



OFFICE OF THE
POLICE COMPLAINT COMMISSIONER

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MEDIA STATEMENT

Commissioner Review Confirms the Decisions of Retired Judges as Final and Conclusive.

Victoria - The Office of the Police Complaint Commissioner (OPCC) announced today that Commissioner Stan T. Lowe has completed a review of two investigations and subsequent discipline proceedings involving former Chief Constable Frank Elsner. The discipline proceedings took place before retired Chief Judge Carol Baird Ellan and retired Justice Ian Pitfield, acting as Discipline Authorities.

The Commissioner has released his findings in his Summary Informational Report available on the OPCC website.

The Commissioner has determined that it is in the public interest to release to the public his Summary Informational Report: "Review of The Investigations and Disciplinary Process Concerning Frank Elsner." The Report includes aspects of the police discipline process, including relevant excerpts from the retired judges decisions in each discipline proceeding. This can be found on the OPCC website.

The Commissioner stated the following:

"I have reviewed the investigations and disciplinary processes concerning these matters and I have concluded that the decisions and discipline proposed by the Discipline Authorities are reasonable and appropriate based on the evidence. Therefore, I have determined that the decisions and discipline are final and conclusive. This concludes the police discipline process."

Ultimately, the former chief was found to have committed a total of 8 acts of misconduct under the *Police Act*. The retired judges found the following misconduct and imposed the following discipline:

Discipline Authority Retired Chief Judge Baird Ellan:

1. ***Discreditable Conduct*** by misleading a subordinate in connection with the disciplinary investigation: **Suspension for 30 days, Demotion to rank of Constable, and Training on ethical issues.**

2. *Discreditable Conduct* by providing misleading information to the internal investigator: **Dismissal from policing**
3. Deceit by attempting to have a witness provide a false statement to the investigator: **Dismissal from policing**
4. *Discreditable Conduct* by engaging in conduct with the spouse of a member under his command, which constituted a breach of trust and conflict of interest: **Dismissal from policing.**
5. Inappropriate use of police department equipment and facilities: **Dismissal from policing.**

Discipline Authority Retired Justice Ian H. Pitfield:

6. *Discreditable Conduct*: unwanted physical contact with female Officer A: **Suspension for 30 days and required training for harassment and sensitivity** (concurrent for all three matters addressed by DA Pitfield).
7. *Discreditable Conduct*: unwanted physical contact with female Officer B: see above, **Suspension for 30 days and required training for harassment and sensitivity.**
8. *Discreditable Conduct*: inappropriate remarks of a sexual nature toward female Officer B: see above, **Suspension for 30 days and required training for harassment and sensitivity.**

The Commissioner states:

“Frank Elsner’s official Service Record of Discipline in policing will reflect that he committed 8 acts of misconduct. The record will also confirm his demotion to constable and his dismissal from policing. The 30 days suspension and training in ethics, harassment and sensitivity will be recorded. These findings and the accompanying discipline measures are unprecedented in Canadian policing.”

Report: Relevant Excerpts

THE ALLEGATIONS ADDRESSED BY RETIRED CHIEF JUDGE CAROL BAIRD ELLAN

ALLEGATION #1: the former chief’s conduct toward the husband officer

In summary, the evidence amply shows that the former chief intentionally and dishonestly minimized the nature of his interactions with the wife, in his September 8, 2015 conversation with the husband. The husband left the meeting under a false impression as to the nature of the conduct that was the subject of the investigation, and then informed the co-chairs, based on that, that he did not want an investigation. The investigation proceeded internally, in part because of the position taken by the husband.

It cannot be overlooked that the former chief's job, under the Police Act, included acting as a Discipline Authority in relation to conduct investigations. The Police Act was part of his job description, as was the BC Police Code of Ethics and the code of ethics of the relevant department. In my view the former chief cannot be heard to say that he hadn't read the Act or all of the relevant codes of ethics and applicable professional standards. He should have known the husband's potential role, but he should also have known his own. Had he been cognizant of his duty as a chief, in my assessment he would not have accepted the invitation to meet with the husband at all.

I have no hesitation in finding that, by misleading a subordinate in connection with the subject matter of an investigation into his own conduct, an investigation in which the subordinate had an obvious role to play, the former chief knew or ought to have known he would bring discredit to his office and hence the department. I find that the evidence establishes the misconduct contained in the first allegation.

Disciplinary Measure: Suspension 30 days, demotion to rank of Constable, training in ethical standards

ALLEGATION #2: Misleading the internal investigator

It becomes clear on reviewing the former chief's evidence that he is caught in a web of untruths. Where he finds himself facing contradictory evidence, he tailors his statements to reveal only that part of the truth he feels he must, to address the established facts with which he is faced. His statements reflect many obvious efforts at obfuscation, in my respectful view.

Reading the statements in sequence and in context, they disclose a clear intent to mislead not only the internal investigators, but the external investigators, as well.

He appears, in his statements and his testimony, to have considered himself justified in presenting to her any version of the events that would assist him to achieve a favourable outcome.

...

*I have no hesitation in concluding that for a Chief Constable to deliberately mislead the investigator on an internal discipline investigation, in which he is the subject, is misconduct. While the internal process is not governed by Section 101, I do not think that leads to a conclusion that the former chief had no obligation to be forthright and responsive in his interviews with the investigator. Police constables have a high standard in relation to providing information within the context of legal proceedings. There is authority for the proposition that providing a false statement in an administrative investigation can be a criminal obstruction of justice: *R. v. Wijesinha*, [1995] 3 SCR 422, 1995 CanLII 67 (SCC). There is also authority for the fact that police officers have a duty of integrity in investigative proceedings: *R. v. Dosanjh*, 2006 BCPC 574. I would observe that Chief Constables have an identical duty of integrity, but that it is combined with a duty to exemplify high standards.*

Disciplinary Measure: Dismissal from policing

ALLEGATION #3: Attempting to procure a false statement

I find that the conversation unfolded more closely to the way it was reported by "A", and that the former chief did ask "A" to lie, or to withhold evidence, should "A" be called to provide a statement to the internal investigator.

...

I have no hesitation in finding that the former chief attempted to procure a statement from "A", knowing it to be false or misleading. I find that the evidence establishes the misconduct contained in the third allegation.

The former chief's actions were not only grounded in self-interest but reflected a lack of respect for "A's" own integrity and potential liability. In addition, this misconduct strikes at the heart of the integrity of the disciplinary investigative process and displays disrespect for a core value of policing, that of testimonial trustworthiness. Moreover, it is an abdication of the exemplary moral and ethical standards required of a Chief Constable.

I consider the misconduct in relation to this allegation of deceit to be very high on the scale of seriousness.

Disciplinary Measure: Dismissal from policing

ALLEGATION #4: Conflict of Interest/ Breach of Trust

I concluded that the former chief engaged in an inappropriate relationship with the wife of a member under his command and found it to be Discreditable Conduct in the nature of an obvious conflict of interest and breach of the subordinate member's trust. I found that it created an objective appearance of conflict and that the former chief knew or ought to have known it was conduct that would bring discredit to his department.

In submitting that the behaviour falls on the low end of the spectrum counsel for the former member in his submissions relies on a passage in the Court of Appeal's reasons in the court characterizes the conduct as "an entirely consensual and short-lived flirtation via Twitter..."

In my decision following the discipline proceeding, I noted in relation to this passage that the Court of Appeal seemed to be "unaware of the extent of the interactions between the former chief and the [spouse of the affected officer]." This was a course of conduct that took place over several months and which included multiple suggestive messages back and forth, and a physical encounter in the nature of a romantic embrace and kiss, in the former chief's office. I would also observe, with respect, that the Court of Appeal's remarks appear to overlook the breach of trust aspect in relation to the member under the former chief's command.

I would characterize the misconduct in relation to this allegation as moderately high on the scale of seriousness.

...

In relation to the effect on the husband member, his initial reaction to the knowledge that there had been an inappropriate interaction was to confront the former chief, as described in the earlier proceedings. This angry confrontation is indicative of his sense of betrayal, albeit perhaps more in relation to his wife; however, it is clear that he went directly to the former chief to discuss the allegation with him. I have already dealt with an allegation arising out of the former chief's deception of the member, during that conversation, about the extent of the relationship, which compounded the betrayal. I am careful not to conflate the issues of personal betrayal with the breach of trust relating to the former chief's office. The fact of the employment relationship adds another layer of betrayal and is what brings the elements of conflict of interest and breach of trust (under the Police Act) into play.

It should have been obvious to the former chief, on many levels, that the dalliance was completely inappropriate. The standard of conduct for a Chief Constable is higher than that for other members in the department. He is required to set the example. For those reasons I place the conduct at a moderately high level of seriousness, when considered within the context of the circumstances which existed at the time it occurred.

ALLEGATION #5: Inappropriate Use of Departmental Facilities and/or Equipment

I found that the former chief intentionally used his business Twitter account which depicted his persona as Chief Constable of the relevant department to communicate with the spouse of the affected member. I also found that he used his email account and his business cell phone to communicate with the spouse of the affected member. These were inappropriate uses of equipment or facilities, which the former chief knew or ought to have known were inappropriate. Much of this activity took place while the former chief was on duty.

I consider the misconduct in relation to this allegation of corrupt practice to also be moderately high on the scale of seriousness. It is not as high as a deceitful misappropriation or theft of equipment and not as low as a single incident of use for a purpose unrelated to the office. Again, the fact of the former chief's position is an aggravating factor: a Chief Constable is required to exemplify the standards of conduct, not flout them.

...

Disciplinary Measures:

I am unable to say whether, had these two allegations stood alone and had the former chief behaved in a very different fashion in relation to them, matters may have been different. I find I am unable to consider them apart from the allegations that arose during the investigation of them, which involved serious breaches of integrity. I am equally unable to

disregard the conduct found by DA Pitfield to have been proven. The allegations in this matter must be considered in light of all that, as well as in light of the former chief's role in the department and the high standard of conduct to which a Chief Constable must be held. Consequently, as stated in the accompanying discipline record, the proposed disciplinary measure on both allegations is dismissal.

THE ALLEGATIONS ADDRESSED BY RETIRED JUSTICE IAN H. PITFIELD

ALLEGATION #1: unwanted physical contact with Officer A

"In assessing the first of three allegations of Discreditable Conduct, retired Judge Pitfield described what Officer A said occurred. She was standing near the former chief's assistant's desk in 2014, when the former chief approached her from behind:

[He] pressed his groin against her buttocks, and his chest against her back in what [Officer A] described as a "nuts to butts" manoeuvre. ... She told investigators she was shocked that "my new Chief would stand behind me and from a female's perspective it's almost like an oppressive position in a, in a way, like just was very inappropriate, awkward."

"Retired judge Pitfield found Officer A's evidence "to be credible and believable" and found that the former chief "made unwanted physical contact" as alleged. He concluded this conduct:

is not consistent in any way with the obligation to avoid harassment and to refrain from workplace misconduct. Mr. Elsner's action in relation to [Officer A] amounts to the application of force, however minimal, without consent. As a police officer and Chief Constable, Mr. Elsner knew or ought to have known that the application of force, however minimal, to an individual constitutes an assault. It goes without saying that non-consensual physical contact of the kind in question is offensive to the victim and was so regarded by [Officer A]. Mr. Elsner's actions in relation to the officer violate both the VicPd Workplace Harassment Policy and Mr. Elsner's employment contract. I find that this allegation of misconduct has been proved on the balance of probabilities."

ALLEGATION #2: unwanted physical contact with Officer B

"Officer B said that the day of a police Mess Dinner in 2015, the former chief approached her in a hallway at the VicPD headquarters and held her by both arms with her back against or close to the wall. She says that he held her in this manner for about a minute. She told investigators that she felt uncomfortable that the former chief was "in her space" and holding her by the arms. Retired Judge Pitfield preferred the officer's evidence embodied in her statements to the evidence of the former chief, who reported no recollection of the incident. He found that the incident did occur and that Officer B felt uncomfortable as she described. The retired judge wrote:

His evidence would suggest that it was his practice to place his arms on individuals as a sign of friendship or gratitude. It is an error to believe that anyone can touch or greet another in that

manner with impunity. The propriety of the act will depend upon the circumstances and whether consent to contact was granted. In this case, [Officer B] was taken by the arms in a position with her back to the wall, whether against it or not is unimportant. As someone subordinate to the Chief Constable she could reasonably have felt threatened or intimidated. It was not open to her to back away and highly unlikely, in the circumstances, that she would tell a Chief Constable to remove his arms from her. In my opinion, Mr. Elsner knew or ought to have known that his actions would humiliate or offend [Officer B]. I find that this allegation of misconduct has been proved on a balance of probabilities.

ALLEGATION #3: inappropriate remarks of a sexual nature toward Officer B

“The third allegation also involved Officer B. It arose at a use-of-force training session in 2014 at which the former chief was paired up with this officer to practice lateral neck restraints; that involved close body contact. Officer B said:

when she applied the restraint to Mr. Elsner, or him to her, he said things like “you are so warm, don’t stop” or “I could do this all day, you’re so warm.” She said the comments were made multiple times. She stated that while the comments were not overtly sexual, she felt they had a sexual tone as they were made at the time when their bodies are touching during the use of force scenarios.”

“The retired judge found that the officer’s recollection of the events was more specific than that of the former chief, and she reported the incident to her husband and another officer. He concluded as follows:

I find that the statements made by Mr. Elsner to [Officer B] in the course of the use of force training session violate the VicPD Workplace Harassment Policy and Mr. Elsner’s contract. There is no justification for the comments made when, as part of a professional training exercise, the Chief Constable is required to engage in close physical contact with a subordinate and vice versa. The remarks must reasonably be construed to have a connotation that is not an expression of need, but of desire. I find this allegation of misconduct to constitute misconduct proved on a balance of probabilities.”

THE DISCIPLINARY MEASURES FOR THESE THREE ACTS OF MISCONDUCT

In my reasons for decision I stated that Mr. Elsner’s conduct on each occasion was a breach of both the VicPD workplace harassment policy and the terms of his written employment contract. Standing alone, the misconduct could be regarded as minimal in impact. However, because Mr. Elsner was the Chief Constable, the members were his subordinates, he stood in a position of power and responsibility vis-à-vis both members, and the three instances constituted breaches of VicPD workplace policy and the terms of his employment contract, I consider the misconduct to be well advanced on the seriousness scale.

...

The aggravating circumstances are the seriousness of the misconduct in the context of clearly defined VicPD policy and Mr. Elsner’s employment contract, and the fact that Mr. Elsner was and appears to remain reluctant to acknowledge the nature and seriousness of the misconduct. Mr. Elsner denied

the incident involving [name withheld], but in submissions regarding penalty says it was brief in duration and an isolated incident involving minimal physical contact. He denied or did not recall the two incidents involving [name withheld] but, in the face of my findings of misconduct, says that both incidents fall at the low end of the spectrum. In sum, Mr. Elsner is obliged, at this point, to accept my determination, but it is apparent he does not regard his conduct toward his subordinates as egregious. I am concerned that Mr. Elsner lacks insight into the effect of his attitude and behaviour towards subordinates.

...

The overriding concern in this case is Mr. Elsner's conduct viewed in the context of his obligations to subordinates and the responsibilities defined in his employment contract. I have found him to be in breach of both. His employment contract required Mr. Elsner to set a high ethical level of conduct for the department; to promote the highest standards of integrity, professional conduct and equality throughout the VicPD; and to foster a culture that promotes ethical practices and encourages individual integrity and accountability. That he has not done in the instances before me.

...

In my opinion, the misconduct in issue before me falls short of warranting dismissal. That said, the question of whether dismissal was warranted had he not resigned, having regard for the accumulation of complaints toward him, was one for consideration by the Victoria and Esquimalt Police Board. The Board was in a position to assess whether Mr. Elsner's conduct and deportment as Chief Constable toward subordinates when assessed by reference to his activities in the workplace, his attitude toward members of the VicPD, and his employment contract were sufficiently egregious to warrant dismissal from his employment for cause.

...

In the result, I conclude that suspension without pay for 30 days [concurrent on the three matters], the maximum term permitted by the Police Act in respect of each finding of misconduct, and the imposition of a requirement that he undertake and appropriately respond to a recognized course of harassment and sensitivity training are the appropriate disciplinary measures in this case.

The Commissioner states in his report:

"For women to feel safe and valued in policing, it is especially crucial that the most senior officers conduct themselves with integrity and respect. The determinations of Retired Judge Pitfield demonstrate the deficit in leadership the former chief exhibited. His conduct caused emotional harm and violated the dignity of the affected parties, the gravity of which is amplified by his position of power and the importance of the office held by a Chief Constable."

COMPLETION OF THE DISCIPLINARY PROCESS

The Commissioner addresses his decision to complete the police discipline process in his report:

“Before detailing the specifics of those two allegations, one point merits some explanation. In the reasons given by the Court of Appeal, there is a comment (at para. 94) suggesting that I as Commissioner:

might reconsider whether it is still necessary or in the public interest to spend public funds at this late date on investigating what appears to have been an entirely consensual and short-lived flirtation via Twitter involving a Chief Constable who is no longer employed.

This comment suggested that it fell to me, as Commissioner, to decide whether or not to launch an investigation. However, the matter was at that point already well underway. The investigation was concluded. The disciplinary adjudication process had begun, but it was interrupted partway along. This was explained by Retired Judge Baird Ellan in her June 27, 2018, decision on the remaining two allegations:

I note that, perhaps because OPCC discipline proceedings are not public, the Court of Appeal does not seem to have been apprised of the fact that the investigation on these two allegations had long been completed at the time they rendered their decision. They also seem to be unaware of the extent of the interactions between the former chief and the [spouse of affected officer]. Further, the passage seems to overlook the fact that the Police Act provides specifically in Section 127 for proceedings to continue despite members having ceased to be police officers. And of course, findings in relation to misconduct, while perhaps academic in relation to a service record, may have future value as precedent, instruction, and deterrent.

In her later disciplinary decision of July 23, 2018, having found misconduct, DA Baird Ellan commented:

This was a course of conduct that took place over several months and which included multiple suggestive messages back and forth, and a physical encounter in the nature of a romantic embrace and kiss, in the former chief's office. I would also observe, with respect, that the Court of Appeal's remarks appear to overlook the breach of trust aspect in relation to the member under the former chief's command.

Although the Court of Appeal was understandably inclined to discourage a protracted investigative process, the two outstanding misconduct allegations were already the subject of adjudication. The retired judge did not have the authority to terminate the proceedings, nor was it appropriate for our office to interrupt the Retired Judge's almost-concluded work. I would add that the retired judge dealt with the remaining two allegations within two months of the Court of Appeal ruling, and discipline was imposed by her four weeks after that.”

A REVIEW OF THE MAYORS' DISCIPLINE PROCESS

The Commissioner's decision to recommend legislative change to government:

"The potential for a conflict of interest arising out of the relationship between the Chief Constable and the chair of that a police board has been recognized in the BC Police Board, Resource Document on Roles and Responsibilities under the Police Act, 2015, at p. 4:

As the chair of a municipal police board is also the mayor of the municipality, there is an inherent conflict of interest, particularly with respect to the budget.

As noted, the mayor of a municipality is an elected politician, and almost always lacks a comprehensive understanding of policing, police culture and the administration of police discipline. Generally, the mayors who serve as police-board chairs do not have adjudicative experience, or a familiarity with administrative law principles.

It is a most serious event when a Chief Constable becomes the subject of a Police Act investigation, because they occupy such a high position of public trust in the community and the justice system. It makes little sense to entrust the responsibilities of Discipline Authority to a person who lacks the requisite training and experience, and who may have little to no understanding of the complexities of the police discipline system.

I have reviewed the administration of the internal discipline process in this matter by the Co-Chairs, Mayors Desjardins and Helps, as Discipline Authorities. I have likewise reviewed the substantial volume of evidence gathered during the course of the external investigations described earlier. This includes reviewing the transcripts of witness interviews, including both mayors as Co-Chairs.

My concerns arising from this matter have served as the catalyst for me to formally recommend to the government amendments to the Police Act. I have recommended that when a misconduct matter involving a Chief Constable or Deputy Chief Constable requires a Discipline Authority, the Discipline Authority should be a retired judge, not a mayor."

Conclusion

The following are excerpts from the Commissioner's report:

Policing has often been referred to as a "noble" profession, a description that I truly endorse. Nobility has generally been defined as excellence of character and superior ethical qualities that often serves others. It has been my experience that those engaged in policing in this province work hard to uphold the nobility of policing. And they almost always succeed in this.

In an oversight system where police investigate police, the professionalism of the investigation team in these matters exemplifies the nobility of policing. Their commitment

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to excellence in their work has served to enhance public confidence in policing, and police confidence in the accountability of the police oversight process.

VicPD has been resilient in moving on from a time in which its members expressed no confidence in their Chief Constable and police board. The department is now under the command of a new Chief Constable, with several new promotions to the executive, all from within its ranks. There is good reason to expect the VicPD executive will cultivate a supportive environment that facilitates women in reaching their full potential professionally, including promotion through the ranks.

It is my hope that this Summary Informational Report will provide useful insights about the police discipline process, and the need for transparency and accountability through civilian oversight of law enforcement. Through civilian oversight, we strive to maintain public confidence in policing and police confidence in the police discipline process. The process has demonstrated that those in executive positions in policing are to be held to a higher standard of ethical conduct than the rank and file who serve under, and they should not be accorded preferential treatment because of their executive status.

I hope that despite the long path taken to get here, ultimately the public and police will see the value of independent civilian oversight.

To learn more about the Office of the Police Complaint Commissioner, please visit the OPCC webpage at www.opcc.bc.ca.

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