

Form 3

DA FILE No.  
OPCC FILE No. 2019-16684

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996 c. 367

and

IN THE MATTER OF A DISCIPLINE HEARING UNDER SECTION 124

And

IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT AGAINST  
CST. [REDACTED] and CST. [REDACTED] OF THE VICTORIA POLICE  
DEPARTMENT

### **FINDINGS OF DISCIPLINE AUTHORITY**

(Section 125(b) *Police Act*)

**Name of members involved:**

[REDACTED] Constable # [REDACTED]

[REDACTED], Constable # [REDACTED]

**Police department, designated policing unit or designated law enforcement unit:**

Victoria Police Department

**Date of discipline proceeding:**

February 10, 2021 and submissions made March 9, 2021

**In relation to each allegation of misconduct against you, my findings are as follows:**

**With respect to both Constable [REDACTED] and Constable [REDACTED]**

Misconduct: abuse of authority, which is oppressive conduct towards a member of the public (when on duty, or off duty but in uniform, using profane, abusive or insulting language to any person including, without limitation, language that tends to demean or show disrespect to the person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability,

sex, sexual orientation, age or economic and social status), section 77(3)(a)(iii) of the *Police Act*, the particulars of which are that the members on [REDACTED] are alleged to have committed a disciplinary breach of public trust, abuse of authority, by making profane, abusive or insulting comments towards one of the Complainants directed at his race colour, ancestry and/or place of origin while on duty and by singling out the Complainant for the purposes of ticketing him based on his race, colour, ancestry and/or place of origin.

**And with respect to Constable [REDACTED]:**

Misconduct: Discourtesy (failing to behave with courtesy do in the circumstances towards a member of the public in the performance of duties as a member), section 77(3)(g) of the *Police Act*, the particulars of which are that the Member on [REDACTED] is alleged to have committed a disciplinary breach of public trust, discourtesy, by using profane and aggressive language in the course of an interaction with the Complainants.

**Members reply to the allegations:**

Deny

## Findings and Reasons:

### I. Decision Summary and Overview of Proceedings

1. This is a decision made pursuant to sections 123, 124, and 125 of the *Police Act* relating to certain complaints of misconduct concerning Constables [REDACTED] and [REDACTED], members of the Victoria Police Department.
2. I was appointed Adjudicator in connection with this matter as a result of the Police Complaint Commissioner's (the "Commissioner") order of July 27, 2020 made in accordance with section 117(4) of the *Police Act*.
3. The misconduct is alleged to have occurred between 8 and 9 PM on [REDACTED] [REDACTED] when the members stopped the complainants ([REDACTED], his wife [REDACTED], and [REDACTED], collectively the "Complainants") and their friend [REDACTED], alleging that Mr. [REDACTED] was carrying a can of beer. The Complainants and Mr. [REDACTED] were walking home from a themed costume party. Mr. [REDACTED] was the only person of colour in the group, was separated from the group, questioned and presented with a ticket for carrying the can of beer. When presenting the ticket Constable [REDACTED] told him that he could thank his friends for getting the ticket.
4. During the course of the encounter between the Constables and the Complainants, Constable [REDACTED] is alleged to have used profanity on a number of occasions and is alleged to have been aggressive in his interaction with the Complainants.
5. The Commissioner had reviewed a June 29, 2020 Discipline Authority decision made pursuant to section 112 of the *Police Act*. In reviewing all of the evidence the Discipline Authority determined that the allegation of abuse of authority for oppressive conduct under section 77(3)(a) had not been substantiated, that the allegation of abuse of authority under 77(3)(a)(iii)(racial discrimination) had not been substantiated, that Constable [REDACTED] comments did not amount to discreditable conduct pursuant to section 77(3)(h) and that the same comments would not amount to discourtesy under section 77(3)(g), all of the *Police Act*. In ordering a section 117 review the Commissioner expressed concern at the acknowledged comments and remarks from Constable [REDACTED] as he approached and interacted with Mr. [REDACTED] and the group. The Commissioner also determined that Constable [REDACTED] statement to Mr. [REDACTED] that he could "thank his friends for the ticket" was not appropriate in the circumstances and was

indicative of the tone of the interaction between Mr. ██████ his friends and the officers.

6. After reviewing the relevant evidence, it was my conclusion that the misconduct allegation of abuse of authority against the two constables appeared to be substantiated on the written evidence before me. I also concluded that the misconduct allegation of discourtesy appeared to be substantiated with respect to Constable ██████ on the written evidence before me. I found that the misconduct allegation of discourtesy did not appear to have been made out with respect to Constable ██████
7. As a result of my decision made pursuant to section 117(7) of the *Police Act*, I became the Discipline Authority concerning the misconduct allegations and heard further evidence concerning those allegations.

## **II. Discipline Proceeding-History of Proceedings**

8. On August 6, 2019 Mr. and Mrs. ██████ and Ms. ██████ submitted registered complaints to the Office of the Police Complaint Commissioner (the "OPCC"). The Complainants suggested that Mr. ██████ had been profiled as a result of his physical appearance, race/ethnicity and clothing. They believed that the aggressive, profanity laced encounter with the constables was totally inappropriate. On September 16, 2019 the OPCC issued a Notification of Admissibility of Complaint and directed the Victoria Police Department to investigate. On June 12, 2020 the investigator submitted the Final Investigation Report (the "FIR") to the Discipline Authority. The Discipline Authority issued his decision on June 29, 2020.
9. The investigation took significantly longer than normal. The sergeant originally tasked with the investigation retired after dealing with the file for a couple of months and it was not until early 2020 that the investigation and interviewing of witnesses began in earnest. Constable ██████ was not identified as being a member involved in the complaint until the spring of 2020. Constables ██████ and ██████ were not interviewed until April 2020, over 8 months after the incident occurred.
10. On October 5, 2020, my decision concerning the section 117 review of the misconduct allegations was delivered. In accordance with section 117(9) of the *Police Act*, the discipline proceeding process commenced concerning the allegations (the "Discipline Proceeding"). As a result, I assumed the duties of Discipline Authority.

11. In my decision of October 5, 2020, I offered Constable [REDACTED] and Constable [REDACTED] a Pre-Hearing Conference pursuant to section 120 of the *Police Act*. Both members elected to proceed with the Discipline Proceeding.
12. An initial hearing date of November 13, 2020 was set. Neither constable made a request to call witnesses at the Discipline Proceeding. Given the structure of the process under sections 123-125 of the *Police Act*, no further oral evidence would be heard from the Complainants nor would any other party call evidence. The question of whether or not the members would testify was left to the hearing itself.
13. The Complainants were provided with a Notice of Discipline Proceeding under section 123(1). That notice satisfied the requirements of section 113 of the *Police Act*, notifying the Complainants that they had the right to make written or oral submissions to the Discipline Authority in relation to one or more of the following matters: the complaint, the adequacy of the investigation and/or the disciplinary or corrective measures that would be appropriate. None of the Complainants elected to make written or oral submissions.
14. On November 13, 2020 the Discipline Proceeding commenced by telephone conference. Both constables denied the allegations and the matter was subsequently adjourned to December 30, 2020, then to January 28, 2020 and finally to February 10, 2020 to accommodate defence counsel's calendar.
15. The evidence entered at the Discipline Hearing conducted by video conference on February 10, 2020 consisted of the FIR (Exhibit 1), a subsequent addendum to that report (Exhibit 2) and the testimony of Constable [REDACTED] and Constable [REDACTED]. Sgt. [REDACTED] presented his FIR and the addendum but counsel for the members had no questions of him.
16. The FIR and the testimony of Constables [REDACTED] and [REDACTED] comprise the record with respect to these proceedings (the "Record").

### **III. Misconduct and the *Police Act***

17. The relevant portions of section 77 of the *Police Act* are as follows:

77 (1) In this Part, "misconduct" means

- (a) conduct that constitutes a public trust offence described in subsection (2), or
- (b) conduct that constitutes

- (i) an offence under section 86 [*offence to harass, coerce or intimidate anyone questioning or reporting police conduct or making complaint*] or 106 [*offence to hinder, delay, obstruct or interfere with investigating officer*], or
- (ii) a disciplinary breach of public trust described in subsection (3) of this section.

(2) A public trust offence is an offence under an enactment of Canada, or of any province or territory in Canada, a conviction in respect of which does or would likely

- (a) render a member unfit to perform her or his duties as a member, or
- (b) discredit the reputation of the municipal police department with which the member is employed.

(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

- (a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,

(i)-(ii)...

(iii) when on duty, or off duty but in uniform, using profane, abusive or insulting language to any person including, without limitation, language that tends to demean or show disrespect to the person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or economic and social status;

- (b) "accessory to misconduct", which is knowingly being an accessory to any conduct set out in this subsection, including, without limitation, aiding, abetting, counselling or being an accessory after the fact;

(c) – (f)...

(g) "discourtesy", which is failing to behave with courtesy due in the circumstances towards a member of the public in the performance of duties as a member;

(h)...

(Emphasis Added)

18. An important overall limitation to the definitions of misconduct in section 77 of the *Police Act* is found in subsection 77(4) as follows:

77(4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.

19. Adjudicator Pitfield in a decision under Section 117 *Police Act* [2014-9919] had this to say about the offence of abuse of authority:

[29] Abuse of authority is a disciplinary breach of trust. While “breach of public trust” is not defined in the *Police Act*, it should be construed to reflect the public expectation that police will act in a manner that is not offensive to the public, to the policing profession generally, or to the police force in which an officer is a member.

[30] Rather than being exhaustively defined, *abuse of authority* embraces any conduct that may be regarded as oppressive to a member of the public. That result flows from insertion of the words *including, without limitation*, before the description of certain kinds of conduct with greater particularity. It is an error to conclude that only intentional or reckless conduct can constitute an abuse of authority.

20. The following allegations of misconduct are relevant to this review:

- i. Abuse of authority involving oppressive conduct towards the Complainants, and specifically Mr. ██████ arising under section 77(3)(a)(iii) concerning both members; and
- ii. Discourtesy arising under section 77(3)(g) concerning Constable ██████ interaction with the Complainants.

21. This review is, therefore, the examination of all of the evidence submitted related to the above noted allegations of misconduct as qualified by section 77(4).

#### **IV. Burden of Proof**

22. The burden of proof lies with the body alleging the misconduct. The standard of proof is on the balance of probabilities. This was clearly stated by the Supreme Court of Canada in *F.H v McDougall*, [2008] 3 S.C.R. 41 at para 49:

[49]... I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil

cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

23. The court noted, in paragraph 46, that in order to satisfy the balance of probabilities standard, the evidence must be sufficiently clear, convincing and cogent:

[46]... Evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

## **V. The Evidence**

### ***Circumstances leading to alleged misconduct***

24. On [REDACTED] Mr. [REDACTED] Mrs. [REDACTED] Ms. [REDACTED] and Mr. [REDACTED] were walking home from a 1990's costume themed party. They had arrived at the party at approximately 8 PM but after discovering that the party was really a family event decided to return to Mr. [REDACTED] home. They had taken alcohol and food to the party and had what remained of it with them as they were walking. Mr. [REDACTED] and his wife had cans of beer while Ms. [REDACTED] had a coffee cup with alcohol in it. Mr. [REDACTED] maintained that he also had a can of beer. It was sometime between 8 and 9 PM when they encountered the Victoria Police.
25. The four were all in costume. Mr. [REDACTED] was dressed all in black, with a black hat and sunglasses perched on the hat, a black short sleeved T-shirt, black denim pants, white socks and Adidas slip on shoes. There was a plastic gold coloured chain around his neck with a rectangular medallion that contained the words "pimp". He was supposed to look like a non-specific 1990's rapper. Mr. [REDACTED] is from the Caribbean and is of South Asian descent. He was the only person of colour in the group. A photo, included in the FIR, taken minutes before the group was stopped by the police confirms the group's clothing as described.

26. Constables [REDACTED] and [REDACTED] were both working a special duty funded by the Insurance Corporation of British Columbia ("ICBC") to enforce impaired driving. Reserve Constable [REDACTED] was also working as a volunteer that night with the Victoria Police Department. It was the Victoria Symphony Splash that weekend and ICBC was expecting an increase in impaired driving. Their shift started at 8 PM and Constable [REDACTED] and Constable [REDACTED] were going to be two of several officers setting up a roadblock and stopping drivers leaving the downtown core. However, it was not very busy in the area of Victoria they were patrolling, and therefore a decision was made to team up and patrol local liquor establishments instead.
27. The constables decided to look for impaired drivers by setting up an observation post outside Christie's Carriage House Pub. They were eastbound on [REDACTED] when Constable [REDACTED] spotted the four friends with what appeared to be open alcohol. Constable [REDACTED] was driving, Constable [REDACTED] was in the front passenger seat and Reserve Constable [REDACTED] was seated behind Constable [REDACTED]. The three were in an unmarked police truck.
28. Constable [REDACTED] made a decision to investigate the Complainants and Mr. [REDACTED] for possession of open alcohol. His decision was based upon his observation of one of the four carrying a can of beer. Although at least one of the women was also carrying a can of beer, Constable [REDACTED] testified that he only saw Mr. [REDACTED] with a beer. The evidence suggests that Mrs. [REDACTED] was the other person with a beer but as the police began their investigation with her husband she put the beer into a bag. Constable [REDACTED] recalled observing the group with alcohol but was not in favour of investigating a possible offence under the *Liquor Control and Licensing Act*. He believed the constables should be focusing on impaired drivers. Ms. [REDACTED] was carrying a mug with alcohol in it and Mr. [REDACTED] suggested he was also carrying alcohol. No investigation was undertaken with anybody other than Mr. [REDACTED].
29. Constable [REDACTED] has been a police officer with the Victoria Police Department since [REDACTED]. Prior to joining the Department he had attended the University of British Columbia and graduated with a degree in civil engineering. He joined the traffic section in [REDACTED] and has been with that section ever since. He described himself as a prolific ticket writer, having written in excess of 5,000 tickets during his time as a traffic section police officer. Indeed, he testified that he and his partner (not Constable [REDACTED]) are responsible for writing 62% of all of the tickets written by the Victoria Police Department.

30. Constable [REDACTED] has been a police officer with the Victoria Police Department since [REDACTED]. He has a Bachelor [REDACTED] and an honour's Bachelor of [REDACTED]. He has also been a [REDACTED] and a [REDACTED] with the [REDACTED]. In [REDACTED] he was assigned to general patrol responding to calls for police service. He knew Constable [REDACTED] but did not normally work with him.

***Evidence regarding alleged misconduct and contents of the FIR***

31. Disciplinary Hearings conducted under the *Police Act* differ somewhat from usual administrative hearings. Only the police officers charged with an offence and the police officer charged with investigating the allegation testify. The members have the option of calling other evidence. The Complainants, in this case, Mr. and Mrs. [REDACTED] and Ms. [REDACTED] do not testify and their evidence is provided through the FIR in the form of summaries of their interviews as well as audio recordings of those same interviews. Neither Constable [REDACTED] nor Constable [REDACTED] elected to call any additional evidence.

32. The offences, the subject of this Discipline Hearing, are alleged to have occurred [REDACTED]. Formal complaints were lodged with the OPCC August 6, 2019. The Victoria Police Department was directed to investigate the allegations September 16, 2019 but formal statements were not taken for months. Interviews were conducted as follows:

- i. Ms. [REDACTED] - January 31, 2020
- ii. Ms. [REDACTED] - February 12, 2020
- iii. Mr. [REDACTED] - March 24, 2020
- iv. Reserve Constable [REDACTED] - March 26, 2020
- v. Mr. [REDACTED] - April 6, 2020
- vi. Constable [REDACTED] - April 8, 2020
- vii. Constable [REDACTED] - April 22, 2020

33. The Record does not indicate any investigative follow-up between September 16, 2019 and the date of the first interview.

34. The evidence in the Record was often contradictory and inconsistent.

35. Neither Constable [REDACTED] or Constable [REDACTED] had any notes regarding the incident and Reserve Constable [REDACTED] had only brief notations.
36. Perhaps Ms. [REDACTED] identified the issue best when during the course of her interview with Sgt. [REDACTED] she asked why the process had taken so long. She observed that Sgt. [REDACTED] was asking a lot of detailed questions and indicated had she known she was going to be required to provide the information he was requesting she would have made detailed notes at the time of her complaint.
37. In response to my questions Constable [REDACTED] conceded that he has made hundreds of stops since [REDACTED] and that 10 months later, with no notes he was trying to piece together what actually occurred on that date in response to the misconduct allegations. He also testified that the three officers did not discuss the case prior to providing statements to Sgt. [REDACTED] but did discuss the case thereafter.

### ***The Stop***

38. The evidence is that Constable [REDACTED] having made the decision to stop the four friends, chirped the siren and activated the truck's lights and turned left from [REDACTED] onto [REDACTED]. The truck came to a stop on the travel portion of Ashgrove Street. The four civilians were standing to the left of the police vehicle on the sidewalk, having crossed [REDACTED]. Constable [REDACTED] asked Mr. [REDACTED] to approach the driver's side of the truck and asked Mr. [REDACTED] what was in his hand. Constable [REDACTED] testified that Mr. [REDACTED] tried to hide the beer behind his leg. Mr. [REDACTED] on the other hand, stated that he knew carrying a beer was a mistake and apologized. At that juncture Constable [REDACTED] directed Mr. [REDACTED] to the passenger side of the truck where he was seated.
39. All of the witnesses recalled Mr. [REDACTED] being the most aggressive and argumentative in the course of the subsequent interaction. He also had had the most to drink since he had had some alcohol prior to going to the costume party. The four were at the party briefly having arrived at around 8 PM and having left between 830 and 845. Mr. and Mrs. [REDACTED] were consuming their first beer. Ms. [REDACTED] had some alcohol in a mug or cup and had consumed some marijuana.

*Evidence of Complainants and Mr. ██████ - FIR*

40. Mr. ██████ allegedly asked Constable ██████ if he could pour out the beer and he stated that Constable ██████ replied: "you are fucking right you will pour it out." Constable ██████ then said "who are you, fucking Flavor Flav?" Apparently, Flavor Flav was a black rapper. Mr. ██████ told Constable ██████ that no, he was not "Flavor Flav", but was coming from a costume party. He said that Constable ██████ was agitated and aggressive. Constable ██████ asked Mr. ██████ for his identification and Mr. ██████ provided his driver's license and asked if he would like to see his Nexus card. After looking at the driver's license which contained Mr. ██████ full name Constable ██████ allegedly asked "what kind of a fucking name is that?".
41. Mr. ██████ considered the comment about his name to be racist. In terms of the sequence of events he stated that the comment about whether he was "fucking Flavor Flav" came after he asked Constable ██████ if he could give him a break. Mr. ██████ denied ever trying to hide the beer. In his statement he elaborated on his observation that Constable ██████ appeared very agitated. He said he could hear cursing and mumbling. He said he was not aggressive with Constable ██████ and in fact was very much afraid, he simply wanted to cooperate, get his ticket and get on his way. Constable ██████ rolled up his window after receiving the identification and began to communicate with Constable ██████. Mr. ██████ had been told to stand away from the truck and after a few minutes Constable ██████ exited the truck and escorted him towards ██████ where he handed him a \$230 ticket and told him that he could thank his friends for the ticket.
42. According to the evidence in the FIR, Mrs. ██████ Ms. ██████ and Mr. ██████ were upset and concerned. In particular, Mrs. ██████ had heard the profanity and although only Mr. ██████ had been directed to the passenger side of the vehicle she circled around to the passenger side. She did not believe that open alcohol warranted being sworn at or the comments about the costume. She explained that they had been coming from a costume party, that they were wrong and then offered to pour out the beer. She did in fact end up pouring out her beer. Her interaction was with Constable ██████ who she described as agitated, loud and swearing. He never left the vehicle. At one point, Reserve Constable ██████ was directed to exit the vehicle and deal with them. She recalled Reserve Constable ██████ saying to them "you don't want to do this: I have seen what he can do".

43. Mrs. ██████ agreed that when they crossed ██████, after seeing the police vehicle, that she had placed the alcohol she was carrying into Ms. ██████ bag. It was the profanity that caused her to move from the driver's side of the truck to the passenger side to see what was going on. She stated that Constable ██████ seemed like he had drunk 12 coffees. At one point he told Reserve Constable ██████ to "get the fuck out there and handle this." From her perspective Constable ██████ was totally out of control, "trigger-happy" and she feared that things would accelerate and result in a tasing or an arrest. She believed that her husband was being racially profiled because he was separated from the group, singled out for a ticket and he was the only person of colour.
44. In his statement Mr. ██████ said he was also dressed as a rapper wearing white boots, shorts and a bright top. He was concerned about the interaction between the police and Mr. ██████. He said he had a can of beer with him. He recalled the police asking the two women to pour out their alcohol. The police were aggressive from the outset. Mr. ██████ was concerned about Mr. ██████ being singled out when they all had alcohol. Mr. ██████ approached the driver's side window to see what was going on. Constable ██████ told him to get the "fuck away". When told to empty his alcohol he poured it out on an adjacent lawn. His audio statement reveals that he had confused Constable ██████ and Constable ██████ believing Constable ██████ was in the driver's seat. He is clear, however, that the aggression and profanity came from Constable ██████.
45. Ms. ██████ recalled walking with her friends before being pulled over by the police. They had come from the costume party and were all carrying open alcohol with them. Her beverage was in a coffee cup. She was also carrying a bag with food and alcohol that they had taken with them when they left the party. She placed her open alcohol in the bag. She recalls Mr. ██████ being separated from the group. She also recalls Reserve Constable ██████ being ordered to leave the vehicle and deal with them. Both Mrs. ██████ and Ms. ██████ recall Mr. ██████ being argumentative and challenging with the police. Ms. ██████ described Mr. ██████ as being fairly quiet throughout the interaction.
46. The Complainants and Mr. ██████ all stated that Constable ██████ was the officer using profanity who appeared aggressive and out of control. Constable ██████ was relatively quiet and they believed Reserve Constable ██████ was not a factor in the events as they unfolded other than his statement to them that "you don't want to do this: I have seen what he can do".

*Constable [REDACTED] Evidence - FIR*

47. Constable [REDACTED] had a different version of events. He provided an ordered statement on April 22, 2020 as contained in the FIR. He recalled his partner Constable [REDACTED] noting the three Complainants and Mr. [REDACTED] on [REDACTED] [REDACTED] with open liquor; what appeared to be beer. During the subsequent interaction the group admitted to being in possession of open liquor. He did recall having a brief discussion with Constable [REDACTED] as to whether or not they should stop the group. He said he believed they should focus on impaired drivers, but Constable [REDACTED] decided to investigate. He recalls exclaiming "Holy fuck, it's Flavor Flav". He said that he was excited to see someone dressed up as Flavor Flav because it took him back to the 90's, an era he related to. He said the Complainants were all of a similar age and the words were uttered in a humorous attempt to establish rapport with them. He described Mr. [REDACTED] as dressed with a brimmed hat, a purple velour type top and purple bottoms with a large clock (14 to 16 inches) around his neck. He said that Mr. [REDACTED] told him that he had just come back from a costume party and was dressed as Flavor Flav.
48. Constable [REDACTED] described Mr. [REDACTED] as standing beside the driver's door and being asked by Constable [REDACTED] numerous times to back away. He said Mr. [REDACTED] was getting more and more agitated and ignored repeated requests to step back all the while getting riled up and swearing at the police. Eventually, Constable [REDACTED] said he'd had enough and he told Mr. [REDACTED] to get off the "fucking road and go stand with his fucking friends". He used profanity he said because those were the same kinds of words being thrown at them. He needed to take control of the situation.
49. Sgt. [REDACTED] asked Constable [REDACTED] if he recalled Mr. [REDACTED] offering to pour out the beer and Constable [REDACTED] replying you are "fucking right you will pour it out". Constable [REDACTED] said he had no recollection of asking that the beer be poured out but he might have. He said he was confident of when he used swearwords and when he did not. The profanity he said was only used towards Mr. [REDACTED] after Mr. [REDACTED] directed similar language at him.
50. Constable [REDACTED] was asked if he recalled reading Mr. [REDACTED]'s identification and running it on the computer system in the truck. Constable [REDACTED] said he did not recall but could have because he was in the passenger seat. He denied ever saying "what kind of fucking name is that" and said he would never say such a thing. He stated that Mr. [REDACTED] was the most aggressive by far. He was 100%

positive that Mr. ██████ was dressed in purple pants, a velour purple top with a flat cap on sideways and a 14 to 16 inch clock on a gold chain around his neck. In his statement Constable ██████ said that he was totally absorbed with Mr. ██████ dressed as Flavor Flav with the big clock around his neck: he had all his attention and it was very difficult to recall anything else other than the massive clock.

51. Constable ██████ said that the four stopped individuals were intoxicated but not grossly so. On a scale of 1 to 10 he placed Mr. ██████ at a 6 in terms of intoxication.

*Constable ██████ Evidence - Testimony*

52. Constable ██████ testified under oath on February 10<sup>th</sup>, 2021. He recalled the day in question and being on special assignment with Constable ██████ and Reserve Constable ██████. He recalls seeing four people in the middle-of-the-road, does not recall who was holding what, but does recall one person holding a beer. He said he was adamant that he did not want to engage the group since he did not believe that it was in the public interest. Mr. ██████ was dressed “almost to a “T” like a famous rapper Flavor Flav, a very distinctive artist. He said he was taken aback, honestly shocked. He was “feeling good, this was a Sunday night, we were getting paid, we were out having, you know, fun.”

53. Constable ██████ testified that he let his emotions get the best of him and said “Holy Fuck, it is Flavor Flav “. There were four reasons why he said what he did: he was genuinely surprised; Mr. ██████ really did look the part: that particular artist uses that vernacular throughout all his songs and his recordings and lastly, he was trying to build a bit of rapport or break the ice because he knew getting stopped and pulled over was stressful.

54. Constable ██████ stated that Mr. ██████ told him he was coming from a themed ██████ costume party and he was dressed up as Flavor Flav. While he was talking to Mr. ██████ he became aware of the fact that Mr. ██████ the other male, was at the driver’s side of the truck and was getting worked up. When asked what he meant by “worked up” he said:

*“They were all very upset, all of them. They were all intoxicated and it was a pretty chaotic scene and the longer that the stop went, which in my estimation was only about 10 minutes, but the longer it went the more aggravated the fellow who was standing at the door, ██████ got. Started yelling at us that we should focus in on some real criminals and why do not*

*we arrest some child sex predators and some murders and some drug dealers and why don't we leave these normal people alone. And that was the initial statement and elevated up from there because he started to throw expletives at us about why do not we just fucking do our job and, you know, take care of real criminals and leave these normal taxpayers alone".*

55. Constable [REDACTED] conceded that he used profanity in directing Mr. [REDACTED] who was aggressive, away from the truck. He was asked to compare his use of the "F" word on that occasion with the initial use of the "F" word with respect to the Flavor Flav comment. He had this to say:

*"Absolutely. The first time I used the swear words, and again I apologize for using the swear words. I do come from the Navy and it was often used as a very utilitarian word. In this case I was overcome with, frankly, joy and surprise that I saw a childhood, sort of, artist live in person in front of me and I let my guard down and I slipped up and instead of saying Holy Crap it is Flavor Flav I said Holy fuck it's Flavor Flav."*

56. Constable [REDACTED] was asked if he recalled Mr. [REDACTED] pouring out a beverage. He said he recalled someone pouring out a beverage, one of the fellows. He cannot recall who directed that the beverage be poured out.

57. He was not asked whether or not, after Mr. [REDACTED] asked whether he could pour out the beer he replied "you are fucking right you will pour it out". He does recall there was a negotiation and it was offered: "I will just pour it out and you leave us alone."

58. Constable [REDACTED] recalled that Mr. [REDACTED] was asked for his license, recalls him fishing for his license and his identification and recalls receiving it and then handing it to Constable [REDACTED]. He categorically denies making "negative overtones" about [REDACTED] name. He said he found it offensive. He insisted that Mr. [REDACTED] was not racially profiled or pulled over because of his race. He was contesting the misconduct allegation, he said, because he did not want a shadow cast over either of the police officers for being racist.

59. When asked whether or not he had acted in an aggressive manner he conceded that using profanity to get Mr. [REDACTED] to move away from the truck may have been perceived by the female Complainants as aggressive. He went on to say:

*“...but sometimes when you are dealing with intoxicated people, who were yelling and screaming and swearing at you, it is appropriate to respond in kind, with a language and a forcefulness that will gain compliance.”*

60. In response to my questions Constable ██████ conceded there were inconsistencies in his evidence: in particular whether it had been Mr. ██████ or Mr. ██████ at the driver’s door acting aggressively. He said he confused their positioning but did not confuse Mr. ██████ being dressed up as Flavor Flav. He said he erred with respect to whether it was Mr. ██████ or Mr. ██████ standing in the roadway yelling and screaming at them. He went on to say:

*“Mr. ██████ Your Honour, was swearing. They were all swearing. It was chaotic. However, the level of elevated mood was substantially higher with Mr. ██████ than it was with the other three, substantially.”*

61. When asked why the situation appeared to get so out of control, so quickly he had this to say:

*“I chose to use loud, verbal commands to Mr. ██████ when he was not complying with my lawful and clear instruction. But at the end of the day, this was not four people, your honour, that were just walking home from a party. These were four people that were intoxicated, that knew that they were in the wrong, and were yelling and screaming over top of us to do our jobs, by arresting real criminals and leave taxpayers alone”.*

Constable ██████ Evidence - FIR

62. On April 8, 2020 Constable ██████ also provided an ordered statement. He conceded that the incident had occurred eight or nine months prior to his statement and he had a poor recall of the events. He recalls first seeing Mr. ██████ with a beer. He thinks he was a little louder than others in the group and believes he tried to hide the beer behind his leg. He says he never observed anyone else with alcohol. He thinks the first conversation was when Constable ██████ made the Flavor Flav remark, shouting it over Constable ██████ to the group that were located on the sidewalk closer to the driver’s side of the vehicle. He said the interaction with the group was not a positive one. One of the males was quite aggressive and was questioning their authority. That male appeared to be Mr. ██████ who spent a good deal of the time at the driver’s side window. Constable ██████ said he decided to write a ticket to the one person he saw drinking and separated that individual from the group because he was giving him a ticket. He

said Mr. ██████ had a clock around his neck. He does not recall whether the lights or siren of the vehicle were activated. He said that the initial statement could have included profanity. He would normally ask individuals to pour out the beer and move on but Mr. ██████ was angry and aggressive. He does not recall whether he directed Mr. ██████ to the passenger side but that is where he ended up. It was Constable ██████ who dealt with him. He does not recall who asked Mr. ██████ for identification. It was Constable ██████ recollection that Constable ██████ might have used profanity. The Constables did not ask anybody else for identification nor did they search anyone else. He does not know why they did not seek that information from the others. He described Constable ██████ as frustrated that Mr. ██████ would not listen to them when they told him to back away.

63. Constable ██████ did complete and serve the ticket and did tell Mr. ██████ that he could “blame his friends for the ticket”. He made the statement he said because it was clear that the group did not understand why they were being stopped and education was not working. He said it was not strictly because of his friends that Mr. ██████ got the ticket although that is what he told him.

*Constable ██████ Evidence - Testimony*

64. Constable ██████ testified under oath on February 10, 2021. He recalled ██████ and his decision to stop the group. He testified he made the decision to stop them because he had the lens of enforcement in mind:

*“I write tickets, that is what I do. If I see an offence I am going to stop and engage, I am not going to just drive by.”*

65. Constable ██████ reiterated that it was his decision to stop the group, Constable ██████ did not want to engage with them. He knows that Constable ██████ does not write many tickets. He went on to say:

*“...In policing there are your ticket writers, your traffic officers, people that like writing tickets and then there’s officers that do not like writing tickets, and I would put Constable ██████ in the kind of camp that does not like writing tickets”.*

66. Constable ██████ believes the time was between 830 and 8:45 PM. It was still light and everything was clearly visible. He testified that he cannot recall the exact details of what happened as it was so long ago. He recalls that there was a Flavor Flav comment made but believes it was as they were turning onto ██████ Street. He recalls that there was probably a curse word associated with the Flavor Flav

comment. He did not believe Constable [REDACTED] was angry when he made the comment but rather excited. He does not recall any of the conversation between Mr. [REDACTED] and Constable [REDACTED]

67. Mr. [REDACTED] was called over to the truck because he was the only member of the group that Constable [REDACTED] saw drinking. He does not believe that Mr. [REDACTED] denied having open alcohol and remembers him dumping it out at some point. He was asked whether he heard Constable [REDACTED] say to Mr. [REDACTED] "you are fucking right, you will pour it out". He replied:

*"He might have said that, I cannot recall exactly what he said, but there was definitely conversation there."*

68. Constable [REDACTED] testified that Mr. [REDACTED] was at the driver side door, very agitated and angry about the group being stopped. He drew most of Constable [REDACTED] attention. Constable [REDACTED] asked him to move away from the truck and Mr. [REDACTED] was completely uncooperative. He recalls Constable [REDACTED] asking Mr. [REDACTED] to move away from the truck. He did not recall exactly what Constable [REDACTED] said but mentioned that Constable [REDACTED] probably used a swear word of some sort. Mr. [REDACTED] eventually did move back away from the truck and stood with the two female Complainants. Mr. [REDACTED] remained on the passenger side of the truck. He does not recall what he said. He does not recall anything the females in the group may have said because his attention was focused on Mr. [REDACTED]. He did not believe Constable [REDACTED] was acting overly aggressively during the stop. He was asked whether Constable [REDACTED] was swearing during the stop. He replied:

*"I do not have exact memory of it. I am, like I said, I am sure it happened, I am not going to deny that he did not swear, but yeah, it was-- is what it is"*

69. Constable [REDACTED] believed that alcohol played a part in how the stop went. Mr. [REDACTED] on a scale of 1 to 10, was a 7 or 8 in terms of intoxication and Mr. [REDACTED] was around a 5 in terms of intoxication. Constable [REDACTED] stated that he made the decision to ticket Mr. [REDACTED] based on what he saw. It was his ticket and the exercise of his discretion. He did not see anyone else with open alcohol and he did not see anyone hide alcohol. He testified that neither Mr. [REDACTED] race, appearance or ethnicity played any role in the decision. The ticket was issued because Mr. [REDACTED] did not see a problem with carrying the open beer and he felt education was not working to resolve the problem. His comment to Mr. [REDACTED]

that he could thank his friends for the ticket was a product of his frustration in dealing with Mr. [REDACTED] in particular, who was aggressive and angry.

*Reserve Constable [REDACTED] Evidence - FIR*

70. Reserve Constable [REDACTED] gave an ordered statement on March 26, 2020. He recalled noticing the four individuals in costume. He does not recall whether lights or the siren of the police vehicle were activated. He does not recall Constable [REDACTED] speaking to Mr. [REDACTED]. He recalls Mr. [REDACTED] saying "I know I should not be doing this but is it really that big a deal". The situation became elevated when Mr. [REDACTED] knocked on the driver's side window startling the police officers. Profanity was used by Constable [REDACTED] who was very displeased. His recollection is that Mr. [REDACTED] was compliant throughout the interaction although he was voicing his displeasure because he did not agree with the ticket. It was the female Complainants that were the most vocal in voicing their displeasure. He does recall Constable [REDACTED] swearing when the window was down on more than two or three occasions. The majority of the profanity was in response to Mr. [REDACTED] at the driver's side window. He stated that Constable [REDACTED] was not out of control but was startled; the concern being for officer safety. They did not immediately recognize Mr. [REDACTED] as part of the original group and initially thought they were dealing with a stranger. Constable [REDACTED] he believed, used profanity to gain control of the situation. He does recall being asked to exit the vehicle and deal with the group and said he tried to calm things down by discussing sports with Mr. [REDACTED].
71. Reserve Constable [REDACTED] recollection of events is limited. For example, he does not recall the Flavor Flav comment and does not recall Constable [REDACTED] exiting the vehicle to serve the ticket on Mr. [REDACTED]. He did not believe the four were too intoxicated and had no difficulty speaking with them.

**VI. Issues**

72. In their written submissions, counsel for the members point out that the issues in this case have undergone various evolutions as the matter progressed. Initially the complaint focused on racial profiling based upon the allegation of the Complainant's that Mr. [REDACTED] was singled out for a ticket because he was the only person of colour in the group and was dressed as a black rapper. Their concern was that while they were all carrying alcohol only Mr. [REDACTED] was separated from the group, questioned, and received a ticket.

73. As the investigation continued additional emphasis was placed upon allegations that Constable ██████ had repeatedly used profane language, behaved aggressively and was responsible for accelerating the encounter with police due to his behaviour.

74. Each officer`s conduct must be viewed separately.

**In my view the issues are as follows:**

- A. Did Constable ██████ stop and/or ticket Mr. ██████ because of his race or ethnicity?
- B. Did Constable ██████ comment that Mr. ██████ could “thank your friends for this” rise to the level of abuse of authority?
- C. Did Constable ██████ conduct, including the use of profanity in the context of the stop, rise to the level of abuse of authority or discourtesy?

75. In deciding this issue it will be necessary to determine what profanity Constable ██████ used and, depending on those conclusions, whether the facts are more appropriately dealt with as an abuse of authority or the separate misconduct of discourtesy. The matter is complicated by the fact that, in this case, the allegation of the use of profanity is inextricably intertwined with the allegation of racial profiling in the statutory definition of abuse of authority.

**VII. The Law**

**Requirement of Gravity**

76. In their submissions, counsel for the members emphasize the seriousness of a finding of misconduct against a police officer. I agree with their assertion that I must assess each element of the particular discipline offence and decide whether the evidence demonstrates the requisite level of gravity to establish a misconduct finding. Not every error equals professional misconduct. In *Khan v. Bar Standards Board* [2018] EWHC 2184 (Admin) ("*Khan*") at para 36 the Court had this to say:

36. The authorities make plain that a person is not to be regarded as guilty of professional misconduct if they engage in behaviour that is trivial, or inconsequential, or a mere temporary lapse, or something that is otherwise excusable, or forgivable. There is, as Lang J put it, a "high threshold". Only serious misbehaviour can qualify.

## Credibility and Reliability

77. Both credibility and reliability are factors in assessing the evidence in this case. Not only are there major inconsistencies in some of the evidence, but it is also clear that the ability of the parties to recall details of the incident has been materially affected by the amount of time it took to conduct the investigation.

78. The court in *R. v. Thomas*, 2012 ONSC 6653 defined reliability as follows:

13. Reliability generally relates to the testimonial factors of perception, memory, and communication whereas credibility relates to sincerity or honesty. Reliability is particularly a concern in cases where witnesses are very young, where they testify about distant historical events, where their accounts are inconsistent or contradictory, where their accounts are unsupported by any other reliable evidence, where their observations are not recorded contemporaneously, where they have a poor opportunity to observe, or where some other shortcoming relevant to perception, memory, or communication may exist.

79. The leading case in British Columbia is *Faryna v. Chorny*, [1951] 2 D.L.R. 354 (B.C.C.A) for its guidance as to credibility assessment. In this case, O'Halloran J.A. provided the following remarks:

[10] ...On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. *Raymond v. Bosanquet* at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

[11] The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the

real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth.

80. More recently, in *Re: Novak Estate*, 2008 NSSC 283 the Nova Scotia Supreme Court, at para 36, expanded upon the above principle by summarizing the tools for assessing credibility as including a consideration of the following:

a) The ability to consider inconsistencies and weaknesses in the witness's evidence, which includes internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses.

b) The ability to review independent evidence that confirms or contradicts the witness' testimony.

c) The ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in *Faryna v. Chorny*, [1951] B.C.J. No. 152, 1951 CarswellBC 133, it is "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions", but in doing so I am required not to rely on false or frail assumptions about human behavior.

d) It is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it should be done with caution (*R. v. Mah*, [2002] N.S.J. No. 349, 2002 NSCA 99, paras. 70-75).

e) Special consideration must be given to the testimony of witnesses who are parties to proceedings; it is important to consider the motive that witnesses may have to fabricate evidence. *R. v. J.H.*, [2005] O.J. No. 39 (Ont. C.A.), paras. 51-56).

81. Justice Warner then continued at para. 37:

[37] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different

weight to different parts of a witness's evidence. (See *R. v. D.R.* [1996] 2 S.C.R. 291 at para. 93 and *R. v. J.H.*, supra).

### **Misconduct Generally**

82. Misconduct is defined at section 77(1) of the *Police Act* as conduct that constitutes a public trust offence, conduct that constitutes an offence under section 86 or 106, or a disciplinary breach of public trust.

83. The misconduct alleged against the members in this matter is a disciplinary breach of trust, which is defined in section 77(3). The following subsections are at issue in this hearing:

(a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,

(iii) when on duty, or off duty but in uniform, using profane, abusive or insulting language to any person including, without limitation, language that tends to demean or show disrespect to the person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or economic and social status;

(g) "discourtesy", which is failing to behave with courtesy due in the circumstances towards a member of the public in the performance of duties as a member;

84. Pursuant to section 77(4), it is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.

### **Discourtesy**

85. Discourtesy under the *Police Act* is defined as failing to behave with the "courtesy due in the circumstances". British Columbia's *Police Act* is unique in that discourtesy is set out as a stand-alone category of misconduct. In most provinces, discourtesy is caught within one of the categories of discreditable conduct, abuse of authority, or disrespectful behaviour. In the publication Paul Ceysens, *Legal Aspects of Policing*, looseleaf (Salt Spring Island, B.C.: Earls Court Legal Press, 1994) there is a useful summary of behaviour amounting to discreditable conduct. The author has this to say:

Disrespectful behaviour may constitute discreditable conduct. Depending upon the jurisdiction, disrespectful behaviour is framed as discreditable conduct, abuse of authority, a separate discipline offence, or a separate configuration. The discussion of disrespectful behaviour is consolidated in the analysis of discreditable conduct for ease of reference.

The term “disrespectful behaviour” is principally intended to capture discourtesy and obscene language, as distinct from behaviour that involves inappropriate or officious responses to situations.

As to whether a police officer’s comment constitutes incivility, an Ontario Board of inquiry has concluded that the test appears to be: whether it would be perceived as such by reasonable or right thinking persons within the community. Thus, “would an objective, reasonable individual in the community consider this statement as being uncivil?”

Disrespectful behaviour as police misconduct contains various gradations. Use of profane language to a member of the public is sufficient to constitute formal misconduct in most cases but not all.

86. Counsel for the members in their thorough written submission point out that there is an expectation that a police officer will exercise appropriate professional restraint and tone in communications with the public. Profanity can certainly give rise to an instance of misconduct, but it depends on the context in the circumstances of the use of the profanity.

### **Abuse of Authority**

87. Abuse of authority includes "oppressive conduct" towards a member of the public, which overlaps to some degree with discourtesy, as it includes at section 77(3)(a)(iii) the use of profane, abusive or insulting language. It can also be conduct that includes “language that tends to demean or show disrespect to the person on the basis of that person’s race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or economic and social status”.
88. Oppressive conduct is not defined in the *Police Act*. A variety of Canadian courts have had occasion to explore the definition in the context of corporate law. It has been described as “conduct that is burdensome, harsh or wrongful or which lacks probity or fair dealing or has been done in bad faith (*O`Connor v Winchester Oil and Gas Inc.* (1986), 69 BCLR 330). In *BCE Inc. v 1976 Debenture Holders*, 2008

SCC the Supreme Court of Canada used the same terminology and suggested it could also include a “visible departure from the standards of fair dealing”, and an “abuse of power.”

89. In this case the abuse of authority allegation has been particularized by alleging that the officers committed the disciplinary breach of public trust by making profane, abusive or insulting comments towards one of the Complainant’s directed at his race, colour, ancestry and/or place of origin and by singling out the Complainant Mr. ██████ for the purposes of ticketing him based on his race, colour, ancestry and/or place of origin.

### **VIII. Analysis**

#### **A. Did Constable ██████ stop and/or ticket Mr. ██████ because of his race or ethnicity?**

90. Constable ██████ defence to this allegation is simple:

*“I write tickets, that is what I do. If I see an offence I am going to stop and engage, I am not going to just drive by.”*

91. He went on to say:

*“...In policing there are your ticket writers, your traffic officers, people that like writing tickets and then there`s officers that do not like writing tickets, and I would put Constable ██████ in the kind of camp that does not like writing tickets”.*

92. Constable ██████ did not want to stop the Complainants, nor did he wish to write a ticket. That position remained consistent even after words had been exchanged between the Complainants and the members.

93. Constable ██████ saw Mr. ██████ carrying an open beer in public. No issue is taken with that assertion and it was admitted. I have no difficulty understanding why the Complainant’s were upset and why they believed that Mr. ██████ had been singled out. They all had open alcohol and only Mr. ██████ was questioned. Mr. ██████ was the only person of colour in the group and the only one investigated. He was the target of profanity and aggression and on the balance of the evidence, although clearly hoping for only a warning and not a ticket, was cooperative and not aggressive.

94. There is no suggestion that Constable [REDACTED] ever used profanity or was anything other than professional in his initial dealings with the group.
95. I am satisfied that Constable [REDACTED] decision to stop Mr. [REDACTED] had nothing to do with his race or ethnic background. Mr. [REDACTED] was not racially profiled. Constable [REDACTED] was a prolific ticket writer and proud of the fact that he and his partner wrote some 62% of all of the tickets written by the Victoria Police Department. I am satisfied that Mr. [REDACTED] was the only person Constable [REDACTED] saw with open alcohol. Mrs. [REDACTED] had placed her beer in a bag shortly after the stop and Ms. [REDACTED] had her alcohol in a travel mug. I am unable to conclude that Mr. [REDACTED] was carrying open alcohol given the conflicts in the evidence. Both Ms. [REDACTED] and Mrs. [REDACTED] stated that Mr. [REDACTED] did not have open alcohol. The other officers did not see open alcohol other than that carried by Mr. [REDACTED]
96. Clearly, Constable [REDACTED] had the legal authority to stop and ticket Mr. [REDACTED]. In all probability he was one of the few Victoria Police Department officers who would have exercised their discretion between 8 and 9 PM on the Sunday night of the [REDACTED] and issued a \$230 ticket for carrying an open beer, despite the group not being disruptive.
97. I am unable to conclude on the evidence in the Record that Constable [REDACTED] decision to issue Mr. [REDACTED] a ticket amounted to an abuse of authority as that offence is defined in the *Police Act*. Unfortunately for Mr. [REDACTED] he ran into the wrong officer at the wrong time – a prolific ticketer who spotted him with open alcohol. No doubt, the decision to issue the ticket was also, in part, motivated by the behaviour of Mr. [REDACTED] in strenuously objecting to the investigation of Mr. [REDACTED]

**B. Did Constable [REDACTED] comment that Mr. [REDACTED] could “thank your friends for this” rise to the level of abuse of authority?**

98. Constable [REDACTED] statement that Mr. [REDACTED] could “thank your friends for this” when he handed Mr. [REDACTED] the ticket showed a singular lack of judgement and was unprofessional. It had the effect of exacerbating what was already a confrontation that should never have occurred. In the context of the facts of this case as contained in the Record, Constable [REDACTED] words do not amount to oppressive conduct as I have concluded that phrase should be interpreted. The lapse in judgement did not meet the test of gravity as outlined above. Constable [REDACTED] statement does not rise to the level of abuse of authority.

**C. Did Constable ██████ conduct, including the use of profanity in the context of the stop, rise to the level of abuse of authority or discourtesy?**

***Which allegations regarding Constable ██████ use of profanity/aggression actually occurred?***

*“You are fucking right you will pour it out.”*

99. Mr. ██████ said that this statement occurred very shortly after he was directed to the passenger side of the vehicle and first encountered Constable ██████. He had initially been directed to the driver’s side door by Constable ██████. He stated that he was hoping for a break if he simply offered to pour the beer out. The comment he attributes to Constable ██████ was in response to his request for that consideration.

100. In his first statement provided to Sgt. ██████ in April 2020, Constable ██████ said he could not recall what happened to the liquor and could not recall if he told the Complainants to pour it out. He added that he did not recall using the words in question but it is possible he could have told him to pour out the beer. He went on to say that he was very confident of when he used swearwords and when he did not.

101. There were many inconsistencies between Constable ██████ first statement and his testimony under oath. For example, Constable ██████ described Mr. ██████ being dressed in a purple velour type top and purple bottoms with a large clock (14 to 16 inches) around his neck. Although vague with respect to most of what happened on ██████, he was 100% certain about this. This was incorrect as shown by the photograph in the FIR. He was also certain that it was Mr. ██████ who was angry and aggressive and using profanity with him while standing at the driver side door. Under oath he admitted that he was mistaken and that in fact it was Mr. ██████ who was aggressive. He reluctantly conceded that Mr. ██████ was not dressed as he had described.

102. Constable ██████ described the Complainants and Mr. ██████ as intoxicated: all yelling and screaming which he explained resulted in him having to use profanity to take control. On the evidence, although Mr. ██████ had consumed a fair amount of alcohol, Mr. and Mrs. ██████ were still working on their first beer of the day. Ms. ██████ had also consumed a small amount of alcohol and some marijuana. The four had been at the costume party briefly having arrived around 8 PM. They encountered the police between 8:30 and 8:45 PM. Reserve Constable

██████ who exited the truck and dealt with the group did not consider them intoxicated. The Complainants and Mr. ██████ explained that they were on their way to Mr. ██████ residence with the alcohol and food they had taken to enjoy at the party. In my view, intoxication was not a factor with respect to Mr. and Mrs. ██████ and Ms. ██████

103. In the evidence provided under oath, Constable ██████ was not asked whether he said to Mr. ██████ “you are fucking right you will pour it out”. Constable ██████ was asked whether he heard the comment. He noted that Mr. ██████ never denied having open alcohol and recalls that at some point he poured it out. Asked whether he heard Constable ██████ make the subject statement he replied

*“He might have said that, I cannot recall exactly what he said, but there was definitely conversation there.”*

104. Mrs. ██████ originally standing with the others on the driver side of the truck, moved over to the passenger side when she heard profanity and what she considered to be aggression from one of the officers.

105. On a careful review of the evidence in the Record I am satisfied that Constable ██████ made the statement in question pertaining to pouring out the alcohol and the use of profanity. I also accept the sequence of events suggested by Mr. ██████ He was trying to talk himself out of the ticket and it is logical that the first thing he would have done is to offer to pour the beer out in the hope that that would end the matter.

*“Who are you, fucking Flavor Flav?”*

106. Mr. ██████ asserts that this comment was made by Constable ██████ shortly after the discussion about pouring out the beer.

107. Constable ██████ concedes that he made the statement but maintains that it was on first encountering the group. He says it was said in humour, a lighthearted attempt to break the ice and lighten the impact of a police stop of the group.

108. Constable ██████ says that Mr. ██████ told him they were coming from a costume party and that he was indeed dressed to look like the rapper Flavor Flav. Mr. ██████ states that that never occurred; he simply told him he was dressed to look like a 90s rapper. Mr. ██████ was offended by the comment because the rapper in question was a black person and he felt the comment was racially motivated.

109. I am satisfied that Mr. ██████ recollection as to the sequence of the comments is correct. Constable ██████ recollection of events, particularly in his first statement was very vague. I note that originally the complaint and investigation focused on Constable ██████ because it was his police number that was on the ticket. It was only after the investigation commenced and statements were taken from the witnesses that Constable ██████ was added to the complaint. Constable ██████ testified that the police officers had not spoken about the incident until after they had provided their initial statements to Sgt. ██████ This may be a partial explanation as to why Constable ██████ evidence changed when provided under oath.

*“What type of fucking name is that?”*

110. Constable ██████ denied in his first statement that he ever made such a comment. Mr. ██████ indicated that it was after Constable ██████ had asked for his identification and he produced a driver’s license and offered to produce his Nexus card. In his first statement Constable ██████ said he could not recall whether he asked for Mr. ██████ identification, but he could have because he was in the passenger seat. In his testimony under oath he recalled that Mr. ██████ was asked for his license, recalls him fishing for his license and his identification and recalls receiving it and then handing it to Constable ██████ He categorically denies making “negative overtones” about Mr. ██████ name. He said he found the suggestion offensive.

111. In their written submissions counsel for the members points out that Mr. ██████ did not include any reference to this comment being made when he made his initial complaint. The allegation of profanity occurred when Mr. ██████ was interviewed in March 2020. They suggest that if the comment had been made in ██████ 2019, Mrs. ██████ and Ms. ██████ would have heard it and would have included it in their complaint. They also note that neither Constable ██████ or Reserve Constable ██████ heard the comment.

112. In my view it is important when weighing the evidence to put the sequence of events in context. The entire encounter apparently took no more than 10 minutes. Both Constable ██████ and Constable ██████ suggested that it would have taken approximately seven minutes to write the ticket. The ticket was written after the windows of the truck had been rolled up, and Reserve Constable ██████ was out of the truck dealing with the Complainants and Mr. ██████ It is therefore

reasonable to conclude that the initial conversation between Mr. [REDACTED] and Constable [REDACTED] was relatively brief.

113. At the same time as the initial conversation was occurring Mrs. [REDACTED] concerned about the profanity and aggression, had moved over to the passenger side and was voicing her opinion. Mr. [REDACTED] was at the driver side of the vehicle aggressively arguing about why the police were proceeding in the fashion they were. Constable [REDACTED] in his first statement, said that he was so taken with Mr. [REDACTED] and his Flavor Flav costume that that is where his entire attention was focused and little else registered. Of course, he had confused Mr. [REDACTED] and Mr. [REDACTED] attributing the aggression and profanity to the wrong person.

114. As Mrs. [REDACTED] pointed out to Sgt [REDACTED] the investigation had taken so long that it was extremely difficult for any of the witnesses to recall the events in detail.

115. This incident was of significance to Mr. [REDACTED] who made his initial complaint within days. I am satisfied that Constable [REDACTED] had little if any recollection of the specifics of what occurred as evidenced by his inconsistent evidence and the passage of time between the incident and his first statement. As Reserve Constable [REDACTED] pointed out Constable [REDACTED] was getting agitated and frustrated as a result of the aggressive behaviour of Mr. [REDACTED]

116. Applying the legal test and considering the credibility and reliability of the witnesses I am satisfied on a balance of probabilities that Constable [REDACTED] made this statement as well.

*“Get back from the fucking truck”*

117. Constable [REDACTED] has admitted making the above noted statement in an effort to force Mr. [REDACTED] away from the truck.

***Does Constable [REDACTED] use of profanity/aggression rise to the level of abuse of authority or discourtesy?***

118. I agree with the written submissions of counsel for the members that when the conduct at issue is profanity, the offences of abuse of authority and discourtesy overlap and cover the same conduct. In this case, the allegation of abuse of authority was framed and particularized by the members as follows:

“Section 77 (3)(a)(iii) of the *Police Act*, the particulars of which are that the members on [REDACTED] are alleged to have committed a disciplinary

breach of public trust, abuse of authority, by making profane, abusive or insulting comments towards one of the Complainants directed at his race colour, ancestry and/or place of origin while on duty and by singling out the Complainant for the purposes of ticketing him based on his race, colour, ancestry and/or place of origin.”

119. I have already found that the original stop was not racially motivated. In my view, the conduct of Constable [REDACTED] is more appropriately dealt with under the stand-alone discipline offence of discourtesy under section 77(3)(g) of the *Police Act*.

120. The test is whether the statements would be perceived as discourteous by reasonable or right-thinking persons within the community. Put another way would an objective, reasonable individual in the community consider the statements as being uncivil?”

121. I have no hesitation in concluding that the statements taken together amount to discourtesy. Constable [REDACTED] use of profanity accelerated what should have been a routine stop into a significant issue. For reasons that are not totally clear on the evidence Constable [REDACTED] not only used profanity but became agitated and aggressive. I am satisfied that had Constable [REDACTED] acted professionally this unfortunate incident could have been entirely avoided.

122. The oft quoted case of *Rex v Zwicker* [1937] NSJ is worth repeating:

15. The well known saying from Gilbert and Sullivan that “a policeman’s lot is not a happy one” is true at times, but it is also true with regard to all public officials. They must expect more or less so-called abuse. It is an incident of democratic government and free speech; and they should bear it, if not in good humour, at least with reasonable tolerance and that tact which is a very necessary part of the equipment of a servant of the public. In this country a policeman is a peace officer, and his duty is not only to the public generally but to every individual citizen, and to protect that citizen, and to protect him, as far as possible, even against his own weakness and not to hail him before the magistrate for every foolish thing he does.

### **IX. Has the Allegation of Misconduct Been Established**

123. I find the allegations of abuse of authority under section 77(3)(a)(iii) against Constables [REDACTED] and [REDACTED] not substantiated.

124. I find the allegation of discourtesy under section 77 (3)(g) with respect to Constable [REDACTED] substantiated.

125. Pursuant to section 125(1)(d) of the *Police Act*, I invite submissions from Constable [REDACTED] as to appropriate disciplinary or corrective measures in relation to my findings.



Date: March 19, 2021

\_\_\_\_\_  
Signature of discipline authority  
Judge John (Jim) James Threlfall (rt.)

**I acknowledge service of this form:**

Date: \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
Signature of [REDACTED], Constable # [REDACTED]

**I acknowledge service of this form:**

Date: \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
Signature of [REDACTED], Constable # [REDACTED]