Office of the
Police Complaint Commissioner

British Columbia, Canada

NOTICE OF APPOINTMENT OF RETIRED JUDGE
Pursuant to section 117(4) of the *Police Act*

OPCC File 2019-16335
January 21, 2022

To: [redacted] and [redacted] (Complainant)
c/o [redacted] and [redacted]

And to: Constable [redacted] (Members)
c/o Vancouver Police Department
Professional Standards Section

And to: [redacted] (External Discipline Authority)
c/o Delta Police Department
Professional Standards Section

And to: The Honourable William Ehrcke, (ret'd) (Retired Judge)
Retired Judge of the Supreme Court
of British Columbia

And to: His Worship Mayor Kennedy Stewart
Chair, c/o Vancouver Police Board

And to: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section

Background

On May 17, 2019, [redacted] wrote to the Office of the Police Complaint Commissioner (OPCC) attaching 16 complaints made by persons who live and/work in the Downtown Eastside of Vancouver about two members of the Vancouver Police Department (VPD). [redacted] asked that the individual complaints be consolidated and that a systemic review be conducted because of the similarity of the incidents described by each of the 16 complainants and the involvement of one or both of the officers with respect to each incident.

On August 14, 2019, the OPCC granted an extension under section 79(2) of the *Police Act* for those individual complaints which involved incidents that occurred more than 12 months prior. The OPCC also determined each of the 16 complaints to be admissible under section 83(2) of the *Police Act* and identified the potential misconduct associated with each of those complaints. The Notice of Admissibility suggested that VPD Chief Constable Adam Palmer explore the use of Division 4 Complaint Resolution or mediation as a means of resolving the complaints.

The OPCC subsequently determined that it was necessary in the public interest to appoint an external investigating agency and external Discipline Authority. Accordingly, on August 14, 2019, the OPCC issued Orders appointing the [redacted] of the Delta Police Department [redacted] as the Discipline Authority and the New Westminster Police Department's Professional Standards Unit as the investigating agency (the Investigator) for each of the individual complaints.

At the request of the Discipline Authority and pursuant to section 158(2) of the *Police Act*, the OPCC issued a notice December 20, 2019, that the complaints were suitable for resolution by mediation and former retired Judge [redacted] was subsequently appointed as the mediator. All of the complaint investigations were suspended pending the outcome of mediation.

There were a number of mediation delays due to public health restrictions and other impacts related to the global pandemic. On January 18, 2021, the mediator advised that the mediation session was completed and that there was no agreement to continue. On January 27, 2021, with the cancellation of the mediation, the investigative suspensions in place for each of the complaints were lifted, and the investigations continued in accordance with Part 11, Division 3 of the Act.

On May 31, 2021, [redacted] wrote the OPCC formally requesting that the complaints "proceed as a 'group complaint' through the investigative process and beyond." The OPCC responded on June 30, 2021, declining the request for two reasons. First, the *Administrative Tribunals Act* provisions enabling tribunals to make their own rules of practice and procedure had not been made applicable to disciplinary processes under Part 11 of the *Police Act*. Second, Part 11 of the *Police Act*, which is procedurally proscriptive, does not authorize the Police Complaint Commissioner to consolidate investigations and Discipline Proceedings.

Complaint of [redacted]

[redacted] (the Complainant) was one of the 16 persons who initially filed a written complaint with the OPCC. He alleged that on June 30, 2018, he was stopped by two Vancouver Police officers (Constable [redacted] and Constable [redacted]) who made him throw out a marijuana cigarette and lectured him in a condescending manner about marijuana being illegal. He reported that police asked him for identification and when he could not produce any, they asked him further questions about whether he had any scars, tattoos or gang affiliations. The Complainant felt the officers were condescending and found their questions to be demeaning. Furthermore, he believed that the police should have left him alone, that their actions created barriers to harm reduction, and that the officers were targeting individuals who use marijuana dispensaries. His complaint was investigated and the Investigator's Final Investigation Report (FIR) was provided to the Discipline Authority on December 8, 2021.

Discipline Authority Decision

On December 22, 2021, the Discipline Authority issued his decision pursuant to section 112 in this matter. Specifically, the Discipline Authority identified one allegation of misconduct against each of Constable [redacted] and Constable [redacted] He determined that the allegation of *Abuse of Authority* pursuant to section 77(3)(a) of the *Police Act* against the two members did not appear to be substantiated and that Constable [redacted] was misidentified and was not present during the incident described in the Complainant's complaint.

The Discipline Authority determined it was clear police had the legal authority to arrest the Complainant in these circumstances. According to the Discipline Authority, while other police may not have chosen to engage the Complainant or may have engaged him in a different manner, there was no clear, convincing, and cogent evidence that the detention and identification of the Complainant was oppressive pursuant to the definition of *Abuse of Authority* under the *Police Act*.

The Discipline Authority also determined that there was no evidence Constable [redacted] "used profane, abusive, or insulting language that tended to demean or show disrespect" to the Complainant on any of the grounds found under section 77(3)(a)(iii) of the *Police Act*.

The Discipline Authority concluded there was insufficient clear, convincing, and cogent evidence that the interaction between the Complainant and Constable [redacted] was "anything more than an argument over drug policy" and did not consider a disagreement over police enforcement of drug laws would amount to oppressive conduct.

Request for Appointment of a Retired Judge

On January 6, 2022, I received a request from [redacted] on behalf of the Complainant, that I appoint a retired judge to review the FIR pursuant to section 117 of the *Police Act* and make his or her own decision on the matter. Section 117 gives me authority to make such an appointment if I consider that there is a reasonable basis to believe the Discipline Authority's decision is incorrect. The Complainant advances a number of propositions in support of his request which can be summarized this way:

1) The Discipline Authority erred by failing to consider the facts of the other registered complaints within the overall "group complaint," any other similar fact evidence when assessing misconduct. Related to this, he argues that, as the Discipline Authority was appointed in relation to each of the individual complaints within the "group complaint," he was "fully apprised" of all the additional allegations involving the two members in those other complaints and he should have considered evidence arising from the other 15 complaint investigations in making his section 112 decision.

2) The Investigator "failed to include other evidence of misconduct in their own report, contrary to section 108 of the Act." The Complainant cites the Discipline Authority's remark in his decision that the investigating officer "raised no additional allegations of misconduct during the investigation" and did not present any evidence "that would lead me to believe that additional counts of misconduct were committed." Related to

this, the Complainant argues the Investigator and Discipline Authority "failed to exercise their authority under s. 98(9) of the Act to require further investigation" and failed to obtain and include any Service Record of Discipline. The Complainant says that such a record should have been reviewed for any potentially relevant evidence, including similar fact evidence, and to assess issues of credibility.

3) The Discipline Authority erred by finding that questions about gang associations do not in and of themselves constitute misconduct, contrary to judicial interpretations of "abuse of authority," and such a finding ignores "the political and social rhetoric that associates gang membership with violence, crimes of moral turpitude, and community fragmentation."

4) The Discipline Authority was incorrect in his analysis of the elements of *Abuse of Authority* under section 77(3)(a) and his incorporation of the elements of "Discourtesy" under section 77(3)(g) and failed to properly consider whether, in the alternative, the member(s) committed misconduct in the form of *Discourtesy*.

The Complainant also requests that, if an appointment is made, that the provision to the retired judge of "all reports" referred to in section 117(6) be delayed pending completion of the investigations and section 112 decisions for all of the complaints and that the retired judge also be provided with any available Service Records of Discipline. The Complainant states that the retired judge will then be in a position to review the totality of the evidence contained in all complaints and investigations to determine what may be probative similar fact evidence.

OPCC Decision, Section 117 of the *Police Act*

I have reviewed the Discipline Authority's decision and the request from the Complainant. I do not agree with many of the propositions advanced by the Complainant for the reasons outlined below. I have, however concluded that I have a reasonable basis to believe that the Discipline Authority's decision is incorrect in relation to Constable [redacted] I do not have a reasonable basis to believe that the decision is incorrect with respect to Constable [redacted] for the reasons cited by the Discipline Authority. Therefore, the decision of the Discipline Authority with respect to Constable [redacted] is final and conclusive under section 112(5).

Turning to the first proposition advanced by the Complainant, this is just another way of asking that the 16 complaints be consolidated and considered collectively which I have already determined I have no statutory authority to do. Similarly, section 112 of the *Police Act* does not give a Discipline Authority the power to consider evidence outside the Final Investigation Report made in respect of an investigation. Section 112(1) and (2) make it clear that a Discipline Authority's task is to review the Final Investigation Report and "the evidence and records referenced in it" and then make a determination as to whether or not the members conduct "appears" to constitute misconduct. The Discipline Authority therefore had no authority to consider any information other than the FIR and the evidence and records referenced in it and cannot be considered in error for failing to do so.

The second proposition does not align with the purpose of section 108 of the *Police Act*. Section 108 is intended to ensure that when an investigation is initiated that potential misconduct not otherwise the subject of an investigation is identified and appropriately reported. In the context of this matter, all allegations made in the other individual complaints were already the subject of ongoing investigations.

As well, the imposition of discipline under *Part 11* is presumptively remedial in nature. Various provisions of the discipline process provide for both a misconduct determination phase and a discipline determination or "penalty" phase. It is typically only at the penalty phase that is appropriate to consider a Service Record of Discipline. As well, there are statutory restrictions on disclosure of Service Records of Discipline established under section 180 of the *Police Act*. In any event, in the circumstances of this matter I do not consider that inclusion of any Service Record of Discipline would have assisted the Discipline Authority in determining whether the incident complained of appeared to constitute misconduct for section 112 purposes or that such a document would have assisted for purposes of assessing credibility.

With respect to the remaining propositions, and for different reasons, I consider that the Discipline Authority erred in his consideration of the totality of the evidence which was properly before him as contained in the FIR and that a retired judge should be appointed under section 117 to conduct a review.

Specifically, I am of the view that the Discipline Authority took too narrow a view of the overall interaction in the context of the wording contained in section 77(3)(a) which defines *Abuse of Authority* as oppressive conduct "without limitation."

I agree with the Discipline Authority that a simple disagreement or debate regarding drug policy between a police officer and a member of the public, without more, cannot amount to misconduct. However, the evidence supports that in this case the discussion took place within the context of what was, at minimum an investigative detention which included questioning, a pat down search, demand for identification and the use of police databases.

While it was was open to the Discipline Authority to conclude that this detention was authorized at law, there is evidence to suggest that it was done for purposes unrelated to the enforcement of the *Controlled Drugs and Substances Act* (CDSA). There was evidence available to the Discipline Authority to conclude that the interaction was oppressive given the Complainant's description that he felt "belittled," the contemporaneous notes of the member characterizing the interaction and the statements of the member during his interview with respect to marijuana enforcement. Specifically, the member stated that "there was lots of people in Downtown Eastside that smoke marijuana and they wouldn't be stopped but it would be a way that we could stop them or I would stop them if I felt the need to." The evidentiary record also has other similar statements with respect to the members use of the authorities under the CDSA.

Having decided to appoint a retired judge, I have been asked to consider whether there be deferral of the section 117 review pending completion of all of the investigations and section 112 decisions for all of the complaints and that the retired judge also be provided with any available Service Records of Discipline.

Under section 117 of the *Police Act*, I am required to appoint a retired judge upon recommendation of the Associate Chief Justice within the time limits established by that section. The reference in section 117(6) to the provision of "all reports," is specific as to what reports are to be provided and it does not include reports relating to other complaints. In the context of this matter, the reports to be provided are the reports made under section 98 of the *Police Act* (the FIR and periodic progress reports) as there were no reports under sections 115 and 132. Consistent with this, section 117(1)(a) directs that the retired judge is to "review the investigating officer's report referred to in section 112 or 115 as the case may be and the evidence and records referred to in it." Once the retired judge receives disclosure and is seized of the matter, that judge has 10 business days to conduct a review. This provision is consistent with other provisions in the Act which emphasize timely process. Section 117 does not provide me with the authority for deferral of a section 117 proceeding to receive reports or other documents not described in section 117(1) and (6) and I therefore decline to do so in this matter.

Order

Pursuant to section 117(4) of the *Police Act* and based on a recommendation from the Associate Chief Justice of the Supreme Court of British Columbia, I am appointing the Honourable William Ehrcke, retired BC Supreme Court Justice, to review this matter and arrive at his own decision based on the evidence.

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

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

Clayton Pecknold
Police Complaint Commissioner

cc [redacted] Registrar