

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

AND

IN THE MATTER OF CONSTABLE [REDACTED], CONSTABLE [REDACTED],
CONSTABLE [REDACTED] AND CONSTABLE [REDACTED]

NOTICE OF DISCIPLINE AUTHORITY'S DECISION

TO: [REDACTED] Complainant

AND TO: Constable [REDACTED]

Constable [REDACTED]

Constable [REDACTED]

Constable [REDACTED] Members

AND TO: Sergeant [REDACTED] Investigator

AND TO: Mr. Clayton Pecknold Police Complaint Commissioner

CIRCUMSTANCES GIVING RISE TO THE COMPLAINT:

[REDACTED] resides at [REDACTED], Vancouver, BC. On August 30th, 2019 he had received his paycheque and attended at [REDACTED] to pay some of the money he owed them and to retrieve items that he had left there for security. Since he had the assistance of a friend with a vehicle, [REDACTED] also did a bit of shopping and picked up a fifty-pound bag of food for his dog. At about 6:00 P.M. he arrived back at his residence and instructed his friend to pull into the loading zone and put his hazard lights on. He removed his items from the trunk of the car and started to walk toward his residence carrying two boxes, two bags and the bag of dog food. He

was midway between the vehicle and his doorway when police waved him over. Two officers took hold of him and told him not to move. Then all four officers began picking up his parcels and going through his boxes and bags. He was asked if he had any weapons on him and directed them to the three knives he had on his belt. He advised the officers that they did not have his permission to sort through his belongings. They told him he'd better have receipts of all of them. When the search was completed the officers left two axes with him but seized a Condor machete, two folding knives, one cold steel and one Gerber, two TOPS knives, a Condor axe and a BB gun. He was told that he would have to produce receipts if he wanted to get these items back. On September 3rd, ██████████ attended the Police Property Division and these items were returned to him save and except for one of the TOPS knives that could not be accounted for. He was not required to produce proof of ownership.

THE COMPLAINT:

On September 3rd, 2019, ██████████ filed a complaint with the Office of the Police Complaint Commissioner. Upon reviewing the circumstances as outlined in the complaint, the OPCC analyst determined that the conduct alleged in relation to the detention and search of ██████████, and the failure to return his TOPs Cockpit Commander knife would, if substantiated, constitute misconduct. Based on the information contained in this complaint, the conduct could be potentially defined as follows:

1. Abuse of Authority pursuant to section 77(3)(a)(ii)(B) of the Police Act, which is oppressive conduct towards a member of the public, whereby in the performance, or purported performance, of duties, intentionally or recklessly detaining or searching any person without good and sufficient cause.
2. Neglect of Duty pursuant to section 77(3)(m)(i) of the Police Act by neglecting, without good or sufficient cause, to properly account for money or property received in one's capacity as a member.

The Vancouver Police Department was directed to conduct an investigation. On April 30, 2020, Sergeant ██████████ completed his investigation and submitted his Final Investigation Report to the Discipline Authority. On May 14, 2020, Inspector ██████████ issued his decision pursuant to section 112 of the Act. He identified two allegations of misconduct against each of the respondent members, Constable ██████████ ██████████ Constable ██████████ Constable ██████████ and Constable ██████████ ██████████ He determined that the allegation of Abuse of Authority pursuant to section 77(3)(a)(ii)(B) of the Police Act against Constable ██████████ Constable ██████████ Constable ██████████ and Constable ██████████ did not appear to be substantiated. He also determined that the allegation of Neglect of Duty pursuant to section 77(3)(m)(i) of the Police Act against Constable ██████████ Constable ██████████ Constable ██████████ and Constable ██████████ did not appear to be substantiated.

Pursuant to section 117(1) of the Police Act, the Police Complaint Commissioner, having reviewed the allegation and the alleged conduct in its entirety, considered that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect. On June 12th, 2020 I was appointed pursuant to the provisions of Section 117(4) of the Police Act to review the matter and arrive at my own decision based on the evidence.

THE BACKGROUND AND CONTEXT OF THE POLICE ACTION:

The downtown east side (DTES) of Vancouver is one of the poorest neighbourhoods in Canada. Many of its residents are homeless, suffer from mental health problems and are addicted to drugs and alcohol. It is a neighbourhood which presents unique policing challenges. Sergeant ██████████ has worked as an officer for seventeen years and for much of that time has been assigned to the detachment that polices this area. The summer of 2019, she reports, saw a deterioration in what had always been a difficult situation. There was an increase in violence against police and also against other members of the public: there had been shootings in Oppenheimer park, several stabbings and an incredible increase in the number of weapons being sold and traded on the streets. The night of August 29th, in one fifteen-minute period, the detachment

received three emergency callouts from officers requiring support. While trying to make arrests, the members had been swarmed and bottles had been thrown at them.

In light of these developments, ██████████ conferred with the City Duty Officer and the Deputy of the Vancouver Police Department. Their response was to deploy an additional sixteen officers to this area. For safety reasons, these officers were to be sent out in groups of four. Constable ██████████, Constable ██████████, Constable ██████████ and Constable ██████████ were sent out as part of this effort to restore peace and order to the neighbourhood. Constable ██████████ says that they had instructions from the NCO (██████████) to seize any items that were in plain view that appeared to be weapons or capable of being used as weapons, and any items that were not being vended according to the street vending bylaws. Constable ██████████ too recalls being told that they were to stick together, seize any weapons they saw, keep the peace, and move out the vendors. Though ██████████ does not recall specifically telling the team what to do, it seems probable that these were the instructions the team received and that when they approached ██████████ they were carrying out these directions.

As a general rule, police officers are professional witnesses who meticulously document each stage of their investigations. They carefully note grounds for detention or arrest and show a mindful regard for the provisions of the Canadian Charter of Rights and Freedoms. The community focus adopted by the officers in this case means they have not noted the details of their actions or their considerations as one might expect them to do if they were investigating a specific offence. For this reason, I will consider their actions based first of all on an analysis of the relevant Criminal Code and Charter provisions and then on any ancillary common-law powers that might be relevant.

GROUND FOR ARREST:

The officers saw ██████████ exit a vehicle and begin taking boxes and bags out of it. Their attention was drawn to a large axe that was on top of the armload he was carrying. When ██████████ approached ██████████ he noticed that there was also a sheathed machete in

plain view. None of the other officers saw the machete at first. The witnesses agree that [REDACTED] was stopped and that the officers began to search through his belongings. [REDACTED] characterized this stop as a detention. [REDACTED] and [REDACTED] believed they had placed [REDACTED] under arrest. [REDACTED] did not know why the members initially stopped [REDACTED] or what authority they relied on. None of the officers mentioned any consideration being given to the complainant's rights under the Canadian Charter of Rights and Freedom.

If [REDACTED] was arrested, did the members have the requisite grounds? Section 495(1)(a) of the Criminal Code of Canada, permits a peace officer to arrest without warrant a person who, on reasonable grounds, the officer believes has committed or is about to commit an indictable offence. [REDACTED] and [REDACTED] both say that the offence involved in [REDACTED] case was "possession of a weapon". This is not an offence. Nor is an axe necessarily a weapon.

Section 2 of the CCC defines "weapon" as follows:

Weapon means any thing used, designed to be used or intended for use

- (a) in causing death or injury to any person, or
- (b) for the purpose of threatening or intimidating any person

An axe is typically used for chopping wood. It is not a tool designed to be used to cause injury or death or for the purpose of threatening or intimidating a person. Absent some evidence that it has been used or is intended to be used to cause death or injury or to threaten or intimidate, it is not a weapon.

The Miriam-Webster dictionary defines a machete as a large heavy knife used for cutting sugarcane and underbrush and as a weapon. At the time that the officers approached him then, [REDACTED] could see that [REDACTED] was in possession of a weapon. A machete is not a prohibited weapon or a restricted weapon. It was not concealed. The

only section of the code that might make the possession of this machete an offence would be section 88 which provides that”

- (1) Every person commits an offence who carries or possesses a **weapon**, an imitation of a **weapon**, a prohibited device or any ammunition or prohibited ammunition for a **purpose dangerous** to the public peace or for the **purpose** of committing an offence. (b) is guilty of an offence punishable on summary conviction.

Viewed objectively, there was nothing in [REDACTED] behaviour to provide the officers with reasonable and probable grounds to believe that he had used or intended to use the machete for a purpose dangerous to the public peace or for committing an offence. Nor do any of the members claim to have formed such a belief. In conclusion, I find the officers did not have reasonable and probable grounds to arrest the complainant.

GROUNDS FOR DETENTION

It was [REDACTED] who seemed to take the lead when the group first approached [REDACTED] and he does not use the word “arrest”. He says that he *detained* the complainant to investigate him for being in possession of a dangerous weapon and for being in possession of stolen property. The requirements for a lawful investigative detention are set out in R v Mann, 2004 SCC 52. There, the court said:

Although there is no general power of detention for investigative purposes, police officers may detain an individual if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that the detention is reasonably necessary on an objective view of the circumstances.

The test is further articulated as follows: (at para 34):

The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individuals to be detained and a recent or ongoing criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference.

This team of officers, like the others that had been dispatched as part of this project, were not investigating any particular incidents of assault, theft or possession of stolen property. None of them mention any reason that they might suspect that the property ██████ had in his possession was stolen. The suggestion that he should be able to prove ownership of each of the items cannot be taken seriously. What person records and keeps proof of the provenance of every item he or she owns?

Though many of the items ██████ had could be used in furthering an assault against the police or other civilians, none of the officers provided any reason for suspecting that ██████ had used them or was likely to use them in an illegal manner. Nor did the officers treat ██████ as if he were a suspect in a criminal investigation. It is evident from the video that captured this encounter that they were interested in the items ██████ was carrying, not in him. When the four officers approached him, they immediately began removing and examining his belongings. At several points they left him standing on his own some 15-20 feet from where they were examining his goods on the trunk lid of their cruiser. ██████ moved about freely. He approached the officers and was interacting with them. At one point, he turned abruptly and went back to retrieve his bag of dog food that had been left in the middle of the sidewalk. The officers showed no interest in this sudden movement. It was not until the decision was made to

remove a number of the items that had been seized that ██████ was even asked to identify himself.

The axes and machete were odd items to have in the DTES and the officers were curious but there has been no suggestion of a nexus between these items or ██████ and any particular crime. Based on this analysis, it appears that ██████ was detained without good and sufficient cause.

THE SEARCH:

Had the detention been justified, would the search that followed it have been one authorized by law?

Iacobucci J. speaking for the court in the Mann decision says:

Police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. In this connection, I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. *The investigative detention and protective search power are to be distinguished from an arrest and the incidental power to search on arrest, which do not arise in this case.* (Emphasis mine.)

If one were to assume that there were the requisite grounds for ██████ to be detained the pat down search of his person that led to him displaying the three knives on his belt or near his pocket would probably meet these conditions. None of the officers gave any reason for extending the search to include the boxes and bags he had been carrying. The video evidence clearly shows that the officers were not concerned about ██████

They were even persuaded to give him back his axes. Their actions speak louder than any words. They proceeded to open boxes and examine the complainant's goods in a manner that made it clear they had no fear for their safety in his presence. This extended search did not meet the conditions set out in the Mann decision.

WERE THE OFFICERS VALIDLY EXERCISING A COMMON LAW POLICE POWER?

On the day in question, [REDACTED] [REDACTED] [REDACTED] and [REDACTED] had been sent out specifically to keep the peace and prevent crime in the 00/100 blocks of E Hastings St. [REDACTED] says that the belief was that the seizure of any potential weapons in plain view would prevent an imminent threat to life or property. The seizures were done for protective and preventative measures.

In the case of *Figueiras v. Toronto (Police Services Board)*, 2015 ONCA 208 the court analyzed the proper scope of common law police powers. Rouleau JA. quoting from the reasons of Doherty J.A. in *R. v. Simpson* (1993), 12 O.R. (3d) 182, at p. 194, notes:

The law imposes broad general duties on the police but it provides them with only limited powers to perform those duties. Police duties and their authority to act in the performance of those duties are not co-extensive. Police conduct is not rendered lawful merely because it assisted in the performance of the duties assigned to the police. Where police conduct interferes with the liberty or freedom of the individual, that conduct will be lawful only if it is authorized by law.

The court went on to apply a *Waterfield* analysis to the facts of the case. (*R. v. Waterfield*, [1963] 2 All E.R. 659 (C.C.A.). Before commencing that process, however, Rouleau J.A. addressed two threshold issues: (a) defining the police power at issue, and (b) identifying the liberty interests at stake.

Applying that pattern of analysis to the present case it appears that;

(1)The police powers in issue are:

- (a) the power of individual police officers to target persons in the Vancouver DTES who are openly in possession of items that might be

used as weapons, and where no crime is being investigated or believed to be in progress, require that person to submit to a search with the intention of preventing crime, and

(b) The power of individual police officers to remove from persons in the Vancouver DTES any items found in their possession that might be used as weapons and to require them to retrieve those items from the police property office at a later date where no crime is being investigated or believed to be in progress, with the intention of preventing crime

(2) The liberty issues at stake are ██████████ right to life, liberty and security of person and his right to be secure against unreasonable search and seizure pursuant to sections 7 and 8 of the Canadian Charter of Rights and Freedoms

There are two stages to the Waterfield test. First one must determine whether the action falls within the general scope of a police duty imposed by statute or recognized at common law. (*R. v. MacDonald*, 2014 SCC 3 at para. 35) Having regard to the violence, the swarming of police officers and the open market in stolen property that had been exhibited in the DTES in the summer of 2019 and more particularly on the 29th of August, 2019, the VPD decision to send out officers to keep the peace and prevent further crime was within the general scope of police duty.

In the second stage, the court must strike a “balance between the competing interests of the police duty and of the liberty [or other] interests at stake” In other words was the police action “reasonably necessary for the carrying out of the particular duty in light of all the circumstances” (*MacDonald*, at para. 36)

In *MacDonald*, at para. 37, the Supreme Court explained that the factors to be weighed in the second stage include:

- (1) The importance of the duty to the public good;
- (2) The extent to which it is necessary to interfere with liberty to perform the

duty; and

(3) The degree of interference with liberty.

WHAT WAS THE IMPORTANCE OF THE PERFORMANCE OF THE DUTY TO THE PUBLIC GOOD?

Keeping the peace and preventing property damage or personal injury are clearly important duties. The secondment of 16 additional members tasked with keeping the peace and preventing further violence in the DTES demonstrates the seriousness of the perceived threat that day.

THE EXTENT TO WHICH IT IS NECESSARY TO INTERFERE WITH LIBERTY TO PERFORM THE DUTY:

Since acts similar to those committed the previous day were likely to be repeated and police had a duty to protect against their commission, was the interference with [REDACTED] liberty and property rights necessary for the performance of that duty? Was it an effective means of materially reducing the likelihood of that risk occurring?

In *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223 (C.A.) at p. 250, Doherty J.A. highlighted some of the factors, which undermined the basis for a finding that the police had acted pursuant to their ancillary common law powers. I find the following to be relevant in the present case:

(1) There was no specific identifiable harm which [REDACTED] detention and the seizure of his weapons sought to prevent. The police had a general concern that the situation in the neighbourhood could get out of control but there was no evidence to support a conclusion that [REDACTED] axe had been or would be used in a way that would contribute to the disorder and violence police were trying to address.

(2) The police concern that some harm could occur rested not on what ██████ had done or was likely to do, but rather on what others in the neighbourhood had done over the preceding weeks.

(3) The liberty interfered with was not a qualified liberty like the right to drive, but rather the fundamental right to move about in the community, to be free from unreasonable searches and to retain property.

(4) The interference with individual liberties resulting from the police conduct was substantial in terms of the length of time ██████ was detained, the violation of his privacy when all his belongings were put on display and the considerable inconvenience he was put to in having to retrieve them from the Police Property Office later.

(5) Since ██████ was able to pick his possessions up a few days later, any risk associated with having these items in the DTES neighbourhood was not eliminated, it was only delayed. One is hard pressed then to say that the seizure was “effective.”

Doherty J.A. framed the principles that inform the final balancing required under *Waterfield* in a preventive policing context, at p. 251:

The balance struck between common law police powers and individual liberties puts a premium on individual freedom and makes crime prevention and peacekeeping more difficult for the police.... The efficacy of laws controlling the relationship between the police and the individual is not, however, measured only from the perspective of crime control and public safety. We want to be safe, but we need to be free.

In conclusion, I find that the police power purportedly exercised here does not meet the *Waterfield* test when it is weighed against the significant infringement

of [REDACTED] liberty interests. The action taken against him was not reasonably necessary and had little, if any, impact in reducing the threats to public safety.

Since the detention and search of the complainant does not appear to be justified, having regard to statutory provisions or the common law, I find that the allegation that the four named officers abused their authority by intentionally or recklessly detaining or searching any person without good and sufficient cause appears to be substantiated. This constitutes misconduct though on the record, there appears to be the likelihood that [REDACTED] [REDACTED] [REDACTED] and [REDACTED] could claim mitigating circumstance pursuant to Police Act S126(2)(f) which provides that the Discipline Authority must consider the degree to which the municipal police department's policies, standing orders or internal procedures, or the actions of the member's supervisor, contributed to the misconduct.

WERE ANY OR ALL OF THE OFFICERS NEGLIGENT IN HANDLING AND PRESERVING [REDACTED] PROPERTY?

Once the items that had been in [REDACTED] possession and which the members felt should be removed from the street had been collected, the officers spread them on the trunk lid of the cruiser that [REDACTED] had been driving. [REDACTED] photographed them. [REDACTED] is later seen carrying them to the back seat of the cruiser. (This transaction takes 7 seconds according to the timer on the video.) Officers report that there were many items seized that day and that they shared seat space with [REDACTED] goods. At some later time, Special Municipal Constable [REDACTED] was dispatched to the unit block (E Hastings St.) to pick up property. Some of the property he picked up, he tagged as the property of [REDACTED]. The TOP Knife in question was not among these items.

On the basis of the analysis already provided, I am of the view that the complainant was unjustly deprived of his property. To find that those who purported to be removing it from him for "safekeeping" have lost some of it is particularly disturbing. That being said, it appears the breakdown in the care and control of the knife in question occurred either in the way [REDACTED] secured it in the back of the vehicle or in the way that [REDACTED] dealt with

the items as he picked them up. The evidence is that [REDACTED] belongings were put in a plastic bag. Was the bag sealed? I suspect not. When [REDACTED] removed it from the vehicle, could the TOP knife have slipped out and been left with the other goods being stored in the back of the police vehicle? This is a distinct possibility. I am not able to say, on a balance of probability that it was [REDACTED] and not [REDACTED] whose actions resulted in the loss or destruction of [REDACTED] knife.

In conclusion then, I find that the allegation that Constable [REDACTED] Constable [REDACTED] Constable [REDACTED] and Constable [REDACTED] neglected their duty by neglecting, without good or sufficient cause, to properly account for money or property received in one's capacity as a member is *not substantiated*.

Since I have decided that this alleged misconduct pursuant to 77(3)(m)(i) of the Police Act is not substantiated, Section 117 ss10 and 11 of the Police Act, apply and this decision is not open to question or review by a court on any ground, and is final and conclusive.

Notice of Next Steps

As required by s. 117(8) of the *Police Act*, I hereby provide notice to Constable [REDACTED] Constable [REDACTED] Constable [REDACTED] and Constable [REDACTED] as follows:


- (a) For the reasons set forth herein, the evidence referenced in the investigation report appears sufficient to substantiate the allegation that on August 30th, 2019, Constable [REDACTED] Constable [REDACTED] Constable [REDACTED] and Constable [REDACTED] intentionally or recklessly detained or searched a person without good and sufficient cause. which constitutes misconduct and requires the taking of disciplinary or corrective measures.
- (b) A prehearing conference will be offered to Constable [REDACTED] Constable [REDACTED] Constable [REDACTED] and Constable [REDACTED]
- (c) Constable [REDACTED] Constable [REDACTED] Constable [REDACTED] and Constable [REDACTED] have the right pursuant to s.119 to request permission to call, examine or cross-examine

witnesses at the discipline proceeding, provided such request is submitted in writing within 10 business days following receipt of this notice of decision.

- (d) The range of disciplinary or corrective measures being considered include:
- i. Reprimanding Constable ██████████ Constable ██████████ Constable ██████████ and Constable ██████████ verbally,
 - ii. Giving Constable ██████████ Constable ██████████ Constable ██████████ and Constable ██████████ advice as to their conduct.

I hereby notify ██████████ the complainant in this instance, of his right pursuant to s. 113(1) of the *Police Act* to make submissions at the discipline proceeding with respect to the complaint, the adequacy of the investigation, or the disciplinary or corrective measures that would be appropriate.

Dated at Surrey, British Columbia this 22nd day of June, 2020.



Carole Lazar, Discipline Authority