

4455 Clarence Taylor Crescent
Delta BC V4K 3E1

phone 604.946.4411
deltapolice.ca



March 7, 2018

Mr. Stan T. Lowe
Police Complaint Commissioner
PO Box 9895, Stn Prov Govt
Victoria, BC V8W 9T8

Dear Commissioner Lowe,

The BC Association of Municipal Chiefs of Police Executive believes there to be confusion regarding on-duty motor vehicle incidents, and the subsequent application of the *Police Act*, the *Motor Vehicle Act*, and/or internal investigations. Over the course of the past several years, there has been a misperception in relation to how each of these investigative courses of action intersect. It is necessary for both the BCAMCP and the OPCC to clarify and agree upon the appropriate approach to investigating motor vehicle incidents that are truly accidental in nature, resulting in damage or injury.

The report attached to this cover letter, has outlined two issues for discussion in relation to MVA situations involving on-duty police, including:

1. The basis on which the PCC can direct that a violation ticket be issued, otherwise a *Police Act* investigation will be ordered; and
2. Clarification whether or not the commission of an MVA offence automatically constitutes *Police Act* misconduct.

Ensuring that all parties are clear on the role of the *Police Act*, the *Motor Vehicle Act* and internal investigations respecting on- and off-duty MVAs will alleviate confusion and set the ground work for appropriate disciplinary measures, if required. We look forward to further discussions with your office regarding this issue.

Thank you,

Neil Dubord, MOM, AdeC
Chief Constable, Delta Police Department
President, BC Association of Municipal Chiefs of Police

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Office of the Police Complaint Commissioner



British Columbia Association of Municipal Chiefs of Police
4455 Clarence Taylor Crescent, Delta, BC V4K 3E1 Tel: 604-940-5009

March 7, 2018

Mr. Stan T. Lowe
Police Complaint Commissioner
PO Box 9895, Stn Prov Govt
Victoria, BC V8W 9T8

Dear Commissioner Lowe,

Re: Clarification of OPCC Position/ Situations Involving Potential *Motor-Vehicle Act* Violations

The BC Association of Municipal Chiefs of Police (BCAMCP) is writing to you to seek clarification with regard to your view of how potential violations of the *Motor Vehicle Act* (MVA) may or may not relate to findings of misconduct within Part 11 of the *Police Act*. Your general opinion is being sought independent of any particular complaint or fact pattern, in the manner of a reference case.

For the BCAMCP, although the topic of potential violations of the MVA allow for a wide range of discussion, the primary situation of concern arises when an on-duty police officer is involved in a motor vehicle accident where an MVA violation *may* have occurred. Therefore the primary question we are seeking clarification on is this:

Is it the position of the Police Complaint Commissioner that all violations of the MVA committed by an on-duty police officer constitute misconduct pursuant to the Police Act, regardless of the circumstances?

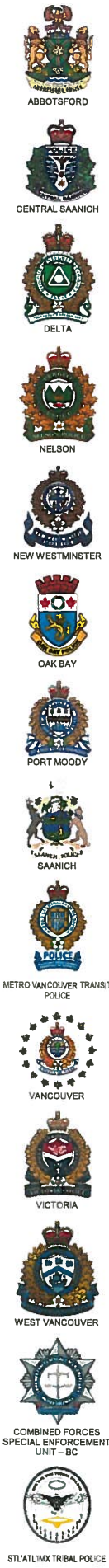
Although that question may appear to be an oversimplification of the matter, it forms a basic premise that, if representative of your position, will assist in further assessment and discussion of situations involving possible MVA violations.

Applicable *Police Act* Definitions

There are a number of sections within the *Police Act* that potentially apply when considering MVA violations by a police officer.

Section 77(1)(a) and 77(2) combine to form the result that an MVA offence, as an offence under an enactment of any province, constitutes a “*public trust offence*” if the conviction either renders a member unfit to perform their duties or discredits the reputation of the municipal police department.

Section 77(3), which sets out “*disciplinary breach[es] of public trust*” includes “*discreditable conduct*” as well as “*neglect of duty*”. The “*discreditable conduct*” application to MVA offences is essentially self-explanatory, in the general sense that the MVA offence must somehow bring discredit on the department. With regard to the “*neglect of duty*” delict, there has been some suggestion that neglecting to “*do anything that it is one’s duty as a member to do*” includes failing to comply with the MVA provisions.





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Specifically with regard to the “neglect of duty” delict we have also considered the Section 117 decision of Adjudicator Oppal dated January 22, 2015, which held that an on-duty Vancouver Police Department member who failed to stop for a red light without having the emergency equipment activated had committed the “disciplinary default” of “neglect of duty”. However, as that incident occurred prior to April 2010, that decision involved the former *Code of Professional Conduct Regulations* which no longer governs police misconduct. In addition, and with the utmost respect to Adjudicator Oppal’s decision, there was no substantive discussion or analysis within his decision that spoke to how he arrived at the conclusion that the actions of the officer specifically constituted “neglect of duty”, or if he was ruling that any MVA offence that was found to have occurred automatically constituted “neglect of duty”. Further, with regard to the issue of whether or not a traffic violation ticket should be issued, that particular case involved a situation where the Vancouver Police Department “wished for the matter to proceed through the *Police Act* process.”

Accordingly, a consideration of the statutory language within the *Police Act* does not appear to directly and unequivocally link an MVA offence committed by an officer, in and of itself, to a finding of misconduct pursuant to the *Police Act*. Rather, it appears that the commission of an MVA offence may also constitute a misconduct delict, depending on the circumstances.

Consideration of OPCC Information Bulletin #12 - Amended

Information Bulletin #12 - *Amended*, dated August 10, 2016 discusses certain MVA matters, both on or off-duty, as a “potential area of uncertainty which should always be forwarded to the OPCC for assessment”, including MVA offences such as Immediate Roadside Prohibitions, driving prohibitions, unauthorized pursuits and all on-duty vehicle collisions and off-duty vehicle collisions where there are serious injuries or the member is charged with an offence [under the MVA]. However, the “area of uncertainty” referred to in the bulletin relates to whether or not the matter should be addressed as a disciplinary breach of public trust or an internal discipline matter – not whether or not the *Police Act* should be considered or not.

One conclusion that can be drawn from a consideration of Information Bulletin #12 – *Amended* is that an MVA offence should *always* be subject to a *Police Act* investigation, with the only determination to be made being whether or not the matter is treated as a disciplinary breach of public trust or an internal discipline matter.

Discussion

The BCAMCP is concerned about this issue and takes the position that MVA offence considerations and procedures, intended to address road safety issues and regulate driver behaviour, should normally be kept separate from *Police Act* misconduct investigations and proceedings. You have often expressed the position that the *Police Act* is intended to constitute a complete code for dealing with police disciplinary matters, and that other statutory mechanisms cannot supersede the requirements set out in the *Police Act*. Similarly, as the MVA is intended as a complete code for ensuring road safety and regulating driver behaviour (with the exception of any application of the relevant *Criminal Code* offences), we would expect that the *Police Act* discipline process cannot automatically be used to impact or affect the decisions and processes set out in the MVA, without some sort of analysis of the circumstances first.

Granted, there will always be incidents – usually involving very serious behaviour – where the fact pattern fully supports an MVA offence (and MVA process) while at the same time supporting potential police misconduct pursuant to the *Police Act*. This is supported by the definitions of misconduct cited earlier, which require some sort of evidence that the conduct in question renders an officer unfit or would otherwise discredit the police department. Examples would include driving behaviour involving gross negligence or other bad faith situations. However, the processes within each statute should be managed separately.

Where these matters appear to be intersecting in a problematic manner, giving rise to the question asked at the outset of this letter, is during situations where an on-duty officer is involved in an accident in the true sense of the word – a collision that occurs unexpectedly and unintentionally, resulting in damage or injury. In those cases, where an MVA offence has likely been committed (whether or not a violation ticket is issued),



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the fact of the MVA offence likely occurring should not *automatically* result in the review of the matter, an ordering of an investigation, or a finding of misconduct pursuant to the *Police Act*.

However, a number of police agencies are seeing recommendations and directions from OPCC staff indicating that where an on-duty member has been involved in a motor-vehicle accident, the issuance of a violation ticket to the officer in relation to the accident will be a significant contributing factor in whether or not a *Police Act* investigation will be ordered. Yet conversely, in cases where a *Police Act* complaint has been made in relation to the accident, we have been advised that the issuance of a violation ticket to the officer may or may not affect your view of what constitutes an appropriate finding of substantiation by a Discipline Authority, or an appropriate subsequent corrective measure, regardless of what weight the Discipline Authority assigns to such a ticket, if issued. There appears to have been no consistency in the recommendations and directions in this area. In the Vancouver Police Department case noted earlier [the case that was referred to Adjudicator Oppal via s. 117 of the *Police Act*], it appears that the fact that an MVA violation ticket was not issued was a contributing factor to the decision to have the matter reviewed pursuant to s. 117. This situation creates uncertainty from the perspective of the member as well as the perspective of PSS investigators.

Having said that, the BCAMCP fully recognizes that the PCC has the absolute discretion to consider any information that comes to his attention when deciding whether or not to order an investigation into the conduct of a member, where that conduct would, if substantiated, constitute misconduct. However, this discretion itself raises (at least) two issues for discussion in relation to MVA situations:

The PCC’s clear and unquestionable discretion to consider any information, such as whether a violation ticket has been issued or not, when deciding whether or not to order an investigation is not equivalent to an authority to direct that a violation ticket be issued otherwise a *Police Act* investigation will be ordered.

The authority to order a *Police Act* investigation must result from conduct that, if substantiated, constitutes misconduct – so the question of whether or not the commission of an MVA offence, no matter how benign, automatically constitutes *Police Act* misconduct again becomes relevant.

With regard to the second point above, it may be helpful to discuss a hypothetical scenario. Consider an on-duty police officer approaching a “courtesy” intersection in a quiet residential area, with no traffic control signs or signals:

A minor collision occurs between the police vehicle and a runner who was crossing the road. There were no overt “police response” issues; that is, the officer was not responding to a call and the vehicle speed was very moderate.

The runner suffers minor injuries that do not require hospitalization.

This scenario is one of a simple “accident” in the truest sense. The police officer could technically be seen as having committed a “fail to yield to pedestrian” offence; but the runner could technically be seen as having committed the offence of “leaving a place of safety into path of vehicle”. Regardless of which party may be “at fault” for the accident, this situation should not raise an issue of *Police Act* accountability in terms of misconduct. Yet, if there is an understanding within your office that any potential MVA offence must be treated as potential misconduct, the above scenario would result in a *Police Act* investigation.

These issues become further complicated when considering police officers who are off-duty, especially in light of Information Bulletin #12 – *Amended*. The bulletin sets out a very wide range of circumstances which, although apparently intended to capture matters that should clearly be reviewed by the OPCC as potential misconduct, also captures situations where it would not be reasonable to apply the police discipline process. As an example, consider the situation of an off-duty police officer, driving with passengers in the vehicle. If the officer’s vehicle is struck by another vehicle and serious injuries result, even in a situation where it is



clear that the officer was not at fault and was not charged with an offence, that matter should be forwarded to the OPCC for assessment in accordance with the bulletin, due to the serious injuries.

Further still, if your office is of the opinion that all MVA offences constitute a “neglect of duty” delict under the *Police Act*, how would that apply to off-duty situations? If an off-duty officer is stopped for a routine speeding offence, is issued a violation ticket, and accepts the ticket with absolutely no conduct issues or other driving issues arising whatsoever, has that off-duty officer still committed “neglect of duty” by exceeding a posted speed limit?

The BCAMCP recognizes that it is not possible to address every possible scenario through policy or guidelines. However, the key principle that the BCAMCP endorses is that the particular circumstances surrounding any on-duty MVA offence must be assessed prior to determining whether or not misconduct has occurred. As a further matter for clarification, the BCAMCP endorses the principle that the OPCC should not be directing the issuance of a violation ticket pursuant to the MVA in relation to decisions about *Police Act* matters - although it is recognized that the PCC may consider any information when considering whether or not to order an investigation - in situations where the police officer’s conduct would, if substantiated, constitute misconduct.

The BCAMCP has outlined these issues in the hope that further discussion can take place. We look forward to hearing back from you or your staff in an effort to clarify matters for our PSS investigators as well as the police community generally.

Regards,

Neil Dubord, MOM, AdeC, PhD, CPHR
Chief Constable, Delta Police Department
President, British Columbia Association of Municipal Chiefs of Police