

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

and

IN THE MATTER OF A REVIEW OF AN ALLEGATION
OF MISCONDUCT AGAINST CST [REDACTED] AND CST
[REDACTED] OF THE VICTORIA POLICE DEPARTMENT

NOTICE OF DECISION

(Section 117 of the *Police Act*)

NOTICE TO: Mr. [REDACTED]	
Mrs. [REDACTED]	
Ms. [REDACTED]	Complainants
AND TO: Constable [REDACTED]	
Constable [REDACTED]	Members
AND TO: Sgt. [REDACTED]	Investigating Officer
c/o Victoria Police Department	
AND TO: Inspector [REDACTED]	Discipline Authority
c/o Victoria Police Department	
AND TO: Mr. Clayton Pecknold	Police Complaint Commissioner

I. Decision Summary

1. This is a decision made pursuant to section 117(7) of the *Police Act* relating to certain complaints of misconduct concerning the Members alleged to have taken place August 4, 2019.

2. I have been 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. As set out below, in accordance with my appointment as Adjudicator, I have considered the evidence available in relation to the following specific allegations of misconduct by the Members:
 - i. Abuse of authority involving oppressive conduct towards the Complainants arising under section 77(3)(a)(iii) of the *Police Act*,
 - ii. Discourtesy arising under section 77(3)(g) of the *Police Act* concerning the Members interaction with the Complainants.
4. My conclusions reached as a result of a review of those allegations in the context of the Final Investigation Report dated May 10, 2020 (the "FIR") can be summarized as follows:
 - a. With respect to Constables ██████████ and ██████████ the evidence considered does appear sufficient to substantiate misconduct allegation (i);
 - b. With respect to Constable ██████████ the evidence does not appear sufficient to substantiate misconduct allegation (ii); and
 - c. With respect to Constable ██████████ the evidence does appear sufficient to substantiate misconduct allegation (ii).
5. In accordance with section 117(11) of the *Police Act*, my decision on matters that do not appear to be substantiated are final and conclusive.
6. A full consideration and reasons for my conclusions as to the misconduct allegations can be found below, as are the next steps required by all parties.

II. Introduction & Alleged Misconduct

7. On July 27, 2020 the Commissioner ordered a review pursuant to section 117(4) of the *Police Act* of the Disciplinary Authority's determination that allegations of misconduct directed at Constables ██████████ and ██████████ could not be substantiated.
8. The misconduct alleged is as follows:

Abuse of authority pursuant to section 77(3)(a)(iii) and 77(3)(g) of the *Police Act* for the conduct alleged in relation to the racialized comments about Mr.

█'s appearance and his name, the use of profanity, and the singling out of Mr █ for the stop and ticketing.

III. Summary of Complaint and Alleged Misconduct

9. █ ("Mr. █") and his wife █ █ ("Mrs. █") accompanied by █ ("Ms. █") and █ ("Mr █") were walking home from a themed costume party between 8 and 9 PM on August 4, 2019. It was the Sunday night of the long weekend and extremely quiet. The four friends had left the party early, were dressed in costume, and were all carrying open alcoholic beverages. Constables █ and █, accompanied by Reserve Constable █, were in an unmarked Victoria Police Department pickup truck on special assignment, directed to conduct ICBC counterattack roadblocks. They noticed the four friends, the open alcohol and activated the truck's lights stopping the four. Mr. █ was dressed in black clothing, with a black cap, white socks and Adidas slip on shoes. He had a large plastic gold coloured chain around his neck with a medallion that read "pimp". He was supposed to look like a 90's rapper. Mr. █ is originally from the Caribbean and is of Indian descent. He was the only person of colour in the group.
10. The three Caucasians were directed to stand together away from the police vehicle while the Constables dealt with Mr. █. Mr. █ was asked to produce his identification and was questioned by Constable █. Mr. █ alleges that the questioning was very aggressive, racially inspired and involved significant profanity. When Mr. █ apologized and offered to pour out his beer Constable █ allegedly replied "you are fucking right, you will pour it out". He asked Mr. █ if he was "fucking Flavor Flav", a black rapper. When looking at Mr. █'s identification Constable █ asked "what kind of a fucking name" is that. During the course of their initial encounter with Mr. █ neither Constable █ or Constable █ left the police vehicle. At one point, Mr. █ knocked on the window of the police truck to inquire why the police officers were dealing with his friend in the manner they were. Constable █ was startled and used profanity in an aggressive way to order Mr █ to back away from the truck.
11. Ultimately, Constable █ exited the vehicle and directed Mr. █ to accompany him a short distance from the police truck. He then presented Mr. █ with a ticket for carrying open alcohol and told him that he could thank his friends for getting the ticket.

IV. Complaint and Investigation History

12. On August 6, 2019 Mr. and Mrs. [REDACTED] and Ms. [REDACTED] submitted registered complaints to the Office of the Police Complaint Commissioner (the "OPCC"). The complaints suggested that Mr. [REDACTED] had been profiled as a result of his physical appearance 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 FIR to the Discipline Authority. It is not readily apparent from a review of the record as to why the investigation took as long as it did.
13. The Discipline Authority issued his decision on June 29, 2020. The Discipline Authority identified and considered several allegations of misconduct against Constables [REDACTED]. The Discipline Authority found that Constable [REDACTED] had made the comment about Mr. [REDACTED] being "fucking Flavor Flav", and that Constable [REDACTED], in issuing the ticket to Mr. [REDACTED] had said that he could "blame his friends".
14. 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 Constabl [REDACTED] "fucking Flavor Flav" comment did not amount to Discreditable Conduct pursuant to s.77(3)(h) and that the same comment would not amount to Discourtesy under s.77(3)(g).
15. 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 his 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. [REDACTED], his friends and the officers.
16. In my Notice of Appointment (July 27, 2020) the Commissioner specified that pursuant to section 117(8) of the *Police Act* I am not limited to the allegations considered by the Discipline Authority or the Police Complaint Commissioner's assessment of those allegations.

V. Section 117 of the *Police Act*

17. The statutory authority governing this review is found in section 117 of the *Police Act*. Specifically, section 117(6) of the *Police Act* imposes a duty on the Commissioner to provide the Adjudicator with copies of all reports under sections 98, 115 and 132 that may have been filed with the Commissioner prior to the Adjudicator's appointment in relation to the allegation(s) of misconduct. The responsibilities of the Adjudicator are set out in sections 117(8) and 117(9) and direct the Adjudicator to review the material delivered under section 117 and determine whether the conduct of the Member appears to constitute misconduct.
18. The law is clear that a review under section 117 is a paper-based examination of the record provided by the Commissioner. It takes place without live witnesses, additional evidence or submissions from any of the parties involved. The review is not an appeal of earlier decisions concerning misconduct nor is it a redetermination in any manner of other court proceedings that may have a connection to the misconduct alleged. The Adjudicator's focus is not on the correctness of an earlier finding but rather the Adjudicator is to reach their own conclusion about whether the materials they have been provided for review support a finding of apparent misconduct. If the Adjudicator concludes that on the record it *appears* that the actions constitute misconduct the Adjudicator becomes the Discipline Authority and a Discipline Hearing results.
19. In discharge of the obligations under section 117(6) the Commissioner has provided a record for review. The record consists of the FIR, the Discipline Authorities report, witness statements, summaries of audio statements and audio recordings of the statements. Also included are a variety of exhibits referred to in the FIR, including photographs and notes. The record also includes a variety of legal authorities referred to by the Investigator and the Discipline Authority. Collectively, I will refer to these materials as the Record.

VI. Misconduct and the *Police Act*

20. 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)

21. 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.

22. 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.

23. 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);
 - ii. Discourtesy arising under section 77(3)(a)(b) concerning the Members’ interaction with the Complainants.

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).

VII. The Evidence

Circumstances Leading to Alleged Misconduct

24. On August 4, 2019 Mr. ██████ Mrs. ██████, Ms. ██████ and Mr. ██████ were walking home from a 1990’s costume themed party. It was between 8 and 9 PM

on the Sunday night of the August long weekend. It was extremely quiet in Victoria that evening with little vehicle traffic. The four friends, after discovering that the party was really a family event decided to return to Mr. ██████'s home. They had taken alcohol and food to the party and had what remained of it with them as they were walking. Mr. ██████ and his wife had cans of beer while Ms. ██████ had a coffee cup with alcohol in it. Mr. ██████ maintained that he also had a can of beer.

25. Constables ██████ and ██████ were in an unmarked pickup truck accompanied by Reserve Constable ██████. They were on special assignment, directed to conduct ICBC counterattack roadblocks. Since it was so quiet they decided to look for impaired drivers by setting up an observation post outside ██████ ██████ ██████. They were eastbound on ██████ Street when Constable ██████ spotted the four friends with what appeared to be alcohol. Constable ██████ was driving, Constable ██████ was in the front passenger seat and Reserve Constable ██████ was seated behind Constable ██████. The police vehicle activated its police lights, chirped its siren, and made a left turn onto ██████ Street. It came to a stop on the travelled portion of ██████ Street. The four civilians were standing to the left of the police vehicle on the sidewalk. Constable ██████ asked Mr. ██████ what was in his hand. Mr. ██████ recognizing that he had the beer started to apologize. He was directed by Constable ██████ to the passenger side of the vehicle and the other civilians were directed to remain where they were.
26. Mr. ██████ 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. ██████ is from the Caribbean and is of East Indian decent. He was the only non-Caucasian in the group.

Evidence Regarding Alleged Misconduct

27. There are differing versions of what happens next and the evidence was received as follows:
- a. Mr. ██████ Mrs. ██████ and Ms. ██████ lodged formal complaints with the OPCC August 6, 2019;
 - b. Formal statements were taken from Mr. ██████ on March 24, 2020 and from his wife Mrs. ██████ on February 12, 2020;
 - c. Ms. ██████ was interviewed on January 31, 2020;
 - d. Mr. ██████ was interviewed on April 6, 2020;

- e. Constable [REDACTED] was interviewed on April 22, 2020, although the FIR states that he was interviewed on April 22, 2019 which is clearly impossible;
- f. Reserve Constable [REDACTED] was interviewed on March 26, 2020; and
- g. Constable [REDACTED] was interviewed on April 8, 2020.

Neither Constable [REDACTED] or Constable [REDACTED] had any notes and it is fair to say from the Record that they had a rather vague recollection of events. Reserve Constable [REDACTED] did make notes but they were very brief.

28. Mr. [REDACTED] evidence was that he did as directed and approached the passenger side of the police vehicle. He apologized for having the alcohol and asked if he could pour it out. The Constable in the passenger seat, Constable [REDACTED] replied "you are fucking right you will pour it out". Constable [REDACTED] then said "who are you, fucking Flavor Flav?". Apparently, Flavor Flav was a 90's rapper known to wear loud clothing with a large clock on a chain around his neck. Mr. [REDACTED], was asked to produce identification. He complied. When Constable [REDACTED] saw the name on the identification, he said "what kind of fucking name is that?" Mr. [REDACTED] was directed to stand away from the vehicle. At this point he said he was scared, quiet and cooperative. He knew a ticket was coming and simply wanted to get it and leave. Constable [REDACTED] rolled up his window after receiving the identification and began to communicate with Constable [REDACTED]
29. Mrs. [REDACTED], Ms. [REDACTED] and Mr. [REDACTED] were upset and concerned. In particular Mrs. [REDACTED] had heard the profanity and although she had been told to wait with the others on the driver side of the police 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 [REDACTED] who she described as agitated, loud and swearing. He never left the vehicle. At one point, Reserve Constable [REDACTED] was directed to exit the vehicle and deal with them. She recalls Reserve Constable [REDACTED] saying to them "you don't want to do this: I have seen what he can do".
30. Mr. [REDACTED] 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. [REDACTED] He had a can of beer with him as well. He recalled the police asking the two women to pour out their alcohol. The police were aggressive from the outset. Mr. [REDACTED] was concerned about Mr. [REDACTED] being singled out when they all had alcohol. Mr. [REDACTED] 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 ██████

31. Ms. ██████ one of the Complainants, 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.
32. Ultimately, Constable ██████ exited the vehicle and walked Mr ██████ to ██████ Street where he presented him with a \$230 ticket under section 73 of the *Liquor Control Licensing Act*. Upon presenting the ticket to Mr. ██████ Constable ██████ said “you can thank your friends for this ticket”.
33. The Complainants 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”.
34. Constable ██████ had a different version of events. He provided an ordered statement on April 27, 2020. He recalled his partner Constable ██████ noting the three Complainants and Mr. ██████ on ██████ Street with open liquor; what appeared to be beer. During subsequent interaction with the group they admitted to being in possession of open liquor. He could not recall what happened to the liquor. He did recall having a brief discussion with Constable ██████ as to whether or not they should stop the group. He said he believed they should focus on impaired drivers but Constable ██████ decided to stop. 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. ██████ 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. He 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.

35. None of the other witnesses recalled Mr. [REDACTED] using profanity, being told to get away from the driver's side door of the vehicle or being aggressive. The only individual present who was told to back away from the driver's side of the vehicle was Mr. [REDACTED]. Moreover, it is clear from the evidence that Mr. [REDACTED] was not dressed in purple with a large clock around his neck. He was not dressed as the rapper Flavor Flav and never told Constable [REDACTED] he was. This fact is corroborated by a photograph of the group taken minutes before their encounter with the Victoria Police Department Constables showing the four in costume and Mr. [REDACTED] being dressed precisely as he described.
36. Constable [REDACTED] does recall telling Reserve Constable [REDACTED] to get out of the truck. He does not recall telling the Complainants to pour out their beer although he concedes it is something he might have done. He denied using profanity when reviewing Mr. [REDACTED] identification. He does not recall receiving the identification, does not recall any conversation with the two female Complainants and said that when he observed someone dressed as outlandishly as Mr. [REDACTED] all other players faded away. He stated that Mr. [REDACTED] was the most verbally aggressive by far.
37. On April 8, 2020 Constable [REDACTED] 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. [REDACTED] 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 [REDACTED] made the Flavor Flav remark, shouting it over Constable [REDACTED] 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. [REDACTED] 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. 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. He 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.

38. Reserve Constabl ██████████ gave an ordered statement on March 26, 2020. He recalled noticing the four individuals in costume. He does not recall whether lights or siren of the police vehicle were activated. He does not recall Constable ██████████ speaking to Mr. ██████████. He recalls Mr. ██████████ saying “I know I should not be doing this but is it really that big a deal”. The situation became elevated when Mr. ██████████ knocked on the driver’s side window startling the police officers. Profanity was used by Constable ██████████ who was very displeased. His recollection is that Mr. ██████████ 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 ██████████ swearing when the window was down on more than two or three occasions. The majority of the profanity was in response to Mr. ██████████ at the driver’s side window. He stated that Constable ██████████ was not out of control but was startled; the concern being for officer safety. They did not immediately recognize Mr. ██████████ as part of the original group and initially thought they were dealing with a stranger. Constable ██████████ 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. ██████████.
39. In terms of intoxication, Constable ██████████ felt that Mr. ██████████ was about a 7/10, with 0 being sober and 10 being the high end of intoxication. Constable ██████████

thought he was about a 6/10. Reserve Constable ██████ who actually dealt with him did not think he was impaired. Mr. and Mrs. ██████ stated they were still working on their first beer and were at most a 3/10 in terms of intoxication. Ms. ██████ was also a 3/10 and Mr. ██████ perhaps a 5/10. None of the Complainants had been drinking heavily and in my view their sobriety is really not an issue.

VIII. Analysis

(i) Abuse of authority involving oppressive conduct towards the complainants arising under section 77(3)(a)(iii)

40. Although the *Police Act* does not define oppressive conduct a variety of Canadian courts have had occasion to explore the definition in the context of corporate law. For example in *O`Connor v Winchester Oil and Gas Inc*(1986),69 B.C.L.R. 330 the BC Supreme Court decided that oppressive conduct was “conduct that is burdensome, harsh or wrongful or which lacks probity or fair dealing” or has been done in bad faith. In *BCE Inc. v 1976 Debentureholders*, 2008 SCC, the Supreme Court of Canada used the same terminology in defining oppressive conduct at common law as conduct that is “burdensome, harsh and wrongful”, “a visible departure from the standards of fair dealing”, and an “abuse of power”.
41. In OPCC File No.2018-14290, a decision rendered October 31, 2018 under section 117 of the *Police Act*, Adjudicator Oppal noted that the *Police Act* did not define “oppressive conduct towards a member of the public”. In his decision he preferred to use the Concise Oxford Dictionary definition which defined “oppression” as connoting “prolonged harsh or cruel treatment or control,” “mental distress”, and “the state of being oppressed”. In my view that definition is too restrictive and does not reflect the common law definition as adopted by the Supreme Court of Canada. *Police Act* proceedings are civil in nature.
42. In relation to the particular allegations of misconduct described above and for the purposes of the within analysis, it is noteworthy that the legislature made it specifically known that oppressive conduct is to include a member 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...” through the wording of section 77(3)(a)(iii). Language that meets that definition would therefore constitute oppressive conduct under the *Police Act*.
43. One of the major concerns of the Complainants was their belief that Mr. ██████ was singled out because he was the only person of colour in the group and

because of the way he was dressed. In *R v. Le*, 2019 SCC 34 the court dealt with the concept of racial profiling and had this to say:

[76] In contrast, the concept of racial profiling is primarily concerned with the motivation of the police. It occurs when race or racial stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or subject treatment (Ottawa Police Service, Racial Profiling (June 27, 2011), Policy No. 5.39 (online), at p. 2).

[77] This Court adopted the following definition of racial profiling in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789 (*Quebec v. Bombardier*):

Racial profiling is any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on actual or presumed membership in a group defined by race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny.

Racial profiling [also] includes any action by a person in a situation of authority who applies a measure in a disproportionate way to certain segments of the population on the basis, in particular, of their racial, ethnic, national or religious background, whether actual or presumed. [Emphasis deleted; para. 33.]

44. Mr. and Mrs. ██████, Ms. ██████ and Mr. ██████ all stated that they were carrying open liquor that was visible as they walked down the street. Constable ██████ testified that Constable ██████ first observed all of the group carrying open liquor. Indeed, he had a discussion with Constable ██████ as to whether they should stop and question the group. During the course of police interaction with the group all admitted to carrying open liquor. Although Constable ██████ and Reserve Constable ██████ could not recall when they gave their interviews whether they saw open liquor with the group (other than Mr. ██████) there is no dispute about the fact that after Constable ██████ interacted with Mr. ██████ and received his identification the truck windows were rolled up and the Constables had a conversation. A decision was apparently made to only ticket Mr. ██████. During

the initial encounter he was the only person waved over to the vehicle, questioned, asked to produce identification and he was the only person of colour in the group. When he was presented with the ticket he was told that he got it because of his friends. It appears that he was singled out notwithstanding the fact that it was Mr. [REDACTED] who was loud and aggressive.

45. During Constable [REDACTED] interaction with Mr [REDACTED] he repeatedly used profanity. Although he explained the comment about Mr. [REDACTED] being “fucking Flavor Flav” as an attempt to establish rapport it is clear from the evidence that Mr. [REDACTED] although in the costume of a 90’s rapper, was not dressed as Flavor Flav whose trademark was a cap worn sideways, loud clothing and a large clock around his neck. Moreover, Constable [REDACTED]’s assertion that Mr. [REDACTED] repeatedly used profanity towards the Constables is simply not borne out by the evidence on the Record. Significantly, when Constabl [REDACTED] presented Mr. [REDACTED] with the ticket he blamed Mr. [REDACTED]’s friends, not Mr [REDACTED] himself.
46. It appears from the evidence on the Record that Constable [REDACTED] was aggressive and used foul language throughout his encounter with both Mr [REDACTED] and Mr. [REDACTED]. Reserve Constable [REDACTED] explained that the Constables were startled when Mr. [REDACTED] knocked on the driver’s window and that upset Constabl [REDACTED] and triggered one of his profane outbursts. This is hard to comprehend since it was the Constables who had directed Mr [REDACTED] and the two females to stand together on the corner.
47. It is significant that Constable [REDACTED] never left the police truck to deal with any of the parties, sending Reserve Constable [REDACTED] out instead. This was not a group of drunks; it was not a group of rowdy young persons; it was not late at night. There had been no complaints of illegal or criminal behaviour. The group was walking, not driving. It is hard to fathom why a police officer would repeatedly use profanity in dealing with this group of persons.
48. It appears that these allegations constitute misconduct:
 - a. Mr. [REDACTED], the only person of colour present, was singled out and given a ticket and told he could thank his friends. After Mr. [REDACTED] provided his identification Constable [REDACTED] asked “what kind of fucking name is that?”

The rationale provided by Constable [REDACTED] as to why Mr [REDACTED] was the only person to receive a ticket was that Mr. [REDACTED] was the only person he saw with open liquor. That explanation is not consistent with the balance of the evidence. Constable [REDACTED] stated that it was Constable [REDACTED] that

brought the fact that the group were carrying open liquor to his attention. Moreover, everyone in the group of Complainants, including Mr. [REDACTED] conceded they were carrying open liquor during the course of their interaction with the police. Not one of them was the subject of further police investigation although after the initial interaction the windows of the truck were rolled up and Constables [REDACTED] and [REDACTED] had a conversation about charges and determined to solely issue a ticket to Mr. [REDACTED]. It appears that this disproportionate treatment meets the test set out by the Supreme Court of Canada for racial profiling in *Quebec v. Bombardier*.

- b. Constable [REDACTED] aggression and profane language during his interaction with the Complainants appears uncalled for in the circumstances. It appears, based on the Record, that Constable [REDACTED], when on duty used profane, insulting and abusive language towards Mr. [REDACTED] and Mr. [REDACTED].

(ii) *Discourtesy arising under section 77(3)(a)(b) concerning the member's interaction with the complainants.*

49. There is very little authority on what amounts to discourtesy under the *Police Act*. The Nova Scotia Court of Appeal in *Blakeney v. Police Review Board*, (1995) 137 NSR (2D) 372 (CA) found that an off-duty officer who called his neighbour a "senile old bastard" committed a discourtesy which amounted to misconduct because the comment was clearly intended to be rude. In another case the Nova Scotia Police Review Board noted that discourtesy requires an element of intention on the part of the officer in order to amount to misconduct.
50. The ordinary meaning of the word discourtesy is defined by the Merriam-Webster Dictionary as "a rude act". Similarly, discourtesy is defined as "rude and inconsiderate behaviour" by the Oxford English Dictionary.
51. A police officer's job can be a difficult one. Members of the public, when stopped for an infraction, often plead their case and ask for leniency. In the oft quoted case of *Rex v Zwicker* [1937] NSJ No 7 the court had this to say:

15 . The well known saying from Gilbert & 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.

52. Based on the Record before me it appears that Constable [REDACTED] behaved professionally throughout his involvement with the Complainants. He did not use profanity and, when giving Mr. [REDACTED] a ticket took him aside and explained why. Leaving aside the question of whether his actions were racially motivated as was considered in relation to section 77(3)(a)(iii) above, it appears that his involvement with the Complainants on this occasion does not amount to discourtesy.
53. I have concluded that, based on the Record, Constable [REDACTED] interaction with the Complainants, in particular his repeated use of profanity and his aggression in the circumstances of this particular police stop does appear to constitute discourtesy under section 77(3)(g) of the *Police Act*.

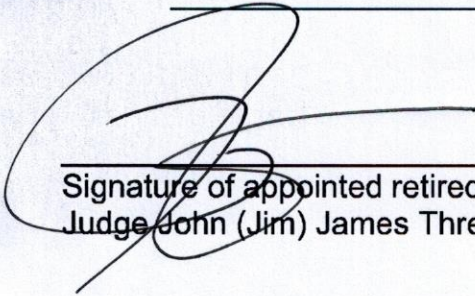
IX. Conclusion

54. Applying the standard of review at this stage of the proceedings, pursuant to section 117(9) and 117(8)(d)(i) of the *Police Act*, I find that there appears to be evidence set out in the FIR which, if proven, could substantiate the following misconduct allegations and require the taking of disciplinary or corrective measures:
- a. misconduct allegation (i) (abuse of authority – 77(3)(a)(iii) with respect to Constables [REDACTED] an [REDACTED], and
 - b. misconduct allegation (ii) (discourtesy – 77(3)(g) with respect to Constable [REDACTED]
55. I further find that applying the same test, the evidence in the FIR does not substantiate misconduct allegation (ii) (discourtesy) with respect to Constable [REDACTED]
56. In accordance with section 117(11) of the *Police Act*, my decision on the misconduct matters that are not substantiated are final and conclusive.

X. Next Steps

57. I hereby notify the relevant parties of the next steps in this proceeding, pursuant to subsections 117(7) and (8) of the *Police Act*.
58. Considering the factors in section 120 of the *Police Act*, and in particular section 120(3), I am willing to offer a prehearing conference to Constables [REDACTED] and [REDACTED] with respect to the misconduct allegations that appear to be substantiated.
59. I am directing Constable [REDACTED] and Constable [REDACTED] to advise the Registrar within five days once a decision has been made on whether or not to accept the offer of a prehearing conference.
60. The range of disciplinary and corrective measures set out in the *Police Act* which I would consider appropriate in the current case includes:
- a. giving advice to the members as to their conduct,
 - b. verbal or written reprimand, and/or
 - c. requiring the members to engage with training or retraining,
- pursuant to subsections 126(1)(f), (i) and (j) of the *Police Act*.
61. Pursuant to s.113 of the *Police Act*, the Complainants have the right to make submissions:
- a. at a discipline hearing (as per section 117(8)(b)) or,
 - b. if the members accept a prehearing conference, (as per section 120(6) and (7) of the *Police Act*), to the prehearing conference authority, within 10 business days of receiving notice of their right to do so under these sections.
62. Pursuant to section 119, at a disciplinary hearing, Constables [REDACTED] and [REDACTED] may each request permission to question witnesses. Such a request must be made within 10 business days of this notification. Any such request will be directed to my attention through the Registrar.
63. Section 118(1) of the *Police Act* provides that a discipline proceeding concerning the substantiated misconduct allegations must be convened within 40 business days of notice of this decision.
64. A pre-hearing conference call will be convened by telephone on October 16, 2020 at 9 AM with Constables [REDACTED] and [REDACTED], or counsel on their behalf. At that

time, dates will be canvassed that are convenient to commence the disciplinary hearing. The Registrar will advise the relevant parties as soon as possible of the conference call details. In the event that date is unsuitable to one or more of the parties, that party will advise the Registrar immediately and provide an indication of available dates and times for a conference call to be convened.



Signature of appointed retired judge
Judge John (Jim) James Threlfall (rt.)

Date: October 5, 2020