



Office of the
Police Complaint Commissioner

British Columbia, Canada

NOTICE OF APPOINTMENT OF RETIRED JUDGE

Pursuant to section 117(4) of the *Police Act*

OPCC File 2017-13587 and 2017-13574

February 26, 2018

To: [REDACTED] (Complainant)

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

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

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

And to: The Honourable Judge David Pendleton (ret'd) (Retired Judge)
Retired Judge of the Provincial Court of British Columbia

On June 26, 2017, the Office of the Police Complaint Commissioner (OPCC) received a complaint from [REDACTED] describing [REDACTED] concerns with members of the [REDACTED]. The OPCC determined [REDACTED] complaint to be admissible pursuant to Division 3 of the *Police Act* and directed that the Delta Police Department (DPD) conduct an investigation.

On January 18, 2018, Delta Police Professional Standards Investigator, [REDACTED] completed his investigation and submitted the Final Investigation Report to the Discipline Authority.

Stan T. Lowe
Police Complaint Commissioner

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On February 2, 2018, [REDACTED] of the Vancouver Police Department, as the Discipline Authority (DA) issued his decision pursuant to section 112 of the *Police Act* in this matter. Specifically, [REDACTED] identified the following one allegation of misconduct involving [REDACTED] of the Abbotsford Police Department and three allegations of misconduct involving [REDACTED] of the Delta Police Department:

1. That on [REDACTED], [REDACTED], committed *Abuse of Authority* pursuant to section 77(3)(a) of the *Police Act* when [REDACTED] seized and searched the vehicle driven by [REDACTED].
2. That on [REDACTED], [REDACTED], committed *Abuse of Authority* pursuant to section 77(3)(a)(i) of the *Police Act* when [REDACTED] arrested [REDACTED].
3. That on [REDACTED], [REDACTED], committed *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* when [REDACTED] used force to arrest and handcuff [REDACTED].
4. That on [REDACTED], [REDACTED] committed *Abuse of Authority* pursuant to section 77(3)(a) of the *Police Act* when [REDACTED] participated in the seizure and search of the vehicle [REDACTED] was driving.

[REDACTED] determined that each of the allegations involving [REDACTED] and [REDACTED] did not appear to be substantiated.

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

As a starting point for the assessment of the Discipline Authority's decision, I note that the evidence is consistent that [REDACTED] stopped [REDACTED] vehicle as required and provided the officers with a valid BC Driver's License and valid BC Registration for the vehicle. Therefore, [REDACTED] provided all necessary information for the officers to fulfill their goal of determining whether the driver was properly licensed and the vehicle was properly insured. For all administrative purposes, the owner of the vehicle is identified in the insurance documents as registered [REDACTED]. When [REDACTED] was asked to provide the owner's name and address, [REDACTED] referred the officers to the owner and address listed on the insurance documents.

With respect to the seizure and search of the vehicle driven by [REDACTED] (allegation #1), I am of the view that the Discipline Authority incorrectly determined that the officers had reasonable and probable grounds to believe that [REDACTED] had committed the offense of *take auto without consent* (TAWOC) and could, therefore, seize and search the vehicle. It appears that the approach taken by the officers placed a reverse onus on [REDACTED] to prove had not committed the offense of TAWOC rather than analyzing the information available to them and whether that information established grounds to arrest for TAWOC and then seize and search the vehicle.

Further, the Discipline Authority appeared to accept the officers' belief that they could seize the vehicle pursuant to their common law duties without applying the appropriate legal test. To properly assess whether the authority to seize a vehicle can be derived from an officer's common law duties, and whether the exercise of that authority is justifiable, an objective review of the evidence as described by the Waterfield Test must be undertaken (*R v Waterfield*, [1963] 3 All ER 659). In my respectful view, the evidence in this case does satisfy the requirements of the Waterfield Test.

With respect to [REDACTED] decision to place [REDACTED] under arrest (allegation #2), I disagree with the Discipline Authority's assessment that the word "intentionally" as articulated under section 77(3)(a) of the *Police Act* refers to situations in which a member is *subjectively aware* that the circumstances do not present good and sufficient cause to detain, search, or arrest a suspect, or otherwise exercise police powers with regard to a member of the public, and the member willfully exercises those powers despite that awareness.

In my view, the Discipline Authority's decision appears to ignore existing case law establishing that an officer's subjective beliefs are to be assessed on an *objective* standard of reasonableness, including *Bernitt v. Vancouver (City)* BCSC 4310 and *Anderson v. Smith* BCSC 1194.

I am also aware of a recent decision pursuant to section 117 of the *Police Act* by a retired Court of Appeal Judge, Mr. Wally Oppal, Q.C., who, in assessing misconduct allegations under section 77(3)(a) of the *Police Act*, held that:

...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. (OPCC File 2016-11505, In the matter of a review of misconduct by a member of the Saanich Police Department, 25 January 2017)

It is my view that the Discipline Authority applied the incorrect test in assessing the conduct of [REDACTED] in relation to [REDACTED] authority to arrest [REDACTED]. The Discipline Authority appears to have relied solely on the member's subjective belief that grounds existed to arrest [REDACTED] without objectively assessing whether those grounds existed based on the evidence.

The Discipline Authority also erred in concluding that [REDACTED] prevented [REDACTED] from towing the vehicle and that doing so constituted the offense of a willful obstruction, pursuant to section 129 of the *Criminal Code*. As mentioned above, I am of the view that the lawful authority to seize the vehicle did not exist, but even if it did, the evidence does not establish that [REDACTED] prevented the seizure and towing of the vehicle. [REDACTED] stated that [REDACTED] refused to hand over the keys, but did not establish an authority to demand those keys or an objectively reasonable belief that the keys were necessary to facilitate the tow.

With respect to the force used by [REDACTED] in placing [REDACTED] under arrest (allegation #3), I am of the view that the Discipline Authority erroneously concluded that [REDACTED] was "assaultive" and that the force used by [REDACTED] was "proportional, necessary and justified in the circumstances." The evidence collected during the investigation, including the available video evidence, does not support the conclusion that [REDACTED] was "assaultive" or that [REDACTED] constituted a threat to the officers. Moreover, as the evidence does not support reasonable grounds to arrest [REDACTED], in my view, the force used by [REDACTED] was unnecessary in the circumstances.

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

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

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

Finally, the *Police Act* requires that a retired judge arrive at a decision **within 10 business days after receipt of the materials** for review from our office. This is a relatively short timeline, so our office will not forward any materials to the retired judge until they are prepared to receive the materials. I anticipate this will be within the next 30 business days.



Stan T. Lowe
Police Complaint Commissioner

cc: [REDACTED], Registrar