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

AND

IN THE MATTER OF A REVIEW OF

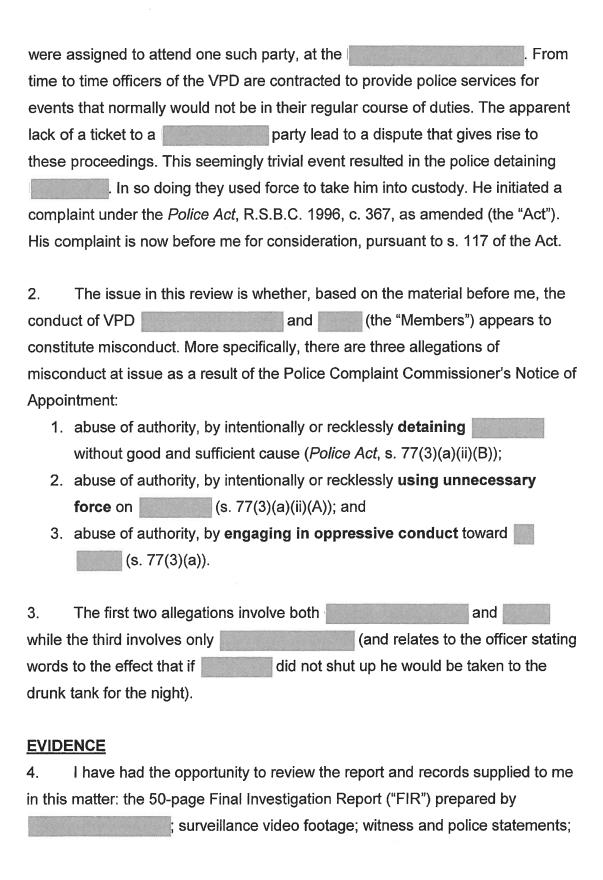
ALLEGATIONS OF MISCONDUCT AGAINST

AND

OF THE VANCOUVER POLICE DEPARTMENT

NOTICE OF DECISION

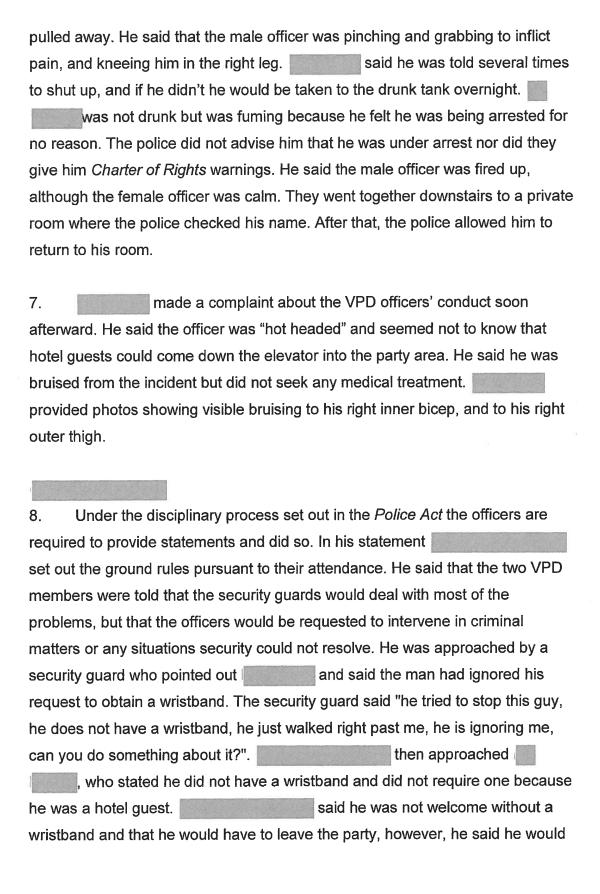
TO:	c/o Vancouver Po Professional Star	•
AND TO:		
AND TO:	Chief Constable A c/o Vancouver Po Professional Stan	plice Department
AND TO:	Mr. Stan Lowe Police Complaint	Commissioner
AND TO:	Inspector Trevor I c/o Vancouver Po Professional Stan	olice Department
INTRODUC	TION	
1. The in	ncidents that give ri	se to these proceedings took place on l
		in the City of Vancouver. For many people, the
		. In this case,
	and .	of the Vancouver Police Department (VPD)

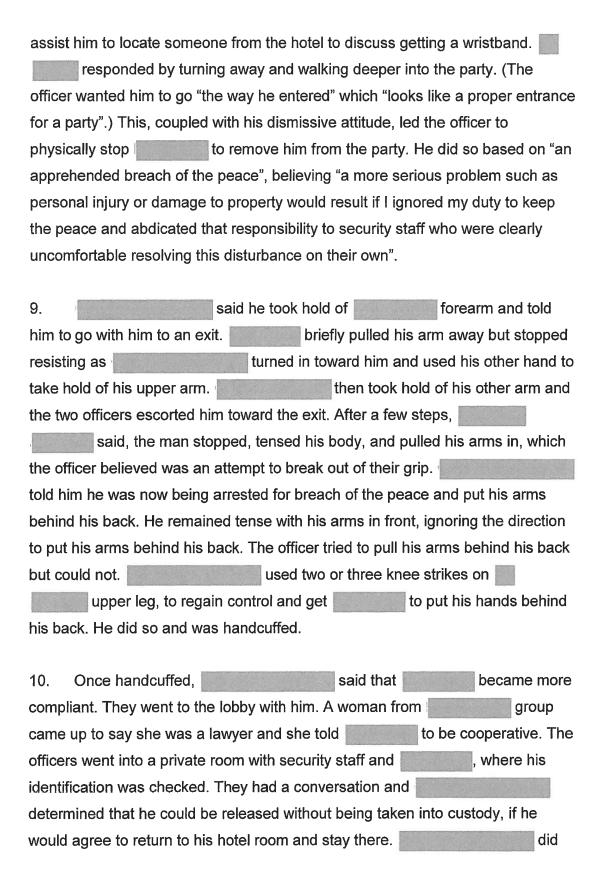


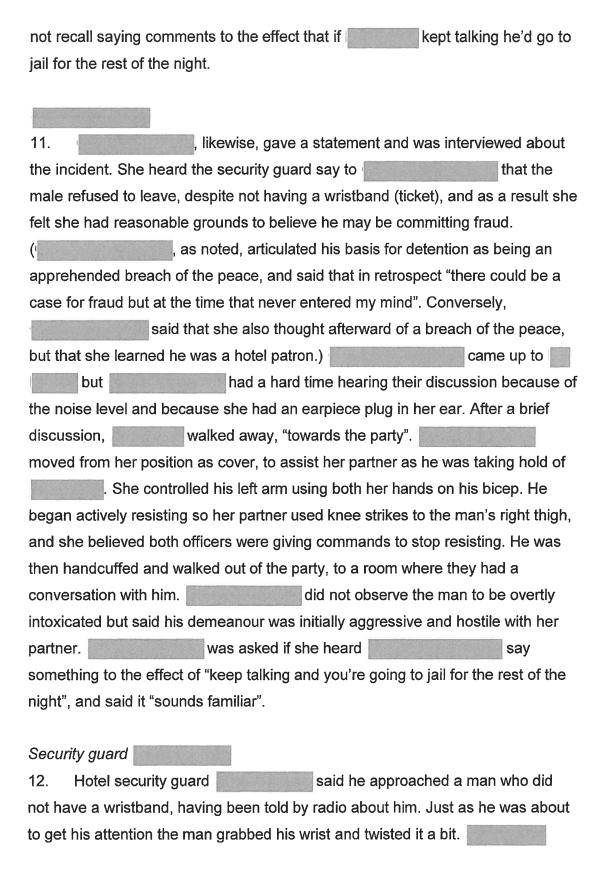
photographs; and the related materials arising in this disciplinary investigation. What follows is an outline of the evidence set out in the record.

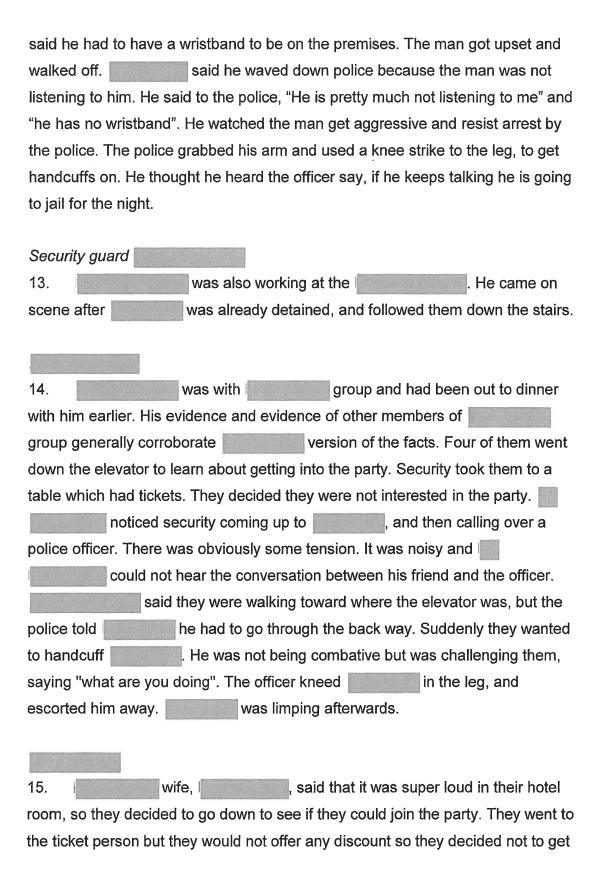
Marine an Arms					
5.		is a	. On	he and his fam	ily were
guests	at the		in the City of Vancou	uver. I will deal more fu	ılly with
his cor	mplaint. He	said that a	fter dinner they were	in their room which ap	parently
was di	rectly above	e a party th	at was in progress or	n the floor below. He n	oticed a
loud "tl	humping" s	ound from	below them in the ho	tel. He called the front	desk to
learn v	vhat was go	oing on, an	d was told their room	was right over the par	ty. He
asked	if they could	d go check	out the party and wa	s told it was a private _l	party, but
they co	ould go dow	n and see	what the hotel could	do for them.	went
with 🥛	and		down an elevator, an	nd walked through a lol	oby area
to a pe	erson selling	j tickets. Tl	ney found it cost \$100	O/person to get the wris	stband for
entry to	o the party,	and since	it was close to midnig	ght and expensive, the	y decided
not to	go.				

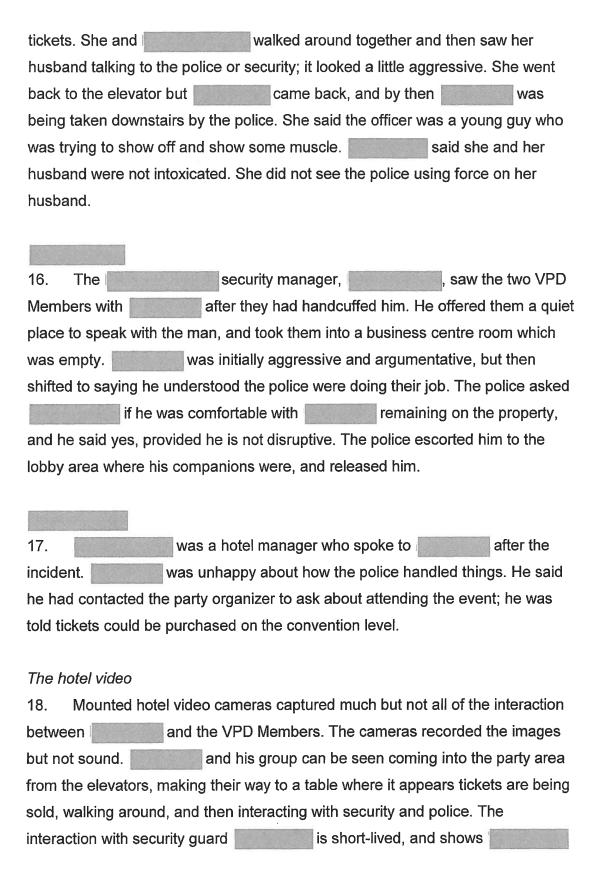
6. The relevant facts are not seriously in dispute. said that he became separated from others in his group. A security guard grabbed his arm and told him he couldn't be in there without a wristband. He told the guard he knew that and was following his friend. He said he had no intention to go to the party. He told the security guard to "take your hands off me" and said, "don't touch my fucking arm". Next, on his account, he was approached from behind by two police officers and was asked what he was doing. He said he was a hotel guest who had come down to see if he could get into the party. An officer asked where his wristband was and he replied, "I don't have a fucking wristband". The officer said, "you're coming with me", but replied, "no, I am going back to my room". The officer said, "you don't tell us what to do", and then grabbed his arm tightly. The police believed he was sneaking into the party but said he was telling them he was staying at the hotel. The male officer began to restrain him, along with the female officer, who grabbed his arm;











stopping	from walking f	orward, and	turning him b	ack. As
walks the other way	γ , he turns to his	s left, past the	e Members. I	le appears to be
going back to the el	evators area he	came from	initially.	appears to
speak briefly with		. Then, in	a different v	ideo clip (Video C),
the officer and	are spea	aking.	points to	where he wants to
go. He begins to wa	ılk away from th	e officer; the	officer grabs	s his right arm and
pulls it a	way.	grab	s his left arm	. The two officers
begin to move him t	he other way, b	out	grabs the o	loor frame.
	is out of the ca	amera's view	, and one ca	n see only
left arm in	the video. Whe	n they re-ap	pear,	hands are
behind his back, and	d he is then har	ndcuffed and	escorted do	wnstairs.

APPLICABLE LAW

- 19. The *Police Act* states that I am to access 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. In this context I do not to hear live witnesses nor consider additional evidence or submissions from the participants. Instead, I merely conduct a paper-based review.
- 20. As I read s. 117 and more generally Part 11, Division 3 of the *Police Act*, I am not sitting on appeal from any previous finding that a misconduct allegation was not substantiated. My focus is not on the correctness of an earlier finding, but rather I am to reach my own 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". Recognizing the limitations of a paper-based review, I have made my own assessment of whether the police conduct here "appears to constitute misconduct".

ANALYSIS AND DISCUSSION

- 21. The misconduct allegations in this case arise under three subsections of s. 77 of the *Police Act*, which provides:
 - 77(1) In this Part, "misconduct" means
 - (a) conduct that constitutes a public trust offence described in subsection (2), or
 - (b) conduct that constitutes
 - (i) an offence under section 86 [offence to harass, coerce or intimidate anyone questioning or reporting police conduct or making complaint] or 106 [offence to hinder, delay, obstruct or interfere with investigating officer], or
 - (ii) a disciplinary breach of public trust described in subsection (3) of this section.

...

- (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 ...
- 22. 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."
- 23. I will deal with the three allegations in this case improper detention, improper use of force, and oppressive conduct in turn.

1. Allegation of improper detention

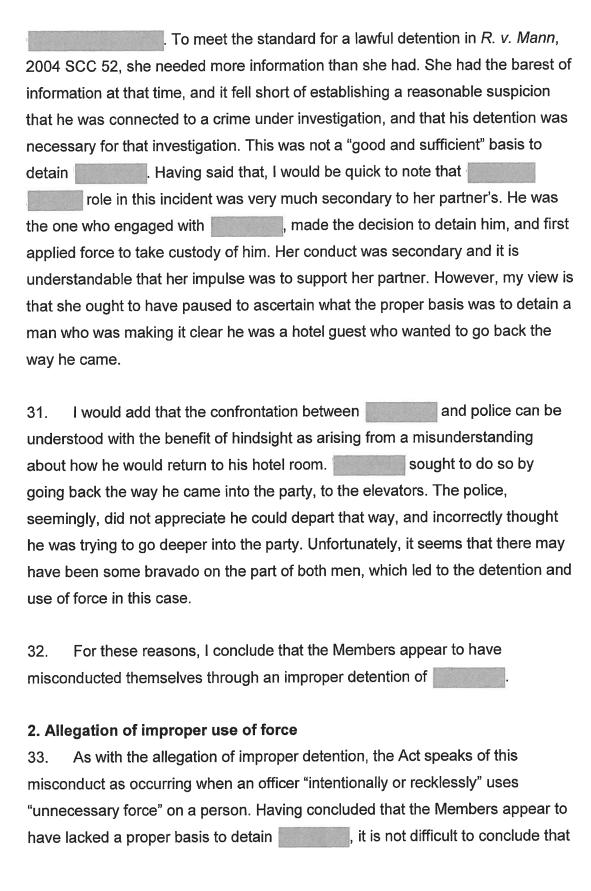
24. The *Police Act* describes this misconduct as arising when an officer, in the performance or purported performance of duties, "intentionally or recklessly" detains a person "without good and sufficient cause". It is trite that the police

cannot detain people without lawful authority. The question, for disciplinary purposes, is whether the officer had a "good and sufficient cause" to effect the detention.

25. In this case, there is no ambiguity that the Members were acting in the				
course of their duties, nor that they did indeed detain . What must be				
resolved in this review is whether it appears that one or both officers acted				
"without good and sufficient cause".				
26. As noted in my review of the facts, the two officers gave different reasons				
for detaining said it was for an apprehended				
breach of the peace, while said it was in relation to a fraud				
investigation. I will consider each officer's position in turn.				
27. VPD Policy defines a breach of the peace as involving "a reasonable				
belief that if the police do not intervene, violence, or damage to property will				
result". The policy speaks of "actual or threatened harm to someone", "a tenor of				
violence", or (in the case of an "apprehended breach of the peace") where the				
officer "believes on reasonable grounds that a breach <u>will take place</u> unless an				
arrest is effected" (emphasis added). The policy also notes:				
Vehement or emotional verbal expression of disagreement with police does not constitute a breach of the peace, if such behaviour does not otherwise create a risk of violence, or damage to property.				
In addition, Criminal Code s. 31(1) gives peace officers the power to arrest a				
person who breaches the peace.				
28. From my review of the evidence, I am unable to find that there was a				
proper basis to categorize conduct as amounting to an				
apprehended or actual breach of the peace. There is no doubt that				
was being assertive and even argumentative, in insisting he was a hotel guest				
and should be allowed to go back the way he came. found				

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nim to be difficult and condescending. But his attitude on its own does not
support a conclusion he would present a risk of violence or destroying property.
He had been stopped by police, he had an explanation for what he was doing,
and it was speculative to think that he would become violent or destroy property if
not detained. On reviewing the video, it appears that when
grabbed arm, he pulled it back, but in an instinctive way. He did not
throw a punch or run or become combative. This reaction, standing alone, does
not appear to support the conclusion he was about to be violent. The police, as
they dealt with, had only a short bit of information from the security
guard, that had no wristband and was not listening. This was not
enough to support any actual or imminent breach of the peace. In any event it
was not the business of the police, absent of any criminal behavior, to concern
themselves with not having a ticket.
29. I would add that the more senior VPD member, did not
characterize this as a breach of the peace situation. That is telling. She was right
there and was dealing with the same situation, yet she did not reach that
conclusion. She may or may not be the mythical doppelganger that Madam
Justice Southin described in Berntt v. Vancouver (City), 1999 BCCA 345, at para.
24; see also R. v. Pompeo, 2014 BCCA 317, at paras. 40-41. But her take on the
situation, as an officer who was there alongside her partner, is, in my view,
instructive.
30. contention that this was a fraud investigation is based
on the notion that was deliberately sneaking into a party without
having purchased a ticket. However the evidence does not support the premise
upon which opinion was based. was upfront
about not having a ticket or wristband. The information available to police at that
time was minimal, simply what security had told them, which was that the man
did not have a wristband and was not listening. Moreover, on
own account, she did not hear what was being said between and



they were not in a position to employ physical force against him. For the same reasons they lacked a basis to detain the man, they likewise did not have a basis to use force against him. While one could conceive of a situation in which the police were justified in using force, despite lacking grounds to detain, this is not such a situation.

34. To draw from an earlier decision I rendered in a review on the record under the *Police Act* (OPCC File No. 2016-11505, at para. 27):

35.

I would add, again, that

While there are express protections in the *Criminal Code* for a police officer's use of force, they apply only when the officer is proceeding lawfully and is acting on reasonable grounds. Where there is an absence of objectively reasonable grounds and the officer is not proceeding lawfully, those powers do not support the use of force.

held o	n to	left arm. It was far less thar	n the force used by	
	. I would also	say that although	employed knee	
strikes	and a grip that l	eft bruises, these uses of ph	ysical force may well have	
been j	ustified had this b	oeen a lawful arrest or deter	ition. But in the absence of a	
prope	r basis to detain 🏻	, these application	ns of force were "unnecessar	у"
within	the meaning of F	Police Act s. 77(3)(a)(ii)(A). I	conclude that this allegation	is
made	out against both	Members.		
3. Alle	egation of oppre	ssive conduct		
36.	The "oppressive	conduct" delict is one that is	s not spelled out in the <i>Police</i>)
Act; s.	77(3)(a) simply r	refers to "oppressive conduc	t towards a member of the	
public	". In this case, the	e allegation is that	(alone) engaged i	in
oppre	ssive conduct, in	stating a few times to	that if he continued to	
speak	or argue, he wou	ıld spend the night in jail.		
37.		was dealing with a man	who was argumentative and	j
vocal.	It was	, approaching midnigh	nt, and the officer felt that hote	el

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use of force was minimal: she

security staff were unable to deal with ______. was, in this context, sharp in threatening ______ that he could spend the night in jail. While not a model of professionalism or courtesy, it is my view that these words do not rise to the level of being "oppressive conduct" in this case. The *Concise Oxford Dictionary* defines "oppression" as connoting "prolonged harsh or cruel treatment or control", "mental distress", and "the state of being oppressed". These words do not qualify as oppressive conduct.

38. Before concluding my discussion of this case, I would add a comment on the role that the VPD Members were charged with undertaking on . As the Police Complaint Commissioner's s. 117 Notice of Appointment observes, at p. 2, it appears the VPD contracts its officers to support private security at functions such as this. In so doing the Department puts its officers in the position of having both ordinary police duties, and also being somewhat answerable to the property manager or security staff. The situation is fraught with potential conflict. The wisdom of having officers do this type of contract work is a topic far beyond my narrow task here, but I suggest it is something worth examining. The lesson from a case like this is that police officers must take care not to rely too quickly on what security staff tell them. They are there as police officers, with overarching public duties and responsibilities under the law. When confronted with a situation, they must do more than take a security guard's indication as giving them valid legal grounds to detain or use force on someone. They remain police officers, not agents of the security staff. They must bring their own considered judgment to bear in executing any police powers.

CONCLUSION AND NEXT STEPS

- 39. I make a finding, pursuant to s. 117(9) of the *Police Act*, that the Members' conduct appears to constitute misconduct, both under ss. 77(3)(a)(ii)(A) and (B). I do not find the third allegation of "oppressive conduct" by to appear to be substantiated on the record before me. I hereby notify the relevant parties of the next steps, pursuant to ss. 117(7) and (8).
- 40. I am prepared to offer a prehearing conference to the Members, under s. 120 of the Act. The range of disciplinary or corrective measures I am considering includes "advice as to conduct"; a verbal or written reprimand; or requiring specified training (as set out under ss. 126(1)(k), (j), (i), and (f)).
- 41. Pursuant to s. 113, the complainant has the right to make submissions at a discipline proceeding.
- 42. At the discipline proceeding, the Members have the right pursuant to s. 119 to request permission to call and examine or cross-examine witnesses, provided such request is made in writing and is made within 10 days of receipt of this notice of decision.

The Honourable Wally Oppal, Q.C.

This 31st day of October, 2018.