

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

AND

IN THE MATTER OF ALLEGATIONS OF MISCONDUCT

AGAINST

CONSTABLE [REDACTED]

CONSTABLE [REDACTED]

CONSTABLE [REDACTED]

CONSTABLE [REDACTED]

OF THE VANCOUVER POLICE DEPARTMENT

**DISCIPLINE AUTHORITY'S DECISION ON APPLICATION TO
EXTEND TIME UNDER SECTION 114 AND 119**

To: Constable [REDACTED]
Constable [REDACTED]
Constable [REDACTED]
Constable Ian [REDACTED] (Members)
c/o Vancouver Police Department
Professional Standards Section

AND TO: Mr. Clayton Pecknold (Commissioner)

AND TO: Mr. [REDACTED] (Counsel)

AND TO: Sergeant [REDACTED] (Investigator)
c/o Vancouver Police Department
Professional Standards Section

[1] This is a ruling in relation to an application to extend the time limit to request further investigation and/or apply to call witnesses on a discipline proceeding under Sections 114 and 119 of the Police Act. There is a related issue pertaining to the members' decisions as to whether to accept the offer of a prehearing conference under Section 120.

[2] On September 17, 2019, I issued a notification under Section 117 substantiating allegations in relation to the subject members. I offered the members a prehearing conference and included in paragraph 92 of the notification a direction as to the timing of their acceptance of that offer, in relation to the timing of their decision whether to request witnesses under Section 119.

[3] Assuming the members received the Section 117 notification on the date it was issued, the timeline in relation to Section 119, which is 10 business days, would have expired on October 1, 2019. I had directed that the members advise me whether they would accept a prehearing conference within 5 business days following the later of the expiry of that deadline and certain other events.

[4] By October 1, I had received indication by email that the members were receiving some advice from counsel and that the notification was not in fact received by some or all of them until perhaps September 20. In that case, the Section 119 deadline would have expired on October 4, 2019. However, there has to date been no formal confirmation of any member's receipt of the notification, nor is there a prescribed mechanism for such under the Act, despite the fact that the Section 119 deadline flows from the date of receipt by the member. The Act essentially leaves it to the member to calculate the Section 119 deadline. None of the officers in this matter have yet applied to call witnesses under Section 119.

[5] On October 4, 2019, I received an email notification from Mr. [REDACTED], a lawyer, who indicated that the members had been receiving general advice from another lawyer but that he anticipated that he "may act" for one or more of the members. Mr. [REDACTED] stated that he had only received the Section 117 notification and the final investigation report on October 3, 2019, after returning from vacation. He states as well that one of the members is currently out of the country. Mr. [REDACTED] on behalf of "all the members" seeks time to take instruction in relation to whether to request further investigation under Section 114, whether to seek to call witnesses under Section 119, and whether to accept the offer of a prehearing conference under Section 120.

He has asked for an extension to October 16, 2019, with the caveat that he may find he needs more time.

[6] The question at this stage is whether I have authority to extend the timelines in relation to Sections 114 and 119, and the effect of any such extension on the direction I have made in relation to the deadline for accepting a prehearing conference.

[7] Regarding a discipline authority's ability to extend the timelines under the Police Act, Mr. ██████ cites the case of *Bowyer v. Lowe*, BCSC, May 18, 2011, Oral Decision, in which Justice Kelleher discussed the difference between mandatory and directory legislative provisions in the context of a Police Act proceeding. He reviewed the antecedents to the enactment of the Act, and observed that timelines should be considered in light of the Act's purposes of thorough and timely investigations of police misconduct. Justice Kelleher concluded that the time limits prescribed in Section 117 for the appointment of a retired judge were directory rather than mandatory, and held that a notice issued well outside the time limit was not invalid. In making his decision, he considered (at page 7) whether there would be significant adverse consequences to the public interest in addressing police misconduct if the provision was treated as mandatory, and whether treating the time limit as directory would result in prejudice to the member.

[8] In relation to the time limit under Section 119, Mr. ██████ points out that *Bowyer v. Lowe* was followed in the decision of Chief Constable Jones in Todd, October 31, 2012. Chief Jones stated at p. 7:

29. Counsel for Cst. Todd submits that same primary objectives cited by the Court in *Bowyer* are applicable here: "thorough and proper investigation and conclusion of complaints in the public interest, and timely conclusion [of] proceedings in the interest of the member"

30. I conclude, on the basis of the reasoning in *Bowyer*, and the general principles cited therein with regard to the underlying public interest, that the 10 business day time limit in section 119(1) is directory.

31. Accordingly, I find that as the discipline authority I have the discretion, in an appropriate case, to extend the time limit for a member or former member to request witnesses, even if that request is made more than 10 business days after the member receives the FIR.

[9] I have observed on a prior occasion that the timelines prescribed in relation to Sections 117, 118, 119, and the process under Section 120 pose procedural difficulties¹. Members are called upon by Section 119 to make their request to call witnesses on a discipline proceeding

¹ <https://opcc.bc.ca/wp-content/uploads/2017/10/13143-03-Nov-2017-S117-Decision.pdf>

within 10 business days of receipt of a Section 117 notification, at the same time as they are considering whether to accept a prehearing conference, if one has been offered. There is no deadline for accepting the offer of a prehearing conference; however, the decision is precluded by acceptance of a request for witnesses. At the same time, notices of the discipline proceeding will need to be delivered at least 15 days before the discipline proceeding, which must be convened, at least initially, within 40 days of the date (not the receipt) of the Section 117 notification.

[10] To say the least there is a lot for a member to consider in this relatively tight time frame, and he or she may well wish or need to seek counsel. The time frame experienced by these members and counsel, in light of busy schedules and communication limitations, would not seem atypical. Procedural fairness would dictate that a member have sufficient time to reflect and obtain advice on these significant decisions. A reasonable extension for these purposes at this stage would not appear to prejudice the public interest in timely and thorough disposition of police complaints.

[11] I am prepared to extend the deadline for the request to call witnesses under Section 119 a further 10 business days beyond October 4, 2019; therefore, to October 21, 2019. In the interests of fairness, my view is that this offer of an extension should be extended to all of the members who are involved in this proceeding, whether or not they are represented by Mr. ██████ in this application.

[12] I have considered separately the issue of whether Section 114 allows of an extension of the time to seek further investigation. The prescribed time limit is 10 business days following the member's receipt of the final investigation report. I have had occasion to consider that section previously in relation to an application made by Mr. ██████ at the outset of a discipline proceeding: OPCC File No. 2016-11867, Decision on Request for Further Investigation, dated October 3, 2017. It was my view then and it remains my view that given the timelines under Section 114 and its context within the Act, and given that there is a separate provision in Section 132(1) for a request for further investigation "before or during" a discipline proceeding, Section 114 has no application to allegations that are substantiated under Section 117.

[13] The timeline in relation to Section 114 will long have expired before the Section 117 decision is rendered. Section 114 would appear to apply only where the original discipline authority substantiates allegations. It is unlikely that a member will request a further

investigation if allegations are not substantiated at that stage. If allegations are later substantiated by an adjudicator under Section 117, the issue of further investigation will be governed by the provisions relating to discipline proceedings, which include Section 132. That application may be made at any time before or during the discipline proceeding.

[14] Paragraph 91 of the Section 117 notification is amended to permit the members to notify me whether they wish to request witnesses under Section 119 by no later than October 21, 2019. The timeline set out in paragraph 92 of the notification in relation to the members' acceptance of a prehearing conference will be amended accordingly.

Dated at Sechelt, British Columbia, this 7th day of October, 2019.

A handwritten signature in black ink, appearing to read 'C Baird Ellan', followed by a period.

Carol Baird Ellan, Retired Judge, Discipline Authority