

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

AND

IN THE MATTER OF A REVIEW OF AN ALLEGATION OF MISCONDUCT AGAINST
[REDACTED] OF THE VANCOUVER POLICE DEPARTMENT

NOTICE OF ADJUDICATOR'S DECISION

TO: [REDACTED] (Complainant)

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

AND TO: [REDACTED] (External Discipline Authority)
c/o New Westminister Police Department
Professional Standards Section

AND TO: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section

AND TO: Mr. Stan Lowe
Police Complaint Commissioner (Commissioner)

Introduction

1. This is a decision made pursuant to section 117 of the *Police Act* relating to a complaint of misconduct concerning the Member, [REDACTED], Vancouver City Police. I have been appointed Adjudicator in connection with this matter as a result of the Commissioner's order of May 15, 2017.

2. The complaint giving rise to these proceedings initiated by the Commissioner on April 2, 2013, arose in connection with an incident alleged to have taken place in Vancouver [REDACTED] involving the Complainant, [REDACTED], the Member and others.
3. The specific allegation of misconduct raised by the Commissioner April 2, 2013, was as follows:

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

History

4. An explanation for the delay in proceeding with this matter under the provisions of the *Police Act* is required.
5. The Commissioner appointed the West Vancouver Police Department to investigate the allegation of misconduct against the Member pursuant to sections 93(1)(a) and 93(1)(b) of the *Police Act* with a report due by September 28, 2013.
6. 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.
7. On September 13, 2013, a summons was issued to the Member alleging the offence of assault against the Complainant on March 26, 2013 contrary to section 266 of the *Criminal Code*.
8. A trial of the criminal matter commenced May 21, 2014 resulting in a conviction of the Member for the offence of assault contrary to section 266 of the *Criminal Code* on August 4, 2015.
9. 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*.
10. On December 21, 2015, the Commissioner again ordered a suspension of *Police Act* proceedings as the Member had filed an appeal of his criminal conviction.

11. The appeal of the Member's conviction concluded June 3, 2016 with a decision by the Honourable Associate Chief Justice Austin Cullen of the Supreme Court of British Columbia to order a new trial. (The appeal arose from a summary conviction proceeding in Provincial Court, and so it was determined by the Supreme Court.) The Crown elected not to proceed with any further trial of the matters in issue and as such, the criminal proceedings concluded in December of 2016.
12. On December 9, 2016, the Commissioner lifted the order suspending *Police Act* proceedings involving the Member and Complainant, followed by a further order December 20, 2016 extending the time for completion of the relevant investigation to February 24, 2017.
13. On February 23, 2017 the 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], committed Abuse of Authority pursuant to section 77(3)(a)(ii)(A) of the *Police Act* by using unnecessary force on [REDACTED].
14. On [REDACTED], [REDACTED], as the external Discipline Authority, issued his first decision pursuant to section 112 of the *Police Act*.
15. On [REDACTED], the Member filed a request for further investigation 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.
16. A Supplemental Investigation Report was prepared and submitted by [REDACTED]. The report augmented the original investigation by including and considering detailed submissions from both Crown and Counsel for the Member in the criminal proceedings relating to the Member, as well as a comprehensive use of force expert report completed by [REDACTED].
17. On [REDACTED], [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.
18. On May 15, 2017, the Police Complaint Commissioner referenced the [REDACTED] 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*.

Section 117

19. The statutory authority governing this review is found in section 117 of the *Police Act*.
20. Specifically, subsection 117(6) of the *Police Act* imposes a duty on the Commissioner to provide the Adjudicator with copies of all reports under section 98, 115 and 132 that may have been filed with the Commissioner prior to the Adjudicator's appointment in relation to the allegation of misconduct.
21. The central role of the Adjudicator as set out in subsections 117 (8) and 117(9) of the *Police Act* is to review the material delivered under subsection 117(6) and determine whether:
 - (a) The conduct of the Member appears to constitute misconduct, or
 - (b) The conduct of the Member does not constitute misconduct.
22. The law is clear that a review under section 117 is a paper based process of the record provided by the Commissioner. It takes place without live witnesses, additional evidence or submissions from any of the parties involved. The review is not an appeal of earlier decisions concerning misconduct nor is it a redetermination in any manner of other court proceedings that may have a connection to the misconduct alleged.
23. The duty of an Adjudicator is to reach his or her own conclusions based on the materials submitted for review. Subsection 117(1)(b) specifically provides that the retired judge appointed as Adjudicator is to "make her or his own decision in the matter".
24. Recently, the Supreme Court of British Columbia provided specific guidance on the role of Adjudicators serving under section 117 of the *Police Act*. In [REDACTED] (*The Police Complaint Commissioner*), [REDACTED], the Honourable [REDACTED] considered an earlier Adjudicator decision provided under section 117, noting as follows:
 - [27] There are two troubling aspects to the approach to his task taken by the retired judge.
 - [28] The first is his implicit interpretation of s. 117(9) of the Act that it permitted him at an early stage of his inquiries to reach conclusions about the petitioner's conduct.
 - [29] In *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92, Newbury J.A. observed that part XI of the Act, where s. 117 is found, "is

not a model of clarity". [Section 117\(9\)](#) fits that description, but in my opinion it is clear that it authorized the retired judge to do no more than express a view that the petitioner's conduct on [REDACTED] "appears" to have been misconduct. To have gone beyond an expression of a preliminary review by giving extensive reasons using conclusory language, such as asserting that the petitioner's "conduct was a marked and serious departure from the standard reasonably expected of a police officer" is not consistent with the scheme and object of the [Act](#) and the intention of the legislature (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

[30] In my opinion the legislature did not intend the retired judge, whose ultimate role could include presiding over a disciplinary hearing involving the very person whose conduct he had already determined was improper, nevertheless could use language, before a hearing had taken place, that on any reasonable reading left no doubt in the mind of the petitioner that the retired judge had already made up his mind that the petitioner was guilty of the misconduct alleged. ...

[37] In my opinion, the retired judge improperly conflated the issue of whether the petitioner was in the course of his lawful duties when he entered the complainant's home and arrested her, with the other issue of whether the petitioner was guilty of misconduct by abusing his authority as defined in the [Police Act](#). That conflation is apparent from the retired judge's conclusion that:

It follows, therefore, that the question of whether [REDACTED] abused his authority must be determined according respect for the factual findings of the trial judge. Respect for those findings of fact would result in the conclusion that [REDACTED] had abused his authority. ...

[39] [Section 117](#) of the [Police Act](#) is unfortunately worded in some respects. On one possible interpretation a retired judge appointed pursuant to the [Act](#) is directed to reach conclusions about the conduct of a member of a police force before a disciplinary hearing has been conducted by the retired judge in respect of that conduct. I do not accept the legislature intended such an approach to be taken. If that was the appropriate interpretation it would inevitably raise a serious issue of an apprehension of bias when the retired judge made preliminary findings adverse to the petitioner and was then required to conduct a disciplinary hearing. I conclude that the retired Judge adopted an interpretation which has now led to that unfortunate outcome.

25. This review has been undertaken in accordance with the foregoing principles and law.

Misconduct and the *Police Act*

26. 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...

27. 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.

28. 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 review.

29. This review is, therefore, not an adjudication of claims or defences raised in civil or criminal proceedings but rather the examination of all of the evidence submitted related to the allegation of misconduct defined by subsection 77(3)(a)(ii)(A) of the *Police Act* as qualified by subsection 77(4).

Records submitted for review

30. In discharge of the obligations under subsection 117(6) of the *Police Act*, the Commissioner has provided copies of the following materials for my review:

- (a) Final Investigation Report of [REDACTED] dated [REDACTED], [REDACTED] 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 [REDACTED] Vancouver Provincial Court Registry [REDACTED].
- (e) Supplemental Final Investigation Report of [REDACTED] dated [REDACTED]
- (f) Use of Force Report of [REDACTED] dated [REDACTED]
- (g) Submissions delivered by Crown and Counsel for the Member in relation to [REDACTED], supra.
- (h) Video extracts relating to the alleged incident.
- (i) Training Records relating to the Member.

These materials, collectively, comprise the "Record" on this review.

31. With the exception of relevant statutory and case law authorities referenced above, no further materials or submissions have been considered as part of this review.

Review of the Record relating to the allegation of misconduct

32. The Record does not suggest any dispute with respect to the following circumstances, namely that:

- (a) On [REDACTED] at approximately [REDACTED] hrs, the Member and his partner, [REDACTED] were operating an unmarked police vehicle in Vancouver. The Member was driving the vehicle proceeding southbound on [REDACTED].
- (b) On the night in question, the Member was approximately [REDACTED] tall weighing approximately [REDACTED].
- (c) 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.

- (d) 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.
- (e) Through the passenger side window, [REDACTED] directed the Complainant to pull over. He identified himself as a Vancouver Police Officer. The Complainant complied with that direction.
- (f) [REDACTED] advised the Complainant of the reason for the stop. Specifically, the Complainant was advised that he had been observed by the officers to run the red light at the [REDACTED] intersection.
- (g) The Complainant's response was adamant in denying the act alleged.
- (h) Concurrent with this exchange, the Member exited the police vehicle once stopped and moved to the side of the road where the Complainant had stopped with his bicycle.
- (i) 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 his bike without a light after dark and not wearing a helmet.
- (j) From the outset, the Complainant appears to have been assertive and argumentative denying the facts alleged by both officers.
- (k) The Member next asked that the Complainant move to the sidewalk with his bike out of the roadway. With some degree of reluctance, it appears that the Complainant complied with this request. However, the Complainant did not move far enough onto the sidewalk to easily allow the Member to join him off the roadway.
- (l) The Member remained on the edge of the travelled road adjacent to the passenger door of the unmarked police car. The Complainant stood on the sidewalk adjacent to a pole. [REDACTED] remained in the police vehicle.
- (m) A demand was made by the Member for the Complainant to produce identification. In response, the Complainant asserted that he did not have any identification with him, however, eventually he did provide his name verbally. This information was transmitted to [REDACTED] for follow up on the patrol car communication systems. The Member had explained to the Complainant that the identification information was needed to complete the ticketing process.
- (n) A further request was made for the Complainant to move back onto the sidewalk which did not result in such movement but rather more argument from the Complainant about the justification for the police stop and ticketing.
- (o) A friend of the Complainant's, [REDACTED] arrived as this argument ensued between the Complainant and the Member. [REDACTED] crossed the street and approached the parties asking what was going on. He was asked by the Member to maintain his distance which he did.

33. What happened next is very much in dispute as the Member moved from engaging the Complainant with presence and communication to physical contact.
34. In terms of physical context, the Record suggests that the Member had found himself on the road immediately below the Complainant who was standing adjacent to a pole on the sidewalk. As such there was an uneven surface between the parties with the Member blocked by the police car a short distance behind. The emergency lights were operating on the unmarked car clearly indicating the presence of police.
35. As well at this point [REDACTED] approached the Complainant for a brief handshake inquiring as to what was going on. The Member requested that [REDACTED] move back which he immediately did, remaining approximately six feet from the Member and the Complainant.
36. [REDACTED] left the police car at approximately the same time [REDACTED] arrived on scene.
37. [REDACTED] appears to have been engaged in an ongoing discussion with the Complainant about the incident and from time to time, engaged the two officers as well.
38. Shortly after he arrived, [REDACTED] began video recording the interaction between the two police officers and the Complainant. [REDACTED] appears to have been fully compliant with officer directions in maintaining a respectful distance as he continued video recording. There is nothing in the Record that appears to suggest that [REDACTED] actually acted in a manner to pose a risk to either officer, other than by his presence.
39. In terms of physical context, therefore, immediately before the escalation to physical contact, there were two police officers standing adjacent to the Complainant on a street corner. Standing approximately 6' away was an apparent friend of the Complainant.
40. In terms of verbal interactions, by the time the Member had made the decision to handcuff the Complainant, approximately 3-4 minutes of debate had ensued between the two officers and the Complainant. The Record suggests that the debate had been animated on both sides with the Complainant swearing and challenging the actions of the two officers.
41. The Record also appears to suggest, however, that the Complainant had in fact complied with all but one of directions received from the officers. This included the initial order to stop, the order to move to the side of the road and ultimately the sidewalk, to the demand for identification and finally to the demand that the Complainant turn around so the handcuffs could be deployed. The one exception was that the Complainant did not move further back onto the sidewalk as requested by the Member as their interaction continued.

42. In terms of the physical movements and actions of the Complainant, the Record does not suggest that there were any overt or aggressive moves made by the Complainant prior to the handcuff attempt. Nor did the Record appear to display any language from the Complainant indicating a dramatic escalation of events was to come about. Indeed, at this point, the Record simply appears to confirm that the Complainant had complied with the direction of officers to turn around and place his hands behind his back. The Complainant had continued to argue with the officers before the Members direction to turn around, but thereafter, as he stood turned with his back to the two members, there does not appear to be any indication in the Record of overt hostility on the part of the Complainant or moves by the Complainant that might suggest an escalation to physical violence.
43. In terms of subjective analysis, the Member's position appears to be that he had concerns for officer safety and hence needed to secure the Complainant by handcuff to complete the ticketing process. This concern appears to have related to the Complainant's ongoing arguments, the arrival of [REDACTED] and a perception of the Member that violence or increased aggression from the Complainant might arise. The decision to handcuff the Complainant appears to have been made just after [REDACTED] [REDACTED] appeared on scene based on these concerns.
44. It appears as though the Member's task was simply to 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 that appears to suggest that at this point the Complainant posed a risk to the public, was committing or about to commit other crimes or that he was acting to pose an overt risk to the two officers. The Complainant was staring the officer, verbally challenging the officer's actions and doing so in disrespectful language, but that was the extent of his actions. Furthermore, the Record does not suggest at any point that the Member requested the presence of [REDACTED] [REDACTED] on the sidewalk to provide additional coverage as the Member's concerns with respect to the Complainant apparently increased.
45. There appears to be an issue, therefore, as to whether or not the Member, or [REDACTED] [REDACTED], in fact had reasonable concerns as to the risk posed by the Complainant at this time. [REDACTED] video recording appears to provide a partial objective perspective on these issues in the context of the development of events between the Member and the Complainant.
46. The video of the handcuff attempt commences shortly after [REDACTED] arrival on scene and only captures a portion of the overall encounter. It appears to provide a cogent account of the interaction between the parties as the Member moved from presence and communication to physical action in order to deal with the Complainant.

47. The video appears to show a compliant Complainant standing next to a lamp post with his arms behind his back. He is not seen to be gesturing aggressively, nor acting violently but rather in compliance with directions standing with his hands behind his back as the two officers stand behind. Both officers appear to have their heads down with the Member clearly visible working on a set of handcuffs near the Complainant's left hand. [REDACTED] is seen to be head down behind the Complainant's right side. The video does not appear to show any overt or aggressive acts from any of the parties at this stage.
48. The video further appears to show the Complainant asking in a normal tone, "what is this for?" turning his head slightly to the left engaging the officers. As he asks that question, the Complainant's left arm is raised slightly behind his back. The Record is unclear as to precisely what was said by the Member in response. The Member can be seen with his right arm and wrist over the Complainant's left arm, his left below, continuing to work the handcuffs. There does not appear to be any furtive or aggressive move on the part of the Complainant.
49. The video next shows the Complainant's left arm moved under control by the Member down and to the Complainant's back. It appears at this point as though the left handcuff has been attached. The Complainant's head remains turned towards the Member who has now turned his body so that he is facing the Complainant's left side with his hand covering the left wrist.
50. The video next appears to show that the left wrist is moved upward behind the Complainant's back by the Member as [REDACTED] continues to work behind the Complainant's right side. This is the second movement of the left arm up behind the Complainant's back and extends further up the back than the earlier move. The arm remains in that position for a few seconds with the Complainant's head turned left towards the Member.
51. At this point the left arm appears to remain elevated, but the lower portion, from the elbow to wrist, moves closer to a vertical position. The move does not appear to be aggressive or assaultive nor does the video provide confirmation of how or who controlled the move of the Complainant's left arm. The Member's left arm can be seen as having moved away from the Complainant's wrist to the upper back area. The Member's right arm can be seen behind the Complainant's wrist. As this move begins, the Complainant appears to be beginning to speak, perhaps to say "no, no", however, the Member's actions stop that process.
52. The Member's reaction to the downward move of the Complainant's left arm was immediate. Rather than attempting to control the left arm as had been done in the earlier move down of the same arm, the video appears to show that the Member raised his left hand striking the Complainant once with a hard, closed fist strike to the left side of the Complainant's face.

53. Immediately after the punch, the Member appears to calmly give direction to both the Complainant and [REDACTED]. He appears to do 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 his left. As this was taking place, the right handcuff seems to be secured.
54. During this time, [REDACTED] appears to be controlling the Complainant's right arm.
55. In the result, the video appears to confirm that the Member had regained control of the Complainant's left arm which remained secured to one of the handcuff rings. The Complainant and [REDACTED] can both be heard objecting to the punch and demanding to know why it had happened. Almost immediately, the Complainant is moved to a sitting position and the Member explains that the punch was taken because the Complainant resisted application of the handcuffs. The Complainant counters that assertion by denying resistance and explaining that his wrist was twisted by the Member in a manner that could not be physically maintained.
56. Shortly thereafter, a Supervisor can be seen arriving and immediately moves to engage both the Member and Complainant. 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 [REDACTED].
57. The total time of interaction between the Member and Complainant before the arrival of the Supervisor appears to be approximately six minutes.

Expert Reports

58. The Record includes significant detail on two expert use of force reports prepared in connection with this matter, one from [REDACTED], the other from [REDACTED]. Both were included and considered in the criminal proceedings involving the Member.
59. Each report considers evidence from the Record, including the video recordings, which was put to the two experts. Their opinions were sought with respect to the interaction between the Complainant and the Member in the context of the *National Use of Force Framework* ("Framework").
60. The Record appears to confirm that the Member had received training in the Framework and in specific subjects within that discipline such as crisis intervention and de-escalation techniques.
61. Both reports appear to confirm the need to consider the totality of circumstances facing an officer in applying the Framework. Both also appear to confirm that the Framework

relies on officer decision making to assess subject behaviour, the perception of risk and the success or otherwise of various use of force techniques.

62. The report from [REDACTED] concluded that the use of force by the Member in punching the Complainant in the head was not reasonable in all of the circumstances.
63. The report prepared by [REDACTED] appears to be conclusive in opining that the actions of the Member were a reasonable use of force consistent with the Framework and the Member's training.
64. Both reports evaluate in great detail the various elements of evidence found in portions of the Record and appear to come to their own conclusions on subjective and objective elements of decision making and appropriate options under the Framework.
65. For example, in [REDACTED] report, at page 15, he expresses various views of techniques that might have been used by both the Member and [REDACTED] to realize effective control over the Complainant.
66. In another example, in [REDACTED] report at page 2, he appears to accept as a premise that:
15. It appeared to [REDACTED] that [REDACTED] 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 [REDACTED] that [REDACTED] became emboldened by the arrival of his friend. This caused [REDACTED] to be concerned that the situation might be getting out of hand, so he decided to place [REDACTED] in handcuffs so he could finish issuing the ticket.
67. Both reports appear to offer considered, expert perspectives on the reasonableness of the Member's actions in the context of the Framework. However, each expert was challenged on those conclusions during cross examination in the criminal proceedings. The Record does not appear to suggest a comprehensive united view from the two experts on the matters in issue, although it is acknowledged that [REDACTED] conceded several elements of the [REDACTED] report conclusions during cross examination.
68. Both reports also appear to rely on stipulated assumptions on important facts such as:
- (a) The nature and degree of resistance actually displayed by the Complainant;
 - (b) The nature and degree of risk enhancement posed by [REDACTED] involvement at the scene of the incident;
 - (c) The precise demarcation and chronicling of movements between the Member, [REDACTED], [REDACTED] and the Complainant;

- (d) The nature and degree of risk actually posed by the Complainant at the outset of his encounter with the Member and during the handcuffing process;
- (e) The reasonableness of the Member's subjective conclusions as the risks he was facing;
- (f) The objective reality of the total risk facing the Member and [REDACTED]; and
- (g) The reasonableness of the use of force options adopted by the Member.

69. Reliance on those assumptions and the conclusions arising drawn from the same by each of the experts raises a number of concerns. For example, there appear to be several unresolved conflicts arising in the evidence set out in the Record with respect to the actions, words and intentions of the parties during the interaction between the Member and the Complainant. These include, amongst several others, questions as to whether or not:

- (a) The Complainant actively resisted application of the handcuff;
- (b) The Member was pulled forward by the Complainant in the movement of his left arm; and
- (c) The verbal exchange between the Member and the Complainant created any real increased risk for the Member.

70. The evidence of experts is not, therefore, in and of itself, conclusive with respect to the appropriateness of the force used by the Member on the Complainant. The reports provide useful perspectives on the issue of misconduct and the use of force, but the reports themselves cannot be determinative of the issues raised in this review.

Analysis of the Record – Section 117

71. This review must independently assess the circumstances of the road-side stop of the Complainant, the actions of the various parties and the totality of the circumstances relating to the same. This includes consideration of the rapid escalation of the use of force by the Member, and the subjective and objective rationale behind that use of force in the context of subsection 77(3)(a)(ii)(A) of the *Police Act*.

72. The Member's subjective beliefs at the time an allegation of misconduct arises are always an important consideration in any review of that conduct. However, such beliefs are not the sole consideration. What must be assessed objectively is whether the Member's beliefs and actions were reasonable in all of the circumstances of this incident. Again, the expert use of force reports are of assistance in considering these matters, but as noted earlier, the reports and opinions of the experts are not in and of themselves determinative. What must be considered is the totality of the evidence reflected in the Record.

73. Having reviewed the Record, it suggests that the rapid escalation in the Member's actions when engaging with the Complainant from presence, to communication to "soft" force, to a closed fist punch, appears to have been unreasonable in all of the circumstances of this matter.
74. Applying the test in section 117, I find that the Record appears to support the conclusion that the Member's actions the evening of March 26, 2013 constituted misconduct by the use of unnecessary force against the Complainant, contrary to section 77(3)(a)(ii)(A) of the *Police Act*.

Conclusion and Next Steps

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.
77. I hereby notify the relevant parties of the next steps, pursuant to subsections 117(7) and (8) of the *Police Act*.
78. Included in the Record was an order of [REDACTED] acting as External Discipline Authority dated [REDACTED]. That order referenced submissions made by Counsel for the Member seeking both a further investigation and the right to call witnesses if matters ultimately proceeded to a discipline hearing. [REDACTED] apparently approved both requests as confirmed by the [REDACTED] order. I have, however, not seen the request submission itself, the proposed list of witnesses, the approval order itself nor any other details concerning this issue as they were not included in the Record.
79. Subsection 120(3)(a) of the *Police Act* provides as follows:
- (3) Subject to subsection (4), a discipline authority must not offer a prehearing conference to a member or former member under this section if
- (a) the discipline authority decides to accept the member's or former member's request under section 119.
80. I have considered the effect of subsection 120 (3) (a) of the *Police Act* on my ability as Discipline Authority to offer a prehearing conference to the Member. Specifically, I have taken into account the following factors:

(a) [REDACTED] is no longer the Discipline Authority in connection with this matter by operation of subsection 117(9) of the *Police Act*. I have now assumed that role.

(b) Subsection 117(1)(b) of the *Police Act* directs that I am to make my own decision in connection with the section 117 review.

(c) Subsection 117(8)(d)(ii) of the *Police Act* directs that I am to consider whether or not to offer a prehearing conference. Of necessity, this role only arises after my review of the Record and determination that the evidence appears to constitute misconduct.

(d) There is no material in the Record confirming the details of any prior order that may have been made by [REDACTED], with the exception of a notation in the [REDACTED] order of the [REDACTED]. That notation simply reads at the last page of the order as follows:

Within the submission [Member's counsel] [REDACTED] also raised the potential request to call a witness if this matter was to proceed to a discipline hearing. That request is accepted, if the matter continues to a proceeding, however, pending the outcome of the request for further investigation there will not be any notification to the witness, or appointment of a discipline representative until additional materials are considered.

(e) It is not clear that the submission of counsel or the decision of [REDACTED] in connection with the right to call a witness arose within the time frames established under subsection 119(1) of the *Police Act*.

(f) There is no specific provision in the *Police Act* relating to this issue.

81. Having considered the foregoing, I am of the view that any prior order that might have been made concerning the right to call witnesses in connection with a disciplinary hearing convened to deal with the Member has lapsed and is of no effect. This is a new decision made pursuant to section 117 of the *Police Act* and I find that this decision supersedes any earlier decisions with respect to the allegation of misconduct involving the Member.
82. This decision also triggers a new right on the part of the Member to request the right to call witnesses under subsection 119(1)(c) of the *Police Act*. However, at this point no such request is before me.
83. Accordingly, considering the factors in section 120 of the *Police Act*, I am willing to offer a prehearing conference to the Member.

84. The range of disciplinary and corrective measures set out in the *Police Act* which I would consider appropriate in the instant case includes:

- a. giving advice to the Member as to his conduct,
- b. verbal or written reprimand, or
- c. requiring the Member to engage with training or retraining,

pursuant to subsections 126(1) (f), (i) (j) and (k) of the *Police Act*.

85. The Complainant has the right to make submissions at a discipline hearing pursuant to s 113 of the *Police Act* (as per subsection 117(8)(b)). At a disciplinary hearing, pursuant to section 119, the Member may request permission to question witnesses. Such a request must be made within 10 days of this notification.



Brian M. Neal, Q.C.

June 7th 2017