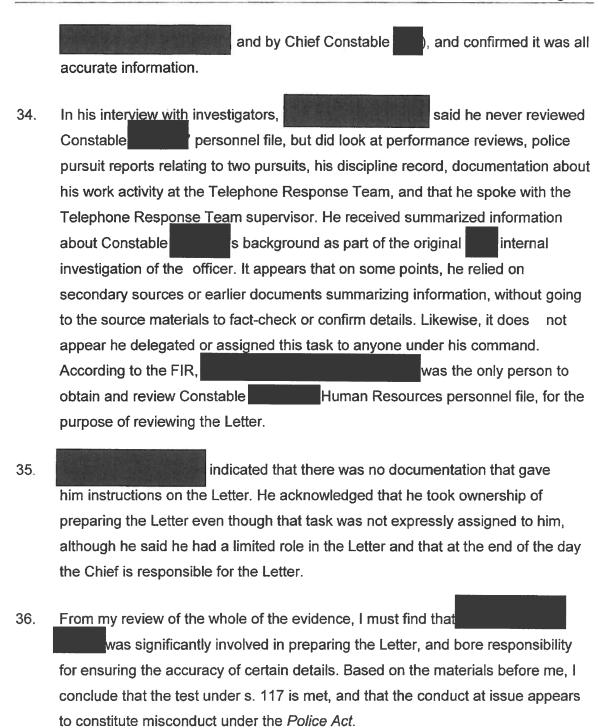
26.	It would seem, with the benefit of hindsight, that many of the problems with the
	Letter might have been avoided. A draft of the Letter was shown to
	, who gave cri <u>tical f</u> eedback and
	identified inaccuracies. He contacted Chief Constable and expressed
	serious reservations about the contents of the Letter, based on its apparent
	unfairness and lack of balance. He was specifically concerned that the
	submission was factually incorrect and misrepresented Constable
	discipline and work performance. Constable said that he initially
	assumed that it was someone other than the Chief Constable who prepared the
	letter but that the Chief Constable stated, "It's my letter, I wrote the bulk of it." He
	did make reference to others who prepared the document. It appears these
	problems were not adequately addressed despite them being identified.

27. I fully agree with Adjudicator in that he was right to criticize the Letter for a lack of accuracy, completeness and balance. Appropriate care was not taken in preparing this unusual document. It goes without saying that officers who face discipline under the *Police Act* must be treated with fairness.

## s role in preparing the Letter

- 28. Having reached that view of the Letter, the particular question for me, on this review, is whether these failings may fairly be said to amount to apparent misconduct on the part of . The answer to this, in my assessment, turns on the nature of responsibility for, the preparation of the Letter.
- 29. According to the Final Investigative Report ("FIR") prepared by
  took conduct of the Letter after
  lawyer had drafted it initially as a legal submission rather than a
  letter. At the time, was the Officer-in-Charge of





#### **CONCLUSION AND NEXT STEPS**

- 37. I make a finding, pursuant to s. 117(9) of the *Police Act*, that s conduct in preparing the Letter appears to constitute misconduct, specifically discreditable conduct contrary to s. 77(3)(h).
- 38. As mandated by s. 117, I hereby give notice of this finding, and rely on my analysis above as the basis for reaching that conclusion. The evidence I have reviewed appears sufficient to substantiate the allegation and require the taking of disciplinary or corrective measures.
- 39. I am prepared to offer a prehearing conference to under s. 120 of the Act, and I can indicate that the range of disciplinary or corrective measures I am considering includes "advice as to conduct", and a verbal or written reprimand (as specified under ss. 126(1)(i), (j), and (k) of the Act).
- 40. In accordance with s. 117(8) of the Act, I hereby give notice to the complainants of their right to make submissions at a discipline hearing under s. 113.
- 41. At the discipline hearing, has the right pursuant to s. 119 to request permission to call and examine or cross-examine witnesses, provided such request is made in writing and is made within 10 days of receipt of this notice of decision.

Dated at Vancouver, British Columbia this 28th day of July, 2016.

The Honourable Wally Oppal, Q.C.

Retired Justice of the Appeal Court of British Columbia