

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

AND

IN THE MATTER OF ALLEGATIONS OF MISCONDUCT AGAINST

[REDACTED]  
OF THE VANCOUVER POLICE DEPARTMENT

NOTICE OF ADJUDICATOR'S DECISION

Pursuant to Section 117

To: [REDACTED] (Complainant)

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

And to: [REDACTED] (Investigating Officer)  
% Vancouver Police Department  
Professional Standards Section

And to: Chief Constable Adam Palmer (Chief Constable)  
% Vancouver Police Department  
Professional Standards Section

And to: Mr. Stan Lowe (Police Complaint Commissioner)

**Overview**

[1] This is a review initiated by the Police Complaint Commissioner (“the PCC”) under Section 117(1) in relation to a finding by a discipline authority under Section 112 that allegations of misconduct against [REDACTED] of the Vancouver Police Department, (“the member”) do not appear to be substantiated.

[2] The allegations arise out of an arrest of an individual on [REDACTED] which was captured on a closed circuit video camera. The two allegations specifically considered by the discipline authority in

relation to the member were abuse of authority by use of unnecessary force under 77(3)(a)(ii)(A) and damage to property of others under Section 77(3)(e)(i). The investigator, [REDACTED], delivered a Final Investigation Report (the “report”) under Section 98 on May 18, 2017, in which he submitted that the two allegations had not been substantiated. After reviewing the report, the discipline authority provided a decision on June 2, 2017, in which he agreed that the allegations were not substantiated. The PCC appointed me on June 29, 2017 to conduct a review under Section 117.

[3] A Section 117 review entails a fresh consideration of “whether the evidence referenced in the report appears sufficient to substantiate the allegation and require the taking of disciplinary or corrective measures”. The review is conducted on the record without hearing evidence, to ascertain whether the investigation as outlined in the materials meets the basic threshold of appearing to substantiate misconduct.

[4] Because the adjudicator may be required to convene discipline proceedings if misconduct appears to be substantiated, this review is to be conducted without drawing any final conclusions as to whether misconduct will in due course be proven: rather, the question is whether it appears to be substantiated by the evidence contained in the record. While questions of law and statutory interpretation as they relate to the apparently supportable facts may need to be addressed, the reviewer does not draw any conclusions about whether those facts will ultimately be established.

[5] In particular, in this case, while there is video evidence of the interaction between the member and the complainant, there is no audio. Accordingly some of what transpired may be dependent upon findings of fact, and credibility, in relation to testimony about what was said and heard, and when.

[6] Based on this framework, my review of the report and related materials leads me to conclude that the misconduct of abuse of authority through the intentional or reckless use of unnecessary force and reckless or intentional damage to property appear to be substantiated by the evidence and materials. The basis for these conclusions follows.

### **Background**

[7] The member arrested an individual on [REDACTED] following a broadcast of a motorcycle being driven erratically. The arrest was captured on video and posted to social media, and reported to the PCC on May 6, 2016. On May 30, 2016 the PCC ordered an investigation into an allegation of abuse of authority by intentional or reckless use of unnecessary force pursuant to section 77(3)(ii)(A) of the Police Act.

[8] On June 30, 2016 the individual applied to be added as a complainant. On July 5, 2016 the PCC found the complaint to be admissible and added the individual (hereafter referred to as the complainant)

to the investigation. On July 15, 2016 the PCC suspended the investigation pending the outcome of criminal proceedings against the complainant: on September 14, 2016 that suspension was lifted after the charges were stayed.

[9] On January 4, 2017, the PCC added a further allegation against the member, of reckless or intentional damage to property. As I have already indicated, the investigator delivered his report on May 18, 2017 and on June 2, 2017, the discipline authority issued his decision pursuant to section 112, finding that the allegations did not appear to be substantiated.

[10] On June 29, 2017 the PCC issued a Notice of Appointment of Retired Judge under Section 117(4) (the "Notice") after considering that there was a reasonable basis to believe that the decision of the discipline authority was incorrect. The reports and materials were delivered electronically on June 29, 2017 and I received them on June 30, 2017. Section 117(7) requires this review to be completed within 10 business days of receipt of the materials, by July 17, 2017.

#### **Materials Considered**

[11] Pursuant to section 117(6) I am to be provided with copies of all reports under sections 98 (and two other sections which do not apply). The reports under section 98 consist of all progress reports and the final investigation report. Section 117(1) makes it clear that the review includes not just the final investigation report but the evidence and records referred to in it.

[12] The materials I have received and considered consist of: the Final Investigation Report dated May 18, 2017 and 13 attachments, described as: complaint form, OPCC documentation (which includes progress reports and various applicable notices), complainant material, member statements, civilian interviews, CPIC and PRIME, emails, miscellaneous documentation, video, GPS data, VPD radio broadcasts, photos, and case law. Additional materials to which I have referred include the Notice of Appointment of Retired Judge dated June 29, 2017, decisions of other retired judges under section 117 posted on the OPCC website, and relevant case law, in particular a BC Supreme Court decision, citation 2016 BCSC 1970, pertaining to the role of an adjudicator under section 117.

#### **Statutory Framework and Obligations**

[13] It is necessary to set out the following portions of Section 117 in order to properly define and frame the scope of this review:

117 (1) If, on review of a discipline authority's decision under section 112 (4) [*discipline authority to review final investigation report and give early notice of next steps*] or 116 (4) [*discipline authority to review supplementary report and give notice of next steps*] that conduct of a

member or former member does not constitute misconduct, the police complaint commissioner considers that there is a reasonable basis to believe that the decision is incorrect, the police complaint commissioner may appoint a retired judge recommended under subsection (4) of this section to do the following:

- (a) review the investigating officer's report referred to in section 112 or 116, as the case may be, and the evidence and records referenced in that report;
- (b) make her or his own decision on the matter;
- (c) if subsection (9) of this section applies, exercise the powers and perform the duties of discipline authority in respect of the matter for the purposes of this Division.

...

(6) The police complaint commissioner must provide the retired judge appointed with copies of all reports under sections 98 [*investigating officer's duty to file reports*], 115 [*if member's or former member's request for further investigation is accepted*] and 132 [*adjournment of discipline proceeding for further investigation*] that may have been filed with the police complaint commissioner before the appointment.

(7) Within 10 business days after receiving the reports under subsection (6), the retired judge appointed must conduct the review described in subsection (1) (a) and notify the complainant, if any, the member or former member, the police complaint commissioner and the investigating officer of the next applicable steps to be taken in accordance with this section.

(8) Notification under subsection (7) must include

- (a) a description of the complaint, if any, and any conduct of concern,
- (b) a statement of a complainant's right to make submissions under section 113 [*complainant's right to make submissions*],
- (c) a list or description of each allegation of misconduct considered by the retired judge,
- (d) if subsection (9) applies, the retired judge's determination as to the following:
  - (i) whether or not, in relation to each allegation of misconduct considered by the retired judge, the evidence referenced in the report appears sufficient to

substantiate the allegation and require the taking of disciplinary or corrective measures;

(ii) whether or not a prehearing conference will be offered to the member or former member under section 120 [*prehearing conference*];

(iii) the range of disciplinary or corrective measures being considered by the retired judge in the case, and

(e) if subsection (10) applies, a statement that includes the effect of subsection (11).

(9) If, on review of the investigating officer's reports and the evidence and records referenced in them, the retired judge appointed considers that the conduct of the member or former member appears to constitute misconduct, the retired judge becomes the discipline authority in respect of the matter and must convene a discipline proceeding, unless section 120 (16) [*prehearing conference*] applies.

(10) If, on review of the report and the evidence and records referenced in it, the retired judge decides that the conduct of the member or former member does not constitute misconduct, the retired judge must include that decision, with reasons, in the notification under subsection (7).

[14] Case law pertaining to section 117, including the case cited as 2016 BCSC 1970, makes it clear that, because the adjudicator may in due course become the discipline authority in relation to discipline proceedings, the task in a section 117 review is not to reach conclusions about the conduct of the member; rather, as set out in Section 117(9), to assess only whether it “appears to constitute misconduct”. Section 117(8)(d) further defines the standard of review as “whether or not, in relation to each allegation of misconduct considered by the retired judge, the evidence referenced in the report appears sufficient to substantiate the allegation and require the taking of disciplinary or corrective measures.” Section 117(1)(b) directs the reviewer to make “her or his own decision on the matter.”

[15] The Notice issued by the PCC on June 29, 2017 specifically states that I am not restricted to considering the allegations considered by the investigator. It is clear from the Notice and the wording of Section 117(8) that I am not simply reviewing the allegations considered in the Final Investigation Report; rather I am to consider what allegations arise from the reports, evidence and materials, after a review of the complaint and/or “any conduct of concern” [Section 117(8)(a)]. The list or description of the allegations considered comes after that, in section 117(8)(c).

**Section 117(8)(a) - Description of the Complaint and Conduct of Concern**

[16] The conduct of concern initially arose from the videotape of the arrest of the complainant, which was posted to social media. That conduct commenced with the member taking the complainant to the ground after the complainant had stopped his motorcycle and dismounted. This may have been preceded by a verbal command that was not audible on the video. The video was captured by a closed circuit television camera attached to a motorcycle shop adjacent to the scene of the arrest.

[17] The stop was preceded by an aborted attempt by a marked police vehicle to chase and apprehend the complainant, which was broadcast via police channels. The member was aware of the failed attempt when he observed the motorcycle at a location not far from the prior sighting. The member's partner was driving, and the officers followed the motorcycle for some blocks, losing sight of him at times. Ultimately the motorcycle turned into the lot behind the motorcycle shop, where the video footage commences, and shows the motorcycle turning in and coming to a stop as the police officers arrive in their cruiser and activate their emergency lights.

[18] The video depicts the complainant looking behind him at the police vehicle just after stopping the motorcycle and before dismounting, as the member exits the passenger side of the police vehicle. The complainant appears to turn off the motorcycle while dismounting on its left side, then turns to face the police vehicle as the member approaches him. The member continues toward him and physically brings the complainant to the ground, placing his knees on his back, and straightening the complainant's left arm behind his back. The complainant ends up face down on the pavement. The partner joins the member and also applies a knee to the complainant's back. The member makes a number of attempts to remove the complainant's helmet with his left hand while using his other hand to continue holding the complainant's arm straight. He ultimately succeeds and casts the helmet leftward where it lands several feet away after rotating or rolling several times. The arrest continues with a search, during which the member removes three cell phones from the complainant and casts them to the pavement.

[19] The conduct of concern depicted by the video itself is the use of force in the arrest, as well as causing damage to the complainant's helmet and cell phones. In relation to the complaint, which came after the conduct came to the attention of the PCC, the complainant identified various injuries, as well as damage to his helmet and cell phones, that he attributes to the actions of the member.

**Section 117(8)(c) - Allegations of Misconduct Considered**

[20] Based on my review of the report and the evidence and materials referenced in it, I have identified the following allegations of misconduct that could appear to be substantiated:

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 public trust by intentionally or recklessly damaging property, specifically a motorcycle helmet and/or 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.

[21] These allegations are further described and considered under the applicable headings below.

### **Section 117(8)(d)(i) - Whether the Evidence Appears Sufficient to Substantiate the Allegations**

#### **1. Use of Unnecessary Force**

[22] The evidence and materials disclose that the member was a passenger in an unmarked police vehicle when he and his partner received information that the complainant had been driving in a dangerous manner on his Ducati motorcycle and had failed to stop for a marked police vehicle a few minutes before they encountered him. They followed him for a period of time at speeds above the posted limit, without activating their emergency equipment, observing several incidents of motor vehicle infractions. They followed the complainant as he drove his motorcycle into the parking lot of a motorcycle shop. The complainant may not have been aware of their pursuit. The officers activated their emergency equipment, as the complainant stopped his motorcycle and the member got out of his vehicle.

[23] In his duty statement the member said he believed the complainant was arrestable for dangerous driving, that he posed a danger to the public, and that he had already resisted apprehension. The member intended to remove him from his motorcycle as quickly and safely as possible. Both the member and his partner stated that the member called to the complainant to get to the ground, and that the complainant resisted the command, raised his arms and stepped toward them before he was taken to the ground.

[24] From the video it can be seen that the member gets out of the police vehicle while the complainant is stopping his motorcycle, at about three seconds before contacting him physically. The member takes about 6 or 7 steps toward the complainant, during which time the complainant can be seen getting off his motorcycle. He finishes dismounting at about the point when the member is three steps away from him.

[25] In the approximately one second between completing his dismount and being physically contacted by the member, the complainant, still wearing his helmet, can be seen looking toward the police cruiser and the member, with his hands coming off his bike, held briefly at about waist height, then pointed slightly toward the member as the complainant leans slightly away.

[26] The initial impact resulted in the complainant falling to the ground. The member admittedly applied two knee strikes to the complainant's torso once the complainant was on the ground, which can be observed in the video. Thereafter the member can be seen kneeling on the complainant with his knees on the shoulder and torso areas, holding the complainant's left arm upright and straight, in what is referred to in the report as an "arm bar".

[27] While kneeling on the complainant and holding his arm in the arm bar with his right hand, the member attempts to remove the complainant's helmet with his left hand. The evidence and materials indicate that the complainant and the bystander may have alerted the member to the need to remove the chin strap, and the member ultimately succeeds in removing the helmet, casting it leftward away from the complainant and toward the police vehicle.

[28] As noted above, I have identified several potential incidences of unnecessary force arising from this sequence of events and the manner in which the arrest was conducted.

[29] Section 77(3)(a)(ii)(A) defines the misconduct of abuse of authority by the use of unnecessary force as follows:

(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...

[30] In the Final Investigation Report the investigating officer performed a careful analysis of the issue of whether the member had grounds to arrest. While my task is not to review his decision, rather to consider the issues and reach my own conclusion, I find it instructive to consider the matter from the perspective of a trained officer, particularly in assessing the reasonableness of the member's response from a policing perspective. In doing so I nonetheless bear in mind that the test has an objective component.



[31] The facts contained in the report and materials appear to support the investigator's view that the member reasonably concluded that the complainant was properly detainable. There may however arise some question of whether detention, as opposed to arrest, would have been sufficient to achieve the member's aims. The issue under the *Police Act* in relation to use of force has been described as whether the decision to use force was reasonable and if so, whether the amount of force used was reasonable: Adjudicator Filmer Decision, Part 1, Gibbons & Howell Public Hearing, PH 13-06, OPCC website<sup>1</sup>. The main question that appears to arise on the evidence however is the reasonableness of the force used in carrying out the detention and/or arrest.

[32] The investigating officer considered the member's actions from the point of view of whether the arrest complied with Section 25(1) of the Criminal Code. In the recent case of *Akintoye v White*, 2017 BCSC 1094 Fleming J. considered the test under Section 25. She stated:

[97] [Section 25\(1\)](#) is not a source of extra police powers. Instead it operates to justify the use of force when a police officer's conduct is permitted pursuant to a separate statutory or common law power.

[98] The defendants accept that under s. 25, they bear the onus of proving on a balance of probabilities, three requirements described in *Chartier v. Graves*, [2001] O.J. No. 634 at para. 54 (S.C.), as follows:

1. the officer's conduct was required or authorized by law in administering or enforcing the law;
2. he or she acted on reasonable grounds in using force; and
3. **he or she did not use unnecessary force.**

[99] The third requirement focuses on the level or degree of force used.

[100] In *R. v. Nasogaluak*, [2010 SCC 6 \(CanLII\)](#), the Supreme Court of Canada specified the degree of "allowable" force is constrained by the principles of proportionality, necessity and reasonableness, cautioning: "courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences" (at para. 32).

[101] A subjective-objective or modified objective test is applied to assess the reasonableness of a police officer's belief that the force used was necessary: he or she must subjectively believe the force used was necessary and that belief must be objectively reasonable in all the circumstances.

[102] Recognizing police officers often engage in dangerous and demanding work that requires them to react quickly, they are not expected to measure the level of force used "with exactitude". Put another way, they are not required to use the least amount of force necessary to achieve a valid law enforcement objective. Although entitled to be wrong in judging the degree of force required, an officer must act reasonably (*Crampton v. Walton*, [2005 ABCA 81 \(CanLII\)](#) at para. 22). The common law accepts that a range of use of force responses may be reasonable in a given set of circumstances (*Bencsetler v. Vancouver (City)*, [2015 BCSC 1422 \(CanLII\)](#) at para. 153). The reasonableness, proportionality and necessity of the police conduct are assessed in light of those circumstances, not based on hindsight.

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<sup>1</sup> [https://opcc.bc.ca/wp-content/uploads/2017/04/PH-13-06\\_Filmer\\_Decision\\_Part\\_1.pdf](https://opcc.bc.ca/wp-content/uploads/2017/04/PH-13-06_Filmer_Decision_Part_1.pdf)

[33] In looking at the analysis performed by the investigating officer (which as I have stated may assist in providing the perspective of a trained officer as to what may be reasonable in the circumstances), he assessed the member's actions based on section 25 of the Criminal Code in light of his own written description of the video footage. With respect, I believe the use of this written description of the video removes the element of time to such an extent that it may be unhelpful in assessing the reasonableness of the member's actions in the circumstances. The investigator's acceptance of the member's characterization of the complainant as "actively resistant" appears to have been based on the actions of the complainant within less than a second of getting off his bike, and within perhaps a second of the earliest time when he could have heard the member giving verbal direction.

[34] Specifically, the actions of the member and the complainant in the video do not appear to support the three conclusions reached by the investigating officer as follows:

- (a) The member used only as much force as was necessary for the purpose of stopping what he perceived was a criminal offence.

[35] At the time of the arrest, the complainant was off his motorcycle and arguably did not pose a risk of continuing the offence of dangerous driving. The member pointed to the fact that the complainant got off his motorcycle without direction as an indication of his non-compliance, but this action achieved the member's initial purpose of stopping the complainant from continuing to drive, and indeed would have been the first step toward compliance with the demand to get to the ground. It also significantly reduced any risk of flight.

[36] Unfortunately the apparent timing of the direct contact between the member and the complainant depicted in the video operates against the member and invites a further consideration, firstly, of whether the member's initial choice to use force at the time when he did so can be said to have been reasonable.

[37] In particular there may be questions as to whether it was objectively reasonable to conclude, as was done by the investigating officer, that the complainant was "actively resistant" at the time of initial contact, or posed a flight risk, such that physical control was reasonably necessary at the time when the officer initially chose to apply it. That is a matter that may fall to be determined after a credibility assessment, but in my view it cannot be resolved in favour of the member on the basis of the record and materials, which appear at odds with the member's stated assessment.

[38] Even despite the complainant's prior driving pattern, given that he had voluntarily stopped his motorcycle and dismounted before the member applied force, and considering the sequence of events

disclosed by the video, there is an available conclusion that the member may have been at least reckless as to whether any force was necessary to effect an arrest or detention, at the moment when he applied it.

- (b) The member was acting on reasonable grounds to believe that the force used was necessary to carry out his duties.

[39] The member's stated duties and purpose were to stop the offence and arrest the suspect. As I have noted, the complainant had apparently stopped voluntarily and dismounted as he saw the police vehicle behind him. Again, these actions arguably constituted compliance or passive resistance, and raise the issue of whether it was necessary, after the arrest, to continue or escalate the degree of force to achieve compliance. The question that arises from the video and the materials in this respect, to my mind, is whether, even if the decision to effect a physical arrest was reasonable, it was also reasonably necessary to take the complainant to the pavement and apply knee strikes in the manner that the member employed, or again, whether lesser measures would have been sufficient. Again, this assessment will depend on the perceptions of the officer at the time and whether they were objectively reasonable, but the video appears to operate against him.

- (c) The member applied use of force techniques that were reasonable based on the circumstances at the time of the event and proportional to the behavior of the complainant.

[40] As I have observed, after the complainant was taken to the ground and before he was handcuffed, the member applied an arm bar and removed the complainant's helmet by force. It is difficult to accept the suggestion that the complainant was doing anything at that point other than physically resisting the unexpected application of force. The statements of the complainant and an onlooker indicate that the member may have initially attempted to remove the helmet without undoing the chin strap. Both the video and the member's and complainant's statements, as well as that of the bystander, raise the issues of whether it was reasonable or necessary for the member to apply the arm bar and then physically remove the helmet at that time and in that way. There is an available suggestion that there may have been other reasonable means of achieving the aim of getting the helmet off (if indeed that was necessary); for instance, after handcuffing the complainant, instead of before. This is wrapped up in the issue of whether the arm bar was reasonably necessary at the time it was applied.

[41] The three-part test set out in *Chartier v. Graves* is similar to the test applied by the investigator in the report. Considering those factors specifically, apparent questions arise from the record as to whether, applying the subjective-objective test of reasonableness: the member's conduct was required or

authorized by law in administering or enforcing the law; the member acted on reasonable grounds in using force; and the member did not (intentionally or recklessly) use unnecessary force.

[42] The matter may well boil down to one of perceptions and timing. Again, these issues may fall to be determined based upon subjective perceptions and whether they were objectively supported, which would likely entail a credibility assessment. Based on the evidence and materials however they cannot apparently be resolved in favour of the member. Bearing in mind that at this point the question is simply whether the allegation is “apparently substantiated,” I find that the evidence referenced in the report appears sufficient to substantiate the allegation of unnecessary use of force under Section 77(1)(a)(ii)(A). In particular, I base this finding on available conclusions that objectively considered, the member was at least reckless as to whether it was necessary to do one or all of the following: forcibly arrest the complainant; take the complainant to the ground by force; use knee strikes; use an arm bar; or remove the complainant’s helmet by force.

## **2. Damage to Property**

[43] After the member removed the complainant’s helmet, the video shows him casting it with his left hand away from the complainant toward the police vehicle, with sufficient force to spin the helmet several times before it came to rest several feet away. The photos provided with the report show extensive scratches to the visor and helmet.

[44] The investigator again provides a verbal description of the sequence of events in his report, concluding with: “[the member] pulls off [the complainant’s] helmet and the helmet rolls over the pavement coming to rest several feet away in front of the police cruiser.”

[45] The member stated in his interview that he took the helmet off to try to communicate with the complainant as communication had been a problem throughout the arrest. He explained that he had difficulty removing the helmet because his [the member’s] right hand was occupied holding the complainant’s left arm in an arm bar. He stated that he did not initially realize there was a chin strap, but once he undid that, he was able to “kinda pop it off and I just quickly moved it or moved it or pushed it around to my side or kinda tossed it to the side.”

[46] The bystander in his interview stated that the member “ripped his helmet off, threw it across the ground”.

[47] The member stated the following in relation to whether the damage was caused intentionally or recklessly: “...yeah that like it just wasn’t a throw it was me trying to remove it so I could communicate

with him, ...and when I did place it quickly over to the side I know, ended up rolling and that was no way was my intention.”

[48] The investigator notes that the member did not “intentionally” damage the helmet, and goes on to consider recklessness, applying the case of *R. v. Sansregret*, 1985 CanLII 79 (SCC), [1985] 1 S.C.R. 570. He finds that the member’s rationale for removing the helmet in the fashion that he did was reasonable, given that his other arm was occupied, and that he was not acting recklessly, rather in good faith, when he arrested the complainant and pulled off his helmet.

[49] As I have stated this review is not a review of the decision of the investigator, rather a fresh consideration of whether misconduct is apparently substantiated. Considering the video and statements the issue that arises, one not considered by the investigator, is whether the member’s actions in relation to the helmet *after its removal* were reasonable. Both the member and the investigating officer appear to characterize the movement of the helmet as a direct result of its removal, but the video and the member’s statement raise the issue of whether it was “tossed,” either intentionally or recklessly.

[50] In addition, as noted by the PCC in the Notice, there is recent authority pertaining to the meaning of recklessness in the context of the *Police Act* that was not brought to the investigator’s attention. Retired Court of Appeal Judge Wally Oppal, acting under section 117, in a January 25, 2017 decision stated that recklessness in section 77 involves 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.”

[51] The standard of good faith applied by the investigator is therefore not apt, and a further analysis needs to be performed to assess the objective reasonableness of the member’s actions. There are different versions and descriptions of the officer’s action, and it is captured on video. Again, the investigator’s written summary of the actions depicted in the video arguably weakens their impact. It would appear from the video that an issue of credibility may arise regarding the member’s denial of intention or recklessness.

[52] Again, the issue at this stage is only whether the evidence appears sufficient to substantiate misconduct. Based on the materials and evidence contained in the report, and considering the need to apply the objective standard contained in the case law, I find that the evidence appears sufficient to substantiate the allegation of intentional or reckless damage to property in relation to the helmet. In

particular, the video appears to depict the member intentionally throwing the helmet with more force than would be necessary to secure it safely away from the area of the arrest.

[53] The investigator found that some damage also occurred to the complainant's cell phones, and that the member's actions may have been careless. The member essentially stated in his statement that it is his usual course of conduct to remove cell phones and toss them face up onto the ground so as to ensure that the screen is not damaged, that he did not intend to damage the complainant's phones, and that he did not believe at the time that any damage had been caused to them. In the video, the member can be seen removing each of the three phones and tossing them in sequence to the left of the complainant, now handcuffed, a distance of perhaps two to three feet away, on the pavement. The third appears to break into two or three pieces.

[54] The investigator's assessment in relation to the member's intent regarding the complainant's cell phones was again based on good faith and lack of intent to cause damage. In particular, the investigator largely accepted the member's assertion that he attempted to ensure that the cell phones remained on their backs, and that he had taken this type of action in relation to cell phones in the past without causing damage to them. He analyzed the member's intent as it related to causing damage, as opposed to considering whether he was objectively reckless as to whether damage was caused.

[55] Again, the written summary of the member's actions is less vivid than the video, which operates against the member. The video footage appears sufficient to support the conclusion that the member intentionally or recklessly cast the phones to the pavement with more force than necessary to secure and inventory them, or remove them from the complainant's reach. Indeed, the investigator appears to have found carelessness, but concluded that recklessness was not shown because the member did not intend to cause damage.

[56] Again, I recognize that this is not a review of the investigator's findings, but a fresh consideration of the issue. Based on my review, the report and materials contained in it, including and in particular the video, appear sufficient to substantiate the misconduct of intentionally or recklessly causing damage to some or all of the four items.

#### **Section 117(8)(d)(ii) - Applicable Range of Disciplinary Measures**

[57] Based on a review of cases involving unnecessary force in the conduct of an arrest, and damage to property, the range of applicable disciplinary measures that should be considered under Section 126(1) are: (c) - suspend the member without pay for not more than 30 scheduled working days; (f) - require the member to undertake specified training or retraining; (g) - require the member to undertake specified counselling or treatment; or (h) - require the member to participate in a specified program or activity.

This assessment is made without information as to the service record of the member, at this point.

### **Section 117(7) - Applicable Next Steps**

#### **1. Section 117(8)(b) - Complainant's Right to Make Submissions**

[58] Pursuant to Section 113(1), the complainant may make written or oral submissions, or both, to the discipline authority in relation to one or more of the following matters:

- (a) the complaint;
- (b) the adequacy of the investigation;
- (c) the disciplinary or corrective measures that would be appropriate.

[59] Pursuant to Section 120(7), if the member accepts a prehearing conference the complainant's submissions must be made to the prehearing conference authority, and within 10 days of receiving notice under that section.

#### **2. Section 117(8)(d)(ii) - Prehearing Conference**

[60] Section 117(8)(d)(ii) directs me to consider whether or not a prehearing conference will be offered to the member. Section 117(9) designates me as the discipline authority following a finding that conduct appears to constitute misconduct. Pursuant to Section 120(2), the discipline authority may offer the member or former member a confidential, without prejudice, prehearing conference with a prehearing conference authority to determine whether the member or former member is prepared to admit misconduct and, if so, what disciplinary or corrective measures the member or former member is prepared to accept. "Prehearing conference authority" is defined in Section 120(1) as the chief constable, deputy chief constable or a senior officer of the member's police department.

[61] In light of the range of penalties identified at this stage of the proceedings, there is no bar under Section 120(3)(b)(i) to offering the member a prehearing conference. Pursuant to Section 120(3)(b)(ii), I am directed to consider whether to do so would be contrary to the public interest. I consider that it would not be contrary to the public interest to offer the member a prehearing conference, which can afford a more expeditious resolution in relation to identifying the appropriate disciplinary or corrective measures, if the member is prepared to admit misconduct.

**3. Section 119(1) - Member's Right to Request to Call or Examine Witnesses**

[62] Under section 119(1), within 10 days of receiving this Notice, the member may file with the discipline authority a request to call and examine or cross-examine at the discipline proceeding one or more witnesses listed in the final investigation report.

Dated at Sechelt, British Columbia, this 14th day of July, 2017.



Carol Baird Ellan, Retired Judge  
Adjudicator