



Office of the  
Police Complaint Commissioner

British Columbia, Canada

**NOTICE OF APPOINTMENT OF RETIRED JUDGE**

Pursuant to section 117(4) of the *Police Act*

OPCC File: 2019-15763

June 24, 2019

- To: Constable [REDACTED] (Member)  
c/o Nelson Police Department  
Professional Standards Section
- And to: [REDACTED] (External Investigative Agency)  
c/o Royal Canadian Mounted Police  
Professional Standards Section
- And to: [REDACTED] (External Discipline Authority)  
c/o Delta Police Department  
Professional Standards Section
- And to: Chief Constable Paul Burkhart  
c/o Nelson Police Department  
Professional Standards Section
- And to: The Honourable Judge Mr. Wally Oppal, Q.C., (ret'd) (Retired Judge)  
Retired Judge of the Appeal Court of British Columbia
- And to: His Worship Mayor John Dooley  
Chair, c/o Nelson Police Board

On January 15, 2019, based on information provided by the Nelson Police Department, former Police Complaint Commissioner Lowe ordered an external investigation into the conduct of Constable [REDACTED]. RCMP Professional Standards investigator [REDACTED], conducted an investigation into this matter.

On May 21, 2019, [REDACTED] completed his investigation and submitted the Final Investigation Report to the Discipline Authority.

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Clayton Pecknold  
Police Complaint Commissioner

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On May 27, 2019, ██████████ of the Delta Police Department issued his decision pursuant to section 112 in this matter. Specifically, ██████████ identified one allegation of misconduct against Constable ██████████. He determined that the allegation of *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* against Constable ██████████ did not appear to be substantiated.

Pursuant to section 117(1) of the *Police Act*, having reviewed the allegation and the alleged conduct in its entirety, I consider that there is a reasonable basis to believe that the decision of the Discipline Authority is incorrect.

## Background

On September 8, 2018, Constable ██████████ and his common law partner attended a barbecue with friends. Constable ██████████ was off duty at the time and both he and his girlfriend consumed alcohol while at this barbecue. At some point during the evening, Constable ██████████ left the barbecue and returned home while his girlfriend remained with friends. During the course of the evening, Constable ██████████ girlfriend sent him several text messages wanting him to re-join her. Constable ██████████ eventually attended a pub where she was sitting with friends, walked up to her, gave her "the finger" then left and returned home.

It was reported that Constable ██████████ returned home angry and proceeded to throw laminate flooring, underlay, coat rack and a picture frame out the front door.

Several hours later, Constable ██████████ partner returned home and became angry when she saw the items thrown outside. As a result, she went into the house, woke Constable ██████████ and attempted to drag him from the bed. This action resulted in Constable ██████████ becoming angry and he pushed his partner away. He then punched two holes in the wall of the bedroom. Constable ██████████ subsequently left the house which was then locked behind him by his partner. Constable ██████████ immediately returned to retrieve some clothing from the house; however, his partner refused to let him back into the residence, at which point he forced open the door, damaging the door and frame.

Constable ██████████ partner was fearful and as a result called 911 and then hung up the phone. Two Nelson Police Department officers attended the residence. The two officers conducted an initial investigation at the scene and eventually Constable ██████████ was taken to stay with a family member.

At the time of the incident, Constable ██████████ had been living with his partner for approximately two weeks.

The Nelson Police Department initiated a criminal investigation into the matter and submitted a Report to Crown Counsel. No criminal charges against either Constable ██████████ or his partner were approved.

The Former Police Complaint Commissioner determined that it was necessary in the public interest that the alleged misconduct be investigated by an external police force and the Royal Canadian Mounted Police (RCMP) were appointed for this purpose. In addition, former Police

Complaint Commissioner Lowe appointed a senior officer at the Delta Police Department to exercise the powers and perform the duties of a Discipline Authority in relation to this matter.

On May 21, 2019, the RCMP completed their investigation and the Final Investigation Report was submitted to the OPCC and to the Discipline Authority.

### Discipline Authority's Decision

On May 27, 2019, the Discipline Authority issued his decision pursuant to section 112 of the *Police Act* in this matter. Specifically, the Discipline Authority identified one allegation of misconduct of *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* against Constable [REDACTED] and determined that this allegation did not appear to be substantiated.

In relation to the interaction between Constable [REDACTED] and his partner at the pub, the Discipline Authority determined that the actions of Constable [REDACTED] were not observed nor did these actions call attention to other patrons in the pub. 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 concluded that the member's standing in his community was not identified and that the reputation of the Nelson Police Department did not appear to have been negatively affected.

In relation to the actions at the residence of Constable [REDACTED] and his partner, the Discipline Authority determined that there was no evidence that Constable [REDACTED] assaulted or threatened his partner. The damage to the property was contained to items that were jointly owned by Constable [REDACTED] and his partner and that damage to the wall and front door were made out of anger as a result of "being assaulted while sleeping and [being] unable to get his belongings." The Discipline Authority concluded that the incident did not garner the attention of any other individuals in the community nor was there any media attention.

In arriving at his decision, the Discipline Authority relied on an objective test for assessing the *Discreditable Conduct* allegation. The Discipline Authority identified two objective standards arising from two separate cases in Ontario and Alberta:

*Silverman and Ontario Provincial Police (1997) 1181 at 1187 OCCPS*

"The measure used to determine whether conduct has been discreditable is the extent of the potential damage to the reputation and image of the service should the action become public knowledge."

And

*Toy v. Edmonton Police Service 2014 ABCA 353*

"An objective evaluation as would be made by a dispassionate reasonable person fully apprised of the circumstances and with due regard for any applicable rules and regulations (or law) in force with due regard to good faith considerations where the officer under the scrutiny was required to exercise discretion under the circumstances."

Applying these standards, the Discipline Authority determined that “the public would recognize that the interaction between Constable [REDACTED] and [his partner] during this incident was a mixture of two adults in a consenting common law relationship making poor decisions in the heat of the moment.” The Discipline Authority concluded that a reasonable member of the public would not want Constable [REDACTED] to be disciplined for his actions that evening and that there was no nexus between the conduct of Constable [REDACTED] and his employment as a police officer.

The Discipline Authority determined on a balance of probabilities that the allegation of *Discreditable Conduct* against Constable [REDACTED] pursuant to section 77(3)(h) of the *Police Act* was not substantiated.

### **OPCC Decision – Section 117 of the *Police Act***

In my view, the Discipline Authority did not correctly apply the test for assessing *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act*. In *Mancini v. Constable Martin Courage*, OCCPS #04-09, the Ontario Civilian Commission on Police Services adopted the following definition of *Discreditable Conduct*:

“The concept of discreditable conduct covers a wide range of potential behaviours. The test to be applied is primarily an objective one. The conduct in question must be measured against the reasonable expectation of the community.”

While I am not bound by the view of the Ontario Commission, I do agree that the test was fairly stated in *Mancini* and appropriate in the context of the *Police Act* in this province. The above test has been consistently applied by Discipline Authorities and adjudicators to assess allegations of *Discreditable Conduct*. With respect, I have a reasonable basis to believe that the decision of the Discipline Authority was incorrect in his determination that there was no nexus between the conduct under investigation and his employment as a police officer and that there needs to be a balance between the privacy interests of the member and their off duty conduct as it relates to “manag[ing] domestic discourse.”

The evidence in this matter suggests Constable [REDACTED] caused damage to his partner’s residence that he recently moved into, notwithstanding that he may have had a partial interest in the property. Although aspects of this event could be characterized as a private or matters between two adults in a consenting relationship, the actions of Constable [REDACTED] resulted in police response to an abandoned 911 call.

Furthermore, I disagree with the Discipline Authority’s determination that the misconduct assessment in these circumstances which has been described by the Discipline Authority as matrimonial discord, would require a breach of a Criminal or Civil law. This is not a simple case of matrimonial discord. In addition, the *Police Act* is clear that a decision by Crown Counsel to not commence or proceed with a criminal charge arising out of the same facts and circumstances to those related to an investigation under the Act does not preclude the continuation or initiation of proceedings (s. 179(2)).

Intimate partner violence continues to be a significant social problem in Canada and awareness of the behavioral precursors and dynamics is a matter well understood by police officers. An arguable case can be made that when measured against the reasonable expectations of the community, Constable [REDACTED] while off duty, did commit the misconduct of *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* 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 department.

**Decision, section 117 of the *Police Act***

Therefore, pursuant to section 117(4) of the *Police Act* and based on a recommendation from the Associate Chief Justice of the Supreme Court of British Columbia, I am appointing the Honourable Wally Oppal, Q.C., retired British Columbia Court of Appeal Judge, to review this matter and arrive at his own decision based on the evidence.

Pursuant to section 117(9), if the appointed retired judge considers that the conduct of the member appears to constitute misconduct, the retired judge assumes the powers and performs the duties of the Discipline Authority in respect of the matter and must convene a discipline proceeding, unless a prehearing conference is arranged. The allegations of misconduct set out in this notice reflect the allegations listed and/or described by the Discipline Authority in their decision pursuant to section 112 of the *Police Act*. It is the responsibility of the retired judge to list and/or describe each allegation of misconduct considered in their decision of the matter pursuant to section 117(8)(c) of the Act. As such, the retired judge is not constrained by the list and/or description of the allegation as articulated by the Discipline Authority.

The Office of the Police Complaint Commissioner will provide any existing service records of discipline to the Discipline Authority to assist him or her in proposing an appropriate range of disciplinary or corrective measures should a pre-hearing conference be offered or a disciplinary proceeding convened. If the retired judge determines that the conduct in question does not constitute misconduct, they must provide reasons and the decision is final and conclusive.

Finally, the *Police Act* requires that a retired judge arrive at a decision **within 10 business days after receipt of the materials** for review from our office. This is a relatively short timeline, so our office will not forward any materials to the retired judge until they are prepared to receive the materials. I anticipate this will be within the next 10 business days.



Clayton Pecknold  
Police Complaint Commissioner

cc: [REDACTED], Registrar