

BRITISH COLUMBIA

CANADA

(The Honourable Judge Holmes Sitting as Adjudicator)

Vancouver, B.C. July 6, 2000

File PH99-02

PUBLIC HEARING

Pursuant to the Police Act, Section 60.1(3)

**IN THE MATTER OF THE PUBLIC HEARING INTO
THE COMPLAINT AGAINST: CONSTABLE ROWAN
PITT-PAYNE OF THE VANCOUVER POLICE DEPARTMENT**

DECISION & REASONS

APPEARANCES:

J. Doyle, Esq.	Counsel for the Police Complaint Commissioner
W. Smart, QC	Counsel for Constable Rowan Pitt-Payne of the Vancouver Police Department
D. Dahl, Esq.	Counsel for the Complainant

THE ADJUDICATOR: The hearing under Section 60.1(3) commenced on May 2, 2000, continuing on May 3, 4, and 5, and submissions were orally made on June 13, 2000.

The defaults alleged by Mr. Rai are as follows: Count 1, under Section 4(1)(g) of the Code of Professional Conduct Regulation, Improper Use of a Firearm. i.e. That Constable Pitt-Payne on or about the 8th day of February, 1999, without good and sufficient cause, drew his firearm at or near Prince Edward Street and Kingsway Avenue in the City of Vancouver, in the Province of British Columbia, in a manner, and at a time that was unjustified in the circumstances.

Count 2 under Section 4(1)(f) of the above Code, Abuse of Authority. i.e. That Constable Pitt-Payne on or about the 8th day of February 1999 without good and sufficient cause arrested, detained, or searched the person of Mr. Rai.

Count 3, under Section 4(1)(f) of the above Code, Abuse of Authority. i.e. That Constable Pitt-Payne on or about the 8th day of February 1999, at the City of Vancouver, in the Province of British Columbia, used unnecessary force on the person of Mr. Rai.

Count 4 under Section 4(1)(f) of the above Code, Abuse of Authority. i.e. That Constable Pitt-Payne on or about the 8th day of February, 1999, while on duty at the City of Vancouver, in the Province of British Columbia, used profane, abusive or insulting language to a person, Mr. Rai, including, without limitation, language that tended to demean or show disrespect to the said Rai, on the basis of the said Rai's race, colour, ancestry, place of origin or sexual orientation.

Section 61(a) states that the Adjudicator must decide whether each alleged discipline default respecting the complaints has been proven on a civil standard of proof and may find all, part or none of the alleged discipline defaults proven on the civil standard of proof.

Mr. Rai, the complainant is a Nepalese who came to Canada in 1996. He is married and at the time of the Hearing was separated from his wife for some two months.

Mr. Rai began by giving his evidence in English, with a Hindi interpreter standing by in the event Mr. Rai needed assistance. Before the commencement of the Hearing, Mr. Rai has refused the assistance of a Nepalese interpreter.

The Hearing began with Mr. Rai answering questions in English. Shortly after beginning, the assistance of the Hindi interpreter was requested by Mr. Rai. I had concerns about his understanding of English or Hindi because his answers were not responsive to the questions. In addition, when questioned, the Hindi interpreter stated Mr. Rai spoke Hindi with a Nepalese accent, and was not fluent in Hindi. An adjournment of Mr. Rai's testimony was granted to obtain a Nepalese

interpreter. It was agreed by all parties that the evidence given in English by Mr. Rai up to the time of the adjournment should be considered part of the Hearing.

Mr. Rai gives evidence that on the 8th of February 1999, he was attending ESL classes at the King Edward campus. The class goes from seven to nine in the evening. He is not feeling well so leaves his class early, around 8:00 P.M. and proceeds to his friend, Charlo 'C''s apartment on Broadway at Prince Edward Street.

He turns right off Broadway and parks his car on the west side of Prince Edward and adjoining the Kingsgate Mall. He states he thought about going out with 'C' to get something to eat. After parking his car, he waits a minute, notices a hair salon across the street, and decides to make a hair appointment for the next day. He exits his car, takes his cell phone from his jacket pocket and calls his friend, 'C', as he is crossing the street, to tell him he is on his way. He is using his left hand to hold the phone and his right hand is by his side.

He then notices someone about six to seven meters ahead of him on the sidewalk. He notices the man because he is screaming at Mr. Rai to put his knee down. The man has long blonde hair and is pointing a gun at him. Mr. Rai asks, "What's going on?" And the man with the gun again shouts to put his knees on the ground.

Rai states he was slowly putting his knees on the ground, still on his cell phone, when a second man came from behind and slowly directed Mr. Rai face down on the ground and grabbed his cell phone.

The man with the gun is identified as Constable Pitt-Payne. He approaches closer and pins Mr. Rai's neck and asks, "Where's the dope? Where's the dope?" The second man is later identified as Constable Fenton. He then handcuffs Mr. Rai and both policemen lift Rai to his feet and they walk to his car.

Mr. Rai doesn't recall Constable Fenton saying anything to him, and says Constable Pitt-Payne searches him and finds a picture of Mr. Rai and his boyfriend, and a small bottle of "poppers". Constable Pitt-Payne then asks if he is gay. Rai answers, "I'm bi". Rai then says Constable Pitt-Payne grabs him by the shirt front and called Rai "a fucking fag".

Constable Fenton then looked through Rai's wallet and nothing, i.e., no drugs were found. The handcuffs were then taken off. Mr. Rai asked for the officers' names and numbers. He stated Constable Pitt-Payne became even angrier and told Rai to go back where he belongs and spat in Rai's face. Rai's evidence is Constable Fenton gave his name and number, but Constable Pitt-Payne never provided his.

The constables then left and Mr. Rai called 911 on his cell phone. The police came and the ambulance. Mr. Rai had told the 911 operators, "Two guys came over him, saying they were police", handcuffed him, and then beat or hit him and he couldn't walk.

Mr. Rai walked to the entrance door to 'C's apartment block, pushed the intercom and said he really needed help, his knee was hurting. 'C' came out and was with Rai when the police and ambulance came. He states the paramedics said his injury was not bad, and told him to put an ice pack on his wound.

The police officer who attended was Sergeant Graham. Rai was standing. He does not recall him limping when he arrived. Rai told him:

1. The gun was pointed at him by two males who said they were policeman, and
2. They had thrown him to the ground and handcuffed him.

Rai did not complain about being spat on or about the gay or faggot remark. The Sergeant advised Rai how to lodge a complaint before he left the scene.

After 20 minutes, the Sergeant spoke to Pitt-Payne and Fenton within the next five to ten minutes and advised them what Rai told him.

Mr. Rai stated he was injured on his back, neck and knee. His back and neck hurt for one month and his knees hurt for two months.

Mr. Rai denies Constable Pitt-Payne identified himself as police before Rai was handcuffed. Rai states he knew who they were after he was handcuffed because he noticed something on their chests like police wear. He persists in denying they identified themselves as police despite the 911 transcript filed as Exhibit 10. This transcript shows Mr. Rai telling the 911 operator the males identified themselves as police before they handcuffed him.

Reid Whiting is a paramedic with B.C. Emergency Health Services. His Crew Report was filed as Exhibit 4, tab 1. The report states the crew arrived at 8:52 P.M. It was dark, but the light was good. Mr. Rai had two complaints of injuries. The first was the back of his head. Whiting examined his head, found no indication of swelling, abrasions, bleeding or dirt. The second or main complaint was his right knee. On examination of the knee the paramedics found an, "insignificant" abrasion, no blood. He could not find blood loss on the pant leg, nor was his pant leg torn. All tests he was able to perform were negative. The injury was consistent with being on his knees. There was no swelling, bruising, creaking or crunchy sound in his knee. Mr. Rai did not complain about his left knee, as it would have been examined.

Mr. Whiting's evidence is that Rai was very agitated, upset, angry, yelling as the ambulance arrived, and not understandable. Rai would not produce ID. When asked what happened, Rai was still swearing, upset and was starting to take his anger out on the paramedics by using profanity that Whiting said was aimed at the female paramedic. Rai would not give his date of birth, details of his medical card, refused to allow his vital signs to be taken and refused to allow an examination of his abdomen or his back.

When asked what happened, Rai originally said he was beaten up. This changed to Rai saying he was outside, hanging, doing nothing and two people beat him up. The third version offered by Rai was a car drove up, he went over, stuck his head in the window, was talking to them and they jumped out and beat Rai up. Whiting said after this version, he disregarded what Rai said because he wasn't telling a consistent story. The fourth version offered by Rai was two cops beat him up. They were in plain clothes and in an unmarked car. Whiting also said he did not note any indicia of Rai being under the influence of alcohol or drugs. The paramedics left the scene at 2104 hours, some 12 to 13 minutes after they arrived.

Charlo 'C' states that Rai called him earlier in the evening, but he was not expecting him that night and had someone else at his apartment. They spoke for three to five minutes on the phone. 'C' states after a few minutes he heard other voices wanting Rai to do something. Rai answered, "What the hell you doing? I'm talking to my friend." The two voices went louder. The phone suddenly stopped. 'C' states he thought it was a drug bust, and waited for Rai to call back. He did 10 to 20 minutes later and wanted 'C' to come down. 'C' did and saw Rai bleeding and wounded. He was unhappy and mad, and wanted help for emotional distress. He noted the injuries on his knee. It may have been both knees. The paramedics attended to Rai.

Rai and 'C' then drove to the courtyard area of 'C's building. Rai was angry 'C' didn't go down right away. He told me the police spit on him and called him a faggot. His opinion was Rai was not exaggerating his distress, but he wouldn't come up to the apartment with 'C'. Instead, he went to visit another friend.

The medical report of Dr. Horvath was filed as Exhibit 4, tab 2. Dr. Horvath saw Rai on February 9th, 1999. Mr. Rai was in no apparent distress. The range of motion in his neck was normal and there was no bruising or swelling in the neck. Dr. Horvath said Rai had a mild tenderness bilaterally along the trapezius. The examination of his knees showed no effusion or swelling, but he found superficial abrasions present on both knees.

Constable Pitt-Payne gave evidence that he and Constable Fenton were stopped at a crosswalk at Prince Edward and Broadway. Constable Fenton was driving and made a comment and Pitt-Payne looked to his right, noted a parked white car with a person standing about one foot from the passenger door. Both

policemen were in plain clothes and in an unmarked police car. Constable Pitt-Payne was wearing a police bullet proof vest with, "Police" on the front and also on the back. The words were reflective. Pitt-Payne wore the vest to alert people to the fact he was in fact a policeman. Both policemen were with the drug unit for a long period of time and were to investigate any crimes related to drugs and dial-a-dope transactions.

Constable Pitt-Payne states after the person near the passenger door left, he walked north on Prince Edward. The driver was still in the parked white car. He was Asian and on his cell phone. From Pitt-Payne's experience, given the location, the time of the day, the person leaving the area of the vehicle, Constable Pitt-Payne believed he had just witnessed the tail end of a drug deal. The police car turned right and the driver of the white car was standing in the middle of the road, walking on the diagonal, speaking on his cell phone. The police car stopped after doing a U-turn, and Constable Pitt-Payne exited. His evidence is he was proceeding to the sidewalk to detain Rai. He was concerned Rai would enter the building. Rai stopped in the centre of the sidewalk, his cell to his right ear and looked directly at Constable Pitt-Payne - he about three car lengths away. His evidence is Rai began to back up and put his phone to his side.

Pitt-Payne said, "Police. Show me your hands." Rai began to turn. Pitt-Payne lost sight of his hand and drew his gun, shouted the same phrase again, lost sight of both of his hands because Constable Fenton took hold of Rai's arm and directed Rai to the ground. Pitt-Payne waited until Rai was handcuffed and then holstered his gun and went over to help Fenton get Rai to his feet. Rai was on the ground less than one minute. Constable Pitt-Payne explains he drew his gun because when he lost sight of Rai's hand, he thought he may be going for a weapon.

Constable Pitt-Payne explained to Rai what he had seen and at Rai's car, gave Rai the Charter warning from a card, told Rai he thought Rai was dealing drugs by using his cell. Rai was yelling, using profanity, clearly upset. Constable Fenton searched Mr. Rai, found "poppers" but no illicit drugs. He also searched Rai's car with his permission, but Constable Pitt-Payne doesn't recall this.

Constable Pitt-Payne gave his name and number while Rai was handcuffed and again when the cuffs were off, Constable Pitt-Payne denies ever using the expression, "fucking faggot," to anyone. He also denies spitting at Rai or telling him to go back to his own country.

Constable Pitt-Payne states he tried to access Rai's cell, but it was locked. He did not ask Rai the number to unlock the phone, because he was so uncooperative. He also states there was no basis to continue Rai's detention, so he was released.

Constable Pitt-Payne states he believed he had grounds to detain Rai and was fully aware if no drugs were found there would be no charges and detention would cease. His evidence is he felt the presence of the hype at the passenger door gave him the grounds to detain. His evidence also is if Rai had not turned and had kept his hands in sight, there was no reason to pull his gun.

Notes were not made of events by either Pitt-Payne or Fenton. Constable Pitt-Payne assumed Fenton had made notes because he was primary investigator.

Constable Fenton's evidence is he was driving the unmarked police car, and while stopped on the curb lane, looked right along Prince Edward and noted a parked white car and a white male exiting the passenger door, and walk north along Prince Edward. He decided to turn to the right and see what the driver was doing. The driver was an Asian male and was using a cell phone. Based on his training and experience, the white male unkempt, exiting the passenger side, the male with the cell inside the car and the area, Constable Fenton thought he had just seen a dial-a-dope drug transaction and had at the least a reasonable suspicion the driver possessed some drugs. Fenton did a U-turn and stopped on the east side. The driver was Asian, exited the car, using cell, walked at an angle to the east sidewalk. Constable Pitt-Payne was approaching driver on foot, and Fenton circled around behind Asian driver. Constable Pitt-Payne called out in a loud voice, "Vancouver Police" at least three times, and approached the driver, Rai, with his gun drawn. Constable Fenton is not aware when he drew his gun. Rai had either not heard Pitt-Payne or ignored him. Finally, Rai looked over at Pitt-Payne and made a sudden movement, turned away and was bringing his left hand to his side while dropping low. As Rai did this, Fenton concerned as movement indicated Rai,

1. Getting ready to flee.
2. Reaching for a weapon, or
3. Attempting to destroy evidence.

Constable Fenton then took hold of the left upper arm of Rai and turned him till he was prone on the ground. Fenton stated he may have used his left leg across shoulders so he wouldn't struggle. Rai was handcuffed by Fenton. Pitt-Payne put gun away and they both helped Rai up. Rai was on the ground ten seconds. Fenton then searched Rai and Rai allowed him to search the car. Nothing illegal was found.

Rai was angry and asked for names and numbers of officers. Constable Fenton advised Rai if still had concerns to call internal affairs. The officers then left scene.

Constable Fenton stated Rai wasn't arrested but advised under investigation. He doesn't recall if Rai was advised of his rights.

Constable Fenton denies Pitt-Payne used the words "fucking faggot", and also denies any spitting.

Later the same evening Constable Pitt-Payne and Fenton met Sergeant Graham, were advised Rai had called 911 and complained two cops had attempted to rob him at gun point. Neither Pitt-Payne nor Fenton made any notes of the incident because Rai was not arrested and the incident was insignificant in their opinion. However, following the meeting with Graham and the complaint was made by Rai, Constable Pitt-Payne wrote a report. He gave it to Fenton and Fenton signed it. His evidence at the Hearing differed at times with the report. His explanation is he agreed with Pitt-Payne's recollection of the issues raised by Rai, but did not agree with all Pitt-Payne's perceptions. Constable Fenton assures the Hearing that in the future, he will write his own notes. My only comment is I would hope so.

The new Act is determinative that the standard of proof is a civil standard. However, the seriousness of the allegation and the gravity of the results must be considered. In the case of *Jory v. College of Physicians and Surgeons of British Columbia*, dated December 13, 1989 and registered as Vancouver Registry No. A850601, Madam Justice McLachlin at paragraph 14 states.

"The standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt. But it is something more than a bare balance of probabilities. The authorities establish that the case against a professional person in a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence: ... The evidence must be sufficiently cogent to make it safe to uphold the findings ..."

The first question to be determined is whether or not the man or hype was at Rai's passenger door. The evidence differs. Mr. Rai states he is not a dealer and was alone in his car. Constable Fenton states that while waiting for the light to change, he glanced to the right and had a clear, unobstructed view of the car and a hype exiting by the passenger door. A few seconds later, Constable Pitt-Payne states he looked and saw the hype one foot from the door. Bearing in mind the inconsistencies in Mr. Rai's evidence throughout his testimony, which I will detail later, I prefer and accept the evidence of Constable Pitt-Payne on this point.

Under Section 5 (1) of the Firearm Regulation, any police officer needs reasonable grounds for drawing his firearm such as to apprehend and detain a person or to protect his or another's life. Here again the evidence differs. Mr. Rai states in his evidence he exits his car, takes his cell phone and calls his friend as he is crossing the street to tell him he is on his way. There is no mention from Rai if 'C', his friend, telling him it wasn't convenient at that time for Rai to come up.

Mr. Rai states it is not a long conversation. Mr. 'C' states it lasted three to five minutes.

Mr. Rai then states he notices someone, Pitt-Payne, six to seven meters ahead of him on the sidewalk, is pointing a gun and yelling at Rai to put his knees down. Rai questions Constable Pitt-Payne and is again commanded to put his knees on the ground. Rai said he was not aware Pitt-Payne was a policeman. Mr. Rai states he begins to do this, is still on his cell, and a second man, Constable Fenton came from behind and slowly directed Rai to the ground, face down. Constable Fenton handcuffs Rai. Pitt-Payne holsters his gun and both policemen help Rai to his feet.

Constable Pitt-Payne in his evidence states after the police car turned right, the driver Mr. Rai was out of his car, crossing the road and talking on his cell. Fenton made a U-turn. The constable was out of his car and proceeding to the sidewalk to detain Mr. Rai. Constable Pitt-Payne states he thought Rai looked directly at him. About three car lengths away, began to back away and put his phone to his side.

Constable Pitt-Payne's evidence is he said, "Police. Show me your hands." and Rai began to turn. Pitt-Payne lost sight of one hand and drew his gun and again shouted and then Constable Fenton was putting Rai on the ground.

Constable Fenton handcuffed Rai and the gun was holstered. Constable Pitt-Payne states he drew his gun when Rai turned, because he lost sight of Rai's hand and thought he was reaching for a weapon. Constable Fenton doesn't see the gun drawn, but states he thinks it was drawn before the turn by Rai.

Mr. Rai's statement that he didn't recognize Pitt-Payne as a policeman is a little confusing, because for some reason he did not hear Pitt-Payne identify himself. Whether Pitt-Payne's evidence that he said, "Police" or whether Fenton's that Pitt-Payne said, "Vancouver Police" is not relevant. The point is he identified himself at least three times. He was wearing a bullet proof vest with the word "Police" on both front and back, and most importantly, in the 911 transcript, Rai states two cops robbed him and then handcuffed him.

The same statement was made to Sergeant Graham.

I can only conclude that Mr. Rai was engrossed in his conversation with Mr. 'C' and not aware of his surroundings.

I accept the testimony of Constable Pitt-Payne with respect to these matters and find he had reasonable grounds to draw his gun to apprehend and detain Mr. Rai. I do not find Count 1 proven on the above stated standard of proof and it is dismissed.

Count 2 under Section 4(1)(f) of the Code, Abuse of Authority in that Constable Pitt-Payne without good and sufficient cause arrested, detained, and searched Mr. Rai. In view of the above findings, this event has also not been proven and is dismissed.

Count 3 also under Section 4(1)(f) that Constable Pitt-Payne used unnecessary force on Mr. Rai also falls, in that both policemen state it was Constable Fenton who handcuffed Mr. Rai. It has already been determined that Pitt-Payne had the necessary grounds to draw his gun. This count is dismissed.

There are many contradictions in Mr. Rai's testimony:

1. There is his evidence he was feeling sick at school and decided to leave class as he testified on the first day of the Hearing and later when this matter resumed, his testimony was he was going to his friends to go out for dinner.
2. There is his evidence he didn't know they were police, yet he tells the 911 operator, Sergeant Graham, Dr. Horvath, and the paramedics that they were.
3. There is the paramedic's evidence that Rai gave three other versions of what happened other than the one where he knew they were police.
4. There is his statement of injuries, as opposed to Dr. Horvath's assessment and the findings of the paramedics. And clearly he did not mention the injury to his left knee to the paramedics in the evidence as he would have been examined.
5. There is his lack of co-operation and open hostility to the ambulance crew, who were present to help him.
6. There is his exaggeration of his injuries, i.e., "I can't walk." in relation to being taken to the ground by Fenton, yet no other witness details him not walking. They do say that he complains about soreness in the knee, but was seen standing and not limping. 'C' did say he was trembling.
7. More importantly, there are no allegations by Mr. Rai of this conduct to Sergeant Graham who is there to help him, or to anyone else except to Mr. 'C' sometime later that evening.
8. There is his conversation with 'C' that he says lasted a short time and 'C' says lasted three to five minutes.

There are also omissions in the police officers' testimony. Some can be attributed to the fact they did not have notes. For example:

1. Constable Pitt-Payne says the police car was stopped in the driving lane. Constable Fenton says it was stopped at the curb.

2. Pitt-Payne says Rai's on the sidewalk. Fenton says Rai's on the street.
3. Pitt-Payne says drew his gun after hand with cell dropped to his side and Rai turned. Fenton says cell still at Rai's ear when turn began.
4. Pitt-Payne says he said, "Police. Show me your hands." Fenton says Pitt-Payne said, "Vancouver Police. Get down on the ground."
5. Pitt-Payne says drew his pistol after Rai began to turn. Fenton says Pitt-Payne's pistol was out before turn.
6. Pitt-Payne says he gave Rai his Charter of Rights warning from a card. Fenton says no warning was given.
7. Pitt-Payne says Rai was arrested by him. Fenton says was no arrest.
8. Pitt-Payne says no search of car. Fenton says he searched the car.

Count 4 also under Section 4(1)(f) that Constable Pitt-Payne used abusive or insulting language to Mr. Rai that showed disrespect to Mr. Rai based on Rai's race or place of origin or sexual orientation.

Bearing in mind my concerns about the testimony of all parties, I am reluctant to accept Mr. Rai's allegations about comments made by Constable Pitt-Payne. I do not find his testimony to be clear and cogent evidence about the comments, bearing in mind the seriousness of the allegations, I am not satisfied it has been established on a fair and reasonable preponderance of credible evidence or on clear and convincing evidence of the allegation.

I dismiss Count 4 as well.

"D.R. Holmes, Adjudicator"