OPCC File No. 2014-9919
July 26, 2017

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

AND

IN THE MATTER OF A REVIEW OF AN ALLEGATION OF MISCONDUCT AGAINST

OF THE ABBOTSFORD POLICE DEPARTMENT

NOTICE OF DECISION

TO:
c/o Abbotsford Police Department
Professional Standards Section

AND TO:

AND TO: Chief Constable Bob Rich
c/o Abbotsford Police Department
Professional Standards Section

AND TO: Mr. Stan Lowe
Police Complaint Commissioner

AND TO:
c/o Abbotsford Police Department
Professional Standards Section

INTRODUCTION

1. This is a review under s. 117 of the *Police Act*, R.S.B.C. 1996, c. 367, as am. (the "*Act*"). On 7 July 2017, I was appointed by the Police Complaint Commissioner to conduct this review, pursuant to ss. 117(1) and (4) of the *Act*.

2. It has been alleged that of the Abbotsford Police Department ("APD") committed misconduct under the *Act*. There are three specific allegations against they are as follows:

(a) Improper entry and search of a residence;

(b) The use of unnecessary force against the complainant; and

(c) Arresting the complainant without good and sufficient cause.

3. The allegations arise from an incident at which the APD attended at a residence to arrest a man for domestic assault, and to apprehend a child whose safety the police believed was at risk.

4. For the following reasons, I have concluded that it does not appear from the materials before me, that there was misconduct on the part of [redacted].

BACKGROUND

5. The incidents which give rise to these proceedings took place on [redacted], [redacted] at [redacted] in the City of Abbotsford. On the previous evening, [redacted] made a report to the police that her daughter [redacted] ("[redacted]") had been assaulted by her spouse [redacted] ("[redacted]"). [redacted] and [redacted] are the parents of a five year old daughter (the "daughter"). [redacted] resides with his mother [redacted] ("[redacted]"), the complainant in these proceedings.

6. At approximately 7:16 p.m., [redacted] attended at [redacted] in Abbotsford and spoke to [redacted] ("[redacted]") who was the reported victim of the assault. The officer noted that [redacted] had visible bruises and scars, her right ankle was swollen and she was limping. [redacted] reported that [redacted] had assaulted her by shoving her down the stairs and that he had previously assaulted her as well. She had been fearful of reporting the prior assault.

7. [redacted] shared that information with her fellow officers. As a result the officers concluded that they could arrest [redacted].

8. At approximately 9:05 p.m., [redacted], [redacted], [redacted] and [redacted], went to the [redacted]' residence where they believed [redacted] resided; they

had no warrant. Their purpose in attending there was two-fold. First it was to arrest , and second it was to apprehend the five year old daughter and return her to the care of , her mother, in light of the mother's concerns about the child's health, safety, and wellbeing.

9. When the officers attended at ' residence, they were met with considerable resistance which is the subject matter of these proceedings. It may be useful to refer to the Final Investigation Report (FIR), which in part reads:

> [ ] resided with his mother, . When the members attended the residence they explained they were there to arrest for domestic assault. advised that was not there and had gone for a walk. also explained to that the child would also be apprehended and returned to her mother. became hostile towards members and was completely irrational. was obviously intoxicated and very volatile and refusing to turn the child over to the mother.
>
> attempted to block police from apprehending the child. assaulted as he was standing outside the door threshold, by grabbing his wrist and attempting to push him, as well as kicking him twice on the leg. also assaulted by kicking her foot.
>
> was arrested for Obstruct Police Officer and Assault Police Officer. During the arrest attempt actively resisted and fought with police inside her residence.

10. I note that from the FIR summary, there is some dispute on the facts. One issue was whether or not the officers were standing outside the door threshold or whether the police shuffled into her house. stated that the police shuffled into her house, whereas police witnesses described as having his foot in the door when pushed him back. (said was not in the threshold of the door.) Not surprisingly, there are varying accounts of the incident. It is clear that however, told the police that they could not come in to the residence without a warrant. She also said she told the police to get out of the house and that they could not take the daughter and that she would resist the police if they

attempted to do so. She was frank in saying she resisted the police, and felt she put up "a pretty good fight".

11. It has been alleged that [redacted] was intoxicated by alcohol however, [redacted] maintained that she was completely sober. A number of officers observed her to be intoxicated by alcohol. While this is a difference between accounts, on either possibility it must be said that she was aggressive and volatile with her conduct with the police, with the young daughter nearby. This view appears to find support in her interactions with the police at the APD holding cells, which were captured on video recordings that include both audio and visual images.

ANALYSIS AND DISCUSSION

12. In reaching my conclusion, I have had access to the following:

(a) the Final Investigation Report ("FIR") (submitted 15 April 2015);

(b) the Addendum to the FIR (submitted 6 January 2016 and re-submitted 12 February 2016;

(c) the appendixes to the FIR;

(d) various investigative materials, including witness statements (transcripts and recordings); police notes and reports; photographs; video footage from within the APD holding cells, showing the complainant; medical records;

(e) these materials include the [redacted] interview taken [redacted];

(f) *Police Act* documents;

(g) decisions from a judicial review brought by [redacted] in relation to an earlier s. 117 decision by a retired judge; and

(h) transcripts and a decision from the case of [redacted], involving the complainant and the incident in question.

13. This is a paper-based review of materials. I must analyze the written record to determine whether the test of "appears to constitute misconduct" has been met. In my analysis I have not presumed any witnesses to be either more reliable or more accurate

in their account. I have, instead, assessed the written record as a whole to apply the test I must employ in a s. 117 review. I do find that the materials before me are sufficient to allow me to reach a decision on this matter.

14. Under the *Police Act*, misconduct is defined in s. 77. The specific allegations here were set out in the Notice of Appointment of Retired Judge by reference to the subsections of the *Act* that I have emphasised with bold text below:

> 77(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,**
>
> **(i) intentionally or recklessly making an arrest without good and sufficient cause,**
>
> **(ii) in the performance, or purported performance, of duties, intentionally or recklessly**
>
> **(A) using unnecessary force on any person, or**
>
> (B) detaining or searching any person without good and sufficient cause …

15. In summary, the misconduct allegations identified here refer to: (1) wrongfully entering and searching a residence; (2) using unnecessary force; and (3) intentionally or recklessly making an arrest without good and sufficient cause.

16. Section 77 of the *Act* goes on to state, in subs. (4):

> "It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work."

17. I pause to note that pursuant to s. 117(8)(c), as the retired judge conducting this review, it appears I am not bound or limited to the allegations as framed in the investigative report or elsewhere. This is consistent with the analysis of retired Chief Judge Baird Ellan in her s. 117 *Reasons* in OPCC File No. 2016-11867 (14 July 2017).

In this case, I do not identify any additional possible allegations of misconduct arising on the materials before me.

18. It may be useful to refer to the evidence in more detail. set out two bases for his attendance at the residence. He was there to arrest , and to apprehend the daughter. , his spouse, was injured from a recent assault allegedly by , and she was present with the police (down the street) and eager to take her daughter. was not present. , who came to the door of the residence, proved to be confrontational and appeared irrational to the police. described as being erratic and referring to as a crackhead (and later, "a con, a cunt and a crackhead") while the daughter was nearby. , for his part, knew there was no custody agreement between and , and he knew the daughter was there — in fact he said hi to her through the screen door when he arrived. There was a basis for the police to be concerned for the child's safety. They knew she was in the residence. And they knew that was not there.

19. had told police that she wanted to have the police return her daughter to her, if was being arrested. She was afraid to go to residence herself. She told the police about concerns with alcohol use by people at the residence. and were the primary caregivers for the daughter, but the police were of course arresting . was sober and willing to take the child.

20. In this incident, much turns on the initial interaction between the police and the complainant at the door of her residence. Once the police began interacting physically with , it is not in dispute that they applied force, but the records before me do not support a conclusion that the force used was "unnecessary" in the context of arresting a person who was actively resisting and obstructing the police. The more difficult question here is whether the police wrongfully entered the home, and whether they arrested without good and sufficient cause.

21. In [redacted] Provincial Court trial, the learned trial judge acquitted her on charges of: (1) assaulting a police officer engaged in the execution of his duty; and (2) of resisting or obstructing the officer in the execution of his duty. The trial judge found that because [redacted] was incorrect in finding he had a proper legal basis to apprehend the child, he was not acting in lawful execution of his duty. As such, [redacted] was not committing a criminal offence in resisting the police entry.

22. The question before the Provincial Court trial judge was whether the Crown had proved two offences against [redacted], and her acquittal hinged on conclusions about whether [redacted] was acting in lawful execution of his duty. The question before me, of course, is whether the record indicates conduct that appears to constitute *Police Act* misconduct.

23. This, in turn, give rise to the question: can an officer do something that is outside his or her valid legal authority, and yet not commit misconduct? In my respectful view, the answer is yes. In many cases, an officer's conduct outside legal authority may well constitute misconduct as well. But it is not hard to conceive of situations in which the officer lacked legal authority for something he or she did, and yet was not acting unprofessionally. One example is the police officer who attends to execute a search warrant which has the wrong address or the wrong date: that officer is intruding on a dwelling home without lawful authority (i.e., trespassing), yet is doing so in the good faith belief that there is a proper basis to do so. Another example is the officer who subjectively forms grounds to arrest someone, but those grounds are later found by a judge to fail the test of "objective reasonableness". (In other words, the officer personally and subjectively felt there were grounds to arrest, but a court found there were not "reasonable and probable grounds".) Again, such an officer would be outside the requirements of the law, and yet would not necessarily have committed misconduct as defined in the *Police Act*. (On this particular point, I note the *Police Act* definition refers to an officer "intentionally or recklessly making an arrest without good and sufficient cause" (s. 77(3)(a)(i)), and this formulation would seem to except the officer who legitimately believed he had reasonable grounds to arrest which later turned out to fall short on an objective assessment.)

24. In the instant case, [redacted] reached a conclusion that he had lawful authority to apprehend the child. On the materials before me, it appears his basis for concern about the child's safety must have increased significantly when the complainant was so aggressive and confrontational with four police officers and one can imagine the criticism that would have ensued if the child suffered serious harm.

25. The materials suggest [redacted] was motivated by the best of intentions: concern for a young child's safety and wellbeing. Unlike ordinary citizens, who may elect to ignore something, the police have a positive duty to keep the peace and ensure public safety. This duty is compelling when it comes to the safety and wellbeing of the most vulnerable in society: children. [redacted] motivations, as they appear on the materials, seem to be admirable and well-intentioned. I find it significant that the record before me does not suggest any arbitrary, spiteful or unreasonable motivation or conduct on the part of [redacted]

26. On the Provincial Court trial judge's analysis, [redacted] made a legal error. She concluded that he had lawful authority to apprehend the child, when in fact he did not. Specifically, the Crown at trial invoked s. 27(1) of the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, as am., which allows an officer to apprehend a child "if the police officer has reasonable grounds to believe that the child's health or safety is in immediate danger". And the trial judge ruled that even if the child here could be said to be "in need of protection", there was an inadequate basis to find the police met the s. 27(1) standard.

27. [redacted] error in this instance related to one of many statutes which the police are expected to be familiar with, but which are not mainstays of day-to-day police work like the *Criminal Code* is. One could conclude that he erred in his understanding of the statutory power, or alternatively that he interpreted that power in a very broad way which later turned out to be wrong. [redacted] was dealing with a situation that was unfolding in real time in an unpredictable way, and he did not have the advantages of time or detachment. His view of his authority was incorrect, but the record suggests a good-faith mistake in relation to a relatively uncommon statute (for the police). Rather

than an unreasonable error or unacceptable ignorance, I find the mistake was understandable and might be classed as being a "reasonable mistake" to make. In such circumstances, I cannot conclude that this appears to constitute misconduct.

28. Given my conclusion that it was not professionally unreasonable for [redacted] in the present case to conclude he had a basis to apprehend the child, and to act on that belief to safeguard the child's wellbeing, it follows that the steps he took here to effect the apprehension are defensible. Believing he could enter and search the home to retrieve the girl, he did not commit an abuse of authority. Similarly, in taking steps to go inside and apprehend the child, when faced with resistance [redacted] used force that was not unnecessary, and had good and sufficient cause to arrest [redacted] for obstructing and assaulting the police.

29. In reaching this conclusion, I accept that assessing police misconduct involves an objective component. The outcome of a misconduct allegation cannot be determined exclusively by an officer's subjective "good faith". In reaching the conclusion that I do, I do not suggest that "good faith" can be invoked to excuse or exempt misconduct. Good faith will be a relevant consideration, certainly, but the assessment of apparent misconduct will require a broader analysis of the evidence, factors and issues. Here I conclude that, viewed objectively, based on the record before me, it does not appear that the officer appears to have misconducted himself, the test under s. 117.

30. In reaching the conclusion I have, I am mindful of the possibility that this result might appear to give rise to the sort of inconsistency in different adjudication outcomes, addressed by the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63. I have considered that issue and do not see the "*Toronto* principle" as precluding me from the result I have reached. In so concluding I am mindful of the comments of Mr. Justice Affleck in the judicial review petition brought by [redacted] in relation to the previous s. 117 decision in this case, which I referred to earlier. See *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970, at paras. 36-38:

> [36] The petitioner does not seek to challenge in subsequent administrative proceedings the acquittal of the complainant. The question before Rounthwaite P.C.J. was whether the complainant was guilty beyond a reasonable doubt of assaulting a police constable in the execution of his duty and of resisting arrest. The issue of the complainant's guilt or innocence is not the same as the issue of whether the petitioner was guilty of misconduct by abusing his authority. Provincial Court Judge Rounthwaite decided the petitioner did not have authority to enter the house of the complainant and arrest her, but made no decision that the petitioner had abused his authority within the meaning of s. 77(3) of the *Police Act* ...
>
> [37] In my opinion, the retired judge improperly conflated the issue of whether the petitioner was in the course of his lawful duties when he entered the complainant's home and arrested her, with the other issue of whether the petitioner was guilty of misconduct by abusing his authority as defined in the *Police Act*. That conflation is apparent from the retired judge's conclusion that:
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> > It follows, therefore, that the question of whether [redacted] abused his authority must be determined according respect for the factual findings of the trial judge. Respect for those findings of fact would result in the conclusion that [redacted] had abused his authority.
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> [38] I do not agree that Provincial Court Judge Rounthwaite's reasons conclusively answer the question of whether the petitioner abused his authority as that phrase is defined in the *Act*.

THE LAW

31. The law is not in dispute. Under section 117 of the *Police Act*, it is my duty to assess whether "the conduct of the member... appears to constitute misconduct" (per s. 117(9)), based on a review of the report, evidence and records supplied to me.

32. This is a review on the record. I pause here to note that [redacted] counsel sought to provide legal submissions for my consideration, but I did not examine or consider the submissions because any such extraneous materials are beyond the scope of section 117(1)(a). Essentially, this is entirely a paper based review. As well it should be noted that, this is not an appeal on any previous finding about an allegation of misconduct. While there were conclusions expressed both in the investigative report and by a different retired judge who considered this very matter, I am not sitting on

appeal or review of either of their conclusions. Under the *Act*, it is my duty to reach my conclusion about whether the materials support a finding of apparent misconduct. I note that s. 117(1)(b) says that the retired judge conducting the review is to "make her or his own decision on the matter".

NEXT STEPS

33. I make a finding, pursuant to s. 117(10), that the conduct of [redacted] does not appear to constitute misconduct.

34. I turn to "next steps". Strictly interpreted, the combined effect of ss. 117(8)(b), 117(7) and 113(1) is to require notice to the complainant of her right to make written or oral submissions to the discipline authority (as to the complaint; the adequacy of the investigation; and/or the disciplinary or corrective measures that would be appropriate). However, I note that s. 113(2), applied mutatis mutandis to this situation, would suggest the legislature did not intend to permit for submissions when a "no misconduct" conclusion is reached. This is supported further by s. 117(11), which makes this decision final and conclusive and not open to review by a court. If that is the case, there seems no reason to notify the complainant of a hollow right to make submissions when a final decision has already been reached. In any event, the complainant is entitled to receive these reasons by virtue of s. 117(7) and as such will be aware of this notice issue, and more importantly my determination of the matter.

35. Section 117(8)(e) requires me to convey that s. 117(11) applies. That provision reads as follows:

> 117(11) The retired judge's decision under subsection (10)
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> (a) Is not open to question or review by a court on any ground; and
>
> (b) Is final and conclusive.

The Honourable Wally Oppal, Q.C.
Retired Justice of the Court of Appeal for British Columbia

Dated at Vancouver, British Columbia, this 26th day of July, 2017.