



Office of the
Police Complaint Commissioner

British Columbia, Canada

NOTICE OF APPOINTMENT OF RETIRED JUDGE
Pursuant to section 117(4) of the *Police Act*

OPCC File 2016-11867
June 29, 2017

To: [REDACTED] (Complainant)

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

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

And to: The Honorable Judge Carol Baird Ellan, (ret'd) (Retired Judge)
Retired Judge of the Provincial Court of British Columbia

On May 30, 2016, based on information provided by the Vancouver Police Department and a request to initiate an investigation into the matter, I ordered an investigation into the conduct of [REDACTED]. Vancouver Police Professional Standards investigator, [REDACTED], conducted an investigation into this matter. On February 14, 2017, based on information received from [REDACTED] pursuant to section 108 of the *Police Act*, an additional allegation of misconduct was identified against [REDACTED].

On May 18, 2017, [REDACTED] completed his investigation and submitted the Final Investigation Report to the Discipline Authority.

On June 2, 2017, [REDACTED] issued his decision pursuant to section 112 in this matter. Specifically, [REDACTED] identified two allegations of misconduct against [REDACTED]. He determined that the allegations of *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) and *Damage to Property of Others* pursuant to section 77(3)(e)(i) of the *Police Act* against [REDACTED] did not appear to be substantiated.

Stan T. Lowe
Police Complaint Commissioner

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

In relation to the allegation of *Abuse of Authority* for using unnecessary force, [REDACTED] has not considered the relevant context within which force was used on [REDACTED]. Although the evidence suggests that commands were provided by [REDACTED] for [REDACTED] to get on the ground, it does not appear as though [REDACTED] afforded [REDACTED] the opportunity to cooperate and respond to the verbal commands given. Further, I am of the view that [REDACTED] characterisation of [REDACTED] behaviour as "actively resistant" is incorrect based on the depicted behaviour of [REDACTED] and has led to the use of force being assessed outside of its proper context.

In relation to the allegation of *Damage to Property of Others*, [REDACTED] determined that [REDACTED] did not intentionally or recklessly damage [REDACTED] property during this incident. [REDACTED] arrives at this conclusion based on [REDACTED] explanation that "he did not intend to break anything, had a reasonable explanation for the distance and documentation and explained he has done this on hundreds of occasions without anything breaking." [REDACTED] argues that recklessness can only be found where "a person is subjectively aware that his or her conduct is creating a risk, but that person goes ahead anyway" and that the element of intentional refers to "situations in which a member is subjectively aware that the circumstances do not present good and sufficient cause but the member proceeds regardless."

I have concerns with [REDACTED] definition of these two elements and his application of these definitions to [REDACTED]' conduct in relation to the damage of [REDACTED] property. We have received guidance from retired Court of Appeal Judge, Mr. Wally Oppal, Q.C. in relation to this definition. In a recent section 117 decision, Mr. Oppal states the following in relation to the use of the word "reckless" in section 77:

"...the use in the *Police Act* of the word "reckless" (in both of the s. 77 subsections at issue here) is consistent with the fact that *Police Act* disciplinary matters involve an objective component. That is to say, the assessment of a misconduct allegation is not dictated by the individual officer's personal intention or "good faith;" rather it also involves an objective question as to the reasonableness of what the officer believed and did. While an officer's subjective belief will always be relevant, and may mitigate a misconduct allegation, the analysis does not start and end with the subjective component. It is necessary to assess objectively whether what the officer believed and did was reasonable."

This case is distinguished from the findings set out in *Lowe v. Diebolt* as the evidence here suggests that [REDACTED] was aware of the risks associated to the manner in which he handled [REDACTED] property and yet continued in his actions. This resulted in the damage to [REDACTED] property.

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

Pursuant to section 117(9), if the appointed retired judge considers that the conduct of the member appears to constitute misconduct, the retired judge assumes the powers and performs the duties of the Discipline Authority in respect of the matter and must convene a discipline proceeding, unless a pre-hearing conference is arranged. The allegations of misconduct set out in this notice reflect the allegations listed and/or described by the Discipline Authority in their decision pursuant to section 112 of the *Police Act*. It is the responsibility of the retired judge to list and/or describe each allegation of misconduct considered in their decision of the matter pursuant to section 117(8)(c) of the Act. As such, the retired judge is not constrained by the list and/or description of the allegation as articulated by the Discipline Authority.

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

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



Stan T. Lowe
Police Complaint Commissioner

cc: 