

**IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, c. 367**  
**AND**  
**IN THE MATTER OF THE PUBLIC HEARING**  
**INTO ALLEGATIONS AGAINST**  
**CONSTABLE DANIEL DICKHOUT**  
**OF THE SOUTH COAST BRITISH COLUMBIA TRANSPORTATION**  
**AUTHORITY POLICE SERVICE**

**NOTICE OF ADJUDICATOR'S DECISION**

- TO: Constable Daniel Dickhout, South Coast British Columbia  
Transportation Authority Police Service
- AND TO: Acting Chief Officer George Beattie, South Coast British Columbia  
Transportation Authority Police Service
- AND TO: David Eby, Executive Director, British Columbia Civil Liberties  
Association
- AND TO: Chief Constable Brad Parker, Port Moody Police Department,  
Discipline Authority
- AND TO: Mr. Stan Lowe, Police Complaint Commissioner
- AND TO: Mr. Joseph M. Doyle, Public Hearing Counsel
- AND TO: Mr. Steven M. Boorne, Counsel for Constable Dickhout

---

***Introduction and History of Proceedings***

[1] On November 19, 2010, the Police Complaint Commissioner ordered a public hearing to inquire into the question of whether Constable Daniel Dickhout committed the disciplinary default of abuse of authority in the performance of his duties by intentionally or recklessly using unnecessary force when, on September 13, 2007, he discharged a Taser conducted energy weapon (the "Taser") for the purpose of subduing Christopher Andrew Lypchuk, an alleged Skytrain fare evader.

[2] Lypchuk fell when struck by the Taser, hit his head on a railing or stair in a stairwell, and suffered a laceration to his forehead that required medical attention and sutures. He did not file a complaint with the Police Complaint Commissioner in connection with the incident. However, the British Columbia Civil Liberties Association filed a complaint after receiving and reviewing information in response to an access to information request regarding the use of conducted energy weapons by members of the South Coast Transportation Authority Police Service of which Const. Dickhout is a member. The Commissioner ordered an investigation of the Lypchuk incident in response to the complaint.

[3] Responsibility for the investigation was assigned to the City of Vancouver Police Department. On April 30, 2009, the investigator provided his report in which he concluded that the allegation that Const. Dickhout had committed a disciplinary default could not be substantiated.

[4] Chief Constable Parker of the Port Moody Police Department, the designated discipline authority in respect of the investigation under the *Police Act*, R.S.B.C. 1996, c. 347, reviewed the investigator's report and, on May 29, 2009, concluded that the complaint could be substantiated. The discipline authority recommended a two-day suspension without pay, special training or retraining on the appropriate deployment of a conducted energy weapon, and a written reprimand.

[5] In the course of the process by which the disciplinary authority's conclusions and recommendations with respect to substantiation and discipline were to be evaluated, counsel for Constable Dickhout obtained a use of force opinion, the author of which concluded that the use of the Taser was appropriate in the circumstances. That opinion was submitted to the disciplinary authority in December 2009. Of his own volition, the disciplinary authority obtained the opinion of another expert regarding the use of the Taser. That expert opined that the use of force by Const. Dickhout was not appropriate.

[6] In May 2010, counsel on behalf of Const. Dickhout applied to the disciplinary authority for an order that he recuse himself from the disciplinary process because of

an apprehension of bias arising from the disciplinary authority's consultation with the use of force expert. The application was dismissed. Counsel then applied by petition to the Supreme Court of British Columbia for an order removing the discipline authority from the proceeding. The Court granted the order sought on October 29, 2010, and remitted the matter to the Police Complaint Commissioner for further consideration: see October 29, 2010, Vancouver Registry, No. S104994 (S.C.). Subsequently, the Police Complaint Commissioner concluded that this public hearing was required to deal with the complaint.

[7] The conduct of the hearing was delayed by additional proceedings in the Court relating to the Commissioner's power to order the public hearing (2011 BCSC 880), and by an illness suffered by Const. Dickhout.

[8] The hearing finally proceeded from January 23 through 26, 2012, and was completed on February 22, 2012 when submissions were made by counsel.

[9] In the course of the hearing Const. Dickhout defended his conduct saying that when he deployed the Taser, he honestly believed that Lypchuk was about to assault Const. Pierre Chartrand who was Const. Dickhout's patrol partner at the time of the incident, the use of force was necessary to prevent the assault, and the use of the Taser was reasonable. Public hearing counsel submitted that Const. Dickhout had no grounds on which to arrest Lypchuk, did not believe he had any such grounds, and in the absence of such grounds the use of the Taser was unjustified and constituted an abuse of authority.

***Review of the Evidence and Findings of Fact***

[10] On September 13, 2007, at approximately 9:00 p.m., Const. Dickhout and Constable Pierre Chartrand boarded a westbound Skytrain at the Gateway Station in Surrey to check passengers for proof of payment of the fare. Lypchuk did not produce proof of payment when Const. Dickhout asked him to do so. Lypchuk admitted then and when giving evidence in this proceeding that he had not purchased a ticket before he boarded the train.

[11] Const. Dickhout told Lypchuk he would have to leave the train at the Scott Road station which was the next stop. Const. Dickhout and Lypchuk got off the train at Scott Road as did Const. Chartrand and another passenger who had failed to produce proof of payment of the fare.

[12] Closed circuit television cameras (“CCTV”) in the Scott Road Station and the camera (the “Tasercam”) mounted on the Taser discharged by Const. Dickhout depict events from the time he and Lypchuk left the train to the point where Lypchuk was struck by the Taser probes. The Tasercam had audio capability while the CCTV did not.

[13] Const. Dickhout and Lypchuk walked side by side from the point on the station platform where they left the train to a point on the platform adjacent to a stairwell leading to the exit from the station. Lypchuk was carrying a can of beer in each hand. He appeared to Const. Dickhout to be “somewhat intoxicated”. Const. Dickhout testified that at that point, this appeared to him to be an ordinary violation of the transit regulation requiring payment of a fare that would be resolved by the issue of a violation ticket.

[14] Const. Dickhout and Lypchuk stopped near the entry to the stairwell. Constable Chartrand and the passenger with whom he was dealing stood in the same general location.

[15] Const. Dickhout asked Lypchuk to put the cans of beer on the platform. Lypchuk complied with the request. Const. Dickhout asked Lypchuk for identification in order that he could issue a ticket for non-payment of the required fare. Lypchuk had no identification with him.

[16] Lypchuk gave Const. Dickhout what he said was his full name, address, birth date, and driver’s licence number. Const. Dickhout placed a call on his radio for the purpose of attempting to verify the information Lypchuk had given him. As he was doing so and without telling him why, Lypchuk told Const. Dickhout that he would find his name in the computer. At the hearing Lypchuk testified that he was a regular

fare evader and that he had received tickets on other occasions. He expected his personal details would be found in the computer database.

[17] In the course of his evidence, Const. Dickhout acknowledged that he had been able to fill in the required fields on the face of the violation ticket, namely full name of the alleged offender, date of birth, gender, address, driver's licence number, and the time and location of the alleged offence. Const. Dickhout signed the ticket as the issuing officer. However, before Const. Dickhout could obtain Lypchuk's signature acknowledging receipt of the ticket, Lypchuk reached down, picked up the two cans of beer, and turned to head down the stairwell to the exit.

[18] Const. Dickhout pursued Lypchuk as he headed down the stairway. He drew the Taser from its holster and activated the weapon whereupon the audio feature became operational and the weapon was ready for discharge. The Taser was one of four weapons carried by Const. Dickhout. The others were a firearm, a baton and what is commonly called pepper spray. Const. Chartrand followed Const. Dickhout and Lypchuk down the stairwell as part of what the officers described as a "contact and cover" manoeuvre whereby one officer makes contact with the subject, and the other covers the contact officer in order to intervene to assist should assistance be required. Const. Dickhout testified that he drew the Taser from its holster hoping that the sight of it would cause Lypchuk to stop as it in fact did.

[19] Const. Dickhout and Const. Chartrand both testified that Lypchuk ran down the stairs. The CCTV video, which is not fluid but a continuous series of single frames recorded some brief time apart, indicates that Lypchuk went down the upper stairs two at a time, but at a moderate pace. On this point, as with other aspects of Lypchuk's involvement with the officers, I can place very little reliance on Lypchuk's testimony. He was somewhat inebriated at the time of the incident, he did not complain about the treatment he received from the officers, and he was not interviewed about the incident nor asked for a statement until some long time after the incident. He was first shown the video recordings in February 2010. Because of his lack of sobriety at the time, and the fact that he was not asked by anyone about

the incident until more than two years had passed, I am compelled to conclude that his evidence with respect to his motions and his recollection of the incident generally is unreliable.

[20] As Const. Dickhout started down the stairwell behind Lypchuk he said, in an aggressive tone of voice: “Get back up here”. Lypchuk replied: “No”. Const. Dickhout repeated the instruction saying: “Get back up here and quit fucking around”. Lypchuk again replied: “No”. Lypchuk then turned around and stopped on the stairs. He testified that he stopped because he thought he saw a 9 mm. handgun being pointed at him. Lypchuk stood facing across the stairwell with his right foot on one step, and his left, on the step below.

[21] Const. Dickhout continued on down the stairs past Lypchuk to a point three or four steps below the lower of the steps on which Lypchuk was standing. Const. Chartrand took up a position about four steps above Lypchuk. Const. Chartrand had also drawn his Taser from its holster, but had not activated it.

[22] Const. Dickhout instructed Lypchuk to put down the beer. Lypchuk replied “No”. Const. Dickhout repeated the instruction to which Lypchuk again replied “No”. Const. Dickhout then said: “50,000 volts in 2 seconds – put down the beer down”. Lypchuk put the beer cans on a step above him and resumed his position against the railing with his arms crossed in front of him. The position of his feet on the steps remained unchanged. Const. Dickhout then told Lypchuk to turn around but did not tell him to put his hands behind his back. Lypchuk replied: “No, go fuck yourself”.

[23] The audio on the Tascam then becomes unclear as a result of interference from an incoming train. The evidence as to what was said at that point is imprecise. However, in a break with what the officers described as the contact and cover protocol, Const. Chartrand said something to Lypchuk. While the Tascam audio recording is not clear, I conclude he said words to this effect: “Do what you are told or you will be sorry”. Lypchuk looked at Const. Chartrand and said, “What the fuck are you going to do about it.” As he said that he began to turn in a clockwise direction up the stairs in the direction of Const. Chartrand.

[24] Const. Dickhout testified that he interpreted the manner in which Lypchuk moved as he turned to be a threatening gesture toward Const. Chartrand. He discharged his Taser. One of the Taser's probes struck Lypchuk in the right center of his back. The other struck him on the right side of his back or torso in the vicinity of his armpit. The shock of the Taser rendered Lypchuk motionless and caused him to fall rather than crumble, much as a tree would fall when felled. Lypchuk struck his head on the opposite railing or the edge of a step. He sustained a laceration above his right eye. Const. Dickhout immediately placed Lypchuk in handcuffs. Emergency personnel were called. Lypchuk was transported to hospital where the laceration was closed with sutures. Lypchuk was charged with no offence except the fare violation.

[25] Other evidence is relevant to the assessment of Lypchuk's movements and Const. Dickhout's reaction to them.

[26] Const. Dickhout testified that he deployed the Taser because he considered Lypchuk's movements on the stairs to mark the commencement of an attack on his partner. He testified that he discharged the Taser solely for the purpose of protecting Const. Chartrand. There is a body of objective evidence that contradicts Const. Dickhout's testimony.

[27] Const. Dickhout completed a form entitled "Subject Behaviour-Officer Response" at 10:44 pm on September 13, somewhat more than an hour after the incident. One of the questions is directed at the nature of the subject's behaviour:

SUBJECT BEHAVIOUR:  
Choose applicable behaviour(s):  
High-risk co-operative  
Passive Resistance  
Active Resistance  
Assaultive  
Grievous Bodily Harm or Death

[28] Const. Dickhout described Lypchuk's behaviour as active resistance, which he testified meant the failure to respond to his commands. The next question was also directed at the subject's behaviour:

Briefly describe behaviour including any pre-assault cues:  
(ie: glaring, verbal threats, threatening body language, etc.)

to which Const. Dickhout responded as follows:

REFUSED TO COMPLY, RAISED ARMS TOWARD PARTNER, VERBAL DEFIANCE

[29] His description of the behaviour was “refused to comply, raised arms toward partner, verbal defiance”. However, if his evidence is to be accepted, what prompted Const. Dickhout to discharge the Taser was assaultive behaviour by Lypchuk toward Const. Chartrand rather than active resistance in the form of a refusal to comply with orders or verbal defiance. The statement that Lypchuk raised his arms toward his partner is inconsistent with the video evidence. The Tasercam clearly records that Lypchuk did not raise either arm above his waist as he turned on the stairs.

[30] In the same report Const. Dickhout stated that the probes from the Taser broke the skin on the “left side of back”. That statement is incorrect. The Tasercam clearly indicates that one of the probes struck Lypchuk to the right of center on his back, and the other further to the right side of his torso near his armpit. The points of impact are significant. Given Const. Dickhout’s position on the stairs below and to the left of Lypchuk, the probes would have entered the left side of his back if Lypchuk had raised his arms and had begun to move toward Const. Chartrand when the Taser was discharged. The inescapable conclusion from observing the Tasercam video is that Lypchuk was facing the wall opposite Const. Dickhout as he had been commanded to do when the Taser was discharged.

[31] In addition, Lypchuk’s left arm is at his side when he begins to turn. His right arm appears bent at the elbow. His right upper arm was not drawn back so that it could reasonably be said he was preparing or threatening to throw a punch at Const. Chartrand who was standing four or five steps above him.

[32] Lypchuk’s position on the steps and his actions in response to the command from Const. Dickhout indicate that he was turning to the wall just as he had been



instructed to do. Because of his stance on the stairs, Lypchuk had two choices regarding the manner in which he could respond to the command. He could turn counter-clockwise toward Const. Dickhout, a move that would require him to move his right foot from the stair above to the step below on which he had set his left foot. Alternatively, he could turn clockwise up the stairs toward Const. Chartrand. In order to turn to face the wall, it was necessary for Lypchuk to lift his left foot to the adjacent step on which his right foot was placed throughout the incident. That is precisely the motion that is indicated by the Tascam and the CCTV video.

[33] Const. Chartrand testified that he regarded Lypchuk's conduct as very defiant and verbally aggressive, as if almost daring Const. Dickhout to discharge the Taser. Const. Chartrand testified that he took up a position on the stairs where he was close enough to Lypchuk to make sure he could not go anywhere, but distant enough to prevent an altercation with him. He testified that he did not react when Lypchuk turned toward him on the stairs and, while he did not know what Lypchuk's intent was, he was "ready to deal with it if he came at me. I didn't know if he was going to come at me or not." Const. Chartrand testified he was aware that a Taser need not be discharged at a distance from the target but could be used successfully by holding it against the target's body.

### ***Analysis***

[34] The Notice of Public Hearing states that the alleged default of abuse of authority was to be determined by reference to s. 77 of the *Police Act*. The Notice pre-dated Notice of Decision 2008.4427T ruling that notwithstanding amendments to the *Act* effective April 2010, defaults alleged to have occurred prior to the amendments were to be assessed by reference to the *Code of Professional Conduct Regulation*, B.C. Reg. 205/98, in force at the time of the alleged default. In conformity with that ruling, counsel agreed that the alleged abuse of authority in this case is to be assessed by reference to ss. 4, 10 and 17 of the *Regulation* in force at September 13, 2007, providing as follows:

**Disciplinary defaults**

**4 (1)** In this Code, "disciplinary default" means

- (a) discreditable conduct,
- (b) neglect of duty,
- (c) deceit,
- (d) improper disclosure of information,
- (e) corrupt practice,
- (f) abuse of authority,
- (g) improper use and care of firearms,
- (h) damage to police property,
- (i) misuse of intoxicating liquor or drugs in a manner prejudicial to duty,
- (j) conduct constituting an offence,
- (k) being a party to a disciplinary default, or
- (l) improper off-duty conduct.

(2) It is a breach of this Code to commit, or to attempt to commit, a disciplinary default referred to in subsection (1).

....

**Abuse of authority**

**10** For the purposes of section 4 (1) (f), a police officer commits the disciplinary default of abuse of authority if the police officer

- (a) without good and sufficient cause arrests, detains or searches a person,
- (b) uses unnecessary force on a person,
- (c) while on duty, is discourteous or uncivil or uses profane, abusive or insulting language to a person including, without limitation, language that tends to demean or show disrespect to a person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or

economic and social status, or

(d) harasses, intimidates or retaliates against a person who makes a report about the conduct of an officer or submits a complaint under Part 9 of the Act.

**Mental element of disciplinary default**

**17** Unless otherwise specified in this Code, a police officer commits a disciplinary default if the police officer intentionally or recklessly committed the act or omission constituting the disciplinary default.

[35] Pursuant to s. 143 of the *Police Act*, the adjudicator's task is to assess the evidence adduced at the public hearing and to determine whether Const. Dickhout abused his authority when he discharged the Taser at Lypchuk. In the event there has been an abuse of authority, the adjudicator must determine the appropriate disciplinary or corrective measures to be taken in relation to the member.

[36] The question of whether Const. Dickhout's conduct amounted to an abuse of authority must be determined by reference to four questions:

1. Did Const. Dickhout believe that force was necessary to subdue Lypchuk in order to effect a lawful arrest?
2. If the answer to question 1 is yes, did Const. Dickhout have reasonable grounds for the belief?
3. Did Const. Dickhout believe that the force used was not excessive in the circumstances?
4. If the answer to question 3 is yes, did Const. Dickhout have reasonable grounds for that belief?

[37] Certain principles govern the assessment:

1. A public hearing under the *Police Act* is a civil process and the applicable standard of proof is the balance of probabilities: *F.H. v. McDougall*, [2008] 3 S.C.R. 41, 2008 SCC 53. Proof on a balance of

probabilities requires that the evidence be sufficiently clear, convincing and cogent.

2. The assessment of an officer's conduct must respect the fact that his or her job is a difficult one and, in the heat of the moment, frequently does not allow for detached reflection when deciding to act: *R v. Nasogaluak*, [2010] 1 S.C.R. 206 at para. 35, and *In the Matter of Constable Smith*, Victoria, January 28, 2009, p. 21.

3. The intention with which the target acted is not relevant to the assessment of the officer's conduct. If the officer's assessment of the need for and the amount of force necessary was reasonable, it matters not that he may have been mistaken about the target's intention: *Berntt v. Vancouver (City)*, [1999] B.C.J. No. 1257 (BCCA), para. 27.

4. The adjudicator must not assess conduct with the benefit of hindsight and must not substitute his or her judgment as to what could or should have been done in the circumstances for that of the officer. The question is whether any belief the officer had with respect to the need for force and the amount of force required was reasonable, and is not to be answered by reference to what others might have done in similar circumstances.

5. The consequences associated with the use of force, in this case the laceration sustained by Lypchuk, are not relevant to the assessment: *Berntt, supra*, para. 27

[38] In this instance, Const. Dickhout says that his conduct was reasonable because he honestly believed that when Lypchuk turned away from him on the stairs he was about to assault Const. Chartrand and the force he employed was necessary to prevent the assault. He says that his actions were justified by ss. 25 and 495 of the *Criminal Code*, R.S.C. 1985, C. c-46.

[39] Public hearing counsel says that the evidence indicates Const. Dickhout did not believe that an assault was about to take place, or if he did harbour that belief, it

was unreasonable when objectively assessed. As a result, there were no grounds on which to effect Lypchuk's lawful arrest, and the use of force in order to make an arrest was an abuse of authority within the meaning of s. 10 of the *Regulation*.

***Was the Arrest Lawful?***

[40] Fare evasion is an offence by virtue of s. 9(1) of the *Greater Vancouver Transit Conduct and Safety Regulation*, B.C. Reg. 87/99:

9(1) A person who contravenes section 3 [requiring payment of a fare] ... commits an offence and is liable on conviction to a fine not exceeding \$150.

[41] Section 2 of the *Offence Act*, R.S.B.C. 1996, c. 338, stipulates that an offence created under an enactment is punishable on summary conviction.

[42] The *Offence Act* contains no power of arrest. As a result, and by virtue of s. 133 of that Act, the lawfulness of an arrest must be determined by reference to the *Criminal Code*. Section 795 of the *Criminal Code* provides that the power of arrest granted by s. 495 of the *Code* applies to summary conviction offences. Section 495 provides as follows:

495. (1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

(b) a person whom he finds committing a criminal offence; or

(c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

(2) A peace officer shall not arrest a person without warrant for

(a) an indictable offence mentioned in section 553,

(b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or

(c) an offence punishable on summary conviction,

in any case where

(d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to

(i) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence, or

(iii) prevent the continuation or repetition of the offence or the commission of another offence,

may be satisfied without so arresting the person, and

(e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

[43] Section 25 of the *Criminal Code* also provides protection to an officer in the performance of his or her duties provided the officer is doing what he or she is required or authorized to do:

25(1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law

(a) as a private person,

(b) as a peace officer or public officer, or

(c) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[44] Counsel for Const. Dickhout correctly and appropriately acknowledged that the offence of fare evasion governed by the *Transit Conduct and Safety Regulation* and the *Offence Act* is not an offence for which an arrest may be made without a warrant. Fare evasion is neither a criminal offence nor an indictable offence. Const. Dickhout says that the right to arrest Lypchuk without a warrant initially arose because Lypchuk committed the indictable criminal offence of obstruction of justice when he left the platform and headed down the stairs, but he testified that he did not arrest Lypchuk because of obstruction. He says that he made the arrest without a warrant because Lypchuk committed the indictable offence of assault when, as he was turning on the stairs, he threatened to apply force to Const. Chartrand.

[45] A person commits the offence of obstruction of justice under s. 129 of the *Criminal Code* when he resists or wilfully obstructs a peace officer in the execution of his duty. There is no doubt that Const. Dickhout was a peace officer and he was lawfully engaged in the execution of his duties. That said and as I have remarked, Const. Dickhout did not attempt to justify his use of the Taser on the basis that Lypchuk had committed or was committing the offence of obstruction of justice. On the evidence, such a claim was not open to Const. Dickhout. Lypchuk had stopped in the stairwell in response to Const. Dickhout's command, Const. Dickhout was below him on the stairs, Const. Chartrand was above him on the stairs, escape was not possible, and there were no objective grounds on which to conclude that an arrest for obstruction could only be effected with the assistance of a Taser. In fact, Const. Dickhout readily admitted in the course of his testimony that use of a Taser to effect an arrest for obstruction of justice was not appropriate in the circumstances.

[46] It follows that if the use of the Taser is to be considered appropriate in this instance, Const. Dickhout must have believed on reasonable grounds that by his actions as he turned on the stairs, Lypchuk was threatening to apply force to Const. Chartrand, thereby committing the criminal offence of assault within the meaning of s. 265 of the *Criminal Code* for which an arrest was lawful and justified. Moreover, Const. Dickhout must have believed that the use of force was necessary to stop the assault, and that the use of the Taser was reasonable in order to effect that purpose.

[47] I do not accept Const. Dickhout's evidence in relation to his belief about the existence of grounds for arrest. On the whole of the evidence, I am compelled to find that Const. Dickhout did not believe that Lypchuk was engaged in an assault of Const. Chartrand when he discharged the Taser.

[48] In a synopsis of the incident written at 2318 hours on September 13, just two hours after the incident, Const. Dickhout wrote:

Prior to the completion of the violator contact and confirmation of Lypchuk's identification, Lypchuk fled. Lypchuk was stopped on the stairwell but failed to comply with instructions and became combative. A conducted energy weapon (Taser) was deployed.

[49] In the occurrence report written at 2345 hours Const. Dickhout wrote:

Dickhout instructed Lypchuk to put the beers down. Lypchuk shouted defiance and did not comply. Dickhout repeated the instruction with the same result. Dickhout repeated the instruction with the ultimatum of taser use. Lypchuk dropped quickly and placed the beers on the floor and sprung back to standing with his back to the wall half facing Dickhout. Dickhout instructed Lypchuk to face the wall and place his hands behind his back. Dickhout intended to handcuff Lypchuk to take control of him for the safety of all concerned. Lypchuk refused. Dickhout repeated the instruction and Lypchuk refused with defiance. Lypchuk was turning toward Chartrand with his arms and hands away and out of sight of Dickhout. Dickhout considered CEW deployment and decided that despite the hard surface, a hands on struggle was less desirable [sic]. Dickhout deployed the CEW. Lypchuk instantly stiffened and toppled to the floor....

[50] In the "Subject-Behavior [sic]-Officer Response" use of force report compiled at 2244 hours on September 13, Const. Dickhout selected the term "active resistance" rather than "assaultive" to describe Lypchuk's behaviour. Under the heading where the officer was required to briefly describe behaviour including any pre-assault cues "such as glaring, verbal threats, threatening body language, etc." Const. Dickhout entered the words "refused to comply, raised arms toward partner, verbal defiance". In the same report, Const. Dickhout stated that the impact points of the Taser probes were the "left side of back".

[51] At the hearing, Const. Dickhout did not testify that Lypchuk's arms and hands were out of his sight when he turned on the stairs. His evidence was that he thought Lypchuk had pulled back his right arm as if preparing to deliver a punch to Const. Chartrand.

[52] As I have previously stated, the Tascam and its audio recording contradict Const. Dickhout's evidence and concurrent reporting of the incident in material respects. At no time did Const. Dickhout instruct Lypchuk to put his hands behind his back. Lypchuk's left arm was clearly visible at all times from Const. Dickhout's position on the stairs, and the video indicates that at no time was it raised in Const. Chartrand's direction. As Lypchuk turned, his right hand and forearm were not visible to Const. Dickhout, but at no point was his right arm raised toward Const. Chartrand. His right forearm remained in a vertical position at waist level. Finally



Lypchuk had turned sufficiently toward the wall as Const. Dickhout had instructed him to do so that one Taser probe struck the right centre of his back, and the other, further right on the back in the area of Lypchuk's right armpit. His position on the stairs at the time the Taser was discharged is inconsistent with any suggestion that Lypchuk was making any physical move in Const. Chartrand's direction.

[53] Const. Chartrand's observations are also relevant and material. In an occurrence report prepared at 2138 hours on September 13 Const. Chartrand wrote:

The male stopped halfway down the stairs and Cst Dickhout went past him and told him to put the beer down or he would be hit with 50,000 volts.

The male that had said don't taser me at the time he stopped then said "No" and "I don't care" when told he would be tasered. The male was quite defiant and almost daring Cst Dickhout to taser him.

The male was told several times to put the beer down before he did. The male then refused to put his hands behind his back and kept saying "no" and being agitated.

The male then turned around and looked at me. I was 4-5 steps above the male with my taser out.

The male looked at me for half a second and "Fuck you too" in an aggressive manner.

Cst Dickhout then fired his taser and the male went rigid right away and fell forward....

[54] There is nothing in Const. Chartrand's report, or in his testimony, to suggest that he perceived that Lypchuk was threatening him with any physical gesture.

[55] Const. Darren Hall testified as an expert on behalf of Const. Dickhout. His opinion was that it was appropriate for Const. Dickhout to use the force he did because Lypchuk had refused to turn around and put his hands behind his back when instructed by Const. Dickhout to do so, Lypchuk raised his right arm with a fist, moved quickly and aggressively to close the distance between himself and Const. Chartrand, and was coiled and ready to strike with a punch at a distance where he could have struck Const. Chartrand. Those observations are not consistent with the testimony of Const. Dickhout and the Tasercam video. Moreover, and with respect, the role of the expert is to provide an opinion based on facts the witness is directed

or asked to assume to be true, and not to suggest the findings of fact that should be made by the trier of fact or an adjudicator on the evidence. In this case, expert evidence is not required to help an impartial observer construe the character of the actions of anyone depicted in the video.

[56] Const. Hall's evidence would have been helpful, although not determinative, in assessing the question of whether, assuming Lypchuk was about to assault or had threatened to assault Const. Chartrand, the use of the Taser was appropriate. That appears not to be a contentious issue as Mr. John McKay, the expert called to testify by public hearing counsel, agreed that were an assault occurring, the use of the Taser to stop it would have been reasonable. Just as Const. Hall's evidence that he thought Lypchuk's conduct was assaultive is not the proper domain of an expert witness, Mr. McKay's evidence that he could see no assaultive behaviour in the video is not helpful or appropriate. Expert evidence is not required for an adjudicator to determine whether conduct could reasonably be considered assaultive or not. In the circumstances, none of the expert evidence is helpful in resolving the question of whether Const. Dickhout abused his authority.

[57] The evidence compels me to find, and I do, that when he discharged the Taser Const. Dickhout did not believe that Lypchuk was committing or attempting to commit the offence of assault which he advances as the reason for his use of the Taser. The existence of any subjective belief is contradicted, on the balance of probabilities, by the objective evidence adduced in the course of the hearing, and Const. Dickhout's contemporaneous description of the incident and his actions. The irresistible inference from the totality of the evidence, in particular the Tascam video and audio, and Const. Dickhout's reports of the incident is that Const. Dickhout discharged the Taser because he was annoyed by Lypchuk's behaviour, foul language, and reluctance to promptly respond to various commands, and not because he believed that Lypchuk was committing a criminal offence.

[58] Were I to have concluded that Const. Dickhout believed that an assault was in process, I would have concluded that the circumstances, objectively considered, did not support the belief.

[59] Lypchuk did respond, albeit slowly and with considerable and entirely inappropriate verbal abuse, to Const. Dickhout's command that he turn toward the wall. He had substantially completed the turn by the time the Taser was discharged. He did not move toward Const. Chartrand. In order to turn, Lypchuk had to get both feet on the same stair. Lypchuk was four or five steps below Const. Chartrand. Lypchuk was making the turn on the step on which he had placed his right foot throughout the encounter with Const. Dickhout. The Tascam shows that he made no move up the stairs toward Const. Chartrand. Lypchuk directed verbal abuse at Const. Chartrand but the officer perceived neither a verbal threat of the use of force, nor movements by Lypchuk suggestive of a physical assault or attempted assault. In sum, it would have been unreasonable for Const. Dickhout to believe that Lypchuk posed any threat whatsoever to Const. Chartrand in the circumstances had he believed that Lypchuk was in the process of assaulting Const. Chartrand.

[60] Because of the finding I have made regarding the absence of a belief or the unreasonableness of any belief that an assault was in process, I need not consider the third and fourth questions I set out at para. [36] of these reasons.

[61] In sum, I conclude that Const. Dickhout abused his authority by intentionally using a conducted energy weapon on Lypchuk's person.

[62] Counsel did not make submissions with respect to the appropriate sanction to be imposed in the event I concluded that Const. Dickhout abused his authority. I require their submissions in that regard. The parties are invited to make

arrangements in consultation with the registrar to appear before me within 30 days of receipt of these reasons for that purpose.

Dated at Vancouver, British Columbia this day 9<sup>th</sup> day of March, 2012.

“Ian H. Pitfield”

---

Hon. Ian H. Pitfield, Adjudicator