OPCC File: 2017-13291

In the matter of the Review on the Record into the Ordered Investigation against Special Municipal Constable Leanne Keith of the New Westminster Police Department

Submissions of Office of the Police Complaint Commissioner, Mark Underhill, on the Review on the Record

I. Introduction and Summary

1. This review concerns the appropriate disciplinary and corrective measures for impaired driving that constitutes discreditable conduct under the *Police Act* ("*Act*").

2. The discipline authority below imposed a one-day suspension for impaired driving. Despite the presence of mitigating factors, the Commissioner says that the sanction was too low. Courts, legislatures and police commissioners across the country have been imposing increasingly onerous sanctions for impaired driving.

3. The one-day suspension in this case falls short of the appropriate sentence for this kind of discreditable conduct in 2018. An appropriate measure in this case is a significant period of suspension that reflects the serious nature of the conduct, and will deter the member and others from engaging in this behaviour in the future.

4. Additionally, the discipline authority took into account irrelevant mitigating factors. First, the discipline authority considered it to be a mitigating factor that the member is a special municipal constable ("SMC"). The Commissioner says there is no principled reason why SMCs should be treated any differently from other members in the imposition of disciplinary and corrective measures for impaired driving. Moreover, this member is specifically involved in laying informations related to impaired driving, which strongly suggests that a lesser sanction would be inappropriate.

5. Second, the discipline authority took into account the member's cooperation with the investigation. This is at best a neutral factor. Unlike criminal investigations where offenders have a right to remain silent, the member is under a statutory duty to cooperate with investigations. Failing to cooperate would constitute a disciplinary breach. The sanctions imposed on her should not be lessened because she complied with her statutory obligations.

II. Statutory Scheme

6. Section 92 of the *Act* gives the Commissioner the authority to order an investigation by a constable of an external police force where it is necessary in the public interest.

7. Investigating officers are granted a number of powers and duties to allow them to investigate alleged misconduct (ss. 102-104, 107-108). "Misconduct" is defined in s. 77 to mean, *inter alia*, a disciplinary breach of public trust described in s. 77(3). That section includes in subsection (h) "discreditable conduct":

> (h) "discreditable conduct", which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department, including, without limitation, doing any of the following:
>
> > (i) 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;

8. In accordance with s. 98, the investigating officer has a duty to file a final investigation report that sets out the investigative steps taken, a summary of the relevant evidence, a list of all witnesses, a list of all records, and the investigating officer's assessment of the evidence and analysis of the facts (ss. 98(4) and (5)).

9. If, after reviewing the final report and evidence, the discipline authority considers that conduct of a member appears to constitute misconduct, then the discipline authority must convene a discipline proceeding in respect of the matter (s. 112(3)). The discipline authority may attempt to resolve the allegation of misconduct at a prehearing conference, and otherwise hold and preside over a discipline proceeding in respect of the allegations of misconduct (s. 122-124).

10. At the conclusion of the discipline proceeding, the discipline authority must, *inter alia*, make a finding in relation to each allegation of misconduct, and invite submissions as to appropriate disciplinary or corrective measures (para. 125). Provided the misconduct is proven, the discipline authority must take one or more of a number of enumerated disciplinary or corrective measures (s. 126(1)). If the discipline authority considers that disciplinary or corrective measures are necessary, an approach that seeks to correct and educate the member takes precedence unless it is unworkable or would bring the administration of police discipline into disrepute (s. 126(3)).

11. Following a discipline proceeding, the Commissioner must arrange a public hearing or a review on the record if there is a reasonable basis to believe the discipline authority's findings are incorrect, the discipline authority incorrectly proposed disciplinary or corrective measures, or otherwise considers that a public hearing or review on the record is necessary in the public interest (s. 138(1)). When deciding if the public hearing or review is necessary in the public interest, the Commissioner must take into account all relevant factors including the nature and seriousness of the complaint or alleged misconduct, the nature and seriousness of harm resulting from the conduct, whether there is a reasonable prospect that a public hearing or review would assist in determining the truth, and whether an arguable case can be made that there was a flaw in the

investigation, the disciplinary or corrective measures are inappropriate or inadequate, or the discipline authority incorrectly interpreted or applied the *Act* (s. 138(2)).

12. After a review of a disciplinary decision, the adjudicator performing a review on the record is required to determine if any misconduct has been proven; determine the appropriate disciplinary or corrective measures; and recommend to a chief constable of the board of the municipal police department concerned any changes in policy or practice advisable in respect of the matter (s. 141(10)).

III. Background

13. The facts giving rise to this review are generally not in dispute.

14. On March 24, 2017, Constable Fildes conducted a check stop on United Boulevard near Fawcett Road in Coquitlam BC. He flagged down a white Volkswagen Jetta operated by Special Municipal Constable Leanne Keith. Special Municipal Constable Keith advised that she had consumed one glass of wine an hour prior to the stop. She provided a breath sample that registered a fail, was detained for an impaired driving investigation, was issued a 90-day immediate roadside prohibition, and had her vehicle impounded for 30 days.

15. SMC Keith notified her immediate supervisor of the incident that weekend, and met in person with her supervisor and the Chief Constable immediately upon her return to work.

16. The Commissioner was informed of the incident on March 29, 2017. On April 4, 2017, the Commissioner ordered an investigation and determined that the conduct of SMC Keith, if substantiated, would constitute discreditable conduct pursuant to s. 77(3)(h) of the *Act*.

17. An investigation was conducted by Sergeant Cahambing, who submitted a Final Investigation Report recommending that the disciplinary default of discreditable conduct be substantiated.

18. A prehearing conference was held on October 17, 2017 before Chief Constable Dave Jones. An agreement was reached regarding disciplinary or corrective measures, which would have imposed a written reprimand. However, the Commissioner determined that the discipline agreed to at the conference was not appropriate to the circumstances and rejected the agreement. The basis for that decision was that the proposed measures did not address the seriousness of the misconduct.

19. On November 10, 2017, Chief Constable Adam Palmer delegated his authority as Discipline Authority to Superintendent Marcie Flamand.

20. On December 14, 2017, after due notice to SMC Keith, Superintendent Flamand convened a discipline proceeding pursuant to the *Act*.

21. At the discipline proceeding, SMC Keith admitted the allegations and took no issue with exhibits, process or findings of fact. She made submissions related to the discipline.

22. The discipline authority applied the test for discreditable conduct set out in *R. v. Peterborough Police Commissioner, Girard v. Delaney* and *Mancini v. Constable Martin Courage*. She found that a reasonable person in the community, dispassionate and fully apprised of the circumstances of the case, would conclude that SMC Keith conducted herself in a manner which she knew, or ought to know, would be likely to bring discredit to the New West Police Department. As such, she found that, despite admissions made by SMC Keith, the evidence on its own merits proved the allegation of discreditable conduct.

23. The discipline authority invited further submissions on an appropriate penalty in accordance with s. 125(1)(d) of the *Act*.

24. After considering those submissions, Superintended Flamand determined that a one-day suspension would be appropriate. She found that the penalty could have been higher if it had not been for:

a. Full acceptance of responsibility and sincere remorse;

b. Cooperation with the investigation;

c. An unblemished employment record;

d. SMC Keith's driving did not result in accidents or injury; and

e. The nature of SMC Keith's employment is dissimilar from that of a municipal police constable or Special Municipal Constable who carries out police-like duties.

25. On February 8, 2018, the Discipline Authority issued a Disciplinary Disposition Record confirming the imposition of the one day suspension.

26. The Commissioner determined that there is a reasonable basis to believe that the discipline authority's application of s. 126 of the *Police Act* was incorrect. Specifically, the Commissioner was of the view that the discipline authority erred in considering the following to be mitigating factors:

a. SMC Keith's status as a Special Municipal Constable, including that she does not wear a uniform;

b. Cooperation with the roadside investigation or the *Police Act* investigation;

27. The Commissioner also formed the view that the Discipline Authority failed to properly consider the jurisprudence regarding the minimum range for discipline/corrective measures under the *Police Act* in relation to drinking and driving incidents, particularly that the minimum disciplinary measure should not be less than a 3-day suspension. The Commissioner also suggested that even the high end of that range may be below the appropriate range given the disposition of similar cases from other jurisdictions.

28. As a result, the Commissioner determined that this review on the record is necessary in the public interest.

IV. Standard of Review

29. The standard of review on a review on the record is correctness. When determining if appropriate disciplinary and corrective measures have been imposed, it is

unnecessary to review the decision below. However, it may be instructive to observe where the discipline authority fell into error in her interpretation of the legislation.

In the matter of the Review on the Record into the Ordered Investigation of Corporal Trish McLaughlin of the West Vancouver Police Department, paras. 8, 32.

V. Discussion

30. In this case, the member admits that her conduct constituted discreditable conduct. The only question is what disciplinary or corrective measures are appropriate.

31. There are two sub-issues: the proper range for disciplinary and corrective measures for impaired driving misconduct; and the relevant mitigating factors when imposing those measures.

A. The Proper Range of Disciplinary or Corrective Measures

32. In recent years, courts and legislatures across the country have imposed increasingly harsher sanctions for impaired driving offences. Disciplinary measures for impaired driving offences, most notably in Ontario, have likewise increased in light of the greater seriousness with which society takes impaired driving. The one-day suspension imposed in this case falls below the minimum accepted range for impaired driving offences in British Columbia, which is itself too low.

1. Legislative Impaired Driving Regimes

33. Courts and legislatures have consistently recognized the harm that impaired driving does to individuals and to society as a whole. This fact was recognized as early as 1995, when Mr. Justice Cory emphasized the devastating consequences of impaired driving in *Bernshaw*:

> Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country.

R. v. Bernshaw, [1995] 1 S.C.R. 254, para. 16.

34. Twenty years later, the same sentiment was voiced by Madam Justice Karakatsanis in *Goodwin*:

> The devastating consequences of impaired driving reverberate throughout Canadian society. Impaired driving renders roads unsafe, destroys lives, and imposes costs throughout the health care system.

Goodwin v. British Columbia (Superintendent of Motor Vehicles), 2015 SCC 46, para. 1.

35. Thus, Federal and Provincial governments have both put into place increasingly severe consequences for impaired driving.

36. In *Lacasse*, the Supreme Court of Canada emphasized that in cases concerning impaired driving causing either bodily harm or death, general or specific deterrence and denunciation must be emphasized. Thus, in most cases, imprisonment is justified. The Court paid heed to Parliament's instruction through legislative amendments that more severe sanctions are warranted:

> [4] One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate.
>
> [5] In the context of offences such as the ones in the case at bar, namely impaired driving causing either bodily harm or death, courts from various parts of the country have held that the objectives of deterrence and denunciation must be emphasized in order to convey society's condemnation: [Citations omitted.]
>
> [6] While it is normal for trial judges to consider sentences other than imprisonment in appropriate cases, in the instant case, as in all cases in which general or specific deterrence and denunciation must be emphasized, the courts have very few options other than imprisonment for meeting these objectives, which are essential to the maintenance of a just, peaceful and law-abiding society.

> [7] The increase in the minimum and maximum sentences for impaired driving offences shows that Parliament wanted such offences to be punished more harshly. Despite countless awareness campaigns conducted over the years, impaired driving offences still cause more deaths than any other offences in Canada: House of Commons Standing Committee on Justice and Human Rights, Ending Alcohol-Impaired Driving: A Common Approach (2009), at p. 5.

R. v. Lacasse, 2015 SCC 64, paras. 4-8.

37. The Court went on at para. 73 to confirm that studies show that harsher sentences may well be a deterrent for the offences of impaired and dangerous driving.

Lacasse, para. 73.

38. In British Columbia, beginning in 2010, the Government has chosen to impose increasingly serious regulatory sanctions to deter drinking and driving.

39. Prior to 2010, driving prohibitions did not come into effect until 21 days after they were issued. In September 2010, the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, was amended to authorize the issuance of immediate roadside driving prohibitions. That version of roadside driving prohibitions was found to violate section 8 of the *Charter* because it did not include a meaningful review process for persons who receive those prohibitions.

Lemieux v. The Superintendent of Motor Vehicles, 2018 BCSC 863, paras. 10-13.
Goodwin v. British Columbia (Superintendent of Motor Vehicles), 2015 SCC 48.

40. The second version of the prohibitions came into effect on June 15, 2012. It, too, allowed for an immediate roadside prohibition, but allowed for a review process. Those prohibitions were upheld on a constitutional challenge to the Court of Appeal for British Columbia.

Lemieux, paras. 14-17.

Gregory v. British Columbia (Superintendent of Motor Vehicles), 2018 BCCA 7 [*Gregory*].

41. A third version of the immediate roadside prohibition regime came into effect by way of amendments to the *Motor Vehicle Act* and its regulations made in 2015 and 2016. Among those amendments, mandatory remedial requirements are now imposed on drivers with a prescribed level of demerit points, and the burden of proof in a review of a driving prohibition falls on the person subject to a driving prohibition.

Lemieux, paras 37-43.

42. Through these legislative amendments, the legislature has demonstrated increased abhorrence for impaired driving offences. The Province's intent with the legislative regime was "to create in purpose and effect strict rules and deterrent to keep intoxicated drivers off the road in order to encourage public safety."

Sivia v. British Columbia (Superintendent of Motor Vehicles), 2014 BCCA 79, para. 104. See also: *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, para. 37.

43. Courts have accepted that the increased sanctions have served these purposes be effecting a serious reduction in the incidence of injuries and deaths caused by impaired driving.

Gregory, paras. 58-60.

2. Disciplinary Measures for Impaired Driving

44. Police officers are held to a higher standard when it comes to obeying the law because they are charged with upholding those laws. In *Lévis*, the Court explained that criminal offences committed by police officers are inherently connected to their employment. Offences committed by police officers outside their employment "compromise the integrity and respect for the law that the municipality and the public were entitled to expect from a police officer."

Lévis (City) v. Fraternité des policiers de Lévis Inc., 2007 SCC 14, para. 43. See also paras 44-45.

45. Thus, in Ontario, given their role and the seriousness of impaired driving offences, members face increasingly onerous disciplinary measures for impaired driving. On November 7, 2016, The Commissioner of the Ontario Provincial Police issued a memorandum to all members concerning Alcohol/Drug misconduct in relation to driving. Due to the seriousness of the conduct, he advised that members who engage in that conduct will face severe consequences, and tribunal prosecutors must seriously consider the penalty of dismissal in every impaired driving related misconduct:

> ... there is no excuse for driving illegally under the influence of alcohol and/or drug. OPP members who do so demonstrate disregard for the safety of the public, their families and themselves and conduct themselves above the laws. Those members will face severe consequences. I have directed our *Police Services Act* tribunal prosecutors to give serious consideration to the penalty of dismissal in every impaired driving-related misconduct from this point forward.
>
> My position and message to you is consistent with the intolerance society has for this type of behaviour and the resultant hardening of the related criminal and provincial laws.

Ontario Provincial Police, Memo from Commissioner J.V.N. Hawkes to All Members RE: Alcohol/Drug Misconduct in Relation to Driving, 7 Nov 2016, File #Gov-CSC-1700

46. Recent media articles from Ontario suggest that minimum penalty for impaired driving in that jurisdiction is a 20-day suspension. In a March 4, 2017, article, CityNews Toronto listed the data on disciplinary measures imposed on police officers facing criminal convictions. For impaired driving and "Over 80", the sanctions imposed were 20-days suspensions (6 incidents), demotions (14 incidents), and dismissal (1 incident).

2017 03 04, "Convicted Cops: A Close Look", *CityNews Toronto*
See also: 2015 09 20, "Dozens of Officers from Across Ontario Busted for Drunk Driving", *Toronto Star*.

47. In Ontario cases akin to this one, the disciplinary measures have been significantly more onerous than a one-day suspension. In *Devine*, the Ontario Civilian Commission on Police Services considered the appropriate discipline where a constable operated a motor vehicle that was involved in an accident and registered a fail on an accepted roadside screening device. The Commission took into account a number of mitigating factors, including the constable's admission, positive performance evaluations, and the limited consequences of the accident. At the same time, the Court considered the serious nature of the misconduct:

> It is clear that drinking and driving is conduct which constitutes serious misconduct. It is conduct which cannot be tolerated and for which a substantial penalty must be assessed.
>
> Both the community and police services across Ontario have become increasingly less tolerant of drinking and driving. Police forces have expended considerable resources to combat drinking and driving. Clearly the perception of the seriousness of this misconduct has increased with the passage of time.
>
> Constable Devine therefore deserves a substantial penalty for his misconduct.

The Commission imposed a one-year demotion on the constable.

Devine v. Ontario Provincial Police, 2008 ONCPC 10.

48. In *Van Straalen*, the Ontario Civilian Police Commission considered the appropriate penalty in cases where there are few if any aggravating factors. There, the appropriate penalty is typically a demotion for a period of up to 18 months. The penalty imposed was a demotion for a period of 12 months in light of the fact that the breathalyzer reading was low but "over 80"; there were some modest signs of impairment; there was nothing in the manner of the member's driving that drew the attention of the police; there were no passengers and no accident; the officer conceded guilt at the scene; it was the member's first formal disciplinary action; and the member was at a low risk to reoffend.

Van Straalen v. Ontario Provincial Police Service, 2017 ONCPC 17, para. 40.

49. In British Columbia, the Commissioner has likewise recognized the seriousness of drinking and driving as discreditable conduct. On October 20, 2014, the Commissioner issued Information Bulletin #6B, *RE: Impaired driving, discreditable conduct & disciplinary/corrective measures* ("Bulletin 6B"). Bulletin 6B is designed to provide further assistance to discipline authorities when approving disciplinary or corrective measures after a finding of misconduct, and to promote a consistent and fair approach in the determination of appropriate disciplinary or corrective measures for misconduct involving impaired driving.

50. Bulletin 6B points out that sanctions for impaired driving have significantly increased in British Columbia to reflect the seriousness of the behaviour. It also notes that police officers are held to a particularly high standard when it comes to impaired driving so as to not conduct themselves in their off-duty time in a way that endangers the public.

51. Given the seriousness of the misconduct, previous cases have established a range for disciplinary measures in British Columbia beginning with a minimum three-day suspension.

52. While sitting as a discipline authority, retired Justice Pitfield considered the appropriate discipline for failure to co-operate with an impaired driving investigation. He emphasized the importance of police officers refraining from impaired driving because of the serious consequences of drinking and driving, the important role played by police in reducing the incidence of drinking and driving, and the public expectation that officers will respect the laws they themselves enforce

Pitfield Decision, para. 18, Final Investigation Report, p. 119.

53. Discipline Authority Pitfield reviewed earlier decisions from 2011 through 2015 that indicated a wide range for sanctions for operating a motor vehicle while off duty and apparently impaired with no aggravating factors. He explained that given the serious consequences associated with drinking and driving, and the important role police play in reducing the incidence of drinking and driving, as a general rule, suspensions should be

imposed for such misconduct. He advised the minimum should be not less than 3 days, and the maximum in the range of 7 to 10 days:

> [18] In my opinion, verbal or written reprimands and minimal suspensions for operating a motor vehicle while off duty and under the influence of alcohol sufficient to result in a "Fail" reading on an ASD are woefully inadequate and the disciplinary authority rightly decided the sanction should be greater. In my opinion, given the serious consequences associated with drinking and driving, the important role played by police in reducing the incidence of drinking and driving, and the public expectation that police officers will respect the laws they themselves enforce, suspension should be the rule rather than the exception, the minimum should be not less than 3 days, and the maximum, in the range of 7 to 10 days.

Pitfield Decision, para. 18, Final Investigation Report p. 119.

54. There are admittedly a number of disciplinary decisions that imposed lesser sanctions than a three-day suspension. However, these cases all appear to predate Discipline Authority Pitfield's reasons.

55. In any event, the Commissioner says that the range set by Discipline Authority Pitfield appears is also too low, particularly in light of the approach taken in Ontario. As set out above, society continues to take a stricter approach to impaired driving offences. Consequences for that conduct by police officers, who are charged with upholding the law, must likewise become increasingly serious. Anything less compromises the integrity and respect for the law that British Columbians are entitled to expect from members of the police forces. If we are to take drinking and driving seriously in this province, then members must face serious consequences when they engage in conduct that causes such grave harm to British Columbians.

56. In this case, due to the nature of her role as a special constable, a demotion is not available as a disciplinary measure. Section 7 of the *Special Municipal Constables Complaints Regulation*, B.C. Reg. 46/2016 [*SMC Regulation*] provides that the range of disciplinary measures available under the *Act* does not include reductions in rank or transfers or reassignments of special municipal constables.

57. Accordingly, the Commissioner says a more significant suspension is required, which takes into account the seriousness of the misconduct and will deter other officers from engaging in impaired driving.

B. Mitigating Factors

58. Pursuant to s. 126(2) of the *Act*, discipline authorities must consider aggravating and mitigating factors in determining just and appropriate disciplinary measures. Those factors include:

> (a) the seriousness of the misconduct,
>
> (b) the member's record of employment as a member, including, without limitation, her or his service record of discipline, if any, and any other current record concerning past misconduct,
>
> (c) the impact of proposed disciplinary or corrective measures on the member and on her or his family and career,
>
> (d) the likelihood of future misconduct by the member,
>
> (e) whether the member accepts responsibility for the misconduct and is willing to take steps to prevent its recurrence,
>
> (f) the degree to which the municipal police department's policies, standing orders or internal procedures, or the actions of the member's supervisor, contributed to the misconduct,
>
> (g) the range of disciplinary or corrective measures taken in similar circumstances, and
>
> (h) other aggravating or mitigating factors.

59. Bulletin 6B sets out the following additional considerations that discipline authorities should take into account when deciding what disciplinary or corrective measures to impose:

> - Whether the Approved Screening Device (ASD) registered a "FAIL" or registered a "WARN":

- A higher degree of intoxication and/or impairment should reflect a higher level of discipline

- Whether the member was charged with impaired driving and/or having a blood alcohol level over 80 mg of alcohol and/or refusal to comply with a demand pursuant to the Criminal Code:

  - Consideration should be given to whether a criminal charge was sought. Consideration should also be given to the blood alcohol level if one was obtained.

- The driving behaviour of the member:

  - Demonstrated impaired ability to operate a motor vehicle should reflect a higher level of discipline (e.g., detection through a roadblock versus a traffic stop)

- The acceptance of responsibility:

  - Member demonstrates a level of remorse for his/her actions

60. While this list is not exhaustive, the Commissioner submits that it is inappropriate to take into account the member's position as an SMC, or her co-operation with the investigation.

1. Role as SMC

61. There is no principled reason why SMCs should be treated any differently than other officers in the context of disciplinary proceedings. The legislation makes it clear that SMCs are subject to the same standards, and subject to the same disciplinary proceedings, as other officers.

62. Section 35 of the *Act* allows municipal police boards to appoint special municipal constables who assist municipal police departments in the performance of their duties. They have "the powers, duties and immunities of a municipal constable" when carrying out those duties (s. 35(4)). Municipal constables and special municipal constables further

have "all of the powers, duties and immunities of a peace officer and constable at common law or under any Act" (s. 38(1)(a)).

63. With the enactment of the *SMC Regulation,* Special Municipal Constables became subject to Part 11 of the *Act*, commencing starting August 1, 2016. Section 2 of the *SMC Regulation* provides:

> (1) The provisions of Part 11 of the Act apply in relation to a special municipal constable as if the special municipal constable were
>
> a. A municipal constable employed with the municipal police department of the municipal police board that appointed the special municipal constable, and
>
> b. An employee of the municipal police board referred to in paragraph (a).
>
> (2) In applying Part 11 of the Act for the purposes of this regulation, the rules set out in sections 3 to 7 of this regulation apply.

64. The definition of "member" throughout Part 11 is to be read as including a reference to SMCs (s. 3). Certain other provisions are to be read somewhat differently for SMCs by excluding the possibility of SMCs being subject to a reduction in rank, transfer or reassignment, due to the role of SMCs (ss. 5-7).

65. On or about July 6, 2016, the Commissioner issued Information Bulletin #15, *Special Municipal Constables Subject to Part 11 of the Police Act* ("Bulletin #15") to update police departments regarding the change to jurisdiction of the *Act* as it pertains to SMCs. The Commissioner confirmed that as a result of s. 2 of the *Regulation*, "the on and off duty conduct of Jail Guards, Traffic Authority members, Community Safety members and Auxiliary/Reserve Constables that are employed as SMC's will be subject to Part 11 of the" *Act*. He further wrote that SMCs "will be treated no differently than municipal constables under the Act."

66. Thus, it is clear that the legislation reveals no principled basis for SMCs to be treated any differently than other officers in the context of disciplinary proceedings. SMC

Keith has the same powers and duties in the exercise of her functions as other constables, and is subject to the same disciplinary processes and proceedings.

67. Furthermore, although she does not interface with the public in the context of impaired driving charges, it is clear that SMC Keith is personally involved in the prosecution of impaired driving offences.

68. At the time of the incident, SMC Keith was the Court Liaison Officer. As part of her regular duties, she reads police files, ensures all the information that Crown needs to approve a file is complete, and notifies the member and supervisor if there are any missing documents. She submits the files to the Crown to approve charges. If charges are approved, she attends the registry and swears the information.

Final Investigation Report, p. 29, para. 47(d)-(e)

69. SMC Keith confirmed that in the course of her position, she has read impaired files, and sworn informations at the courthouse. In that interview, she confirmed that she understood that as an SMC, she is required to abide by the rules and regulations of other constables, and that she would be held to a higher standard.

Final Investigation Report, p. 29, paras. 47(b), (f).

70. Admittedly, SMC Keith has not conducted any impaired driving investigations, or otherwise enforced any impaired driving laws. She has never been issued a uniform.

Final Investigation Report, p. 30, para. 47(g)).

71. In his analysis and assessment of evidence, the Investigator acknowledged this was the case, and rejected the proposition that SMC Keith should be treated differently because she plays a lesser role in the prosecution of drinking and driving offences:

> 69. While it might be argued that Special Constable KEITH, by virtue of her position as a Court Liaison Officer is not engaged in the "diligent detection and sanction of citizens who inappropriately drink and drive," by her statement, the evidence is clear that as part of her regular duties, she is required to review Reports to Crown

> Counsel for charge approval and swears Information once charges are approved. Special Constable KEITH conceded that she has also reviewed Impaired Driving files for the purposes of assisting the Crown in the charge approval process.
>
> 70. In this light, it can be articulated that while Special Constable KEITH does not actively enforce impaired driving laws, she is an active part of the administrative charge-approval process with Crown Counsel, which includes impaired driving files.

Final Investigation Report, p. 40, paras. 69-70.

72. Notably, the investigation report does not list as a mitigating factor the nature of SMC Keith's role with the NWPD.

Final Investigation Report, p. 41, para. 74.

73. Thus, just as there is no principled basis for any SMC to be held to a lower standard than other officers when it comes to impaired driving, there is no specific reason why this should be the case here. SMC Keith plays an important role in the prosecution of impaired driving files. To maintain the integrity of the profession, SMC Keith should not be subject to a reduced disciplinary measure simply by virtue of the nature of her position.

2. Cooperation with the Investigation

74. The discipline authority considered it to be a mitigating factor that SMC Keith co-operated fully with the Investigation.

75. At best, this factor should be treated as a neutral factor, not a mitigating one.

76. Members are under a duty to cooperate with an investigation under Part 11 of the *Act*. Section 101 provides:

> 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 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).

(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).

77. Members are likewise under a duty to cooperate with the police complaint commissioner and its staff. Section 178 provides:

> 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.

78. A member engages in professional misconduct when he or she fails to meet those duties. Pursuant to s. 77(3)(m), "neglect of duty" includes a failure to promptly and diligently do anything that it is one's duty as a member to do.

79. Further, section 106 of the *Act* makes it an offence for a member to knowingly hinder, delay, obstruct, or interfere with an investigating officer acting under Part 11.

80. The Commissioner concedes that in criminal sentencing cases, cooperation is frequently said to be a mitigating factor. However, an accused in a criminal investigation is not under any duty to cooperate in a police investigation. That is a fundamental precept of the right to remain silent: a right that SMC Keith did not have.

R. v. Turcotte, 2005 SCC 50, para. 55.

81. Here, SMC Keith did nothing more than fulfill her statutory duty by cooperating with the investigation. If she had failed to do so, it may have been further grounds for discipline. SMC Keith should not be treated leniently for her co-operation.

VI. The Appropriate Sanction in This Case

82. There is no issue that SMC Keith committed discreditable misconduct. She conducted herself in a manner which she knew, or ought to know, would be likely to bring discredit to the New Westminster Police Department. As such, the discipline authority found that, regardless of admissions made by SMC Keith, the evidence on its own merits proved the allegation of discreditable conduct. That conclusion is not challenged. Given the misconduct, s. 126(1) requires the imposition of disciplinary or corrective measures.

83. Here, disciplinary or corrective measures that seek to correct and educate the member are unworkable and would bring the administration of police discipline into disrepute (s. 126(3)). The law and the expectations placed on police in BC and Canada are clear to everyone, including (by her own admission) SMC Keith. Education would have no practical effect, and is therefore unworkable.

84. More importantly, it would bring the administration of police discipline into disrepute to impose educational or corrective measures for such serious misconduct. It would be

contrary to societal expectations, embodied in the actions and statements of legislatures and courts across the country, if members did not face serious sanctions for impaired driving.

85. Admittedly, there are a number of mitigating factors in this case. Specifically, SMC Keith fully accepted responsibility and demonstrated sincere remorse. She further has an unblemished record. Her driving did not result in any accidents or injury.

86. However, weighing significantly against these mitigating factors is the serious nature and consequences of impaired driving. The principles of general and specific deterrence are at play. Significant sanctions for such misconduct, well beyond a one day suspension, are now regularly imposed in Ontario. To have such a significant discrepancy in British Columbia, particularly when the misconduct is by a special municipal constables involved in laying informations for impaired driving, brings the integrity of policing in this province into disrepute.

87. Accordingly, and in light of the fact that a demotion is not available as a disciplinary measure, the Commissioner says that the adjudicator should impose a significant suspension that properly reflects the seriousness of the misconduct, and will deter other police officers from engaging in impaired driving.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 9th day of July, 2018.

FOR Mark G. Underhill
Office of the Police Complaint Commissioner