



Office of the
Police Complaint Commissioner

British Columbia, Canada

NOTICE OF APPOINTMENT OF RETIRED JUDGE

Pursuant to section 117(4) of the *Police Act*

OPCC File 2013-8522

May 15, 2017

To: [REDACTED] (Complainant)

And to: [REDACTED] (Member)

c/o Vancouver Police Department
Professional Standards Section

And to: Chief Constable David Jones (External Discipline Authority)
c/o New Westminster Police Department
Professional Standards Section

And to: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section

And to: The Honourable Judge Mr. Brian Neal, (ret'd) (Retired Judge)
Retired Judge of the Provincial Court of British Columbia

West Vancouver Police Professional Standards investigator, [REDACTED],
conducted an investigation into this matter and on [REDACTED], she submitted the
Supplemental Investigation Report to the Discipline Authority.

In the report, and in conjunction with the Final Investigation Report submitted on [REDACTED]
[REDACTED], [REDACTED] identified the following allegation of misconduct:

1. That on [REDACTED], [REDACTED], committed *Abuse of Authority*
pursuant to section 77(3)(a)(ii)(A) of the *Police Act* by using unnecessary force on [REDACTED].

Stan T. Lowe
Police Complaint Commissioner

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On [REDACTED], Chief Constable David Jones, as the external Discipline Authority (DA), issued his decision pursuant to section 112 in this matter. On [REDACTED], [REDACTED] filed a request for further investigation pursuant to section 114 of the *Police Act*. On [REDACTED] Chief Jones issued his decision pursuant to section 116 in this matter. Specifically, Chief Jones determined that the allegation of *Abuse of Authority* against [REDACTED] did not appear to be substantiated.

Pursuant to section 117(1) of the *Police Act*, having reviewed the allegation and the alleged conduct in its entirety, I consider that there is a reasonable basis to believe that the decision of the Discipline Authority is incorrect.

With respect, it is apparent that the DA placed undue emphasis upon the use of force opinions submitted by Defence Counsel and Crown Counsel from [REDACTED] criminal trial, including that those opinions indicated "[REDACTED] actions were consistent with his training and an appropriate level of force that could be used for a resistive subject." I am concerned that those opinions approached the ultimate issue to be decided by the DA and, in my view, were not necessary as the assessment of the use of force in this matter was not outside the experience and knowledge of the DA.

In *The Public Hearing into Allegations against Constable Daniel Dickhout of the South Coast British Columbia Transportation Authority Service (PH10-03)*, the adjudicator, retired BC Supreme Court Justice, Ian H. Pitfield, noted the following with respect to the inclusion of use of force opinions:

"Moreover, and with respect, the role of the expert is to provide an opinion based on facts the witness is directed or asked to assume to be true, and not to suggest the findings of fact that should be made by the trier of fact or an adjudicator on the evidence. In this case, expert evidence is not required to help an impartial observer construe the character of the actions of anyone depicted in the video."

"Expert evidence is not required for an adjudicator to determine whether conduct could reasonably be considered assaultive or not."

Adjudicator Pitfield also provided useful guidance with respect to the appropriate analysis for assessing allegations of *Abuse of Authority* for unnecessary force, at paragraph 36:

- 1) *Did Const. Dickhout believe that force was necessary to subdue Lypchuk in order to effect a lawful arrest?*
- 2) *If the answer to question #1 is yes, did Const. Dickhout have reasonable grounds for the belief?*
- 3) *Did Const. Dickhout believe that the force used was not excessive in the circumstances?*
- 4) *If the answer to question #3 is yes, did Const. Dickhout have reasonable grounds for that belief?*

At paragraph 37, Adjudicator Pitfield outlined principles that should govern the above analysis:

- 1) *A Public Hearing under the Police Act is a civil process and the applicable standard of proof is the balance of probabilities: F.H. v. McDougall, [2008] 3 S.C.R. 41, 2008 SCC 53. Proof on a balance of probabilities requires that the evidence be sufficiently clear, convincing and cogent.*
- 2) *The assessment of an officer's conduct must respect the fact that his or her job is a difficult one and, in the heat of the moment, frequently does not allow for detached reflection when deciding to act: R v. Nasogaluak, [2010] 1 S.C.R. 206 at para. 35, and In the Matter of Constable Smith, Victoria, January 28, 2009, p. 21.*
- 3) *The intention with which the target acted is not relevant to the assessment of the officer's conduct. If the officer's assessment of the need for and the amount of force necessary was reasonable, it matters not that he may have been mistaken about the target's intention: Berntt v. Vancouver (City), [1999] B.C.J. No. 1257 (BCCA), para. 27.*
- 4) *The adjudicator must not assess conduct with the benefit of hindsight and must not substitute his or her judgment as to what could or should have been done in the circumstances for that of the officer. The question is whether any belief the officer had with respect to the need for force and the amount of force required was reasonable, and is not to be answered by reference to what others might have done in similar circumstances.*
- 5) *The consequences associated with the use of force, in this case the laceration sustained by Lypchuk, are not relevant to the assessment: Berntt, supra, para. 27*

Finally, it is important to note that Adjudicator Pitfield found that the totality of evidence, including the video and audio footage and the respondent officer's evidence that:

[57] *"Const. Dickhout discharged the Taser because he was annoyed by Lypchuk's behaviour, foul language, and reluctance to promptly respond to various commands, and not because he believed that Lypchuk was committing a criminal offence."*

It is my view that the assessment of the allegation in this matter is within the experience and knowledge of the DA, based on a review of the evidence. This incident was captured on video which depicts the use of force in a clear and unobstructed manner. The focus of the trier of fact ought to be placed on the video footage and witness evidence.

Further, the issue of whether officers had the lawful authority to apply handcuffs prior to the use of force in question is a relevant factor. I am of the view that the DA did not give proper consideration to this issue or whether [REDACTED] actions could be considered resistant in the circumstances.

Therefore, pursuant to section 117(4) of the *Police Act* and based on a recommendation from the Associate Chief Justice of the Supreme Court of British Columbia, I am appointing Mr. Brian Neal, retired Provincial Court Judge, to review this matter and arrive at his own decision based on the evidence.

Pursuant to section 117(9), if the appointed retired judge considers that the conduct of the member appears to constitute misconduct, the retired judge assumes the powers and performs the duties of the discipline authority in respect of the matter and must convene a discipline proceeding, unless a prehearing conference is arranged.

The Office of the Police Complaint Commissioner will provide any existing service records of discipline to the Discipline Authority to assist him or her in proposing an appropriate range of disciplinary or corrective measures should a pre-hearing conference be offered or a disciplinary proceeding convened. If the retired judge determines that the conduct in question does not constitute misconduct, they must provide reasons and the decision is final and conclusive.

Finally, the *Police Act* requires that a retired judge arrive at a decision **within 10 business days after receipt of the materials** for review from our office. This is a relatively short timeline, so our office will not forward any materials to the retired judge until they are prepared to receive the materials. I anticipate this will be within the next 10 business days.



Stan T. Lowe
Police Complaint Commissioner

cc: Vancouver Police Board
[Redacted] West Vancouver Police Department
[Redacted] Registrar