

**In the matter of the Public Hearing into  
The complaint against Constable Jason Howell and  
Constable John Gibbons of the Vancouver Police Department**

**NOTICE OF ADJUDICATOR'S DECISION**

To: Constable 2399 John Gibbons, Vancouver Police Department

And to: Constable 2516 Jason Howell, Vancouver Police Department

And to: Chief Constable Jim Chu, Vancouver Police Department

And to: Superintendent Jeff Sim, Vancouver Police Department

And to: Mr. Stan T. Lowe, Police Complaint Commissioner

And to: Mr. Joseph M. Doyle, Public Hearing Counsel

And to: Mr. M. Kevin Woodall, Counsel for Constables Gibbons and Howell

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**I. INTRODUCTION:**

Constable John Gibbons is alleged to have committed the following disciplinary defaults, contrary to section 77 of the *Police Act*:

- a. **Abuse of Authority:** contrary to section 77(3)(a)(ii)(A) of the *Police Act* – intentionally or recklessly used unnecessary force on Mr. James Feng;
- b. **Abuse of Authority:** contrary to section 77(3)(a)(ii)(B) of the *Police Act* – intentionally or recklessly searched Mr. James Feng without good and sufficient cause; and

- c. **Damage to the Property of Others:** contrary to section 77(3)(e)(i) of the *Police Act* – when on duty, or off duty but in uniform, intentionally or recklessly damaged the vehicle being driven by Mr. James Feng.

Constable Jason Howell is alleged to have committed the following disciplinary defaults, contrary to section 77 of the *Police Act*:

- a. **Abuse of Authority:** contrary to section 77(3)(a)(ii)(A) of the *Police Act* – intentionally or recklessly used unnecessary force on Mr. James Feng; and
- b. **Abuse of Authority:** contrary to section 77(3)(a)(ii)(B) of the *Police Act* – intentionally or recklessly searched Mr. James Feng without good and sufficient cause.

During submissions in this matter, Commission Counsel suggested and Mr. Woodall agreed, that there was insufficient evidence on either allegation against Constable Howell to require him to answer to the delicts alleged. I agree with Counsel and therefore I dismiss the two allegations against Constable Howell.

On the same basis, I dismiss allegation b. against Constable Gibbons.

## II. **FACTS:**

Constables Howell and Gibbons were on traffic duty just before 6:00 P.M. on June 22, 2012 (a busy Friday) in the area of King Edward Avenue and Knight Street in the City of Vancouver.

Mr. James Feng, driving his father's older model BMW, came to the attention of the officers. They observed him to be a young, Asian male. They questioned the vehicle he was driving on their computer, and they were informed that the vehicle was associated with a prohibited driver. The officers decided to make a traffic stop to investigate the

possibility that the driver was prohibited. To do this, they drove behind the Feng vehicle with their emergency lights activated, and they also probably “chirped” their siren.

Mr. Feng says that he was unaware of the police vehicle, but stopped because the vehicle in front of him had stopped at a red light. After Mr. Feng stopped, the officers immediately got out of their vehicle and approached the BMW, Constable Howell at the driver’s door, and Constable Gibbons on the passenger side.

Both officers loudly ordered Mr. Feng to roll down the windows of his vehicle. Mr. Feng appeared to ignore the officers’ commands. He stared ahead and then picked up a cell phone, but replaced it on the console. Otherwise, he did not respond. The BMW’s motor was running and the vehicle appeared to Constable Howell to be in gear.

The incident which next occurred transpired within the 40 second span of the red light. Constable Gibbons says he was concerned that the driver of the BMW might attempt to flee the scene. He therefore opened his baton and brandished it in the window at Mr. Feng, who continued to ignore the officer. With his baton, Constable Gibbons then smashed out the passenger side window of Mr. Feng’s vehicle, unlocked the passenger door, opened it, and partially entered the vehicle to disable the driver.

Constable Gibbons punched Mr. Feng in the side of the head three times with considerable force. When asked how hard he hit him, Constable Gibbons testified “9.5 out of 10”. The first blow was significant, as the officer broke his hand. Constable Gibbons testified that the second and third blows were less forceful because his hand was fractured. The force of the blow split Mr. Feng’s scalp in a 3 cm. cut. Constable Gibbons then turned off the vehicle and unlocked the driver’s side door. Mr. Feng was then removed, arrested and searched. His wallet was examined, even though he objected.

In dealing with this matter, it is accepted that:

- i) On the date in question, Mr. James Feng was a prohibited driver; and

- ii) Mr. Feng was carrying false identity papers, and attempted to identify himself as his brother, who was not a prohibited driver.

### **III. ISSUES IN THIS MATTER:**

1. Was the vehicle stop reasonable?

In my view, the officers had reasonable grounds to make a traffic stop to investigate the Feng vehicle. They had received sufficient information from their computer search to conclude the driver might be prohibited. Good and sufficient cause existed to detain the driver for investigative purposes.

2. Was the arrest and search made with good and sufficient cause?

Both officers were involved in the handcuffing and search of Mr. Feng. His actions, in obstructing the police officers in the execution of their duties, made it inevitable that he would be arrested and searched. In my view, the arrest and search were justified.

3. Did Constable Gibbons have sufficient grounds to smash the window of the car, in light of Mr. Feng's passive resistance to the the officer's commands that he provide access to the vehicle?

Constable Gibbons says that he gave Mr. Feng a clear warning of his intention to break the window. Mr. Feng failed to respond and appeared to ignore him. In Constable Gibbons' mind, that refusal amounted to an obstruction of a police officer in the execution of his duty, and therefore justified the arrest of Mr. Feng.

Constable Gibbons says he was concerned that the driver was contemplating putting the car in motion, contrary to his command. He therefore chose to enter the vehicle by smashing out the passenger side window.

Although this action is probably not uncommon in similar situations, neither Counsel has been able to find case law that might be of assistance to me. Vehicles are constructed to be difficult to enter if the windows are rolled up and the vehicle is locked. One needs think only of examples where a pet is left in an overheated car, and it becomes necessary to smash the window to rescue the animal.

A confirmatory piece of evidence that Mr. Feng did not intend to allow access to the vehicle is contained in the triage assessment notes made by hospital staff at the time he was examined in the hospital. It appears that Mr. Feng “refused to open door”.

In my view, breaking the window seems somewhat excessive. However, the law requires that I not measure the conduct of the officer against a standard of perfection. As well, there appeared to be no other means of access to the vehicle. As pointed out by Counsel for the police officers:

*It is both unreasonable and unrealistic to impose an obligation on the police to employ only the **least** amount of force which **might** successfully achieve their objective. To do so would result in unnecessary danger to themselves and others.*

Therefore, I find that Constable Gibbons did not intentionally or recklessly, without good and sufficient cause, damage the vehicle being driven by Mr. Feng.

4. Did Officer Gibbons intentionally or recklessly use unnecessary force on Mr. Feng?

It is clear Constable Gibbons intentionally used force on Mr. Feng. He entered the vehicle by breaking the window and immediately struck Mr. Feng several times on the

head. The officer says he struck Mr. Feng on the head because it was the only target he had. He contended the strike (or strikes) were intended “to stun” Mr. Feng so that the officers could gain control of the situation. Constable Gibbons said the situation he wanted to control was the possibility that Mr. Feng, a suspected prohibited driver, might attempt to flee. With the Vancouver City Police policy of non-pursuit of a fleeing vehicle, the officer believed that Feng’s potential flight could have created a grievously dangerous situation for those in the immediate area. In my view, considering the traffic congestion in the area on a busy Friday evening at 6:00 P.M., this seems a rather far fetched supposition. In addition, the officers knew the address of the registered owner of the BMW and had sufficient contact with James Feng to identify him as the driver of the vehicle on the day in question.

Constable Gibbons says that when he entered the vehicle, Mr. Feng had his fists up beside his face, in a defensive posture. Mr. Doyle, Commission Counsel, contends that Mr. Feng’s hands were in that position to protect himself from flying glass. A photograph after the window was broken shows the vehicle to be full of glass shards. When examined at the hospital, Mr. Feng was found to have glass in his hair.

To quote Constable Gibbons – “once I realized the punches were ineffective, I reached up under him and turned the ignition off, and then I reached across him and unlocked the door for Constable Howell”.

As mentioned above, it is clear Constable Gibbons intentionally used force on Mr. Feng. The issue to me is whether *any* force was necessary. A number of options were available to the officer when he entered the vehicle:

- a. Constable Gibbons could have attempted to communicate verbally with Mr. Feng. First, it was important to determine whether Mr. Feng spoke English and was able to comprehend the commands of the officers. Second, it was important to determine whether Mr. Feng was

incapacitated because of fear, and was now willing to obey the commands from the officers.

- b. Constable Gibbons could have put the vehicle out of gear. The gear shift is located on the console and the officer needed just to push the gear shift lever forward.
- c. Constable Gibbons could have turned the vehicle off.

It appears to me that a combination of either b. or c., followed by a, would have been the most logical sequence of events and would have obviated the necessity of striking Mr. Feng.

Mr. Doyle, Commission Counsel, points out that after the window was smashed, Mr. Feng no longer had his hands on the steering wheel. Doyle notes that by striking Mr. Feng with his fist, Constable Gibbons created an extremely dangerous situation, both for the constable and his partner, and for persons who might have been hit if the constable's actions had resulted in the vehicle spurting ahead.

In his testimony, Constable Gibbons states that his use of force was intentional, with the purpose of stunning Mr. Feng. His first blow was so severe that he fractured his own hand. He then proceeded to strike Mr. Feng two more times on the side of the head.

The issues I must assess are whether the constable's decision to use force was reasonable, and if so, whether the amount of force used was reasonable.

In my view, the situation did not require the use of any force by the officer. After the window was smashed, Mr. Feng had not responded in a manner that threatened, but rather in a defensive "turtled up" posture. He appeared to be submissive and non-aggressive.

In all of the circumstances of this matter, I find that the force used by Constable Gibbons was excessive, unnecessary, and unreasonable.

**IV. CONCLUSION:**

The disciplinary default under section 77(3)(a)(ii)(A), that Officer Gibbons intentionally or recklessly used unnecessary force on Mr. Feng is made out, and I so find.

As Adjudicator in this matter, I exercise my discretion to invite the participants to make written submissions by August 25, 2014, under section 126(i) of the *Police Act*, regarding corrective and disciplinary measures. If this date is not convenient for Counsel, please contact the Registrar with a mutually acceptable date.

Dated at Victoria, British Columbia, on August 12, 2014.



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Alan E. Filmer, Q.C.

Adjudicator