

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

AND

IN THE MATTER OF A DISCIPLINE PROCEEDING CONCERNING AN ALLEGATION OF  
MISCONDUCT AGAINST [REDACTED]  
OF THE VANCOUVER POLICE DEPARTMENT

REASONS FOR DECISION: DISCIPLINE PROCEEDING

TO: [REDACTED] (the "Member")  
c/o Vancouver Police Department  
Professional Standards Section

AND TO: [REDACTED], Counsel for the Member ("Counsel")

AND TO: Mr. S. Lowe  
Police Complaint Commissioner (the "Commissioner")

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I Discipline proceeding – the allegation of misconduct relating to the Member

- (1) This is a Discipline Proceeding pursuant to sections 123 to 125 of the *Police Act* relating to a complaint of misconduct concerning the Member.
- (2) The process giving rise to these proceedings was initiated by the Commissioner on April 2, 2013. This complaint arose in connection with an incident alleged to have taken place in Vancouver on [REDACTED] involving [REDACTED] (the "Complainant"), the Member and others.

- (3) The allegation of misconduct raised by the Commissioner was as follows:

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

- (4) The specific details of the use of unnecessary force relate to the actions of the Member in attempting to handcuff the Complainant during a traffic stop and, in particular, a punch to the Complainant's head during that process.

## **II History of Proceedings**

- (5) An explanation for the delay in proceeding with this matter under the provisions of the *Police Act* was outlined in my earlier decision pursuant to section 117 of the *Police Act*. However, to ensure proper context for this decision, a restatement and updating of the history relevant to this case is required.
- (6) On April 2, 2013 the Commissioner appointed the West Vancouver Police Department to investigate the allegation of misconduct concerning the Member pursuant to sections 93(1)(a) and 93(1)(b) of the *Police Act*. A report was due by September 28, 2013.
- (7) On August 15, 2013, the Commissioner ordered a suspension of *Police Act* proceedings involving the Member in accordance with section 179(4) of the *Police Act*. The suspension was ordered to facilitate a criminal investigation of the incident in question and the role of the Member in connection with the same.
- (8) On [REDACTED], a summons was issued to the Member alleging the offence of assault against the Complainant on [REDACTED].
- (9) A trial of the criminal matter commenced [REDACTED]. That led to a conviction of the Member for the offence of assault contrary to section 266 of the *Criminal Code* on [REDACTED].
- (10) As a result of the conclusion of the criminal trial, the *Police Act* investigation was briefly reactivated November 19, 2015 including the appointment of New Westminster Police Department [REDACTED] as external Discipline Authority with respect to the complaint involving the Member. This appointment was made in accordance with section 135(1) of the *Police Act*.
- (11) On December 21, 2015, the Commissioner again ordered a suspension of *Police Act* proceedings because the Member had filed an appeal of his criminal conviction.

(12) The appeal of the Member's conviction concluded [REDACTED] with a decision by the Honourable Associate Chief Justice Cullen of the Supreme Court of British Columbia to order a new trial. However, the Crown elected not to proceed with any further trial of the matters in issue and as such, the criminal proceedings concluded in [REDACTED].

(13) On December 9, 2016, the Commissioner lifted the order suspending *Police Act* proceedings involving the Member and Complainant. This was followed by a further order on December 20, 2016 extending the time for completion of the relevant investigation to February 24, 2017.

(14) On February 23, 2017 a "Final Investigation Report" was delivered by [REDACTED] of the West Vancouver Police Department. The report identified the following allegation of misconduct in connection with the Member's interaction with the Complainant:

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

(15) On March 2, 2017, [REDACTED], as the external Discipline Authority, issued his first decision pursuant to section 112 of the *Police Act*.

(16) On March 16, 2017, Counsel for the Member filed a request for further investigation of the allegations pursuant to section 114 of the *Police Act*. The request was approved by [REDACTED]. [REDACTED] was directed to receive additional materials as directed by [REDACTED] and prepare a "Supplemental Investigation Report".

(17) This Supplemental Investigation Report was prepared and submitted by [REDACTED] on April 11, 2017. The report augmented the original investigation by including and considering testimony in the criminal proceedings relating to the Member, detailed submissions from both Crown and Counsel for the Member, and a comprehensive use of force expert report completed by [REDACTED].

(18) On April 13, 2017, [REDACTED], acting as external Discipline Authority, issued a further decision pursuant to section 116 of the *Police Act* taking into consideration the Supplemental Investigation Report of [REDACTED]. In the final result, [REDACTED] determined that the allegation of Abuse of Authority against the Member in relation to the Complainant did not appear to be substantiated.

(19) On May 15, 2017, the Police Complaint Commissioner referenced the April 13, 2017 decision of [REDACTED] and ordered this further review of the allegation of misconduct against the Member pursuant to section 117(1) of the *Police Act*. I was appointed as the reviewing retired judge in connection with the section 117 process.

(20) On June 7, 2017 my decision concerning the section 117(1) review was released. At paragraphs 75 and 76 of the decision I found as follows:

*75. Pursuant to my authority under section 117(9) of the Police Act, I am satisfied that on review of the Record, the conduct of the Member appears to constitute misconduct.*

*76. The specific misconduct in issue relates to the use of unnecessary force by the Member against the Complainant contrary to section 77(3)(a)(ii)(A) of the Police Act [REDACTED] in Vancouver, B.C.*

(21) As part of the section 117 decision, a pre-hearing conference was offered to the Member, however, that offer was not accepted.

(22) A Form 2, Notice of Discipline Proceeding, was delivered to the relevant parties June 27, 2017 setting the commencement of the Discipline Proceeding to July 28, 2017. I then assumed the responsibilities of Discipline Authority in accordance with section 117 (9) of the *Police Act*.

(23) At the July 28, 2017 hearing, Counsel sought an adjournment to obtain additional material concerning an application.

(24) On August 15, 2017 Counsel delivered materials requesting that I recuse myself in the Discipline Proceedings. Several further adjournments were sought and approved to accommodate Counsel's interest in providing additional factual context and legal argument on the recusal application.

(25) The Member's recusal application was amended, finalized and ultimately heard November 27, 2017.

(26) A decision was released on November 29, 2017 denying the amended recusal application and establishing a further hearing date of December 20, 2017. On that date one further adjournment was granted to January 19, 2018 being the date set to consider evidence and submissions with respect to this Discipline Proceeding.

(27) Further adjournments to seek supplementary submissions were made to January 26, 2018, February 5, 2018 and finally February 13, 2018 when the evidentiary proceedings concluded.

### **III Misconduct and the Police Act**

(28) Section 77 of the *Police Act* sets out the definition of “misconduct” relevant to the allegations concerning the Member. Specifically, subsection 77 of the *Police Act* provides, in part, as follows:

*77(1) In this Part, "misconduct" means*

*(a) conduct that constitutes a public trust offence described in subsection (2), or*

*(b) conduct that constitutes*

*(i) an offence under section 86 [offence to harass, coerce or intimidate anyone questioning or reporting police conduct or making complaint] or 106 [offence to hinder, delay, obstruct or interfere with investigating officer], or*

*(ii) a disciplinary breach of public trust described in subsection (3) of this section.*

*(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:*

*(a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,*

*(ii) in the performance, or purported performance, of duties, intentionally or recklessly*

*(A) using unnecessary force on any person.*

(29) An important overall limitation to the definitions of misconduct in section 77 of the *Police Act* is found in subsection 77(4) as follows:

*77(4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.*

(30) It is an allegation of misconduct arising under subsection 77(3)(a)(ii)(A) of the *Police Act* concerning the Member’s interaction with the Complainant that is relevant to this Discipline Proceeding.

(31) These proceedings are not an adjudication of claims or defences raised in other matters or an appeal of other decisions under the *Police Act*. Rather, this decision reflects an examination of all of the evidence submitted in these proceedings related to the allegation of misconduct defined by subsection 77(3)(a)(ii)(A) of the *Police Act* as qualified by subsection 77(4).

- (32) The standard of proof with respect to the allegations of misconduct is evidence on a balance of probabilities.

#### **IV Records submitted for review**

- (33) The following records were entered as exhibits in this proceeding:

- (a) Final Investigation Report of [REDACTED] dated February 24, 2017 with related procedural documents.
- (b) Vancouver Police Department General Occurrence Report [REDACTED] and attachments.
- (c) West Vancouver Police Department Report to Crown Counsel.
- (d) Court Transcripts and Decisions related to the Member, Vancouver Provincial Court Registry [REDACTED].
- (e) Supplemental Final Investigation Report of [REDACTED] dated April 11, 2017.
- (f) Use of Force Report of [REDACTED] dated March 16, 2014.
- (g) Submissions delivered by Crown and Counsel for the Member's criminal trial in relation to *R. v. (the Member), supra*.
- (h) Video extracts relating to the alleged incident.
- (i) Training Records relating to the Member.

- (34) The sole witness testifying in these proceedings was [REDACTED], the investigating officer in connection with this matter.

- (35) These materials, and the testimony of [REDACTED] collectively, comprise the record with respect to these proceedings (the "Record").

- (36) The Member elected not to testify in these proceedings and relied on [REDACTED] evidence detailed in the Record. However, the Member did offer to answer any questions I might have as Discipline Authority.

- (37) I did take the opportunity to direct questions arising from my review of the Record to Counsel for the Member. As such, I find that section 124(9), the potential to draw an adverse inference from a failure to testify on the part of the officer concerned, is not relevant to these proceedings. I have not drawn any inference from the Member's decision not to testify in this Discipline Proceeding.

## **V The Video of the incident**

(38) Before considering the evidence in detail, it is appropriate to describe the content of a key video of the incident in question contained in the Record.

(39) On the night of the incident involving the Complainant, the Member and [REDACTED], [REDACTED], a friend of the Complainant, was present and video-recorded one perspective of the interaction between the parties (the "Video"). The Video begins just before the Complainant was handcuffed and ends after police involvement had substantially ended.

(40) The Video is an important part of the Record detailing part of the interaction between the Complainant and the two officers present, and it provides an objective perspective into some of the matters in issue. I am aware, however, that the Video itself has limitations. Specifically, the Video only captures the view of a person standing to the front of the Complainant, and does not provide a 360- degree perspective of all interactions. Furthermore, the Video captures only a portion of the overall interactions between the Member and the Complainant.

(41) Notwithstanding those limitations, the Video is a critically important part of the Record serving as cogent, objective and reliable evidence of much of what took place that is in issue. As such, it provides the opportunity to compare witness testimony with a reliable, objective record of the interactions between the parties for the period in question.

## **VI Position of Counsel for the Member**

(42) The position of Counsel for the Member was set out in considerable detail in submissions incorporated into the Record during the criminal proceedings. Those submissions were augmented by further detailed submissions on the expert reports and testimony at the commencement of the evidentiary portion of this Discipline Proceeding hearing. As well, Counsel was asked to clarify the Member's position on certain matters of fact and law and has provided additional submissions on those matters.

(43) With respect to the facts surrounding the allegation of misconduct, Counsel for the Member's submission can be summarized as follows:

- (a) The facts do not establish misconduct. All force used by the Member was both necessary and reasonable;
- (b) On the date in question, the Member was on duty in plain clothes operating an unmarked police car. On that date [REDACTED] was [REDACTED] tall weighing approximately [REDACTED];

- (c) Specifically, the Complainant was observed late in the evening of [REDACTED], [REDACTED] to be riding through a red light on a bike with no lights and without a helmet in downtown Vancouver. The Member and [REDACTED] decided to stop the Complainant to further investigate matters. The Member activated the emergency lights and pulled over to the curb;
- (d) At this point the Member's intention in making the traffic stop was simply to give the Complainant a violation ticket and allow [REDACTED] to go on [REDACTED] way;
- (e) On being stopped, the Complainant denied having gone through the red light;
- (f) The Complainant became verbally belligerent saying things like "You're wasting my time", "You should go to Tim Horton's", "This is fucking bullshit", "You should be catching real criminals", "There are drug dealers you should be dealing with", "someone's being raped right now" and other similar comments;
- (g) incidental to a traffic stop, the Complainant was asked if [REDACTED] had any identification, and responded in the negative, repeating more negative comments. In fact, a subsequent search of the Complainant revealed identification in a jacket pocket;
- (h) The tone and demeanor of the Complainant was uncooperative, aggressive and confrontational from the outset. This included swearing and derogatory comments made to the officers;
- (i) As the Member exited the police car, [REDACTED] partner, [REDACTED] remained inside;
- (j) The Member asked a few times for the Complainant to identify [REDACTED], but the Complainant refused, continuing [REDACTED] negative diatribe;
- (k) The Member advised the Complainant that [REDACTED] was obliged by law to give [REDACTED] name and address. Identification information was then provided by the Complainant which was transferred to [REDACTED] to complete a search on the police car computer terminal;
- (l) The Member had concerns for [REDACTED] safety standing curbside and as such asked the Complainant to move onto the sidewalk. Although the Complainant did so, the Member made further requests for [REDACTED] to move further back to allow the Member to step up to the sidewalk, but the Complainant did not move further;
- (m) The Member was not initially bothered by the Complainant's language but noted that [REDACTED] was becoming more agitated, raising safety concerns for the Member;
- (n) While the Member was engaging with the Complainant, [REDACTED] arrived on scene, evidently a friend of the Complainant. [REDACTED] was not known to the officers;
- (o) It appeared to the Member that the Complainant was becoming more agitated, emotional and emboldened, in part, due to the arrival of [REDACTED];



- (p) The Complainant was also staring at the Member and in the view of the Member, becoming more aggressive and angrier. This caused the Member to be concerned that the situation might be getting out of hand, so [REDACTED] made a decision to handcuff the Complainant to calm things down allow the Member to finish writing the ticket safely;
- (q) The decision to arrest and handcuff the Complainant was authorized once the Member observed the Complainant committing several offences: *R. v. Moore*, [1979] 1. S.C.R. 195;
- (r) [REDACTED] was then seen to begin video recording the incident with a cell phone. The Member believed [REDACTED] was within [REDACTED] "reaction gap" and presented an additional risk to the officers;
- (s) [REDACTED] exited the police car to assist with the handcuffing of the Complainant;
- (t) Before beginning the handcuffing, the Member explained that to the Complainant that [REDACTED] would be in handcuffs for a short while. The Complainant objected and said "No" or "no you're not going to do that" and began to pull away;
- (u) Both officers who were then behind the Complainant felt [REDACTED] resisting having the handcuffs applied;
- (v) [REDACTED] told the Complainant to stop resisting;
- (w) The Member was successful in attaching one of the handcuffs on [REDACTED] left wrist;
- (x) While attempting to attach the right cuff, both officers could feel the Complainant tense up, pulling [REDACTED] arms away from them;
- (y) The Complainant was resisting with one handcuff attached to [REDACTED] left wrist, the right was unattached;
- (z) The Member was holding on to the loose handcuff, but believed if [REDACTED] lost control of that cuff due to the Complainant's resistance, it would create a serious safety risk and could result in a significant injury;
- (aa) Further, the Member believed that the specific location of the incident on the curb of a busy street could have posed further risk of injury in the event of a struggle. [REDACTED] was also concerned about the presence of [REDACTED] and unknown risks [REDACTED] might pose as a friend of the Complainant;
- (bb) The Member believed that [REDACTED] had to take the Complainant into immediate custody by way of a quick and decisive maneuver;
- (cc) The Member believed that the position of the police car, the curb, the bike and adjacent lamp standard, made it impractical to take the Complainant to ground to complete the handcuffing process; and
- (dd) With [REDACTED] left hand, [REDACTED] weaker hand, the Member punched the Complainant in the left side of the face regaining control and ultimately applying the second handcuff.

- (44) Counsel for the Member submits police officers do not have to be perfect in the application of force, they must only be reasonable: *R. v. Nasogaluak*, 2010 SCC 6; *Anderson v. Smith*, 2000 BCSC 1194.
- (45) Counsel further submits that reasonableness in the use of force is demonstrated in and supported by the National Use of Force Framework.
- (46) In considering the application of the National Use of Force Framework to the Member's position on the facts, the submission is that the Member's use of force was reasonable based on [REDACTED] training, experience and the framework.
- (47) In support of this position, Counsel for the Member relies on evidence of both use of force experts from the criminal proceedings, [REDACTED] and [REDACTED].
- (48) Counsel for the Member submits that the Member had the power to detain the Complainant as a person found committing offences under the *Motor Vehicle Act*. The purpose of the detention was to allow the Member to confirm the Complainant's name and address so the officer could complete and issue a ticket.
- (49) Counsel for the Member further submits that having lawfully detained the Complainant, the Member had the common law power to take reasonable steps to ensure the safety of both officers, and the detainee.
- (50) It is specifically submitted that such reasonable steps included briefly placing the detainee in handcuffs for officer safety.
- (51) Once the handcuffing process began, Counsel for the Member submits that the risk to the officers was elevated. An incomplete handcuffing process and resistance to the application of the handcuffs, described in submissions from Counsel for the Member, justified the use of force by the Member through the use of a sharp punch to the face. The purpose of the punch, it is submitted, was to regain control and preserve officer safety.
- (52) In the final result, Counsel for the Member submits that misconduct has not been proven against the Member.

## **VII Review of the Record– Evidence not in dispute**

(53) The Record does not suggest any dispute with respect to the following facts, namely that:

- (a) At all material times the Member served as a patrol officer with the Vancouver Police Department. [REDACTED] has done so for approximately nine years. Prior to that, the Member served for two years with the [REDACTED];
- (b) The Member is approximately [REDACTED] tall weighing approximately [REDACTED]. The Complainant's height was estimated to be approximately [REDACTED]. At all material times the Member was taller and larger than the Complainant;
- (c) The Member received training in the National Use of Force Framework as part of Justice Institute training in [REDACTED]. The specific details of that training have not been provided either in the Record or supplemental submissions;
- (d) On [REDACTED] at approximately [REDACTED], the Member and [REDACTED] partner, [REDACTED], were operating an unmarked police vehicle in Vancouver as plain clothes officers. The Member was driving the vehicle proceeding southbound on [REDACTED];
- (e) The Member first noticed the Complainant operating a bicycle when the Complainant ran a red light at the intersection of [REDACTED] and [REDACTED]. The Complainant was not wearing a helmet and the bike in question had no operating lights;
- (f) The Member followed the bicycle south along [REDACTED] coming to a stop at the [REDACTED] intersection where the Member activated the police vehicle's emergency lights;
- (g) Through the passenger side window, [REDACTED] directed the Complainant to pull over. [REDACTED] identified [REDACTED] as a Vancouver Police Officer;
- (h) [REDACTED] advised the Complainant of the reason for the stop. Specifically, the Complainant was advised that [REDACTED] had been observed by the officers to run the red light at the [REDACTED] intersection;
- (i) The Complainant's response was to argue that there was no reason for a stop and to deny that [REDACTED] had in fact run an earlier red light;
- (j) Concurrent with this exchange, the Member exited the police vehicle once parked and moved to the curbside of the road where the Complainant had stopped with [REDACTED] bicycle. [REDACTED] remained in the police car passenger seat, window open;
- (k) The Member reiterated the reason for the stop and confirmed that the Complainant would receive a *Motor Vehicle Act* ticket. The Member also explained that the Complainant was operating [REDACTED] bike without a light after dark and not wearing a helmet; and
- (l) The Complainant continued to question the grounds for the traffic stop and possible ticket. [REDACTED] also asked whether or not the police officers present might have something better to do than deal with a traffic stop suggesting at some

point that perhaps the officers should be at a coffee shop or investigating more serious crimes.

(54) Beyond this stage most of the facts are in dispute.

## **VIII Credibility assessments with respect to evidence in dispute**

(55) In reviewing the facts in dispute, it is evident that there are clear differences in the unfolding events as described by the various participants. The evidentiary issues arise with respect to four key areas:

- (a) The physical acts and movements of the parties subsequent to the stop of the Complainant;
- (b) The demeanor of the Complainant throughout the incident;
- (c) The Member's subjective beliefs throughout the incident; and
- (d) The standards for the use of force on the facts of this case.

(56) In order to make findings of fact on the next stages of the interaction between the Member and the Complainant, I have considered the evidence of all parties with respect to these developments as set out in the Record. I have specifically considered the conflicts arising from the various reports, materials, statements and testimony.

(57) I am aware, of course, that my ability to assess the credibility of the various witnesses is limited to a review of the Record. I have not had the ability to personally observe or, indeed, raise questions of any of the witnesses, other than the limited testimony of investigating Officer, [REDACTED].

(58) With those limitations taken into consideration, I have reviewed the evidence provided in the Record. I have no credibility concerns with respect to the evidence of [REDACTED]. As noted below, I also find that I have identified no material credibility issues with respect to the evidence of [REDACTED].

(59) However, I have identified a number of significant credibility concerns relating to the evidence of the Complainant, the Member and [REDACTED] set out in the various components of the Record. My concerns touch on the ability of each of those parties to objectively and fully observe what was taking place on the evening in question; their ability to fully recollect the details of those events; and their respective ability to report accurately, and completely, on the interaction between the parties.

(60) I will begin by considering in some detail the credibility of [REDACTED].

## A [REDACTED] – Credibility

- (61) In considering the evidence that is in dispute, I do not have any material credibility concerns with respect to the evidence of [REDACTED]. Let me explain:
- (a) Although a friend of the Complainant, [REDACTED] was careful and detailed in [REDACTED] evidence, objectively describing events as [REDACTED] encountered them;
  - (b) [REDACTED] had a demonstrated ability to independently observe, recollect and report on events on the evening in question;
  - (c) [REDACTED] also had no difficulty in maintaining [REDACTED] objectivity. For example, [REDACTED] was forthright in acknowledging that during the argument ensuing between the Member and the Complainant, [REDACTED] friend, the Complainant, had a slightly elevated tone while the Member did not;
  - (d) [REDACTED] also confirmed the disrespectful content of the argument arising from the Complainant; and
  - (e) It is particularly significant that in the criminal trial of the Member, [REDACTED] was not cross examined on [REDACTED] evidence.
- (62) Overall, I find that [REDACTED] was an important and objective credible witness to the events in question, quite apart from the Video record that [REDACTED] created. I accept [REDACTED] evidence without reservation as credible, trustworthy and reliable.

## B The Complainant – Credibility

- (63) The Complainant was forthright in acknowledging much of [REDACTED] communications with the officers. This included acknowledgement of the use of the expletive “bullshit” and suggestions that officers could better spend their time elsewhere, including investigating more serious criminal matters and visiting coffee shops. [REDACTED] denied, however, being angry or speaking in a raised tone immediately after [REDACTED] stop which appears, to some degree, to be inconsistent with [REDACTED] observations.
- (64) However, the Complainant did acknowledge gaps in [REDACTED] recollection of some specifics, and [REDACTED] use of unflattering language in dealing with the Member and [REDACTED].
- (65) The Complainant’s evidence was replete with acknowledgements that [REDACTED] “could not recall” specific details.
- (66) The Complainant was also casual with detail or, at best, equivocal with material facts. For example, [REDACTED] initially denied having any identification on [REDACTED] person when asked, but later was found to have a BC ID card in [REDACTED] wallet after being searched incidental to [REDACTED] arrest. The explanation proffered that [REDACTED] did not recall if [REDACTED] had [REDACTED] wallet with [REDACTED] does

not have the ring of truth. [REDACTED] also categorically denied to officers running the red light at the [REDACTED] intersection which again does not have the ring of truth.

- (67) I find that the Complainant's evidence was characterized by apparent gaps in [REDACTED] recollection and some degree of minimization or equivocation as to [REDACTED] reaction on being stopped by police. These features here have an impact on both the reliability and credibility of the Complainant's evidence.

C [REDACTED] – Credibility

- (68) [REDACTED] had a limited ability to fully observe and report on interactions with the Member. It was limited because [REDACTED] remained in the police car roadside and was focused on the process of querying the Complainant's name on the computer as discussions continued with the Member. This raises an issue as to the value of [REDACTED] evidence in describing the Complainant's demeanor and actions immediately after the stop. I find that [REDACTED] ability to fully observe the interactions was limited until [REDACTED] left the police car.
- (69) After leaving the police car, I find that [REDACTED] description of the degree of hostility exhibited by the Complainant was inconsistent with both [REDACTED] evidence and the Video. [REDACTED] appears to have exaggerated the belligerence, and hence risk, posed by the Complainant as confirmed by [REDACTED] and the Video.
- (70) The inconsistency in [REDACTED] evidence is evident from comparison of [REDACTED] initial occurrence report, apparently written the night of the incident in question, with subsequent court testimony. That report, referenced in [REDACTED] testimony in the criminal proceedings, characterizes the Complainant's behaviour as "*swearing with disapproval*".
- (71) In later testimony in those proceedings, that description elevated the Complainant's behaviour to confrontational and agitated, yet those terms are not referenced in the officer's initial report. That report also apparently completely omitted any reference to [REDACTED] punch to the Complainant's head, clearly the most significant development in the events of that evening.
- (72) On another issue, [REDACTED] testified to the ID of the Complainant ultimately being located in [REDACTED] rear pocket. In fact, the Video confirms that the ID was removed from the Complainant's front jacket pocket.
- (73) Cumulatively, these are examples of [REDACTED] lack of accuracy and completeness in reporting the facts.

- (74) [REDACTED] evidence, which I find bears the hallmarks of minimization and equivocation, significantly affects the reliability of [REDACTED] evidence.
- (75) Finally, with respect to credibility, [REDACTED] evidence is replete with the response “*I don’t recall*” when pressed for details. These extensive omissions raise serious questions as to [REDACTED] selective ability to recall key evidence and the role of the various parties with respect to the matters in issue.
- (76) Considering all of the foregoing, I find that [REDACTED] reliability and objectivity were compromised. I have, as such, noted concerns about both [REDACTED] reliability and credibility as a witness.

#### **D The Member – Credibility**

- (77) The Member’s description of events after the traffic stop depicted the Complainant as immediately aggressive, argumentative and increasingly hostile. This included intense staring by the Complainant interpreted by the Member as hostile and confirmation of an increasing risk to the officers.
- (78) Furthermore, prior to the punch, the Member took the position on direct examination at the criminal trial that it was [REDACTED] view that in all of the circumstances, the Complainant was at this stage non-compliant.
- (79) However, such characterizations are inconsistent with the Member’s acknowledgement on cross examination that prior to the punch, the Complainant had in fact ultimately complied with what [REDACTED] had been requested to do, with the exception of the request to move further up the sidewalk.
- (80) Subsequent to the arrival of [REDACTED] and the commencement of the Video, both the evidence of [REDACTED] and the Video recording confirm that the Member’s description of an increasingly hostile and aggressive Complainant exaggerates the true state of affairs.
- (81) Specifically, the Member testified to an aggressive and hostile demeanor exhibited by the Complainant. However, there is no dispute that the Complainant had:
- (a) Stopped [REDACTED] bike as requested;
  - (b) Responded to requests for identification from [REDACTED] and the Member;
  - (c) Provided [REDACTED] name and address once it was explained it was required by law;
  - (d) Moved [REDACTED] bike to the sidewalk consistent with a request from the Member, although [REDACTED] did not move further in response to subsequent requests made by the Member;

- (e) Turned, as directed, to accommodate the placement of handcuffs by the Member, a clearly submissive act;
- (f) Not raised a fist, flailed about, threatened or physically challenged the Member, either before, or after, the punch during the handcuffing process; and
- (g) Broken off any prolonged staring at the Member as [REDACTED] focus moved from the Member to [REDACTED] and back.

(82) In general, the Complainant was compliant with all but one request of the officers, that being the request to move back further onto the sidewalk to allow the Member to step up from the curb.

(83) Taken together, such actions are inconsistent with the level of hostility and increasing safety risk described by the Member and gives rise to a question as to the objectiveness of this officer in reporting on the actions of the Complainant.

(84) The Video does not show the Complainant as an aggressive or angry person when the officers are attempting to apply handcuffs. Furthermore, [REDACTED] was never called upon by the member for assistance before announcing [REDACTED] intention to handcuff the Complainant, which may provide some insight into the actual risks faced by the Member.

(85) In fact, I find that the Complainant was subdued and relatively calm throughout the Video until [REDACTED] arm was twisted and [REDACTED] received the punch by the Member. In that sense, any argument or abuse emanating from the Complainant towards the Member had substantially abated as the handcuffs were applied and the punch delivered.

(86) Even after the Member's punch, there was no retaliation by the Complainant, [REDACTED] simply followed the directions of the Member and went to ground. These facts again raise a concern as to the Member's objectivity in describing the risk [REDACTED] believed [REDACTED] was facing from the Complainant.

(87) The objective evidence and [REDACTED] testimony simply do not support the aggressive demeanor or increasing risk associated with the Complainant described by the Member. The Member's exaggeration of the Complainant's hostility and risks associated with those interactions raises concerns as the reliability of [REDACTED] evidence.

(88) In terms of the movements of the Complainant, on cross examination the Member was asked to agree with the proposition that the Complainant did not pull away with any great force. The Member disagreed with that proposition. The Member's position in that regard is at odds with the Video record which shows minor movements and force associated with the Complainant's left arm. Again, I find that the Member has exaggerated the actions of the Complainant. There is no question that the Complainant moved [REDACTED] arm twice, however, the moves were not as described by the Member.



(89) A further material exaggeration arises from the Member's description of [redacted] own stability immediately before punching the Complainant. The Member was steadfast in maintaining that [redacted] had very poor balance just prior to the punch as a result of the pulling actions of the Complainant. However, on cross examination the Member acknowledged with respect to that particular aspect of the incident, that:

- (a) At all times [redacted] retained a firm two-handed grip on the Complainant's right arm;
- (b) The Member retained a firm grip with [redacted] right hand on the left handcuff which had been applied to the Complainant's hand;
- (c) The Member's left hand was removed from covering the left handcuff and redirected to the punch;
- (d) Any balance issues were not so severe that they prevented the Member from delivering a quick punch with [redacted] left hand to the Complainant's head with considerable force;
- (e) Finally, any balance issues did not cause the Member to fall over, nor to fall to one side.

(90) With respect the balance issues, the Member's testimony is also inconsistent with the objective Video record. There is simply no evidence of any imbalance on the Member's part at any stage in the interaction with the Complainant. The steadfast assertion by the Member that a significant balance issue had any bearing on [redacted] actions raises further concerns as to reliability of the officer's evidence as it exaggerates the actual state of affairs.

(91) In the criminal proceedings, the Member testified that immediately before the punch to the Complainant, [redacted] tried to pull the Complainant's arm back, but *"that wasn't working. So, I decided to hit [redacted] with a stunning blow, a punch, with the intent to distract or stun [redacted] enough that I could complete the handcuffing manoeuvre"*.

(92) However, the Video shows that the Member's assertion was not accurate. At the time the Member was leaning back to deliver a punch, the Complainant's left hand had, in fact, been pulled back down behind [redacted] back by the Member. Clearly, the actions of the Complainant and the Member's responses cannot be considered in isolation as the situation was dynamic and evolving. However, the Member was, I find, inaccurate in [redacted] description of the circumstances leading [redacted] to believe that a punch was required.

(93) Hence, considering the totality of the foregoing, I find that there are material concerns as to the Member's overall credibility and the evidence [redacted] has provided in the various evidentiary forums set out in the Record. I do not reject the Member's evidence, rather I note that there are credibility issues arising from [redacted] explanation of the interactions with the Complainant.

## IX Findings of fact on evidence in dispute

### A Actions of the parties

(94) Having considered the Record and the credibility of the parties noted therein, I find with respect to the evidence in dispute concerning the actions of the parties that:

- (a) Immediately after the roadside stop, [REDACTED], seated in a police car, asked the Complainant if [REDACTED] had any identification. The Complainant replied that [REDACTED] did not have any identification available;
- (b) Concurrent with this exchange, the Member exited the police vehicle and moved to the side of the road where the Complainant had stopped with [REDACTED] bicycle. At this point, the Member was standing curbside beside the passenger door of the police car.;
- (c) The Member reiterated to the Complainant the reasons for the traffic stop explaining that [REDACTED] had run a red light, was operating [REDACTED] bike without a light after dark and was not wearing a helmet. The Member confirmed that the Complainant would receive a *Motor Vehicle Act* ticket as a result of [REDACTED] actions;
- (d) The Complainant was asked for [REDACTED] name and address in order to complete the ticking process;
- (e) Initially, the Complainant refused to identify [REDACTED], however, the Member explained such information was required by law. Receiving that information, the Complainant complied with the Member's request;
- (f) [REDACTED], still seated in the police car, took that information and began a search of police records on the vehicle computer to locate any records relevant to the Complainant;
- (g) Throughout this post stop interaction, the Complainant challenged the basis for the officer's actions and any ticket that might issue. [REDACTED] did so by calling the justification for the stop "*fucking bullshit*" and suggesting that the officers should be spending their time on higher priority criminal matters or attending local coffee shops;
- (h) The Member next requested that the Complainant move to the sidewalk with [REDACTED] bike out of the roadway. I find that the Complainant complied with this request with some degree of reluctance, ultimately stopping adjacent to roadside lamp post. In the result, the Member remained curbside adjacent to the police car;
- (i) However, the Complainant did not move far enough onto the sidewalk to easily allow the Member to join [REDACTED] off the roadway;
- (j) The Member therefore again requested that the Complainant move even further onto the sidewalk. However, the Complainant did not accede to those requests;

- (k) The Member made no further effort to move onto the sidewalk to either side of the Complainant. [REDACTED] remained curbside immediately in front of the Complainant. The Member did not assert any legal basis for asking the Complainant to move as requested;
- (l) In the result, the Member found [REDACTED] on the road immediately below the Complainant who was standing adjacent to a pole on the sidewalk;
- (m) There was a small uneven curb surface between the parties with the Member standing at the edge of the road by the police car passenger door. The emergency lights were operating on the unmarked car clearly indicating the presence of police;
- (n) No order was given by either officer for a further move by the Complainant to a different spot on the sidewalk nor was there any escalation by the Member to use physical contact to move the Complainant as had been requested;
- (o) The Complainant continued to challenge the basis for [REDACTED] stop advising that [REDACTED] only lived a few blocks away. The Complainant sought a discontinuance of the ticketing process, however, neither officer responded to that suggestion. The Member and Complainant continued to argue, with the Complainant using a slightly elevated voice;
- (p) At this point, a friend of the Complainant's, [REDACTED] arrived, crossed the street and approached the parties briefly shaking hands with the Complainant. [REDACTED] asked what was going on. [REDACTED] was asked by the Member to maintain [REDACTED] distance, which [REDACTED] did, immediately backing off and remaining approximately six feet from the Member and the Complainant;
- (q) The Complainant was swearing at the Member and continuing to argue about the stop and ticketing process. As such, the Member made a decision to arrest the Complainant by saying to [REDACTED]: *"Turn around, you're under arrest"*. The Complainant's verbal response was to reply *"that's fucking bullshit"*. However, the Complainant dutifully complied by turning and placing [REDACTED] hands behind [REDACTED] back as directed;
- (r) The Member's task prior to the decision to arrest the Complainant was simply to safely confirm adequate identification information, in order to enable a ticket to be written for the various infractions alleged under the *Motor Vehicle Act*. There is nothing in the Record to suggest that at this point the Complainant posed a risk to the public, was committing or about to commit other crimes or that [REDACTED] was acting to pose an overt risk to the two officers. Moreover, the police were dealing with a cyclist on a minor ticketing infraction, as opposed to a suspect in relation to a crime.
- (s) The Complainant had provided identification information which was being confirmed by [REDACTED]. Before arrest the Complainant had been staring at the Member on and off, verbally challenging the Member's actions and doing so in disrespectful language. However, that was the extent of [REDACTED] actions before arrest.

- (t) Furthermore, the Record does not suggest at any point that the Member requested the presence of [REDACTED] on the sidewalk to provide additional coverage as the Member's concerns with respect to the Complainant apparently increased;
- (u) [REDACTED] left the police car at approximately the same time [REDACTED] arrived on scene and just before the Member handcuffed the Complainant;
- (v) Prior to the arrest, [REDACTED] was engaged in an ongoing discussion with the Complainant about the incident and from time to time engaged the Member as well;
- (w) Shortly after [REDACTED] arrived, [REDACTED] began video recording the interaction between the two police officers and the Complainant;
- (x) [REDACTED] was fully compliant with officer directions in maintaining a respectful distance as [REDACTED] continued video recording;
- (y) There is nothing in the Record that suggests that [REDACTED] actually acted in a manner to pose a risk to either officer, other than by [REDACTED] presence. There were no overt verbal or physical acts or threats by [REDACTED] directed towards either officer;
- (z) In terms of verbal interactions, by the time the Member had made the decision to arrest and handcuff the Complainant, approximately 3-4 minutes of debate had ensued between the two officers and the Complainant. The debate had been animated on both sides with the Complainant swearing and challenging the actions of the two officers in a slightly elevated voice;
- (aa) With [REDACTED] hands behind [REDACTED] back, the Complainant was compliant in following directions standing next to a lamp post roadside. The Complainant was not gesturing aggressively, actively resisting nor acting violently but rather acting in compliance with directions of the Member. [REDACTED] was standing with [REDACTED] hands behind [REDACTED] back as the two officers stood immediately behind;
- (bb) At this point, both officers had their heads down with the Member clearly visible working on a set of handcuffs near the Complainant's left hand;
- (cc) [REDACTED] had [REDACTED] head down behind the Complainant's right side. There were no overt or aggressive acts from any of the parties at this stage. The left handcuff was secured by the Member;
- (dd) As the Member and [REDACTED] had begun applying the handcuffs, the Complainant asked in a normal tone, "What is this for?" turning [REDACTED] head slightly to the left attempting to engage the Member. Any movement felt in the right arm by [REDACTED] was minor and related directly to the Complainant's turn to address the Member;
- (ee) As the Complainant asked that question, the Complainant's left arm was raised slightly behind [REDACTED] back extending to the left while under control by the Member with both hands. This was not a forceful or purposeful movement and did nothing to affect [REDACTED] grip on the Complainant's right arm;

- (ff) The Record is unclear as to precisely what was said by the Member in response. However, the Member had [REDACTED] right arm and wrist over the Complainant's left arm, [REDACTED] left below, continuing to work the handcuffs.
- (gg) There were no furtive or aggressive moves on the part of the Complainant at any point;
- (hh) The Complainant's left arm was then again moved under control by the Member first down and then up towards the Complainant's back. The left handcuff was clearly attached at this point;
- (ii) The Complainant's head remained turned towards the Member who had now turned [REDACTED] body so that [REDACTED] was facing the Complainant's left side with [REDACTED] right hand covering the left wrist;
- (jj) The Complainant's left wrist was next moved by being pushed upward behind the Complainant's back by the Member further than the first movement;
- (kk) [REDACTED] continued to work behind the Complaint's right side. This was the second movement of the left arm up behind the Complainant's back;
- (ll) On this second move, the Complainant's arm extended further up the back than the earlier move and in apparent response, the Complainant turned [REDACTED] head left even further towards the Member. The Complainant's back was arched backward slightly in response to the move of the left arm. The arm remained in that elevated position for a few seconds with the Complainant's head turned left towards the Member;
- (mm) The Complainant's left arm then moved from behind [REDACTED] back extending to a 45-degree angle angled back toward the member with the palm turned inward towards the Member. This was accompanied by a further move left of the Complainant's head. The move was reflexive to that point and then moved to a near vertical position with [REDACTED] palm open and facing upward towards the Member. The move by the Complainant was neither aggressive nor assaultive. It was, after the reflexive move, a brief repositioning of the arm down and closer to the Complainant's left side. There was no material elevation of the Complainant's shoulder during this move nor any other apparent signs telegraphing any action beyond returning [REDACTED] arm to a more conventional posture. The move was not an intentional attempt pull away to escape the Member's efforts with respect to the application of handcuffs;
- (nn) As the Complainant moved [REDACTED] left arm, the Member retained a grip on the handcuff with [REDACTED] right hand. [REDACTED] maintained a strong, two-handed grip on the right arm of the Complainant;
- (oo) As [REDACTED] moved [REDACTED] left arm, the Complainant remained turned to the left then began to speak, saying "no, no";
- (pp) The Member's reaction to the downward move of the Complainant's left arm was immediate. The Member pulled down on the handcuff with [REDACTED] right hand and disengaged [REDACTED] left hand from handcuff control, raised the same quickly, and struck the Complainant once with a hard, closed fist strike to the left side of the Complainant's face. At the time the punch was commenced, the

- Complainant's left arm had been pulled by the Member back to a near vertical position but still slightly bent, approximately a fist width away from [REDACTED] waist.;
- (qq) Immediately after the punch, the Member told the Complainant to stop resisting and calmly gave direction to both the Complainant and [REDACTED]. [REDACTED] did so while moving to grab the right-hand side ring of the handcuffs with the Member's right hand and pushing the Complainant's head down hard with [REDACTED] left. In the result, the Complainant was moved by the Member to a seated position curbside;
- (rr) The Complainant and [REDACTED] both objected to the punch and were demanding to know why it had happened;
- (ss) The Member explained that the punch was taken because the Complainant resisted application of the handcuffs;
- (tt) The Complainant denied active resistance and explained that [REDACTED] wrist had been twisted by the Member in a manner that could not be physically maintained ("*I don't bend that way*");
- (uu) Shortly thereafter, a Supervisor arrived and immediately moved to engage both the Member and Complainant;
- (vv) The Complainant sought medical treatment for a chipped tooth and cut lip arising from the Member's punch;
- (ww) The Complainant was released on a Promise to Appear with respect to an allegation of "obstruction of Justice" as well as a ticket under the *Motor Vehicle Act* for running the red light at Robson Street;
- (xx) The total time of interaction between the Member and Complainant before the arrival of the Supervisor was approximately six minutes; and
- (yy) Throughout the encounter with the Complainant, the Member remained relatively calm and displayed no apparent anger or animus to either the Complainant or [REDACTED], with the exception of the obvious elevated tension associated with the single outburst arising from the punch to the Complainant.

## **B Demeanor of the Complainant**

(95) With respect to the demeanor of the Complainant I find that:

- (a) From the first contact with police the Complainant was clearly argumentative about the reason for [REDACTED] stop by police and ultimately frustrated by [REDACTED] inability to resolve matters. The Complainant was repeatedly challenging the basis for [REDACTED] stop by the police for what [REDACTED] perceived to be a minor matter;
- (b) The characterization of the Complainant's demeanor described by the Member and [REDACTED] as increasingly aggressive or angry is inaccurate. I find that the Complainant was simply challenging the basis

- for [REDACTED] stop by police, although [REDACTED] was clearly doing so in a moderately disrespectful manner invoking profanity;
- (c) The characterization of the Complainant's demeanor by the Member and [REDACTED] as very agitated, aggressive, angry, harsh or loud is also inaccurate. I find that the Complainant's tone of voice in dealing with the Member did become slightly elevated, and was at times disrespectful, however, it did not extend to yelling or an overtly harsh tone at any point;
  - (d) The Complainant's demeanor did not at any point telegraph any reasonable potential for physical safety risk to either officer. Neither [REDACTED] words nor [REDACTED] conduct portended any violence. The Complainant was simply questioning what was going on, and why, in the context of a bicycle traffic stop; and
  - (e) I find nothing unusual or threatening about the Complainant's demeanor in the circumstances of this traffic stop, although it is clear that the Complainant was disrespectful and argumentative.

## X The law

(96) In considering whether or not misconduct has been established with respect to the Member, I have been guided by the principles established by earlier case law on the subject, including the Supreme Court of Canada decision in *Hill v. Hamilton Wentworth Police Services Board*, [2007] 3 S.C.R. 129. I have also noted the additional authorities referenced at pages 14 to 16 of the decision of Adjudicator Baird Ellan in the *Tiwana* Public Hearing (B.C. *Police Act* - PH. 2014-2):

In *Lowe v. Diebolt* [2013 BCSC 1092, aff'd 2014 BCCA 280], Myers J. held that "intentionally" in section 77(3)(a)(ii) modifies the mental element in paragraph (B) of "without good and sufficient cause" and found that the officer's ignorance of case law requiring her to have grounds to arrest before strip-searching a woman she had detained did not satisfy the mental element of the allegation of misconduct;

In *Berntt* [*Berntt v. Vancouver (City)*, 1999 BCCA 345] and *Anderson v. Smith*, 2000 BCSC 1194 the relevant law is summarized as follows at para 51:

[51] Consideration must be given to the circumstances as they existed at the time. Allowance must be made for the exigencies of the moment, keeping in mind that the police officer cannot be expected to measure the force with exactitude: *Wackett v. Calder* (1965), 51 D.L.R. (2d) 598 at 602 (B.C.C.A.); *R. v. Botrell* supra at 218; *Allrie v. Victoria (City)*, [1993] 1 W.W.R. 655 at para 20 (B.C.S.C.); *Levesque v. Sudbury Regional Police Force*, [1992] O.J. No.512 (QL) (Ont. Gen. Div); *Breen v. Saunders* (1986), 39 C.C.L.T. 273 at 277 (N.B.Q.B.); *Berntt v. Vancouver (City)*, supra at 217.

This may include the aura of potential and unpredictable danger: *Schell v. Truba* (1990), 89 Sask.R. 137 at 140 (Sask.C.A.) (in dissent). There is no requirement to use the least amount of force because this may expose the officer to unnecessary danger to himself: *Levesque v. Sudbury Regional Police Force*, supra;

Adjudicator Pitfield said this about the relevance of exigencies at paragraph 37 of the *Dickhout* decision [*Re: Dickhout*, PH 2010-03]: ...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*, [cited earlier, paragraph 35] and *In the Matter of Constable Smith*, Victoria, January 28, 2009, p.21.

Southin J.A. provided the helpful description of the trier of fact's role as a "doppelganger" to the officer at para. 24 of *Berntt*, and elaborated as follows at paragraph 25:

"The judge must go with the officer, at least from the time the officer first was sent to the place where the riot was in progress. I say "at least" because the officer's training, experience, the orders of the day given to him, are all part of what goes into the answer to the question of "reasonable grounds".

The test with respect to an officer's use of force cannot be a purely objective standard, of course, because a person not familiar with police training and tactics may not be able to put herself into the shoes of the officer or of the reasonable officer with the same level of training. I am not entirely sure that counsel differ on that proposition, as they both placed reliance on the "doppelganger" analysis put forward by Southin J.A. in *Berntt*.

Where they differ is the effect of *Lowe v. Diebolt* on that line of cases. I do not see that *Lowe v. Diebolt* is inconsistent with that line of cases or establishes an entirely subjective test of good faith. Myers J. pointed repeatedly to the lack of evidence, and observed specifically that ignorance of the law might indicate a lack of training. Justice Myers appears to simply have been observing that the evidence in that case did not establish that the officer had training, or had been taught a standard, that fixed her with knowledge that she was searching unlawfully. That is not the same as a purely subjective test; it means only that the adjudicator was not equipped to find that the officer knew her options and intentionally or recklessly acted outside her authority.

What *Lowe v. Diebolt* highlights, in my view, is the need for expert evidence, or at least evidence regarding the knowledge and training available to the officer, in cases where the trier of fact may not be equipped to assess the reasonableness of



the officer's belief. *Lowe v. Diebolt* was such a case, as is the one before me. In other cases, disproportion between the incident and the response may be so self-evident as to negate the need for testimony about what the reasonable officer might have done or been trained to do in the circumstances, or, as in this case, about the surrounding events. In those cases, it may be enough for the adjudicator to point to the officer's actions and using common sense, conclude the action was intentionally or recklessly taken without authority. In other cases where reasonable lay people may differ as to whether a police response was appropriate, evidence will be required to show that the officer failed to adhere to a general standard imposed by his or her training and available knowledge.

Clearly the officer's own view regarding the necessity of force is not determinative; the reasonableness of that view must be assessed against the yardstick of acceptable behaviour from the perspective of an officer with the same level of training and experience. But the doppelganger analysis prescribed by the cases requires that the adjudicator be equipped to understand the perspective of a reasonable officer in the shoes of the respondent.

(97) As Discipline Authority my assessment of an officer's use of force must:

- (a) Take account the exigencies and immediacy of the moment;
- (b) Consider the fact that officers are often required to make decisions quickly in the course of an evolving incident, without the detached reflection that is available to those looking back on an incident; and
- (c) Consider that at law, there is no requirement that the officer perfectly calibrate his or her use of force to the perceived threat.

(98) In *Tiwana*, Adjudicator Baird Ellan considered all of the foregoing and applied a four-part test to consider use of force allegations of misconduct under the *Police Act*:

1. *Was the officer's use of force objectively unnecessary?*
  - a. *If the use of force was objectively necessary, this ends the analysis. There is no misconduct. The force is not "unnecessary".*
  - b. *If the force is not, objectively, necessary, then the analysis proceeds to the next questions.*
2. *Did the officer subjectively believe the force was necessary?*
  - *This question, as well as the next one, involve an assessment of the officer's evidence or account: does the officer credibly say he felt the force was necessary and not excessive?*
3. *Did the officer subjectively believe the force was not excessive?*
4. *Objectively, were the officer's beliefs about his/her use of force reasonable beliefs?*

- *This analysis may take into account the officer's attributes and circumstances, as well as his training. The analysis, though, is an objective one: stepping back from what this particular officer believed about his use of force, were those beliefs reasonable?*

(99) I adopt the analysis and tests set out by Adjudicator Baird Ellan in *Tiwana* for the purposes of these proceedings.

#### **XI Was the Member's use of force objectively unnecessary?**

(100) The first issue is whether or not on the facts of this case, the use of force was objectively unnecessary. The use of force in this case was the punch by the Member in the context of attempting to handcuff the Complainant.

(101) The context of the Complainant's encounter with the Member and [REDACTED] is highly relevant to consideration of objective necessity:

- The Complainant had been stopped at the corner of [REDACTED] and [REDACTED] in downtown Vancouver by [REDACTED] and the Member driving an unmarked police car, at approximately [REDACTED] on [REDACTED];
- The Complainant had stopped without dispute but immediately began to argue with officers about the grounds for the stop;
- The Member exited the police car and ultimately the Complainant moved to the sidewalk with [REDACTED] bike as requested by the Member. The Complainant stood beside a light standard with [REDACTED] bike on the sidewalk, and the Member stood curbside on the roadway adjacent to the passenger police car door. [REDACTED] remained in the police car planning to follow up on identification provided by the Complainant; and
- After a few minutes of debate, [REDACTED], a friend of the Complainant, arrived on scene approaching the Complainant to see what was taking place. [REDACTED] was requested to move back by the Member to allow [REDACTED] to continue to deal with the Complainant. [REDACTED] complied without argument and remained where [REDACTED] had been directed to stand. While standing, [REDACTED] began to video the encounter.

(102) At no point in the unfolding of events did [REDACTED] presence create an objective risk to either officer. There were no threats or physical actions of [REDACTED], beyond [REDACTED] presence, that affected either officer. [REDACTED] was simply an interested observer of developments who complied with police requests in terms of [REDACTED] movements.

- (103) In the events leading up to the Video, I have found that the Complainant exhibited argumentative and disrespectful behaviour in [REDACTED] dealings with the Member and [REDACTED]. However, I also found that with one exception, the Complainant had complied with directions of the two officers present, both requests and lawful orders.
- (104) I have previously noted concerns with respect to the objectivity of both the Member and [REDACTED] in describing the risks posed by the Complainant. The only fully credible objective observer, [REDACTED], confirmed that when [REDACTED] arrived, just prior to the handcuffing, the Complainant was indeed argumentative and disrespectful in [REDACTED] dealings with the Member. However, notwithstanding that demeanor, [REDACTED] could not confirm any threatening behaviour by the Complainant.
- (105) Of significance, [REDACTED] confirmed that the Complainant complied without delay to a demand from the Member that [REDACTED] turn and place [REDACTED] hands behind [REDACTED] back. As noted earlier, this was a clearly submissive act, attorning to police direction right at the moment the Member maintained that the objective risks posed by the Complainant were escalating.
- (106) The question raised objectively is whether or not, given the cooperative attitude of the Complainant, and the objective absence of serious risk factors, the escalation to handcuffing the Complainant was warranted as a use of force?
- (107) That question becomes more significant when seconds after the commencement of the handcuffing process, the Member strikes the Complainant with a hard, left hand punch to the head.
- (108) It is clear from the objective evidence that prior to and during the handcuffing process the Complainant continued [REDACTED] at times disrespectful questioning of officers, asking questions as to what they were doing and why. There had been an initial response from the Complainant denying possessing identification and refusing to provide [REDACTED] name and address when required by the Member. The Member's actions at this stage were consistent with a detention to secure identification to complete the ticketing process. However, a name and address had been provided and was being queried by [REDACTED]. The Member and Complainant were awaiting the results of that search.
- (109) [REDACTED] confirmed that prior to the application of the handcuffs, the tone taken by the Complainant was disrespectful and argumentative. However, the objective evidence of the Complainant's turn to be handcuffed does not support the conclusion that officer safety was at risk at that stage as [REDACTED] awaited identification confirmation from [REDACTED].

- (110) With respect to the punch, the Video record and [REDACTED] confirm that the Complainant had [REDACTED] arms behind [REDACTED] back. [REDACTED] had the Complainant's right arm well secured. The Member was head down, focused on applying the left handcuff.
- (111) Minor arm movements take place as the Complainant turns [REDACTED] head far to the left in an attempt to talk to the Member. I do not accept the evidence of either officer that these movements by the Complainant were forceful or pulling away. There are no apparent threats, wild gestures or attempts to move away from either officer. The Member is seen working with both hands to secure the handcuffs. The movements are minor and objectively not threatening in any manner.
- (112) However, during the second movement out and down of the Complainant's left arm, the Member turns [REDACTED] head to look directly at the Complainant, pulls hard with [REDACTED] right hand and acts swiftly, striking fast and hard, in a punch with [REDACTED] left hand. The blow hits the Complainant in the left side of [REDACTED] face and immediately results in [REDACTED] dropping to a seated position as directed by the Member.
- (113) The punch by the Member was clearly in response to the movements of the Complainant. However, the movements were minor and objectively raised no risk to the officers who at the time of the punch had control of both the Complainant's arms. This is evident in the fact that just before the punch lands on the Complainant's face, [REDACTED] left arm has been substantially returned down and to [REDACTED] back by the Member.
- (114) Considering all of the foregoing, I find that on the first part of the analysis, the use of force by the Member in handcuffing and striking the Complainant was objectively unreasonable.

## **XII Did the Member believe that the use of force was necessary?**

- (115) The second aspect of the test requires a subjective consideration of the Member's belief that the use of force was necessary.
- (116) The evidence of the Member is that [REDACTED] believed that the use of force was necessary in all of the circumstances. Specifically, the Member maintained that both the decision to handcuff the Complainant and the punch to the head were required in order to address officer safety concerns and re-establish control over the handcuffing process.
- (117) The Member also maintained that [REDACTED] believed that all of the actions taken were consistent with training [REDACTED] had received in the use of force, taking into consideration [REDACTED] belief that:

- (a) the tone and demeanor of the Complainant was angry, uncooperative and confrontational from the outset. This included swearing and derogatory comments made to the officers;
- (b) the Complainant was staring at the Member with increased intensity;
- (c) the Member felt uneasy after [REDACTED] requests for the Complainant to move further up the sidewalk was refused as a result of what [REDACTED] perceived to be a vulnerable position curbside on a busy street;
- (d) [REDACTED] arrived on scene, evidently a friend of the Complainant. Although complying with a request to move back, the Member had concerns that [REDACTED] remained within what the Member considered a critical reaction gap;
- (e) It appeared to the Member that the Complainant was becoming more emboldened, agitated and more emotional, in part due to the arrival of [REDACTED];
- (f) The Complainant objected to the placement of handcuffs and said "No" or "no you're not going to do that" and began to pull away;
- (g) Both officers who were then behind the Complainant felt [REDACTED] resisting having the handcuffs applied;
- (h) [REDACTED] told the Complainant to stop resisting;
- (i) The Member was successful in attaching one of the handcuffs, the left;
- (j) While attempting to attach the right cuff, both officers could feel the Complainant tense up pulling [REDACTED] arms away from them;
- (k) The Complainant was resisting with one handcuff attached to [REDACTED] left wrist, the right was unattached;
- (l) The Member was holding on to the loose handcuff, but believed if [REDACTED] lost control of that cuff due to the Complainant's resistance, it would create a serious safety risk and could result in a significant injury. The Member's views in this regard were informed by experience [REDACTED] had had as an officer in the [REDACTED] when an incomplete handcuffing had gone wrong resulting in a five minute fight and injuries to [REDACTED] partner;
- (m) The specific location of the incident on the curb of a busy street could have posed further risk of injury in the event of a struggle;
- (n) [REDACTED] had to take the Complainant into immediate custody by a quick and decisive maneuver;
- (o) The position of the police car, the curb, the bike and adjacent lamp standard, made it impractical to take the Member to ground to complete the handcuffing process; and
- (p) A left-handed punch to the Complainant's head was needed to regain control.

(118) With respect to the Member's subjective beliefs on the events unfolding with the Complainant, I have found that there are credibility concerns in the facts outlined by the Member. I have not rejected the Member's evidence, but rather have doubts as to the accuracy of [REDACTED] expressed subjective beliefs as [REDACTED] approached the handcuffing decision. Those concerns have arisen as a result of my finding that there have been exaggerations made in terms of the risks posed by the evolving situation facing the Member and [REDACTED]

(119) With respect to the next use of force, the punch to the Complainant, I have similar concerns as to the Member's subjective beliefs at that point on the need to use such force.

(120) I have concerns with respect to the credibility of the Member's description of [REDACTED] subjective beliefs on all aspects of the need to use force in punching the Complainant. For example, the situation [REDACTED] was facing dealing with the Complainant differed greatly from that experienced as an officer in the [REDACTED] attempting to handcuff a subject during a five-minute fight. Any risks that were posed by the Complainant were not remotely as dangerous as that apparently encountered by the Member in the [REDACTED]. At no point was the Complainant engaged in a fight with either the Member or [REDACTED], nor was there any realistic prospect that [REDACTED] might do so after being compliant in turning to allow the police to handcuff him.

(121) However, although I have doubts as to the objective reality of the risks presented by the Complainant, and have not found that the facts match the Member's position on several issues, I am not able to reject the Member's assertion that [REDACTED] believed the use of force was required both to handcuff the Complainant and subdue [REDACTED] with a punch.

(122) I am therefore prepared to find that subjectively the Member believed that the use of force was required both to handcuff the Complainant and ultimately to subdue the Complainant with a punch to the head.

### **XIII Did the Member subjectively believe the force was not excessive?**

(123) The third aspect of the test requires a further analysis of the Member's subjective beliefs with respect to the amount and nature of force used to control the Complainant.

(124) Under this part of the test, there are two main areas to consider:

- (a) The Member's use of force to control the Complainant through the application of handcuffs; and
- (b) The Member's use of force in punching the Complainant.

(125) With respect to both matters, the Member has testified that [REDACTED] believed the use of force employed was not excessive and indeed necessary to achieve the officer safety and control objectives that [REDACTED] had established.

(126) My credibility concerns with respect to the Member's subjective beliefs remain as noted above.

- (127) With respect to the first sub issue, the handcuffing, I am satisfied that the Member developed [REDACTED] plan to handcuff the Complainant over several minutes after exiting the police car. During that time the Member was considering the demeanor of the Complainant, the Member's location, that of the Complainant, the arrival of [REDACTED] and the ongoing debate with the Complainant. The Member was also considering use of force options to resolve [REDACTED] concerns including altered presence up on the sidewalk and verbal engagement. I find that in [REDACTED] subjective view, nothing was working.
- (128) As noted earlier, I have concerns as to the objective reality of risks facing this officer, however, I must find that subjectively [REDACTED] assessed those facts differently, and decided to use force to resolve officer safety concerns and achieve greater control over the Complainant as the identification process was completed. The force chosen was the application of handcuffs which, again, I find [REDACTED] believed, based on [REDACTED] training and experience, would achieve [REDACTED] objectives and calm the situation down.
- (129) The Member's subjective beliefs in punching the Complainant are in a different category. I cannot accept that the Member seriously considered the degree of force required to subdue a Complainant who was said to be actively resisting the handcuffing process. The actions of the Member in removing [REDACTED] left hand from the handcuffing process, and striking the Complainant's head with a hard, closed fist punch were more instinctive than considered.
- (130) At the time the blow was struck, I am not satisfied that the Member had time to consider if the use of force was, in all of the circumstances, excessive. Rather I find that the actions of the Member were an instinctive reaction to difficulty in securing the right handcuff.
- (131) I do accept, however, that the Member's reaction was borne of training and experience rather than a considered weighing of use of force alternatives. Clearly, if the officer genuinely believed force was required for officer safety, there was little time to do other than rely on training and instinct.
- (132) I have serious doubts as to the Member's actual subjective thought process — on the weighing of force options prior to the strike — which led [REDACTED] to conclude that the punch was not excessive. And, of course, I have made findings of fact that result in very different circumstances than those advocated by the Member.
- (133) However, considering all of the foregoing, I have resolved those doubts and differences by accepting that subjectively the Member had concluded that a sharp and forceful punch to the Complainant's head was a reasonable use of force tool in all of the circumstances.

#### **XIV Were the Member's beliefs about his use of force reasonable beliefs?**

##### **A -The test**

- (134) On the final aspect of this test, I must consider whether or not in all of the circumstances, the Member's beliefs were reasonable in that the use of force was both necessary and reasonable.
- (135) This is not simply an assessment of what I might consider reasonable, but rather the reasonableness of the Member's beliefs about [REDACTED] use of force must be measured against the standard of acceptable behaviour from the perspective of a reasonable police officer with the same level of training and experience.

##### **B-Use of force experts**

- (136) Counsel for the Member relies heavily on the reports and testimony of the two use of force experts set out in the Supplemental Investigation Report. It is [REDACTED] position that these reports support [REDACTED] submission that the Member's beliefs (about the force used with respect to the Complainant) were reasonable beliefs. Expert reports can, of course, provide useful evidence in reviewing facts in dispute.
- (137) Both use of force experts noted in the Record provided opinion evidence with respect to assumed facts and a viewing of the Video taken by [REDACTED]. The first report was authored by [REDACTED] who concluded that the use of force was unreasonable. The second was authored by [REDACTED] who opined that in all of the circumstances the force used was necessary and reasonable.
- (138) Both experts based their opinions on consideration of the Video and assumptions of fact outlined by Counsel for the Member, substantially as set out in paragraph 43 above. However, neither expert was present for the testimony of the Complainant, [REDACTED], [REDACTED] or the Member.
- (139) In this case, the reports came to differing conclusions on the reasonableness of the Member's use of force. In cross examination in the criminal proceedings, however, [REDACTED] modified his initial position, coming closer to the conclusion reached by [REDACTED] that the use of force, observed in the circumstances of the Video and based on the assumptions of fact posed by Counsel for the Member, was reasonable.
- (140) [REDACTED] evidence outlined [REDACTED] considerable experience in use of force matters, the history behind the development of the National Use of Force Framework, its adoption as policy in British Columbia by all relevant policing agencies, and its role as a tool in training police officers.



(141) The threshold question is whether or not I should admit and consider the evidence of either expert as I analyze the necessity and reasonableness of the Member's actions. The test for admission is a four-part analysis set out in *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 (S.C.C.):

- (a) Is the expert opinion relevant to the issues in dispute?
- (b) Is the expert opinion necessary?
- (c) Is the expert opinion not contrary to any exclusionary rule?
- (d) Has the opinion been given by a properly qualified expert?

(142) With respect to both expert opinions, reports and testimony, I find they are relevant to the issues in dispute, not given contrary to any exclusionary rule and produced by properly qualified experts.

(143) On the issue of necessity, I have considered the submissions of Counsel for the Member that the evidence of these experts, and in particular the evidence of [REDACTED], is necessary because it provides insight into areas of risk assessment unique to policing duties. In particular, the reports detail the training and decision making processes in the National Use of Force Framework and, as well, highlight the particular risks that can be associated with handcuffing a person. Specific reference is made to the risk associated with a partially complete handcuffing process and the possible dangers raised by a loose handcuff.

(144) Considering those submissions, I am satisfied that both expert reports and the testimony set out in the Record are necessary in the context of my consideration of the allegations related to the Member. This, of course, is not a trial proceeding and as such, I have the authority to consider all relevant evidence. Furthermore, I find that there is substantial assistance provided in the reports and testimony of these experts in explaining the National Use of Force Framework and the risks of handcuffing a subject.

(145) In light of that finding, the evidence of both experts is properly admissible in these proceedings.

(146) What is in issue, however, is the weight to be given to these reports and associated testimony when applied to the facts of this case as I have found them. My specific concerns are as follows:

- (a) As noted earlier, neither expert attended the trial proceedings to hear to evidence of [REDACTED], [REDACTED], the Complainant or the Member;
- (b) The assumptions of fact put to both experts were inconsistent with the facts as I have found them. In particular, contrary to the assumptions of fact put to the experts, I have found that:

- i. Assumption number 15: "It appeared to the Member that the Complainant was becoming more agitated and more emotional, in part because of the arrival of the friend. The friend began to record the incident on a cell phone. It appeared to the Member that the Complainant was becoming emboldened by the arrival of [REDACTED] friend. This caused the Member to be concerned that [REDACTED] situation might be getting out of hand, so [REDACTED] decided to place the Complainant in handcuffs so [REDACTED] could finish the ticket safely" has not been proven.

From the first contact with police the Complainant was clearly argumentative about the reason for [REDACTED] stop and ultimately frustrated by [REDACTED] inability to resolve matters. The Complainant repeatedly challenged the basis for [REDACTED] stop by the police for what [REDACTED] perceived to be a minor matter. I have not found, however, that the characterization of the Complainant's demeanor described by the Member and [REDACTED] as "increasingly aggressive or angry" was correct. Nor have I found that the arrival of [REDACTED] created any additional risk to the officers. Rather, I have found that the Complainant was simply challenging the basis for [REDACTED] stop by police, although [REDACTED] was clearly doing so in a moderately disrespectful manner invoking profanity on occasion.

I have found that the Complainant's demeanor did not at any point telegraph any reasonable potential for physical safety risk to either officer. I have found that the Complainant was simply questioning what was going on, and why, in the context of a bicycle traffic stop. I have found nothing unusual or threatening about the Complainant's demeanor in that regard in the circumstances of this traffic stop, although it is clear that the Complainant was disrespectful and argumentative. Certainly, there is nothing proven to confirm the assumption provided that the Member faced a situation that was getting out of hand;

- (ii) Assumption number 17, that prior to handcuffing the Complainant, "the Member explained that [REDACTED] would be in handcuffs for a short while", has not been proven;

(iii) Assumption number 18; that after being told [REDACTED] would be in handcuffs, "the Complainant objected. [REDACTED] said 'No', or 'No,, you're not going to do that,' and began to pull away" has not been proven. In fact, I have found that the Complainant, contrary to pulling away, turned and put [REDACTED] hands behind [REDACTED] back as ordered by the Member;

- (iii) Assumption number 20, "[REDACTED] told the Complainant to stop resisting". This assumption has not been proven;

(iv) Assumption 22, that "while [REDACTED] was attempting to attach the other end, both officers could feel the Complainant tensing up and pulling [REDACTED] arms away from them" has not been proven. On this issue I have found that there was no attempt by the Complainant to pull away from the officers but rather a movement of [REDACTED] left arm in response to a twisting of the same behind the Complainant's back by the Member to an uncomfortable degree. The movement was initially reactive to the twisting of the arm to a more comfortable position before it was pulled vertical and back by the Member;

(v) Assumption 23 "The Complainant tried pulling [REDACTED] right arm away from [REDACTED] and [REDACTED] left arm from the Member" has not been proven. I have not found that the Complainant was intentionally pulling [REDACTED] right arm away from [REDACTED]. In fact, I have found that while the Complainant was turning to [REDACTED] left to address the Member, the right arm remained fully secure and controlled by [REDACTED]. Any movement felt in the right arm was minor and related directly to the Complainant's turn to address the Member; and

(vi) Assumption 24 "The Complainant was now resisting with one hand attached to [REDACTED] left wrist. The handcuff that should have been on [REDACTED] right wrist was unattached" has not been proven. What has been proven was that the left handcuff had been successfully attached and was secured by the Member with both hands. The right handcuff remained unattached, however, [REDACTED] retained two-handed control over that hand and wrist.

The resistance, if any, was limited to the Complainant turning to the left to speak to the Member and moving [REDACTED] left arm down from an uncomfortable twisted position behind [REDACTED] back;

- (c) [REDACTED] conclusion based on [REDACTED] view of the Video and consideration of the assumptions of fact set out in paragraph 43 concluded that the Complainant was non-compliant and actively resistant. However, during cross examination [REDACTED] was asked about [REDACTED] position on a differing set of facts:

*Q. So if the scenario changes at this point – up to this point, basically there has been some name calling, and [REDACTED] has arrived, and then the officer takes out [REDACTED] handcuffs, is going to place them on the Complainant and says nothing to [REDACTED], just takes the cuffs off, out and the subject turns around voluntarily, where does that place [REDACTED] in the framework—the Complainant?*

*A. Well, it's difficult to freeze frame moments of these interactions, but if [REDACTED] turned around and placed [REDACTED] hands behind [REDACTED] back in anticipation of having the handcuffs put on [REDACTED], I think at that moment, that would be a co-operative gesture.*

- (d) On this issue, I have found that the Complainant was simply told [REDACTED] was under arrest by the Member and not told why the handcuffs were to be applied. I have found that the Complainant was in fact substantially compliant during this incident, voluntarily turning on direction of the Member and placing [REDACTED] hands behind [REDACTED] back as [REDACTED] was handcuffed. This was a significantly different fact pattern than that put to the experts in the assumptions of fact; and
- (e) Both experts put their own interpretation on the Video and extrapolated from there in terms of conclusions. It is my role, not that of the experts, to make findings of fact considering all of the evidence in the Record. As such, conclusions drawn by the experts as to verbal exchanges they thought they could make out, or moves they could infer from viewing the Video are not an appropriate basis for determining in this proceeding the facts as to the interaction between the parties.

(147) The significance of these differences in assumptions and facts all relate to the value of both expert perspectives on the use of force engaged by the Member and the weight to be accorded the conclusions reached. As [REDACTED] observed in [REDACTED] testimony, the National Use of Force Framework is a teaching aid, not a decision matrix. Furthermore [REDACTED] also fairly acknowledged that the evolution of events on the night in question was fluid and dynamic. As a result, any change in the assumptions on which the expert opinions have been created impacts the weight of the conclusions reached.

(148) It is my conclusion that there are sufficient material differences between the assumptions provided to the experts and the facts as I have found them to accord them minimal weight in my consideration of the use of force issues. I find that the reports and testimony of the experts have weight and value in touching on the National Use of Force Framework parameters and the dangers posed to officers in the handcuffing process, but not beyond those points.

### **C – The test applied – A reasonable officer with equivalent training and experience**

(149) Considering all of the evidence in the Record and specifically the Member's training history, his Canadian and [REDACTED] policing experience and the National Use of Force Framework, I find that:

- (a) The Member's use of force in handcuffing the Complainant was necessary and reasonable in all of the circumstances; and

- (b) The Member's use of force in subduing the Complainant with a hard, left hand punch was unnecessary and unreasonable.

(150) I make the finding set out in paragraph 149(a) with respect to the handcuffing of the Complainant for the following reasons:

- (a) The Member was acting in the execution of [REDACTED] duty when [REDACTED] initially detained the Complainant and subsequently placed [REDACTED] under arrest. The actions of the Member were consistent with [REDACTED] duty to follow up on the several breaches of the *Motor Vehicle Act* [REDACTED] had observed and to secure the Complainant pending confirmation of [REDACTED] identification;
- (b) I find that a reasonable police officer with the equivalent experience and training of the Member would, facing the circumstances surrounding the detention of the Complainant outlined above and the guidance provided under the National Use of Force Framework, conclude that:
  - i. In terms of environmental assessment, the Member and [REDACTED] were dealing with one subject, joined later by a friend, [REDACTED], as a non-participant observer. Neither officer knew the subject or [REDACTED]. [REDACTED] nor any of their abilities. As well, the Member had a clear size and weight advantage over the Complainant;
  - ii. In terms of time and distance, there was no pressing threat to public safety, the police involvement was for a less serious matter, a traffic stop, and there were alternatives and escape routes available to the Member along the road and sidewalk;
  - iii. [REDACTED] was within a "reaction gap" of the Member, however, [REDACTED] had complied with requests to move back and was posing no threat to either officer beyond participation as an interested observer;
  - iv. The Member's apparent preference based on [REDACTED] training was to move off the curb to the sidewalk, however, circumstances were not serious enough to compel the Complainant to move further back;
  - v. In terms of potential attack signs, the Complainant had been argumentative and disrespectful to both officers staring at the Member from time to time. [REDACTED] had also been slow to comply with demands for identification, although [REDACTED] had complied with those demands and a request to move with [REDACTED] bike up off the roadside;
  - vi. However, the Complainant had not refused any lawful demand and had made no physical threatening gestures to either officer. [REDACTED] also had not adopted an aggressive stance or posture;
  - vii. The Complainant had no weapon and at this stage pre-arrest, there was no reasonable expectation of grievous bodily harm to either officer arising from the Complainant or [REDACTED];

- viii. In terms of subject behavior, the Complainant was passive resistant in arguing with the officers, but had complied with lawful demands for identification;
  - ix. The Complainant had not, however, used any physical action to escape or evade dealing with officers;
  - x. Once a decision had been made to arrest the Complainant, [REDACTED] in fact complied, without argument, to a lawful demand that [REDACTED] turn around and placed [REDACTED] hands behind [REDACTED] back;
  - xi. In terms of perception and tactical considerations, the Member was dealing with an argumentative and disrespectful subject witnessed by a supportive friend nearby;
  - xii. The Member's perception was that officer safety had become an issue because of the limited space between the Complainant, the Member and the police car parked nearby; and
  - xiii. Furthermore, the Member believed that the uncooperative attitude and disrespectful tone of the Complainant was escalating.
- (c) Considering all of the foregoing, I find that a reasonable officer with the Member's training and experience might well conclude that the arrest of the Complainant and the subsequent immediate use of force by securing the Complainant with handcuffs was necessary and a reasonable use of force. Such a conclusion could be consistent with officer safety concerns, although it is clear that other less intrusive options were also available.

(151) With respect to finding set out in paragraph 149(b), the punch subsequent to arrest, I find that a reasonable officer with equivalent training and experience to that of the Member would consider the foregoing facts, in the context of the guidance provided by the National Use of Force Framework, and note that:

- (a) In terms of environmental considerations, the decision to arrest the Complainant and the direction for [REDACTED] to turn and place [REDACTED] hands behind [REDACTED] back had resulted in material changes in subject behaviour;
- (b) First, the Complainant had immediately complied with the demand to turn around and move [REDACTED] hands as directed;
- (c) Second, the Complainant's demeanor had become more submissive, calmer and less argumentative;
- (d) However, because the Complainant had not been told why [REDACTED] was being handcuffed, [REDACTED] was turning [REDACTED] head left to engage the Member and question what the handcuffs were for;
- (e) There had been no other material change in the subject's abilities, actions of [REDACTED] or potential attack signs;
- (f) As the first handcuff was attached to the Complainant's left hand, there was a potential elevated risk associated with an incomplete handcuffing process;
- (g) However, [REDACTED] had a secure hold on the Complainant's right arm with two hands. With respect to the Complainant's left hand, the Member at all times

had effective control with both hands until [REDACTED] removed [REDACTED] left hand to punch the Complainant;

- (h) In terms of the potential for grievous bodily harm, had either officer lost control of the handcuffs, risks could arise from a loose handcuff attached to one wrist;
- (i) However, such a loss of control was not imminent during this handcuffing process;
- (j) The initial moves by the Complainant in turning to speak to the Member as the left arm was first raised behind the Complainant's back were minor. The moves were associated with a turned head and attempts to engage in conversation with the Member, not active resistance or attempts to escape;
- (k) The second move of the Complainant's left arm was largely an instinctive reaction to the arm having been pushed too far and too hard up the Complainant's back in the handcuffing process;
- (l) These moves would not telegraph that the Complainant was now actively resisting officer direction or attempting to escape;
- (m) Rather, the Complainant's actions turning and speaking simply conveyed that the Complainant was attempting to reposition [REDACTED] arm to relieve the upward twist, achieve a more comfortable position and learn why [REDACTED] was being handcuffed;
- (n) The downward pull on the engaged handcuff by the Member with [REDACTED] right hand was itself immediately sufficient to return the arm behind the Complainant under control;
- (o) Officer safety was not at an increased risk prior to the punch because [REDACTED] retained [REDACTED] control over the Complainant's right arm and the Member had, at all times, maintained control over the left arm;
- (p) As well, the demeanor of the Complainant had become more compliant and less argumentative subsequent to [REDACTED] detention; and
- (q) As such any further action to subdue the Complainant with a punch would be an unnecessary and unreasonable use of force, considering the guidance provided by the National Use of Force Framework and the degree of resistance actually demonstrated by the Complainant.

(152) In the context of the events of [REDACTED], the Member's training and experience did not provide a reasonable basis for [REDACTED] belief that officer safety was an issue prior to punching the Complainant.

(153) Considering all of the foregoing, I find that a reasonable officer with the Member's training and experience might well conclude that the punch to the Complainant was both unnecessary, and an unreasonable use of force.

## **XV Conclusion**

(154) I have, of course, considered that *R. v. Asante-Mensah*, 2003 SCC 38, confirms at para. 73 that “a certain amount of latitude is permitted to police officers who are under a duty to act and must often react in difficult and exigent circumstances”. As noted earlier in this decision, it is clear that the law recognizes that officers are not required to measure the force they use with precision.

(155) I have also considered the guidance provided by Madam Justice Kirkpatrick in *R. v Fettes*, 2001 BCSC 1535 included in the submissions of Counsel for the Member. I find, however, that the facts encountered by the officers in that case were significantly more serious than those facing the Member. As such I find that the *Fettes* decision is materially distinguishable on the facts.

(156) Finally, I have also taken into consideration the provisions of section 77(4) of the *Police Act*.

(157) Considering all of the foregoing in the context of the subjective objective analysis outlined above, I find that:

(a) The evidence does substantiate the Member’s position that [redacted] used necessary and reasonable force in handcuffing the Complainant;

(b) The evidence does not substantiate the Member’s position that [redacted] used necessary and reasonable force in punching the Complainant; and

(c) The circumstances of the events involving the Complainant, the Member’s actions and the Member’s training and experience confirm that the force used by the Member against the Complainant by punching the Complainant was “intentional or reckless”.

(158) I therefore find that the allegation of misconduct relating to the Member arising from the punch to the Complainant’s head is substantiated under section 77(3)(a)(ii)(A) of the *Police Act*.

## **XVI Next Steps**

(159) Pursuant to section 125(1)(d) the Member may make submissions regarding disciplinary or corrective measures. Pursuant to section 125(2), those must be submitted in writing within 10 days business days of the Member receiving a copy of the Form 3 in this matter.



(160) In light of the filing date of this decision, those submissions will be due no later than March 12, 2018.

(161) If the Member seeks to make oral submissions in addition to, or in lieu of, written submissions, I ask that the Member provide notice of this to me on or before March 5, 2018.

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Brian M. Neal, Q.C.(rt)

February 26, 2018  
Victoria, B.C.