OPCC

OFFICE OF THE
POLICE COMPLAINT
COMMISSIONER

SEPTEMBER 26, 2018

SUMMARY INFORMATIONAL REPORT

> REVIEW OF THE INVESTIGATIONS AND DISCIPLINARY PROCESS CONCERNING FRANK ELSNER

Integrity Independence Excellence

INTRODUCTION

In 2015, information regarding the Chief Constable of the Victoria Police Department, Frank Elsner came to the attention of this office. We were advised that Chief Constable (now former) Frank Elsner had exchanged personal and sexual messages on Twitter with the spouse of one of his serving officers. (For ease of reference, I will refer to Frank Elsner as "former chief" in this report.)

The discovery of those messages triggered an unusually complex police disciplinary process. The investigation and resulting disciplinary process was procedurally complicated and included court challenges initiated by the former chief. What began as allegations about inappropriate messages evolved to include further allegations of serious misconduct, and allegations of sexual harassment. Following a thorough and professional investigation into this sensitive matter, along with the completion of the disciplinary process by two retired judges, this case is finally at a conclusion.

As the Police Complaint Commissioner for British Columbia, I have the responsibility of promoting accountable policing within our communities and enhancing public confidence in law enforcement through impartial, transparent civilian oversight. The *Police Act* provides that I have a general responsibility for overseeing and monitoring the complaints and disciplinary process for police officers (other than the RCMP) in BC.[1]

This case gives rise to public concerns, not just about the former chief's conduct, but also about how the police discipline process works when elected mayors (Co-Chairs) are charged with judging their Chief Constable's behaviour. I have decided that the public must be informed about this case and the process that has unfolded since initiating the Public Trust investigations into the conduct of the former chief back in December 2015.

In this report, I will summarize the findings of the initial internal investigation and disciplinary decision of the Co-Chairs of the Victoria Police Board, and the subsequent external Public Trust investigations ordered by this office. I will then provide a summary of the discipline proceedings that were before the two independent retired judges appointed to act as discipline authorities.

Following the disciplinary decisions issued by the retired judges, I will provide my rationale for confirming both of their decisions. This confirmation will conclude the matter and no further review will be conducted into these allegations of misconduct.

[1] *Police Act*, R.S.B.C. 1996, c. 367, as amended, s. 177.

I will also address the initial handling of this matter by the Co-Chairs and the need for change to the *Police Act* when there are concerns involving the Chief Constable or Deputy Chief Constable of a municipal police department.

In releasing this report, I have considered a number of factors, including the public interest, the privacy interests of those individuals directly affected by these matters, the extent of the information that is in the public domain, and the interests of the Victoria Police Department officers. I have endeavoured to ensure the identities of the affected parties will remain confidential.

SUMMARY OF THE FORMER CHIEF'S MATTERS

The police disciplinary matters involving the former chief are complicated and are likely confusing to those unfamiliar with what happened. To provide context, I will summarize as follows:

- On December 15, 2013, the former chief became Chief Constable for the Victoria Police Department (VicPD).

- Under the *Police Act*, allegations of misconduct relating to a chief are to be determined by the chair of the police board for that municipality. In this case, the Co-Chairs of the Victoria and Esquimalt Police Board were at the time, Mayor Lisa Helps and Mayor Barbara Desjardins.

- In the summer of 2015, information came to light about the former chief exchanging inappropriate personal messages via Twitter, with a female police officer, whose husband worked with VicPD. Those initial allegations were addressed through an "internal" investigation process, culminating in the Co-Chairs issuing a "discipline letter" (placed on the former chief's personnel file) on December 4, 2015.

- On December 18, 2015, I ordered two external investigations. One dealt with the Twitter messages and information suggesting that the former chief misled people in the course of the internal investigation. The other dealt with allegations of sexual harassment of female police officers within VicPD. The Vancouver Police Department and RCMP conducted a detailed investigation of both matters.

- During the first investigation, in April 2016, additional allegations of misconduct surfaced and were included with the original allegations, for a total of five misconduct allegations.

- When I ordered the external investigations, I also appointed two independent retired judges to serve as "Discipline Authorities" — that is, the decision-makers for the misconduct allegations.

- Before the retired judges could address the allegations, the former chief filed proceedings in the BC Supreme Court to stop the process. He was partially successful; the Court said that two of the five allegations could not proceed. I appealed that court decision, and one year later the Court of Appeal overturned the lower court and ruled that all the allegations could be addressed. (This led to a separated discipline process, since some of the allegations were frozen, but

then re-started later on.)

- Ultimately, the former chief was found to have committed a total of eight acts of misconduct under the *Police Act*. The retired judges found the following misconduct (and imposed the following discipline):

  Discipline Authority Retired Chief Judge Carol Baird Ellan:

  1. *Discreditable Conduct* by misleading a subordinate in connection with the disciplinary investigation: 30 days' suspension, demotion to rank of constable, and training on ethical issues.
  2. *Discreditable Conduct* by providing misleading information to the internal investigator: Dismissal from policing.
  3. *Deceit* by attempting to have a witness provide a false statement to the investigator: Dismissal from policing.
  4. *Discreditable Conduct* by engaging in conduct with the spouse of a member under his command, which constituted a breach of trust and conflict of interest: Dismissal from policing.
  5. Inappropriate use of police department equipment and facilities: Dismissal from policing.

  Discipline Authority Retired Justice Ian H. Pitfield:

  6. *Discreditable Conduct*: unwanted physical contact with female Officer A: 30 days' suspension and required training on harassment and sensitivity (concurrent for all three matters addressed by Retired Judge Pitfield).
  7. *Discreditable Conduct*: unwanted physical contact with female Officer B: see above, 30-day suspension and required training.
  8. *Discreditable Conduct*: inappropriate remarks of a sexual nature toward female Officer B: see above, 30 day suspension and required training.

- With those processes having concluded, what remained was the prospect of a Public Hearing or Review on the Record. The former chief did not request a Public Hearing or Review on the Record, and I determined I would not order such a proceeding. This has now brought the matter to its conclusion.

Having provided this overview of the complicated disciplinary history, I turn to a discussion of the context of this case, beginning with the approach to policing in Canada.

THE CONTEXT: Policing in Canada; the chain of command; the office of the Chief Constable; and ethical and employment obligations for a Chief Constable

Policing in Canada

In Canada we have adopted the same philosophical approach to policing that exists in the United Kingdom and other Commonwealth jurisdictions. In 2012, the Home Office in the UK released a document addressing the concept of "Policing by Consent," the relevant portions state:

> *When saying "policing by consent," the Home Secretary was referring to a longstanding philosophy of British policing, known as the Robert Peel's 9 Principles of Policing. However there is no evidence of any link to Robert Peel, and it was likely devised by the first Commissioners of Police of the Metropolis (Charles Rowan and Richard Mayne). …*
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> *Essentially, as explained by the notable police historian Charles Reith in his "New Study of Police History" in 1956, it was a philosophy of policing "unique in history and throughout the world because it derived not from fear but almost exclusively from public co-operation with the police, induced by them designedly by behavior which secures and maintains for them the approval, respect and affection of the public."*
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> *It should be noted that it refers to the power of police coming from the common consent of the public, as opposed to the power of the state. It does not mean the consent of an individual. No individual can chose to withdraw his or her consent from the police, or from a law.*

Ontario Court of Appeal Justice Michael H. Tulloch, released his report on the Independent Police Oversight Review in Ontario in 2018. In his report he addressed the concept of "policing by consent":

> *6. "Policing by Consent" involves giving considerable authority to police officers with the consent of the public, thereby providing officers with the powers and legal defences unavailable to other citizens. In essence, the police are simply citizens in uniform who ensure the welfare of the community. …*
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> *8. Policing by consent recognizes that the exercise of special powers by the police depends on public approval, also known as legitimacy. The public's acceptance of the police's role in society as legitimate is based on public trust and requires the respect and cooperation of the public. …*
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> *35. The public's voluntary conferral of powers on the police comes with a commensurate right to ensure that those powers are being used properly and effectively.*

> *This requirement of accountability has led to the increased adoption of various models of civilian oversight of police around the world. While in many jurisdictions police initially resisted civilian oversight, most police today recognize its value.*

In Canada, we have in place a network of civilian oversight of law enforcement agencies across the country. While provincial and federal legislative regimes governing policing vary, all share some form of independent civilian oversight. The idea is for there to be sufficient accountability and transparency so as to foster public confidence in police discipline and more generally, in the police. Such trust and confidence in an accountable process for police oversight does not exist in many jurisdictions in the United States; that fact goes a long way toward explaining the fractured state of the relationship with the police in that country.

The concept of independent civilian oversight applies for all officers. As a matter of logic and principle, the public wants to know and trust that the police are doing their jobs properly, but if not, that there will be a meaningful and fair process to address misconduct. Just as the public expects the police discipline process to work effectively for a young constable, the public has the same expectation for the highest ranking officer, the Chief Constable. Put differently, there is no reason to think that the need for independent civilian oversight is diluted or lowered just because the case involves the Chief Constable. In some respects, given the prominence and influence of the police chief, there is a particular need for the Chief Constable to be accountable and be seen to be accountable.

The chain of command

The office of Chief Constable finds its authority through the principle of "chain of command." The "chain of command" is a line of authority and responsibility in which directions or orders flow down, and accountability from the rank and file flows up.

The profession of policing is paramilitary in nature. Concepts such as discipline, accountability and loyalty are ingrained through training and culture. The chain of command is also supported by legislation through the creation of a statutory duty binding the members to these concepts. Paramount to the chain of command is the relationship of trust and loyalty between the executive and the members.

In a police department with a chain of command structure, it is vital that the most senior officer does not merely "command respect" — in the sense of requiring it — but also that the officer earn and keep the respect of his or her officers. The rank structure is vital to the operation of modern-day police departments. Police officers have an organizational loyalty to the department and the office of Chief Constable, which

survives any particular leader. (Indeed, in the BC *Police Act* setting, there are provisions that require this organizational loyalty.[2]) But for the department to be truly effective, that organizational loyalty must be supplemented by an individual loyalty. And that can only occur when the Chief Constable demonstrates integrity and ethics of the highest order.

The office of Chief Constable

As noted by Discipline Authority Retired Judge Baird Ellan in her disciplinary measures decision issued on July 23, 2018:

> *The standard of conduct for a Chief Constable is higher than that for other members in the department. He is required to set the example.*

This view is supported in the law. The Ontario Civilian Police Commission expressed the same view in a case involving the chief officer of the Timmins Police Service.[3] The chief appeared before a conduct hearing at which he admitted to *Discreditable Conduct*. (He had cancelled two traffic tickets issued by an officer against a Timmins city councillor.) The Commission observed, at paras. 16 and 28:

> *The role of a chief of police is vital in the functioning of police services in the Province of Ontario. A chief of police is the highest-ranking officer of his or her service and is therefore held to the highest standard of conduct. Implicit in the Commission's prior decisions is the principle that with high rank and responsibility comes great accountability.*
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> …
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> *An integral function of a chief of police is the management of his or her police officers. The Chief is expected to do this not only through the chain of command but also through exemplifying the conduct expected of the officers in the force.*

[2] For instance, s. 77(3)(m)(iii) mandates that it is misconduct for an officer not to "promptly and diligently obey a lawful order of a supervisor".
[3] *Chief John Gauthier of the Timmins Police Service*, 2015 ONCPC 19 (CanLII), <http://canlii.ca/t/glm94>.

The British Columbia Police Code of Ethics

The BC Police Code of Ethics has been in existence since January of 2005. All policing agencies in British Columbia are signatories to the Code; they represent a commonly accepted set of ethical values for all police officers in the province. The Code states:

> *The people of British Columbia expect the police to serve with courage, fairness, impartiality and integrity and to apply democratic principles that honour human dignity in the pursuit of justice. Recognizing that the policing profession is distinguished by the character and values within it, the British Columbia Code of Ethics reflects the commitment of all Police Officers in British Columbia, regardless of rank or position, to ethical principles and values and acceptance of the responsibilities and privilege that accompany public service.*
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> …
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> *The Public*
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> *… Recognizing, however, that the ability of the police to perform their duties is dependent upon public approval, support and willing cooperation, we must provide open, responsive, impartial and accessible service. In other words, to safeguard the public trust, we will be responsible to the public and accountable publicly for what we do.*
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> *Ethical Decision-Making*
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> *… To avoid such difficulties, Police Officers, along with their respective organizations and agencies, should ask themselves the following questions, which help to identify ethical issues and the test decisions on ethical grounds:*
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> 1. *Is the activity or decision consistent with organizational or agency policy and the law?*
> 2. *Is the activity or decision consistent with the British Columbia Police Code of Ethics?*
> 3. *What are the outcomes or consequences resulting from the activity or decision and whom do they affect?*
> 4. *Do the outcomes or consequences generate more harm than good? Do they create legitimate controversy?*
> 5. *Is the activity or decision likely to raise actual or perceived conflicts of interest where a personal advantage is gained because of one's professional position?*

6. *Can the activity or decision be justified legally and ethically? Would the activity or decision withstand public scrutiny on legal and ethical grounds if it resulted in problems that became known generally?*

The former chief's employment contract

As a final contextual point, it is relevant to note that the former chief's contract of employment articulated his "duties and responsibilities" which included:

> *32. Promotes the highest standards of integrity, professional conduct and equality throughout the organization.*
>
> *33. Fosters a culture that promotes ethical practices and encourages individual integrity and accountability.*

THE INITIAL INTERNAL INVESTIGATION AND DISCIPLINE

The complete history of this case is beyond the purview of this report. My approach has been to provide salient information that will allow readers to understand what transpired. With respect to the initiation of this case, I provided a more detailed explanation in my December 18, 2015 Order for External Investigation.[4] What follows is a summary of the initial part of this case.

In late August of 2015, Victoria Mayor Lisa Helps and Esquimalt Mayor Barbara Desjardins contacted me, as the Co-Chairs of the Victoria and Esquimalt Police Board. The mayors did so through their lawyer, who described (without providing) personal messages between the former chief and a woman married to a VicPD officer. I was asked to permit the matter to be addressed through an "internal disciplinary" approach, rather than a "public trust" approach. I agreed to allow that to occur, but required that two pre-conditions be fulfilled.[5]

As detailed in my December 18, 2015 Order, while I understood my pre-conditions were met, I came to learn they were not. Eventually, in a rushed process that coincided with misleading statements to the public by both Esquimalt Mayor Desjardins and the former chief (which I detail below), the internal process concluded with a decision issued on December 4, 2015. That decision, contained in a short letter, indicated that while there had been misconduct, the appropriate discipline was for the letter itself to serve as the penalty or sanction.

The Victoria City Police Union's response

In terms of police culture, the manner in which the initial internal investigation was conducted and the resulting outcome had a profound impact on the membership of the VicPD. On December 9, 2015, following a unanimous non-confidence vote, the Victoria Police Union issued a media release stating:

1. *The Victoria City Police Union has no confidence in the way in which the Police Board and its Chairs handled the incident involving Chief Elsner's inappropriate conduct.*

[4] https://opcc.bc.ca/wp-content/uploads/2017/04/11048_2015-12-18_Media_Part_2_Order_for-External_Investigation.pdf

[5] First, there had to be a full and continuing disclosure of the allegations and progress of the investigation to the other Victoria Police Board members. Second, there had to be disclosure of the allegations to the VicPD officer serving under the command of the former chief, and the mayors were to obtain the officer's informed views as to whether he wished to initiate a complaint or request a public trust investigation under the *Police Act*.

2. *Based on the actions and conduct of Chief Elsner, which the Police Board has found to be improper, the Victoria City Police Union has no confidence in his ability to continue to lead the Victoria Police Department.*

3. *The Victoria City Police Union has requested that the Office of the Police Complaint Commissioner order an independent Public Trust investigation into these matters. The BC Police Act should be applied equally to all members of the Victoria Police Department; regardless of rank.*

THE EXTERNAL PUBLIC-TRUST INVESTIGATIONS

As my December 18, 2015 Order explained, I reached the conclusion that it was necessary that the misconduct allegations against the former chief be investigated independently.

We currently work in a system in which the police investigate police when it comes to allegations of misconduct. Police agencies retain their control over the investigation and their independence in the conduct of investigations, subject to the intervention of my office through specific oversight powers that are set out in the *Police Act*.

An important legislative component of those oversight powers is my office's ability to provide advice to investigators in relation to investigative avenues during the course of an investigation. Furthermore, we have the authority to reject the submission of a Final Investigation Report, and to direct that further investigative steps be undertaken.

The public-trust investigations in this case were conducted by an integrated team of highly experienced investigators led by Chief Superintendent Sean Bourrie of the Royal Canadian Mounted Police and Deputy Chief Constable Laurence Rankin of the Vancouver Police Department (VPD). The investigative team included Staff Sergeant Cam Murdoch, Sergeant Shelley Horne, Sergeant Christian Lowe, Sergeant Wendy Taylor, Sergeant Sandra Glendinning, Sergeant Dave Instant, Sergeant Glenn Burchart, Detective Constable Sylvia Lim, and Detective Constable Nancy Yingling. Joining the team during the discipline proceeding was Chief Superintendent Trent Rolfe of the RCMP.

The investigations were thorough and professional. They followed best investigational practices. Major case management principles were applied to manage the many investigative steps, and process the vast quantity of evidence obtained. The team completed 231 investigative tasks, including 82 interviews adding up to about 75 hours of audio. The team executed 23 investigative entry and search orders, conducted a forensic examination of the VicPD computer servers, as well as department-issue electronic devices, computers and email accounts. All relevant policies and contracts were considered.

The investigative team's cooperation with my office was exemplary. We performed our respective duties seamlessly and without friction, but with a healthy flow of information so that my office was apprised of the state of the investigation, as provided in the *Police Act*. The team diligently pursued investigative avenues, professionally and impartially. Their interviews were conducted in accordance with accepted interviewing techniques. At least two investigators were present for all interviews. The witnesses and

the former chief were provided an opportunity to exhaust their memories and, having done so, investigators read back to the witnesses their understanding of the evidence that had just been provided, correcting anything not accurately summarized. At that point, further clarifying questions were asked in a non-confrontational way. Witnesses and the former chief were also provided an opportunity to respond to evidence received from other witnesses. This was a thorough and careful gathering of evidence.

The investigative team met weekly to discuss the progress of investigative tasks, assess the evidence as a group and plan upcoming tasks. The lead investigator communicated regularly with my office, and provided all evidence in a timely manner so that we could fulfill our mandate to oversee the investigation in accordance with the *Police Act*.

In total, 10 officers contributed to the completion of this investigation. The Final Investigation Report was prepared by the lead investigator, Sergeant Shelley Horne, then reviewed and approved by Chief Superintendent Bourrie. In total, the Final Investigation Reports for the three Orders for External Investigation were 1,136 pages. The reports thoroughly and impartially summarized the relevant evidence, and they set out considered recommendations to the Discipline Authority.

Due to the length of the investigation, some members of the team were delayed moving to new job opportunities within the department by several months in order to ensure a thorough investigation into these matters.

Chief Superintendent Bourrie's dedication to public service was exemplary and inspiring. During the course of the investigation, he was diagnosed with a serious illness. Despite the illness and his ongoing treatment, Chief Superintendent Bourrie oversaw the investigation through to its completion. When called as a witness in the discipline proceedings before Discipline Authority Pitfield, he attended and provided testimony over two days. Sadly, Chief Superintendent Bourrie succumbed to his illness in December 2017.

Each member of the investigation team has received a commendation from my office for their commitment to integrity and professionalism, while enhancing public trust in law enforcement.

The quality of the investigative work, and the resulting reports, set the stage for the discipline proceedings that were to follow. I turn next to those proceedings.

SUMMARY OF INVESTIGATIONS AND DISCIPLINE PROCEEDINGS

On December 18, 2015, and as noted above, I issued two Orders for External Investigation in relation to the former chief. With respect to the first investigation, I appointed Retired Judge Carol Baird Ellan as the Discipline Authority. The second investigation concerned workplace harassment allegations, and in respect of this investigation, I appointed Retired Judge Ian Pitfield as the Discipline Authority. While the first Order was made public at the time,[6] the second Order was not.

The Allegations Addressed by Retired Judge Carol Baird Ellan

There is a complicated procedural history relating to the various misconduct allegations that were addressed by Retired Judge Baird Ellan. As the summary below will explain, eventually there were two streams of allegations, which she dealt with separately. This occurred because of the timing of court decisions rendered, first by the BC Supreme Court, and later by the Court of Appeal.

Of the five allegations before Retired Judge Baird Ellan, one involved the inappropriate use of police department equipment and facilities (workplace social-media account and devices). The remaining four involved *Discreditable Conduct*, specifically:

1. engaging in conduct with the spouse of a member under his command which constituted a breach of trust and/or conflict of interest;
2. providing misleading information to the member under his command;
3. providing misleading information to the internal investigator; and
4. contact with witnesses during the internal investigation, contrary to the investigator's direction.

In addition to those initial allegations, because of information provided by the external investigators in April of 2016, I directed that three further misconduct allegations be addressed by the RCMP/VPD investigation and by Retired Judge Baird Ellan.[7]

[6] https://opcc.bc.ca/wp-content/uploads/2017/04/11048_2015-12-18_Media_Part_2_Order_for-External_Investigation.pdf

[7] More precisely, I originally directed that the new misconduct allegations be addressed by former Justice Pitfield, but later asked that Retired Judge Baird Ellan assume conduct of those matters; see: https://opcc.bc.ca/wp-content/uploads/2017/04/2016-04-29_2015-11048_Order_for_External_Order.pdf .

On February 24, 2017, after a number of extensions, the investigators submitted their Final Investigation Reports, totaling almost a thousand pages in length.

The *Police Act* process is complicated even in simple cases, but this was an especially complex matter. The Act directs that once a Final Investigation Report is completed, the Retired Judge must provide an initial decision under s. 112, as to whether the evidence "appears to substantiate the allegation." In other words, the Retired Judge does not determine whether there was misconduct; instead he or she must ask a different initial question: does there appear to be misconduct, based on a review of the investigation report and evidence enclosed?

Retired Judge Baird Ellan made her initial s. 112 decisions on March 10, 2017. She found that four of the five allegations from the original order appeared to be substantiated. In addition, one allegation from the second order appeared to be substantiated. Following this, on April 7, 2017, she directed a supplementary investigation be conducted based on a request made by the former chief.

By early April of 2017, Retired Judge Baird Ellan had concluded there would be a discipline proceeding to deal with five allegations of misconduct. She was awaiting the supplemental investigation report.

It was at that time that the BC Supreme Court released its decision prohibiting consideration of two of the original allegations. (The decision, indexed as 2017 BCSC 605,[8] was released on April 12, 2017.) This ultimately led to two different streams of adjudication.

I appealed the decision of the BC Supreme Court, and one year later, on April 19, 2018, the Court of Appeal for British Columbia reversed the earlier decision.[9] That appeal decision had the effect of returning to Retired Judge Baird Ellan the two allegations that had previously been prevented from moving ahead.

That is why the Retired Judge ended up convening two discipline proceedings and issuing two sets of decisions, in each case dealing both with (1) misconduct, and (2) discipline (which the *Police Act* refers to as "disciplinary or corrective measures").

I will now return to the disciplinary decisions of Retired Judge Baird Ellan and Retired Judge Pitfield.

[8] http://canlii.ca/t/h35nc
[9] 2018 BCCA 147, http://canlii.ca/t/hrkq6

Retired Judge Baird Ellan's decisions on the three allegations (March and April 2018)

Following the completion of a discipline proceeding, on March 19, 2018, Retired Judge Baird Ellan found that the three allegations before her had been substantiated. She noted that these allegations "concern information disclosed during the internal investigation suggesting the former chief had conversations with two potential witnesses that may have amounted to attempts to interfere with the investigation, and that he may have attempted to mislead the investigator."

Two of the allegations involved the misconduct of "*Discreditable Conduct*," which is to say conducting oneself in a manner that would be likely to bring discredit on the police department. The third involved *Deceit*.

Allegation #1: the former chief's conduct toward the affected officer

The first allegation of *Discreditable Conduct* arose from the former chief's communications with the male officer under his command at the VicPD, whom I shall call "the husband" for present purposes. To step back, the matters involving the former chief came to light because of the discovery of sexually charged text messages between the former chief and the spouse of the affected member.

When these texts came to light in early September, 2015, the husband met with the former chief in a park and confronted him. The former chief denied any inappropriate communication and, consistent with an explanation given by the wife, said there was only one Twitter message which was mistakenly sent by the wife to the former chief instead of her husband. However, Retired Judge Baird Ellan wrote:

> *Based on the evidence, I find that the former chief clearly misled the husband as to the nature of the messages. In doing so he acted consistently with the June email [in which the chief advised the [spouse of the affected member] that his own wife had found the message and suggesting that "perhaps" she meant it for her own husband] and with his apparent deception of his own wife disclosed in that email.*
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> …
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> *In summary, the evidence amply shows that the former chief intentionally and dishonestly minimized the nature of his interactions with the wife, in his September 8, 2015 conversation with the husband. The husband left the meeting under a false impression as to the nature of the conduct that was the subject of the investigation, and then informed the co-chairs, based on that, that he did not want an investigation. The investigation proceeded internally, in part because of the position taken by the husband.*

The retired judge concluded that the former chief either was aware, or ought to have been aware, that misleading the husband in this manner would likely bring discredit on the department. She emphasized that there is an expectation that the Chief Constable will be aware of and follow ethical guidelines:

> *It cannot be overlooked that the former chief's job, under the Police Act, included acting as a Discipline Authority in relation to conduct investigations. The Police Act was part of his job description, as was the BC Police Code of Ethics and the code of ethics of the relevant department. In my view the former chief cannot be heard to say that he hadn't read the Act or all of the relevant codes of ethics and applicable professional standards. He should have known the husband's potential role, but he should also have known his own. Had he been cognizant of his duty as a chief, in my assessment he would not have accepted the invitation to meet with the husband at all.*

The retired judge determined that the former chief agreed to meet with the husband with the intention to defuse "the serious situation in which he found himself," when the "honourable response would have been to send a message back that a meeting was inadvisable and to trust and await the outcome of the investigation process." The retired judge also found that the former chief's "decision to speak with the husband can only have been based on an intention, which became manifest in how the former chief conducted himself, to attempt to convince the husband that nothing happened and thereby reduce his own liability." She concluded:

> *I have no hesitation in finding that, by misleading a subordinate in connection with the subject matter of an investigation into his own conduct, an investigation in which the subordinate had an obvious role to play, the former chief knew or ought to have known he would bring discredit to his office and hence the department. I find that the evidence establishes the misconduct contained in the first allegation.*

Allegation #2: misleading the internal investigator

The second allegation of *Discreditable Conduct* involved the former chief giving inaccurate information to the senior lawyer appointed to conduct the internal investigation into his conduct in the fall of 2015. Specifically, the former chief told the internal investigator that he had told the husband about an incident involving physical contact with the spouse of the affected officer, and also that there were a number of Twitter messages "back and forth." In a later interview with the internal investigator, the former chief tried to back away from these assertions once he was challenged; he said he did not remember whether he had told the husband those things or not.

With respect to this allegation, Retired Judge Baird Ellan concluded that the former chief's explanations were not credible and that he had intended to deceive the investigator. She wrote:

> *It becomes clear on reviewing the former chief's evidence that he is caught in a web of untruths. Where he finds himself facing contradictory evidence, he tailors his statements to reveal only that part of the truth he feels he must, to address the established facts with which he is faced. His statements reflect many obvious efforts at obfuscation, in my respectful view.*
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> *Reading the statements in sequence and in context, they disclose a clear intent to mislead not only the internal investigators, but the external investigators, as well.*
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> *He appears, in his statements and his testimony, to have considered himself justified in presenting to her any version of the events that would assist him to achieve a favourable outcome.*
>
> …
>
> *I have no hesitation in concluding that for a Chief Constable to deliberately mislead the investigator on an internal discipline investigation, in which he is the subject, is misconduct.*

In the course of finding this allegation to be substantiated, Retired Judge Baird Ellan referred to the duty imposed on police officers under s. 101 of the *Police Act*, to cooperate in relation to an external *Police Act* disciplinary investigation. She wrote:

> *While the internal process is not governed by Section 101, I do not think that leads to a conclusion that the former chief had no obligation to be forthright and responsive in his interviews with the investigator. Police constables have a high standard in relation to providing information within the context of legal proceedings. There is authority for the proposition that providing a false statement in an administrative investigation can be a criminal obstruction of justice: R. v. Wijesinha, [1995] 3 SCR 422, 1995 CanLII 67 (SCC). There is also authority for the fact that police officers have a duty of integrity in investigative proceedings: R. v. Dosanjh, 2006 BCPC 574. I would observe that Chief Constables have an identical duty of integrity, but that it is combined with a duty to exemplify high standards.*

Allegation #3: attempting to procure a false statement

The third allegation of *Deceit*, alleged the former chief asked a VicPD employee ("A") to lie to the internal investigator, and corroborate, his story that he did not know the member was still married to his spouse. "A" said that the former chief asked if she

would be comfortable telling the investigator that "A" did not recall telling the former chief that the affected officer and his spouse were still married. "A" said the former chief added that "nobody would know but you and I." "A" told him that, while she would not intentionally throw him under the bus, she would not lie about it if asked.

In evaluating this allegation, the Retired Judge framed the issue as one involving credibility. She wrote:

> *I find that the conversation unfolded more closely to the way it was reported by "A," and that the former chief did ask "A" to lie, or to withhold evidence, should "A" be called to provide a statement to the internal investigator.*
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> …
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> *I have no hesitation in finding that the former chief attempted to procure a statement from "A," knowing it to be false or misleading. I find that the evidence establishes the misconduct contained in the third allegation.*

Disciplinary measures for misconduct

In finding these three allegations to have been proven, the retired judge went on to consider the appropriate disciplinary or corrective measures for the former chief. In her decision on disciplinary measures, issued on April 18, 2018, Retired Judge Baird Ellan considered the framework under s. 126 of the *Police Act* and the aggravating and mitigating circumstances of the case.

Dealing with the first allegation, for giving misleading information to the husband, she found this to be "a deliberate attempt to avoid personal jeopardy" which "may also have amounted to a criminal offence." Although it arose at a time when emotions were high, she considered this misconduct to be "high on the scale of seriousness." On the second allegation (misleading the internal investigator), this too was "high on the scale of seriousness," even though the statement was not made under oath and did not affect any other person's jeopardy, unlike the third allegation. In regards to the third allegation, for attempting to have person "A" make a false statement, the retired judge concluded that "not only was the motive self-serving, but the former chief sought to enlist a subordinate into joining him in the deception of the investigator." She went on to state:

> *The former chief's actions were not only grounded in self-interest but reflected a lack of respect for "A's" own integrity and potential liability. In addition, this misconduct strikes at the heart of the integrity of the disciplinary investigative process and displays disrespect for a core value of policing, that of testimonial trustworthiness. Moreover, it is an abdication of the exemplary moral and ethical standards required of a Chief Constable.*

> *I consider the misconduct in relation to this allegation of deceit to be very high on the scale of seriousness.*

The retired judge then considered the former chief's record of employment, including the 30-day concurrent suspensions imposed by Retired Judge Pitfield (summarized below), the impact of the discipline on the former chief, and the likelihood of future misconduct. In addressing this last point, she said it was "difficult to conclude at this point that the former chief has gained significant insight into the nature or the seriousness of his misconduct." Likewise, she had "difficulty concluding that he can be said to have taken full responsibility for his actions." Retired Judge Baird Ellan then reviewed a series of *Police Act* decisions dealing with similar misconduct sanctions, noting that they supported dismissal "in cases of deceit involving multiple incidents of deliberate untruthfulness." The retired judge also considered the former chief's testimony regarding the devastating impact of the investigation and the publicity both to him and his family, concluding that "the consequences the former chief has experienced would appear to flow less from the fact of the investigation or any measures that might be imposed on him than from his choice of how to respond to the investigation."

In summary, the retired judge imposed the following disciplinary measures:

- On the first allegation, 30 days' suspension, demotion to the rank of constable, and training on ethical standards.
- On each of the second and third allegations: Dismissal from policing.

Retired Judge Baird Ellan's decisions on the remaining two allegations (June 2018 and July 2018)

As outlined above, two of the initial allegations of misconduct against former Chief Constable Elsner were effectively frozen for a year because of court decisions, and then remitted back to be addressed by Retired Judge Baird Ellan.

Before detailing the specifics of those two allegations, one point merits some explanation. In the reasons given by the Court of Appeal, there is a comment (at para. 94) suggesting that I as Commissioner:

> *might reconsider whether it is still necessary or in the public interest to spend public funds at this late date on investigating what appears to have been an entirely consensual and short-lived flirtation via Twitter involving a Chief Constable who is no longer employed.*

This comment suggested that it fell to me, as Commissioner, to decide whether or not to launch an investigation. However, the matter was at that point already well underway. The investigation was concluded. The disciplinary adjudication process had begun, but it was interrupted partway along. This was explained by Retired Judge Baird Ellan in her June 27, 2018, decision on the remaining two allegations:

> *I note that, perhaps because OPCC discipline proceedings are not public, the Court of Appeal does not seem to have been apprised of the fact that the investigation on these two allegations had long been completed at the time they rendered their decision. They also seem to be unaware of the extent of the interactions between the former chief and the [spouse of affected officer]. Further, the passage seems to overlook the fact that the Police Act provides specifically in Section 127 for proceedings to continue despite members having ceased to be police officers. And of course, findings in relation to misconduct, while perhaps academic in relation to a service record, may have future value as precedent, instruction, and deterrent.*[10]

In her later disciplinary decision of July 23, 2018, Retired Judge Baird Ellan said of the former chief's misconduct that:

> *This was a course of conduct that took place over several months and which included multiple suggestive messages back and forth, and a physical encounter in the nature of a romantic embrace and kiss, in the former chief's office. I would also observe, with respect, that the Court of Appeal's remarks appear to overlook the breach of trust aspect in relation to the member under the former chief's command.*

Although the Court of Appeal was understandably inclined to discourage a protracted investigative process, the two outstanding misconduct allegations were already the subject of adjudication. The retired judge did not have the authority to terminate the proceedings, nor was it appropriate for our office to interrupt the Retired Judge's almost-concluded work. I would add that the retired judge dealt with the remaining two allegations within two months of the Court of Appeal ruling, and discipline was imposed by her four weeks after that.

Relying on the comment made by the Court of Appeal, the former chief applied to have Retired Judge Baird Ellan terminate his remaining discipline proceeding, arguing that he was unable to prepare a defence because of the length and cost of the proceedings (inclusive of the court proceedings initiated by him). She noted that the former chief

[10] The Retired Judge went on to note that the wording of s. 112(3) of the *Police Act*, which is mandatory, does not afford a Discipline Authority any type of "'public interest' discretion to discontinue the proceedings". Moreover, even if she had such a discretion, she wrote, "I would exercise that discretion against the former chief's request".

had elected not to attend the hearing, nor had he requested that any witnesses attend. She wrote:

> *While the former chief has referred in his submission to having been "outlasted and outspent;" I am doubtful that the process contemplated by the Police Act to this stage in the proceedings involves a right of representation at public expense, nor has any argument been presented to that effect. And that concern does not explain a decision not to attend in person.*

I turn now to the two misconduct allegations addressed in this "second stream" before Retired Judge Baird Ellan. The first allegation was of *Discreditable Conduct* because of the former chief's conduct with the spouse of a member under his command, which was a conflict of interest or breach of trust or both. The second allegation involved the inappropriate use of police equipment or facilities for purposes unrelated to the officer's duties. As will become plain, the retired judge found that both allegations were proven, and that both led to the disciplinary sanction of dismissal.

Allegation #1: conflict of interest / breach of trust

Retired Judge Baird Ellan reviewed the Twitter direct messages between the former chief and the spouse of the affected officer, noting that the former chief "does not dispute that the content of several direct messages… was sexually suggestive on both parts and that the meeting in his office involved physical contact that went beyond what would be appropriate between business colleagues." That is an accurate characterization of the messages; although both participants deny any ongoing physical affair, the messages are sexually charged and suggest an apparent if not actual affair.

The retired judge concluded that the former chief engaged in an inappropriate relationship with the wife of a member under his command. His conduct "placed him in a conflict of interest or constituted a breach of trust" in relation to the husband. In articulating the standard to be expected of a Chief Constable, she wrote:

> *… the applicable ethical standards require all officers to specifically consider whether they are in a conflict of interest. In addition, the former chief's employment contract requires him to set a high ethical level of conduct for the Department. These materials set the objective standard for an officer in the position of chief of a police department, and in particular, the former chief.*[11]

[11] I note that in this case, former Chief Constable Elsner's contract of employment contained specific terms requiring that the chief:

> 32. Promotes the highest standards of integrity, professional conduct and equality throughout the organization.

On this point, later in her decision, she found that "professed ignorance of the applicable codes and legislation is to my mind a complete abdication of the duty of a Chief Constable."

She found that an improper relationship between a married person and a third party (in this case, the former chief) who is in a position of power over the spouse, creates a concern about unequal or unfair treatment of that spouse. There is also the prospect of "a barrier of deceit between the third party and the spouse. It can easily be seen that, objectively, the third party has placed himself in a conflict of interest and breached the trust of the spouse."

Retired Judge Baird Ellan concluded that "the former chief's denial that he knew the [spouse of the affected officer] was married to a member under his command is not credible" and that "the evidence and materials amply support a finding that the former chief knew or ought to have known that his conduct was likely to bring discredit to the department."

Allegation #2: improper use of department equipment or facilities

Retired Judge Baird Ellan found this allegation to be substantiated, concluding that the former chief's Twitter account, cell phone and email were departmental property, and that he used that property to carry out his relationship with the affected member's spouse, "while he was on duty and/or acting in his capacity as chief."

Disciplinary measures for misconduct

In reasons given on July 23, 2018, Retired Judge Baird Ellan concluded that each of the two misconduct allegations merited the maximum sanction of dismissal.

The first act of misconduct (conflict of interest and breach of trust) was characterized "as moderately high on the scale of seriousness." In discussing the elements of the conflict of interested and breach of trust, she wrote:

> *In relation to the effect on the husband member, his initial reaction to the knowledge that there had been an inappropriate interaction was to confront the former chief, as described in the earlier proceedings. This angry confrontation is indicative of his sense of betrayal, albeit perhaps more in relation to his wife; however, it is clear that he went directly to the former chief to discuss the allegation with him. I have already dealt with an allegation*

33. Fosters a culture that promotes ethical practices and encourages individual integrity and accountability.

> *arising out of the former chief's deception of the member, during that conversation, about the extent of the relationship, which compounded the betrayal. I am careful not to conflate the issues of personal betrayal with the breach of trust relating to the former chief's office. The fact of the employment relationship adds another layer of betrayal and is what brings the elements of conflict of interest and breach of trust (under the Police Act) into play.*
>
> *It should have been obvious to the former chief, on many levels, that the dalliance was completely inappropriate. The standard of conduct for a Chief Constable is higher than that for other members in the department. He is required to set the example.*

The second act of misconduct — inappropriately using the police department's Twitter account, email, and cell phone, while on duty — was also "moderately high on the scale of seriousness."

The retired judge reviewed the former chief's record of employment, which by this time included the earlier three sanctions she had imposed as well as those imposed by Retired Judge Pitfield. She considered the impact of dismissal on the former chief, his family and career. The former chief argued that our office's public issuance of the Order for External Investigation had caused the media attention which deeply impacted him and his family. However, the retired judge wrote:[12]

> *In fact, the former chief himself made statements to the press before the Commissioner made any. He issued and publicized a letter to his department in which he referred to "rumours circulating around," and stated that the internal investigation found "some private, direct messages in [his] Twitter account, but … no inappropriate relationship." While I note that one of the co-chairs of the relevant police board made that same statement to the media before the former chief did, the former chief had received the internal investigation report before he made his own statement. That report specifically found that there was an "inappropriate relationship." The former chief also stated that the investigation related to events in "late spring, early summer," when he knew it was a significantly longer period, and, by his own admission to the internal investigator, consisted of inappropriate physical contact as well as the Twitter messages. By deliberately misrepresenting the nature and duration of the conduct in his own remarks, in my view the former chief undermined public confidence and invited a public correction.*
>
> *The Commissioner's first public statement was the announcement of his review, the day after the former chief's media statements, with no details of the allegations. In the Order for External Investigation issued 10 days later, the Commissioner stated that he had exercised his discretion under Section 95 of the Act to make the notice public in part because of the information that had already been provided to the media.*

[12] Footnote references in original removed.

> *It is very clear from this sequence of events that the former chief himself played a key role in initiating the publicity surrounding the external investigation. In any event, the former chief's high profile role would make it inevitable that the conduct in which he engaged with the female [withheld], and indeed all of his conduct, would at some point have been extensively reported. Indeed, the public may have had a right to be informed. There was no guarantee that conduct such as this would remain private, in proceedings under the Police Act. While discipline proceedings are not open to the public, subsequent proceedings such as reviews on the record or Public Hearings are reported publicly.*
>
> *I see the publicity surrounding these matters as a foreseeable and direct result of the conduct of the former chief and nothing else.*

As in her previous disciplinary decision, the retired judge found the former chief did not take responsibility for his actions or demonstrate insight into his misconduct. She considered the impact on the VicPD to be both a relevant and aggravating factor. She concluded that the appropriate disciplinary measure was dismissal in respect of both allegations for these reasons:

> *The remaining step is to consider whether an approach that emphasizes correction and education would be unworkable and inconsistent with the administration of police discipline. In considering this aspect I am unable to disregard the context and totality of the disciplinary allegations against the former chief. In my view, the damage that has been done to the administration of police discipline and confidence within the department by the former chief's conduct makes unworkable any suggestion that he could remain in the role of Chief Constable, had he not chosen to leave the service. Demotion within the department would be equally unworkable.*
>
> *I am unable to say whether, had these two allegations stood alone and had the former chief behaved in a very different fashion in relation to them, matters may have been different. I find I am unable to consider them apart from the allegations that arose during the investigation of them, which involved serious breaches of integrity. I am equally unable to disregard the conduct found by Retired Judge Pitfield to have been proven. The allegations in this matter must be considered in light of all of that, as well as in light of the former chief's role in the department and the high standard of conduct to which a Chief Constable must be held. Consequently as stated in the accompanying discipline disposition record, the proposed disciplinary measure on both allegations is dismissal.*

The allegations addressed by Retired Judge Ian H. Pitfield

Having described the complicated procedural history of the *Police Act* misconduct allegations addressed by Retired Judge Baird Ellan, I turn to the separate allegations

dealt with by Retired Judge Ian H. Pitfield. In comparison, these matters were more straightforward.

As noted above, on December 18, 2015, I issued two Orders for External Investigation. The order led to Retired Judge Pitfield being the Discipline Authority for allegations of workplace harassment and inappropriate conduct involving female officers at VicPD. It is those allegations, and specifically the substantiated allegations, that I have summarized here.

Having received a Final Investigation Report, on March 10, 2017, Retired Judge Pitfield rendered his decision under s. 112 of the *Police Act*, finding that four allegations involving three female officers "appeared to be substantiated."

In the disciplinary proceeding that followed, as summarized below, Retired Judge Pitfield concluded that three misconduct allegations were proven. All three allegations involved "*Discreditable Conduct*," which is to say, conduct that the member knows or ought to know would be likely to bring discredit on the police department. He imposed, as disciplinary or corrective measures, concurrent 30-day suspensions without pay, and mandated that the former chief complete harassment and sensitivity training.

Retired Judge Pitfield's decisions on misconduct and discipline (January and February 2018)

In a decision issued on January 30, 2018, Retired Judge Pitfield described the two-day hearing at which he considered four allegations of misconduct, all of which were denied by the former chief in testimony. In this summary I have referred to the female officers as Officers A and B. The summary below addresses the allegations involving Officers A and B.

In addressing the remaining misconduct allegations, Retired Judge Pitfield addressed both factually what was proved, and objectively what standard was to be used in considering whether the proven conduct amounted to "*Discreditable Conduct*." He wrote:

> *Whether conduct was likely to bring discredit on the VicPD must be determined objectively by reference to the standards that the community should reasonably expect of its police department generally, and of one holding the office of Chief Constable in particular.*

He noted that apart from community expectations for a Chief Constable, the VicPD had written policy on workplace harassment. Additionally, the former chief's employment contract required him to both exhibit "a high ethical level of conduct" and "promote the

highest standards of integrity, professional conduct and equality throughout the VicPD." Part of the conduct expected for a Chief Constable "involves dealing with subordinates in a respectful manner."

Allegation #1: unwanted physical contact with Officer A

Officer A testified that she was standing near the former chief's assistant's desk in 2014, when the former chief approached her from behind. Retired Judge Pitfield described what followed next this way:

> *[He] pressed his groin against her buttocks, and his chest against her back in what [Officer A] described as a "nuts to butts" manoeuver. … She told investigators she was shocked that "my new Chief would stand behind me and from a female's perspective it's almost like an oppressive position in a, in a way, like just was very inappropriate, awkward."*

Retired Judge Pitfield found Officer A's evidence "to be credible and believable" and concluded that the former chief "made unwanted physical contact" as alleged. He determined that this conduct:

> *…is not consistent in any way with the obligation to avoid harassment and to refrain from workplace misconduct. Mr. Elsner's action in relation to [Officer A] amounts to the application of force, however minimal, without consent. As a police officer and Chief Constable, Mr. Elsner knew or ought to have known that the application of force, however minimal, to an individual constitutes an assault. It goes without saying that non-consensual physical contact of the kind in question is offensive to the victim and was so regarded by [Officer A]. Mr. Elsner's actions in relation to the officer violate both the VicPd Workplace Harassment Policy and Mr. Elsner's employment contract. I find that this allegation of misconduct has been proved on the balance of probabilities.*

Allegation #2: unwanted physical contact with Officer B

Officer B said that the day of a police Mess Dinner in 2015, the former chief approached her in a hallway at the VicPD headquarters and held her by both arms with her back against or close to the wall for about a minute. She told investigators that she felt uncomfortable that the former chief was "in her space" and holding her by the arms.

Retired Judge Pitfield preferred the officer's evidence to the evidence of the former chief, who reported no recollection of the incident. Retired Judge Pitfield found that the incident did occur and that Officer B felt uncomfortable as she described. He wrote:

> *His evidence would suggest that it was his practice to place his arms on individuals as a sign of friendship or gratitude. It is an error to believe that anyone can touch or greet*

> *another in that manner with impunity. The propriety of the act will depend upon the circumstances and whether consent to contact was granted. In this case, [Officer B] was taken by the arms in a position with her back to the wall, whether against it or not is unimportant. As someone subordinate to the Chief Constable she could reasonably have felt threatened or intimidated. It was not open to her to back away and highly unlikely, in the circumstances, that she would tell a Chief Constable to remove his arms from her. In my opinion, Mr. Elsner knew or ought to have known that his actions would humiliate or offend [Officer B]. I find that this allegation of misconduct has been proved on a balance of probabilities.*

Allegation #3: inappropriate remarks of a sexual nature toward Officer B

The third allegation also involved Officer B. It arose at a use-of-force training session in 2014 at which the former chief was paired up with Officer B to practice lateral neck restraints; that involved close body contact. Officer B said:

> *when she applied the restraint to Mr. Elsner, or him to her, he said things like "you are so warm, don't stop" or "I could do this all day, you're so warm." She said the comments were made multiple times. She stated that while the comments were not overtly sexual, she felt they had a sexual tone as they were made at the time when their bodies are touching during the use of force scenarios.*

The Retired Judge found that the officer's recollection of the events (which she had reported to both her husband and another officer) was more specific than that of the former chief. He concluded as follows:

> *I find that the statements made by Mr. Elsner to [Officer B] in the course of the use of force training session violate the VicPD Workplace Harassment Policy and Mr. Elsner's contract. There is no justification for the comments made when, as part of a professional training exercise, the Chief Constable is required to engage in close physical contact with a subordinate and vice versa. The remarks must reasonably be construed to have a connotation that is not an expression of need, but of desire. I find this allegation of misconduct to constitute misconduct proved on a balance of probabilities.*

Disciplinary measures for misconduct

Having found three misconduct allegations to be proven, the retired judge imposed disciplinary and corrective measures by way of a decision dated February 26, 2018. He referred to the considerations in s. 126 of the *Police Act*. He wrote:

> *In my reasons for decision I stated that Mr. Elsner's conduct on each occasion was a breach of both the VicPD workplace harassment policy and the terms of his written employment contract. Standing alone, the misconduct could be regarded as minimal in impact. However, because Mr. Elsner was the Chief Constable, the members were his subordinates, he stood in a position of power and responsibility vis-à-vis both members, and the three instances constituted breaches of VicPD workplace policy and the terms of his employment contract, I consider the misconduct to be well advanced on the seriousness scale.*

As aggravating factors, the seriousness of the misconduct, was coupled with "the fact that Mr. Elsner was and appears to remain reluctant to acknowledge the nature and seriousness of the misconduct. … I am concerned that Mr. Elsner lacks insight into the effect of his attitude and behaviour towards subordinates." On the other hand, mitigating factors included that the former chief's employment record did not give rise to other concerns about his treatment of subordinates as Chief Constable, and the other disciplinary matters (before Retired Judge Baird Ellan) were the subject of a separate proceeding.

In imposing final discipline in the matter, Retired Judge Pitfield wrote:

> *The aggravating circumstances are the seriousness of the misconduct in the context of clearly defined VicPD policy and Mr. Elsner's employment contract, and the fact that Mr. Elsner was and appears to remain reluctant to acknowledge the nature and seriousness of the misconduct. Mr. Elsner denied the incident involving [name withheld], but in submissions regarding penalty says it was brief in duration and an isolated incident involving minimal physical contact. He denied or did not recall the two incidents involving [name withheld] but, in the face of my findings of misconduct, says that both incidents fall at the low end of the spectrum. In sum, Mr. Elsner is obliged, at this point, to accept my determination, but it is apparent he does not regard his conduct toward his subordinates as egregious. I am concerned that Mr. Elsner lacks insight into the effect of his attitude and behaviour towards subordinates.*
>
> …
>
> *The overriding concern in this case is Mr. Elsner's conduct viewed in the context of his obligations to subordinates and the responsibilities defined in his employment contract. I have found him to be in breach of both. His employment contract required Mr. Elsner to set a high ethical level of conduct for the department; to promote the highest standards of integrity, professional conduct and equality throughout the VicPD; and to foster a culture that promotes ethical practices and encourages individual integrity and accountability. That he has not done in the instances before me.*
>
> …

In my opinion, the misconduct in issue before me falls short of warranting dismissal. That said, the question of whether dismissal was warranted had he not resigned, having regard for the accumulation of complaints toward him, was one for consideration by the Victoria and Esquimalt Police Board. The Board was in a position to assess whether Mr. Elsner's conduct and deportment as Chief Constable toward subordinates when assessed by reference to his activities in the workplace, his attitude toward members of the VicPD, and his employment contract were sufficiently egregious to warrant dismissal from his employment for cause.

…

In the result, I conclude that suspension without pay for 30 days [concurrent on the three matters], the maximum term permitted by the Police Act in respect of each finding of misconduct, and the imposition of a requirement that he undertake and appropriately respond to a recognized course of harassment and sensitivity training are the appropriate disciplinary measures in this case.

MY DECISION TO CONCLUDE THESE PROCESSES AND ISSUE THIS REPORT

At this juncture in the complaint process, as Police Complaint Commissioner I am to perform a "gatekeeping" function. I must review the Discipline Authorities' findings in relation to each allegation of misconduct, along with their decisions on the appropriate disciplinary or corrective measures. The *Police Act* sets out that I can elect to have a matter go to a Public Hearing or a Review on the Record (if I conclude the findings were incorrect or that the hearing/review is necessary in the public interest). If I do not order any further hearing/review, the retired judge decisions are final and conclusive.

(I note that, when a retired judge concludes that dismissal or demotion is warranted, the member can request a Public Hearing, in which case I must arrange for one. The former chief did not request a Public Hearing.)

It is my view that there are procedural shortcomings in the *Police Act* discipline process that present challenges in discipline proceedings, such as those undertaken by the retired judges in this case. For example, under the *Police Act*, a Discipline Authority does not have any power to summons witnesses who may have material evidence to give. Instead, under the present legislation, witnesses may only attend if a request is made by the member, in this case the former chief. This procedure sets the stage for an unusual and one-sided evidentiary hearing, which is out of step with how adjudicative processes generally operate.

In both discipline proceedings, the former chief chose to appear as the only witness in the proceedings. Accordingly, neither retired judge was able to explore the former chief's version of events through questioning of other witnesses, except as contained in evidence in the Final Investigation Reports. The failure to hear from witnesses other than the member, impacts on the accountability of the process. That is not a criticism of the retired judges, but a complaint about how the discipline process under the *Police Act* is structured.

Having completed my review of both discipline proceedings and the decisions of the retired judges who presided over the adjudications, I have issued notices to advise the participants that I have concluded both proceedings. The decisions of both Retired Judge Baird Ellan and Retired Judge Pitfield are final and conclusive.

I will next provide a summary of each of my notices of conclusion of proceedings.

Review of Retired Judge Baird Ellan's decisions

Based on my review of the evidence, I am satisfied that Retired Judge Baird Ellan appropriately determined that the allegations against the former chief were proved. In my view, her conduct of the discipline proceedings, her substantive findings and her determination of the appropriate disciplinary/corrective measures are unassailable. Every aspect of procedural fairness was afforded to the former chief during these proceedings.

With respect to the public interest, I have considered the fact that the conduct in question is of a most serious nature, particularly given the high office that the former chief occupied. I am also of the view that the former chief's conduct would undoubtedly undermine public confidence in the police. The conduct itself, for a Chief Constable, would have a negative impact on the public's perception of the VicPD, and policing as a whole. The former chief's lack of acceptance of responsibility and his efforts to escape liability, as described by the retired judge, would similarly undermine public confidence. The former chief's conduct has also had a serious negative impact on the VicPD and has come at significant cost to the community.

The investigation into this matter was extensive, thorough and fair. The investigative team was highly trained and professional. They applied major case management principles to effectively manage the investigation and pursued every possible investigative avenue fairly, impartially and transparently. The interviews of the former chief were also fair and done in accordance with accepted best practices. I have identified no flaws in the investigation. The impact on the former chief and his family has not been the product of the media, the *Police Act* process or those involved in that process, so much as his own conduct and his response to the allegations against him.

In terms of the appropriateness of the disciplinary/corrective measures, I am of the view that dismissal is the only appropriate outcome in circumstances such as this, where a Chief Constable knowingly misled an officer under his command and an investigator, and attempted to procure misleading statements to avoid culpability. Demotion to the rank of constable appropriately captures the fact that a Chief Constable ought to lead by example, to be a beacon for all members of the department, and the public whom he/she serves. For these reasons, I determined that ordering a Public Hearing or Review on the Record was not in the public interest. The seriousness of the conduct and the impact on the VicPD, the community and the public's perception of police, have been addressed through the exemplary professionalism exhibited by the investigative team and the adjudication undertaken by Retired Judge Baird Ellan.

I have issued a notice of conclusion of proceedings to those parties identified under the *Police Act* as confirmation that rulings of Retired Judge Baird Ellan as final and

conclusive. The former chief's service record of discipline will reflect his demotion to constable and his dismissal from policing.

Review of Retired Judge Pitfield's decisions

Based on my review of the evidence, I am satisfied that the determinations of misconduct substantiated by Retired Judge Pitfield have been established, based on the reasoning he provided.

I am of the view that Retired Judge Pitfield's assessment of the seriousness of the misconduct and the appropriate disciplinary measures was within the appropriate range. Although pursuant to the *Police Act* process he determined the conduct fell short of dismissal, had the suspension taken place prior to his resignation, it would have amounted to a sizable penalty, equating to approximately $23,000.

For women to feel safe and valued in policing, it is especially crucial that the most senior officers conduct themselves with integrity and respect. The determinations of Retired Judge Pitfield demonstrate the deficit in leadership the former chief exhibited. His conduct caused emotional harm and violated the dignity of the affected parties, the gravity of which is amplified by his position of power and the importance of the office held by a Chief Constable.

The investigative team conducted a thorough and professional investigation into this sensitive matter, commensurate with the nature and seriousness of the allegations.

Consultation with female members and staff

As noted, at this stage in the process I am charged with deciding whether it is necessary to have some or all of these misconduct matters proceed to a Public Hearing or Review on the Record. To assist in my determination of that question, my office initiated a consultation with the six female officers and staff members who had come forward with allegations about the former chief. (A seventh woman declined to participate.) Although each of these women had her own perspective and views on the process and outcome, a number of common themes emerged.

The overall consensus among the women was that they did not wish the matter to proceed to a Public Hearing, but they all confirmed that they would appear, if a Public Hearing was arranged. One member wanted the opportunity to stand up and tell her story, but stated that she would be content with any determination.

Significant concern was expressed amongst the women about the stress and emotional impact of testifying in a formal proceeding, which would involve media attention and likely have an impact upon their family. In light of the resignation of the former chief, many women harboured a desire for the VicPD to "move on."

The women said that the police environment for women was challenging. Although there was a consensus that there has been real change over time, there is still a long way to go. The women discussed the difficulty coming forward with harassment allegations, as they feared repercussions for coming forward. The women believe there to be a "boys club" dynamic at play, particularly at the higher ranks.

A number of the women expressed concern about the Police Board, and whether real change can take place without a change in leadership. Their perception was that the Board seemed to support their former chief, yet chose not to communicate or offer support for the women who were the victims of his harassment.

In Canada, women in policing still face barriers and challenges in finding a work environment that is respectful and free of harassment. The recent issues raised by many present and past women in the Royal Canadian Mounted Police have served to shed much needed light on this, and have garnered significant attention from the media, the public and governments.

In this particular matter, the Victoria City Police Union was instrumental in bringing forward information to my office that resulted in my initiation of a public-trust investigation. It has been my experience that police unions have provided valuable support to their members, regardless of whether the allegations involve a member of the executive or a fellow member.

My office has adopted a proactive approach in designating allegations of sexual harassment into the public trust stream, as I believe it is in the public interest to ensure these complaints have the benefit of independent and impartial oversight.

Decision to issue a public report

At the outset of this report, I said that I considered it important and necessary that the public be informed about the former chief's disciplinary case and what has gone on. I wish to set out my thinking on this, and why it is that I have prepared this public report now that the matters are finally concluded.

As described earlier, on December 18, 2015, I issued two Orders for External Investigations. At the outset, I was careful to minimize the amount of information I released to the public. In my December 2015 public order, I referred to my discretion

under section 95 of the *Police Act*, to make information public where doing so is in the public interest. I have previously indicated that I would provide a summary informational report at the conclusion of the investigation and disciplinary process because I see it to be in the public interest to do so.

Pursuant to sections 177(4) and 95 of the *Police Act*, I have determined that it is in the public interest to disclose this report to the public. In making this disclosure, I have tried to strike a balance in terms of the nature and extent of disclosure, having considered a number of factors, including:

- the nature and accuracy of the information that has been introduced into the public domain by the mayors and the former chief, initially and throughout the process;
- the extent of the information that entered the public domain through the court proceedings that were initiated by the former chief;
- the privacy interests of those individuals directly affected by these matters;
- the public interest, and in particular, that of maintaining public confidence in the investigation of alleged police misconduct, and the administration of police discipline through the accountability and transparency afforded under the *Police Act* of British Columbia; and
- The interests of the members of the Vic PD whose concerns were clearly expressed through a vote of non-confidence in the former chief and the Victoria Police Board, an action unprecedented in Canadian policing history.

A REVIEW OF THE MAYORS' DISCIPLINE PROCESS

The role of Discipline Authority in the administration of police discipline is critical to the accountability of the police discipline process, as well as public trust in policing. In most investigations in the police discipline process, the position of Discipline Authority is occupied by a senior officer at the rank of Inspector or higher. This requirement ensures that the Discipline Authority is an adjudicator who understands policing, police culture and the police discipline process pursuant to the *Police Act.*

In British Columbia, the executive ranks of all municipal police agencies have come out in strong support of civilian oversight of law enforcement. They work cooperatively with my office to support the administration of the police discipline process.

However, in my view, there exists a deficiency in the current *Police Act*. When it comes to a disciplinary matter involving a Chief Constable or Deputy Chief Constable, the "norm" of having a senior police officer serve as the Discipline Authority no longer prevails. Instead, under the present legislation, it falls to the chair of the municipal police board to become the Discipline Authority, unless I appoint a retired judge. And the mayor of that municipality is designated by statute to be the chair of the police board.

While there may be exceptions, ordinarily an elected mayor will not have a background in policing or police discipline, and in addition, she or he will have innumerable other responsibilities and demands in the discharge of civic office.

One key responsibility for the chair of a police board, is to take a leadership role in supporting the work of the Chief Constable, sworn members and civilian staff of the police department.

Under the BC approach, a municipal police board is responsible for the recruitment, evaluation and support of the Chief Constable. Considerable time and effort is expended in the hiring process for a Chief Constable. Careful planning and a clear understanding of the needs of the department and the community are required. Both the chair and the board have a key stake in the success of the Chief Constable.

In this situation, it will often be the case that the mayor (as chair of the police board) and the Chief Constable are allied in interest. The mayor (and board) may have been responsible for recruiting and hiring the Chief Constable. The mayor will usually have a strong interest in having his or her Chief Constable succeed, both to serve the public interest, but also to buoy the mayor's political position as an elected official.

The potential for a conflict of interest arising out of the relationship between the Chief Constable and the chair of that a police board has been recognized in the BC Police Board, Resource Document on Roles and Responsibilities under the *Police Act*, 2015, at p. 4:

> *As the chair of a municipal police board is also the mayor of the municipality, there is an inherent conflict of interest, particularly with respect to the budget.*

As noted, the mayor of a municipality is an elected politician, and almost always lacks a comprehensive understanding of policing, police culture and the administration of police discipline. Generally, the mayors who serve as police-board chairs do not have adjudicative experience, or a familiarity with administrative law principles.

It is a most serious event when a Chief Constable becomes the subject of a *Police Act* investigation, because they occupy such a high position of public trust in the community and the justice system. It makes little sense to entrust the responsibilities of Discipline Authority to a person who lacks the requisite training and experience, and who may have little to no understanding of the complexities of the police discipline system.

I have reviewed the administration of the internal discipline process in this matter by the Co-Chairs, Mayors Desjardins and Helps, as Discipline Authorities. I have likewise reviewed the substantial volume of evidence gathered during the course of the external investigations described earlier. This includes reviewing the transcripts of witness interviews, including both mayors as Co-Chairs.

My review has left me with serious concerns regarding the adequacy of having the office of Mayor assigned as Discipline Authority for matters involving the conduct of a Chief Constable. In light of my concerns, as a practical approach for the time being, I intend to appoint a retired judge to serve as a Discipline Authority for matters involving the conduct of a Chief Constable or Deputy Chief Constable in which an investigation is warranted.

My concerns arising from this matter have served as the catalyst for me to formally recommend to the government amendments to the *Police Act*. I have recommended that when a misconduct matter involving a Chief Constable or Deputy Chief Constable requires a Discipline Authority, the Discipline Authority should be a retired judge, not a mayor.

My concerns about the administration of the internal discipline process by the mayors in this matter relate to their cooperation with our office, and their communications to the public. I outline these concerns next.

Cooperation with my office

All police officers are bound by a statutory duty to cooperate with our office pursuant to the *Police Act.* The Act reads:

> *Duty of members to cooperate with Police Complaint Commissioner and staff*
>
> *178 A member has a duty to cooperate with the Police Complaint Commissioner in the Police Complaint Commissioner in the Police Complaint Commissioner's exercise of powers or performance of duties under the Act and with any Deputy Police Complaint Commissioner or other employee of the Police Complaint Commissioner who is acting on behalf of the Police Complaint Commissioner.*

If a police officer fails to comply with this statutory duty, it may result in a finding of misconduct pursuant to the disciplinary process. It is important to note that there is no commensurate obligation to cooperate with our office, when it comes to a chairperson of a police board acting as Discipline Authority. The public is left to rely on the good judgment and reliability of a chairperson, and that she or he will ensure a fair and impartial internal discipline process.

I will not repeat my earlier findings contained in the External Order of Investigation of December 18, 2015. I simply note that the determinations of the retired judges in this case validate the seriousness of those concerns. Their findings support my considerable concern about the inadequacy of both the process, and the substantive result, in the internal process undertaken by the mayors.

I turn to how allegations of misconduct, outside those disclosed to our office by the mayors, were administered by the mayors in the internal discipline process.

Disclosure of further allegations of misconduct pursuant to the internal investigation

At the outset of my office's dealings with the mayors and their legal counsel, there was a clear understanding among all concerned that if, during the course of the investigation, any information came to light about conduct by any police officer that may constitute misconduct, our office was to be informed so that I could determine whether the conduct should be addressed as a public trust matter.

In the police disciplinary process, the Discipline Authority has unfettered discretion in relation to the scope of any investigation; the Discipline Authority's task is to determine if any misconduct has occurred. The examination of information should be one that is open-minded and alert to the possibility that beyond the original incident or complaint, other conduct could come to light that would amount to police misconduct. In my

review of this matter the mayors did not proceed in an open-minded and open-eyed way, and failed to consider information that pointed strongly to additional misconduct by the former chief, including misconduct that arose in the course of the investigation itself.

In a letter dated September 16, 2015, legal counsel for the mayors wrote to the internal investigator in this matter as confirmation of the scope of her investigation. The mayors and legal counsel for the former chief were copied on the correspondence. The relevant excerpts are as follows:

> *I am writing now to confirm the scope of your mandate. As indicated in the letter to Chief Elsner, which was also copied to your attention, the issues that have come to the Board's attention are:*
>
> 1. *Whether Chief Elsner has properly used the [VicPD's] social media account or accounts; and*
> 2. *Whether Chief Elsner has engaged in an inappropriate relationship with an [individual] who is married to a member of the [VicPD].*
>
> *I have had the opportunity to speak with Chief Elsner's counsel, He has raised an additional concern with how the information from Chief Elsner's Twitter account cam (sic) to be disclosed to the Board. Although your mandate is confined to issues related to <u>any</u> misconduct by Chief Elsner, you may conclude that this is a question that may properly arise in the scope of the mandate.*
>
> …
>
> *If in the course of your investigation you have reason to believe that there was any misconduct by any other sworn member of the [VicPD], please inform me immediately so that we can consult with the Office of the Police Complaint Commissioner to determine who should be assigned as the Discipline Authority. Similarly, if you have reason to believe there was misconduct by any other employee of the [VicPD], or that there was security issues with the [VicPD's] information systems please inform the Co-Chairs so that appropriate steps may be taken.* [Emphasis added.]

This correspondence confirms the need to report to my office, any and all information related to the Chief Constable and any other serving member in the VicPD that may arise in the investigation.

As I alluded to in my Order for External Investigation, there were two preconditions that I sought from the mayors in order for the matter to proceed in the internal process. In my review of the internal investigation it was evident to the mayors that the affected spouse, the husband, had been materially misinformed by the former chief regarding

the matter, and they chose not to correct his misapprehension of the circumstance. They then confirmed the husband's decision to proceed with an internal process, without disclosing that the husband had been misinformed by the former chief. Furthermore, the mayors did not expand the investigation to include this apparent misconduct, nor report it to our office as required. This conduct by the former chief falls in the most serious range of misconduct and has resulted in his dismissal from policing by Retired Judge Baird Ellan.

It is clear from my review that the mayors were aware of their discretion to expand the scope of the investigation. In an email from Mayor Desjardins to the investigator on October 20, 2015, speaking on behalf of both mayors, she directs the following:

> *I want to add that on further discussion we would like you to include in your investigation whether the chief has made any acts that are retaliatory. We do not want this to delay your report but it falls within your scope. Contact if you have a question, thanks*

Based on my review of internal communications, notes and evidence summaries, it is apparent that by October 20, 2015, the internal investigator had reported to the mayors that numerous witnesses had made allegations of bullying and harassment against the former chief. These witnesses included members and civilian staff; the nature of the harassment was characterized as "inappropriate comments and behaviour towards women," which included inappropriate physical contact.

Despite receiving this information, the mayors chose not to expand the investigator's mandate to include these allegations. On the contrary, the correspondence indicates that they instructed the investigator not to pursue those allegations or consider them in any respect in drafting the investigation report because they were "outside the scope of the investigator's mandate."

The internal investigator sent a Preliminary Investigation Report to the Mayors on November 16, 2015, in which the covering letter addressed "additional issues" that arose during the course of the investigation. One of the issues was allegations of bullying and harassment, which included inappropriate physical contact. The internal investigator wrote:

> *Since allegations of bullying and harassment are outside the scope of my mandate, they were brought to the attention of the Discipline Authority but were not pursued during the investigation, put to the Chief for response or considered in any respect in drafting the attached report.*
>
> *I understand that you are now considering how to address those allegations. As previously stated, should you wish to expand our mandate to include an investigation of those matters, in light of my schedule and given the need to deal with these matters*

> *expeditiously, I would need to engage the assistance of one of my partners to complete the investigation. I have discussed the matter with my partner … and she advises the she would be able to set aside a week to conduct the witness interviews.*

The investigator concluded her covering letter by clearing the other members and staff of the VicPD of any wrongdoing in the matter:

> *On October 9, 2015, I advised counsel for the Board that based on the interviews to that date, I was not aware of any security issues to be addressed. Now that I have completed the investigation, based on all the evidence collected I have no reason to believe that there was any misconduct by any other sworn member of the [VicPD] or by any other employee of [VicPD].*

When our office sought the initial disclosure of the Discipline Authorities' decision and investigation report, we received the mayors' disciplinary decision addressed to the former chief, dated December 4, 2015. This was a letter purporting to impose a written reprimand as the appropriate discipline. We also received the internal investigator's preliminary investigation report, without its accompanying cover letter.

The first time my office learned of any allegations of bullying and workplace harassment was through the Victoria City Police Union, which provided information and materials to my office after the disciplinary decision made by the mayors. After receiving information from the union, my office made an extensive request for disclosure through our legal counsel, pursuant to the *Police Act*. It was only in response to our disclosure request that we received the covering letter of the investigator, and other material that supported my decision to order external public trust investigations into the harassment allegations and other matters.

In reviewing the internal investigation, in order to determine whether or not to order external public trust investigations, we noted the conclusion of the internal investigator in her report:

> *Although on the evidence I find the Chief did not have a sexual relationship with [A], I do find that the exchange of "salacious" and "sexually charged" Tweets over a period of approximately six months and the hug and kiss in the office do constitute an "inappropriate relationship" with [A] who is married to a member of [VicPD].* [Emphasis added.]

We became aware at that same time that the media comments from the mayors differed materially:

> *The investigation indicated that there was no relationship, but it was an inappropriate use of social media.* [Mayor Barbara Desjardins, CFAX news, December 6, 2015; emphasis added.]

While I had solicited the cooperation of the mayors to set the record straight as to the public comments denying the existence of an investigation, I exercised my discretion not to intervene again and correct the record. At this juncture, I determined that two external public trust investigations were required, and I needed to protect the integrity and independence of the external investigations and the determinations pursuant to the discipline process. It was during the course of litigation in the court process, that the internal investigator's actual conclusion – that there was an "inappropriate relationship" – came to light, which garnered harsh criticism from the media, for the mayors' lack of candor in their earlier remarks to the media.

From my review of this matter, it was apparent that in the time period just prior to our receipt of the discipline decision and preliminary report on December 4, 2015, there was a rush to conclude the matter based on rumors beginning to circulate about an investigation of the former Chief. The following email exchange between Mayor Desjardins and Mayor Helps speaks to the urgency of the situation:

> [Co-Chair Desjardins to Co-Chair Helps on December 3, 2015 at 2:32 AM]
>
> *[Counsel] Marcia McNeil called me again last evening. She indicated the rumour may be further afield ie within the police agencies. This means it may reach the media. I believe for this reason we have to make a decision asap and then call the board to inform them of it. Please look at your calendar to see what could be cleared to move things up. This must be top priority in my mind*
>
> [Co-Chair Helps to Co-Chair Desjardins on December 3, 2015 at 5:45AM]
>
> *Can we have a board meeting Monday morning at 8am?*
>
> [Co-Chair Desjardins to Co-Chair Helps on December 3, 2015 at 6:07 AM]
>
> *I think this is going to pop in the next 2 days, they need to be informed. I will clear my calendar for it as necessary, do you have any flexibility today. So you soon. I have written the questions we are to ask.*

On December 4, 2015, my office began receiving queries from the media attempting to confirm an investigation into the former chief. We made no comments to the media and directed them to the mayors as the co-chairs of the police board. When our office learned through the media of the denial of any investigation by the mayors, we sent a request for an explanation as to what had occurred. We received an email from Mayor Desjardins, the relevant portion is as follows:

> [Email sent from Co-Chair Desjardins to Deputy Commissioner on December 4, 2015 at 5:42 PM]
>
> *The question that I was asked was "Is there an investigation at this time regarding the chief?. My response was "there is not an investigation at this time"(and emphasized the*

> *at this time) because we had concluded an investigation and our decision given, and board informed of all documentation.*
>
> *"We happy (sic) to clarify that there had been an internal investigation but that it was concluded. Internal investigations and personnel matter are confidential."*
> *Would appreciate if you could forward this email to Stan so that we can understand his concerns.*

I chose not to deal directly with the mayors at this time as I was about to commence a review of the internal discipline process, however, I instructed the Deputy Police Complaint Commissioner to contact Mayor Desjardins and advise that I was very concerned with her response to the media and that I would not countenance the media and public being misled. I wanted to know what she planned to do. I was advised she would contact the reporter and set the record straight. The correction took place a short time later.

Upon learning that the investigation had been recently concluded, we made a request for a copy of the investigation report and disciplinary decision. Later that day, we received a report entitled "preliminary" investigation report, with a discipline decision containing numerous typographic errors and unusual formatting. It appeared that the process had been hastily concluded that same day in anticipation of media queries.

During the course of litigation in this matter it was revealed that two versions of the internal disciplinary letter existed. One version had been provided to our office by the mayors and the other version provided to the former chief. Both decisions were signed by both mayors, both dated the same date, and both addressed to the former chief. Strangely, both versions had obvious typographical errors and different fonts, which suggested they were rushed, although it is unclear why those mistakes were not fixed when the letter was presumably revised and re-signed.

When comparing the two versions of the letter, there was one significant substantive difference in the content of the decision as set out below:

> OPCC Version:
>
> > *We understand that you have met several times with the affected officer and have and are taking steps to address your working relationship with him.*
>
> Former chief's Version:
>
> > *You will meet with the affected officer within your chain of command with an appropriate third part (sic) to speak to your actions and to take steps to address your working relationship with him.*

The version provided to my office suggested that a reconciliation between the affected member and former chief was well underway, with active steps being taken towards normalizing relations. Based on our consultations with the affected member following receipt of the letter, and through evidence provided by the external investigation, this information was false and misleading.

During an interview of the former chief in the external investigation, he confirmed he was only aware of the existence of one version of the discipline decision, the one in his possession. Furthermore, he confirmed that this requirement, as stipulated in the discipline letter, was never acted upon nor enforced by the mayors or board.

I was disappointed in both the lack of cooperation and the avoidance of communication with our office by the mayors in their very important role of Discipline Authorities in this matter. A strong arguable case can be made that the mayors had predetermined the outcome of the internal discipline process from the outset, and set about navigating a course to allow the former chief to remain in his post.

One can juxtapose the outcome reached by the mayors in the internal discipline process (a letter of reprimand) and the outcomes reached by the retired judges through the police discipline process (suspension, demotion, dismissal). The difference is glaring. This gulf exposes the pitfalls associated with the inherent conflict of interest between the mayors and their relationship with the former chief.

There are lessons to be learned from the Elsner case, and I am hopeful that eventual legislative change will remove from elected mayors, the problematic arrangement that assigns them to be Discipline Authorities for their chief or Deputy Chief Constable.

CONCLUSION

Policing has often been referred to as a "noble" profession, a description that I truly endorse. Nobility has generally been defined as excellence of character and superior ethical qualities that often serves others. It has been my experience that those engaged in policing in this province work hard to uphold the nobility of policing. And they almost always succeed in this.

In an oversight system where police investigate police, the professionalism of the investigation team in these matters exemplifies the nobility of policing. Their commitment to excellence in their work has served to enhance public confidence in policing, and police confidence in the accountability of the police oversight process.

VicPD has been resilient in moving on from a time in which its members expressed no confidence in their Chief Constable and police board. The department is now under the command of a new Chief Constable, with several new promotions to the executive, all from within its ranks. There is good reason to expect the VicPD executive will cultivate a supportive environment that facilitates women in reaching their full potential professionally, including promotion through the ranks.

It is my hope that this Summary Informational Report will provide useful insights about the police discipline process, and the need for transparency and accountability through civilian oversight of law enforcement. Through civilian oversight, we strive to maintain public confidence in policing and police confidence in the police discipline process. The process has demonstrated that those in executive positions in policing are to be held to a higher standard of ethical conduct than the rank and file who serve under, and they should not be accorded preferential treatment because of their executive status.

I hope that despite the long path taken to get here, ultimately the public and police will see the value of independent civilian oversight.

Issued at Victoria, BC, this 26th day of September, 2018.

Stan T. Lowe
Police Complaint Commissioner for British Columbia

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 Victoria Police Department	(Member)
And to:	Chief Superintendent Sean Bourrie Royal Canadian Mounted Police	(External Investigating Agency)
And to:	Ms. Carol Baird Ellan Retired Provincial Court Judge	(External Discipline Authority)
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.

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