

OPCC FILE NO. 16-11867

D.A. NO. [REDACTED]

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

AND

IN THE MATTER OF A DISCIPLINE PROCEEDING UNDER SECTION 124

AND

IN THE MATTER OF ALLEGATIONS OF MISCONDUCT AGAINST

[REDACTED]  
OF THE VANCOUVER POLICE DEPARTMENT

TO:	[REDACTED]	MEMBER
	C/O [REDACTED], COUNSEL	
AND TO:	MR. STAN LOWE	COMMISSIONER
AND TO:	CHIEF CONSTABLE ADAM PALMER C/O PROFESSIONAL STANDARDS SECTION VANCOUVER POLICE DEPARTMENT	
AND TO:	[REDACTED] C/O PROFESSIONAL STANDARDS SECTION VANCOUVER POLICE DEPARTMENT	INVESTIGATOR
AND TO:	[REDACTED] C/O [REDACTED], COUNSEL	COMPLAINANT

DISCIPLINE AUTHORITY'S FINDINGS AND REASONS UNDER SECTION 125(1)(b)

(Supplement to Form 3)

## Overview

[1] This discipline proceeding under Section 124 of the Police Act pertains to two allegations of misconduct against [REDACTED] (referred to hereafter as the “member”), arising out of the arrest of an individual (the “complainant”) on [REDACTED]. The allegations, which are set out in full below under the applicable heading, concern use of unnecessary force and causing damage to property. In brief, the force allegation relates to actions of the member in taking the complainant to the ground and applying additional force while arresting the complainant for driving his motorcycle dangerously, and the damage allegation relates to cracks and/or scratches to the complainant’s helmet and two of his three cell phones.

[2] Section 125(1)(a) requires me as discipline authority to decide, in relation to each allegation of misconduct, whether the misconduct has been proven. Applicable case law establishes that the standard of proof is a balance of probabilities, and the question is whether there is clear, cogent and convincing evidence establishing that the actions of the officer amount to misconduct.

[3] I have concluded for the reasons that follow that misconduct has been proven in relation to both of the allegations.

## History of Proceedings

[4] The Police Complaint Commissioner (“PCC”) initiated an investigation on [REDACTED] pertaining to a single allegation of unnecessary force. The additional allegation of damage to property was added on [REDACTED]. The Final Investigation Report was delivered on [REDACTED]. The discipline authority delivered his Section 112 notification, finding the allegations not to be substantiated, on [REDACTED]. The PCC appointed me to perform a Section 117 review of that finding on June 29, 2017. The Section 117 decision was delivered on July 14, 2017.

[5] A discipline proceeding was convened on [REDACTED]. The discipline proceeding was adjourned pursuant to Section 123(10) and then pursuant to Section 132, reconvening for evidence and submissions on [REDACTED]. Written submissions were filed by the member’s counsel on [REDACTED]. On the same date, I provided notice to counsel for the member and to the registrar that I would accept further submissions until [REDACTED], following which I would consider the evidence and the submissions to be closed.

[6] My decision under section 125(1) is due within 10 business days of the completion of evidence and submissions on December 1, therefore by December 15, 2017.

## Allegations

[7] The two allegations are as follows:

1. Disciplinary breach of trust by abuse of authority through oppressive conduct, by intentionally or recklessly using unnecessary force in conducting an arrest of the complainant, [REDACTED], on [REDACTED]; specifically, by one or more of the

following: forcibly arresting the complainant, placing the complainant on the ground, applying knee strikes, and/or using an arm bar while removing or attempting to remove the complainant's helmet by force, contrary to Section 77(3)(a)(ii)(A) of the Police Act.

2. Disciplinary breach of trust by intentionally or recklessly damaging property, specifically a motorcycle helmet and one or more cell phones, belonging to the complainant, [REDACTED], a member of the public, contrary to Section 77(3)(e) of the Police Act.

### Legislative Framework

Police Act, Section 77(3)(a)(ii)(A):

(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...

Police Act, Section 77(3)(e):

(e) "damage to property of others", which is

(i) when on duty, or off duty but in uniform, intentionally or recklessly damaging any property belonging to a member of the public...

### Evidence

[8] The evidence in this case comes from the final investigation report, which includes video footage of the incident, the member's testimony, and an expert opinion admitted under section 132.

[9] Section 124(3) directs me to consider only those of the following records as pertain to the proceeding:

- (a) the final investigation report and materials and evidence referenced in it;
- (b) any supplementary report, investigation report under section 132 ... or other separate reports prepared in respect of the investigation, and the evidence and records referenced in them;

- (c) any other relevant written records, including, without limitation, a complainant's submissions and transcripts made under section 113.

[10] The complainant did not make submissions. Earlier in the proceeding I granted an application for further investigation under Section 132. The member's counsel had obtained a report from a use of force expert, [REDACTED], pertaining to the National Use of Force Framework (NUFF), which I accepted as potentially relevant to the assessment of the reasonableness of the member's use of force. The investigating officer was asked to consider the report, and to provide any comments he may have on it, which he did in his supplemental report, appending a copy of the expert opinion.

[11] In addition to these records, the investigating officer testified, mainly to submit the final investigation report and the Section 132 report, and as stated, the member testified as well.

## Findings

[12] The following summary represents my findings in relation to the evidence following a complete review of the Final Investigation Report and attachments, the member's testimony, the video, and the expert report.

### a. Final Investigation Report, Statements, and Testimony

[13] On [REDACTED], the member, as passenger, and his partner, as driver, were on duty, undercover, traveling in an unmarked police vehicle, when they heard a radio dispatch of a motorcycle rider traveling south on [REDACTED] in Vancouver. The dispatch indicated that the motorcycle had "avoided" a marked police cruiser by traveling into an adjacent laneway, then returning onto [REDACTED] and speeding off southbound. The officer in the marked vehicle reported that he had not activated lights, just noticed that the motorcycle "took the lane" in an apparent effort to avoid the police car. He broadcast a request for units in the area to look out for the motorcycle.

[14] The member stated in his duty statement that he was responding to the other officer's broadcast in relation to a "dangerous driver evading police" that had "fled from" the other member. The marked vehicle broadcast shortly that it "reacquired" the motorcycle and that it was "evading" them and another marked unit, at [REDACTED]. The police statement of one of the officers in the marked vehicle indicates that they activated their lights and sirens to initiate a traffic stop while a block behind the motorcycle on [REDACTED], but saw it turn westbound on [REDACTED] toward [REDACTED]. They stated in their police report that they did not broadcast this attempt and it appears to have been short-lived and ineffective. The description of the motorcycle's driving pattern provided by these officers reflected several traffic infractions and high rates of speed.

[15] The member stated that he saw the marked vehicle, with emergency equipment activated, at [REDACTED], which he suspected was "in relation to the fail to stop". The police radio call record indicates that about this time, the member reported that he and his partner were "following at normal speeds" and didn't know where the other police unit had gone. At this point the member and his partner were traveling north on [REDACTED] from [REDACTED]. The member, who said he was directing his

partner, told him to turn west from [REDACTED] onto [REDACTED]. They then sighted the motorcycle at [REDACTED] and [REDACTED], traveling south at an excessive speed through the intersection and a playground zone. The marked unit had deactivated its equipment to discontinue the attempt to pull over the motorcycle for public safety reasons, due to its distance and speed, and pulled off at [REDACTED].

[16] The motorcycle's licence plate had been traced by the marked unit to a [REDACTED] address, and the member and his partner concluded that the motorcycle would likely head east. They followed it on [REDACTED]. The next radio call from the member's unit was when the complainant was being taken into custody.

[17] Between those radio calls, the GPS Plot Data from the member's unit indicates that their vehicle was traveling at speeds between 78 kmh and 129 kmh as they attempted to close the distance with the motorcycle. They travelled south on [REDACTED], east on [REDACTED], and south on [REDACTED]. The speed limit on [REDACTED] is 30 kmh (at least in some areas) and on [REDACTED], 50 kmh. As the members followed the motorcycle south on [REDACTED], it continued speeding excessively, failing to stop at stop signs at [REDACTED] and [REDACTED], which are through streets.

[18] The member and his partner detoured onto [REDACTED] in an attempt to head off the motorcycle, which they expected to head east toward the [REDACTED] residence of the registered owner. They next encountered the motorcycle as they were traveling south on [REDACTED] at the intersection of [REDACTED], a four-way stop. The motorcycle was traveling east, and they arrived at the intersection at approximately the same time.

[19] In the General Occurrence report, the member states that the motorcycle "passed directly in front" of them. In his duty statement, he noted that it "immediately turned right" at that intersection, and he believed it was "about to flee from police again". In his statement to the investigator, he described this encounter as an attempt to evade himself and his partner, on which he relied as part of his grounds to arrest the complainant and conclude that he was resisting police.

[20] The member stated in his statement to the investigator that he believed the complainant was aware that their unmarked vehicle was a police vehicle when they arrived at the [REDACTED] intersection at the same time, due to the fact that the complainant looked to his left toward them before turning right. In his testimony, the member stated that the rider looked directly at him before making his turn, and that the unmarked vehicle was clearly recognizable as a police vehicle, despite being unmarked, because of its police accoutrements -- a black push-bar in front, visible lights on computer inside, a mounted spotlight on driver's side, two black hockey pucks on the rear, tires no caps, and steel rims. The member's partner said in his statement to the investigator that he did not believe the complainant was aware at any time that they were following him.

[21] From [REDACTED] the motorcycle made a quick right turn onto [REDACTED], and then a quick left turn onto [REDACTED]. The officers concluded that it may continue onto a pedestrian area at the end of that road, which was blocked to vehicle traffic, but instead it turned right into the parking lot of an

adjacent business park. The member said he was concerned that the rider may come out a second entrance to the parking lot, and was considering having his partner let him out to go on foot to that entrance, but as they turned into the parking lot, and activated their emergency equipment, they saw that the motorcycle had stopped just behind a van that was parked in the lot. The rider was still on the bike, and looked back toward the police vehicle just as they arrived and activated their lights.

[22] In his duty statement the member stated that he planned to remove the rider from the motorcycle “as quickly and safely as possible”. He believed he “had a duty of care to the public to immediately apprehend the suspect ... to prevent the rider from continuing to drive in a dangerous manner.” He said he believed that the rider “posed an immediate and grave risk to public safety.” In the General Occurrence Report he stated that he [the member] quickly exited his vehicle, approached the rider and told him to get off his bike, which he slowly started to do. The member said he “took control of his arm to pull him off the bike. He was placed in an arm bar and subsequently placed in handcuffs and his helmet pulled off of his head.”

[23] In his Duty Statement, the member said the complainant got off his bike “without direction ... to do so” and that he immediately yelled at him to get on the ground, which he did not do. He said he told the complainant a second time to get on the ground, but he did not do so, nor did he give any sign of comprehension or surrender. The member said he was mindful of the rider’s prior failures to follow police direction. He still had his helmet on with his tinted visor down, so the member could not read his face. The member was not sure of their exact location, and was concerned that the complainant would flee on foot.

[24] In his statement to the investigating officer the member acknowledged that the complainant was getting off the bike, but said he did not want to give him an opportunity to change his mind, and the complainant failed to get on the ground after being directed to do so. He reiterated his concern about not being able to see the complainant’s face as he approached him, the lack of any response to the verbal direction, and the concerns regarding officer safety. He did not recall if he had identified himself as a police officer and could not say whether the complainant would have been aware of why he was being arrested.

[25] To summarize, the member in his General Occurrence statement said that he had ordered the rider off the motorcycle, in his duty statement said the rider got off without direction, and in his statement to the investigator said that after viewing the video he was aware that the rider had gotten off without direction, so he went directly to ordering him to get on the ground.

[26] In his testimony, the member said whether or not the rider had gotten off, he was going to make sure he was on the ground, but that he could have gotten himself there.

[27] Based on all of the circumstances, the member says, he opted for physical control of the complainant, intending to take him down in a controlled fashion by holding his arms and shoulders as he swept his legs out from under him. His intention was to prevent an opportunity to fight or flee.

[28] In the member's interview with the investigator it was pointed out to him that the takedown was not a controlled descent as he said he intended [in his duty statement], rather that the complainant fell to the ground and the member landed on him with a knee. The member agreed that the takedown did not go as planned, that the complainant fell freely to the ground, but said he did not purposely land on him with his knee. The member stated, "he was on his side and I kinda have a decision to make at that time which is I either like step back and disengage and start giving verbal commands again or you quickly reengage and take control of him" and that he opted again for physical control, landing on him while he was on his side, and "quickly push[ed] him to his front" to "regain control".

[29] The member described physical contact as a "step below" lights and sirens, which he agreed was equivalent to officer presence, and explained that the complainant had already ignored police presence and the prior commands. He said he considered the use of what is described as an "empty hand" technique to be the least available force. The member stated that he was qualified in use of force and empty hand control techniques and received training in that every year.

[30] The member recognized that it appeared from the video that he was "boom thumping [the complainant]" but he did not intend the initial knee contact to be a knee strike. He simply fell to the ground to try to take control, he said. In his evidence he described the complainant as having "bladed" himself so as to interfere with the controlled descent, necessitating his re-taking control.

[31] In explaining his decision to use physical force in the arrest, the member stated to the investigator, "I believe that ... he'd already ignored police commands through his fail to stop and he'd already ignored police presence ... through his fail to stops ... so I was moving to my, least means of force available to me which was open hand techniques." He said he decided the complainant was failing to comply with his direction to get on the ground after he got out of his vehicle and told him to do so. He described him as not taking action, rather than demonstrating any overt resistance. The member said this was the complainant's opportunity to comply, to get on the ground and he did not do so, nor did he demonstrate any action of surrender, he "just stood there", "kind of just froze". The member based his decision that physical contact was necessary to take the complainant to the ground in part on the complainant's prior non-compliance with the officers' directions to stop while he was riding his motorcycle, and took into consideration the fact that the complainant had his helmet on with a tinted visor down and he could not see his eyes to assess his level of response.

[32] In relation to what he knew before he decided on the degree of force he needed to use, the member listed "three violations" via police radio, and noted that he was "close" to the [REDACTED] maneuver. He included his own observations from [REDACTED] to [REDACTED], including excessive speeds and passing through two stop signs into busy main streets at [REDACTED] and [REDACTED]. He added that the complainant had sped in park zones at [REDACTED] and [REDACTED].

[33] When the complainant reached the ground, the member stated, he had his arms under him, which prevented the member from taking control of them, and raised concerns about access to weapons. The member applied a knee strike to the complainant's mid-torso to gain control of his arms.

This permitted the member to pull the complainant's left arm out from under him and place it in what is referred to as an arm bar, straightening it out behind the prone suspect and raising it in the air.

[34] The member said he pulled off the complainant's helmet in order to try to communicate with him. He acknowledged that contrary to his General Occurrence report, the complainant was not handcuffed at that point, rather he was already in an arm bar, which the member said was consistent with his training. He used his left hand to get it off, but it would not come off. He realized there was a chin strap but found that was not easy to undo, he was reaching into complainant's face and mouth area. Ultimately he succeeded and just tossed the helmet to the side, and it ended up rolling. Essentially he explained that the toss was largely due to the difficulty in removing the helmet.

[35] The member proceeded to search the complainant, incidentally to his arrest. He found his wallet and a knife, and tossed these a couple of feet, to the side of the complainant on which he found them. He said he removed the complainant's belongings in manner consistent with how he searches everything. He rolled the complainant up onto his side, noting that he did not roll onto the wallet or knife. He found three cell phones which he intended to "place a certain distance away". He said he could not just place them to the complainant's left with the other items, that he needed to keep an accurate log, to document what came from where.

[36] In relation to whether he "tossed" the items, he said he did not intend to break them. He said it was a dynamic situation, there was a lot going on, and he had to gauge the appropriate distance so that the items would be away from the complainant and he would not be rolled back onto them. He usually tried to throw cell phones screen up, and if something had broken off the third cell phone as appears in the video, it must have been the removable back case off the Blackberry. He watched the three phones as they landed, making sure that they did not land on the screens. He also noted that in his experience people with three phones were usually drug dealers and their screens were usually already scratched.

[37] The member was asked by the investigator to comment on the speeds reached by the police vehicle during their pursuit of the complainant. He estimated they reached between 40 – 70 kmh between [REDACTED] and [REDACTED]. His partner was following his direction and the member had suggested they follow the suspect at a reasonable distance. He said it was policy to have an unmarked vehicle tail a few blocks back to see if the suspect stopped or went somewhere.

[38] When asked about the speeds recorded by the GPS on the vehicle, the member was shocked, and said he felt it was safe at all times. He stated there was no one in the park, they didn't want to engage the suspect, but they did want to locate him, so they decided to go left [to [REDACTED]] and beat him to [REDACTED], to "ensure that he stopped". He felt he had a duty to arrest, but did not intend to use his equipment to initiate a pursuit and if the complainant had beat them through [REDACTED], he would have disengaged. He said that when they traveled down [REDACTED], it didn't seem like they were going 130 km/h, they were just trying to get ahead of the guy and try to arrest him. In relation to their authority to travel at those speeds, he stated that the Motor Vehicle Act provisions permit police to exceed the speed limit, and that they often don't use emergency equipment when following a suspect, so as not to jeopardize public safety.



[39] The member thought the complainant would take the bike lane and the incident would have been over. Instead he made a quick right and the officers were shocked to find him right there, stopped. He noted that the complainant had an open route behind him to flee.

[40] In his testimony at the discipline proceeding, the member essentially adopted his statement in relation to the pursuit, but added that when they encountered the complainant at the [REDACTED] intersection, the member felt like they were looking right at each other. He said he had assessed the complainant as actively resistant based on his driving behaviour and his fail to stop and to comply with police direction, including having "faced off" at the [REDACTED] intersection, then "turned off and tried to hide". He considered this to be purposefully disobeying police direction. Once he saw the motorcycle stopped he planned to get the complainant off and onto the ground, so he could be arrested. He wanted him on the ground because for anyone who is "actively resistant" it is safest to get them onto the ground, to remove the options of fighting or fleeing. Because the complainant did not do anything to demonstrate compliance such as put his hands up, he concluded that a controlled takedown was necessary. He believed the complainant's behaviour had not changed from what he had heard and seen in his driving.

#### b. Video

[41] Turning to consider the video footage of the incident, I will observe that the timing of what occurred at the outset is a crucial component of the evidence. Verbal descriptions do not capture the immediacy of the situation, and they must be considered in light of what can be plainly observed. There is no audio.

[42] At 19:54:03, as the complainant is looking back at the police vehicle, still on the motorcycle, the member is walking swiftly toward him, with his right arm bent at his side, pointing his index finger in a brief gesture that looks like "get off" or "get away from the vehicle". The gesture looks as though it corresponds with the member telling the complainant to get on the ground, or get off the bike. The complainant then turns back to face away from the member toward the front of his bike, as he takes his right leg over the back of the bike to dismount on the left side. He is in the process of doing this at 19:54:04. He completes his dismount and at 19:54:05 he turns to face the approaching member, who is then about two feet to his right. The complainant's arms come up to his waist, hands open with palms down, and loosely pointed toward the member. The member makes his first contact with the complainant at 19:54:06.

[43] This initial contact consists of the member placing one arm across the chest of the complainant, which seems consistent with an attempt at upper body control. The other arm is toward the complainant's back. The force of the impact, however, knocks the complainant to the ground onto his side, and the member loses contact with him.

[44] The member then lands on the complainant with one knee to his back, rolls him onto his front (onto his hands), and applies a further knee strike to his left side. He then removes his left arm from under him, and straightens it behind his back. This whole sequence takes about 5 seconds.

[45] The total series of actions taken by the complainant during the arrest consist of dismounting after some apparent direction from the member, turning to face the member after doing so, and raising his arms loosely toward the member at waist height as the member reaches him. He may also have attempted to raise his torso somewhat while face down on the ground.

[46] Once the complainant is under control, the member attempts to remove his helmet without undoing the chin strap, and the member admits he did not know there was one. He is holding the complainant's arm with one hand and attempting to remove the helmet with the other. He ultimately succeeds, and can then be seen casting the helmet behind him with a flick of his left hand. The helmet spins several feet away, coming to rest near the police vehicle.

[47] The member removes two items from the complainant's right side, which appear to have been a pocket knife and a wallet, and places them on the ground at the complainant's right side. He then rolls the complainant back to his right, over top of the wallet. He then removes two cell phones from the complainant's left side pants pocket, and casts them quickly to his left onto the pavement about two feet away. He removes the third, also from the complainant's left and throws it about three feet to the left, where it can be seen to break into two pieces. The member glances briefly to his right as the third item lands. These actions take a total of about 30 seconds.

### c. Expert Report

[48] The report from [REDACTED] outlines the National Use of Force Framework that is taught to police officers, through which they make assessments of the appropriate level of force to use in relation to a spectrum of behaviour on the part of a suspect. [REDACTED] not only provided information regarding the framework and how it is applied, he offered opinions in relation to the member's conduct in this case. In doing so he relied upon assumed facts provided by the member's counsel, as well as viewing the videotape.

[49] [REDACTED] assumed facts included:

1. "...given the driving pattern in which the motorcyclist had evaded police efforts to pull him over, there was a significant risk that the motorcyclist would attempt to evade the police on the motorcycle, or may attempt to flee on foot into the business, or in any number of other directions."
2. When the police officer got out of the car, the motorcyclist was still on the motorcycle. At that point the police officer's plan was to pull the motorcyclist off the motorcycle so he could not ride away, further risking the safety of the public. ... As the police officer was about a pace or so away from the police car, the motorcyclist got off the motorcycle. ... The police officer then changed his plan. ... the police officer and his partner ... then immediately yelled commands to the motorcyclist to get onto the ground. ... The police officer shouted [this direction] from the time when he emerged from the police car, until just before he made physical contact with the motorcyclist. ...

The motorcyclist did not comply or respond in a way that indicated an intention to comply.

3. The police officer assessed the motorcyclist's behaviour as "active resistance", based primarily on the pattern of evading police attempts to pull him over, and secondarily on the failure of the motorcyclist to comply with the direction to get to the ground.
4. The [members] moved into the intersection [at [REDACTED]] in their unmarked grey Dodge Charger with center-console computer, black push bar, GPS pucks and antenna, in an effort to cut off the motorcycle and stop it. It was obviously a police car. [The complainant] made an immediate right turn from [REDACTED]. North onto [REDACTED] southbound ... an immediate left turn onto [REDACTED] and then a quick right turn into a business parking lot.
5. [The complainant] looked back over his right shoulder in [the member's] direction as he emerged from the police car. [The complainant] then began to get off his motorcycle. He appeared to be looking directly at [the member]. [The member] appeared to make two gestures with his right hand pointing towards the ground from the time he emerged from the police car until a moment before making contact with [the complainant]. The ... members were shouting for him to get down on the ground. He did not give any indication of complying with the verbal direction and/or the accompanying gestures.

[50] [REDACTED] concludes based on the assumed facts and his review of the video that the actions of the complainant at the scene of the arrest were consistent with someone contemplating flight on foot, that it would be prudent and consistent with training for police to preclude flight "from lawful arrest or detention with low-level force response whenever possible. The acts of evading, hiding, driving away, running away, and/or walking away from police who are making a demonstrated effort to stop a person are all examples of 'active resistance'. ... When [the complainant] was in the process of dismounting his motorcycle, both ... members were shouting loud verbal direction to 'get down on the ground'. ... [the member] also appeared to make two gestures with his right hand pointing down to the ground. Granted that what happened next, happened in a matter of seconds, [the complainant] made no demonstration of compliance ... his posture appeared to be consistent with someone who could have done any number of things, none of which resembled immediate compliance. [REDACTED] also observed that the complainant's face was covered by his helmet, impeding an assessment of his intentions.

[51] [REDACTED] concluded that, based on the immediately past "actively resistant" behaviour, his "furtive glancing" back and forth, his "non-compliance in the moment," his "able posture", the fact that he was unsearched and uncontrolled, in an open environment of his choosing, it was reasonable of responding police to conclude that he might flee or physically resist arrest." He said, "the application of a physical takedown, followed by handcuffing is consistent with police training, policy, the National Use of Force Framework and policing practices in Canada. He added that a single knee strike when the complainant pulled his arms into the centre would also be consistent with police training and policy.

#### d. Civilian Statement

[52] The owner of the adjacent motorcycle shop who observed the interaction between the member and the complainant gave this description of it in his statement to the investigator:

...they got out of the car, he at the same time was basically getting off of his motorcycle, he turned around and saw them, he put his hands out to his side kind of like, you know, like, well what's up, kind of, uh, thing, the cop from the passenger side rushed him, yelled get on the ground, uh, by about the time he got to the back of the motorcycle, and basically tackled him, threw him to the ground, began to knee him in the back, and bend his arms up in behind his back and it looked like the, uh, person that was being pulled over, wasn't trying to resist or wasn't reaching for his pockets, uh, he didn't even, wasn't even given, I'd say less than one second to try to comply with any kind of order, um, and then they started kneeling him and bending his arms in, he was on the ground face down for almost twenty minutes, they ripped his helmet off, threw it across the ground, ripped all the stuff out of his pockets, including his phone and smashed it, and left him on the ground face down for I'd say almost twenty minutes before they finally picked him up and let him sit, um, the cops were here for probably an hour and a half, it took them probably about twenty-five minutes before he was actually loaded into the car and taken away, and that's all we saw.

#### Analysis

[53] Case law establishes that the test in relation to unnecessary force has both objective and subjective components, meaning that both the officer's state of mind and the reasonableness of his state of mind must be considered. The subjective component turns on the officer's own statements and testimony, and may entail an assessment of credibility. The objective component is to be considered not from a lay perspective, but from the point of view of an officer with similar training and experience. Police officers are not required to use the least amount of force available to them, and an adjudicator must recognize that police officers are acting under the exigencies of the moment without the leisurely ability to reflect that a review of the evidence might afford: *R. v. Nasogaluak*, 2010 SCC 6; *Anderson v. Smith*, 2000 BCSC 1194; *Berntt v. Vancouver (City)*, 1999 BCCA 345.

[54] Both allegations involved here include recklessness, which places the mental element short of intentionality. The member's counsel submits that the terms "abuse of power" and "oppressive conduct" in Section 77(3)(a) should be incorporated into the mental element required for establishing misconduct, and must be taken as requiring that the member knew or was reckless as to whether the force used was necessary; essentially, that the term "reckless" relates to the degree of force and requires something more than negligence.

[55] Be that as it may, the issue in this case comes down to one of credibility in relation to the member's assessment of the level of resistance he encountered from the complainant at the time when he made the decision to use force in taking him to the ground.

[56] I will say that, based on what the member had heard and seen prior to encountering the stopped motorcycle, his conclusions that the rider was fleeing police and that he was arrestable for dangerous driving were not unreasonable. The question in my view, however, is whether the circumstances known to the member supported a conclusion that force was necessary. This turns on whether the member's assessment of the complainant as "actively resistant" was objectively reasonable.

[57] As pointed out by the investigator in the Final Investigation Report (p. 50), active resistance is defined in the National Use of Force Framework as actively resisting in a manner that prevents the officer from taking control, such as verbal non-compliance, pushing or pulling away, or attempting to flee.

[58] In my view, the assessment of the complainant as actively resistant at the time of the arrest was neither credible nor reasonable. The timing and sequence of actions depicted on the videotape contradict the member's assertion that the complainant was not responding to his command to get to the ground. The member stated alternately in two statements that he took the complainant off the bike by the arm and that the complainant dismounted without direction. He made the second statement after viewing the video and realizing that the complainant had dismounted on his own. In his duty statement and evidence, he said he directed him to the ground after the dismount, and that the complainant was disregarding his direction. However, in the video it is clear that the member gestures to the complainant to get on the ground or off the bike before the complainant gets off the bike. Although there is no audio, I conclude from the video, the timing, and the member's evidence that he told the complainant to get on the ground, or off the bike, at same time as he made the gesture. This clearly occurs before the complainant dismounts. This cannot be a dismount "without direction".

[59] In fact, if the complainant is dismounting at or slightly after the member's first direction to him to get on the ground, given the timing, the only reasonable interpretation is that the complainant was in the process of *complying* with the officer's direction at that point. And that is how it appears on the video. Continuing with the video footage, the complainant's left foot touches the ground barely a second, less than two, before the member makes contact and knocks the complainant to the pavement. Even if I were to conclude that the member had not told the complainant to get to the ground or off the bike before he dismounted (so that the dismount could be characterized as non-compliance), the time from the first demand to the takedown would narrow to that less-than-two-second timeframe. Either way, the video evidence is not consistent with resistance.

[60] It is notable that as with other areas of the member's evidence, his characterization of the complainant's actions, or degree of inaction, after dismounting changed over time, becoming progressively more favourable to the member's assertion of active resistance. The member's equivocation as to the events surrounding the takedown, as summarized above, detract from his credibility regarding his assessment of the level of resistance he was encountering.

[61] The video footage also belies the assertion of an attempt at a "controlled descent", given the speed with which the officer makes contact and the apparent result of that contact; a free fall to the

pavement. While the member suggests the complainant “bladed” and prevented his taking control, viewed on the video footage, the complainant barely had time to turn and face the member, his hands coming up loosely in what can only be described as a reflexive, defensive gesture, before the impact. It is clear the impact was forceful enough to knock the complainant to the ground.

[62] The member (and the expert) rely as well on the complainant’s driving pattern as indicative of a non-compliant attitude. The expert described it as “primary” in the assessment, but his assumed facts are taken from the member’s statements. Having reviewed the telephone records and the various officers’ statements, I find the member to have over-stated the driving pattern, sequentially, in his various statements.

[63] The radio broadcasts do not reflect a rider who was actively resisting serial attempts by the police to stop him, as [ultimately] portrayed by the member and accepted by the expert. They suggest one failed attempt by the marked car to close the distance due to traffic being between them and the motorcycle, and one aborted and ineffectual attempt to stop from a block behind the motorcycle just before it turned west on [REDACTED]. A careful review of the broadcasts does not support a conclusion that the rider had failed to follow police direction as much as “evaded” the police due to speed and distance. There was little in those broadcasts, apart from the use of the word “evade” [which may more aptly have been “elude”] that suggested the rider was “failing to stop” as characterized by the member in his statements. I note as well that with each successive statement the member’s description of the rider’s actions escalated in its characterization of the degree of non-compliance, much as with those pertaining to the arrest.

[64] Notable in this respect is the description of what transpired at the [REDACTED] intersection, initially characterized as the suspect “passing by” the officers, then as him having looked in their direction, then having met the member’s eye coupled with the description of the vehicle as being readily identifiable. I find this latter point somewhat inconsistent, as well, with the partner’s evidence regarding whether the unmarked vehicle had been “made” by the suspect at any time during the pursuit.

[65] At very least, based on the objective evidence, far from the conclusion that the complainant was fleeing police, there should still have been some question in the member’s mind at the time of the stop whether the complainant knew he was being pursued by them.

[66] Even if it was reasonable for the member to conclude that the complainant was disregarding police direction while on his motorcycle, at the time when the member chose to apply force, the objective circumstances known to him were that the complainant had (a) stopped his vehicle, albeit without police direction; (b) become aware of police presence and made no motion to get back on his motorcycle or escape on foot; (c) dismounted in apparent compliance with direction; and (d) turned to face the officer with obviously open, empty and relaxed hands.

[67] It should not be forgotten that there were two officers present, and nothing overt to indicate that the complainant was posing an immediate risk of fight or flight. Even if flight were a possibility, the officers had the address of the registered owner, and his motorcycle was with them. In addition, the

member stated he would have withdrawn if the motorcycle had proceeded through the vehicle barrier at the foot of [REDACTED], suggesting the level of urgency to apprehend the subject was not particularly high at that point.

[68] If I were to accept that the member was trying to apply a controlled takedown, I would see that as excessive and objectively unnecessary, in the circumstances that were known to the member at that time. However, considering the member's various statements and the video, I do not accept that his intention was in fact anything other than knocking the complainant directly to the ground, as he obviously did. The timing on the video makes it very clear that the member had no intention of giving the complainant a chance to comply with verbal commands. This is supported by the civilian witness's statement, and consistent with member's own testimony that the complainant was going to the ground one way or the other. It is also consistent with his actions after the complainant was on the ground.

[69] What followed the takedown must be considered in light of the initial use of force and what I have found to be the motivation for it. The knee strikes, removal of the helmet, and application of the arm bar were all a continuation of unnecessary and excessive force, and all appear to fall within a context of the member's demonstrated intent to use force unnecessarily. There was no apparent resistance, throughout the arrest. The complainant's arms were under him because the member had rolled him onto his front after landing on him with his knee. Had the actions to that point been justified, it may not have been unreasonable in and of itself to apply a knee strike to distract the complainant and gain control of his arms, but viewed in context, the entirety of the member's actions were unreasonable, unnecessary and excessive.

[70] In relation to member's counsel's argument that the element of intent or recklessness must relate to the unnecessariness of the force applied, which might raise the issue of whether a mistake as to the level of force required would be misconduct, in my view it is not raised in this case. Given what I have found with respect to the member's credibility, I conclude that he intended to apply the level of force that he did apply, to knock the complainant to the ground, and continue with a hard takedown. The member did not mistakenly over-assess the complainant's level of resistance. He either declined to consider or intentionally exceeded what was necessary. The evidence is more consistent with the member being caught up in the moment after a high-speed chase and hunt-down of an elusive suspect. His statements show that he progressively overstated the surrounding facts. It is clear on the evidence that he decided, probably based on an unreasonable over-reaction to the behaviour of the complainant, to apply force that was objectively unnecessary. I find that this level of intent on his part establishes recklessness or intention within the meaning of the section.

[71] I will also observe that the driving pattern exhibited by the officers themselves, which was the subject of a misconduct allegation against the driver, and their apparent disregard for policy relating to speeding without emergency equipment, are consistent with callousness, not mindfulness, in relation to public safety. It must be remembered that the member was directing his partner and was therefore a party to his driving behaviour. He is not facing an allegation in relation to that, and it is not a significant factor in this analysis, but it supports a conclusion that the member was less motivated by public safety



concerns than he was by over-zealousness and contempt for the complainant's flaunting of the traffic rules.

[72] I am mindful of the fact that three experienced officers -- the member, the investigator, and the expert, have expressed the view that the force used in this case was in line with police training, consistent with the national standard, and reasonable. However, each of those opinions is premised upon a fact that I must find is not supported by the evidence: that is, that the complainant was in a state of active resistance at the time when the force was applied, or that it was reasonable to conclude that he was. I do not believe that an attitude of reckless driving while on or in a vehicle can support an automatic characterization of the driver as actively resistant once he has stopped voluntarily and left the vehicle. The assessment of resistance and the degree of force required is fluid, and a significant change in circumstances such as that must, to my mind, demand some reassessment.

[73] In relation to the treatment of the complainant's property, the actions of the member as depicted on the video are consistent with his state of over-reaction. His fast, seemingly aggressive movements, the distance he "tossed" the items, starting with the helmet, displayed callous disregard for their preservation. The damage described by the complainant is the obvious result. The member's professed intent to inventory the items is not consistent with the obvious actions, including the fact that in one case, one of the items is placed under the area onto which the complainant was then rolled, contrary to the member's assertion that this was the precise reason that he cast the phones away as far as he did. His assertion that he watched them come to rest is also inconsistent with the video, where he is clearly looks away as he tosses at least one of the phones.

[74] It makes no difference if the member did not "intend" to damage the property, as found by the investigator. The mental element is recklessness as to whether damage is caused, and the callousness displayed by the officer amply establishes that. Again, the issue turns on credibility and the video and prior circumstances contradict the member's assertion of due care.

## Conclusion

[75] This case turns on the member's credibility, and I do not accept either his stated assessment of the degree of resistance exhibited by the complainant or his denial of recklessness in relation to the complainant's property.

[76] In relation to the allegation under Section 77(3)(a), it is not a question on which the expert opinion is of any assistance. That kind of opinion can assist on the issue of whether, given a certain level of resistance, the degree of force was objectively reasonable. Here, the question is an evidentiary one: do the facts support a conclusion of active resistance? I find they do not.

[77] In relation to the allegation under Section 77(3)(e), I find the necessary mental element of recklessness to be supported by the video evidence, which is consistent with what I have found to be the member's attitude of reckless or intentional over-reaction to the circumstances.

[78] I find both allegations to have been established.



### Next Steps

[79] 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 within 10 days business days of the member receiving a copy of the Form 3 in this matter.

[80] In light of the filing date and the time of year, those submissions will be due no earlier than January 2, 2018.

Dated at Vancouver BC this 14<sup>th</sup> day of December 2017.

A handwritten signature in black ink, appearing to read 'C Baird Ellan', with a stylized, cursive script.

Carol Baird Ellan  
Discipline Authority