PH. File No. 2014-2
OPCC File No. 2012-7819

PUBLIC HEARING
(Pursuant to s. 137(1) of the *Police Act*, R.S.B.C. 1996, c. 267, as am.)

In the matter of a
Public Hearing into the complaint against
Constable Tiwana of the Vancouver Police Department

# ADJUDICATOR'S DECISION

## Contents

## A. Introduction

This is my decision following a public hearing to determine whether Constable Jesse Tiwana of the Vancouver Police Department committed misconduct when he used his foot to strike a handcuffed robbery suspect, Ryan Fenton.

Under the *Police Act*, R.S.B.C. 1996, Chapter 367, which governs police misconduct, the question is defined in section 77(3)(ii)(A) as whether Cst. Tiwana's conduct "constitutes a disciplinary breach of public trust" by virtue of being "abuse of authority" by "oppressive conduct" … "in the performance …of [his] duties [by] intentionally or recklessly …using unnecessary force" on Fenton.

## B. History and Nature of the Proceedings

The misconduct allegation arises out of Constable Tiwana's interaction with Mr. Felton, a suspect fleeing from the scene of a reported robbery and attempted carjacking on August 15, 2012 in the South Granville area of Vancouver. Cst. Tiwana was the officer who arrested Mr. Felton. A bystander, Ms. Tenille Evelyn, an employee of the CBC, recorded a portion of their interaction on a digital phone. The CBC aired the video and provided a clip from it to the Vancouver Police Department.

The Professional Standards Section of the Vancouver Police Department asked the Police Complaint Commissioner to order an investigation of Cst. Tiwana's behaviour, under section 93(1) of the Police Act, which he did on August 17, 2012. That section requires that the Police Complaint Commissioner conclude that the conduct in question "would, if substantiated, constitute misconduct." As a result a Vancouver Police Department investigator was assigned to review the incident. She was required, pursuant to section 98(5), to provide her assessment of the evidence and analysis of the facts.

The investigator prepared a Final Investigation Report dated August 27, 2012 and submitted it to Acting Inspector Dan Dubé, as provided for under the *Act*. As stated in the Notice of Hearing, the investigator's assessment of the evidence and analysis of the facts led her to the conclusion that "the force used by Constable Tiwana was not justified and not necessary." Following his review pursuant to the *Police Act*, Acting Inspector Dan Dubé determined that the evidence "appeared to substantiate" the allegation of abuse of authority under section 77(3)(ii)(A) of the *Act*.

Following the process under section 124 of the *Act* a Disciplinary Proceeding was convened with Superintendent Dean Robinson as Discipline Authority. Cst. Tiwana was the only witness who testified at the proceeding. There is no mechanism in the *Act* for the Discipline Authority to summons witnesses. Superintendent Robinson found that misconduct had not been proven.

The Commissioner, pursuant to his duty under Part 11 of the Police Act, reviewed the investigation and decisions at the various levels of the process, and determined for reasons set out in the Notice of Public Hearing that the Superintendent's decision was incorrect, that a public hearing was necessary for that reason, and also that it was necessary in the public interest. The

Commissioner stated in the Notice that the Superintendent had applied a different test from that applied by the previous reviewers, and also that the absence of witnesses hampered the accountability of the process and its ability to search for the truth.

The additional factors on which the Commissioner's decision was based are set out in the Notice. In summary, the Commissioner's concerns were that 1) the Superintendent did not interpret Part 11 of the Police Act correctly; 2) no witnesses other than Cst. Tiwana testified at the disciplinary hearing; 3) a public hearing would assist in ascertaining the truth; and 4) a public hearing was required to preserve or restore public confidence in the investigation of misconduct and the administration of police discipline.

As I have mentioned, a significant feature of this case is that a portion of Mr. Felton's arrest was videotaped by the CBC employee Ms. Evelyn. That footage aired the next day. In addition to the proceedings outlined above, the Abbotsford Police Department commenced a criminal investigation into the incident, and obtained a warrant to seize the digital video recording. No criminal charges were laid.

Clearly, in the circumstances, the decision that a public hearing was justified is unassailable: there were differing results from the reviewing authorities, the incident gained media attention, and indeed, the video depicts alarming behaviour on the part of the officer.

The foot strike was preceded by an arrest involving a number of officers, many of whom testified at the public hearing. Mr. Felton did not attend. The evidence establishes that he did not lodge a complaint and in fact apologized to the officers for his behaviour and told the ambulance attendants that the police had treated him well.

It is important to view the video in the context of the preceding events, perceptions of the onlookers, assessments of the officers, and the reaction of the suspect, in order to properly assess whether Constable Tiwana's foot strike constituted unnecessary force as that is defined in the relevant section. One of the issues to be resolved in this hearing is the meaning of the words, "intentionally or recklessly" in paragraph (ii) of Section 77(3), as they relate to the use of unnecessary force in subparagraph (A).

The public hearing is not a review of the Commissioner's or indeed any prior decision. It is defined as a "new hearing" under section 143(2) of the Act. None of the decisions of the prior reviewers other than that of the Commissioner were placed before me. The evidence must prove on a balance of probabilities that Constable Tiwana committed an act of misconduct, within the meaning of the relevant section.

The video was filed as Exhibit 1 at the hearing, and as might be expected it figured prominently throughout the evidence and submissions. An Agreed Statement of Facts was filed as Exhibit 3. It outlined Ryan Felton's evidence as well as that of a civilian named Edward Horsey and certain other background and evidentiary facts, which are incorporated into the summary of evidence that follows.

## C. Evidence

### 1. The Video

The relevant portion of the video is 7 seconds. I shall refer to this portion of the video, from 00:30 to 00:37, as "the incident".

The video commences prior to that time with Mr. Felton lying sideways on the sidewalk, handcuffed behind his back, dressed only in skin-tight flesh coloured short pants described by several of the witnesses as "Spanx." From a distance he appears naked. He is surrounded at first by five and then six officers, and then, during the relevant time, five. There is a break at about 00:29 when Ms. Evelyn changes her vantage point and moves somewhat closer to Mr. Felton and the officers.

Just before the foot strike, Mr. Felton is perched on his right shoulder, lying prone on his right side with his right knee drawn up. Constable Tiwana, in plainclothes consisting of a short sleeve button up shirt, khaki style shorts and running shoes, is in front of Mr. Felton's feet, taking notes in his notebook. Then, looking in the direction of the camera, Mr. Felton lifts his head and yells "Fuck off!" apparently at Ms. Evelyn, as he moves upward and then kicks his left leg out sideways to lift himself up to a seated position.

As Mr. Felton speaks, Constable Tiwana looks to his left in the direction that Felton is facing, just as Felton gets up to a seated position. Tiwana turns back toward Felton, after he has righted himself. In a literally split second Tiwana says "shut up," or "hey, shut up," and almost simultaneously with that, takes a step toward Felton with his left foot, bends his right leg to raise his foot, and applies the flat bottom of his foot to Felton's bare upper chest. This action is accompanied by a thud or smacking sound. Felton's head moves immediately forward, and then he grunts, "Ooh!", and arches his head back while his upper body moves backward in response to the strike. He brings his head back up, and as he moves deliberately and somewhat slowly to lie back down onto his right side, he looks back in Evelyn's direction and says, "Hey, did you get that one?" Constable Tiwana says, "Yeah, I hope she did."

Of the five officers present, only Constable Tiwana reacts in any visible way to Mr. Felton's action or Constable Tiwana's reaction. One of the officers present, Sergeant Brewer, was putting on his gloves as Mr. Felton sat up. As Felton's head tips back, Brewer leans slightly back in response. After Felton lies back down, Brewer drops a glove behind Felton's back and leans over to pick it up, turning to his right, to face away from Felton, bringing his left shoulder within a meter or less of Felton's back.

After the incident, Felton remains prone and cooperative until the arrival of an ambulance. Sergeant Brewer spoke with him about the robbery and his drug use, although much of the conversation is barely audible. The conversation as interpreted by public hearing counsel is recorded in Exhibit 17, which appears to be a relatively accurate reconstruction.

### 2. Ryan Felton's Evidence

Mr. Felton has a lengthy criminal record. His evidence was admittedly clouded by drug consumption. He described receiving a "stomp or a kick" in the chest. He believed the police had

"taken it a step too far, since he was already in handcuffs and surrounded by police officers and being submissive." He denied attempting to carjack a vehicle.

## 3. Officers' Evidence

### a. Events Preceding the Incident

Five officers testified at the hearing, including Constable Tiwana. All were present at the scene during the relevant time. All had attended the area in response to a dispatch of a robbery in progress at an adult boutique near Hemlock and Broadway, with a possibly armed suspect. The officers also heard updates indicating that the suspect had fled on foot, attempted a carjacking, and tried to enter a residence.

The officers had varying degrees of experience at the time, ranging from Constable Capers, a recruit, to Detective Brewer, the supervisor on the scene, with over 20 years.

The aim was to contain the relevant area so as to locate the suspect. Constable Mazloum, who attended with his partner, Constable Schellenberg, considered it imperative to contain the suspect. Based on the dispatch of an armed robbery with unusual and apparently irrational attempts to flee the scene, the officers attending had concluded that the suspect was exhibiting "volatile" behaviour and would be considered to pose a significant risk to the public. Sgt. Brewer had concluded that the suspect was likely very high on drugs and not thinking clearly.

Constable Capers and his partner attended "Code 3" to see Felton jumping over a hedge, shedding clothing, apparently running from Constable Ames and his police dog. Sergeant Brewer also saw Ames and his dog running, and took what he described "the lethal over-watch," observing the scene with his sidearm at the ready.

Constable Capers and Constable Tiwana arrested Mr. Felton on West 15th Avenue. Capers drew his weapon as did the other officers as they arrived on the scene. At this point there were about 6 officers, and many onlookers including children, on a narrow street with residences on both sides. Felton was sweating profusely and had stripped down to his flesh coloured underwear.

Capers' description of Felton's arrest and subsequent behaviour follows. Felton was not entirely complying with the officers' orders, looking around to see if he could break away, and acting erratically. The officers "swarmed" him and handcuffed him behind his back. Felton continued acting irrationally and was speaking gibberish. He complained of being hot and wanting to take his clothes off although they were already off. He said he hadn't slept in 9 days and had done some drugs. His behaviour was escalating. He was moving left and right jerkily and wanting to leave; then sitting but wanting to lie down. Constable Capers recalled that the officers had wanted to keep Mr. Felton upright because they did not know what he had ingested. He continued escalating verbally while the officers told him to calm down. Capers recalled Felton popping up from his sitting position to a standing position on more than one occasion, with the officers pulling him down to sit on the curb.

When Constable Mazloum arrived Mr. Felton was already in handcuffs, sitting on the sidewalk with Constable Tiwana and Sergeant Brewer near him. Mazloum also described Felton as breathing heavily, sweating profusely, with an erratic gaze and a volatile demeanour. He

appeared tired from running and seemed quite upset or agitated. He was gazing around, scanning his surroundings, and often mumbling something. Mazloum concluded that Felton was possibly high on drugs. Mazloum recalled an officer telling Felton at one point to lie down in order to be more comfortable and that Felton had done so. Mazloum also recalled one or more of the officers telling him to relax. Mazloum said that after several minutes Felton still appeared to be in an agitated state due to drugs or some other cause. Constable Schellenberg also arrived after the arrest and described Felton in similar terms.

Sergeant Brewer said Mr. Felton was extremely agitated, in and out of focus, sweating, showing "classic signs of excited delirium". He had a large gash on his back. Brewer thought immediately about contagion, and tried to put his gloves on shortly after he arrived.

By all accounts Felton had become relatively calm immediately before the incident until he noticed Ms. Evelyn nearby, filming. Constable Capers recalled Felton calling Evelyn a "fucking bitch" and the other officers telling him to calm down.

b. The Incident

Constables Mazloum and Schellenberg both saw Ms. Evelyn on the south side of the street opposite Felton and the other officers, obviously videotaping with a smart phone. Both noticed that the light on the phone was shining in the direction of Felton and the officers. Both saw Felton look at Evelyn a few times; Schellenberg described him as fixating on her.

Felton then raised himself up and leaned forward to yell at Evelyn. Schellenberg described Felton's demeanour as he rose up as very aggressive. He perceived that Felton might try to stand up or to engage Evelyn. Felton was clearly not comfortable with someone filming him. The officers all agreed that it did not appear that Felton's agitation was directed toward the police.

As Constable Schellenberg was considering what to do, he saw Constable Tiwana push Mr. Felton back down with the flat sole of his foot to the chest. Schellenberg described Felton as recoiling, which he perceived as slightly exaggerated, before he said "did you get that" and laid back down. Constable Mazloum described Tiwana as using the base of his foot to push Felton back. He demonstrated by pushing with his hand out at a downward angle to illustrate the action. Felton made a grunting noise and then returned to rest back on his right side.

Constable Capers described Tiwana's action as "push kicking" him down. He recalled Felton returning to a sitting position and saying he would be quiet and lie down, but complaining that Evelyn did not have a right to video him. He was "gibbering" and again calling Evelyn a "fucking bitch". He was speaking in a lower voice but Capers was close enough to hear him.

Mazloum said that seeing Felton's action and Tiwana's reaction made him realize he had been complacent for a moment, and heightened his awareness. He felt he had not been as vigilant as he should have been, but noted that it would fall to the arresting officers and those closest to the suspect to watch more closely for signs of aggression. Tiwana was the closest to Felton, the arresting officer, and the only officer with soft shoes on. The officers close to Fenton including Tiwana all had had their hands occupied and none wore gloves.

Schellenberg also felt he could have done more or been more observant. Both Mazloum and Schellenberg observed that Felton calmed down quite a bit after the incident. While he was still making the odd grunting noise and continuing his odd behaviour the maneuvre seemed effective to control him.

Sergeant Brewer said he saw Fenton "lock onto" Evelyn, and become agitated in a manner he considered consistent with cocaine psychosis or excited delirium. Felton tried to get up and right himself in order to go after Evelyn. Tiwana pushed him back down with his foot.

Brewer perceived that Evelyn was clearly escalating Felton's behaviour. He had started to put his gloves on because he perceived that he would need to be hands on with Felton, and he would not do that without gloves. He dropped one of his gloves right after the incident. He picked it up, finished putting it on, and commenced speaking to Felton. Felton apologized and said he was concerned about his family seeing him on the news and that he did not want them to. Brewer put his hand on Felton's shoulder to try to calm him and de-escalate his behaviour. He noticed that after the incident, as Evelyn moved closer, Felton flipped himself to put his back to the camera to try to shield his face.

## 4. Constable Tiwana's Evidence

Constable Tiwana is a member of the Vancouver Police with 12 years' experience including Emergency Response and Strike Force experience. He arrived to spot Mr. Fenton fleeing from the police dog, between buildings, approaching 15th Avenue from the north. He had received the information from dispatch that Felton was suspected of a robbery and attempted carjacking. He considered the carjacking incident to indicate a desperate desire to flee.

Tiwana pulled his gun and ordered Felton to the ground. Felton complied quickly. Tiwana noted that given the dispatch it would have been protocol to draw weapons and employ verbal commands while performing the arrest. As soon as Tiwana perceived that there were enough police officers present, he holstered his gun and moved in with Constable Capers to handcuff Felton. Tiwana identified photographs of himself with a knee on Felton while handcuffing him.

Tiwana saw that Felton was sweating profusely, his balance was not good, and that he was speaking gibberish at times. He believed Felton was significantly under the influence of drugs. He said he called or initiated a call to Emergency Health Services because he and the other police on the scene believed Felton may be suffering from a drug induced state such as excited delirium or cocaine psychosis.

While Felton was being held on the sidewalk awaiting the ambulance, Tiwana said, he was given verbal commands to remain lying down and remain calm, and told that the ambulance was coming. He was placed into the recovery position as a matter of protocol and told to stay down more than once prior to the incident.

When Felton noticed Ms. Evelyn recording he took great exception to this. He had been calm and compliant before that, not posing a real threat or appearing angry, but when he saw Evelyn he sat up abruptly and swore at her. He appeared focussed on her.

Constable Tiwana said he believed Felton was in process of getting up, and that he was going to rush at Evelyn or assault her, or attempt to flee. He characterized Felton's conduct as "active resistance" to the prior verbal commands to stay down. As a result, he said, he pushed Felton with his right foot and told him to shut up. He agreed that Felton had grunted as a result of the impact.

Tiwana said that if Felton had been able to get up he would pose a greater risk to himself, to Tiwana and the other police officers, and to the public. He could have fallen and would have had to be wrestled back to the ground, which would have been difficult given his sweaty state and the fact that he was in a drug-induced "goal-oriented" state. Tiwana said that in his experience such people are unpredictable and very difficult to deal with. His conclusion that Felton was goal-oriented was informed by the report of Felton's efforts to flee prior to his arrest.

The fact that Felton had been lying on the ground apparently calmly for a time did not mean to Tiwana that he was no longer a flight risk. Tiwana agreed that Felton had not been combative at any other point after the arrest, although he had "flailed around" a bit. He agreed that the mood was relatively relaxed as the police stood around Felton before the incident, that it was not a tense situation and that at one point just prior to the incident Schellenberg was smiling and laughing. However, he would not have assumed that Felton had "given up," and noted that he was not entirely lucid in his conversations with the officers during that time.

Constable Tiwana recalled telling Mr. Felton numerous times to stay on the ground and remain calm. He agreed Felton was rather calm and compliant before sitting up and then again afterward but Tiwana had seen people flee unexpectedly with handcuffs on. Far from handicapping such an attempt, the influence of drugs could have made him unnaturally strong. Tiwana saw Felton get his feet under him on the road as he sat up on the curb, and thought it would be easy for him to get up and make a run for it, so he acted quickly. He described Felton's movement as abrupt and quick. He used minimal force and did not feel that Felton's medical condition was a contra-indication to the use of that level of force.

Constable Tiwana had been trained that subject behaviour dictates officer behaviour, and he reacted quickly to Felton's action. In training he had not been taught to go through the force options one by one, but to react in a fluid fashion, taking whatever step is necessary. He had reacted instinctively according to his training and assessment of the entire situation. Considering Felton's prior behaviour and the fact that he was no longer complying with the prior verbal command to stay down, Felton's action amounted to "active resistance," in Tiwana's assessment. He responded with what he described as "soft foot contact" at about 25% of full force. He intended to push Felton back and it had that effect.

Constable Tiwana denied "kicking" Felton. He considered a kick to be done with force with the toe of the foot for pain compliance. This, he said, was a push with the bottom of his foot, with no wind-up and minimal force; soft contact on the force continuum. He did not intend to cause pain; simply to push Felton back down to have him lie on his side. His intention, which he noted was achieved, was to ensure that Felton didn't get up and to try to get his focus off Evelyn. He had used the word "kick" in his notes to record in the most efficient way that he had used force with

his foot. He had not reported the kick in his general occurrence report as he did not consider it relevant to the charges against Felton.

Tiwana noted that the reaction time available to him was only a fraction of a second. He did not consider that a verbal response would suffice or be appropriate because Felton may not have heard him or complied, given that he was fixated on the female and not in a lucid state. He owed a duty to Felton and to the public to use the most effective appropriate action in the circumstances.

At the time of the kick, Tiwana had his pen and notebook in his hands. He did not want to lay hands on Felton because he was an apparent drug user and had a large scratch on his back. Additionally he would have had to get closer to Felton to push with his hands, which was riskier. He had used his bare hands during the arrest because of the immediate need to gain some control over Felton. In connection with Felton's attempt to get up, his foot was the most efficient way to deal with situation.

Tiwana told Felton to shut up because he was swearing and being belligerent and there were families and children gathered around. He wanted him to stop swearing and talking. He agreed that what he said was unprofessional but disagreed it was disrespectful given that Felton had already sworn at a member of the public. He disagreed that was his primary concern, however, or that he displayed a loss of temper.

### 5. Officers' Training Re Effects of Drug Ingestion

No experts were called regarding the potential effects of ingestion of methamphetamine or other drugs on a suspect in custody. The officers testified to varying degrees about their experience and training related to persons in custody who were significantly intoxicated by illicit substances.

Sergeant Brewer spoke of excited delirium and cocaine psychosis. His understanding was that they were different but often seen together in a suspect. As he understood it, excited delirium is a heightened sense, emotional and physiological, with a raised heart rate. The suspect is in and out of consciousness, alternating with hyper-focus. Brewer assumed based on Felton's sweating and actions that his heart rate would be elevated and he concurred in the decision to call an ambulance.

Sergeant Brewer had been taught that excited delirium was a bona fide medical condition that police need to be aware of. They received training not to deploy a taser in such circumstances, because of the potential to cause death where there is an elevated heart rate. He did not agree that it was necessary to factor that into the other use of force options. He had not been taught to differentiate between individuals who are high on coke or methamphetamines. For any individual in a similarly altered state he had been instructed that they may possess more than human strength and officers needed to be on heightened alert and may need to escalate force in response to the situation. Officers were trained to be on guard in cases of drug ingestion because suspects could be unpredictable.

Several of the officers testified that drug users could pose a risk of communicable diseases and should not be handled without gloves. Constable Mazloum said it was not practicable to wear

gloves all the time and the point at which an officer would put them on would depend on the situation and the opportunity.

### 6. Officers' Training re Use of Force

Several of the officers were asked about their training in the use of force, and asked to comment on the level of force used in this incident. None were qualified as experts in the use of force but their evidence is relevant in considering the information and knowledge available to Cst. Tiwana at the time of the incident.

Sgt. Brewer has received training in the use of force and has provided training within the Vancouver Police. In Brewer's view it would be wise tactically to stop Felton "early and decisively" because of the risk he posed to himself and others by virtue of his condition. Quick action would be in line with his training, which he described as using force in proportion to the subject's behaviour. He said police were trained to assess a suspect's behaviour on a spectrum of passive, resistant, actively resistant, threatening, all the way to threatening grievous bodily harm. He characterized a sudden rise to a seated position in these circumstances as "active resistance". The spectrum or continuum of force moved from officer presence to verbal commands, to degrees of force, but officers are not trained that it is not necessary to go progressively through the sequence. For a suspect unlikely to respond to verbal commands, an officer could use force combined with a command.

The lowest level of actual force was described by Sgt. Brewer as "empty hand soft," meaning force without equipment by the use of hands with a low impact strike or and application of light force, which would include pushing with a foot. Brewer said that his training taught that empty hand soft techniques were appropriate in response to "active resistant" behaviour, and in some cases one could move up to "empty hand hard" contact. The purpose of training in this area is to enable an officer to react instantly in an appropriate situation.

Brewer's understanding was that if excited delirium was suspected, a taser should not be used and the officer should be careful about the use of force. One way to avoid escalating the use of force is to act decisively and quickly before a situation gets out of hand. The level of physical contact required in such circumstances is dictated by the subject and although his own health is a concern, officer and bystander safety is paramount.

In Brewer's assessment, Felton seemed about to get out of hand, "laser-locked" on Evelyn, and Tiwana's action "brought him back and broke his focus". He had experience with many agitated people where a little shove would break their concentration and calm them down.

Constable Mazloum stated that he had been trained that as a general principle it is better to act quickly and stop a suspect who is volatile from getting wound up rather than letting him get out of control. All the officers agreed that their training and experience taught them that if Felton had managed to stand up the situation would have been potentially much more serious.

Constable Schellenberg described the use of physical control such as a punch or a foot strike as "empty hand control", which could be hard or soft. A full kick would be an "empty hand hard" tactic and a push with a foot could be "empty hand soft," the lowest level of actual force. This

kind of force may be used as a means of control or as a distraction to assist in gaining control of a suspect. It is generally used in conjunction with verbal commands, such as "get down" or some other quick, sharp, terse command, to gain compliance.

Cst. Tiwana testified that he had been trained to force proportionate to the situation. Police presence being the lowest level, progressing to verbal commands and then to the use of force of increasing degrees, but that did not dictate moving sequentially through the steps.

## 7. Subsequent Events

After the foot strike, Felton displayed no further signs of violence or non-compliance. Once the ambulance arrived, Felton was assessed by medical personnel and taken to the hospital for apparent excessive drug ingestion, on an emergency basis. Those officers remaining at the scene at the time the ambulance arrived are seen in the video wearing gloves that were supplied by the ambulance attendants.

While being attended to by the medical personnel, Felton complained of chest pains, but did not suggest that it was from police contact. He did not complain about his treatment and told the ambulance attendants that the police had treated him well. He apologized to Sergeant Brewer.

## 8. Evidence of Onlookers

Tenille Evelyn, the CBC employee who recorded the video on her Blackberry phone, said that on her way home she observed that a police incident was occurring near her residence. She called the CBC newsroom and advised them that she would be recording it.

Evelyn first observed Felton after he was handcuffed. She did not have information regarding the nature of his criminal involvement. She noted that he was mostly naked, wearing what appeared to be flesh coloured bike shorts, and was handcuffed behind his back. She believed he had been seated at one point but did not remember when in terms of the sequence of events. At some point he tipped over to lying on his side.

She heard Felton swear at her and saw Tiwana raise his foot and kick him in the chest with a flat foot. She stated, "The impact was certainly not as hard as he could kick but it was significant."

After the kick she heard Felton say, "Did you get that?" and took it that he was asking if she had recorded the officer kicking him. None of the other officers seemed to react. She described Felton as mostly calm throughout the incident.

Evelyn said she was surprised by the kick and it didn't seem appropriate because the man seemed calm, he was mostly naked, and his hands were cuffed behind his back. She agreed that Felton did not collapse because of the kick, but disagreed that he was exaggerating the effect.

Michelle Sinclair, a sales assistant, lives on the second floor of low-rise building in the same block as the incident, on the north side with south facing windows. She looked out to see Felton lying or sitting on the sidewalk with handcuffs on. She saw police assist him toward a sign post closer to her window where they remained for quite a while. She was viewing the scene from an angle. Sinclair believed that Felton had been seated for a time before the incident but sometimes would roll over or flop over on his side and she thought it must be very uncomfortable for him to

be handcuffed. She noticed Tiwana in plainclothes just before Felton started "swearing and cussing". She remembered thinking, "Oh-oh, he may be about to get up off the sidewalk." She could see his back from her window. She saw Tiwana's knee come up but did not see where his foot made contact. Felton then rolled over onto his side. Sinclair did not feel it was a "kick" and did not see any kind of a backswing to it.

Sinclair said that when she saw the video on TV she was surprised because it looked like Tiwana had hit the fellow much harder than she recalled. To her it had looked like he was pushing the man with the sole of his soft soled foot, not punitively but as if to say, "Hey, buddy, stay where you are."

Retirees John and Linda Samosinski live on the northeast corner of Fir and 15th. Robert said they were in their south facing living room when they heard the sound of footsteps on the gravel between their building and the next. Mr. Samosinski looked out to see Felton lying face down on the asphalt. He was then moved to the sidewalk and placed sitting down near the traffic sign. He had few clothes on and seemed to be swaying back and forth. There were a number of onlookers.

Felton started to "vocalize" to people across from him. He saw Tiwana tell him something indicating not to talk, and lift his shoe. He described the motion as "tapping lightly, not like a kick," with the sole of his foot. He noted that Felton seemed to hardly notice it; it seemed to have little impact given it would be relatively easy to topple him; and he himself had "clapped people on the back with more force."

Mr. Samosinski described Felton as quite agitated at the time of the incident. When he viewed the video he expressed surprise that Felton had been lying down just before the incident. He recalled him being seated but seeming unsteady and unable to sit up on his own. He said the impact of Tiwana's foot seemed to be more significant when he viewed the video than when he had seen it.

Linda Samosinksi saw Felton being taken down at gunpoint and handcuffed, following which the situation calmed down a bit. Felton was moved to the sidewalk in front of her building. She described him as "floppy" and "reacting to people". She heard him swear, "mouthing off", and saw Tiwana "nudge him with his foot". She described the action as "not a kick", rather like a gentle push as if to shut him up. It did not look like anything spectacular and did not look like he was hurt. She said she thought the officers had told him to get down. After that the officers seemed to have it under control, and were just standing around.

Mrs. Samosinski also remembered Felton sitting up at the time of the incident and was surprised to see him lying down in the video. She had not heard either the impact or Felton's grunt.

Edward Horsey's evidence is contained in the Agreement of Facts. He recalled that Mr. Felton was seated on the curb with five to seven officers around him; that he went to get up and Constable Tiwana used his foot to his chest in a combination shove and kick; and that Mr. Horsey had remarked to his wife that it was "brutal".

## D. Counsel's Submissions

Public hearing counsel and Commission Counsel advanced an argument that the mental state for "intentional or reckless" use of force under section 77(3)(ii)(A) is that defined in the body of case law dealing with excessive force: a modified objective standard requiring proof that the officer knew he was applying force and was intentional or reckless as to whether that force was "necessary".

Commission Counsel Mr. Tammen submitted that the belief of an officer that force was necessary and that his use of force was reasonable are factors but are not determinative of the issue in any type of case involving an allegation of excessive force. He relied upon the cases of *R. v. Nasogaluak*, 2010 SCC 6; and *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 and submitted that the recent case of *Lowe v. Diebolt*, 2013 BCSC 1092; affmd 2014 BCCA 280 did not change that law, or if it did, it was distinguishable from the facts in this case and should be restricted to subparagraph (B) because it dealt with a *Charter* breach. He submitted that if I found that *Lowe v. Diebolt* was applicable to this case I should find that Myers J. was in error in that decision when he found that ignorance of the law did not establish the mental element of a misconduct allegation.

Mr. Tammen distinguishes *Lowe v. Diebolt* on the basis that the mental state required to detain or search a person "without good and sufficient cause" is different from that required to use "unnecessary force," because as pointed out by Myers J. in his reasons, one cannot unintentionally search a person, whereas one could unintentionally apply force, such as by accident or reflex action.

Mr. Tammen submits that the words, "intentionally or recklessly" contained in (ii), as they relate to (A), modify only the application of force, and do not require that the officer intend to use unnecessary force or be reckless as to whether the force is unnecessary. The question, he submits, is determined according to a modified objective standard; that of a reasonable police officer standing in the shoes of this officer, and the officer's intention [or lack thereof] cannot be determinative.

Public hearing counsel Mr. Martland submitted that the test for use of unnecessary force cannot be one more favourable to the officer than the modified objective standard, as that would lead to the illogical conclusion that the standard for a finding of misconduct was more stringent than for proof of general intent on a criminal charge of assault.

Mr. Martland submitted that there were several facts in the evidence that established recklessness or intention on the part of Constable Tiwana: Mr. Felton was handcuffed behind his back and did not have access to a weapon; Mr. Felton had been permitted to sit at some time prior to the incident; Mr. Felton's anger was directed toward Ms. Evelyn and not the police; the application of force occurred in a sequence of events which included Constable Tiwana looking toward Ms. Evelyn, lifting his foot and moving it forward; Constable Tiwana yelled, "Shut up!" as he kicked Mr. Felton; five officers were close by at the time; Mr. Felton was plainly impacted by the incident, grunting, moving forward, then back, then lying down and asking Ms. Evelyn if she

"got that one"; Constable Tiwana responded "I hope she did"; and no other officer responded to Mr. Felton physically or verbally.

Counsel for the respondent, Mr. Woodall, submitted firstly, that Constable Tiwana's use of force in this case was reasonable. He argues as well that, even if that force was objectively unreasonable, the words "intentionally or recklessly" in Section 77(3)(ii) should be interpreted as requiring that it be established that the officer knew that it was unnecessary or was reckless as to whether it was necessary. He says this interpretation of the section is consistent with the case of *Lowe v. Diebolt*. He challenges Commission Counsel's argument that ignorance of the law is not a "defence" to a charge of misconduct, and points out that the cases he relies on are cases assessing state action, not that of an individual officer.

Mr. Woodall relied on the line of cases, including civil cases decided on the balance of probabilities, that establish that a police officer's actions should not be measured against what appears in hindsight to be the level of necessary force; rather against the yardstick of the reasonable police officer with the respondent's level of training, the exigencies of the day and situation, and that he cannot be required to measure his force with precision.

## E. Analysis

The decision of the BC Supreme Court in *Lowe v. Diebolt* dealt with the interpretation of section 77(3)(ii)(B), what I will refer to as the "sister" section to the one at issue here: 77(3)(a)(ii)(A). Because the decision considers the type of intent described by the words, "intentionally or recklessly" in section 77(3)(a)(ii) and how or whether they modify (B), which deals with search and seizure, in my view the decision must be considered in relation to the mental element required for a case brought under (A).

As Mr. Woodall points out, if I find that the police officer's actions in this case were objectively necessary, I am not required to decide whether he used the force intentionally or recklessly. If the force used was objectively unnecessary, then I am to consider the officer's state of mind in applying that force. At this stage, the analysis becomes: 1. Did Constable Tiwana believe the force was necessary? 2. Did Constable Tiwana believe that the force was not excessive? 3. If the answer is yes to both, were Constable Tiwana's beliefs reasonable? [modified from *Berntt v. Vancouver (City)* BCCA 1999 345, para. 17 and the Public Hearing decision in the Dickhout case, (https://www.opcc.bc.ca/hearings_reviews/public_hearings/PH2010-03/10-03_Pitfield_Decision_Part_1.pdf), paragraph 36].

In *Lowe v. Diebolt*, Myers J. held that "intentionally" in section 77(3)(a)(ii) modifies the mental element in paragraph (B) of "without good and sufficient cause" and found that the officer's ignorance of case law requiring her to have grounds to arrest before strip-searching a woman she had detained did not satisfy the mental element of the allegation of misconduct.

In my view the test for assessing the reasonableness of an officer's response in a civil case remains as established by a considerable body of case law, of which *Berntt* and *Anderson v. Smith* 2000 BCSC 1194 are examples.

The following passage from *Anderson v. Smith* provides a succinct summary of the law:

> [51] Consideration must be given to the circumstances as they existed at the time. Allowance must be made for the exigencies of the moment, keeping in mind that the police officer cannot be expected to measure the force with exactitude: Wackett v. Calder (1965), 51 D.L.R. (2d) 598 at 602 (B.C.C.A.); R. v. Botrell supra at 218; Allrie v. Victoria (City), [1993] 1 W.W.R. 655 at para 20 (B.C.S.C.); Levesque v. Sudbury Regional Police Force, [1992] O.J. No.512 (QL) (Ont. Gen. Div); Breen v. Saunders (1986), 39 C.C.L.T. 273 at 277 (N.B.Q.B.); Berntt v. Vancouver (City), supra at 217. This may include the aura of potential and unpredictable danger: Schell v. Truba (1990), 89 Sask.R. 137 at 140 (Sask.C.A.) (in dissent). There is no requirement to use the least amount of force because this may expose the officer to unnecessary danger to himself: Levesque v. Sudbury Regional Police Force, supra.

Adjudicator Pitfield said this about the relevance of exigencies at paragraph 37 of the Dickhout decision:

> …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, [cited earlier, paragraph 35] and *In the Matter of Constable Smith*, Victoria, January 28, 2009, p.21.

Southin J.A. provided the helpful description of the trier of fact's role as a "doppelganger" to the officer at para. 24 of *Berntt*, and elaborated as follows at paragraph 25:

> The judge must go with the officer, at least from the time the officer first was sent to the place where the riot was in progress. I say "at least" because the officer's training, experience, the orders of the day given to him, are all part of what goes into the answer to the question of "reasonable grounds".

The test with respect to an officer's use of force cannot be a purely objective standard, of course, because a person not familiar with police training and tactics may not be able to put herself into the shoes of the officer or of the reasonable officer with the same level of training. I am not entirely sure that counsel differ on that proposition, as they both placed reliance on the "doppelganger" analysis put forward by Southin J.A. in *Berntt*.

Where they differ is the effect of *Lowe v. Diebolt* on that line of cases. I do not see that *Lowe v. Diebolt* is inconsistent with that line of cases or establishes an entirely subjective test of good faith. Myers J. pointed repeatedly to the lack of evidence, and observed specifically that ignorance of the law might indicate a lack of training. Justice Myers appears to simply have been observing that the evidence in that case did not establish that the officer had training, or had been taught a standard, that fixed her with knowledge that she was searching unlawfully. That is not the same as a purely subjective test; it means only that the adjudicator was not equipped to find that the officer knew her options and intentionally or recklessly acted outside her authority.

What *Lowe v. Diebolt* highlights, in my view, is the need for expert evidence, or at least evidence regarding the knowledge and training available to the officer, in cases where the trier of fact may

not be equipped to assess the reasonableness of the officer's belief. *Lowe v. Diebolt* was such a case, as is the one before me. In other cases, disproportion between the incident and the response may be so self-evident as to negate the need for testimony about what the reasonable officer might have done or been trained to do in the circumstances, or, as in this case, about the surrounding events. In those cases it may be enough for the adjudicator to point to the officer's actions and using common sense, conclude the action was intentionally or recklessly taken without authority. In other cases where reasonable lay people may differ as to whether a police response was appropriate, evidence will be required to show that the officer failed to adhere to a general standard imposed by his or her training and available knowledge.

Clearly the officer's own view regarding the necessity of force is not determinative; the reasonableness of that view must be assessed against the yardstick of acceptable behaviour from the perspective of an officer with the same level of training and experience. But the doppelganger analysis prescribed by the cases requires that the adjudicator be equipped to understand the perspective of a reasonable officer in the shoes of the respondent.

The problem in *Lowe v. Diebolt* was that there was no evidence regarding the training within the officer's department and whether it was common or available knowledge for a trained officer in her department that a search could not be conducted without grounds for an arrest. A finding of "recklessness" on the part of the officer in relation to her search powers was not available.

In this case, several officers testified regarding the training they had received pertaining to the use of force in various circumstances. Several of those officers were present and stated that they would have acted, or wished they had, in the same fashion as did Constable Tiwana. While that evidence probably crosses the line into the adjudicator's role, and a trier of fact must be particularly wary in police conduct cases of a "closing of the ranks", credible evidence regarding other officers' perception of the situation and relevant training can be of assistance in determining what is a reasonable interpretation of the facts.

The adjudicator must also be alive to the allure of applying jargon to simple acts. Police use of force training refers to "tactics" in terms of "empty hand soft", "empty hand hard" and so on. That training also refers to levels of aggression such as "active resistance" as used in this case. To characterize the action here as simply a prescribed use of "empty hand soft" contact in response to "active resistance" would be pre-determinative of the reasonableness of the force used, which is a question of fact that must be established by the evidence.

### *1. Was the Force Used Objectively Unnecessary?*

The first question is whether force was in fact required, objectively speaking. Of course, if the answer to that is yes, the analysis need go no further.

Watching the video, the blow appears gratuitous and as I have mentioned, alarming. It is accompanied by the obvious sound of an impact, as I have noted. Mr. Felton is clearly underdressed in almost a comical fashion and he is lying prone and handcuffed behind his back at the beginning of the incident. He appears harmless at the outset.

One might conclude on watching only the excerpt that Mr. Felton was not apparently about to rise to his feet, and that he may have been persuaded to resume his prone position without the use of force. He was largely compliant before and after the incident. None of the subtler or contextual observations of the officers are apparent on the video.

The evidence of the onlookers is relevant only to the issue of objective reasonableness, in my view, because none of them can say what is reasonable behaviour for a police officer. And while several of the onlookers believed the blow was excessive, it is of note, in my view, that those who observed the arrest did not conclude that, while of those who did not observe it, only two of three, Evelyn and Horsey, concluded that the force was excessive. Both Mr. Samosinski and Ms. Sinclair thought the force depicted in the video seemed harder than they had observed, but they had both been watching from behind and did not see the blow land. One interpretation of the evidence of onlookers is that seeing the incident from the front was more alarming, but the other is that seeing it in the context of the gunpoint arrest made it seem reasonable.

While Ms. Evelyn disagreed that Felton seemed to overreact, Constable Mazloum concluded that he was exaggerating. Viewing the video, in my view the tipping back of his head and the grunt are both slightly more delayed and deliberate than one would expect of a spontaneous reaction to the blow, particularly in light of the fact that Felton did not lose his balance and remained largely upright, despite being handcuffed behind his back.

I am not entirely convinced that the evidence meets the standard of proof in relation to objective necessity or lack thereof. While based solely on what is depicted on the video, the force is arguably objectively unnecessary, the "objective" reality in context and in the exigencies of the moment may well have been quite different. However, I will assume for these purposes that the evidence supports a finding that objectively and in hindsight, Mr. Felton did not need to be subdued with force, or with the degree of force that was used.

In considering the remainder of the questions I am required to answer I am mindful, as suggested by Mr. Woodall, of the fact that the video, while it may be helpful regarding timing and positions of the parties, may not be entirely reliable in terms of the audio, does not show the events from Constable Tiwana's aspect, and shows only a portion of the interactions between Constable Tiwana and Mr. Felton.

### *2. Did Constable Tiwana Believe that Force was Necessary?*

Constable Tiwana clearly intentionally kicked Mr. Felton. His express intention was to achieve compliance by having Mr. Felton return to a prone position.

Constable Tiwana also clearly displayed a tone of mild annoyance. Although he denied that he was annoyed, his admittedly unprofessional remark to Felton contradicts that denial. However, his annoyance and unprofessional remark are not determinative of whether he believed it was necessary to use force nor is my rejection of his denial determinative of his credibility on the rest of his evidence.

Constable Tiwana articulated his belief consistently with his understanding of his training with respect to when to use and when not to use force. The fact that Felton had responded to verbal commands during the arrest is not inconsistent with a belief that they would not suffice at a time when the officers had all holstered their side-arms, and it does not require that I reject Constable Tiwana's evidence that he believed force was required. Constable Tiwana's belief is consistent with his evidence that Mr. Felton had been given verbal commands to lie prone before the portion of the incident depicted on the video and was resisting those commands.

In assessing the credibility of Constable Tiwana's belief that force was required, I am mindful of all of the information available to him, and of the fact that his decision that force was required was made in the heat of the moment. As I have noted, Constable Tiwana was facing away from Mr. Felton when Mr. Felton rose to a seated position, and he turned back to see him already erect with his legs bent in front of him. His reaction was immediate, and it is apparent from the video that it occurred slightly after he commenced his intemperate remark. Even if he uttered the remark in annoyance, he turned back to see that Felton was not just "mouthing off," but posing a serious immediate risk.

The video and the surrounding evidence are consistent with Constable Tiwana's assertion that his primary intent in using force was to put Mr. Felton back into a prone position, and I accept that was his primary purpose. Constable Tiwana was the arresting officer; he had charge of Mr. Felton; and he perceived that Mr. Felton was resisting the direction that he had received to remain prone. All of that must be considered in light of the gunpoint arrest and the fact that force had already been used in the arrest and handcuffing, minutes before the incident. I accept that Constable Tiwana, the arresting officer, with all of the information he had in connection with the dispatch and arrest and Mr. Felton's mental state, believed, or decided quickly, as he turned to see Mr. Felton sitting erect with his feet beneath him, that force was required to address Mr. Felton's unexpected, sudden, and aggressive movement.

While I do not find it particularly material that he believed that Mr. Felton was about to get onto his feet or whether he was also annoyed by his non-compliance, I find based on the evidence that Constable Tiwana believed that Felton was posing an imminent risk by his defiance of the verbal commands he had been given. The fact that he had been seated at some prior time is not inconsistent with Constable Tiwana's evidence that he had been told to lie down before the incident.

Put another way, and mindful of the burden of proof, I am not able to find that Constable Tiwana is probably being untruthful about his belief.

### *3. Did Constable Tiwana Believe that the Force was not Excessive?*

Constable Tiwana applied his foot, quickly and decisively, to Mr. Felton's chest. He used a moderate level of force with a soft soled shoe. He was equivocal about whether this blow could be described as a kick, but little turns on that or the fact that he described it that way in his notes. It was a kick, as opposed to a push. As Constable Tiwana pointed out, he would be unlikely to

include a fuller description of the action in his notebook when describing the use of force. The fact that he made the note at all may be consistent with a belief that it was not excessive force.

Tiwana's prior use of bare hands to apply the handcuffs is not inconsistent with his assertion that the absence of gloves was one factor in his decision to use his foot. Cst. Tiwana's testimony was consistent with the evidence of the other officers regarding the need for gloves, and I do not find that his failure to don gloves for the arrest is inconsistent with his evidence that he used his foot in part due to the fear of disease. Constable Tiwana articulated other factors such as the fact that he was holding objects in his hands, his foot was closer, and his foot was a safer option than getting close enough to lay hands on Felton. I note as well that none of the other officers had put on gloves by the time of the incident and that they all clearly did when the ambulance arrived. Further, the act of drawing a suspect's hands behind his back and placing a knee onto him is quite different from placing an open hand onto his bare, sweaty chest.

I accept Constable Tiwana's evidence that the use of his foot was the most expedient type of force available given their positions, Mr. Felton's condition, Constable Tiwana's footwear, and the fact that his hands were less available.

I also accept that Constable Tiwana believed that the force of the kick was not excessive. He described it as soft contact. He was mindful of his footwear. Viewed on the video, and as he stated in his evidence, he did not wind up or kick with his toe so as to inflict pain. He used the flat bottom of his soft-soled shoe.

Whether the blow proved to be harder than Constable Tiwana intended or look harder than he described on the video does not negate the honesty of his belief that the level of force he applied was appropriate. His remark after the kick is in keeping with the mild annoyance that I find he displayed, but it is probably more inconsistent with a belief that the force was entirely reasonable than with the opposite.

### *4. Were Constable Tiwana's Beliefs Reasonable?*

This part of the analysis is where the circumstances as perceived by the officers present can be of assistance. All of them emphasized that Mr. Felton was fleeing from the scene of a robbery where he may have used a weapon and that he may have attempted to carjack a vehicle in order to escape. Testimony establishes that protocol required side-arms be drawn; a significant show of force at the outset. That Mr. Felton complied in the face of that level of force does not establish submissiveness. He was ordered to the ground and handcuffed, with a knee to the back as depicted in the photographs; again, already a significant level of force and physical contact.

The testimony of the officers present establishes that Mr. Felton may have been sitting for a time before the incident; the evidence is equivocal as to how long. It is clear however from the evidence that he was prone before the incident, on his side in the recovery position, and that he had been told to remain in that position, whether for his own health or for security purposes.

All of the officers assessed Felton as significantly under the influence of drugs, volatile, and potentially erratic. Only two of the officers present for the incident had been physically involved

in the arrest. Of those two, Capers seemed prone to overstatement of Felton's behaviour, and if anything, Tiwana seemed prone to understatement.

The evidence establishes that Vancouver Police officers' training includes a need to be vigilant and responsive to a subject who appears to be significantly under the influence of drugs as was the case with Mr. Felton. On the other hand the evidence does not establish that the officers present, and in particular, Constable Tiwana, had been trained or believed that a strike to the chest of a person in an agitated state attributable to drug ingestion posed a medical risk or was contra-indicated.

All of the experienced officers agreed that they he had been trained that drug users often pose a higher risk of communicable disease, that these can be communicated by bodily fluids including sweat, and that such suspects should generally not be handled without gloves.

As to the use of force, the officers' training was that force is dictated by the suspect, and that active resistance may be met with force in appropriate circumstances. They classified a foot strike as potentially either soft or hard contact. At least two officers testified, credibly, that their training supported a conclusion that swift and decisive action was advisable when a person significantly affected by drugs demonstrated a lack of compliance with verbal directions.

Although none of the officers reacted either to Felton's action or to Constable Tiwana's reaction, there was no apparent need to do so, as Felton was immediately contrite and compliant. As well, although the officers appeared on the video to be unconcerned about Felton posing a threat immediately before the incident, two of those officers expressed regret that they had not been as vigilant as Constable Tiwana.

The officers' testimony regarding their training in use of force and the effects of drugs is the objective standard established by the evidence in this case, against which the actions of the "reasonable" police officer standing in the shoes of Constable Tiwana can be measured. No evidence was led to show that a different training standard or knowledge base should be applied, in conducting the applicable analysis.

Bearing in mind the case law regarding the fact that officers are not required to measure the force they use precisely, I am unable to find unreasonable Constable Tiwana's beliefs that force was required or that the force he used was necessary. The preponderance of evidence points to the conclusion that he acted on a reasonable belief that Mr. Felton was volatile, unpredictable, potentially dangerous, agitated, not entirely lucid, and, at the time of the incident rude and non-compliant.

The kick did not have enough force to cause Felton to lose his balance, his reaction appeared somewhat overstated, and he was able to deliberately lower himself back to a prone position. It achieved compliance and nothing more. The sound of the impact on the video is not inconsistent with a measured degree of force applied to that area of the body. It may not have been the least amount of force required, but that is not the issue. Felton apologized for his actions, he was not injured, and he declined to lodge a complaint.

## F. Conclusion

The evidence does not establish to the requisite standard that Constable Tiwana's belief that he used necessary force was not a reasonable belief. I therefore find that Constable Tiwana did not "intentionally or recklessly" use unnecessary force against Ryan Felton and the allegation of misconduct has not been established.

Dated at Vancouver, British Columbia this 23rd day of December, 2014.

Carol Baird Ellan, Adjudicator