

IN THE MATTER OF THE *POLICE ACT, RSBC 1996, C.367* as amended

AND

IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT AGAINST
[REDACTED] OF THE NELSON POLICE DEPARTMENT.

NOTICE OF DECISION

To: [REDACTED]
c/o Nelson Police Department
Professional Standards Section

And to: Chief Constable Paul Burkhart
c/o Nelson Police Department
Professional Standards Section

And to: [REDACTED]
[REDACTED]
Professional Standards Section

And to: [REDACTED]

And to: Clayton Pecknold, Commissioner
c/o Office of the Police Complaint Commissioner

INTRODUCTION

On September 8, 2018, [REDACTED], of the Nelson Police Department, and his common-law spouse, [REDACTED] became involved in a loud, verbal altercation at a bar in the City of Nelson. In a fit of anger, [REDACTED] left the bar, returned home and caused physical damage to their shared

residence by throwing building material from a recent renovation out the front door of the residence.

When [REDACTED] returned from the bar, an argument developed; she got on top of [REDACTED], began hitting him, and tore his shirt. [REDACTED] then punched two holes in the bedroom wall. A 911 call was made. Members of the Nelson Police Department attended, which resulted in a Police investigation.

BACKGROUND

The evidence in these proceedings is not in dispute. [REDACTED] is a member of the Nelson Police Department. At the material time, he was involved in a common-law relationship with [REDACTED]. On September 8, 2018 he became involved in two incidents; the first in a bar and the second at his residence that resulted in a 911 call and subsequent Police investigation.

I will review the evidence in more detail.

[REDACTED]

[REDACTED] The trouble between the parties started at a barbeque. [REDACTED]. Apparently a male at the barbeque made flirtatious comments toward her and the fact that she did not rebuff the comments angered [REDACTED]. [REDACTED] was drinking; admitting to Police that he consumed 4 – 5 drinks of scotch and water. However, later, he told police that he consumed 3 - 4 drinks over a 4-hour period.

At some stage [REDACTED] wanted to go home but [REDACTED] wanted to go dancing at a bar. The two agreed to go their separate ways. However, [REDACTED] continued to text [REDACTED], urging him to come to the bar. [REDACTED]

[REDACTED]. In any event, after continued texts from [REDACTED] relented and went to the bar. He became angry and attempted to convince [REDACTED] to go home with him. She refused and went with her friends to a

different bar. He again called out to her for her to return home with him. She ignored him so he went home alone.

Once at home, [REDACTED] became angry with her continued text messages. He drove to the bar where [REDACTED] was; he walked up to where she was sitting and gave her "the finger". He said it's quite possible that he told her to "fuck off". [REDACTED] then returned home. Once home, and in a fit of anger, he took the previously installed hard-wood flooring, and underlay and threw it out the front door. He said it was an act of defiance. He said he also threw out some garbage and a coat rack. When [REDACTED] returned home he was asleep. She jumped on his back. She was intoxicated and angry for throwing the garbage out the front door. She grabbed onto his shirt and ripped it. He took hold of her arms to prevent her from making contact with him and pushed her off his body with his forearm. At that stage he became upset and punched two holes in the wall. He did not, at any time, hit or push her. She wanted him to leave so he left. When he was outside he realized he needed some clothes and tried to get back into the house. She had locked the door and refused to let him back in . She then called 911.

POLICE INVESTIGATION

Members of the Nelson Police Department attended at the residence. [REDACTED], one of the two officers who attended, offered to drive [REDACTED] to his father's home. [REDACTED] of the Nelson Police Department submitted two reports to Crown Counsel. The first was in relation to [REDACTED] and her physical confrontation with [REDACTED] and the second was related to the damage [REDACTED] caused. No charges were approved. Other than the physical contact to stop her from hitting him, [REDACTED] did not use any physical force against [REDACTED].

The Police reports are quite favourable towards [REDACTED], stating that he never threatened or harmed [REDACTED] in any way. In fact, one of the police reports refers to him in an all too familiar way by using his first name, [REDACTED]. As well, [REDACTED], while not condoning the damage that [REDACTED]

██████████ did to their home, agreed that she continually aggravated him to a point where it drove him over the edge. ██████████.

On December 1, 2018 the Office of the Police Complaint Commissioner received information regarding the incident of September 8, 2018. On January 15, 2019, then Commissioner, Stan Lowe, concluded that, based on the information provided by Chief Constable Burkhart, the conduct alleged against ██████████ ██████████, if substantiated, would constitute misconduct. He thus ordered that any potential misconduct or attempted misconduct as defined in s.77 of the *Police Act*, be investigated. The Commissioner noted that, according to the initial police report, Chief Constable Burkhart advised the Office of The Commissioner the Nelson Police primarily focused on the actions of ██████████ girlfriend and considered ██████████ to be a victim in the matter. Commissioner Lowe concluded, *"in addition to the relatively small size of the Nelson Police Department, the Department's response to this incident has created a perception that investigators may have come to a predetermined conclusion regarding the member's conduct" ... "accordingly I am of the opinion that it is necessary in the public interest that the alleged misconduct as described above be investigated by an external police force, pursuant to s.93(1)(a) and s.93(1)(b)(ii) of the Police Act. I confirm that the Royal Canadian Mounted Police will conduct the external Police Act investigation and that Deputy Commissioner Brenda Butterworth-Carr will appoint an investigating officer to conduct the investigation"*.

The Commissioner, under s.35(1) designated ██████████ of the ██████████ Police Department to exercise the powers and perform the duties of the Discipline Authority (DA) in relation to this matter. The investigative function was then delegated to acting ██████████. He concluded that ██████████ actions in the pub were not observed, nor did they call the attention of other patrons in the pub. As well, the interaction was brief, in the heat of the moment, and *"was between two individuals during a period of domestic upheaval aggravated by the consumption of alcohol"*. The Discipline Authority also concluded that the members' standing in the community was not identified and that the reputation of the Nelson Police Department did not appear to have been negatively affected. As

well, with respect to the incidents at the house, ██████████ concluded that there was no evidence ██████████ assaulted or threatened ██████████. In summary, the DA concluded that these actions took place in the heat of the moment during an argument with a common-law spouse. The report goes on to state that had ██████████ not called 911, this incident would never have been known to the Nelson Police Department. Moreover, there was no media coverage of the incident and the neighbours were unaware of what had occurred at the residence. The report also states that ██████████, "appeared to be the primary aggressor in relation to a domestic argument". In an earlier investigation ordered by, then Commissioner Lowe, ██████████ of the RCMP ██████████ ██████████, concluded that, "this was a private, domestic argument that on the balance of probabilities does not meet the threshold of discreditable conduct". Throughout the Police reports and the FIR, ██████████ actions were unduly minimized. The clear perception appears to be that he was given favourable treatment in light of his position as a police officer. That may not have been the intent of the reports. I recognize that there are many mitigating circumstances favouring ██████████ ██████████, but examining the circumstances objectively, there can be no justification for (taken as a whole) his actions of the evening.

Complaint Commissioner Lowe did not agree. He stated that "In my view, the Discipline Authority did not correctly apply the test for assessing discreditable conduct pursuant to s.77(3)(h) of the Police Act". Accordingly, I was appointed pursuant to s.117(4) of the Act, to conduct a review of that decision.

PROCESS UNDER THE POLICE ACT

I have been appointed under s.117(4) of the Police Act, thus this review is governed under that provision of the Act. Under the Act, it is my duty to assess whether "the conduct of the member...appears to constitute misconduct". See s.117(9). It is instructive to note that my review is based on the FIR and other written material that is provided. This is what is commonly called a paper-based review; that is to say, I do not hear witnesses or call additional evidence. Moreover, as a reviewing Judge, I have no

appellate function from any previous finding. As well, it is not my duty to determine the correctness of an earlier finding. S.117(1)(d) states that "a retired judge conducting the review is to "make her or his own decision on the matter".

It is with these guidelines that I have made my own assessment as to whether [REDACTED] conduct appears to constitute misconduct.

THE LAW

The law is not in dispute. *Discreditable Conduct* is defined under s.77(3)(h) of the Police Act. It is as the words of the section state, "*conduct that a member knows or ought to know would likely bring discredit on the Police Department whether the officer is on or off duty*". (emphasis added). There are two aspects of the statutory definition that are important. The first is the phrase, "knows", or "ought to know".

Discreditable Conduct may arise when the officer subjectively knew that his or her actions would bring discredit to the Municipal Police Department. However, there may also be Discreditable Conduct where the officer "ought to know" that his/her actions might bring discredit upon the Municipal Police Department. Thus, the primary test to be applied is an objective one. In other words, the circumstances and the conduct in question must be measured against the reasonable expectation of the community. In other words, what conclusions would reasonable people in the community draw from an objective analysis of the evidence? The question of course, is rhetorical.

The second aspect of the statutory definition in the phrase is "*would likely bring discredit on the Municipal Police Department*". It is not necessary that the conduct *would bring, or has brought* discredit on the Municipal Police Department. It is sufficient that the conduct would *likely* bring discredit.

S.77(3)(h)(i)-(iii) are specific examples of Discreditable Conduct. For instance, s.77(3)(h)(i) refers to an officer who has acted "in a disorderly manner that is prejudicial to the maintenance of discipline in the

Municipal Police Department. The phrase *disorderly conduct* is broad and intended to capture a broad range of conduct. It is sufficient that the conduct was disorderly.

FINDINGS

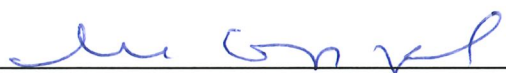
I have no difficulty in concluding that the conduct of [REDACTED], on the evening in question, appears to constitute misconduct. Throughout the investigation and the review, the Police and the Discipline Authority appear to have treated this matter as a domestic incident involving two people. This is not a case of "domestic discourse". There is no doubt that as far as the events are concerned, there is enough blame to share as between the parties. However, that is not the issue in determining whether or not [REDACTED] committed acts of misconduct under the *Police Act*.

I recognize that [REDACTED] has agreed that she goaded [REDACTED] into coming to the bar. It is no answer to say that all the parties consider the matter to be personal and private. The Discipline Authority appears to have treated this matter as a domestic situation rather than a potential offence under the *Police Act*. As stated above, the evidence is not really in dispute. There are a number of specific examples in the instances where in [REDACTED] conduct appears to constitute misconduct. They include going into the pub and making a gesture with his middle finger to [REDACTED], and returning to their residence and causing willful damage to the property therein, including punching holes in the bedroom wall. Perhaps, taken individually, these actions may not appear to be discreditable conduct, however, taken cumulatively, they appear to constitute misconduct within the meaning of the *Police Act*. It should be noted, that [REDACTED] actions span the whole evening.

CONCLUSION AND NEXT STEPS

I have made a finding pursuant to s.117(9) of the *Police Act*, that [REDACTED] conduct appears to constitute misconduct. Under the Act, I must now assume the role of Discipline Authority. I am prepared to offer a pre-hearing conference to [REDACTED] under s.120 of the *Act*. The range of disciplinary

corrective measures I am considering include, "*requiring the officer to undertake specified counselling or treatment, requiring the officer to participate in a specified programme or activity, reprimanding the member in writing or reprimanding the member verbally, or giving the member advice as to his conduct*".



The Honourable Wally Oppal, Q.C.