

Court File No.: 17 1290
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE VICTORIA AND ESQUIMALT POLICE BOARD

PETITIONER

AND:

POLICE COMPLAINT COMMISSIONER

RESPONDENT

PETITION TO THE COURT

ON NOTICE TO:

Police Complaint Commissioner
c/o Brock Martland
Martland and Saulnier
Barristers and Solicitors
506 – 815 Hornby Street
Vancouver, BC V6Z 2E6

The Attorney General of British Columbia
c/o Leah Greathead, Director
Constitutional and Administrative Law
Legal Services Branch
1st Floor – 1001 Douglas Street
Victoria, BC V8W 2C5

Retired Judge Ian H. Pitfield and Retired Judge Carol Baird Ellan
Discipline Authorities
c/o Sylvia Sangha, Registrar
Office of the Police Complaint Commissioner
5th Floor, 947 Fort Street
Victoria, British Columbia V8W 9T8

Chief Constable Frank Elsner
c/o Janet Winteringham, QC
Winteringham MacKay Law Corporation
The Landing
620 – 375 Water Street
Vancouver, BC V6B 5C6

Chief Superintendent Sean Bourrie
Chief Investigator
Royal Canadian Mounted Police
"E" Division - Federal Policing
14200 Green Timbers Way
Mail Stop #206
Surrey, B.C. V3T 6P3

This proceeding is brought for the relief set out in Part 1 below, by the person named as Petitioner in the style of proceedings (above).

If you intend to respond to this petition, you or your lawyer must:

1. file a response to petition in Form 67 in the above-named registry of this court within the time fore response to petition described below, and
2. serve on the petitioner:
 - i. 2 copies of the filed response petition, and
 - ii. 2 copies of each filed affidavit on which you intend to rely at the hearing

Orders, including orders granting relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner:

- a. if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed petition was served on you,
- b. if you reside in the United States of America, within 35 days after the date on which a copy of the filed petition was served on you,
- c. if you reside elsewhere, within 49 days after the date on which a copy of the filed petition was served on you, or
- d. if the time for response has been set by order of the court, within that time.

Let all persons whose interests may be affected by the Order sought TAKE NOTICE that the Petitioner applies to this Honourable Court for the relief set out in this Petition.

The address of the Registry is:

Court Registry
P.O. Box 9248, Stn Prov Govt
Second Floor
850 Burdett Avenue
Victoria, British Columbia
V8W 9J2

The address for service is:

Joseph M. Doyle
Johnson Doyle Sugarman & Ferguson
2nd Floor, 195 Alexander Street
Vancouver, British Columbia V6A 1B8
Tel: 604-688-8338
Fax: 604-688-8356

The name and OFFICE address of the Petitioner's Solicitor is:

Same as above

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. The Petitioner seeks the following relief:
 - i. A declaration that the statutory powers of the Respondent pursuant to Part 11 of the *Police Act* require him to provide the Petitioner with the following materials created pursuant to the Respondent's Orders of December 18, 2015 and April 29, 2016 in relation to the conduct of Chief Constable Frank Elsner of the Victoria Police Department:

- a. The Final Investigation Reports, including the evidence and records referenced therein (the “FIRs”); and
 - b. The section 112 Notices of the Discipline Authorities (the “Section 112 DA Decisions”).
- ii. An Order in the nature of mandamus that the Respondent provide the Petitioner with copies of:
 - a. the FIRs; and
 - b. the Section 112 DA Decisions;
 - iii. Such further and other Orders as this Honourable Court deems just.

Part 2: FACTUAL BASIS

2. The Petitioner is a Police Board constituted in accordance with Part 5 of the *Police Act* for both the City of Victoria and the Township of Esquimalt, Province of British Columbia.
3. The Respondent is an officer of the legislature appointed under s. 47 of the *Police Act*.
3. In accordance with its obligation under Part 5 of the *Police Act*, the Petitioner has established the Victoria Police Department to police the two Municipalities.
4. At all material times, the Chief Constable of the Victoria Police Department has been Frank Elsner.

5. Relying upon Part 11 of the *Police Act*, on December 18, 2015, the Respondent ordered two investigations into allegations of misconduct on the part of Chief Constable Elsner.
6. On April 29, 2016, again relying upon Part 11 of the *Police Act*, the Respondent ordered a third investigation into allegations of misconduct on the part of Chief Constable Elsner.
7. That the Respondent has appointed two retired judges to serve as Discipline Authorities in these three matters, again in reliance upon Part 11 of the *Police Act*, in particular section 135.
8. On April 29, 2016 and pursuant to his authority under subsection 110(1) of the *Police Act*, one of the Discipline Authorities ordered that Chief Constable Frank Elsner be suspended.
9. By operation of subsection 110(4) of the *Police Act*, the above noted suspension has continued to date with full pay and allowances.
10. Subsection 110(5) of the *Police Act* provides that if at any time the Petitioner decides that it is in the public interest, the Petitioner may require that the suspension be without pay or may discontinue the pay and allowances for the suspended member. The applicable process is set out in subsections 110(6), (7) and (8) of the Act.
11. No person other than the Petitioner has the statutory authority under the *Police Act* to consider, hear, decide or reconsider the issue of whether a suspension under subsection 110(1) should, in the public interest, be without pay or discontinue the pay and allowances for the suspended member of the Victoria Police Department.

12. The investigations ordered by the Respondent into the conduct of Chief Constable Elsner were recently completed and the FIRs were submitted to the Discipline Authorities. Both Discipline Authorities issued their Section 112 DA Decisions on March 10, 2017.
13. The Respondent issued a Media Release on March 23, 2017, describing which allegations each of the respective Discipline Authorities had, or had not, been “substantiated”, as that term is used in the *Police Act*.
14. In accordance with section 98(5) of the *Police Act*, the FIRs would include:
 - a. A brief account of investigative steps taken;
 - b. A complete summary of the relevant evidence;
 - c. A list of all witnesses interviewed by the investigator;
 - d. A list of all records related to the investigation;
 - e. The investigator’s assessment of the evidence and analysis of the facts.
15. In accordance with subsection 112(2) of the *Police Act* the Section 112 DA Decisions would include:
 - a. A description of the conduct of concern;
 - b. A list or description of each allegation of misconduct considered by the Discipline Authority;
 - c. For each substantiated allegation of misconduct, the Discipline Authority’s determination of:
 - i) Whether or not the evidence requires the taking of disciplinary or corrective measures;
 - ii) Whether or not a prehearing conference will be offered; and
 - iii) The range of disciplinary or corrective measures being considered.

16. Subsection 177(2)(j)(iv) of the *Police Act* requires that the Respondent “inform, advise and assist” the Petitioner in respect of Part 11 of the *Police Act*.
17. Section 95(2) permits the Respondent to disclose certain information if it is in the public interest.
18. In order for the Petitioner to discharge its statutory responsibilities as set out in section 110 of the *Police Act*, the Petitioner must have the information the Act contemplates a person in the position of the Petitioner would have. Absent that information, the Petitioner cannot assess the matter, which is contrary to the public interest and the interests of chief Constable Elsner.
19. The Petitioner has requested that the Respondent provide it with the materials sought. The Respondent has made the decision not to do so.

Part 3: LEGAL BASIS

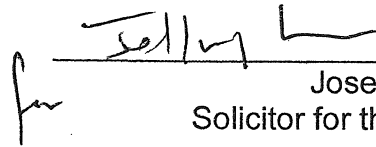
1. The Petitioner pleads and relies upon:
 - i. Parts 9 and 11 of the *Police Act*; and
 - ii. *Judicial Review Procedure Act*, RSBC 1996, c. 241.

Part 4: MATERIAL TO BE RELIED UPON:

1. Affidavit #1 of Lisa Helps sworn March 28, 2017.
2. Such further and other information as may be permitted.

The Petitioner estimates that the Petitioner's argument will take one day.

DATED: March 28, 2017



Joseph M. Doyle
Solicitor for the Petitioner

To be completed by the court only

Order made:

- on the terms requested in paragraphs _____ of Part 1 of this Petition
- with the following variations and additional terms

Date: _____

Signature of Judge Master