



OFFICE OF THE  
POLICE COMPLAINT COMMISSIONER

British Columbia, Canada

**ORDER FOR EXTERNAL INVESTIGATION**

Pursuant to s.93(1)(a) & (b)(ii) of the *Police Act*, RSBC 1996, c. 367

**NOTICE OF DESIGNATION OF NEW DISCIPLINE AUTHORITY**

Pursuant to s.135 of the *Police Act*, RSBC 1996, c.367

OPCC File No: 2015-11048  
December 18, 2015

To: Chief Constable Frank Elsner (Member)  
Victoria Police Department

And to: Chief Superintendent Sean Bourrie (External Investigating Agency)  
Royal Canadian Mounted Police

And to: Ms. Carol Baird Ellan (External Discipline Authority)  
Retired Provincial Court Judge

And to: Her Worship Mayor Barbara Desjardins  
Her Worship Mayor Lisa Helps  
Co-Chairs, Victoria and Esquimalt Police Board

**INTRODUCTION**

This document outlines my review of the internal investigation and disciplinary process involving the Chief Constable of the Victoria Police Department, Frank Elsner. Based on my review, I am ordering an investigation into this matter. Pursuant to section 95 of the *Police Act*, I have determined that it is in the public interest to disclose this *Order for Investigation* to the public. I base my decision on the importance of the public office of the Chief Constable, the seriousness of the allegations, and the amount of information currently in the public domain initiated by comments made by individuals directly involved in this matter. At this early stage of the process, I have tried to strike a balance in terms of the degree of disclosure, and in consideration of a number of factors, including:

- protecting the integrity of the impending investigations;
- the privacy interests of those directly affected by this matter and their families; and

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- the public interest, and in particular, maintaining public confidence in the investigation of alleged misconduct, and the administration of police discipline through the accountability and transparency afforded under the *Police Act* of British Columbia.

## BACKGROUND

In late August 2015, our office was contacted by phone by the legal counsel for Mayors Barbara Desjardins and Lisa Helps (the “Co-Chairs”) in their capacities as joint Chairpersons of the Victoria Police Board. Counsel was both seeking advice and providing a submission on behalf of the Co-Chairs, with respect to how this matter should proceed pursuant to the *Police Act* (the “Act”). Counsel advised that the Co-Chairs were in possession of communications between Chief Constable Elsner and a member of another local police department. The member involved was the spouse of a member (the “Member”) of the Victoria Police Department serving under the command of Chief Constable Elsner. The Co-Chairs took the position that this was an internal disciplinary matter as defined under the Act.

(For context, internal disciplinary matters should be distinguished from public trust matters – the *Police Act* provides for these two methods of addressing failings on the part of a police officer. In this case, the Co-Chairs’ position was that the matter should be addressed, not through the more formal public-trust process, but instead through the internal-disciplinary process.)

An in-person meeting was scheduled with counsel for the Co-Chairs, so that I might receive further information and review the Twitter messages between the parties. Due to illness, counsel for the Co-Chairs was not able to attend personally, so our meeting took place by teleconference, in which some additional information was provided. At this point, the available information was limited; there was no information available at that time as to the ownership, operations and privacy related to the social media account. There was no information available with respect to whether the communications took place while on duty or off duty, and whether any municipal police equipment was used to facilitate the communications. These considerations were relevant to determining whether this matter involved a disciplinary breach of public trust and whether it should be dealt with under the public trust process under the Act.

In our discussions, counsel for the Co-Chairs advised me of an anticipated course of action if this matter was to proceed through the internal disciplinary process; that is, counsel set forth an anticipated approach to the situation. In addition, counsel strongly raised the concerns of the Co-Chairs about the privacy interests at stake and the families involved. At the time, I made clear to counsel for the Co-Chairs my concerns about the information and the alleged conflict of interest and/or breach of trust arising out of the employment relationship between Chief Constable Elsner and the Member serving under his command.

I acceded to the request of counsel for the Co-Chairs to allow this matter, initially, to proceed in the internal discipline process. My decision was based on the course of action proposed by counsel for the Co-Chairs, the privacy interests involved, and the requirement that two preconditions be met by the Co-Chairs. These conditions could have an impact on the

information available in determining whether the matter should be dealt with through the internal process or by way of disciplinary breach of public trust. They were as follows:

**Precondition 1** There had to be a full and continuing disclosure of the allegations and progress of the investigation to the other Victoria Police Board members.

**Precondition 2** There had to be disclosure of the allegations to the Member serving under the command of Chief Constable Elsner, and the Co-Chairs should obtain the Member's informed views as to whether he wished to initiate a complaint or request a public trust investigation under the *Police Act*.

The following day our office was advised by counsel for the Co-Chairs that the remaining Police Board members had been briefed, and that the affected Member did not wish an investigation. On the understanding that my two conditions had been satisfied, I supported the decision to proceed with this matter as an internal discipline matter. It was my expectation that if the investigation revealed evidence of conduct that could constitute a disciplinary breach of public trust, the Co-Chairs would raise the matter with our office.

#### **INTERNAL DISCIPLINE PROCESS AND JURISDICTION OF THE OPCC**

Pursuant to the Act, the Commissioner is generally responsible for overseeing and monitoring complaints, investigations and the administration of discipline and proceedings.

The Act requires that Chairpersons of municipal Police Boards establish procedures for governing internal discipline matters and taking discipline or corrective measures that are not inconsistent with the Act. In my view, the internal disciplinary process should be guided by the spirit of the public-trust process under the Act, with a focus on procedural fairness, accountability and transparency, as is found in that process.

For internal discipline matters, the oversight jurisdiction of our office is confined to an *ex post facto* review of the investigation and the disciplinary process. It is an after-the-fact role, and in this respect, it may be distinguished from the way public-trust matters are handled. In the public-trust process, our office has the jurisdiction to provide active oversight of the investigation and to request any and all information as it becomes available. In contrast, in the internal discipline process, the request for the investigation report, and all additional information or records, can only be made by our office at the *conclusion* of the internal discipline process, unless voluntarily provided or disclosed by the Co-Chairs at an earlier time.

In practical terms, the *ex post facto* review by my office is one that requires me to determine whether the matter should be addressed through the more formal public-trust process. The question is whether there is information in relation to which I should exercise my discretion to independently order an investigation into any aspect of the matter. The Act provides that if, *at any time*, our office receives information concerning the conduct of a municipal police officer – *which if proven would constitute a disciplinary breach of public trust* – I may order an investigation into the conduct of the officer. The matter then falls within the jurisdiction of our office, both in terms of oversight of the investigation and any ensuing disciplinary process.

I attach, as an appendix to this Order, some of the relevant provisions from the Act that I have alluded to.

### **OPCC COMMUNICATIONS WITH THE INTERNAL DISCIPLINE AUTHORITIES**

Shortly after confirmation that both pre-conditions had been met, our office was contacted by counsel for the Co-Chairs, canvassing whether a senior lawyer with experience in the area of policing could act as an independent investigator in the matter, as opposed to a Chief Constable of another police agency. I was advised that Chief Constable Elsner was in agreement with this proposal and I believed in the circumstances that it was preferable to proceed this way.

There was no further contact from the Co-Chairs until approximately October 28, 2015, when our office received information that members of the Board had not received adequate disclosure with respect to the allegations and investigation related to Chief Constable Elsner. Our office contacted counsel for the Co-Chairs, who advised that it was the Co-Chairs' position that the Board members were not entitled to disclosure. We reminded counsel for the Co-Chairs that this was a pre-condition for our agreeing that this matter could be dealt with as an internal discipline matter. Our office advised the Co-Chairs through counsel that I was contemplating taking action in the matter. A short time later, we received confirmation that the Board members had received adequate disclosure.

The next contact between our office and the Co-Chairs was on December 4, 2015, when a member of the media contacted our office in relation to rumours that Chief Constable Elsner was the subject of an investigation. We did not comment at all, but it appeared the media may have received incomplete or inaccurate information about the matter from Mayor Desjardins. I directed my staff to contact Mayor Desjardins to confirm her comments to the media. Based on a briefing from my staff, I had a conversation with counsel for the Co-Chairs, in which I provided Mayor Desjardins the opportunity to contact the media and correct the misinformation she had provided earlier. That same day we learned that the Co-Chairs' investigation was in fact completed, with a decision having been rendered in the previous 24 hours. We requested and received a document entitled "preliminary" investigation report and a decision letter from the Co-Chairs.

Internal Discipline Authorities are not required to communicate with our office on an ongoing basis on the status of an internal discipline investigation. As noted earlier, our office is confined to an *ex post facto* review of an internal disciplinary matter unless an Internal Discipline Authority chooses to include our office in the process. Since the commencement of the internal investigation into this matter, there was no contact initiated by the Co-Chairs with our office; the first contact was initiated by our office in relation to the Co-Chairs' comments to the media on December 4, 2015.

### **REVIEW OF THE INVESTIGATION**

An internal discipline investigation, like any formal investigation, involves a systematic and thorough search for the evidence to assist in determining the truth. The processes and procedures engaged in an internal disciplinary investigation are the responsibility of an Internal Discipline Authority; in this matter this responsibility falls directly to the Co-Chairs of the

Police Board. The Internal Discipline Authority is responsible for determining the terms of reference of the investigation, and the nature and manner in which an investigation is conducted – the standards adopted to gather and preserve evidence. Simple and less serious matters (e.g. lateness or dresscode violations) do not normally require comprehensive and professional-grade investigative practices. However, in matters involving serious allegations, or issues where there is a likelihood of conflicting or controversial evidence, or both, it is my view these types of investigations require the use of best practices to ensure the accurate preservation of all evidence.

In my view, based on the information and course of action provided by counsel for the Co-Chairs at the outset, this matter involved serious allegations. It involved an obvious potential for conflicting and controversial evidence amongst the witnesses and parties. It was my expectation that, at a minimum, all interviews would be audio recorded. Instead, I learned afterward, all the witness interviews were documented by handwritten notes made by the interviewer, and constituted summaries of the evidence. Furthermore, there was no opportunity provided to the witnesses to review the summaries of their interviews and raise any issues, nor a requirement for them to sign a document attesting to the accuracy of their evidence.

My review also revealed that a number of obvious investigative avenues were not explored, some of which could have provided important corroborating and/or contradictory evidence. One material witness refused to cooperate with the investigation or participate in an interview. In my view, there were procedural options available that could have been explored to obtain the cooperation of this witness. The effect of the non-participation of an important witness was to leave an evidentiary gap on one side of the ledger, with the result that the accounts of other witnesses may have achieved a greater influence than had this evidence been available in the investigative process.

Based on my review of the investigation report and the accompanying materials, I am of the view that there is conduct described which, if substantiated, would constitute disciplinary breaches of public trust. (These are set out in detail below.) Furthermore, pursuant to the Act, an investigating officer has a statutory duty to report any such conduct to the Co-Chairs of the Police Board. Our office has not received any further reports of alleged misconduct from the Co-Chairs since the commencement of the internal investigation.

While I appreciate that there may be arguments about the admissibility and use of information arising through the internal disciplinary process in this case, the question I must address at this stage is one that does not permit me to engage in an assessment of the weight of the evidence, nor a threshold screening of admissibility or use. At this early stage, the question is instead whether, on the information available to me, an investigation is warranted.

Likewise, while I appreciate that I was previously inclined to the view that the matter might be properly addressed through the internal disciplinary process, as this outline makes plain, the conditions sought for that approach were not met. Moreover, the facts of the case have changed significantly, and the information available now is different both in quantity and in character. Because section 93(1) of the *Police Act* speaks to information that comes to my attention “at any

time”, I see it as not only appropriate, but necessary that I act based on my present understanding and view of the matter.

Based on the information contained in the investigation report, it appears that very early, if not at the outset of the investigation, there was information that the device at issue (used by Chief Constable Elsner to transmit and receive the information) belonged to the Victoria Police Department, and in addition that some communications occurred while the Chief was on duty. The Twitter account that was involved in the exchange of information was directly related to Chief Constable Elsner’s role as Chief Constable. This information was relevant to the question of whether the alleged conduct of Chief Constable Elsner constituted a disciplinary breach of trust and ought to have been provided to our office for consideration.

Furthermore, the report contained new information related to further conduct of Chief Constable Elsner which supports an allegation that he placed himself in a conflict of interest and/or breached a relationship of trust with a member under his command while on duty. This information involves an appearance of unfair treatment that may have compromised the Member’s position in and employment with the Police Department. The Chief Constable’s conduct, if substantiated, would constitute the disciplinary breach of trust of *Discreditable Conduct*.

In addition, there is information contained in the report that, while under direction by the internal disciplinary investigator not to speak to witnesses related to the investigation, Chief Constable Elsner had conversations with two witnesses, in relation to the ongoing investigation. This conduct, if substantiated, would constitute the disciplinary breach of trust of *Discreditable Conduct*.

There is information contained in the report that supports an allegation that Chief Constable Elsner met with the Member under his command and provided him with inaccurate and misleading information, in circumstances the Chief knew would influence the Member in the decision the Member had to make with respect to whether he wished to initiate a complaint or request a public trust investigation under the Act – circumstances which, in turn, may have impacted upon (and may have been intended to impact upon) the disciplinary response to the matter. The false information provided by the Chief was consistent with an attempt to mislead the Member as to the nature of the Chief’s conduct involving the Member’s spouse. This conduct, if substantiated, would constitute the disciplinary breach of trust of *Discreditable Conduct*.

Finally, the report contained the Chief’s own account of the events and communications, as well as his response to the account given by the affected Member – the two accounts are difficult to reconcile. They appear to be internally contradictory. This information supports an allegation that the Chief failed to accurately and completely answer the questions of the internal discipline investigator. This conduct, if substantiated, would constitute the disciplinary breach of trust of *Discreditable Conduct*.

On a related but different point, in the report the Member is described as advising the Co-Chairs of his meeting with Chief Constable Elsner and the information the Chief provided to the Member. It appears that the Co-Chairs did nothing to correct the Member's misguided appreciation of the circumstances, despite the Co-Chairs knowing the information provided to the Member was false and misleading. In advising our office that the informational pre-condition had been met, no mention had been made that the Member had received false and misleading information from Chief Constable Elsner. Given the circumstances as contained in the report, it is clear that the Member's decision was influenced by misleading information; therefore, the pre-condition had not been fulfilled. The independent investigator in her report confirmed that the Member has not received adequate information about this matter. The independent investigator commented in her report that, "*It is particularly troubling that [the Member (name removed for privacy)] still does not know about the Twitter exchanges between his spouse and the Chief. As a result, there continues to be a risk of further workplace consequences should those Tweets be exposed.*"

## **REVIEW OF THE INTERNAL DISCIPLINE PROCESS**

As to the contact between our office and the Co-Chairs, beyond our initial discussions with counsel for the Co-Chairs, our office received no communications regarding the progress made on the matter. This was true both in terms of the proposed course of action, and also as to the status of the internal investigation. It was not until our office was contacted by journalists regarding comments made by Mayor Desjardins that I initiated contact (through counsel for the Co-Chairs) regarding my concerns about the accuracy of the comments in media reports. The Mayor subsequently addressed my concerns, confirming that an internal investigation did in fact take place. It was a short time later that Chief Constable Elsner made his comments to the media.

Based on the information provided to our office, it is my view that aspects of this internal discipline process were inconsistent with the spirit and principles of the *Police Act*, as well as the principles of procedural fairness and natural justice. I am of the view that the internal process and procedures in this matter did not meet the level of procedural fairness, accountability and transparency contemplated by the *Police Act*. Furthermore, based on the information that I have received, I am of the view that some individuals who have a direct interest in this matter were not accorded sufficient informational rights, were not provided a sufficient right to be heard, and did not receive a decision which clearly identified the basis upon which the Co-Chairs decided the matter.

## **PUBLIC TRUST INVESTIGATION AND PROCESS**

Speaking in general terms, the processes under the *Police Act* related to the investigation and determination of an alleged disciplinary breach of public trust are clearly set out in the *Police Act*. The legislation and the process contemplate active oversight by our office in relation to the investigation and the outcomes in the police disciplinary process. The oversight role of our office and the processes in place are intended to maintain public confidence in the investigation of misconduct and the administration of the police disciplinary process. More broadly, this office is charged with an overarching public duty of ensuring the integrity of the police disciplinary process and fostering public confidence in this process.

The *Police Act* includes a number of provisions that promote thorough and professional investigations, and adjudicative processes that are focused on accountability, with varying degrees of transparency to public. These processes cover a range, and include: discipline proceedings; reviews by retired judges; public hearings; reviews on the record; and, finally, a Commissioner may recommend to government a public inquiry based on the criteria established under the Act.

Based on the information I have received, including but not limited to the Preliminary Investigation Report, I am of the opinion that the following conduct alleged against Chief Constable Frank Elsner, if substantiated, would constitute misconduct:

1. *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department: That Chief Constable Elsner did engage in conduct with the spouse of a member under his command which constituted a conflict of interest and/or a breach of trust, in circumstances in which he knew, or ought to have known, would likely bring discredit to the Victoria Police Department.
2. *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department: That Chief Constable Elsner did provide misleading information to a member under his command, in circumstances in which he knew, or ought to have known, would likely bring discredit to the Victoria Police Department.
3. *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department: That Chief Constable Elsner did provide misleading information to an investigator in circumstances in which he knew, or ought to have known, would likely bring discredit to the Victoria Police Department.
4. *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department: That Chief Constable Elsner did contact witnesses during the course of an internal investigation, which he was the subject of, contrary to the direction of the independent investigator and in circumstances which he knew, or ought to have known, would likely bring discredit to the Victoria Police Department.
5. *Inappropriate Use of Department Equipment and/or Facilities* pursuant to section 77(3)(c)(iv) of the *Police Act*: That Chief Constable Elsner did use police equipment and/or facilities of the Victoria Police Department for purposes unrelated to his duties as a member.

Accordingly, I am of the opinion that it is necessary in the public interest that the alleged misconduct described above be investigated by an external police force. Therefore, pursuant to section 93(1)(b)(ii) of the *Police Act*, I order that the incident involving Chief Constable

Frank Elsner be investigated by the Royal Canadian Mounted Police. The Commanding Officer of the RCMP 'E' Division, Deputy Commissioner Craig Callens, has agreed that Chief Superintendent Sean Bourrie will be the assigned Chief Investigator. Working under his supervision will be a senior team of external investigators with the Vancouver Police Department under the command of Superintendent Laurence Rankin.

I also order that the investigation include any potential misconduct, or attempted misconduct, as defined in section 77 of the *Police Act* that may have occurred in relation to this incident. In addition, if, during the course of this investigation, any policy or procedural issues are identified, the external *Police Act* investigator shall notify the Office of the Police Complaint Commissioner for appropriate processing under section 177(4)(c) of the *Police Act*.

Pursuant to section 135(2) of the *Police Act*, because this matter involves a Chief Constable of a municipal police department in a context where the internal disciplinary process to date has given rise to difficulties as outlined above, I consider it necessary in the public interest to appoint a retired judge as Discipline Authority in this case. (This provision of the Act provides that, any time after an investigation has been initiated into the conduct of a member or former member of a municipal police department, who is or was a Chief Constable or Deputy Chief Constable at the time of the conduct of concern, the Police Complaint Commissioner may if he considers it necessary in the public interest, appoint a retired judge to exercise the powers and perform the duties of a Discipline Authority under the applicable provision, in substitution of the Chair of the Board of the municipal police department.)

Based on a review of the information received by this office, I consider it necessary in the public interest that a person other than the Co-Chairs of the Victoria Police Board be the Discipline Authority for all purposes pursuant to the Act.

Therefore, pursuant to section 135(2) of the *Police Act*, in substitution, I am appointing retired judge Carol Baird Ellan, to exercise the powers and perform the duties of a Discipline Authority in relation to this matter.

An investigation under Division 3 of the *Police Act* must be completed within six months. Unless the circumstances of this investigation warrant a further extension, the investigation limitation period is scheduled to expire on **June 18, 2016**.



Stan T. Lowe  
Police Complaint Commissioner

Appendix

## **APPENDIX: RELEVANT PROVISIONS OF THE *POLICE ACT***

### **General responsibility and functions of police complaint commissioner**

177 (1) The police complaint commissioner is generally responsible for overseeing and monitoring complaints, investigations and the administration of discipline and proceedings under this Part, and ensuring that the purposes of this Part are achieved.

(2) In addition to any other duties imposed under this Part or Part 9, the police complaint commissioner must do the following: ...

(j) inform, advise and assist the following in respect of this Part:

- (i) persons who make complaints;
- (ii) members and former members;
- (iii) discipline authorities;
- (iv) boards;
- (v) adjudicators;

### **Internal discipline matters**

175 (1) A chief constable of a municipal police department and the chair of the board of the municipal police department must establish procedures, not inconsistent with this Act, for dealing with internal discipline matters and taking disciplinary or corrective measures in respect of them.

...

(4) The internal discipline authority must provide the police complaint commissioner with a copy of

- (a) any recommendation on disciplinary or corrective measures arising from an internal discipline matter, and
- (b) the final decision reached by the internal discipline authority, the board or the arbitrator.

(5) On request of the police complaint commissioner, an internal discipline authority must provide any additional information or records respecting an internal discipline matter that are in the possession or control of the municipal police department concerned.

(6) The internal discipline authority may determine any issue respecting a member's competence or suitability to perform police duties that arises in an internal discipline matter.

### **Ongoing duty of investigating officer to report information**

108 (1) If, during the course of an investigation,

- (a) information comes to the attention of an investigating officer concerning the conduct of a member or former member of a municipal police department,
- (b) the conduct is not the subject of the investigating officer's investigation, and
- (c) the conduct would constitute misconduct, if the information were substantiated,

the investigating officer must immediately report the information to a chief constable of that municipal police department, unless subsection (2) applies, and to the police complaint commissioner.

(2) If the conduct referred to in subsection (1) is that of the chief constable or former chief constable of the municipal police department, the investigating officer must immediately report the information to the chair of the board of that municipal police department.

### **Independent power to order investigation, whether or not complaint made**

**93** (1) Regardless of whether a complaint is made or registered under section 78, if at any time information comes to the attention of the police complaint commissioner concerning the conduct of a person who, at the time of the conduct, was a member of a municipal police department and that conduct would, if substantiated, constitute misconduct, the police complaint commissioner may

- (a) order an investigation into the conduct of the member or former member, and
- (b) direct that the investigation into the matter be conducted under this Division by any of the following as investigating officer:
  - (i) a constable of the municipal police department who has no connection with the matter and whose rank is equivalent to or higher than the rank of the member or former member whose conduct is the subject of the investigation;
  - (ii) a constable of an external police force who is appointed for the purpose of this section by a chief constable, a chief officer or the commissioner, as the case may be, of the external police force;

### **Power to designate another discipline authority if in public interest**

135 (2) At any time after an investigation is initiated under this Part into the conduct of a member or former member of a municipal police department who is or was a chief constable or deputy chief constable at the time of the conduct of concern, if the police complaint commissioner considers it necessary in the public interest that a person other than the chair of the board be the discipline authority for the purposes of one or more provisions of this Division,

(a) the police complaint commissioner must request the Associate Chief Justice of the Supreme Court to

(i) consult with retired judges of the Provincial Court, the Supreme Court and the Court of Appeal, and

(ii) recommend one or more retired judges to act as discipline authority for the purposes of those provisions, and

(b) the police complaint commissioner must appoint one of the retired judges recommended to exercise the powers and perform the duties of a discipline authority under the applicable provision, in substitution of the chair of the board of the municipal police department.

(3) The police complaint commissioner may make a designation under subsection (1) or an appointment under subsection (2) ...

(b) on the police complaint commissioner's own motion.