

July 30, 2018

Clarification whether or not the commission of a Motor Vehicle Act offence committed by an on duty police officer constitutes misconduct pursuant to the Police Act, regardless of circumstances.

The BCAMCP references a case in which retired Justice Mr. Wally Oppal, Q.C., reviewed a matter pursuant to section 117 of the *Police Act*, and rendered a decision. This matter involved a Vancouver Police Department (VPD) member who, while on duty, drove his vehicle through a red light colliding with a taxi and its occupants. At the time, the member was driving at normal speed, did not have the emergency equipment activated, and yet drove through a red light while talking with another member who was a passenger. The occupants of the taxi were injured and taken to hospital by ambulance. On January 22, 2015, Mr. Oppal determined that the conduct of the member amounted to a *Neglect of Duty* misconduct.

The BCAMCP raised concerns regarding Mr. Oppal's decision stating that Mr. Oppal did not provide any substantive discussion or analysis to show how he arrived at the conclusion he did. Furthermore, the BCAMCP reported that the incident occurred prior to April 2010 and involved the former *Code of Professional Conduct Regulations* which no longer governs police misconduct. The BCAMCP also stated that the Vancouver Police Department's position at the outset was that this matter should proceed through the *Police Act* process. It appears that the BCAMCP's view that the Commissioner's decision to appoint a retired judge to review this matter was contingent upon the fact that the member did not receive a violation ticket.

The BCAMCP also discussed the amended *Information Bulletin #12*, released by this office to police departments on August 10, 2016. This Information Bulletin offers clarification on when certain *Motor Vehicle Act (MVA)* matters should be reported to our office for assessment. The BCAMCP has inferred that based on the information contained in Information Bulletin #12, that a *Motor Vehicle Act* 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."

OPCC Response:

There are a number of factual inaccuracies in the BCAMCP's letter which need to be addressed, before responding to the main question.

Section 117 Review

According to our records, the incident which led to this section 117 review by Mr. Oppal occurred on February 17, 2014. This matter was initially brought to the attention of this office as a Reportable Injury, pursuant to section 89 of the *Police Act* as there was significant damage and injuries to a number of civilians. The incident was first investigated by the Collision Investigation Unit (CIU) of the Vancouver Police Department. An investigator with the CIU recommended that the respondent member receive a violation ticket for disobeying a red light. Our records show that the recommendation was not acted upon by the VPD and no action was taken to deal with the member's violation of the *Motor Vehicle Act*.

The Commissioner exercised his discretion under section 93 of the *Police Act* to order an investigation into the matter, and directed the Chief Constable of Vancouver Police Department to appoint an investigator. During the course of the investigation the Professional Standards investigator requested that the matter be discontinued pursuant to section 109 of the *Police Act*. The rationale for the discontinuation request was that the respondent member would be issued a traffic violation ticket for a red light offence under the *Motor Vehicle Act*.

In determining whether a discontinuation of the investigation of this matter was appropriate, our office requested a copy of the violation ticket to confirm it had been issued to the member. Our request was not facilitated. Given the significant damage to property, the injuries to members of the public in which they required medical attention, and the lack of confirmation that this member had been held accountable in another forum pursuant to the *Motor Vehicle Act*, the discontinuation request was denied.

Since the evidence was clear from independent witnesses and video that the member had proceeded into an intersection on a red light, that he was not operating under the emergency vehicle regulations, and that his actions caused a traffic incident resulting in serious damage and numerous injuries to members of the public, the Commissioner also exercised his discretion to report the matter to Crown counsel, pursuant to section 111 of the *Police Act*, for entering an intersection on a red light contrary to section 129 of the *Motor Vehicle Act*.

The Criminal Justice Branch approved a charge for the offence of driving without due care and attention contrary to section 144 of the *Motor Vehicle Act*. The matter was heard in Provincial Court and the member was found guilty for that offence. The member received a sentence that included a fine and penalty points on his licence. The matter was appealed to the BC Supreme Court and was heard before the Honourable Madam Justice Watchuk on September 12-13, 2017. The appeal was dismissed in her decision dated March 29, 2018. The link to that decision is <https://oCommissioner.bc.ca/wp-content/uploads/2018/03/Judge-Watchuk-re-R.-v.-Plummer-03-29.pdf>

On December 5, 2014, pursuant to section 117 of the *Police Act*, the Commissioner appointed retired Justice Wally Oppal, Q.C. to review the VPD Discipline Authority's determination that the member did not commit misconduct. The issuance of a violation ticket was not a contributing factor in the decision to have the matter reviewed pursuant to section 117. The matter was reviewed and the decision was made based on the language contained in the section 117 of the *Police Act*; the Commissioner considered that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect. The inclusion of the fact that a violation ticket was not issued to the member in the cover letter appointing Mr. Oppal, Q.C., was to correct misinformation that was contained in the Final Investigation Report which indicated that the member would receive a violation ticket.

The BCAMCP is also incorrect in assuming that this matter occurred and was adjudicated under the provisions of the previous *Police Act*. Any decision made by a retired judge appointed by this Act is independent of this office. The Commissioner does not have any participation in that stage of the process beyond the appointment of the retired judge and providing disclosure to the retired judge of the investigative file.

If the member involved had concerns with Mr. Oppal Q.C.'s decision, he could have moved to the next step in the process and declined the offer of a Pre Hearing Conference (PHC). The member had the opportunity to raise those concerns at the Discipline Proceeding stage; however, he chose to accept the PHC and did not raise these concerns.

Information Bulletin #12 (amended)

The BCACMP has come to erroneous conclusion that based on the content of Information Bulletin #12, that a *Motor Vehicle Act* offence should always be subject to *Police Act* investigation, with the only determination to be made whether or not the matter is treated as a disciplinary breach of public trust, or an internal discipline matter.

We have included *Information Bulletin #12 - amended* so that members of the BCAMCP can review its content. Nowhere in this Information Bulletin does it suggest that every *Motor Vehicle Act* offence should always result in a *Police Act* investigation. The only mention of *Motor Vehicle Act* offences is in the Guidance and Process section which states the following:

Potential areas of uncertainty which should always be forwarded to the Commissioner for assessment include, but are not limited to:

- Matters related to Federal legislation including potential contravention of the *Criminal Code* on and off duty.
- Matters related to Provincial legislation including potential contravention of the *Motor Vehicle Act* provisions, both on and off duty, 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.

The purpose of this Information Bulletin and this particular area of guidance is to assist Police Chiefs in understanding the Commissioner's expectations as it relates to the reporting requirements of this office. In the past, there were incidents where departments would use internal mechanisms such as pursuit review boards, shots fired review boards, or the internal discipline stream to deal with conduct that should have been reported to our office and/or dealt with under the public trust provisions of the *Police Act*. The examples provided in the Information Bulletin are provided to give guidance in terms of matters that should be brought to the attention of this office.

Do MVA offences automatically constitute misconduct?

The BCAMCP has taken the position that *Motor Vehicle Act* 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. The BCAMCP stated the following:

"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 driving behaviour (with the exception of an 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."

To be clear, this is not the position of the Commissioner; this is the position of the Supreme Court of Canada in the decision *Regina Police Assn. Inc. vs Regina (City) Board of Police Commissioner*, 2000 SCC 14. The quote the BCAMCP refers to in their letter is the following:

"The legislature intended the *Police Act*, 1990 and Regulations to be a complete code for the resolution of disciplinary matters involving members of the police force...No discretion exists to select another legal mechanism, like arbitration, to proceed against a police officer on a disciplinary matter."

Although this matter is out of Saskatchewan, this decision has been quoted in several *Police Act* adjudications and in the Supreme Court of BC.

It is important to note that the *Police Act* contemplates that members could be held to account under more than one statute. Section 179 of the *Police Act* states, in part:

Criminal prosecutions and civil remedies not prohibited

- 179** (1) Nothing in this Act or the regulations prohibits
- (a) civil or criminal proceedings against a member or former member, or

(b) proceedings under the *Labour Relations Code* as to the interpretation, application or operation of a collective agreement.

(2) A decision by Crown counsel not to commence or proceed with a criminal charge arising out of the same facts and circumstances as those related to a complaint or an investigation under this Part does not preclude the continuation or initiation of proceedings under this Act.

(3) Acquittal or conviction on a criminal charge arising out of the same facts and circumstances as those related to a complaint or an investigation under this Part does not preclude the continuation or initiation of proceedings under this Act.

...

The BCAMCP's assumption that the *Motor Vehicle Act* somehow limits the Commissioner's discretion to consider members conduct as an offence under the *MVA* and as potential misconduct *Police Act*, is incorrect and does not exist in law.

The BCAMCP appears to be particularly concerned in cases where an on duty police officer is involved in a collision that occurs unexpectedly and unintentionally where there may be damage or injury as a result; cases that the BCAMCP characterizes as a "simple 'accident' in the truest sense." They differentiate these types of incidents with those where the driving behaviour of the member would involve "gross negligence or other bad faith situations" which would support potential misconduct under the *Police Act*. They state that the processes within each statute, the *Motor Vehicle Act* and the *Police Act*, should be managed separately.

For those cases where a collision occurs unexpectedly or unintentionally, it is the position of the BCAMCP that the determination that a police officer likely or may have committed, a *Motor Vehicle Act* offence should not automatically result in the Police Complaint Commissioner ordering an investigation under the *Police Act* or for there to be a finding of police misconduct pursuant to the *Police Act*.

This artificial distinction offered by the BCAMCP is not particularly helpful for this analysis, it would be difficult to envision incidents where there are collisions that are expected, or intentional (with the exception of ramming-type incidents as a means to stop a vehicle). To be clear, it is not the Commissioner's view that the commission of an offence under the *Motor Vehicle Act* either on or off duty will automatically constitute misconduct under the *Police Act*. Despite the conclusions reached by the BCAMCP, our records do not support that this is a practice that actually occurs.

The ability for the Commissioner to initiate an investigation under the *Police Act* is discretionary. The first step in the assessment is to determine whether or not the conduct, if substantiated, would constitute misconduct. Secondly, a number of public interest factors are taken into consideration when determining whether to initiate an investigation into an incident as laid out in the cover letter.

The BCAMCP reported that there are a “number of police agencies” who have experienced either recommendations or directions from this office indicating that the issuance of a Violation Ticket will be a significant contributing factor in whether or not a *Police Act* investigation will be ordered, and that there does not appear to be consistency in the practices of this office in this area.

Police officers should be treated no differently than a member of the public in cases when there is a motor vehicle incident. Their status as a police officer should not afford a member special treatment in determining whether a violation ticket is warranted in the circumstances.

Depending on the circumstances associated with of a motor vehicle incident, the issuance of a violation ticket and acceptance of responsibility on part of the member, are factors that the Commissioner will consider in determining whether to initiate an investigation under the *Police Act*. The fact that a member has accepted responsibility for an incident in another forum, is an important factor in addressing whether the public interest requires an investigation.

Based on a review of our records, a total of **32** files were located since April 2010, which related to driving incidents by police members. They can be categorized as follows:

- **Five** incidents related to registered complaints submitted by a member of the public;
- **12** incidents where the Commissioner initiated an investigation into the matter;
- **Four** incidents where the Commissioner received a request for ordered investigations from the involved police agency;
- **Three** matters were dealt with by the police department pursuant to internal discipline, Division 6 of the *Police Act*;
- **Six** matters related to monitor files that were reviewed and closed with no action taken by this office; and
- **Two** matters which were the subject of a mandatory external investigations pursuant to section 89 of the *Police Act* as a result of injuries suffered to a member of the public.

There were a total of 22 incidents where there was either an investigation under the *Police Act*, or the department issued a Violation Ticket and the matter was concluded and closed with no further action taken by this office. Since April 2010, only two matters relating to motor vehicle incidents have been sent to Crown counsel by this office, pursuant to section 111 of the *Police Act*

Based on a review of our internal records, there is no evidence of our staff providing direction to investigators to have violation tickets issued. There are several matters where investigators sought advice from this office or requested a discontinuation based on a decision from the collision investigator to issue a violation ticket for an offence related to the motor vehicle incident. Making inquiries as to whether a violation ticket will be issued is a part of our duties in ensuring that the Commissioner appropriately exercises his discretion. When we receive a *Police Act* complaint from a member of the public that discretion is removed, the Act states that the Commissioner must determine whether the complaint is admissible or not.

There have been occasions where the Commissioner has agreed to a discontinuation request from a police department. In reviewing these cases, the Commissioner determined that it was not in the public interest to pursue an investigation under the *Police Act* when the matter has been dealt with appropriately in another forum. I have included an excerpt from a *Notice of Discontinuation* below:

It is in the public interest that the oversight conducted in these cases be fair to the parties involved, and that if alternate courses of action such as *Motor Vehicle Act* offences are proceeded with, consideration should be given to whether a discontinuation is warranted. Having had the opportunity to review all of the information obtained in relation to this matter, this office has determined that further investigation is neither necessary nor reasonably practicable.

I have personally been involved in a small number of files where I have queried senior management as to whether or not a violation ticket was contemplated, with the understanding that if the member accepted responsibility, that the Commissioner would consider this information in terms of his exercise of discretion to order an investigation, or discontinue an ongoing investigation.

This office has worked to maintain positive working relationships with the police executives. This letter is an unfortunate misstep and was clearly authored without an understanding of the actual practices of our office with regard to this issue. As mentioned in the cover letter, should the BCAMCP disagree with decisions of this office, we suggest that you convince government to make changes to the legislation, file a petition to Judicially Review a decision made by the Commissioner, or convince two-thirds of the Legislature to remove the Commissioner from his position.



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