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
[redacted]
OF THE [redacted] POLICE DEPARTMENT
NOTICE OF DECISION

TO: [redacted]
c/o [redacted] Police Department

AND TO: [redacted]
c/o [redacted] Police Department
Professional Standards Section

AND TO: [redacted]
c/o [redacted] Police Department
Discipline Authority

AND TO: [redacted]
c/o [redacted] Police Department
Investigator

AND TO: [redacted]
Complainant

AND TO: Mr. Stan Lowe, Police Complaint Commissioner

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 [redacted] could not be substantiated:

(a) That on August 2, 2014, [redacted] committed abuse of authority pursuant to section 77(3)(a) of the *Police Act* when officers entered and searched [redacted] home unlawfully.

(b) That on August 22, 2014, [redacted] committed abuse of authority pursuant to section 77(3)(a)(ii)A of the *Police Act* when officers pushed [redacted] to the couch; and

(c) That on August 22, 2014, [redacted] committed abuse of authority pursuant of section 77(3)(a)(i) of the *Police Act* when officers arrested [redacted] without good and sufficient cause.

[2] The Commissioner's concerns in relation to the determination are that the Disciplinary Authority disregarded the finding of the Provincial Court of British Columbia that [redacted] acted without lawful authority w[redacted]nd other officers entered the [redacted] residence, and improperly concluded that [redacted] had not abused [redacted] authority because [redacted] had acted in good faith. The Commissioner is of the view that disregard for the finding of the Provincial Court results in an abuse of process, and good faith cannot be relied upon as a defence to the officer's conduct because any belief in [redacted] mind that [redacted] had authority to act as [redacted] did was unreasonable in the circumstances.

[3] In my view, the Commissioner's concerns are well founded. In the result, I conclude that the allegations may be substantiated. As a result, a disciplinary hearing should proceed in the absence of a satisfactory disposition at a pre-hearing conference.

Background

[4] [redacted] alleges that on August 21, 2014 [redacted] common law partner, [redacted], assaulted [redacted] in the course of a domestic dispute. The couple are the biological parents of a daughter, [redacted] who was 5 years old at the time of the alleged assault.

[5] On August 22, 2014, [redacted] Police Department (the "[redacted]"). [redacted] was assigned to investigate the complaint. [redacted] met with the complainant and [redacted] on August 22, 2014. Later, in consultation with [redacted] determined that [redacted] should be found, arrested, and charged with assault, and that [redacted] who was thought to be with [redacted] should be apprehended and returned to [redacted] Police were told that [redacted]

and [redacted] were likely to be found at [redacted] home, that o[redacted] the *Police Act* complainant in this instance.

[6] [redacted] and [redacted] of the [redacted] went to the [redacted] residence on the evening of August 22, 2014 to arrest [redacted] on a charge of assault and to apprehend [redacted] so that [redacted] could be returned to [redacted] custody. [redacted] accompanied police to the [redacted] residence in a police vehicle. Police had no warrant to arrest [redacted] and no warrant to enter the [redacted] residence for the purpose of apprehending [redacted]

[7] [redacted] responded to the knock on [redacted] door. For present purposes I need not be concerned with the precise nature of the discourse between [redacted] and police, nor of the conduct of either. Suffice to say that [redacted] told [redacted] the police were there for the purpose of arresting [redacted] on a charge of domestic assault. [redacted] told police that [redacted] was out for a walk and not at the residence. Police then told [redacted] that they intended to apprehend [redacted] and to return [redacted] to [redacted] custody. [redacted] told police they could not take [redacted] with them. [redacted] tried to close the door to prevent entry to the residence, at the same time telling police they could not enter because they had no warrant. [redacted] placed a foot on the threshold of the door to prevent [redacted] from closing it. A struggle ensued between [redacted] and [redacted] [redacted]s alleged to have kicked [redacted] and to have strenuously resisted police entry to the residence.

[8] Police ultimately gained entry, apprehended [redacted] forcefully subdued [redacted], and arrested [redacted] on charges of assaulting [redacted] and obstructing [redacted] in the execution of [redacted] duty.

[9] On November 9, 2014, [redacted] was charged with two offences:

> Count 1: [redacted] on or about the 22nd day of August, 2014, at or near [redacted], in the Province of British Columbia, did assault [redacted] a peace officer engaged in the execution of that officer's duty, contrary to Section 270(1)(a) of the *Criminal Code*; and
>
> Count 2: [redacted] on or about the 22nd day of August, 2014, at or near [redacted], in the Province of British Columbia, did wilfully resist or obstruct or resist a

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

Procedural Background

[10] The [redacted] Professional Standards Section investigated [redacted] complaint to the Commissioner. A final investigation report dated April 15, 2015 set forth the investigators' conclusion that none of the allegations outlined by the Commissioner could be substantiated in respect of any of the officers who entered the [redacted] residence and arrested [redacted]

[11] The investigators concluded that the police were in "hot pursuit" of [redacted] when they entered and searched the [redacted] residence; [redacted] assaulted and obstructed an officer before police entered the residence; [redacted] had been lawfully arrested for assault and obstruction of a police officer; and the amount of force used was reasonably necessary to subdue [redacted] who was strenuously resisting police. The Disciplinary Authority accepted the investigators' determination that none of the allegations against any of the officers could be substantiated.

[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] [redacted] was tried in the Provincial Court of British Columbia on charges of assaulting [redacted] and obstructing [redacted] in the execution of [redacted] duties. On August 13,

2015, the trial judge delivered reasons for judgment acquitting [redacted] on both charges. The trial judge found the following as fact:

> Police attended at the accused [redacted] residence, in order to arrest [redacted] for assaulting [redacted] some 17 hours earlier, and to apprehend the couple's child and deliver [redacted] to [redacted] the victim [redacted] When informed that the [redacted] was not home, the police decided to proceed with apprehending the child. I am satisfied on the evidence of both [redacted] and [redacted] 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 [redacted] expressed safety concerns about the [redacted]** believed [redacted] had 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 [redacted] had 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
>
> (a) the police officer has reasonable grounds to believe that the child's health or safety is in immediate danger, and
>
> (b) a person denies the police officer access to the child.

[16] The trial judge addressed this argument saying that the baseline for apprehension of a child without a court order was reasonable grounds to believe that a child was in immediate danger. He found as a fact on the evidence that the officers did not have reasonable grounds for such a belief. The trial judge also found as a fact on the evidence that police entered the residence before any physical response from [redacted] As a result, the trial judge concluded, on the evidence before him, that police were not acting in the execution of their

duty at the time of the alleged assault or obstruction. [redacted] was acquitted. There was no appeal from the decision.

[17] The *Police Act* investigation continued in accordance with the Commissioner's direction following the acquittal of [redacted].

[18] The investigator considered the elements that define an abuse of authority using the trial judge's reasons as a guide. The investigator proceeded from the base that the issue was whether the officers "intentionally or recklessly acted without good and sufficient cause." The investigator summarized his conclusions as follows:

- The physical acts of entering the residence, applying force to arrest [redacted] and apprehending the child, demonstrate the element of intention:

  > "[redacted] and [redacted] believed that they had been assaulted and obstructed by [redacted] while they were in lawful execution of their duty to apprehend the child under the [Child and Family Care Services Act]. It is clear that [redacted] and [redacted] entered the residence with intention to arrest [redacted] for Assault P.O. and Obstruction, followed by an apprehension of the child. [redacted] and [redacted] intentionally applied force to facilitate the arrest of [redacted]."

- To act recklessly, an officer has to have known that their actions were wrong and chosen to continue to act:

  > "The Courts found that [redacted] believed [redacted] had the authority under Sec 27 of the *CFCSA* to apprehend the child and to use force if necessary....
  >
  > [The investigator] believes that there is an abundance of evidence to show that [redacted] and the officers under [redacted] command believed that they were acting in accordance the law; there is no evidence to suggest that the officers knowingly chose to act contrary to the law. Additionally, had the Court concluded that the child was in immediate danger and not just in need of protection as suggested, the officers would have been acting in lawful execution of their duty when they entered the residence to arrest [redacted] for Obstruction and Assault P.O."

- To substantiate an abuse of authority, an officer must be shown to have acted without good and sufficient cause. Case law has clearly defined good and sufficient cause as good faith; did the officers have an honest belief?:

  > "In acceptance of the Court's position, it would appear that [redacted] and [redacted] made a mistake of law.... [The investigator] believes that the actions of the respondent officers

> cannot be construed as reckless as they believed that they were acting in accordance with the law."

- [redacted]actions were not arbitrary, irrational or unreasonable:

> "[redacted]had made a determination that the child should be apprehended based on the mother's claim that [redacted]feared for the child's wellbeing if left in the care of [redacted] specifically [redacted]given their propensity for alcohol consumption and subsequent conduct. The [redacted]was reasonable and was not alleging that the child was in danger while in custody of the [redacted]"

[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

> 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.P.E* 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. [redacted] was the accused and was acquitted. [redacted] s the person complaining of police conduct including that of [redacted] The trial judge found as fact that [redacted] id not have physical contact with or obstruct [redacted] before the officer entered [redacted] residence, that [redacted] had no lawful authority to enter the residence, and that [redacted] id 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 [redacted] belief that the child was in immediate danger was reasonable because of concern about [redacted] 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 complaint process.

[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 in the acquittal of [redacted] and the determination failed to apply the principles enunciated by the Supreme Court of Canada in *C.U.P.E.*

[27] It follows, therefore, that the question of whether [redacted] abused 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 [redacted] had abused [redacted] authority. Moreover, the investigator's interpretation of the phrase "abuse of authority", regardless of the facts, was overly restrictive. In addition, the investigator incorrectly concluded that [redacted] should be found to have acted in good faith because [redacted] believed [redacted] had the right to enter the [redacted] residence and therefore exonerated.

[28] The term "abuse of authority" must be considered in the context of the definition of misconduct" as that term is defined in s. 77 of the *Police Act*:

> 77 (1) In this Part, "misconduct" means
>
> ...
>
> (b) conduct that constitutes
>
> ...
>
> (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,
>
> (ii) in the performance, or purported performance, of duties, intentionally or recklessly
>
> (A) using unnecessary force on any person, or
>
> (B) detaining or searching any person without good and sufficient cause, or

> (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 [redacted] was not acting in the execution of [redacted] duty when entering the residence and dealing with [redacted] 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.

[32] [redacted] cannot say that [redacted] acted in good faith and should therefore be exonerated given the finding of the trial judge that [redacted] did not have reasonable grounds upon which to enter the [redacted] residence. Good faith requires more than an honest belief. The belief must be reasonable and, given the trial judge's findings, [redacted] 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 substantiated.

Notice of Next Steps

[34] As required by s. 117(8) of the *Police Act*, I hereby provide notice to [redacted] as follows:

(a) For the reasons set forth herein, the evidence appears sufficient to substantiate the allegation that [redacted] abused [redacted] authority when [redacted] entered the [redacted] residence without lawful authority; when [redacted] pushed [redacted] to the couch; and when [redacted] arrested [redacted] without lawful excuse;

(b) A prehearing conference will be offered to [redacted]

(c) [redacted] 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] Pursuant to s. 117(8) of the *Police Act*, I hereby give notice to the complainant, [redacted], of [redacted] right pursuant to s. 113 of the *Police Act* to make submissions at any discipline proceeding.

Dated at Vancouver, British Columbia this "13th" day of April 2016.

"Ian H. Pitfield"

Hon. Ian H. Pitfield