

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, c. 367

AND

IN THE MATTER OF A REVIEW OF
ALLEGATIONS OF ABUSE OF AUTHORITY
AGAINST
SERGEANT [REDACTED]
OF THE VANCOUVER POLICE DEPARTMENT

NOTICE OF DECISION

TO: Sergeant [REDACTED], Vancouver Police Department
AND TO: Chief Constable Jim Chu, Vancouver Police Department
AND TO: Mr. [REDACTED], Complainant
AND TO: Mr. Stan Lowe, Police Complaint Commissioner

Introduction

[1] On March 5, 2012, the Police Complaint Commissioner ordered a review by a retired judge of a disciplinary authority's determination that allegations of abuse of authority by Sergeant [REDACTED] of the Vancouver Police Department against Mr. [REDACTED] could not be substantiated. The allegations against the officer arise out of an incident at the [REDACTED] Night Club located at [REDACTED] Street and are framed as follows:

Count 1: Abuse of Authority

That on October 8, 2009, it is alleged that Sergeant [REDACTED] abused his authority by arresting and detaining Mr. [REDACTED] without good and sufficient cause pursuant to s. 10(a) of the *Code of Professional Conduct Regulation*, B.C. Reg. 205/98.

Count 2: Abuse of Authority

That on October 8, 2009, it is alleged that Sergeant [REDACTED] abused his authority by using unnecessary force on Mr. [REDACTED] pursuant to s. 10(b) of the *Code of Professional Conduct Regulation*, B.C. Reg. 205/98

[2] The review was ordered under s. 117 of the *Police Act* because the Commissioner considered that there was a reasonable basis on which to conclude that the disciplinary authority's determination was incorrect. The purpose of this review is to determine whether the disciplinary authority's conclusion in respect of either allegation is correct, or whether, on the evidence referenced in the investigating officer's report and accompanying documents, the conduct complained of appears to constitute misconduct. Any determination on review that there is no misconduct is final and binding. Any determination that the evidence appears to support a finding of misconduct results in the retired judge becoming the disciplinary authority in relation to the complaint and the person responsible for the conduct of a disciplinary proceeding.

Overview

[3] On or about October 7, 2009, Mr. [REDACTED] was given an entry pass to the [REDACTED] Nightclub by a friend, the disc jockey who was going to be working at the club that evening.

[4] Soon after midnight on October 8, 2009, Mr. [REDACTED] presented the pass claiming he was entitled to free admission. Staff refused him entry saying that the pass had expired at midnight, a fact that was evident on the face of the ticket. Mr. [REDACTED] pressed the staff to permit him to enter. Staff refused. A bouncer backed Mr. [REDACTED] out of the club. An altercation ensued and the bouncer threw Mr. [REDACTED] to the sidewalk. Once released from the bouncer's grip, Mr. [REDACTED] got up and returned to the entrance area of the club where he apparently pursued his claim that the pass

he had been given entitled him to entry free of charge and protested his treatment by the bouncer.

[5] Police arrived on the scene. Sgt. [REDACTED] and A/Sgt. [REDACTED] of the Vancouver Police Department engaged in a discussion with Mr. [REDACTED]. The discussion ended with Sgt. [REDACTED] taking Mr. [REDACTED] to the ground and directing his arrest.

[6] Mr. [REDACTED] filed a complaint with the Commissioner on October 16, 2009. The Commissioner ordered an investigation under the *Police Act*. The investigation was suspended on May 27, 2010 when the Vancouver Police Department determined that it should commence its own investigation in order to determine if Sgt. [REDACTED] should be charged with assault. The resulting report to Crown Counsel stated that the elements "may exist" to justify a charge of assault. The Crown was asked to consider whether the charge approval threshold was met. On two occasions the Crown declined to approve any charge against Sgt. [REDACTED]. In September 2011, almost two years after the incident, the *Police Act* investigation into Mr. [REDACTED]'s complaint was re-activated. The file was delivered to Sgt. Bellia who was charged with the responsibility of completing the allegation of misconduct investigation on September 6, 2011, one month short of the second anniversary of the incident. The suspension of the *Police Act* complaint proceeding was not lifted until November 1, 2011.

[7] On February 1, 2012, the investigating officer issued his report in which he stated his opinion that neither the complaint of unlawful arrest nor the use of excessive force made against Sgt. [REDACTED] could be substantiated. The disciplinary authority accepted the conclusions reached by the investigating officer. The Commissioner reviewed the report and concluded that the investigating officer's determination and the resulting decision of the disciplinary authority were incorrect. This review is the result.

[8] I have reviewed the final investigation report and the considerable amount of material accompanying it with primary focus on the content of Mr. [REDACTED]'s complaint, the actions of various individuals as depicted in videos of the incident, the duty

report completed by Sgt. [REDACTED] the transcript of his subsequent interview with the investigating officer, the statements of [REDACTED] Nightclub staff regarding Mr. [REDACTED]'s conduct, and the original and amended use of force reports compiled by Sgt. Milligan of the Vancouver Police Department. In summary, I am of the opinion that the investigating officer properly concluded that the complaint of unlawful arrest had not been substantiated, but that the evidence referenced in the report appears sufficient to substantiate the allegation of misconduct by use of excessive force in effecting the arrest.

Review of the Evidence

[9] In his complaint, Mr. [REDACTED] stated that he had been removed from the [REDACTED] Nightclub for no reason at all. He said he was completely sober and rational at the time. He described the encounter with the officers in the following terms:

I had just been physically assaulted and removed from the club "[REDACTED]" for absolutely no reason before I actually gained entrance. Naturally, there are police officers all over [REDACTED] St. at this time of night.

I was with my two colleagues [REDACTED] + [REDACTED] the night of the incident. We went to see our friend the DJ play – they joined me outside after I was removed from the club. Several officers saw the incident and approached me to find out exactly what happened. The cop that spoke to me was between 40-50 years old, medium build, and was 6 feet tall with grayish hair + a moustache. I told him the story while my friend notified me that there was blood on the ground from the bouncer assaulting me.

The officer seemed indifferent and less than impressed by what I had said. I then informed the cop that I needed to get the bouncers name + phone number so that I could press charges. But the other bouncers, I was now afraid would assault me further if I approached the entrance –so I politely asked the officer if he could retrieve the bouncer's information so I could write a report and let everyone go home. When I asked that question I gestured with an open palm and a thumb at the officer + then at the club entrance (he was less than 3 feet from me).

It seemed as though the officer had no interest whatsoever in what I was saying until I slightly gestured at him. He quickly responded very aggressively towards me with, and I quote, "Don't point your fucking finger at me, asshole".

I was completely and utterly shocked. I had done nothing but politely ask the officer to help me file a charge. There was now another police officer in front + to the right of me. Dumbfounded, I looked to my right + asked my friend and shrugged while

putting both hands palm up at around the height of my chest in question "How are we to proceed if the people that are supposed to serve + protect me are doing nothing of the sort?" I was still looking at my friend when to my left I hear the elderly officer to my left say, "that's it!"

He grabbed me + threw me to the ground immediately smashing my head on the pavement and pulled my right hand behind my back roughly while putting his hand on the back of my head and shoving it very forcefully into the asphalt [sic]. I did not resist whatever + then several more officers quickly jumped on my back + repeatedly [sic] kned my in my back + neck.

I was completely sober + rational, I asked why they were assaulting me and got a reply of "shut up asshole" The officers then put hand cuffs on me tightly and while keeping their knees on my back pulled up on my cuffs, causing excrutiating [sic] pain.

[sic]

[10] Mr. [REDACTED] provided a statement to police on April 6, 2010, and again on July 20, 2010. When interviewed on the latter occasion, he said that the bouncer grabbed him by the neck and one arm and dragged him to the street where he was thrown to the ground. He stated that he never threatened or acted in an aggressive manner toward the bouncer and he denied being asked to leave the club. Other evidence undermines the description of the incident in the club provided by Mr. [REDACTED]

[11] Soon after the incident, the bouncer who ejected Mr. [REDACTED] from the club, one Mr. [REDACTED], provided the following description of the incident:

Male subject was at cover/coat check being uncooperative with the cover/coat check personnel. He was arguing because he was on guest list, so I ([REDACTED]) interjected to help resolve the situation. I directed the subject to speak with the guest list personnel. He continued to be uncooperative and became verbally abusive, I then began to inform the subject that he has to leave and began to escort him out. Once the subject was a few metres out the front doors, the subject grabbed my jacket and attempted to throw me over the ropes. I reacted by throwing him to the ground using his momentum. Other VCH assisted me in temporarily restraining the subject. After the subject was compliant, I left the scene to return inside. The subject or one of his friends located VPD upon which time he became argumentative and was arrested.

[sic]

[12] When [REDACTED] was interviewed by police again on July 13, 2010, he initially stated that he was unable to recall the details of the incident. He watched the videos and then repeated his earlier observation that Mr. [REDACTED] was verbally abusive with staff, he had asked Mr. [REDACTED] to leave the lobby, Mr. [REDACTED] had declined and was belligerent and abusive toward him, he placed his hand on Mr. [REDACTED]'s chest in order to get him to move outside, and once outside Mr. [REDACTED] grabbed [REDACTED]'s jacket, whereupon [REDACTED] reacted by throwing Mr. [REDACTED] to the sidewalk.

[13] Some time after the incident, various employees of the [REDACTED] Nightclub were asked to provide statements. Mr. [REDACTED] an employee working at the entrance outside the club who was interviewed on July 14, 2010, recalled that the individual ejected from the club was being verbally abusive and aggressive towards the police officers engaged in discussions with him as well as engaging in physical posturing toward the officers.

[14] Ms. [REDACTED] the employee who dealt with Mr. [REDACTED] at the ticket booth, was interviewed by police on June 30, 2010. At that time she did not recall any details of the incident. When interviewed on July 19, 2010, Ms. [REDACTED] another employee working at the front entrance taking payment for the cover charge, could not recall much about the incident.

[15] Ms. [REDACTED] the [REDACTED] Nightclub employee who was working with the VIP guest list outside the entrance to the club at the time of the incident, was interviewed by police on June 30, 2010. She recalled that the individual ejected from the club was very mouthy and verbally abusive when talking to one of the bouncers in an attempt to find out why he had been ejected.

[16] Mr. [REDACTED], a doorman working at the club on the night in question, was interviewed by police on June 30, 2010. He stated that he recalled the male ejected from the club uttering violent threats while he was standing at the stanchions outside the club, and stated that the individual was quite intoxicated when he first arrived at the club. No other employee involved with the incident, directly or indirectly, states that Mr. [REDACTED] was or appeared to be intoxicated.

[17] In sum, the evidence that would likely be provided by ██████████ Nightclub staff contradicts Mr. ██████████'s assertions that he acted in a calm and rational manner throughout his engagement with club personnel and that there was no basis upon which to remove him from the premises. The likelihood is that the evidence would substantiate a finding that Mr. ██████████ was verbally abusive toward staff of the ██████████ Nightclub both before and after Mr. ██████████ removed him from the club.

[18] The video evidence also contradicts Mr. ██████████'s description of his behaviour and the manner in which he was removed from the club. The video indicates that ██████████ placed his hand on Mr. ██████████'s chest to back him out the door. There is no indication that ██████████ held Mr. ██████████ by the arm and the neck in the manner Mr. ██████████ described in his statement or subsequent interviews in order to get him out of the club.

[19] It is likely that the ██████████ Nightclub employees are quite familiar with the assessment of one's state of sobriety. Were it obvious that Mr. ██████████ was intoxicated when he arrived at the club, it is likely that staff would have noticed the fact. As it is, there is a conflict in the evidence regarding Mr. ██████████'s state of sobriety, he saying he was sober, and Mr. ██████████ saying he was intoxicated. Regardless of Mr. ██████████'s state of sobriety, the evidence regarding his dealings with staff would appear to justify his forcible removal from the club.

[20] Video recordings depict the scene outside the club entrance. The fact that Mr. ██████████ continued to act outside the club as he had when inside the lobby attempting to gain admission is supported by the video evidence, and by the evidence of ██████████ Nightclub staff working at the time outside at the entrance to the club on ██████████ Street.

[21] As Mr. ██████████ was exchanging words with security staff outside the club, A/Sgt. ██████████ of the Vancouver Police Department approached the scene from the north. The officer engaged in discussion with club staff and when apparently apprised of the issue, placed his hand on Mr. ██████████'s shoulder thereby moving Mr. ██████████ away from the entrance area toward the street itself. Mr. ██████████ did not resist.

A/Sgt. [REDACTED] engaged in a curb-side discussion with Mr. [REDACTED]. As he was doing so, Sgt. [REDACTED] approached the scene from the south in a police vehicle that he double-parked on the street. The officer got out of the vehicle and approached Mr. [REDACTED] and A/Sgt. [REDACTED]. The three individuals stood with A/Sgt. [REDACTED]'s back facing the club entrance, Sgt. [REDACTED] standing to his right with his back facing north along [REDACTED] Street, and Mr. [REDACTED] in front of the officers with his back facing [REDACTED] Street.

[22] As the three individuals engaged in discussion, Mr. [REDACTED] made a move toward the entrance to the club. Sgt. [REDACTED] prevented him from doing so by placing his left hand on Mr. [REDACTED]'s chest. Mr. [REDACTED] readily returned to his position in front of the officers. Sgt. [REDACTED]'s action in deterring Mr. [REDACTED] from approaching the stanchions cannot be described as forceful or aggressive to any degree.

[23] The evidence regarding the content of the discussion among Mr. [REDACTED], Sgt. [REDACTED] and A/Sgt. [REDACTED] on the sidewalk is unsatisfactory. Mr. [REDACTED]'s evidence to the effect that all he wanted was for police to help him gain entry and to get particulars of the bouncer who he claimed had assaulted him is not consistent with the video evidence portraying his conduct, nor his recollection that Sgt. [REDACTED] had said to him "Don't point your fucking finger at me, asshole" or words to similar effect. Neither Sgt. [REDACTED] or A/Sgt. [REDACTED] recalls anything Mr. [REDACTED] said to them. A careful consideration of all the evidence would likely result in one concluding that Mr. [REDACTED] continued to speak aggressively and possibly in a threatening manner to police as he had done with staff both in and outside the club. I will return to the propriety of the police response to his verbiage when discussing the lawfulness of the arrest and the allegation of the use of excessive force.

[24] Regardless of what was said among them, the videos record the fact that from time to time, Mr. [REDACTED] waved what appears to be a ticket which he was holding in his right hand in front of or at the officers. Having done so with some amount of repetition, Mr. [REDACTED] then raised his right arm with the ticket in hand and pointed in Sgt. [REDACTED]'s direction. In response, Sgt. [REDACTED] used his left hand to grab

Mr. [REDACTED] at the neck and took him to the ground whereupon Mr. [REDACTED] was placed in handcuffs. He was arrested for breaching the peace and causing a disturbance, and transported to police cells. He spent the early morning hours of October 8, 2009 in jail and was released some time after 0600 hours. He was not charged with any offence.

[25] Sgt. [REDACTED] described the incident and his actions in a duty report completed on May 1, 2010 on orders from the Vancouver Police Department. He described the incident as follows:

On 2009/10/08 I (Sgt [REDACTED]) was on duty full uniform, assigned to [REDACTED] . I attended the [REDACTED] Nightclub as requested (flagged over) by their door staff. They pointed out [REDACTED] who was standing first in line to enter the premise. He was yelling at the staff directly in front of the entrance. [REDACTED] was very loud, intoxicated, angry and yelling at the door staff for refusing him entry. In speaking with staff on the scene, I was able to ascertain that the reason for their refusal to allow [REDACTED] entry was because although he possessed a ticket for the venue, the hours that the ticket was valid had expired. [REDACTED] said he knew the D.J. [REDACTED] was very hostile and angry at me for not over riding the staff and allowing him in. I explained that I had no authority to do so. I walked away and covered Cst. [REDACTED] as he dealt with a friend of [REDACTED] . A short time later [REDACTED] again approached me on the sidewalk. With no warning, [REDACTED] flung his arm at me and I reacted instinctively by pushing him backwards. [REDACTED] fell to the ground. That is confirmed by the video footage of the event. It is difficult for me to respond to all the issues in the complaint as I can not read most of it. That being said if you view the footage you will see that I am calm throughout the interaction, and stand in a non-confrontational and non-threatening manner - ie. With my hands in my pockets. Given the (in my mind) unremarkable nature of my interaction with Mr. [REDACTED] I do not have any notes of the conversation I had with him, nor can I recall this event in any but the most general terms. I do know, that given the thousands of successful interactions I have had (and continue to have) with inebriated people in the entertainment area of the downtown core, I do not interact with members of the public in an unprofessional manner. In other words, I know that I did not swear, nor was I rude or otherwise abusive to Mr. [REDACTED]

[sic]

[26] Sgt. [REDACTED] appropriately declined to be interviewed while his conduct was the subject of a criminal investigation by the Vancouver Police Department. However, he was interviewed January 10, 2012 following the reactivation of the

Police Act misconduct investigation. In the course of that interview he expanded upon the comments in his duty report.

[27] Sgt. [REDACTED] stated that his memory of the incident had faded and he had no notes of the incident. Before writing his duty report, he had been shown only one of four video clips. Which clip he was shown is not clear. He said he dealt with Mr. [REDACTED] on two occasions in the course of the incident. On the first occasion, he was called over by [REDACTED] Nightclub staff to deal with Mr. [REDACTED] whom he described as intoxicated and increasingly agitated, aggravated, angry and hostile. Mr. [REDACTED] asked him to help him get into the club on his pass. Sgt. [REDACTED] replied that he could not do that and left the scene.

[28] Sgt. [REDACTED] stated that he returned to the scene about twenty to thirty minutes later to assist A/Sgt. [REDACTED] who was dealing with Mr. [REDACTED] after he had been ejected from the club. He stated that the fact he returned on foot from the north is clearly shown in a video. He said that Mr. [REDACTED] was much more agitated at that time and his body language exhibited an unwillingness to listen. He said Mr. [REDACTED] was "flailing his arms about" which prompted him to tell Mr. [REDACTED] to keep his hands down because he believed his actions were "pre-assaultive cues" and a "safety hazard and safety issue for [Sgt. [REDACTED]]." He said that when he told Mr. [REDACTED] to put his hands down he said "I take that as pre-assaultive cues." He did not recall any verbal response from Mr. [REDACTED]. Sgt. [REDACTED] said that Mr. [REDACTED] continued to wave his arms about in a manner that Sgt. [REDACTED] believed made it more dangerous for him to be standing opposite him. He believed that Mr. [REDACTED] was going to assault him or A/Sgt. [REDACTED].

[29] Sgt. [REDACTED] said that he used as much force as was necessary to arrest Mr. [REDACTED] who he thought was going to assault him, and who he believed was going to continue breaching the peace. He attempted to grab Mr. [REDACTED]'s shoulder to spin him around. He said he grabbed Mr. [REDACTED] on the left shoulder with his right hand, his left hand went to Mr. [REDACTED]'s right shoulder, and he spun him to the right and took him to the ground. Sgt. [REDACTED] did not believe he grabbed Mr. [REDACTED] by the

neck but believes his hand or hands may have connected with Mr. [REDACTED]'s neck and throat.

[30] Sgt. [REDACTED] repeated his observation that Mr. [REDACTED] was extremely hostile and was not listening even to a person in authority. He believed Mr. [REDACTED] was not in a frame of mind to listen and continued to act out. He stated that in addition to thinking that Mr. [REDACTED] was about to assault him, he believed he would continue to get worse and act in an improper manner.

[31] There are conflicts between the statements provided by Sgt. [REDACTED] and the character of the incident as portrayed in the videos that captured the scene, and other difficulties with Sgt. [REDACTED]'s statements. Given the passage of time from the incident in October 2009 to January 2012 when Sgt. [REDACTED] was interviewed, I am of the opinion that the most reliable evidence regarding the incident and the conduct of the individuals involved is that provided by the videos of the scene that capture the actions of those involved in this incident.

[32] When asked by the investigating officer if he was certain that he had dealt with Mr. [REDACTED] on two occasions in connection with the same incident, Sgt. [REDACTED] responded that he was. Sgt. [REDACTED] said he left Mr. [REDACTED] on the first occasion and walked north on [REDACTED] Street. He said he walked back south toward A/Sgt. [REDACTED] and Mr. [REDACTED]. In fact, nothing in any of the videos supports that view of events. The videos record a single continuous interaction between [REDACTED] Nightclub staff, Mr. [REDACTED] and the police. At no point is Sgt. [REDACTED] captured walking north or south on [REDACTED] Street to or from the scene. The video capturing the south view along [REDACTED] Street clearly shows Sgt. [REDACTED] double-parking his vehicle on the street adjacent to the [REDACTED] Nightclub entrance, getting out of his vehicle, and approaching A/Sgt. [REDACTED] and Mr. [REDACTED] from the street. Sgt. [REDACTED] statement that he dealt with Mr. [REDACTED] on two occasions in connection with the denial of entry to the [REDACTED] Nightclub does not appear credible.

[33] The statement that Mr. [REDACTED] was flailing his arms about appears to be an exaggeration and overstatement. The video evidence indicates that from time to

time, Mr. [REDACTED] motioned toward the officers with his right hand in which he held the ticket. The most likely explanation is that he was stating his case, albeit in an aggressive manner, that the ticket entitled him to entry.

[34] There is little likelihood that in the heat of the moment and a difficult conversation with Mr. [REDACTED] Sgt. [REDACTED] would utter the "police speak" embodied in the phrase "pre-assaultive cues" which comprise part of the use of force model. It is more likely that Sgt. [REDACTED] spoke as Mr. [REDACTED] says he did telling him with coarse language to stop pointing his finger at the officer.

[35] In addition, there is nothing in the duty report prepared by Sgt. [REDACTED] in May 2010 that would suggest he was concerned about any potential assault. Rather, it appears he was irritated by Mr. [REDACTED]'s behaviour which can only be described as juvenile, petulant, and completely inappropriate.

[36] Finally, Sgt. [REDACTED]'s recollection of the manner in which he applied force to Mr. [REDACTED] is contradicted by the video evidence which shows Sgt. [REDACTED]' right upper arm at his side as he reaches out with his left to grab Mr. [REDACTED] by the neck. Any suggestion that Sgt. [REDACTED] attempted to grab Mr. [REDACTED] by the shoulder with the right hand, or with the left for that matter in order to spin him around does not appear credible when contrasted with the video evidence.

[37] A/Sgt. [REDACTED] provided a written statement to police on May 10, 2010, in which he stated that he had no independent recollection of the incident even after reviewing the video and the general occurrence report.

[38] Const. [REDACTED] was at the scene but not directly involved with Mr. [REDACTED] until he had been taken down by Sgt. [REDACTED] [REDACTED] was instructed to write up the general occurrence report. In order to do so, he must have been told by Sgt. [REDACTED] and/or A/Sgt. [REDACTED] what occurred. Portions of the report are material for present purposes:

[REDACTED] refused to leave the area and police intervened. Police demanded several times that [REDACTED] calm down and back away from them for officer safety concerns.

[REDACTED] kept waving his arms in the PCs directions after asked several times to stop. [REDACTED] was subsequently taken to the ground and arrested for Breach of Peace.

...

On 2009-10-08 at approx 0045 hrs Charged [REDACTED] ([REDACTED]) was refused entry into the [REDACTED] Nightclub located at [REDACTED] St.

[REDACTED] became belligerent and police were forced to intervene.

Police advised [REDACTED] to back away from them for officer safety concerns. Police also told [REDACTED] to stop waving his arms at them.

[REDACTED] refused to listen to police directions and continued acting erratically and waving his arms at police. [REDACTED] was subsequently taken to the ground.

[39] The statement that police told Mr. [REDACTED] to back away because of officer safety concerns is not consistent with Sgt. [REDACTED]'s duty report or the video evidence. Likewise, the statement that Mr. [REDACTED] persistently waved his arms at police is at variance with the video portrayal of the incident.

[40] No other relevant evidence was either gathered, provided, or available from any other officer involved in the incident.

Analysis

[41] Two questions arise in the context of the incident. The first is whether Mr. [REDACTED] was lawfully arrested because Sgt. [REDACTED] had good and sufficient reason to believe he had breached the peace. If the arrest was unlawful, so too was the use of any force to carry it out. The second issue is whether, if the arrest was lawful, the amount of force used by Sgt. [REDACTED] to effect it was excessive.

[42] Whether or not Sgt. [REDACTED]'s actions constituted misconduct must be assessed by reference to the *Code of Professional Conduct Regulation*, B.C. Reg. 205/98, which governed alleged misconduct until April 2010. Sections 4, 10 and 17 of the *Regulation* provide as follows:

Disciplinary defaults

- 4 (1)** In this Code, "disciplinary default" means
- (a) discreditable conduct,
 - (b) neglect of duty,
 - (c) deceit,
 - (d) improper disclosure of information,
 - (e) corrupt practice,
 - (f) abuse of authority,
 - (g) improper use and care of firearms,
 - (h) damage to police property,
 - (i) misuse of intoxicating liquor or drugs in a manner prejudicial to duty,
 - (j) conduct constituting an offence,
 - (k) being a party to a disciplinary default, or
 - (l) improper off-duty conduct.
- (2)** It is a breach of this Code to commit, or to attempt to commit, a disciplinary default referred to in subsection (1).

....

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, or
 - (d) harasses, intimidates or retaliates against a person who makes a report

about the conduct of an officer or submits a complaint under Part 9 of the Act.

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.

[43] Section 31 of the Criminal Code empowers a peace officer to arrest someone he or she finds breaching the peace:

Every peace officer who witnesses a breach of the peace and everyone who lawfully assists him is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable grounds he believes is about to join in or renew the breach of the peace.

[44] The section does not make a breach of the peace an offence. Rather, it authorizes an arrest to stop a breach of the peace. However, the conduct that constitutes the breach may also be an offence under some provision of the Code, such as s. 175 providing that causing a disturbance in a public place is an offence punishable on summary conviction. While s. 31 stipulates that an officer must observe a breach in order to rely on it for purposes of making an arrest, a peace officer may rely on the section or the common law to make an arrest in order to prevent a reasonably apprehended breach of the peace: see *Hayes v. Thompson* (1985), 18 C.C.C. (3d) 254 (BCCA). The common law authority derives from the fact that it is a peace officer's responsibility to maintain order and to prevent injury to persons or property.

[45] Whether the circumstances support a reasonable apprehension of a breach is not an issue that should not be examined with exactitude or determined with precision. Rather, it is sufficient that one hold to the belief that there is a reasonable prospect that harm to persons or property will result if the breach is not restrained, and objective indicia support that belief. One must remember that police officers are charged with the responsibility of preserving the peace, preventing crime, protecting life and property, enforcing the law, and apprehending offenders. In a high traffic, sometimes highly-charged, environment such as the [REDACTED] Street entertainment district where the [REDACTED] Nightclub is located, officers must be vigilant and should

not be discouraged from doing their utmost to maintain safety for all by dealing firmly with individuals such as Mr. [REDACTED] who, from all appearances, was acting in a most inappropriate manner. Indeed, his conduct as described by observers other than police likely amounted to causing a disturbance within the meaning of s. 175 of the Criminal Code.

[46] Sgt. [REDACTED] asserts two grounds for the arrest: the fact that he perceived the threat of an assault by Mr. [REDACTED] and a concern that Mr. [REDACTED] who was increasingly agitated, aggravated, argumentative and hostile, was likely to cause harm to person or property if not restrained.

[47] It does not appear that the evidence would support Sgt. [REDACTED]'s statement that he believed he or A/Sgt. [REDACTED] was going to be assaulted by Mr. [REDACTED]. However, the available objective evidence appears to support the conclusion that Mr. [REDACTED] would not likely be deterred from breaching the peace or causing a disturbance except by arrest. He had been verbally abusive to staff in the lobby of the [REDACTED] Nightclub. He had been ejected from the club. He had grabbed the bouncer, Mr. [REDACTED] by the jacket whereupon he was thrown to the ground. Upon getting up he immediately returned to the entrance to the club and continued to argue with or speak abusively to [REDACTED] Nightclub staff. He spoke and gestured rudely to police. When talking to police he attempted to return to the club's entrance. Police prevented him from doing so. He continued to gesture at and argue with police, and appears to have refused to accept the fact that as he was fully aware, he was not going to be admitted free of charge to the club because the pass he had been given by a friend had expired at midnight.

[48] There is no way of knowing what Mr. [REDACTED] would have done had police left the scene without getting him away from the vicinity of the [REDACTED] Nightclub. Had police been able to get him to leave the scene, there is no way of knowing whether he would have returned. It was not unreasonable for the police to exercise judgment to arrest Mr. [REDACTED] in order to ensure that order could be restored to the street and maintained at the entrance to the club. In any event, what Mr. [REDACTED] might have

done had he not been arrested is not determinative. The question is whether it was reasonable to be concerned about the risk of injury to person or property had police not arrested Mr. [REDACTED]. In this instance, it was. Police would have been properly criticized had they not intervened thereby allowing Mr. [REDACTED] to engage in a renewed physical encounter with staff or to damage property. Whether or not Sgt. [REDACTED]'s statement in January 2012, but not in May 2010, that he perceived Mr. [REDACTED] was about to assault him or A/Sgt. [REDACTED] is to be believed, Mr. [REDACTED]'s conduct in a public place fully justified his arrest on the basis of an apprehended breach of the peace or for causing a disturbance.

[49] In reaching this conclusion, I have not overlooked Sgt. [REDACTED]'s duty report in which he stated that "with no warning, Mr. [REDACTED] flung his arm at me and I reacted instinctively by pushing him backwards." The suggestion is that arresting Mr. [REDACTED] for breaching the peace was not foremost in Sgt. [REDACTED]'s mind, but retaliation of some kind for Mr. [REDACTED]'s disruptive behavior was. However, the statement is not consistent with the evidence as a whole. In assessing the weight that should be attached to it, I take note of the fact that the statement is at variance with Mr. [REDACTED]'s recollection of the incident, Sgt. [REDACTED] made no notes of the incident, there is a discrepancy between the substance of the statement and the observations recorded in the general occurrence report, the duty report was made some seven months after the incident, Sgt. [REDACTED] was shown only one video clip of the incident, the content and vantage point of that which he saw is not known, and the video evidence is not consistent with Sgt. [REDACTED]'s statement that Mr. [REDACTED] had "flung" his arm at him.

[50] I conclude that on all of the evidence that was accumulated and reviewed in the course of the misconduct proceeding, the allegation that Sgt. [REDACTED] arrested Mr. [REDACTED] without good and sufficient cause cannot be sustained.

[51] The remaining question is whether Sgt. [REDACTED] used unnecessary force when arresting Mr. [REDACTED]. The answer turns on the answers to four other questions:

1. Did Sgt. [REDACTED] believe that force was necessary to subdue Mr. [REDACTED] in order to effect a lawful arrest?
2. If the answer to question 1 is yes, did Sgt. [REDACTED] have reasonable grounds for the belief?
3. Did Sgt. [REDACTED] believe that the force used was not excessive in the circumstances?
4. If the answer to question 3 is yes, did Sgt. [REDACTED] have reasonable grounds for that belief?

[52] In the event this incident were to become the subject of a disciplinary hearing, I am of the opinion that Sgt. [REDACTED] would likely be able to persuade the disciplinary authority by reference to the video evidence and the evidence of [REDACTED] Nightclub staff that he believed some amount of force, however minimal, would be required to restrain Mr. [REDACTED] in order to effect the arrest. The evidence appears to support the view that Mr. [REDACTED] demonstrated his unwillingness to refrain from abusive language directed at the police and club staff and that he was agitated, aggravated, and hostile. The evidence in this regard appears capable of justifying a belief that Mr. [REDACTED] would not willingly submit to arrest in order to be removed from the scene, and that some amount of force would be required to effect the arrest. In the result, each of the first two questions should be answered in the affirmative.

[53] At the same time, the evidence, taken as a whole, would not appear to support the conclusion that Sgt. [REDACTED] believed that the amount of force he used was not excessive. It appears that the amount of force used was the result of Sgt. [REDACTED] being provoked by Mr. [REDACTED]'s gestures and verbal abuse. In response to the provocation, Sgt. [REDACTED] used force that would leave no doubt that Mr. [REDACTED] would be subdued, without regard for the question of whether that amount of force was required. While the conduct of an officer must not be examined to a nicety, the totality of the evidence is likely to persuade a disciplinary authority at any disciplinary

hearing that the force used was unnecessary and far in excess of anything required to arrest Mr. [REDACTED]

[54] In addition, the totality of the evidence does not appear to support Sgt. [REDACTED]'s statement in the 2012 interview that he feared an assault of him or A/Sgt. [REDACTED]

Had that been the case, the duty report authored by Sgt. [REDACTED] in 2010 would undoubtedly have contained some reference to the fact given that a criminal investigation was under way and Sgt. [REDACTED] would be expected to have justify the amount of force he used. The apprehension of an assault coupled with Sgt. [REDACTED]'s statement he told Mr. [REDACTED] he detected pre-assaultive cues appears to be an *ex post facto* justification for Sgt. [REDACTED]'s conduct.

[55] Having regard for the foregoing, I am of the opinion that the evidence appears sufficient to justify a finding that Sgt. [REDACTED] abused his authority by applying a neck hold to Mr. [REDACTED] in order to make the arrest.

Notice of Next Steps

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

- (a) For the reasons set forth herein, the evidence does not establish that Sgt. [REDACTED] abused his authority by arresting Mr. [REDACTED] on the basis of an apprehended breach of the peace.
- (b) For the reasons set forth herein, the evidence referenced in the investigation report appears sufficient to substantiate the allegation that Sgt. [REDACTED] abused his authority by applying a neck hold to Mr. [REDACTED] in order to arrest Mr. [REDACTED]
- (c) A prehearing conference will be offered to Sgt. [REDACTED]
- (d) Sgt. [REDACTED] has the right pursuant to s. 119 to request permission to call, examine or cross-examine witnesses at the discipline proceeding, provided such request is submitted in writing within 10 business days following receipt of this notice of decision.
- (e) The range of disciplinary or corrective measures being considered include:
 - a. Reprimanding Sgt. [REDACTED] verbally;
 - b. Reprimanding Sgt. [REDACTED] in writing;

- c. Giving advice as to his conduct; and
- d. Requiring Sgt. [REDACTED] to undertake further training in the appropriate use of force.

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

Dated at Vancouver, British Columbia this 11th day of April 2012.

"Ian H. Pitfield"

Hon. Ian H. Pitfield