



February 21, 2017

## MEDIA STATEMENT

**Victoria** - The Office of the Police Complaint Commissioner (OPCC) announced today that Commissioner Stan T. Lowe will be discontinuing the investigation into a number of allegations against members of the Abbotsford Police Department (APD). This investigation arose from information received from the Vancouver Police Department's criminal investigation into the conduct of Constable Christopher Nicolson, a member of the APD. Upon request from the APD, the Commissioner initiated an Order for Investigation to be undertaken by the New Westminster Police Department and appointed Chief Constable Dave Jones of the New Westminster Police Department to act as the Discipline Authority for these allegations. The allegations of misconduct were serious in nature and included, *Corrupt Practice, Deceit, and Neglect of Duty* pursuant to the *Police Act*. The Police Complaint Commissioner disclosed these investigations to the public in a media statement on February 18, 2015.

The Commissioner has determined that it is in the public interest to inform the public of the outcome resulting from a court action undertaken by the OPCC to obtain disclosure of the investigative materials relating to this ongoing investigation into allegations of misconduct against members of the Abbotsford Police Department (APD). The courts have determined that only the police officers conducting the criminal investigation are permitted within the circle of privilege. As a result, the police agency responsible for conducting the *Police Act* investigation cannot access the relevant and necessary investigative materials. While this judgment limits the investigation into allegations where confidential informants are involved, other allegations will continue to be properly and thoroughly investigated. A concluding report will be released to the public when the remaining investigations are completed.

### **Background**

Chief Constable Bob Rich received information alleging that Constable Christopher Nicholson, a member of the APD, was engaged in criminal activity. Chief Rich sought the assistance of the Vancouver Police Department (VPD) to conduct an external criminal investigation into the allegations. Chief Rich also asked the VPD to conduct an audit of source handling procedures within the APD. During the course of the criminal investigation, the VPD raised concerns related to the findings of the investigation with the OPCC.

On May 6, 2013, Constable Nicholson was arrested and charged with several criminal offences which included breach of trust and obstruction of justice.

On May 8, 2013, Chief Rich requested an *Order for External Investigation* and the appointment of an external Discipline Authority for allegations of misconduct arising out of the VPD investigation.

On August 15, 2013, the Police Complaint Commissioner ordered an investigation into Constable Nicholson's alleged misconduct and directed that the New Westminster Police Department (NWPD) conduct an external *Police Act* investigation into the matter. In addition, the Police Complaint Commissioner appointed Chief Constable David Jones of the NWPD to exercise the powers and perform the duties of a Discipline Authority in relation to this matter.

This investigative team was an integrated unit, comprised of members from the NWPD, RCMP and other external municipal police agencies. This integrated unit, led by the NWPD, reviewed a large quantity of information. Evidence that was gathered by the VPD and NWPD investigators was forwarded to the OPCC in accordance with the contemporaneous oversight required under the *Police Act*.

The VPD concluded their audit of the APD files involving confidential informants in March, 2014. After having received the audit report, NWPD investigators requested additional orders for investigation against other members of the APD. In addition, after reviewing information provided by NWPD investigators, the OPCC ordered further investigations into allegations of misconduct against members of the APD.

Based on the information provided by both the VPD and the NWPD to this office, the majority of the additional orders for investigation initiated by this office dealt with incidents where members of the APD allegedly included materially inaccurate statements in Information to Obtain Search Warrants (ITO's) sworn before a Judge or Judicial Justice of the Peace. For example, of these additional incidents that were provided to our office, 13 involved allegations that members provided materially inaccurate information in the ITO's relating to the actual information attributed to the confidential informant; 33 involved allegations that members provided materially inaccurate information relating to the confidential informants previous criminal history, or 'source pedigree,' and 13 involved allegations that members provided materially inaccurate information related to the number of times a confidential informant had provided information to the APD member.

Furthermore, 13 incidents involved the alleged misappropriation of source payments by APD members, and eight incidents concerned alleged materially inaccurate information placed in source debriefing reports which may or may not have been used to obtain ITO's. These allegations were serious in nature as it placed the integrity of these ITO's into question.

On June 20, 2014, an order was granted by the Honourable Associate Chief Justice Austin F. Cullen which permitted investigators under the *Police Act* to provide the OPCC with the disclosure materials gathered and produced during the criminal investigation, edited to protect identities of confidential informers.

On January 30, 2015, counsel for the Office of the Police Commissioner brought an application before Associate Chief Justice Cullen, seeking direction with respect to his previous order of

June 20, 2014. In particular, the OPCC sought direction as to whether or not NWPD investigators could provide relevant draft ITO's to this office for the purposes of contemporaneous oversight. The OPCC also sought guidance as to the appropriate procedure to apply to have the sworn ITOs "unsealed." A number of stakeholders were involved in this application: the OPCC, New Westminster Police Department, Vancouver Police Department, Abbotsford Police Department and the Attorney General of British Columbia.

During the course of the proceedings, Associate Chief Justice Cullen raised an issue of informant privilege; specifically, whether members of the NWPD could be within the circle of privilege for purposes of conducting an investigation under the *Police Act*.

On February 27, 2015, counsel for the aforementioned parties made submissions on the issue raised by Associate Chief Justice Cullen. The Attorney General of British Columbia, the responsible Crown prosecuting agency, took the position that the NWPD investigators could not be within the circle of privilege for purposes of a non-criminal investigation, and as such, the NWPD should return any privileged materials to the VPD, who were properly brought within the circle of privilege during the criminal investigation. Counsel for the APD also opposed the continued possession of information by the NWPD which disclosed the identities of what counsel referred to as "APD informants."

On March 11, 2015, Associate Chief Justice Cullen issued his decision determining that NWPD investigators could not be considered as persons within the circle of privilege for purposes of the *Police Act* investigation, and that they must deliver the privileged material either back to the APD or VPD, or to the Court to be held in a sealed state until final resolution of the litigation. At the conclusion of his reasons, Associate Chief Justice Cullen opined that due to the importance of the issues under examination, it was a matter that probably should be appealed.

The Office of the Police Complaint Commissioner launched an appeal to the British Columbia Court of Appeal, which was argued on November 12 and 13, 2015, with judgment rendered on December 17, 2015. The Attorney General of British Columbia took a similar position that was advanced before Associate Chief Justice Cullen. Counsel for the APD, in addition to arguing the appeal on its merits, took the position that the appeal was criminal in nature, and as such the Court of Appeal for British Columbia lacked jurisdiction to hear it.

In its reasons, the Court of Appeal for British Columbia agreed with the APD and quashed the appeal on the basis that they did not have jurisdiction; however, the Court stated that even if the appeal had been properly brought, the Court would have dismissed it on the merits. The OPCC sought leave to appeal both judgments, that of Associate Chief Justice Cullen and that of the BC Court of Appeal, to the Supreme Court of Canada. That application for leave to appeal was dismissed, without reasons, on September 15, 2016.

The effect of these judgments by the courts in British Columbia is that police officers investigating potential misconduct under the *Police Act* are not permitted access to information which would or could identify confidential informers. Only police officers conducting criminal investigations are permitted to be within the circle of privilege. The practical implication of these court rulings is that the NWPD investigators cannot assess information and evidence

relating to the alleged misconduct. In short, investigators are unable to determine if certain sworn statements contained in ITO's are accurate or not. Thus, there is no realistic means of properly and fully investigating the alleged misconduct in these cases.

Based on the determination by the Courts, on February 21, 2017, the Police Complaint Commissioner determined that further investigation was neither necessary nor reasonably practicable and discontinued any further investigation for a majority of the allegations against members of the APD arising out of this investigation.

This has resulted in 122 allegations being discontinued from further investigation. As some of the allegations did not directly involve information contained in ITO's, those investigations will continue. Of a total of 137 allegations against 15 members of the APD, 15 allegations against four members of the APD will continue to be investigated.

As a result of the Supreme Court and Court of Appeal decisions, no determination will be made as to the outcome of those investigations in terms of whether the allegations being discontinued would have been substantiated or not. The Commissioner respectfully requests, in the interest of fairness, that the public not engage in speculation with respect to the allegations being discontinued.

One *Police Act* investigation involving three APD officers that related to the investigation of Constable Nicholson has been concluded, as it depended on material that had been made available to investigators and the OPCC. In that case the Discipline Authority determined that the allegations against all three officers were unsubstantiated. The OPCC agreed with that decision.

Since the criminal and professional misconduct matters involving Constable Christopher Nicholson remain outstanding, our Office will not be making any further comment to protect the integrity of both processes. The Police Complaint Commissioner intends to release a concluding report when the remaining investigations are completed.