IN THE MATTER OF THE POLICE ACT, R.S.B.C. 1996, c. 367 AND IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT

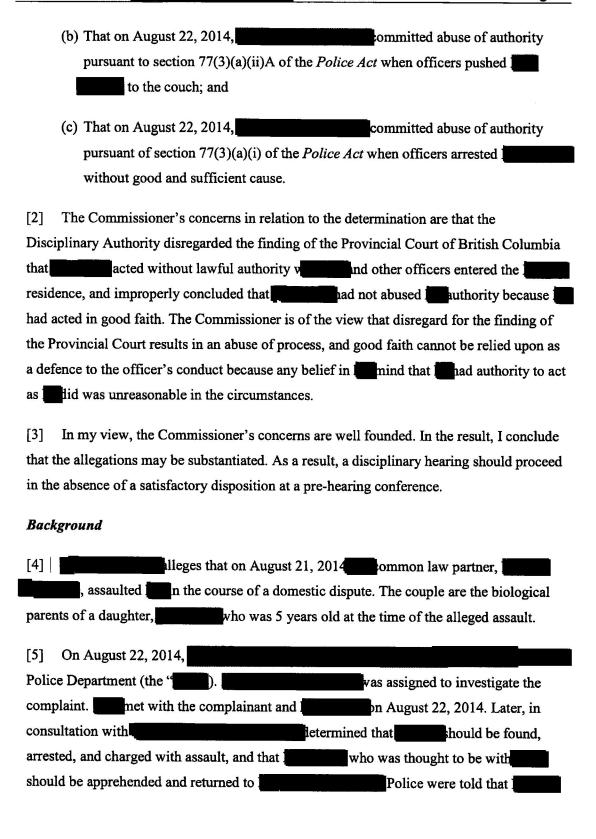
AGAINST

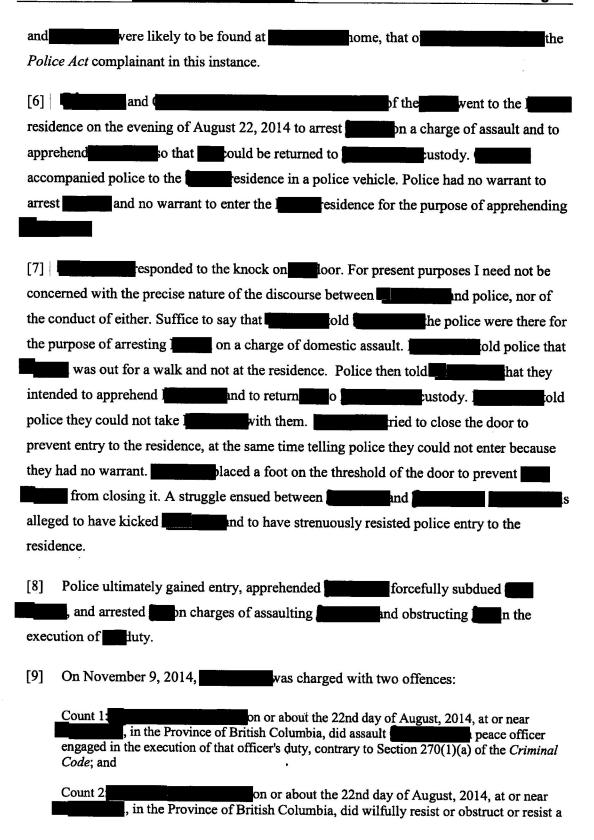
OF THE POLICE DEPARTMENT NOTICE OF DECISION

NOTICE OF DECISION TO: Police Department AND TO: Police Department Professional Standards Section AND TO: Police Department Discipline Authority AND TO: c/o Police Department Investigator AND TO: Complainant Mr. Stan Lowe, Police Complaint Commissioner AND TO:

Introduction

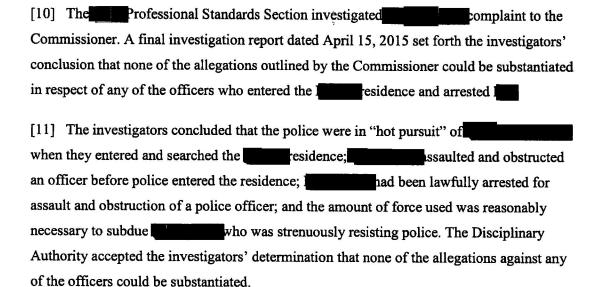
- [1] On March 22, 2016, the Police Complaint Commissioner ordered a review pursuant to s. 117(4) of the *Police Act* of the Disciplinary Authority's determination that the following allegations of misconduct directed at substantiated:
 - (a) That on August 2, 2014, seemed committed abuse of authority pursuant to section 77(3)(a) of the *Police Act* when officers entered and searched home unlawfully.





peace officer, in the execution of that peace officer's duty, contrary to Section 129(a) of the *Criminal Code*.

Procedural Background



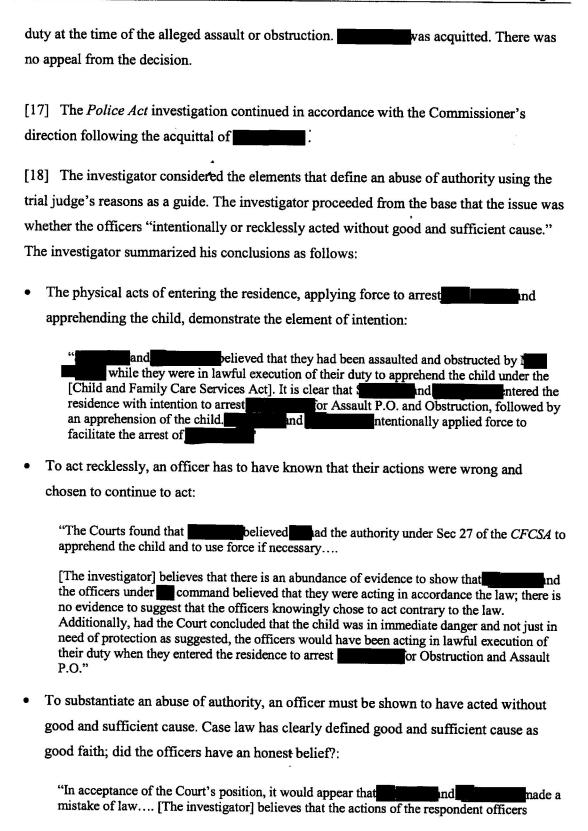
[12] On April 27, 2015, the Commissioner issued a direction that further investigative steps be undertaken because:

The criminal prosecution in this matter will likely have a significant impact on the *Police Act* process from an evidentiary standpoint. There exists a real potential that the criminal proceedings will likely examine the same issues involved in the *Police Act* investigation. Therefore, the Professional Standards investigator will be able to have access to the evidence tendered in the court process. This avenue of investigation will have the benefit of evidence in the form of admissions, and testimony under oath under the scrutiny of cross-examination. The court process will be able to shed light on evidence in terms of reliability and credibility.

[13] The direction included a reference to *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, concerned with ensuring procedural fairness and consistent results when similar facts and circumstances are at issue in different judicial or administrative proceedings.

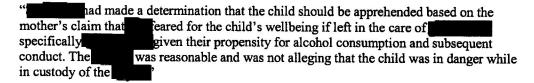
[14] was tried in the Provincial Court of British Columbia on charges of assaulting was tried in the Provincial Court of British Columbia on charges of assaulting was an obstructing with the execution of Eduties. On August 13,

2015, the trial judge delivered reasons for judgment acquitting the second on both charges.				
The trial judge found the following as fact:				
Police attended at the accused residence, in order to arrest assaulting to the couple of the victim When informed that the was not home, the police decided to proceed with apprehending the child. I am satisfied on the evidence of both and that the decision to apprehend was made in advance of the police arrival at the residence, and was without an evidence-based assessment of the health and safety of the child and based only on the expressed safety concerns about the believed and the discretion and the authority to enter the residence to take the child, and to use as much force as necessary. [emphasis added]				
••••				
After carefully considering the whole of the evidence, I am satisfied the police did indeed step into the residence before any physical response from the accused.				
[15] In support of the officer's belief that that the discretion and the authority to enter				
the residence, facts that were essential if there were to be a conviction, the Crown had relied				
on s. 27 of the CFCSA:				
27(1) A police officer may, without a court order, take charge of a child if the police officer has reasonable grounds to believe that the child's health or safety is in immediate danger.				
(2) A police officer may, without a court order and by force if necessary, enter any				
premises for the purpose of taking charge of the child under subsection (1) if				
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cannot be construed as reckless as they believed that they were acting in accordance with the law."

actions were not arbitrary, irrational or unreasonable:



[19] The Disciplinary Authority accepted the investigator's conclusion that none of the three allegations of abuse of authority could be substantiated.

Analysis

- [20] The investigator's findings and conclusions differ in material respects from those of the Provincial Court judge. In my opinion, the investigator and the Disciplinary Authority failed to appropriately construe the Provincial Court ruling and the findings of fact on which the acquittal was based, and failed to respect the directive of the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79, supra,* to avoid inconsistent results flowing from different judicial or administrative proceedings.
- [21] In C.U.P.E., the Court addressed the question of whether a person convicted of sexual assault, and dismissed from his employment as a result, could be reinstated by a labour arbitrator who concluded, on the evidence before him, that the sexual assault did not take place. The question can be revised to reflect present circumstances. Can a disciplinary authority in a *Police Act* proceeding determine that an officer acted appropriately in the execution of his duty and therefore had not abused his authority when a court of law has found the contrary as fact when acquitting an accused who is not the officer whose conduct is in question?
- [22] In C.U.P.E. the Court considered whether the grievance was a collateral attack on the conviction:

However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness

complaint process.

of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

[23] In refusing to uphold the grievance adjudicator's determination that the grievor should be reinstated, the Court found the reasoning of the Ontario Court of Appeal to be apposite:

Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. This conclusion, reached in proceedings to which the prosecution was not even a party, could only undermine the integrity of the criminal justice system. The reasonable observer would wonder how Oliver could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault. That reasonable observer would also not understand how Oliver could be found to be properly convicted of sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.

[24] The obvious material difference between present circumstances and those that prevailed in *C.U.PE* is that the individual whose conduct is presently the subject of review is not the person convicted of an offence. Nonetheless, the *C.U.P.E.* decision and the Provincial Court judgment cannot and should not be ignored. Was the accused and was acquitted. So the person complaining of police conduct including that of the trial judge found as fact that is did not have physical contact with or obstruct persone the officer entered presidence, that is did not have reasonable grounds to believe that the child was in immediate danger.

[25] Acceptance of the Disciplinary Authority's determination, derived from the investigator's findings, that an assault occurred outside the residence and that the child was in immediate danger was reasonable because of concern about sobriety, facts that the Provincial Court found had not been proved, would bring the administration of justice and into disrepute and undermine the integrity of the police

[26] In my opinion, the investigator's conclusions, and therefore the Disciplinary Authority's determination, cannot be sustained because the investigator failed to					
appropriately interpret the substance of the reasons of the Provincial Court Judge resulting					
the acquittal of and and the determination failed to apply the principles					
nunciated by the Supreme Court of Canada in C.U.P.E.					
27] It follows, therefore, that the question of whether bused his authority must					
be determined according respect for the factual findings of the trial judge. Respect for those					
findings of fact would result in the conclusion that					
foreover, the investigator's interpretation of the phrase "abuse of authority", regardless of					
ne facts, was overly restrictive. In addition, the investigator incorrectly concluded that					
should be found to have acted in good faith because believed and the right to					
nter the residence and therefore exonerated.					
The term "abuse of authority" must be considered in the context of the definition of a defined in s. 77 of the <i>Police Act</i> :					
77 (1) In this Part, "misconduct" means					
•••					
(b) conduct that constitutes					
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•••					
•••					
 (ii) a disciplinary breach of public trust described in subsection (3) of this section. (3) Subject to subsection (4), any of the conduct described in the following paragraphs 					
 (ii) a disciplinary breach of public trust described in subsection (3) of this section. (3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member: (a) "abuse of authority", which is oppressive conduct towards a member of the public, 					
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 (ii) a disciplinary breach of public trust described in subsection (3) of this section. (3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member: (a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation, (i) intentionally or recklessly making an arrest without good and sufficient cause, 					

(iii) when on duty, or off duty but in uniform, using profane, abusive or insulting language to any person including, without limitation, language that tends to demean or show disrespect to the 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;

(4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.

[emphasis added]

- [29] Abuse of authority is a disciplinary breach of public trust. While "breach of public trust" is not defined in the *Police Act*, it should be construed to reflect the public expectation that police will act in a manner that is not offensive to the public, to the policing profession generally, or to the police force of which an officer is a member.
- [30] Rather than being exhaustively defined, "abuse of authority" embraces *any* conduct that may be regarded as oppressive to a member of the public. That result flows from insertion of the words "including, without limitation" before the description of certain kinds of conduct with greater particularity. It is an error to conclude that only intentional or reckless conduct can constitute an abuse of authority.
- [31] The finding of the trial judge that was not acting in the execution of duty when entering the residence and dealing with because of the absence of reasonable grounds to believe a child was in immediate danger support the view that the allegations of abuse of authority may be substantiated. The officer's conduct was a marked and serious departure from the standard reasonably to be expected of a police officer.
- given the finding of the trial judge that still id not have reasonable grounds upon which to enter the still residence. Good faith requires more than an honest belief. The belief must be reasonable and, given the trial judge's findings, still belief was not reasonable. Similarly, it is not defence to say that the officer acted under a mistake of law. If the officer acted under a mistake of law, the mistake was not reasonable. The officer is presumed to know the law as it pertains to search, seizure, entry to a residence, arrest and apprehension of a child.

[33]	In summary, I conclude that the allegations of abuse of authority may be
subst	antiated.

Notice of Next Steps				
[34] follow		required by s. 117(8) of the <i>Police Act</i> , I hereby provide notice to		
	(a)	For the reasons set forth herein, the evidence appears sufficient to substantiate the allegation that a substantiate abused substantiate without lawful authority; when substantiate the couch; and when substantiate without lawful excuse;		
	(b)	A prehearing conference will be offered to		
	(c)	has the right pursuant to s. 119 to request permission to call, examine or cross-examine witnesses at the discipline proceeding, provided such request is submitted in writing within 10 business days following receipt of this notice of decision.		
	(d)	The range of disciplinary or corrective measures being considered include:		
		a. Reduction in rank; and		
		b. Suspension without pay for not more than 30 scheduled working days.		
[35]	Pur	suant to s. 117(8) of the <i>Police Act</i> , I hereby give notice to the complainant,		
	0	f gight pursuant to s. 113 of the Police Act to make submissions at any		
discip	oline	proceeding.		
	Dat	ed at Vancouver, British Columbia this "13 th " day of April 2016.		
		"Ian H. Pitfield"		
		Hon. Ian H. Pitfield		