

**IN THE MATTER OF THE POLICE ACT, RSBC 1996,
c. 367 (as amended)**

**AND IN THE MATTER OF THE
PUBLIC HEARING INTO THE COMPLAINT AGAINST
CONSTABLE DUNCAN GEMMELL
and
CONSTABLE GABRIEL KOJIMA
OF THE VANCOUVER POLICE DEPARTMENT**

Adjudicator D.L. Clancy, Q.C.

Appearances:

D. Urban, Q.C., Commission Counsel
D. Butcher, Counsel for Constable Gemmell
D. Crossin, Q.C., Counsel for Constable Kojima
G. Somjen, Counsel for Vancouver Police Union
G. Macintosh, Q.C. and D. McWhinnie, Counsel for Vancouver Police
Department
P. Rankin, Counsel for the Complainants

Hearing Dates:

April 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 27, 29, May 2, 3, 4, 5, 6, 9,
10, 11, 12, 13, 16, 30, 31, June 1, 2005

DECISION

PART ONE

Introduction:

Constable Duncan Gemmell and Constable Gabriel Kojima (the Respondents) are members of the Vancouver Police Department (the VPD), currently under suspension without pay. They were on duty in the late hours of January 13, 2003 and the early morning hours of January 14, 2003. During that shift, the Respondents and four other officers were involved in the arrest of and subsequent assaults upon Grant Wilson, Barry Lawrie and Jason Desjardins (the Complainants). Constable Gemmell filed a General Occurrence Report on the incident.

As a result of their actions, all of the officers were charged with and pleaded guilty to three charges of assault, one upon each of the Complainants. Additionally, discipline proceedings within the VPD were brought against them. All officers admitted the disciplinary default of abuse of authority for the assaults and the further disciplinary default of discreditable conduct for their overall conduct. Constable Gemmell admitted the disciplinary default of deceit for filing a false, misleading and inaccurate General Occurrence Report.

On January 28th, 2004 Chief Constable Jamie Graham recommended the dismissal of both Respondents from the VPD. He imposed further sanctions in respect of all of the officers.

As they were entitled to do, the Respondents requested a public hearing pursuant to Section 60(1)(a) of the *Police Act*, RSBC 1996, c. 367 (the Act). Dirk Ryneveld, Q.C., the Police Complaint Commissioner arranged for this hearing to take place. In carefully considered reasons delivered in support of his decision to arrange a public hearing, Mr. Ryneveld noted that the Respondents were entitled as of right to a hearing but, in deciding not to order a public hearing in respect of the conduct of the other four officers, he went on to consider the public interest. He said:

What concerns me most on behalf of the public is the fact that this incident appears to be a pre-meditated act, (not an assault committed in the heat of battle) executed with a vigilante mob mentality by those very persons sworn to uphold the law and protect the public. Not only did they commit the act (as evidenced by their guilty pleas) but they planned the means to escape detection and ultimate punishment...the credibility and honesty of police officers is an issue that goes to the very heart of the administration of justice in general and the criminal justice system in particular.

Whether he was correct in his understanding of the factual background is an issue before me. His assessment that the credibility and honesty of police officers engages the public interest cannot be doubted. An informed public understands that police officers may make honest mistakes just as any other witness might, but citizens have a right to expect, indeed to demand, that officers will testify honestly when they are under oath.

The Issues

My duties as Adjudicator are found in Section 61(6) of the Act which provides:

61(6) The adjudicator must decide whether each alleged discipline default respecting the complaint has been proved on the civil standard of proof and may do one or more of the following:

(a) find that all, part or none of the alleged discipline default has

been proved on the civil standard of proof;

(b) impose any disciplinary or corrective measures that may be imposed by a discipline authority;

(c) affirm, increase or reduce the disciplinary or corrective measures proposed by the discipline authority.

As can be seen, the process is divided into two parts. I must first consider whether the discipline defaults have been proved on the civil standard of proof. If proof of the discipline defaults is found, I must then consider whether to go on to impose disciplinary or corrective measures and affirm, increase or reduce the measures proposed by Chief Constable Graham.

At the request of counsel, I agreed to separate the hearing into two parts. That discipline defaults were committed is not in issue. Both of the Respondents admitted the discipline defaults of abuse of authority and discreditable conduct. Constable Gemmell admitted the discipline default of deceit. Apart from those admissions, the evidence establishes that the defaults occurred. The specifics of the abuse of authority, the discreditable conduct and the deceit are very much in issue. This part of the decision involves a determination of those specific issues and the effect of the commission of the defaults on others, including any injuries suffered by the Complainants.

Burden of Proof:

Counsel for the Commissioner has conceded that as Commission counsel, he bears the responsibility of presenting "the case relative to the alleged discipline defaults" (Section 61(2) of the Act).

Standard of Proof:

The standard of proof is not proof of the discipline defaults on the criminal standard of proof beyond a reasonable doubt. Section 61(6) of the Act provides for proof on the civil standard. The accepted civil standard is proof on a balance of probabilities but I agree with counsel that something more than the bare balance of probabilities is required in circumstances such as these where the careers of two police officers are in jeopardy.

In ***Regina v. Oakes***, 24 C.C.C. (3rd) 325 (S.C.C.), Dickson, C.J.C. adopted the following passage from the judgment of Lord Denning in ***Bater v. Bater***, [1950] 2 All E.R. 458 at p. 459 (C.A.):

The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will

naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

I think it fair to characterize this public hearing as a disciplinary hearing. That phrase has been applied to the proceedings before the Chief Constable but, as I held during the Case Management Conference, I am not sitting in review of the Chief Constable's decision. He did not hear evidence under oath. Similarly, the facts placed before the Provincial Court Judge were agreed upon by counsel. No sworn evidence was heard. The first opportunity to hear evidence under oath has occurred before me. Section 61(6) of the Act requires a consideration of disciplinary or corrective measures.

In those circumstances, I find it appropriate to adopt the standard enunciated in ***Jory v. College of Physicians and Surgeons of British Columbia***, [1985] B.C.J. No. 320 (S.C.) at p. 3:

The authorities establish that the case against a professional person on a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence: *Regina v. Discipline Committee of the College of Physicians and Surgeons of the Province of Saskatchewan, Ex parte sen* (1969), 6 D.L.R. (3d) 520 (C.A.). The evidence must be sufficiently cogent to make it safe to uphold the findings with all the consequences for the professional person's career and status in the community: *Hirt v. College of Physicians and Surgeons of B.C.*, supra at p. 206.

Affirmed: ***Doctor Q. v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226 (S.C.C.).

What is required is a fair and reasonable preponderance of credible evidence which establishes on a balance of probabilities the case against the officers.

Background:

The events giving rise to the criminal charges and the allegations of disciplinary defaults occurred during the early morning hours of January 14, 2003. An Agreed Statement of Facts was filed at the hearing, a statement dated February 27, 2003 was prepared and signed by all of the officers and a Statement of Agreed Facts was filed in Provincial Court in November 2003. From those documents, the truth of which is admitted, and from testimony which I accept, I find the following summary of events to have been proved.

In addition to the Respondents, the officers on duty were Constable Jagroop

Cheema, Constable James Kenney, Constable Raymond Gardner, Constable Brandon Steele, Constable Christopher Cronmiller, Constable Troy Peters and Constable Sean Barry. Constable Cheema was serving as Acting Sergeant. Constable Barry was on duty elsewhere within the district and was not involved in the incidents.

All of the constables were members of Team Four, District One. Among its duties, Team Four was responsible for policing in the Granville Mall section of Granville Street which is in a high-crime downtown area known as the Entertainment District. In that district, it was well known that drugs, particularly marihuana, crystal meth and crack cocaine could be purchased.

Grant Wilson was a known drug dealer and drug addict who frequented the area. He was a chronic property-crime offender, known to be violent and to become agitated.

Similarly, Barry Lawrie was known as a crack cocaine addict who committed criminal acts, primarily selling drugs. He also was known to do property crimes, to get into fights and become involved in confrontations with the police.

Jason Desjardins was less well known to the police. His reputation was as a property crime offender and drug addict.

At approximately 3:30 a.m. on January 14th, 2003, in the 1100 block of Granville Street (in the mall area), Acting Sergeant Cheema investigated the Complainant, Grant Wilson, for possession of drugs. Present were Constables Gardner and Gemmell. Mr. Wilson resisted but with the assistance of Constable Gardner and Constable Gemmell, a search was conducted. Mr. Wilson was found to be in possession of a quantity of low-grade marihuana. He was arrested, detained and transported out of the 1100 block of Granville Street to the area of Main and Hastings Streets where he was released.

In transporting Mr. Wilson out of the Granville Mall area, Acting Sergeant Cheema was purporting to act under the authority of what is commonly referred to as the "breach policy" of the VPD. That policy allows an officer to arrest a person for a breach or anticipated breach of the peace. When an officer acts under the breach policy, he or she must advise an NCO or person in supervisory authority. The NCO then decides whether,

"the person arrested is to be incarcerated or removed from the area and released in order to prevent an occurrence, continuation or renewal of a Breach of the Peace." (Regulations and Procedure Manual: Arrest/Confinement, 2.03)

There has been recent criticism of the breach policy of the VPD but I am not concerned with that criticism. It is not disputed that the officers were authorized

to employ the breach policy in January 2003.

At approximately 4:00 a.m., Acting Sergeant Cheema left the shift and Constable Kenney took over as Acting Sergeant.

At about 4:30 a.m., Wilson had returned to the area and Constables Gemmell and Gardner observed Wilson, Lawrie and Desjardins in the company of one Shannon Pritchard in the 1100 block Granville Street. After asking for assistance on the police radio, Constable Gardner, assisted by Constable Gemmell, arrested the four suspected offenders. Shortly after, they were joined at the scene by Constables Steele, Kojima and Cronmiller. Following that, Acting Sergeant Kenney and Peters arrived. After discussion, Acting Sergeant Kenney approved breaching the four individuals out of the area to Stanley Park, a wooded area on the outskirts of downtown Vancouver. They were placed in the police wagon and transported to the park. All of the constables present at the scene followed the wagon to the park. Constable Gemmell was with Constable Gardner, Constable Kojima was with Constable Cronmiller and Acting Sergeant Kenney was with Constable Peters. Constable Steele drove the wagon.

On the way to the park, Ms. Pritchard was released near the Sylvia Hotel which is close to the entrance to Stanley Park. The officers continued on into the park.

Once inside the park, the vehicles all stopped. After discussion, they proceeded to Third Beach. Constable Kojima led the way to Third Beach with floodlights and emergency lights illuminated. He was obliged to travel the wrong way on Stanley Park Road which, at that location, is a one-way thoroughfare. Constable Kojima missed the turn into the Third Beach parking lot with the result that Constable Steele, followed by the other police vehicles, drove to the lot first. Constable Kojima followed.

One civilian vehicle was parked in the Third Beach lot. Constable Kojima and Constable Cronmiller spoke to the occupants and that vehicle left, after which Kojima and Cronmiller joined the other officers who had parked in a location adjacent to a grassy area. All of the officers got out of their vehicles.

The events which followed give rise to the criminal charges and the alleged discipline defaults related to the assaults on the Complainants. I will deal later with the specific circumstances.

After releasing the prisoners at Third Beach, the officers involved returned to the VPD station at Cambie Street at approximately 5:30 a.m. There they met in a debriefing session and discussed the happenings of that morning. Constable Gemmell either volunteered or was given the duty, along with Constable Gardner, of filing a General Occurrence Report.

VPD policy requires that whenever a person is arrested for an apprehended or

witnessed breach of the peace, the arresting member must submit a detailed General Occurrence Report. That report must contain the reasons and authority for the arrest, the name of the authorizing NCO and "disposition of the arrested party (i.e. lodged in jail or removed to a specifically named location)".

Constable Gemmell prepared and submitted the General Occurrence Report during his next shift which began that same evening.

Constable Troy Peters brought the conduct of the six officers involved to the attention of the Vancouver Police Union and, through the Union, to the Internal Investigations Section of the VPD.

In due course, formal complaints were submitted by counsel on behalf of Mr. Wilson, Mr. Lawrie, Mr. Desjardins and Ms. Pritchard.

During the hearing, counsel for the Respondents initially did not admit the defaults. Quite properly, they waited to hear the evidence before making that admission but, having heard the evidence, all of the defaults alleged against them were admitted by Constable Gemmell and Constable Kojima. In argument, counsel confirmed that those admissions were to be accepted.

Provincial Court Proceedings

The guilty pleas of all six constables to charges that they assaulted Mr. Wilson, Mr. Lawrie and Mr. Desjardins were entered on November 25, 2003. On January 5, 2004, the officers were sentenced.

Cst. Gemmell was given a 60-day Conditional Sentence on all three counts, the sentences to run concurrently, followed by a six-month probation period.

Constable Kojima was given a 30-day Conditional Sentence on all three counts, the sentences to run concurrently, followed by a six-month probation period.

Constable Gardner received a suspended sentence with nine months probation and fifty hours of community service.

Constable Steele received a suspended sentence and six months probation.

Constable Cronmiller received a conditional discharge with six months probation and 30 hours of community service.

Constable Kenney received an absolute discharge without conditions.

The Discipline Hearing

Chief Constable Graham presided over the Discipline Hearing acting as a Discipline Authority under the Act. The hearing commenced January 15, 2004. In reply to Chief Constable Graham's reading of the five disciplinary defaults alleged, the following admissions were entered:

- 1) Constables Kenney, Gardner, Gemmell, Steele, Kojima and Cronmiller admitted Count 1: Abuse of Authority for the assault of Barry Lawrie;
- 2) Constables Kenney, Gardner, Gemmell, Steele, Kojima and Cronmiller admitted Count 2: Abuse of Authority for the assault of Grant Wilson;
- 3) Constables Kenney, Gardner, Gemmell, Steele, Kojima and Cronmiller admitted Count 3: Abuse of Authority for the assault of Jason Desjardins;
- 4) Constables Kenney, Gardner, Gemmell, Steele, Kojima and Cronmiller admitted Count 4: Discreditable Conduct for their overall conduct; and
- 5) Constable Gemmell admitted Count 5: Deceit for filing a false and misleading General Occurrence Report.

After considering submissions heard and written materials submitted by counsel on behalf of the respondent officers, Chief Constable Jamie Graham imposed discipline on January 28, 2004:

Chief Constable Graham recommended dismissal for Constable Gemmell in respect of Counts 1 and 5. On Counts 2, 3 and 4 he was reduced in rank, suspended without pay and required to work under supervision for one year.

On Counts 1 and 3, Constable Kojima was reduced in rank, suspended without pay and required to work under supervision for one year. On Counts 2 and 4, Chief Constable Graham recommended dismissal.

The other officers were all suspended without pay, reduced in rank and required to work under supervision for a period of time.

It is from the recommendations that they be dismissed that the Respondents allege that they are aggrieved by the decision of the Chief Constable. In Constable Gemmell's case, the principal concerns involve the inappropriate breaching of the Complainants, the assaults in Stanley Park, his overall conduct

and his filing of a false, misleading and inaccurate General Occurrence Report. The concerns over the conduct of Constable Kojima involve his alleged behaviour throughout the incident. The defaults alleged include the assaults, the inappropriate breaching of the Complainants, his improper use of the police baton and threats and inappropriate comments allegedly made by him.

In brief, the Respondents state that their conduct does not warrant the disciplinary or corrective measure of dismissal.

I should make it clear that I have not seen the decision of the Chief Constable. Except for excerpts from his decision included in the decision of Mr. Ryneveld and his conclusions as to the appropriate corrective measures, I do not know the contents. I am obliged to reach independent conclusions as to what occurred. At this stage, it would be inappropriate for me to consider the reasons of the Chief Constable for reaching his decisions.

I am satisfied further that I am obliged to consider the circumstances relating to all of the allegations of misconduct against all of the officers and not just those allegations which form the basis for the dismissal of the Respondents. Both Constable Gemmell and Constable Kojima have admitted the disciplinary default of discreditable conduct for their overall conduct. To consider that conduct in context requires a review of all of the circumstances. Before undertaking a review of the circumstances, I wish to deal with the question of credibility.

Credibility

In his decision to arrange this hearing, Mr. Ryneveld expressed concern over the lack of opportunity to test the evidence relied upon by the Provincial Court Judge and by Chief Constable Graham. In neither situation was evidence given under oath, tested by cross-examination. I have now had that opportunity and now face the unpleasant task of assessing the credibility of the officers, the Complainants and Ms. Pritchard.

Before me, Constable Gemmell and Constable Kojima both admitted all of the discipline defaults alleged against them. The Respondents do not therefore dispute that their conduct was discreditable. They did not do so. Constable Gemmell said he was not proud of himself. He described the room at the debriefing as being very quiet. After the shift, he went home but couldn't sleep and developed a migraine headache. He did disagree with the characterization of the officers' conduct as repugnant and disgusting.

Constable Kojima admitted he was part of a group of officers who should not have acted as they did. He described the mood at the debriefing as sombre. He agreed he should have stopped the events at Stanley Park but said he was one of a group.

The other officers used similar language to describe the mood at the debriefing.

Constable Cronmiller said that what had happened was horrible.

Acting Sergeant Kenney apologized to Constable Peters in the car and to Constable Peters and Constable Cronmiller at the debriefing.

In the car as they drove from the police station to Stanley Park, Constable Peters said Acting Sergeant Kenney apologized for putting him "in that position." He told him that he could be honest with him as to what he thought, that it wasn't his style, but it was the style of the other guys and that he had to work with them in a day-to-day function. That conversation was prompted by Constable Peters saying that he was not happy with the position he had been put in, that he did not want any part of it, that he was not involved.

In his testimony, Acting Sergeant Kenney recalled his apology. He remembered saying that he knew how Constable Peters felt and went on to say that when he was in Block 2, his field trainer had done something that made him feel very uncomfortable.

There appears to be no reason for Acting Sergeant Kenney making that apology unless he knew that Constable Peters had observed the prisoners being assaulted.

From the foregoing alone, it is apparent that something serious happened in Stanley Park yet it is fair to say that, with the exception of Constable Peters, the officers described a relatively minor series of events. That description is not believable. If it were accurate, there would be no reason for a sombre mood, apologies or a description of the events as horrible.

Generally, the officers said the assaults involved little force with virtually no harm resulting to any of the Complainants. Threats allegedly directed toward Mr. Wilson by Constable Kojima were denied as were unprofessional comments allegedly made by him. Constable Gemmell testified that his filing of a false General Occurrence Report resulted from a mistake he made and from the fact that he was following the orders of Acting Sergeant Kenney. Their testimony requires careful scrutiny.

No notes were taken by any of those officers. A truthful account of events includes a reasonably detailed recounting of what actually occurred. The evidence makes it clear that all officers are trained to take notes of important events. That would be particularly so where the events are criminal in nature as was the case here. Acting Sergeant Kenney had advised at the debriefing that the events should not be disclosed to others without first consulting with the members of Team Four. He allegedly said that to avoid rumours circulating about the events of that morning. Some of the officers indicated that they took that to be an order that they were to record none of the events. That seems unlikely. Constable Gemmell conceded that this was not a simple breach of the

peace and I so find. It involved criminal conduct on the part of the officers. I have no doubt that had the circumstances not involved police officers, careful notes would have been taken.

On the evidence, I cannot find that there was a specific agreement reached whereby the officers would not record the events. The only reasonable conclusion however is that the officers either collectively or individually made the decision that they would not do so.

The exception to that finding is Constable Peters. Two days after the events and after consulting with his father, he prepared a summary of what he had observed on a computer at his home. That was done during the evening of January 16 and the early morning hours of January 17, 2003. His notes were the only reasonably contemporaneous notes available. The fact that he was able to refresh his memory from his notes gives added weight to his testimony.

The officers did consult with counsel when the complaints were lodged. Presumably they gave accounts of the events to counsel. There is no evidence however that any of the officers took advantage of the opportunity to refresh their memory before this hearing by referring to those accounts. They also gave statements to the Internal Investigations Section but that was not done until March 2005, some time after the events.

The omissions and contradictions in the evidence of the officers cannot be excused by the passage of time. In excess of two years had gone by from the day of the events to the various dates on which the officers testified. If notes had been taken in January 2003 and referred to, the important particulars would have been available. Minor discrepancies are inevitable but here the discrepancies were anything but minor. The officers concede that they were well aware that the assaults which occurred were criminal in nature. It was therefore important to keep proper notes of the important events.

Even without notes, one would expect that the events of January 14, 2003 would have been highly significant in the minds of all officers. They knew very soon after they occurred that their actions would be considered by the authorities and by the court. They must have known that their evidence in this hearing would be carefully scrutinized. Discrepancies are therefore unlikely to be the result of carelessness. Where there are serious conflicts, that is far more likely the result of a deliberate intention to mislead.

A meeting was held among the officers to discuss the complaints. That was done shortly after an order forbidding them to meet was rescinded. Commission counsel contended that the evidence of all of the officers is tainted by their participation in that meeting. Without knowing what was said, that conclusion seems harsh. It was only natural for the officers to meet and discuss their course of action in dealing with the complaints that had been made. It is certainly true

that the opportunity was there for agreeing upon a strategy to defend themselves but the evidence before me does not support a conclusion that some dishonourable agreement was reached. I find that the fact the meeting was held does not taint the evidence of all of the officers. That conclusion does not assist them greatly.

I recognize that it is hard to tell unpleasant truths about colleagues who are also friends. The evidence was that the officers socialized outside of working hours and formed friendships. In such circumstances, there is undoubtedly a desire to put the best possible interpretation on what a witness or participant observes. That too seems a likely explanation for the lack of recall of details.

Self interest is another matter to be considered. Each of the six officers involved had an interest in minimizing the seriousness of the events and his participation in them. That is particularly true of Constable Gemmell and Constable Kojima who seek reinstatement, but findings of involvement greater than previously admitted could have an adverse effect on the careers of the other officers as well.

Once again the exception to the concern about self interest is Constable Peters. He had nothing to gain in coming forward other than a clear conscience. He may well have made mistakes but it is difficult to see how his testimony could have been motivated by self interest.

I do not suggest that the evidence of the officers should be disregarded. Because of the guilty pleas and admission made, the officers were obliged to admit some of the events which occurred. There were, as well, descriptions of some events which I have accepted. The question is whether relevant evidence has been withheld either deliberately or through a failure of memory. If the latter is true, it is due to carelessness which cannot be excused. If so, the officers should not be surprised if adverse findings are made.

I do not accept the officers' version of the events. The evidence of the six officers disciplined, without exception, was self-serving and unsatisfactory. Memories ranged from poor to non-existent and the recollection of events that the officers did have was frequently contradictory. I will deal with specific instances later in these reasons.

My discussion of credibility has dealt with the officers generally. I will make specific findings as to the credibility of individual officers as I review the evidence.

As to the Complainants and Ms. Pritchard, I find that it would be dangerous to rely heavily on their recollection of events. They took no notes although they did give statements to the Internal Investigations Section in January 2003. Each of them admitted taking drugs before the events of January 14, 2003. Given their lifestyle, there is a probability they were under the influence of drugs when they

gave statements as well. Without exception, they were addicted to drugs of various kinds and Mr. Wilson, Mr. Lawrie and Mr. Desjardins had extensive criminal records. Mr. Wilson admitted to 83 prior criminal convictions up to 2003 and further convictions for breaches of probation in 2004 and 2005. Mr. Lawrie admitted that he had been convicted of approximately 28 previous offences. Mr. Desjardins admitted 36 prior convictions.

I was also advised that Ms. Pritchard and the Complainants have commenced actions for damages against the officers. The element of self interest cannot be ignored.

The testimony of Ms. Pritchard was particularly unreliable. She admitted her recollection of the events was "foggy". She contradicted herself and contradicted a previous statement she gave, on numerous occasions. At the time she gave her previous statement, she said she may have been on drugs, "I usually was."

That is not to say I reject the evidence of the Complainants and Ms. Pritchard in its entirety. Where their testimony is supported by and consistent with evidence I accept, it has evidentiary value. It is also worth noting that Mr. Wilson and Mr. Desjardins were not anxious to give evidence. They were brought to the hearing in custody. To some extent that militates against finding that they were deliberately fabricating their accounts of the events.

Where I have relied on the evidence of the Complainants and Ms. Pritchard, I have tried to exercise extreme caution.

I turn now to the disciplinary defaults alleged.

The Discipline Defaults

The Police Act Code of Professional Conduct

The term "disciplinary default" is defined in the *Police Act Code of Professional Conduct Regulation* BC Reg. 205/98 deposited June 11, 1998, O.C. 725/98 effective July 1, 1998 (the Code). The relevant portions of Section 4(1) of the Code provide:

Disciplinary defaults

4(1) In this Code, "disciplinary default" means:

- (a) discreditable conduct,
- (c) deceit,
- (f) abuse of authority.

- (j) conduct constituting an offence,
- (k) being a party to a disciplinary default.

Section 15 of the Code provides:

Party to a disciplinary default

15 For the purposes of Section 4(1)(k), a police officer commits the disciplinary default of being a party to a disciplinary default if the police officer aids, abets, counsels or is an accessory after the fact to a disciplinary default under this Code.

The mental element of a disciplinary default is described in Section 17 of the Code:

Mental element of disciplinary default

17 Unless otherwise specified in this Code, a police officer commits a disciplinary default if the police officer intentionally or recklessly committed the act or omission constituting the disciplinary default.

I will consider the provisions of the Code relating to specific defaults in context when dealing with each alleged disciplinary default.

Abuse of Authority

Section 10 of the Code provides:

Abuse of authority

10 For the purposes of Section 4(1)(f), a police officer commits the disciplinary default of abuse of authority if the police officer

- (a) without good and sufficient cause arrests, detains or searches a person,
- (b) uses unnecessary force on a person,
- (c) while on duty, is discourteous or uncivil or uses profane, abusive or insulting language to a person including, without limitation, language that tends to demean or show disrespect to a 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.

The discipline default of Abuse of Authority therefore includes the arrest, detention or search of a person without good and sufficient cause and the use of unnecessary force on a person. The section goes on to include discourtesy or uncivil, profane, abusive or insulting language. It might be possible to include an alleged threat to Mr. Wilson by Constable Kojima and unprofessional comments made by him under that subsection but it seems to me they fall more comfortably within the discipline default of discreditable conduct. I propose to deal with them under that heading. In considering Abuse of Authority, I will deal only with Sections 10(a) and (b).

The events of January 14, 2003 involving abuse of authority occurred at two locations. I will deal with them separately.

Granville Street

The arrest, detention and search of the Complainants was initiated on Granville Street. The Complainants described assaults which occurred at that time. It is unnecessary to go into detail since I am not satisfied that their evidence is sufficiently reliable to find that those assaults occurred. They were denied or not observed by all of the officers present, there is no corroboration, the descriptions of events differ factually and, even if the fact of the assaults could be accepted, there is no reliable identification of the officer or officers who perpetrated the assaults. Not all of the officers were present throughout the incident. I find that the alleged assaults on the Complainants on Granville Street have not been proven. There is no credible body of evidence establishing the use of unnecessary force at that time. Some force was used but police officers are authorized to use reasonable force during an arrest.

As to whether there was good and sufficient cause for the arrest, detention and searching of the individuals, I have some concerns. The justification for the arrests and breaching consisted primarily of the verbal exchanges between Wilson and Lawrie which the officers say they believed would result in a physical confrontation if they did not intervene. Constable Gardner conceded that he drew his weapon and said he did so because he was concerned for his safety. Sergeant Robinson, an officer of some twenty-one years experience, described Mr. Wilson as often violent and agitated but in dealing with him said he had never been concerned for his own safety. He felt that he could calm him down. On the other hand, Constable Gardner and Constable Gemmell knew Mr. Wilson to have multiple criminal convictions and to have a reputation as a violent person. Similarly, they knew Lawrie to be a criminal drug addict who was involved frequently in confrontations. That too is supported by the evidence of Sergeant Robinson. Both officers also knew that Mr. Wilson had been breached earlier at which time he had been confrontational to the point where Constable Gemmell described the need to physically restrain him.

Constable Gardner admitted that he had kicked Mr. Wilson in the thigh but said that occurred when Mr. Wilson refused to go down when ordered to do so.

Police officers, particularly in the Granville Mall area, are frequently involved in dangerous and potentially violent situations. They have a right to expect the support of authority when carrying out their duties. In the absence of persuasive evidence, it would be wrong for me to substitute my opinion for that of the officers. There is no credible evidentiary basis for a finding that good and sufficient cause for the arrest, detention and search of Mr. Wilson and Mr. Lawrie did not exist.

It is in respect of the arrests of Mr. Desjardins and Ms. Pritchard that I express concern. There is some slight evidence that Mr. Desjardins was argumentative but the degree to which he may have contributed to any potentially violent behaviour fell far short of a valid reason for his arrest. Ms. Pritchard did nothing overt to persuade the officers that she should be arrested. Constable Gemmill conceded that, on reflection, he would not have arrested either Mr. Desjardins or Ms. Pritchard.

There was a suggestion that Mr. Desjardins was believed to be involved in the trafficking of drugs shortly before his arrest. There was some evidence adduced to support that contention but that evidence is irrelevant except possibly to show criminal activity. The breach policy of the VPD did not apply to substantive drug charges. It was also suggested that the officers were concerned that Mr. Desjardins might join in a breach of the peace, that is, the probable fight between Wilson and Lawrie. The evidence does not support that suggestion.

The justification for the arrest and breach of Mr. Desjardins and Ms. Pritchard can therefore only be found in their association with Mr. Lawrie and Mr. Wilson. While criticism of that justification is warranted, once again I would not interfere with the discretion exercised by the police officers. All four individuals were involved to some extent. It cannot be said that Mr. Desjardins and Ms. Pritchard were simply spectators. They, on their own evidence, were there in association with Mr. Wilson and Mr. Lawrie. No evidence was led to contradict Constable Gardner's testimony that if persons are associated in an enterprise, all are breached. If that is so, there was justification for deciding to breach all four persons and not just Wilson and Lawrie.

The breach policy of the VPD permits a breach where the disturbance or threat of a disturbance is "serious enough to cause a reasonable belief that, if the police do not intervene, a more serious problem will result, such as an assault or mischief."

The reasonable belief must be in the mind of the officer and it is that belief with which I will not interfere. That finding relates only to the arrest and not to the

conduct of the officers as they acted pursuant to the breach policy.

Breach policy also provides that the police "have a duty of care to ensure that police actions do not endanger the well-being of the person being released." The evidence makes it abundantly clear that the officers failed to meet that obligation. They assaulted the Complainants.

The policy also requires that, when determining when and where the person or persons are released, the authorizing NCO must consider vulnerability which may be present due to such matters as lack of money and release location. The offenders had no money and that was known to the police. I am satisfied that the release location chosen was inappropriate. The policy could not have contemplated release in a deserted, remote area such as the Third Beach parking lot.

I conclude that the breach policy then in place was not followed. It was the responsibility of the NCO in charge to authorize a breach and to consider the location of the release point for the prisoners. There is no doubt that Constable Gardner and Acting Sergeant Kenney were involved in the decision to breach the Complainants to Stanley Park but the evidence as to who else was involved is contradictory and I find that I am unable to decide who else participated in the decision. That is not a matter of great concern.

Acting Sergeant Kenney authorized the breach to Stanley Park. That decision can be criticized but of itself seems to comply with policy. The only limitation on the location to which prisoners could be breached was the city limits of the City of Vancouver. The decision to release the prisoners at the Third Beach parking lot was not made by Acting Sergeant Kenney. According to the officers present, the location was suggested by Constables Cronmiller, Steele and Kojima and all of the officers went there. All were equally responsible for the selection of Third Beach for the release of the Complainants. They were not following the orders of Acting Sergeant Kenney.

I find that the Third Beach parking lot location was outside any reasonable interpretation of the policy. All of the officers participated in breaching the Complainants to that location. Constable Gemmell and Constable Kojima participated in the transport and release of the prisoners. I find that they failed to follow the breach policy in place. The breach policy of the VPD was not followed. All officers involved must share responsibility.

The breach policy did not authorize the officers to act as they did. In the absence of that validation of their actions, there was no authority for the continuing detention of the Complainants. The disciplinary default of abuse of authority under Section 10(a) of the Code has been proven.

Constable Gemmell and Constable Kojima were personally involved in the

continuing detention of the prisoners.

In participating as they did, both Constable Kojima and Constable Gemmell acted intentionally. They have not suggested otherwise. The mental element of the disciplinary default has been made out.

For the reasons given, I find that the breaching of the Complainants to Third Beach in Stanley Park was not conducted in accordance with policy. Their continued detention was without good and sufficient cause. The assaults were committed without any justification. The discipline default of abuse of authority has been proven.

The further allegations of abuse of authority involve the assaults which took place in Stanley Park.

Stanley Park

The most serious allegations involve the assaults. Much of the evidence against Constable Gemmell and Constable Kojima comes from Constable Peters. It is appropriate therefore to consider his credibility before proceeding further. I earlier mentioned that he could not have been motivated by self interest. That does not mean that he could not be mistaken in describing what he saw and heard. His powers of recollection have been criticized in a number of ways by counsel for the Respondents.

The first criticism made is that Constable Peters refused to admit the possibility that he was wrong about any of his recollections unless he was confronted with objective proof of error. There is some substance to that criticism. He did wrongly identify Constable Gemmell as the author of a radio broadcast and clung to that identification until the broadcast was played back for him. At that time, he admitted that the voice was that of Constable Gardner.

Constable Peters further testified that after dropping off Ms. Pritchard near the Sylvia Hotel, the police wagon made a second stop just past the entrance to Stanley Park near the lawn bowling facility. He refused to allow for the possibility that he was wrong about the location of the stop. I am satisfied from the evidence of all of the other officers that the stop was made near the Second Beach parking lot. They would have no reason to be untruthful about that location. I find it probable that Constable Peters was in error.

Constable Peters also said that the headlights of some of the vehicles were on in the parking lot. All of the other officers testified that they were off. Constable Peters would not allow for the possibility that the lights were not on. There is some support for Constable Peters. Barry Lawrie stated that he was positive that the vehicles had their headlights on and that two had their parking lights on. Because of my concern about the credibility of Mr. Lawrie, I do not accept his

recollection. The bulk of the evidence was that it was very dark that night but that a number of flashlights were illuminating the scene. Constable Peters' recall may not be correct in stating that the headlights were on. I find there is insufficient credible evidence to support his recollection.

As to the flashlights, Constable Peters insisted throughout that Constable Kojima was the only officer who had his flashlight illuminated and that he was the officer who shone his flashlight into the faces of the Complainants as they were released. The admissions of other officers, who described how their flashlights were turned on, is sufficient to persuade me that I should not accept the evidence of Constable Peters. The other officers had no reason to be untruthful in their evidence in this area. Their evidence generally was that it was very dark when the prisoners were released. It would have been to their advantage to minimize the number of flashlights illuminated.

Constable Peters is also said to be wrong as to his evidence about lighting at the parking lot at Third Beach. He said there was light from the sky and at one point referred to the sun starting to come up. It has been established that sunrise that morning was at 0802 hours so he was in error about that part of his evidence. I am unable to say he was wrong about light generally. Other officers apparently had no difficulty observing where the Complainants went after their release. Mr. DelAngel, a civilian witness who saw the Complainants shortly after they were released, referred to a moon shadow or a little bit of light of the moon. I would not comment adversely on the evidence of Constable Peters. He may have been mistaken about the source of illumination but I am satisfied there was sufficient light to allow observation of events.

Other criticisms of Constable Peters relate to conflicts in the evidence and not to his refusal to consider the possibility that he was wrong. Where I have found him to be in error, those errors do not persuade me that the rest of the evidence of Constable Peters should be considered suspect because of them. None are related directly to his ability to see and describe what occurred.

There are two examples of Constable Peters agreeing to a change in his testimony when confronted with contradictions. Those examples seem to refute the suggestions that he is the type of officer who will cling to a decision even in the face of contrary evidence. During evidence in chief, Constable Peters said he had seen officers kick Mr. Lawrie. On cross-examination, he said he was certain he had seen kicking. On further cross-examination and questioning by myself, he changed his position and said he did not recall him being kicked.

When describing the release of Mr. Wilson, Constable Peters agreed that he had earlier described how he had been kicked by each officer at least five times. He conceded he had not seen those kicks. He said that he had a "feeling" that he was being kicked because he heard Mr. Wilson making exclamations of pain and asking the officers to stop.

The willingness of Constable Peters to admit these errors demonstrates that he did not blindly cling to mistaken testimony.

There is however one area where I am not persuaded that Constable Peters was right about a damaging allegation. He testified that Constable Gemmell had struck a blow to the back left kidney area of Mr. Lawrie. A supplemental Statement of Agreed Facts was filed which documents the recollection of Tanya Dupuis who is now the wife of Constable Peters. The agreed facts relate to a conversation she had with Constable Peters. In her statement to Sergeant Bezanson of the Internal Investigations Section dated January 27, 2003, she stated that Constable Peters had told her that the second male taken from the police wagon was struck in the kidney area by an officer. Mr. Lawrie was the first male released.

On cross-examination, Constable Peters said he could not recall what he said to Ms. Dupuis. He suggested that she could be mistaken. That could be so. In his notes of January 17, 2003, Constable Peters recorded that it was the first prisoner who was struck in the kidney area. He did not identify Constable Gemmell as the officer who struck the blow. Constable Gemmell denied that he had done so.

Given the evidence of Ms. Dupuis, I conclude it would be unsafe to find that Constable Gemmell had struck Mr. Lawrie in the kidney area.

I do not find that the uncertainty in this area is determinative of Constable Peters' credibility. It does show he may have made a mistake. That demonstrates the need for caution in considering his evidence but does not persuade me to disregard his description of events. On the contrary, I found Constable Peters to be a truthful witness who did his best to recall events accurately. He had absolutely no reason to fabricate or exaggerate.

The Assault on Mr. Lawrie

When discussing credibility, I have made adverse findings in respect of the officers other than Constable Peters. In doing so, I referred to contradictions and a degree of forgetfulness which I've found to be consistent with an understanding among the officers that as little as possible would be said. A review of some of the evidence illustrates those contradictions and lack of recall.

I also found Constable Peters to be a credible witness. Those parts of his evidence which I accept are important to reaching my conclusions and I will set them out below.

The first person to be released from the police wagon and assaulted was Barry Lawrie. Constable Peters described how Constables Kojima, Cronmiller,

Gardner, Gemmell and Steele congregated behind the wagon. He was instructed by Acting Sergeant Kenney to stand back and watch. He positioned himself approximately 20 feet from the rear of the wagon. Acting Sergeant Kenney was in the same general area. Constable Steele released Mr. Lawrie and led him to the rear of the wagon. He was facing outwards towards a semi-circle of police officers. Constable Gardner then began to lecture Mr. Lawrie. He described Constable Gardner telling Mr. Lawrie that "He's a piece of shit, he's in the middle of nowhere. Nobody knows who he is. Nobody knows where he is. People on Granville Street are tired of drug dealers... and that it's time for alternative measures." He spoke in a loud tone of voice. Lawrie had his hands up to cover his face. He was not assaultive.

The officers began to deliver a flurry of punches. They were delivered in a short, swift forward motion. Constable Gemmell and Constable Kojima joined in to deliver punches. Lawrie continuously asked the officers to stop.

After he was released, Constable Peters observed Mr. Lawrie to be holding his torso and limping.

Constable Peters testified that Constable Gardner then approached him and asked if he was "all right with what I saw". He then said that Constable Peters could go and sit in the police cruiser and no one would take offence.

Constable Gardner agreed that he had delivered a lecture and used language which was colourful and unsavoury. He said Constable Gemmell poked Lawrie in the chest area twice with his index finger in the manner of a schoolteacher disciplining a child.

He then described how Lawrie was pushed by Constables Cronmiller, Steele and Kojima, from one to the other and then sent on his way. He saw no punches, kicks or elbows.

He then agreed he spoke to Constable Peters. He did that because Constable Peters was a recruit and therefore vulnerable. It is reasonable to ask why he asked the question when all he had observed was two taps with an index finger and some pushing.

Constable Gemmell agreed that he had poked Lawrie twice in the chest with his index finger. He did that because Lawrie was not paying attention. He said that Constable Cronmiller gave Lawrie a double-handed shove in the back, that Constable Steele had pushed him as well and then he was sent on his way.

He testified that Constable Gardner's lectures were inappropriate. He felt there was no need to threaten anyone and that it was neither the police nor the criminals but the citizens of Vancouver who own the streets of Vancouver.

Constable Steele said that in addition to Constable Gardner's lecture, Constable Gemmell gave Lawrie a tongue-lashing and emphasized that by poking him in the chest. He admitted giving Lawrie a shove and said that Constable Kojima had also shoved him. He saw no conduct which would cause any injuries. He did not believe any other officer had pushed Mr. Lawrie.

Constable Cronmiller said he saw Constable Gemmell use his elbow to nudge Mr. Lawrie in his mid-torso from behind as he told him to pay attention. He said that Constable Gemmell had his hands inside his pockets and moved his arms. On cross-examination, he alleged that he may have been confused.

He said that he saw Lawrie pushed by Constables Gardner, Kojima, Steele and Gemmell. He is the only officer who testified that he saw Mr. Lawrie go to the ground. He denied that he had pushed Mr. Lawrie.

Constable Kojima testified said that someone to Mr. Lawrie's left had shoved him but he did not see who it was although logically it had to be Constable Steele. Lawrie was pushed towards Constable Cronmiller who then pushed him towards Kojima. Constable Kojima acknowledged that he had given him a shove after blocking him with both hands.

Acting Sergeant Kenney saw only one contact with Lawrie and that was a push as if the officer was making distance between them. He saw and heard nothing else. He did not see or hear Constable Gardner speak with Constable Peters.

Mr. Lawrie described in great detail how he was threatened, punched, kicked and pushed in circles. Because of my concerns over his credibility, I do not accept Mr. Lawrie's recollection of the specifics of the assault.

I do accept that he had limped when leaving the area because he had lost a shoe. It has not been established that he limped because of injuries received.

Mr. Desjardins saw Mr. Lawrie after both had been released. He described how Mr. Lawrie was holding his rib area. I see no reason to reject his evidence as to that observation. The testimony of Constable Peters is corroborative.

In the documentary evidence, the officers describe what was called a "minor assault". It is conceded that Mr. Lawrie was berated, that Constable Gemmell poked Lawrie with his index finger several times in the right upper-chest area and that Constables Steele and Kojima both shoved Lawrie. The officers then admit only to a poking of Mr. Lawrie by Constable Gemmell with his index finger and some minor pushing and shoving.

The contradictions in the evidence of the officers are obvious. Constable Gardner saw the pokes by Constable Gemmell. Constable Gemmell agreed that he had poked Mr. Lawrie and described pushes only by Constable Cronmiller

and Constable Steele. Constable Steele admitted shoving Mr. Lawrie.

Constable Cronmiller denied any shoving by himself. He saw Constable Gemmell nudge Mr. Lawrie from behind and pushing by Constables Gardner, Kojima, Steele and Gemmell. He saw Lawrie on the ground. Constable Kojima saw someone shove Mr. Lawrie towards Constable Cronmiller. He then agreed he and Constable Cronmiller both pushed Mr. Lawrie. Acting Sergeant Kenney saw nothing of any substance.

The documentary evidence describes only a minor assault.

I found the evidence of all of the officers to be unsatisfactory. They saw only pokes and some shoving which could not possibly have caused injury to Mr. Lawrie. The contradictions and the gaps in their memory are supportive of my conclusions as to their credibility.

In the circumstances and for the reasons given in the discussions of credibility, I accept the evidence of Constable Peters as to the flurry of punches delivered by the officers. I find it likely that Constables Gemmell and Kojima joined in the assault personally. At the very least, they were parties to the assault as described in Section 15 of the Code.

I conclude that the admitted assault of Mr. Lawrie was more severe than suggested by the officers. Their evidence was unhelpful for the most part. Whether that was from a lack of proper preparation or part of an understanding that as little as possible would be said is hard to determine.

I do not find however that Mr. Lawrie was severely beaten. I cannot accept his evidence that he was knocked to the ground, kicked and punched. He is contradicted in that evidence by Constable Peters and all of the other officers. Something did happen to him, the particulars of which other than those I have described are not of great importance. The significant conclusion is that he was struck and roughly treated by the officers causing injury to his rib area.

The Assault on Mr. Desjardins

Constable Peters described how, following his release from the wagon, Mr. Desjardins was lectured by Constable Gardner in similar terms to the lecture delivered to Mr. Lawrie. When the lecture stopped, Constable Peters said Constable Kojima deployed his police baton and, at that point, the officers launched a flurry of punches which Constable Peters described as being similar to those inflicted on Mr. Lawrie. He could not estimate the force with which they were delivered. He said that everyone except Constable Kojima, himself and Acting Sergeant Kenney punched Mr. Desjardins.

After being struck, Mr. Desjardins fell to the ground on his back. He brought his

knees to his chest and covered his face. The officers then began to kick him all over his body. All of the officers kicked him except for himself and Acting Sergeant Kenney. The kicks were directed to his torso and lower extremities. Mr. Desjardins asked them to stop. Constable Peters had no doubt that the kicks had connected.

Constable Peters described how Constable Kojima stepped on Mr. Desjardins' left collarbone area and moved his head from side to side with his right foot. He then alternated sides. He described the action as being like a child trying to control a soccer ball with his feet. On cross-examination, he agreed that the force of Kojima's alleged kicks were "a tap". He acknowledged that he could not say there was enough force to cause Desjardins' head to move.

Constable Kojima saw Constable Gemmell punch Mr. Desjardins in the torso after which Constable Cronmiller pushed him back to the rear of the wagon where he was shoved again by Constable Gardner and Constable Gardner's lecture began. He deployed his baton and did so to emphasize the point Constable Gardner was making. He had been taught that it was appropriate to use the baton as a compliance tool and it was in that spirit that he deployed it. He later agreed that the use of the baton to enforce an order to stay away from Granville Street was inappropriate and showed poor judgment.

He agreed that when Constable Gardner asked Desjardins who owned Granville Street and received no response, he tapped him with the baton on the inside of his right thigh above the knee and asked him if he was paying attention. That explanation cannot be accepted. At that time, Mr. Desjardins had been punched in the stomach and pushed by two officers. It is not credible to suggest that he was not paying attention.

Constable Kojima denied that anybody had kicked Mr. Desjardins. He denied that he was ever on the ground, he did not stand on his shoulder and he denied that he had been injured.

Constable Steele saw little. He did not see Constable Gemmell punch Desjardins in the stomach nor did he see him fall down. He did not see Constable Kojima deploy his baton. He did not hear Desjardins ask the officers to stop. He only conceded that Mr. Desjardins was given a shove or possibly a punch and that he had seen Constable Kojima with his baton. He heard it being collapsed after Mr. Desjardins was released.

Constable Cronmiller saw Constable Kojima take out his baton and use it on Desjardins' left leg with a flick of the wrist. He agreed that he had previously said that Constable Gardner had grabbed Mr. Desjardins' ear but could not remember that at the hearing. He saw Desjardins pushed between two officers forward and backward and side to side. He could not recall Desjardins being on the ground. He did not see Constable Gemmell punch Desjardins.

Constable Gardner said that because of the tone which had been set with Mr. Lawrie, he anticipated an assault on Desjardins was likely. He saw the punch to the stomach of Mr. Desjardins by Constable Gemmell. He said that was with a closed fist. Constable Gardner then pushed him forcefully with both hands. He saw Constables Cronmiller, Steele, Kojima and Gemmell all push him after that.

He saw Constable Kojima give a little tap to Mr. Desjardins' leg from a distance of about one foot.

He denied that Desjardins had gone down, he saw no punches or kicks, he did not see Constable Kojima stand on his collarbone, he denied twisting Desjardins' ear.

He was certain that Constable Kojima had collapsed his baton after Desjardins was released.

Acting Sergeant Kenney saw little. He saw no contact between the officers and Desjardins nor did he see the baton being used. He did not hear it deployed or retracted. He explained his lack of observation by saying he turned away periodically to check on Mr. Lawrie. That explanation seems unlikely especially if the only illumination came from flashlights.

Constable Gemmell agreed that he had punched Mr. Desjardins. He described that as simply a reaction to Mr. Desjardins coming toward him as he came out of the wagon. He saw Constable Cronmiller and Gardner both push him. He heard Constable Kojima deploy his baton and saw him "clip" Desjardins on the knee with a flick of the wrist. He saw no other punches.

Constable Gemmell agreed that it would be improper to use the baton to enforce an order to return to Granville Street.

Mr. Desjardins described a relatively serious assault with a punch to the stomach and the strike with the baton. He also said he was kicked in the collarbone area and his hair and ear were twisted. Given his lifestyle, I find that the photographic evidence introduced is not persuasive. I did not find Mr. Desjardins a particularly credible witness.

He agreed that he had only advised Sergeant Bezanson of the Internal Investigations Section of one punch, one blow with a nightstick and some poking and pushing.

Counsel for both Respondents contend that the evidence of Mr. Desjardins should be accepted. The only assaults were the punch from Constable Gemmell, pushes from Constable Cronmiller and Constable Gardner and the "clip" by Constable Kojima's baton. They described as contentious the evidence

that he was kicked once and tapped on the head with the baton. They asked that Constable Peters' description of a flurry of punches, followed by Desjardins being kicked repeatedly while on the ground should be rejected as being inaccurate and utterly incapable of belief.

I find it strange that counsel place so much emphasis on the evidence of Mr. Desjardins. He is and was an acknowledged drug addict. He had consumed drugs that evening. It was apparent that he had continued his lifestyle following the events of January 14, 2003. At the hearing, he was very emotional. There were long silences between his descriptions of events. He accused counsel of confusing him. He rocked back and forth as he testified. He stated that he was getting all mixed up.

The inconsistencies in the evidence of the officers are again obvious. That is particularly true of their inability to recall what had occurred. All of the officers denied seeing anything other than Constable Gemmell's punch, a tap or clip with his baton by Constable Kojima and some pushing. They all denied that Desjardins had gone to the ground.

There was no sensible reason for Constable Kojima to deploy his baton. Even he does not suggest that his explanation that he used it as a compliance tool is acceptable.

All of the officers denied seeing anything other than Constable Gemmell's punch and some pushing. They all denied that Desjardins had gone to the ground.

The evidence of Constable Peters contains too much detail to accept the lack of recollection of the officers. It seems inconceivable that Constable Peters would give such a vivid description of the assault if he had not seen it. I find that Mr. Desjardins was assaulted with a flurry of punches from everyone except Constable Kojima, Acting Sergeant Kenney and Constable Peters. I am satisfied that he must have gone to the ground at which point the officers all began to kick him. The exceptions to that are Constable Peters and Acting Sergeant Kenney.

I find further that Constable Kojima did step on Mr. Desjardins' collarbone area and moved his head from side to side with his foot. There was obviously little force involved in that assault.

From the evidence of Constable Gemmell alone, it is clear that he punched Mr. Desjardins in the stomach. Constable Kojima also admitted tapping him with the baton.

I have accepted the evidence of Constable Peters as opposed to the brief description given by the officers. As was the case with Mr. Lawrie, I do not accept the denials and the description of the assault given by the officers. Their lack of recall can only be attributed to either an understanding that as little as

possible would be said or a lack of memory attributable to a failure to carry out their duties as police officers in recording the events.

Of all the officers present, Acting Sergeant Kenney had perhaps the best opportunity to observe events. To believe that he saw so little strains credulity. That view is supported by his apologies later in the evening and his desire to keep the events secret. If so little of significance occurred, his subsequent behaviour is inexplicable.

I attach little weight to the testimony of Mr. Desjardins but to some extent his description is consistent with the evidence of Constable Peters, although it lacks much of the detail given by the constable.

I find that the assault on Mr. Desjardins was not minor or simply technical in nature as suggested. He was punched, pushed and struck with a baton. I accept the evidence of Constable Peters that he was also kicked. There is no evidence that he was badly beaten in the sense that serious injuries were inflicted but I conclude that he was assaulted with some considerable force. His description of pain in his chest and stomach following the assaults is probably accurate.

The Assault on Mr. Wilson

In the Agreed Statement of Facts provided to the Provincial Court at the time of sentencing, it was admitted that Constable Cronmiller pushed Wilson, that he was berated and punched by Constable Steele, that he was shoved by Constable Gardner and was grabbed or pulled by Constable Kojima. Constable Kojima also prodded him with the instep of his boot. As a result of the incident, it was acknowledged that Wilson received three minor abrasions to his forehead.

Constable Peters testified that before Mr. Wilson was released from the police wagon, Acting Sergeant Kenney said to him words to the effect of "You may want to take a walk during this one, it will be the worst or the ugliest of the three". Constable Peters said that his reaction was one of disbelief and shock.

As Mr. Wilson got out of the wagon, Constable Peters did not see him stumble and fall. He said he first heard Constable Gardner lecture Mr. Wilson. This lecture was slightly different from the others. The constable said, "Wilson, you wouldn't listen, you've got no regard for police authority, it's time to learn a lesson."

Constable Peters followed Acting Sergeant Kenney's advice and walked away in the direction of the police vehicle. As he did so, he looked over his shoulder and saw Constable Kojima strike Mr. Wilson in the left thigh area with his baton. He was not sure of the force used but said that Mr. Wilson fell to the ground. After

that, Mr. Wilson was out of his view but he did hear him make sounds of distress and call out "please stop".

He said he heard Constable Steele yell "Who owns Granville Street?" He leaned on the hood of his vehicle with his head in his hands. He was disgusted by what he had seen and felt ashamed to be wearing the uniform. He continued to hear yelling and Mr. Wilson calling for the police to stop.

He saw Wilson walk away from the officers. He was holding his torso and limping.

Constable Steele said Mr. Wilson stumbled as he got out of the wagon. He fell forward onto the ground and popped up immediately. He had his hands in front of himself and this cushioned his fall. He did not see or hear his head hit the ground.

Mr. Wilson got up and Constable Cronmiller pushed him. Constable Steele then punched him in the stomach with his fist and Mr. Wilson fell to the ground a second time. He said there probably were other punches but could not identify the officer who had punched.

After Wilson went to the ground, Constable Kojima nudged him with his foot in the shoulder or arm area. He did not kick or punch him.

He denied that Wilson collapsed after being struck with a baton.

Acting Sergeant Kenney ordered the officers "get him out of here" after which Wilson swore at them. Constable Steele observed a "small trickle of blood" coming from Wilson's forehead as he got to his feet.

Constable Cronmiller thought something might happen. He did not see Wilson fall. As Wilson came towards him, he reacted by pushing Wilson with both hands as hard as he could. He retreated to the grassy verge and did not strike Mr. Wilson again.

He did not see Constable Steele punch Mr. Wilson but he did see Constable Kojima poke him in the torso along the ribs with the end of his baton. He recalled a couple of pokes and said they were not love-taps although there was not a lot of force.

He too saw blood on Mr. Wilson's forehead when he got up from the ground.

Constable Gardner denied any discussion as to assaulting Mr. Wilson before he was released but agreed that he expected him to be assaulted. He saw Mr. Wilson fall forward as he was released and assumed that he had hit his head on the ground. It was apparent that he had seen no such thing.

He agreed that he and Constables Cronmiller, Steele and Kojima all pushed Mr. Wilson. He was sure that Constable Gemmell did not participate.

He was certain that Constable Kojima had retracted his baton after Desjardins had been released. He was equally certain that the baton was not put away after Mr. Wilson was released. That evidence contradicts the testimony of Constable Kojima and, to some extent, the testimony of Acting Sergeant Kenney.

Constable Gardner saw no punches or kicks directed at Mr. Wilson. He did not see him go down a second time. As he left, Mr. Wilson held his hand to his head but he was not limping.

There was no chat among the officers as had been planned.

He described the conduct of the police officers as regretful and agreed that they had acted like thugs and bullies. I took that evidence to apply to all of the assaults. It seems a strange description for the minimal force he described.

Constable Gardner also raised the concept of zero tolerance. To him that meant officers used any means to get the job done. If that could not be done through proper means, you may have to work around it. He did not suggest that illegal means were approved and that is contrary to the evidence of Sergeant Robinson who said that the philosophy of zero tolerance is applied in context. Special attention is paid to chronic offenders; there is no tolerance for them but that does not apply to others.

An interesting sidelight was raised in Constable Gardner's evidence. He said that Sergeant Robinson had told him and Constable Gemmell that they could do breaches without getting approval from him. They only had to advise him at the end of a shift as to how many breaches he supposedly had authorized. That evidence was supported by Constable Gemmell although he said that the instruction had been given by Sergeant Robinson at the time of the parade of an oncoming shift and that everyone on Team Four would have heard it. Constable Kojima confirmed that he was aware of the instruction. It is interesting that the only persons who confirmed the instructions were the witnesses who followed Constable Gardner. Sergeant Robinson was called and he categorically denied that he had ever given any such instruction.

Counsel did not raise this issue during argument and I am reluctant to resolve it without hearing from the officers who were present at the parade. I find it unnecessary to decide the issue. It is irrelevant except on the question of credibility. I am satisfied there is sufficient evidence on which I can decide the question of credibility without reference to this issue.

Acting Sergeant Kenney said that he went along to Stanley Park to have an informal debriefing before returning to the station. I find that explanation from Acting Sergeant Kenney and from the other officers who put it forward to be highly unlikely. Sergeant Robinson and Acting Sergeant Cheema both said that debriefing was done at the station when a shift was completed. Debriefings may also have taken place over coffee at the end of a shift but to suggest that it would have taken place in a deserted parking lot in Stanley Park defies common sense. I also note that no debriefing took place. I find that the officers who suggested the explanation including Acting Sergeant Kenney and Constable Gardner were untruthful. Similarly, I do not accept the evidence of Constable Kojima that he went to Third Beach simply to keep Constable Steele company.

Acting Sergeant Kenney agreed that he had told Constable Peters that he might wish to take a walk. He explained that comment by reference to Wilson's history of violence with other officers. He said he thought he might react badly with the police. He denied any knowledge of the likelihood that Wilson would be assaulted. I find it far more likely that even if there was no specific agreement to assault Mr. Wilson, there was an intent to intimidate him. Given the treatment accorded Mr. Lawrie and Mr. Desjardins, I find that Acting Sergeant Kenney expected Mr. Wilson to be assaulted, as had Constable Gardner.

After checking on Constable Peters, he said he heard a yell. He looked back and saw Wilson on the ground on his back. He said the yell could have been a cry of pain. Constable Steele was bent over Wilson's head and torso. On direct examination, he said that Constable Kojima was standing to Grant Wilson's left-hand side with the extended baton in his hand. He said that was the first time he had realized that the baton was out.

On cross-examination, he changed his evidence to say that when he turned back and observed Mr. Wilson on his back on the ground, he did not see the baton at that point.

He said that he then turned away to look at Constable Peters once more and when he looked back, that was when he saw Constable Kojima with his baton in his left hand. He could not recall hearing it collapse after that. Counsel for Constable Kojima suggests that the evidence is consistent with Constable Kojima having removed the baton from his belt in preparation for collapsing it.

Acting Sergeant Kenney was perhaps the most unsatisfactory witness among the officers. He saw very little and here altered the evidence he did give. His evidence on direct examination is consistent with the testimony of Constable Peters who said that he had seen Constable Kojima strike Mr. Wilson with his baton. Constable Cronmiller and Constable Gemmell also said they saw the baton used. I do not accept the evidence of Acting Sergeant Kenney as to the time he saw Constable Kojima with the baton in his hand.

I find that Acting Sergeant Kenney could not possibly have had so little memory of the events. His testimony is only consistent with an attempt to say as little as possible about what had occurred.

When Mr. Wilson rose to his feet, Acting Sergeant Kenney said he saw a mark on his forehead which he described as a black smudge above the eye.

As Wilson walked away, he saw no limp, no hand to his ribs nor a hand to his head.

Constable Gemmell said that when he saw Mr. Wilson released, he tripped and fell and struck his face on the pavement. He later changed that evidence to say that he had not seen Wilson's head strike the ground.

He too saw a mark on Wilson's forehead. He described it as being dark and triangular.

If the evidence of marks on Mr. Wilson's forehead was put forward to suggest that a prior injury could explain the blood observed by Constable Steele and Constable Cronmiller and the injuries documented by Doctor Kassen, I reject that suggestion. Constable Cheema made no mention of the injury prior to consulting with counsel in the Spring of 2005. Neither Constable Gemmell nor Acting Sergeant Kenney mentioned it in prior statements. The evidence before me is only consistent with the injury to Mr. Wilson's forehead occurring while he was being assaulted by the officers. That was admitted in the Provincial Court Statement of Agreed Facts.

Constable Gemmell said he climbed onto the rear bumper of the wagon and from there he observed Constable Cronmiller push Wilson who went back down to the ground. He saw Constable Kojima "clip" Wilson with his baton on his leg with a flick of the wrist. He thought the blow was to the right leg above the ankle. That is consistent with photographic evidence which shows that on January 23, 2003, Mr. Wilson still had bruising in that area. It seems apparent that the force applied was more than a minor "clip".

Constable Gemmell also saw Constable Gardner push Mr. Wilson.

On cross-examination, he said that he had not actually seen the baton in Constable Kojima's hand, nor did he see it strike Wilson.

Constable Kojima testified that after Desjardins was released, he tried to collapse his baton but was unsuccessful. He therefore tucked it into his duty belt where it hung down his leg.

He saw Constable Cronmiller push Mr. Wilson. Constable Kojima then grabbed Mr. Wilson by the shoulder. He denied pushing him.

He next saw Constable Gardner strike Wilson with both hands and Constable Steele give him a shove. Wilson fell down and Constable Steele stood over him.

He testified that Wilson started shrieking and that he had heard enough so he walked over and "scooped him" in the buttock area with his foot and told him "that's enough, get out of here." It is reasonable to ask why Mr. Wilson was shrieking but no explanation was offered for that. Constable Kojima said that they were not sounds of pain. They were sounds like one makes when one jumps from a high place.

After Wilson was released, Constable Kojima stepped back, took out his baton and collapsed it. He said he never touched Mr. Wilson with his baton.

Harneck Nirwan is a taxi driver. In the morning hours of January 14, 2003, he was dispatched to the Teahouse for "Grant". He picked up Mr. Wilson and described how he was bleeding. He saw blood on the left side of his face from his eye to his beard and on his hands. He also noted blood in the area of his right wrist. He took him to St. Paul's Hospital.

Saul DelAngel was the senior maintenance person at the Teahouse restaurant on January 14th, 2003. He was not certain of the date but recalled coming to work early in 2003 at about 5:15 to 5:30 in the morning. He parked his truck in the Teahouse parking lot located above the Third Beach lot. He observed three people walking toward him on the road from Third Beach. One was bleeding from his face. He held the side of his face with his hand. The left side of his face was covered in blood. Another of the men was holding his ribs and limping. Those descriptions fit Mr. Wilson and Mr. Lawrie.

They said that they had been beaten by the police and needed help to get to the hospital. They had no money to telephone for a taxi. He gave them directions and they left. He saw no injuries on the two who were not bleeding.

Doctor David Kassen was the emergency room doctor at St. Paul's Hospital on January 14, 2003. Mr. Wilson was first seen by the triage nurse and then by him. Mr. Wilson complained of headache, neck pain, pain to the left chest and right leg. On examination, he had three abrasions on his forehead.

He was tender along the area examined on his neck and along the lateral side of his left chest in the rib cage area. He had difficulty examining Mr. Wilson's right leg and assumed that was because of soreness.

He concluded the Mr. Wilson had suffered soft tissue injuries. He said his conclusion was based on objective observations.

Mr. Wilson gave a vivid description of being beaten by the police, the particulars of which cannot be accepted in their entirety. I do accept his general description of being beaten. When he was released, he said he was in too much pain to run away.

After meeting Mr. Lawrie and Mr. Desjardins, he went to the Teahouse parking lot and called his mother collect from the pay telephone. She in turn called a taxi and Mr. Nirwan arrived.

He described a large bruise on his leg which he said was from the baton. The photographic evidence seems to support that. He also said the scabbed over area on his forehead was caused by the police officers.

He concluded his evidence by saying that he was not sure of any of this. All he knew was that he had been beaten by the cops. That is evidence which is consistent with what Constable Peters saw and heard and which I accept. The particulars given by Mr. Wilson are unreliable because of his prior convictions and his consumption of drugs.

Sergeant Daniel Bezanson of the Internal Investigations Section interviewed Mr. Wilson on January 23rd and again on January 24th, 2003. He took photographs and he noted bruising on the shin and calf of Mr. Wilson. He also noted scabbing on the forehead which he said seemed appropriate if he had been injured on January 14th. I find that the scabbing on the forehead is consistent with the evidence of Constable Steele, Constable Cronmiller, Mr. Wilson, Mr. Nirwan and Doctor Kassen. I am satisfied that Mr. Wilson was injured when he was beaten in Stanley Park. That is how he received the abrasions to his forehead and the bruises to his legs. The bruises are consistent with the use of the baton described by Constable Peters and the other officers who observed Mr. Wilson being struck by the baton of Constable Kojima. It is not certain the blow was to the right thigh but the evidence of Doctor Kassen is consistent with that conclusion. Little turns on the exact location.

Jason Desjardins was not helpful when describing the assault on Mr. Wilson. He heard no sounds of pain or yelling and saw nothing. He said that after his release, Mr. Wilson was giggling but he confirmed that he was limping. He also had numerous blood marks on his face. His shirt was ripped.

Once again, the evidence of the officers was inconsistent. Constable Steele claimed he had not seen Constable Kojima use his baton. Constable Cronmiller did see the use of the baton but said it was to the torso area. He did not see Mr. Wilson fall while Constable Steele, Constable Gardner and Constable Gemmell said that he did.

Constable Gemmell said he saw Constable Kojima "clip" Mr. Wilson with his baton and then he changed that evidence to say that he had not actually seen

that. Acting Sergeant Kenney contradicted himself as to when he saw the baton deployed in the hand of Constable Kojima. Constable Gardner insisted that Constable Kojima had retracted his baton and put it away after Mr. Desjardins left. Even Constable Kojima does not support that testimony.

The inconsistencies in the evidence of the officers makes it difficult to accept their testimony. In almost all particulars, I accept the evidence of Constable Peters. It is consistent with the evidence of Mr. Wilson as to a beating and it is supported in some areas by the evidence of the officers.

I did not find Constable Kojima to be a credible witness. His support from the other officers was far from persuasive. I specifically reject his denial of the use of his baton.

I conclude that Mr. Wilson was assaulted by the six officers. There is little evidence to connect Constable Gemmell specifically to the assault but he was a party to the assault even if he did not directly participate.

Constable Kojima did assault Mr. Wilson. I find that he struck him with some considerable force sufficient to cause bruising to Mr. Wilson's legs.

The injuries described by Doctor Kassen were not accidental. The assault on Mr. Wilson was perpetrated with sufficient force to cause the soft tissue injuries described. Bleeding from his forehead was extensive as confirmed by Mr. DelAngel and Mr. Nirwan. None of the injuries was serious in the sense that there was permanent damage caused but they do indicate an intent to cause physical harm to Mr. Wilson. I am satisfied he received a relatively serious beating at the hands of the police officers. I do not accept as truthful their lack of recollection of blows sufficient to cause the injuries suffered.

Deceit

The allegation of Deceit refers only to Constable Gemmell. He is accused of filing a false, misleading and inaccurate General Occurrence Report.

The Code provides in Section 7:

7 For the purposes of Section 4(1)(c), a police officer commits the disciplinary default of deceit if

(a) the police officer makes or signs a false, misleading or inaccurate oral or written statement or entry in any official document or record.

Although his counsel did not support him in argument, Constable Gemmell testified that his report was only inaccurate and not false or misleading. The

report said in part, "All three males were dropped off at separate (sic) locations..." That statement is not truthful. Constable Gemmell testified that he had intended to say "separate intervals". That explanation is grammatically difficult and completely different in meaning. It is far more likely to be the product of invention and I reject it as an explanation.

There are many other discrepancies. He described the injury to Wilson as minor and stated that it was the result of his tripping on the step of the wagon and falling to the ground. Constable Gemmell conceded at the hearing that he had not seen Wilson's head strike the ground. The Provincial Court Statement of Agreed Facts contradicts that explanation.

There may be others but, in addition to the foregoing, the following misstatements and omissions were in the report:

- (a) There is a reference to three aggressive males. There was no evidence of Jason Desjardins being aggressive.
- (b) Three males were breached on two separate occasions on Granville Street. Only Mr. Wilson was breached on the first occasion.
- (c) No money was found on the males. Ten dollars was found.
- (d) There was no mention of Shannon Pritchard having been arrested.
- (e) There was no mention of the attendance of Acting Sergeant Kenney and Constable Peters at Stanley Park.
- (f) There was no mention of intimidating lectures.
- (g) There was no mention of pushing or punching or any assaults.
- (h) There was no mention of a baton being deployed.

Apart from his evidence that he had made a mistake when he referred to separate locations, Constable Gemmell offered no excuse other than to say he was following the orders of Acting Sergeant Kenney. The evidence simply does not support that explanation. There was no order that the assaults in Stanley Park be left out of the General Occurrence Report. Even if there was such an order, it does not provide an excuse for failure to include a reference to the assaults. Counsel for Constable Gemmell conceded that was so.

I have no hesitation in finding that Constable Gemmell signed a report that was false, misleading and inaccurate and that he did so deliberately.

Section 17 of the Code provides that "a police officer commits a disciplinary default if the police officer intentionally or recklessly committed the act or omission..." In intentionally failing to include particulars of misconduct by the officers, I find Constable Gemmell committed the disciplinary default of deceit.

Discreditable Conduct

Constable Gemmell and Constable Kojima are alleged to have committed the disciplinary default of discreditable conduct for their overall conduct. They have admitted that their conduct falls within the definition found in the Code. Section 5 of the Code provides:

5 For the purposes of Section 4(1)(a), a police officer commits the disciplinary default of discreditable conduct if

(a) the police officer, while on duty, acts in a disorderly manner or in a manner that is

(i) prejudicial to the maintenance of discipline in the municipal police department with which the police officer is employed, or

(ii) likely to discredit the reputation of the municipal police department with which the police officer is employed,

(b) the police officer's conduct, while on duty, is oppressive or abusive to any person.

Section 18 of the Code provides for an exception to those provisions:

18 A police officer does not commit a disciplinary default under section 5 (a) or (b) ... if the police officer's action, omission or conduct, as the case may be, is necessary in the proper performance of authorized police work.

I have reached conclusions as to the failure of the officers to follow the breaching policy of the VPD, the assaults on the Complainants and the deceit of Constable Gemmell. In addition, I am obliged to consider the allegations that Constable Kojima threatened Mr. Wilson before the assaults took place and made inappropriate comments concerning the nature of policing after the assaults. He also allegedly suggested, by inference, during the debriefing that the officers would regret disclosing what occurred.

Threats and Inappropriate Comments

Constable Peters testified that when he arrived at the second breach of Mr. Wilson on Granville Street, he observed Constable Kojima in a heated discussion

with Mr. Wilson. He said he heard Constable Kojima threaten to "kick the shit" out of Mr. Wilson, that he had already been breached and just didn't learn. He then heard Constable Kojima say something to the effect of "you had better watch out or I'll take you to the park". Constable Peters then heard Mr. Wilson respond in a profane way to the effect that Constable Kojima did not have the "balls" to take him to the park.

Constable Peters also recalled that at the debriefing, Constable Kojima had said that Mr. Wilson had challenged him on taking him to the park. That conversation was denied in its entirety by Constable Kojima. He described how Wilson was complaining about always getting "jacked around". Constable Kojima responded by saying "stop dealing drugs and we'll stop". He also denied referring to Mr. Wilson having challenged him about taking him to the park during the debriefing.

Mr. Wilson was not of a great deal of assistance. He did say that an Oriental officer had threatened to punch a hole in his head but he had no recollection of the specific threat described by Constable Peters.

All of the other officers testified that they had not heard the threat being made. That is not surprising given their lack of recall but it may well be true. They were engaged in their duties and would not necessarily have paid attention or given any particular emphasis to a conversation between Constable Kojima and Mr. Wilson.

Constable Peters also testified that as he, Kojima and Cronmiller walked from the kiosk to the police station, Constable Kojima said something to the effect of "Now that's the shit we sign up for, isn't it?" He allegedly said that with a bit of a smirk on his face. Constable Cronmiller denied hearing that conversation. There was some suggestion that Acting Sergeant Kenney was also present. He too denied any recollection of such a statement.

Recollections of all of those statements come from Constable Peters but they are internally consistent. They are also consistent with the behaviour of Constable Kojima during the assaults. Despite the lack of corroboration, I am satisfied that the threat was made and that Constable Kojima made the other statements attributed to him. There is no rational explanation for why Constable Peters should fabricate such a particularized sequence of events.

I accept the evidence of Constable Peters. I have previously found that Constable Kojima was not a credible witness. In denying the conversation attributed to him, I find that he was being deliberately untruthful.

The conduct of Constable Kojima was not exempt under Section 18 of the Code. What he said was not necessary in the proper performance of his duties.

The Debriefing

After assaulting the Complainants, the officers all returned to the police station. They stopped at the kiosk under the Cambie Bridge to return their equipment and then walk to the station. At the station, on the instructions of Acting Sergeant Kenney, they attended a debriefing session.

There is no need to go into the debriefing session in detail. I am satisfied that the evidence of all of those present shows clearly that the mood was not a happy one although there seems to have been a consensus that the three Complainants were dealt with appropriately. At the request of Acting Sergeant Kenney, it was agreed that no reference would be made to the presence of Acting Sergeant Kenney and Constable Peters at Stanley Park. The reason given was the protection of Constable Peters who was a probationary constable.

Acting Sergeant Kenney said it would be best not to speak of what occurred in Stanley Park with others who were not members of Team Four. He suggested that before disclosing any details, there should be discussion with other members of the team. Constable Peters said that Acting Sergeant Kenney had specifically mentioned that no disclosure should be made to anybody from the Academy. Constable Peters felt that was directed at him because he was the only officer currently in the Academy.

Constable Kojima provided an anecdote about a classmate who had informed on a fellow member who had cheated while at the Academy. He described how the informing officer was feeling the repercussions of her actions. Constable Kojima testified that he had told that story in order to support Acting Sergeant Kenney's concern over how rumours could spread. It is difficult to accept that explanation. I find it far more likely that the anecdote was told as a warning to the other officers about the repercussions following disclosure of misconduct by fellow officers.

Constable Gemmell agreed that he and Constable Gardner had been assigned the task of filing the General Occurrence Report and that Constable Peters and Acting Sergeant Kenney should not be linked to Stanley Park. He took Acting Sergeant Kenney's instructions to "keep the events in the room" as an order to the effect that the events were not to be documented. As stated, I do not accept that explanation. Constable Gemmell knew full well or was grossly negligent in taking the instruction as an opportunity to fail to disclose the assaults.

Conclusions - Discreditable Conduct

I conclude that in making the statements and threats attributed to him, Constable Kojima acted in a manner prejudicial to the maintenance of discipline in the VPD and in a manner likely to discredit the reputation of the force.

I find further that in referring to what occurred to those who disclosed discreditable conduct of other officers, he was acting in an oppressive or abusive manner toward those officers.

Similarly, I find the conduct of Constable Gemmell in filing a false, misleading and inaccurate General Occurrence Report to be conduct prejudicial to the maintenance of discipline within the VPD and likely to discredit the reputation of the force.

It is beyond question that the assaults in which the two constables participated amounted to discreditable conduct. As well, I find that the failure to follow the breach policy was again discreditable and done with the knowledge that their actions could not have been authorized under the existing policy.

None of the actions of the Respondents were necessary to the proper performance of authorized police work.

I am not concerned with discreditable conduct as that discipline default relates to other officers.

Summary

To summarize, I have reached the following conclusions:

1. The arrest of the Complainants and the decision to implement the breach policy of the VPD did not involve the disciplinary default of abuse of authority.
2. The conduct of the Respondents and other officers involved in implementing the breach policy of the VPD was flawed. There was a failure to ensure that their actions did not endanger the Complainants as required by the breach policy. The selection of the Third Beach parking lot as a point of release, the continued detention of the Complainants and the subsequent assaults were not authorized by the policy guidelines. Failure to follow the breach policy was an abuse of authority.
3. The assault of Barry Lawrie was not a "minor assault". He was not severely beaten but he was struck repeatedly and roughly treated by the officers causing injury to his rib area.
4. The assault of Jason Desjardins was not minor or technical in nature as suggested. He was punched, pushed, struck with a baton and kicked. He was not badly injured but he was assaulted with some considerable force causing him to suffer chest and stomach pain.

5. Grant Wilson was assaulted with some considerable force. He was struck in the leg with a baton with sufficient force to cause bruising. He was punched, pushed and generally beaten as a result of which he suffered abrasions to his forehead which bled profusely. He also suffered soft tissue injuries including bruising to his right leg and painful contusions to his chest area. Mr. Wilson did not have a prior injury to his forehead which could explain the injuries observed on medical examination. He received a relatively serious beating.
6. Constable Gemmell and Constable Kojima were parties to the assaults on all three Complainants.
7. Constable Kojima struck both Mr. Wilson and Mr. Desjardins with his police baton. A blow to Mr. Wilson was delivered with sufficient force that he suffered bruising to his leg.
8. Constable Gemmell did not file a mistaken General Occurrence Report. The report he filed was intentionally false, misleading and inaccurate.
9. Constable Kojima threatened Mr. Wilson and made inappropriate and unprofessional statements to Constable Peters on the way to the police station and generally at the debriefing.
10. Both Respondents committed the discipline default of abuse of authority in failing to follow the breach policy of the VPD and in assaulting the Complainants.
11. Constable Gemmell committed the discipline default of deceit in filing a false, misleading and inaccurate General Occurrence Report.
12. Constable Kojima committed the discipline default of discreditable conduct by threatening Mr. Wilson and making inappropriate and unprofessional statements.
13. Both constables committed the disciplinary default of discreditable conduct in failing to follow the breaching policy of the VPD and the assaults on the Complainants.

Conclusion

The discipline defaults of abuse of authority, deceit and discreditable conduct have been admitted and established on the evidence. I am satisfied that the assaults were not committed in the heat of battle nor can the other disciplinary

defaults be excused for that reason. There was not sufficient evidence to conclude that all of the officers agreed ahead of time to assault the Complainants. I am satisfied there was an intent to take them to a secluded place and intimidate them. It may be that physical violence was not contemplated. As events unfolded however, I find it is not an exaggeration to say that a vigilante mob mentality developed.

I am also satisfied that the officers did, as suggested by Mr. Ryneveld, try to escape detection and ultimate punishment. They failed to take notes. No proper report of the incidents was filed. They agreed in the debriefing not to speak of the matter except among themselves.

It is easy to understand the support for the officers expressed by members of the public. They do a dangerous and difficult job. They deal with difficult and disreputable criminals. I can understand why it is necessary at times to deal with them in a manner they understand. That does not excuse failure to follow VPD regulations and policy nor the breaching of the rights of citizens. It certainly cannot excuse criminal actions on the part of the police.

Part Two of this hearing will deal with the appropriate disciplinary or corrective measures to be imposed.

D.L. Clancy, Q.C.
June 15, 2005