



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 2018-15634

September 3, 2019

To: [REDACTED] (Complainant)

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

And to: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section

And to: The Honourable Judge Carole Lazar, (ret'd) (Retired Judge)
Retired Judge of the Provincial Court of British Columbia

And to: His Worship Mayor Kennedy Stewart
Chair, Vancouver Police Board
c/o Vancouver Police Board

On December 10, 2018, the Office of the Police Complaint Commissioner (OPCC) received a complaint from [REDACTED] describing his concerns with members of the Vancouver Police Department (VPD). The OPCC determined [REDACTED] complaint to be admissible pursuant to Division 3 of the *Police Act* and directed the Vancouver Police Department to conduct an investigation.

Background

On December 7, 2018, [REDACTED] was visiting Vancouver for a [REDACTED] conference. [REDACTED] advised he had dinner, a few drinks over the course of the evening, and was walking back to the [REDACTED] Hotel at approximately 2 am. [REDACTED] stated he crossed Burrard Street at the intersection of Smithe Street and Burrard Street while obeying the crosswalk signals. [REDACTED] and [REDACTED] advised they were

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Police Complaint Commissioner

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on duty, wearing police uniforms, and driving a marked police vehicle when they advised they observed [REDACTED] to be jaywalking contrary to the *Motor Vehicle Act*.

[REDACTED] reported in his evidence that he gave the middle finger to a vehicle after the vehicle had honked at him while crossing the street. The members' evidence is that [REDACTED] [REDACTED] swore at them and disagreed with their stopping him for jaywalking.

[REDACTED] reported that police approached him quickly and the use of force also happened quickly when he was struck by an officer's right hand punch in the face. [REDACTED] evidence is that he did not resist and he received other punches from police and then went down to the ground.

The members reported that [REDACTED] demonstrated pre-assaultive cues when they were speaking with him such as puffing up his chest, "sizing up police", and clenching his fists. The members then reported that [REDACTED] placed his hands in his pockets in an aggressive and threatening way. The members advised in their evidence that they took hold of [REDACTED] arms and [REDACTED] reported that [REDACTED] was told he was under arrest for Breach of the Peace.

[REDACTED] evidence is that he delivered 3-4 punches to [REDACTED] head and face in order to gain compliance from [REDACTED]. [REDACTED] was reported to have been placed in handcuffs and transported to the Vancouver Jail as a Breach of Peace arrest and held for three hours. [REDACTED] alleged that he was missing \$30 from his wallet following the incident.

On July 15, 2019, [REDACTED] completed his investigation and submitted the Final Investigation Report to the Discipline Authority.

Discipline Authority's Decision

On August 7, 2019, [REDACTED] issued his decision pursuant to section 112 in this matter. Specifically, [REDACTED] identified three allegations of misconduct against [REDACTED] and [REDACTED]. He determined that the allegation of *Abuse of Authority* pursuant to section 77(3)(a)(i) of the *Police Act*; the allegation of *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act*; and the allegation of *Neglect of Duty* pursuant to section 77(3)(m)(i) of the *Police Act* against [REDACTED] and [REDACTED] did not appear to be substantiated.

Arrest and Use of Force

In relation to the arrest of [REDACTED], the Discipline Authority determined that the officers were in the lawful execution of their duties to stop and detain [REDACTED] for the purposes of confirming identity and further investigation into violations contrary to the *Motor Vehicle Act* and the *Liquor Control and Licensing Act*.

The Discipline Authority found that when [REDACTED] actions of thrusting his hands into his pockets caused the officer's an immediate safety concern and when he became assaultive, in conjunction with his level of intoxication and aggressive behaviour, both officers had reasonable grounds to arrest [REDACTED] for Breach of the Peace and use force by utilizing a leg sweep and closed hand strikes.

Neglect of Duty (missing \$30.00)

██████████ also alleged that he noticed \$30.00 was missing from his wallet after his belongings were returned to him. The Discipline Authority found that it was unclear if ██████████ ██████████ was in possession of \$30.00 at the time of his arrest. There is no mention of any money nor any observations of ██████████ being in possession of money by any of the subject or witness officers, nor is it recorded in any police document. The Discipline Authority found that neither officer can be held accountable or be neglectful of a duty when the physical existence of the item is unknown.

Decision, section 117 of the *Police Act*

Pursuant to section 117(1) of the *Police Act*, having reviewed the allegations 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 allegation #1 and #2, *Abuse of Authority* for intentionally or recklessly making an arrest without good and sufficient cause and *Abuse of Authority* for in the performance, or purported performance, of duties, intentionally or recklessly using unnecessary force on any person respectively.

Arrest of ██████████

It is my view that the actions of ██████████ do not constitute a Breach of the Peace as defined by section 31 of the *Criminal Code of Canada* and the common law. The member's evidence does not demonstrate that ██████████ actions met the "tenor of violence" required for a Breach of the Peace. The evidence supports that once ██████████ stopped to speak with the police that he does not resist, attempt to become assaultive, or fail to comply with any verbal commands, prior to police grabbing ahold of him. Additionally, the use of the Breach of Peace authority was arbitrarily and unreasonably utilized by the members in the circumstances resulting in ██████████ ██████████ being violently arrested and detained in VPD cells for three hours. It is my view that the Discipline Authority's decision in relation to the arrest of ██████████ is incorrect.

Application of Force

There is insufficient support on the evidence that either officer utilized de-escalation techniques pursuant to the mandated and binding British Columbia Policing Standards in dealing with ██████████ ██████████ advised that there was no option for any de-escalation techniques due to the speed at which the incident unfolded. However, ██████████ stated that he asked ██████████ why he raised his middle finger to police and both ██████████ and ██████████ reported that they advised ██████████ he was being stopped for jaywalking and asked him why he was jaywalking. This first contact with ██████████ offered the members the opportunity to use de-escalation and lower use of force options.

It is my view that the evidence does not support that ██████████ conduct met the behavioral threshold that could reasonably support a concern for the member's safety that required them to respond so rapidly with the level of force employed, including closed hand strikes to the face. Furthermore, ██████████ was only noted to become resistive after he was advised he was being arrested for Breach of the Peace and the police had grabbed ahold of him. It is my view that the force used on ██████████ was unnecessary.

It is noted in a previous section 117 decision by retired BC Court of Appeal Judge, Mr. Wally Oppal, Q.C., (OPCC file 2016-11505 refers), 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."

I therefore consider that the Discipline Authority's decision in relation to the use of force on [REDACTED] is incorrect.

Appointment of Retired Judge

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 the Honourable Ms. Carole Lazar, retired Provincial Court Judge, to review this matter and arrive at her own decision based on the evidence.

Pursuant to section 117(9), 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 10 business days.



Clayton Pecknold
Police Complaint Commissioner

cc: [REDACTED], Registrar
[REDACTED], Vancouver Police Department