Office of the
Police Complaint Commissioner

British Columbia, Canada

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

OPCC File: 2016-11505
December 7, 2016

To: [redacted] (Complainant)

And to: [redacted] (Member)
c/o Saanich Police Department
Professional Standards Section

And to: Chief Constable Bob Downie
c/o Saanich Police Department
Professional Standards Section

And to: The Honourable Judge Mr. Wally Oppal, Q.C., (ret'd) (Retired Judge)
Retired Judge of the Appeal Court of British Columbia

Saanich Police Professional Standards investigator, Acting Sergeant [redacted] conducted an investigation into this matter and on October 28, 2016, he submitted the Final Investigation Report to the Discipline Authority.

In the report, Acting Sergeant [redacted] identified the following allegations of misconduct:

1. That on [redacted], [redacted] committed *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* by intentionally or recklessly using unnecessary force on [redacted] Specifically, grabbing, pushing to the ground and handcuffing [redacted].
2. That on [redacted], [redacted] committed *Abuse of Authority* pursuant to section 77(3)(a)(ii)(B) of the *Police Act* by intentionally or recklessly detaining and searching [redacted] without good and sufficient cause.

On November 8, 2016, [redacted] as the Discipline Authority (DA), issued his decision pursuant to section 112 in this matter. Specifically, [redacted] determined that the allegations of *Abuse of Authority* against [redacted] did not appear to be substantiated.

Stan T. Lowe
Police Complaint Commissioner

Fifth Floor, 947 Fort Street
PO Box 9895 Stn Prov Govt
Victoria, British Columbia V8W 9T8
Tel: (250) 356-7458 / Fax: (250) 356-6503

Toll Free 1 877 999-8707 ⌘ Website: www.opcc.bc.ca

Pursuant to section 117(1) of the *Police Act*, having reviewed the allegations and the alleged conduct in its entirety, I consider that there is a reasonable basis to believe that the decision of the Discipline Authority is incorrect.

With respect to both allegations, the Discipline Authority appears to have applied a purely subjective test to ' conduct, which in my view is inconsistent with a significant body of case law establishing that an officer's subjective beliefs are to be assessed on a standard of reasonableness, including *Bernt v. Vancouver (City)* BCCA and *Anderson v. Smith* 2000 BCSC 1194.

In relation to allegation #1, in my view failed to consider that even if believed he had the authority to arrest this does not *by itself* mean that did not intentionally or recklessly use unnecessary force in the course of doing so. I would add that consideration of recklessness may well require consideration of the reasonableness of such a belief in all of the circumstances.

In relation to allegation #2, the focus here is on whether the detention and/or search was undertaken for "good and sufficient cause." Again, the fact that may have believed he had authority to arrest does not *by itself* mean he did not subsequently recklessly detain and search "without good and sufficient cause."

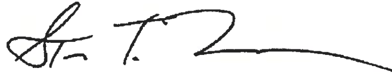
As noted in *R. v. Mann*, 2004 SCC 52 "*police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such detention is necessary.*" It is not clear to me that had reasonable grounds to suspect was connected to the arson when he conducted the search and he did not make inquiries of as to why he was in the area. Nor, for example, did he make inquiries as to what was in the coke bottle. Also, at the time stopped (a block or so away from the fire), the fire had been out for some 10 to 15 minutes, yet one of the reasons given for stopping him was that arsonists often stay at the scene to watch the fire. Additionally, as noted from the video footage, the reason provided to for the stop was "*we're checking everybody in the area,*" which suggests that the stop was arbitrary and demonstrates ' state of mind.

Therefore, pursuant to section 117(4) of the *Police Act* and based on a recommendation from the Associate Chief Justice of the Supreme Court of British Columbia, I am appointing Mr. Wally Oppal, Q.C., retired British Columbia Appeal Court Judge, to review this matter and arrive at his own decision based on the evidence.

Pursuant to section 117(9), if the appointed retired judge considers that the conduct of the member appears to constitute misconduct, the retired judge assumes the powers and performs the duties of the Discipline Authority in respect of the matter and must convene a discipline proceeding, unless a prehearing conference is arranged.

The Office of the Police Complaint Commissioner will provide any existing service records of discipline to the Discipline Authority to assist him or her in proposing an appropriate range of disciplinary or corrective measures should a pre-hearing conference be offered or a disciplinary proceeding convened. If the retired judge determines that the conduct in question does not constitute misconduct, they must provide reasons and the decision is final and conclusive.

Finally, the *Police Act* requires that a retired judge arrive at a decision **within 10 business days after receipt of the materials** for review from our office. This is a relatively short timeline, so our office will not forward any materials to the retired judge until they are prepared to receive the materials. I anticipate this will be January 3, 2017.



Stan T. Lowe
Police Complaint Commissioner

cc: [redacted], Registrar