

Form 3

DA FILE No.  
OPCC FILE No. No.2018-14353

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

and

IN THE MATTER OF A DISCIPLINE HEARING UNDER SECTION 124

and

IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT AGAINST  
CST. [REDACTED] OF THE VANCOUVER POLICE DEPARTMENT

### **FINDINGS OF DISCIPLINE AUTHORITY**

(Section 125(b) *Police Act*)

**Name of member involved:**

[REDACTED] Constable # [REDACTED]

**Police department, designated policing unit or designated law enforcement unit:**

Vancouver Police Department

**Date of discipline proceeding:**

August 14, 2020

**In relation to each allegation of misconduct against you, my findings are as follows:**

Misconduct: Abuse of authority (oppressive conduct towards a member of the public, including, without limitation, in the performance, or purported performance of duties) pursuant to section 77(3)(a)(ii)(A) of the *Police Act*, R.S.B.C. 1996, c. 37 (the "*Police Act*"), the particulars of which are that the member on October 7, 2017 is alleged to have, intentionally or recklessly, used unnecessary force against the Complainant in attempting to remove her from the lobby of Vancouver Police Headquarters located at 2120 Cambie Street Vancouver.

**Member's reply to allegation:**

Deny

## Findings and reasons:

### **I. Decision Summary and Overview of Proceedings**

1. This is a decision made pursuant to sections 123, 124, and 125 of the *Police Act* relating to certain complaints of misconduct concerning Constable [REDACTED], a member of the Vancouver Police Department.
2. The misconduct is alleged to have taken place in the early morning hours of October 7, 2017 with respect to the complainant [REDACTED] (the "Complainant"). At the time of the alleged misconduct Constable [REDACTED] was just coming on duty. The Complainant and her mother were in the lobby of Vancouver Police Department headquarters located at 2120 Cambie Street Vancouver. The allegation of misconduct is alleged to have occurred when Constable [REDACTED] attempted to remove the Complainant from the lobby by force.
3. I was appointed Adjudicator in connection with this matter as a result of the Police Complaint Commissioner's (the "Commissioner") Order of April 3, 2020 made in accordance with section 117(4) of the *Police Act*.
4. The Commissioner had reviewed a March 6, 2020 Discipline Authority decision made pursuant to section 112 of the *Police Act*. In that decision the Discipline Authority had determined that the allegation of abuse of authority pursuant to section 77(3)(a)(ii)(A) of the *Police Act* with respect to Constable [REDACTED] did not appear to be substantiated. On March 27, 2020, the Complainant advised the Office of the Police Complaint Commissioner that she disagreed with the Discipline Authorities' decision and requested that the Commissioner exercise his authority to appoint a retired judge to review the matter. The Commissioner reviewed the allegation and the alleged conduct of Constable [REDACTED] in its entirety and considered that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect. In particular, the Commissioner was concerned that Constable [REDACTED] asserted that he had authority to use force on the Complainant because she and her mother were committing the *Criminal Code* offence of mischief. In the Commissioner's view there was a reasonable basis to believe that Constable [REDACTED] actions were inconsistent with taking enforcement action for that offence.
5. After reviewing the relevant evidence, it was my conclusion that the misconduct allegation relating to Constable [REDACTED] appeared to be substantiated on the written evidence before me.
6. As a result of my decision made pursuant to section 117(7) of the *Police Act*, I became the Discipline Authority concerning the misconduct allegation relating to Constable [REDACTED] and heard further evidence concerning the allegations.

### **II. Discipline Proceeding-History of Proceedings**

7. This is a Discipline Proceeding pursuant to sections 123 – 125 of the *Police Act* relating to an abuse of authority allegation.

8. As noted above, the process giving rise to these proceedings was initiated by the Commissioner on April 3, 2020. The complaint arose in connection with an incident alleged to have occurred in Vancouver on October 7, 2017 involving the Complainant and Constable [REDACTED]
9. On April 27, 2020 my decision concerning the section 117 review of the misconduct allegation was delivered. As noted above, I found that the allegation of misconduct (abuse of authority) concerning Constable [REDACTED] appeared to be substantiated.
10. In accordance with section 117(9) of the *Police Act*, the discipline proceeding process commenced concerning the allegation (the "Discipline Proceeding"). As a result, I assumed the duties of Discipline Authority.
11. In my decision of April 27, 2020, I offered Constable [REDACTED] a Pre-Hearing Conference pursuant to section 120 of the *Police Act*. Initially, Constable [REDACTED] decided to accept the offer of a Pre-Hearing Conference but subsequently changed his mind and determined that he wished to proceed with the Discipline Proceeding. Mr. [REDACTED] was retained as his counsel.
12. An initial hearing date of June 22, 2020 was set. Constable [REDACTED] did not make a request to call witnesses at the Discipline Proceeding. Given the structure of the process under sections 123 - 125 of the *Police Act*, no further oral evidence would be heard from the Complainant or her family nor would any other party call evidence. The question of whether or not the member would testify was left to the hearing itself.
13. The Complainant was provided with a Notice of Discipline Proceeding under section 123(1). That notice satisfied the requirements of Section 113 of the *Police Act*, notifying the Complainant that she had the right to make written or oral submissions to the Discipline Authority in relation to one or more of the following matters – the complaint, the adequacy of the investigation, and/or the disciplinary or corrective measures that would be appropriate.
14. On May 22, 2020 a written submission was received from the Complainant concerning the misconduct allegation. The written submission was entered as Exhibit 2 in these proceedings.
15. On June 22, 2020 the Discipline Proceeding commenced by telephone conference. Constable [REDACTED] denied the allegation of misconduct and the matter was adjourned to July 7, 2020 by telephone conference. Due to the pandemic the possibility of holding the hearing by video conference call was to be explored. The matter was adjourned to July 29, 2020 to test whether a video conference call would be appropriate. The video conference call was successful, and it was decided to hold the August 14, 2020 hearing by video conference. Mr. [REDACTED] on behalf of Constable [REDACTED] confirmed that he did not require the presence of Staff Sgt. [REDACTED] the Investigating Officer at the hearing. He further confirmed that he would not be calling any evidence but rather would be making legal argument and undertook to have that legal argument available by July 31, 2020. He did confirm that he would make his client, Constable [REDACTED] available for examination by the

Discipline Authority. The Final Investigative Report (the “FIR”) was entered as Exhibit 1 and the matter was adjourned to August 14, 2020 for hearing.

16. The evidence considered at the Discipline Proceeding included the FIR , testimony from Constable [REDACTED] and the written submission of the Complainant. The FIR consisted of 725 pages made up of an initial Final Investigative Report initially submitted on January 14, 2019 and rejected by the Disciplinary Authority on January 15, 2019. The report was resubmitted to the Discipline Authority on April 5, 2019 and rejected by the Commissioner on April 26, 2019. The Final Investigative Report was resubmitted to the Discipline Authority on February 21, 2020. During the course of the investigation the principal investigator changed to Staff Sgt. [REDACTED] from Sgt. [REDACTED] Mr. [REDACTED] did not require the attendance of either Investigator.
17. The FIR, the submissions of the Complainant and the testimony of Constable [REDACTED] comprise the record with respect to these proceedings (the “Record”).
18. It is notable that the FIR did not include any video recordings of the alleged incident of October 7, 2017 despite being recorded by security cameras. No video footage was available on the Record.
19. The Complainant and her mother provided their evidence to the investigator through a translator.

### **III. Misconduct and the *Police Act***

20. Section 77 of the *Police Act* sets out the definition of misconduct relevant to the allegations concerning the member. Specifically, subsection 77(1) of the *Police Act* provides, in part, as follows:

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 [offences to harass, coerce or intimidate anyone questioning or reporting police conduct or making complaint] or 106 [offences 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,

...

- (ii) in the performance, or purported performance, of duties, intentionally or recklessly

(A) using unnecessary force on any person....

21. An important overall limitation to the definition of misconduct in section 77 of the *Police Act* is found in subsection 77(4) as follows:

77(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.

22. Adjudicator Pitfield in a decision under Section 117 *Police Act* (2014-9919) had this to say about the offence of abuse of authority:

[29] Abuse of authority is a disciplinary breach of trust. While “breach of public trust” is not defined in the *Police Act*, it should be construed to reflect the public expectation that police will act in a manner that is not offensive to the public, to the policing profession generally, or to the police force in which an officer is a member.

[30] Rather than being exhaustively defined, *abuse of authority* embraces any conduct that may be regarded as oppressive to a member of the public. That result flows from insertion of the words *including, without limitation*, before the description of certain kinds of conduct with greater particularity. It is an error to conclude that only intentional or reckless conduct can constitute an abuse of authority.

23. In *Scott v. British Columbia (Police Complaint Commissioner)*, 2016 BCSC 1970 (“*Scott v. British Columbia*”) the British Columbia Supreme Court considered Adjudicator Pitfield’s comments:

I do not read the phrase ‘without limitation’, as the retired Judge apparently did, to mean that intention or recklessness can be ignored when considering the petitioner’s conduct. In my view, the section should be read to apply to conduct which has a serious blameworthy element and not simply a mistake of legal authority alone.

24. In my view Mr. [REDACTED] correctly summarized the law in paragraph 31 of his written submission:

In summary, in order to substantiate an allegation of abuse of authority, it is not sufficient to establish that a search or arrest was unlawful. There must also be evidence that the police officer arrested or searched knowing he lacked the grounds or was reckless as to whether he had the grounds. Recklessness in this context means that the officer did not even turn his mind to whether he had grounds in circumstances where the officer knew he should turn his mind to that question.

25. It is the allegation of misconduct (abuse of authority) arising under subsection 77(3)(a) of the *Police Act* concerning the member’s interaction with the Complainant that is relevant to this review. This review is, therefore, the examination of all of the evidence submitted in these proceedings related to the allegation of misconduct as defined under section 77(3)(a)(ii)(A) and as qualified by subsection 77(4).

#### **IV. Burden of Proof**

26. The burden of proof lies with the body alleging the misconduct. The standard of proof is on the balance of probabilities. This was clearly stated by the Supreme Court of Canada in *F.H v McDougall*, [2008] 3 S.C.R. 41 at para 49:

[49]... I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

27. The court noted, in paragraph 46, that in order to satisfy the balance of probabilities standard, the evidence must be sufficiently clear, convincing and cogent:

[46].. Evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

28. A determination as to credibility was not a significant factor based on the legal issues raised by Constable [REDACTED] and the evidence on the Record.

#### **V. Position of Counsel for the Member**

29. There are three main arguments advanced on behalf of Constable [REDACTED] which are framed as follows:

(1) Did Constable [REDACTED] have the authority to remove the Complainant and her mother from the Vancouver Police Department building?

(2) If he did not have the authority to remove the Complainant and her mother did he make a non-culpable error of law that does not amount to misconduct under the *Police Act* because there is no evidence that his conduct was blameworthy, reckless or that he knew he had no authority?

(3) If Constable [REDACTED] reasonably believed he had authority to use force to remove the Complainant and her mother, did he use excessive force?

#### **VI. Review of the Record - Evidence Not in Dispute**

30. The Record does not suggest any dispute with respect to the following facts.

31. On October 6, 2017, the Complainant, (DOB [REDACTED]) and her mother (DOB [REDACTED]) attended a meeting in the basement of [REDACTED], Vancouver, B.C. A bag belonging to the Complainant and a cell phone belonging to a friend were stolen. The bag contained personal items of the Complainant and her mother including house keys, a bankbook, letters, a bus pass, invoices and other miscellaneous items including records of her personal address. Police were called but were not immediately available. After a number of phone calls to police who failed to respond, the Complainant and her mother, at approximately 9:08 PM were able to flag down a police car and report the theft. They then headed home. Upon their return home, they observed that the front door appeared insecure (left open). Frightened, and afraid to go inside their apartment they took a taxi to 2120 Cambie Street, Vancouver Police Department headquarters. Apparently, their preferred contact with the Vancouver Police Department was in Chinatown but that station was closed.

32. From the Record it appears that they took a taxi to Vancouver Police Department headquarters at approximately 10 PM. The building was closed. They used the intercom and waited for a Cantonese speaking member to arrive. Ultimately Constable [REDACTED] was contacted and arrived at Vancouver Police Department headquarters at approximately 12:12 AM on October 7, 2017. He parked his police cruiser at the rear of the building and then proceeded to the front doors, locating the Complainant and her mother seated on the front entrance steps of the building. It was cold and windy outside so Constable [REDACTED] brought the Complainant and her mother into the Vancouver Police Department headquarters lobby. The Complainant and her mother had been waiting outside Vancouver Police Department headquarters for approximately two hours.
33. Constable [REDACTED] obtained further details from the Complainant and her mother including the fact that they had reported the theft. He told the Complainant that he would call for a taxi so that they could return home, and that he would follow the taxi back to their home, in order to deal with the incident. He decided to attend to his police car to see if he could pull up the theft report and get some further background. He left the Complainant and her mother in the Vancouver Police Department headquarters lobby, attended to his police car and checked out the police report. Constable [REDACTED] then repositioned his police cruiser to the front of 2120 Cambie Street so he could follow the taxi to the Complainant's residence.
34. Upon re-entering Vancouver Police Department headquarters he noted that two other police officers were talking to the Complainant and her mother. They had asked the Complainant who they were and if they were waiting for somebody. Constable [REDACTED] told the members that he was dealing with the Complainant and the other two members left the lobby.
35. Constable [REDACTED] spent considerable time patiently telling the Complainant and her mother what the police would be doing to investigate their complaint related to the theft and the concerns raised about the security of their residence. Throughout, the Complainant's mother continued to criticize police and stated on a number of occasions that they were useless. It was readily apparent that the Complainant and her mother were very distrustful of police.
36. Constable [REDACTED] tried on at least two occasions to arrange for a taxi. For a variety of reasons his efforts were unsuccessful. It was clear, however, that the Complainant and her mother did not want to take a taxi home. The Complainant's mother at one point told Constable [REDACTED] that she did not believe that he would follow the taxi back to their home; that she believed that he would just leave once the taxi started driving. Constable [REDACTED] became extremely frustrated. He provided other options, but the Complainant and her mother indicated that they wished to stay at Vancouver Police Department headquarters and the Complainant's mother insisted that they had a right to stay there.
37. At approximately 3 AM the Complainant told Constable [REDACTED] that since he had offered to drive them home in his police cruiser that he could drive them home now. Constable [REDACTED] received authorization to drive them home but only if there was an available unit that could assist him. Unfortunately, no units were available. Constable [REDACTED] advised the Complainant that under the circumstances he could

not drive them home. He then told them that his shift would be ending soon and he had reports to write. He reminded them that they were not supposed to be inside Vancouver Police Department headquarters at 2120 Cambie Street during non-business hours but given the circumstances he would not be forcing them out. He told them that other members encountering them in the lobby might ask why they were there and might ask them to leave. Constable [REDACTED] left the building after telling the Complainant and her mother that he was sorry that he could not help them. The Complainant's mother continued to insist that they would remain in the lobby until Vancouver Police Department headquarters opened as they had a right to be there and the police should be helping them.

38. Constable [REDACTED] sat in his police cruiser, which was parked directly in front of the lobby at 2120 Cambie Street. He notified the dispatcher that he could not help the Complainant and her mother and that he would be clear from the call. He observed many members arriving for the start of their shift, entering the building walking past the Complainant and her mother without acknowledging their presence. He said he felt disappointed that his colleagues were not challenging them. He therefore felt compelled to flag down some random members who were at the beginning or end of their shift and returning to Vancouver Police Department headquarters. Constable [REDACTED] says he told some of these random members that he had been dealing with the Complainant and her mother, but they were refusing his assistance and were refusing to leave the lobby. He says that he wanted some of these members to engage with the Complainant and her mother in order to make them aware that they were seated in a secure building and should leave.
39. One of the members Constable [REDACTED] flagged down turned out to be Constable [REDACTED]. Moments after speaking to Constable [REDACTED] Constable [REDACTED] observed a disturbance inside the lobby area involving Constable [REDACTED] and the Complainant. Constable [REDACTED] immediately exited his police cruiser and proceeded to the lobby to intervene. As he entered the lobby the Complainant's mother pointed at him angrily and blamed him for having Constable [REDACTED] forcibly attempt to remove them from the building. The Complainant's mother was loud and agitated. She pointed at the video camera and stated that she was going to call 911. Ultimately other members intervened, and arrangements were made to have Vancouver Police Department officers sit with the Complainant and her mother until the police station opened.

## **VII. Review of the Record - Evidence in Dispute**

40. What occurred in the lobby of the Vancouver Police Department headquarters is not entirely clear. The Record discloses that the incident happened between 3 and 4 AM just before shift change. Numerous members of the Vancouver Police Department passed through the lobby either going on or off shift. If they noticed the Complainant and her mother sitting in the lobby they did not challenge them. There is no evidence to suggest that the Complainant and her mother did anything to attract attention, to interfere, annoy or harass any of the members. Obviously, the video would have been the best evidence of what transpired: a picture being worth a thousand words.



41. The Complainant's evidence was as follows:

- a. A Caucasian male and a female police officer came into the lobby of the Vancouver Police Department headquarters and started yelling at them and telling them to leave. The male officer allegedly said that they had better leave now.
- b. The male police officer then approached the Complainant, took her hat off and grabbed her by the hair, lifted her hair and pulled her towards the front door. The Complainant was crying and screaming and ultimately the officer let her go and left. Because she was screaming loudly other officers came over to see what was going on.

42. Constable [REDACTED] was the female police officer that approached the Complainant and her mother. She was interviewed August 15, 2018 by Sgt. [REDACTED]. She provided a compelled statement in compliance with the requirements of the *Police Act*. It appears that she was the only officer to actually take notes in relation to the incident. Sgt. [REDACTED] asked her to address her mind to an incident that occurred at about 4 AM on December 7 (no year provided). It is apparent from the balance of her statement that the date was incorrect and that she was referring to October 7, 2017. Constable [REDACTED] evidence as outlined in her statement was as follows:

- a. She was coming on shift when she saw two Asian females seated quietly in the front lobby. Since the lobby was a secure area at 4 AM she approached them and asked why they were there. She was told that an officer had let them in. She asked who the officer was but did not get a response. There was further conversation in which the females gave what, in her view, was conflicting information as to who they were waiting for.
- b. Constable [REDACTED] then asked them to leave. In her mind it was a secure environment, they had no lawful reason to be there and it did not look like they were in distress. Apparently neither the Complainant nor her mother indicated that they had been in the process of making a police complaint.
- c. It was at this point that Constable [REDACTED] arrived. Constable [REDACTED] said she gave Constable [REDACTED] a "help me" look and he came over and spoke to the Complainant and her mother. At some point Constable [REDACTED] showed them her badge. The Complainant and her mother were shaking their heads and said they were not leaving.
- d. It was at this juncture that Constable [REDACTED] took the arm of the younger Asian female, now understood to be the Complainant, and started to pull her in the direction of the doorway. The Complainant used her body weight to actively resist and Constable [REDACTED] pulled her further to the door. The Complainant's resistance increased. Constable [REDACTED] let her go and she returned to the seated area.
- e. She never saw Constable [REDACTED] grab the Complainant's hair.

- f. At this point Constable [REDACTED] showed up and intervened.
  - g. Both Constable [REDACTED] and Constable [REDACTED] were in plain clothes.
43. Constable [REDACTED] provided two compelled statements under the *Police Act*. In the first, given October 9, 2018 (more than a year after the alleged incident) he is asked about an incident that happened October 3, 2017 at approximately 4 AM. It is apparent from the balance of this statement that the date was incorrect and that he was referring to October 7, 2017. Constable [REDACTED] evidence as outlined in his statement of October 9, 2018 is as follows:
- a. He was in civilian clothes going to Vancouver Police Department headquarters at 2120 Cambie Street to start his shift. He encountered Constable [REDACTED] who addressed him by his first name. Constable [REDACTED] told him that there were some ladies in the lobby and that they would not leave. He added that they had been there for hours and Constable [REDACTED] asked Constable [REDACTED] to give them a hint that they had to leave.
  - b. Upon entering the lobby Constable [REDACTED] observed Constable [REDACTED] speaking with two Asian women who were sitting side-by-side in the small lobby seating area. One of the women was much older than the other. He sensed that Constable [REDACTED] was not having much success with the two women so approached them and since he had some Cantonese language skills he addressed them in Cantonese.
  - c. He asked the women their names but got no answer. He said he asked them in Cantonese to please go home but received no response. When he asked again the younger of the two defiantly yelled “no”. It was apparent to him that the two women were not going to leave.
  - d. Constable [REDACTED] had been speaking to the Complainant and her mother for about one minute. He decided that he needed to escort them out of the building and approached the younger of the two and asked her to please stand. She did not comply and he took action by gently taking a hold of her left arm and attempting to lift her from her seat with minimal force. He said the younger woman stood and then batted him in the head with her hands then dropped to the floor where she repeatedly kicked his legs and screamed.
  - e. He said he wondered whether the Asian woman, now understood to be the Complainant, had a mental health problem.
  - f. At this point Constable [REDACTED] entered the lobby and stated that he would handle the situation.
  - g. Constable [REDACTED] left to change into his uniform for his patrol duties that day.

- h. When asked about his legal grounds to remove the Complainant and her mother he replied that he was an agent for the Vancouver Police Department, that they were on city property that was closed to the public and posited that if he, as a police officer, could not remove them then who could?

44. The second compelled interview of Constable [REDACTED] occurred on November 23, 2018. On this occasion Sgt. [REDACTED] the investigator, asked Constable [REDACTED] to address his mind to an incident that happened on December 7, 2017 at approximately 4 AM in the lobby of 2120 Cambie Street. Constable [REDACTED] did not clarify the date but I am satisfied that the events that he was addressing occurred October 7, 2017 at approximately 4 AM. The evidence he provided as to the alleged incident was reasonably consistent with his earlier compelled statement. Sgt. [REDACTED] asked him what authority he had to remove the Complainant and her mother from the lobby of the Vancouver Police Department headquarters. Constable [REDACTED] further evidence as outlined in his statement of November 23, 2018 is as follows:

- a. It was urgent to remove the Complainant because he was ensuring the integrity and security of the building and that the Complainant and her mother were interfering with and obstructing the lawful use of the property.
- b. He made a decision that a criminal offence was happening since the two women were interfering and obstructing the use of the Vancouver Police Department headquarters from the police officers coming in and taking up their time.
- c. He was not aware of the history of police involvement with the women but the bottom line was that they were not welcome, they were not taking direction and they were interfering with the use of the building and obstructing the use of the building.
- d. He did not know how they got into the building but how they entered the building was not germane to what he was dealing with in his opinion. They were unwanted and it was a closed police facility. Any information he had would have come from "PC [REDACTED]" (clearly a typo in the transcript and he meant Constable [REDACTED] the police constable he encountered outside the building at the start of his shift.
- e. When asked again whether he thought the situation he was dealing with was urgent he stated that he believed the urgency had occurred hours before he got there. He had no idea why the situation had lapsed for hours and was not a party to that.
- f. Ultimately, he said that his authority to remove the Complainant comes from the offence of mischief in the *Criminal Code* whereby a person who interferes and obstructs with the lawful use of property commits a criminal offence.

45. Constable [REDACTED] *viva voce* evidence was as follows:

- a. He maintained that he had the authority to remove the Complainant by virtue of the *Trespass Act*.
- b. He had studied Cantonese and had a limited ability to communicate in that language. Accordingly, when he addressed the Complainant in Cantonese he felt she understood him.
- c. Constable [REDACTED] had been trained at the Justice Institute but could not recall whether he been trained in terms of power or authority to remove individuals from a premise. He did not receive any training after he became a member of the Vancouver Police Department related to this subject area. He had however worked at Rogers Arena and did have experience removing disruptive people from the premises.
- d. Although he had indicated in his second compelled statement that he acted under the belief that the *Criminal Code* offence of mischief had occurred, he conceded that in fact that criminal offence never crossed his mind when he made the decision to remove the Complainant.
- e. He denied ever dragging the Complainant across the floor and said that she dropped between two rows of seats, a very confined area, and she stayed in that small area.
- f. When shown a photograph of himself and the lobby he was not clear on where the Complainant was seated in relation to her mother. He did not recall stepping in front of the mother in order to place his hand on the Complainant.
- g. His conclusion that Constable [REDACTED] wanted the Complainant and her mother removed from the lobby was a result of Constable [REDACTED] asking him to hint to the two that they should leave. He had no communication with Constable [REDACTED] He had received no history or background as to why the two women were in the lobby and he did not believe he needed to inquire.
- h. The events occurred on October 7, 2017 but Constable [REDACTED] was not made aware that there was an issue or allegation against him until sometime in the spring of 2018. He had made no notes at the time but did prepare a statement for the professional standards branch. That statement was not part of the FIR.
- i. He was not interviewed about what had occurred on October 7, 2017 until October 9, 2018; just over one year later.

46. Staff Sgt. [REDACTED] and Inspector [REDACTED] both viewed the Vancouver Police Department headquarters CCTV video footage of the incident sometime between October 20 and November 2, 2017.
47. Staff Sgt. [REDACTED] gave a compelled statement on November 29, 2018. Sgt. [REDACTED] evidence as outlined in his statement was as follows:
- a. He did not document the time or summarize the video when he viewed it. He recognized Constable [REDACTED] and saw him conversing with the two Asian women.
  - b. Constable [REDACTED] engaged with the female who was sitting closest to the door. Constable [REDACTED] took her by the arm in a manner that gave him the impression that she was going to be escorted out of the building. The female dropped to the ground and looked like she was resisting. Constable [REDACTED] continued to pull her by her left arm and she slid across the floor towards the north door. Constable [REDACTED] then entered the lobby and interjected.
  - c. There was nothing that he observed that was a strike or a knock other than the application of Constable [REDACTED] two hands to the woman's arm. When the woman ended up on the ground it became a dragging motion with Constable [REDACTED] pulling her across the floor. The woman obviously did not want to leave.
  - d. He felt that Constable [REDACTED] pulled the female 10 to 13 feet. He said it was not clear whether her hair had been pulled.
48. Inspector [REDACTED] gave a voluntary statement on January 8, 2019. Inspector [REDACTED] evidence as outlined in his statement was as follows:
- a. He recalled observing the video with Staff Sgt. [REDACTED]
  - b. He saw a male in plain clothes speaking to the younger of two females who appeared to be quite animated. There was no audio but it appeared the female was yelling. It was apparent to him that the females were being asked to leave.
  - c. He said the Constable looked like he was touching the female in an escort grip when she dropped to the ground. At this juncture other members showed up. He thought the females fall to the ground was embellished. He did say that there was motion towards the door and once they got to the door he stopped watching but he could not recall any dragging of the Complainant.
  - d. The events were fuzzy and his recollection was not very good.

49. Significantly, although all the events of the evening of October 6, 2017 and the morning of October 7, 2017 were video recorded, the video was not part of the Record. Apparently, it was misplaced or lost after it was reviewed by Vancouver Police Department Professional Standards Members sometime between October 20 and November 2, 2017. There was one frame in the FIR that showed Constable [REDACTED] the Complainant and her mother. Other frames were referred to by the Investigators when they were interviewing various witnesses, but those frames were not included in the materials I was provided. The loss of the video is the subject of a separate complaint and investigation.
50. In addition to the loss of the video there was confusion over the date of the incident. The Record was far from perfect but I am satisfied that all of the statements given, despite incorrect dates, addressed the incident that occurred during the early morning hours of October 7, 2017.

### **VIII. Analysis**

- a. **Did Constable [REDACTED] have the authority to remove the Complainant from the Vancouver Police Department building?**

51. The argument advanced on behalf of Constable [REDACTED] is that he had the power to remove a person from the Vancouver Police Department headquarters who is no longer welcome. That authority lay in the power to arrest the Complainant for trespass and the power to take reasonable steps to prevent the continuation of the trespass. If he had the power to arrest, then he must have had the power to use a less intrusive force than a full arrest; the power to escort them from the building. It is submitted that the Complainant and her mother's continued presence in the Vancouver Police Department building constituted the offence of mischief contrary to section 430(1)(c) of the *Criminal Code*, R.S.C., 1985, c. C-46 (the "*Criminal Code*") and the offence of trespass contrary to section 4(3) of the *Trespass Act*, R.S.B.C. 1996, c. 462 (the "*Trespass Act*") (since repealed and replaced).
52. Mischief is described in the *Criminal Code* as follows:

430 (1) Every one commits mischief who wilfully

- (a) destroys or damages property;
- (b) renders property dangerous, useless, inoperative or ineffective;
- (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or
- (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

53. The relevant sections of the *Trespass Act* that were in effect in October 2017 are as follows:

### **Definitions**

#### **1** In this Act:

**"authorized person"** means a person authorized by an occupier of premises to exercise a power or perform a duty of the occupier under this Act;

**"occupier"**, in relation to premises, means

(a) if the premises are land, including enclosed land, foreshore and land covered by water, or are property described in paragraph (a) of the definition of "premises", a person entitled to maintain an action of trespass in respect of those premises...

...and includes a person who

(d) has responsibility for and control over the condition of the premises or the activities there carried on, or

(e) has control over persons allowed to enter the premises;

### **Trespass prohibited**

**4.** (1) Subject to section 4.1, a person commits an offence if the person does any of the following:

(a) enters premises that are enclosed land;

(b) enters premises after the person has had notice from an occupier of the premises or an authorized person that the entry is prohibited;

(c) engages in activity on or in premises after the person has had notice from an occupier of the premises or an authorized person that the activity is prohibited.

(2) A person found on or in premises that are enclosed land is presumed not to have the consent of an occupier or an authorized person to be there.

(3) Subject to section 4.1, a person who has been directed, either orally or in writing, by an occupier of premises or an authorized person to

(a) leave the premises, or

(b) stop engaging in an activity on or in the premises, commits an offence if the person

(c) does not leave the premises or stop the activity, as applicable, as soon as practicable after receiving the direction, or

(d) re-enters the premises or resumes the activity on or in the premises.

### **Defences to trespass**

**4.1** A **person** may not be convicted of an offence under section 4 in relation to premises if the person's action or inaction, as applicable to the offence, was with

(a) the consent of an occupier of the premises or an authorized person,

- (b) other lawful authority, or
- (c) colour of right.

### **Arrest without warrant**

**10** (1) In **this** section, "peace officer" means a peace officer described in paragraph (c) of the definition of "peace officer" in section 29 of the *Interpretation Act* and includes a conservation officer as defined in section 1 (1) of the *Environmental Management Act*.

(2) A peace officer may arrest without warrant any person found on or in premises if the peace officer believes on reasonable and probable grounds that the person is committing an offence under section 4 in relation to the premises.

54. In his sworn testimony Constable [REDACTED] admitted that the offence of mischief under the *Criminal Code* had never crossed his mind. As such, the offence of mischief was not a live issue or the focus of the proceedings.
55. I find as a fact that he believed his authority to remove the Complainant from the Vancouver Police Department headquarters came from the fact that he was a police officer and they were on city property in an area that was closed to the public. As he stated in his first interview, "if he as a police officer couldn't remove them who could".
56. Based on his brief conversation with Constable [REDACTED] Constable [REDACTED] had concluded that the Complainant and her mother were not welcome and had been asked to leave. Constable [REDACTED] never asserted that he had exercised a statutory jurisdiction under the *Trespass Act*. Under either the *Trespass Act* or the *Criminal Code* he would have had to have had reasonable and probable grounds to effect an arrest.
57. In *R v. Storrey*, [1990] 1 SCR 241 ("*Storrey*"), the Supreme Court of Canada dealt with what constitutes reasonable and probable grounds:

Section 450(1) makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the *Criminal Code* requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. **In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest.**

The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and



the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest. The vital importance of the requirement that the police have reasonable and probable grounds for making an arrest and the need to limit its scope was well expressed in *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.), wherein Scott L.J. stated at p. 329:

The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a *prima facie* case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably.

There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest. See *R. v. Brown* (1987), 33 C.C.C. (3d) 54 (N.S.C.A.), at p. 66; *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.), at p. 228.

In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

[Emphasis added]

58. In the decision of *Park v. A.G. et al*, 2012 BCPC 109, the court was dealing with an action for wrongful arrest and false imprisonment against the RCMP, among other claims. One of the arguments raised on behalf of the RCMP was that, notwithstanding that there was no evidence that the RCMP member involved turned her mind to the *Trespass Act* when arresting the plaintiff, she would have been justified under the *Trespass Act* in requiring the plaintiff to identify himself and subsequently arresting him if he refused to do so. The court concluded the following:

[119] In my view, the problem with a finding that the arrest *could have* been made lawfully is that it does not meet the *Storrey* criteria for reasonable grounds. To be a lawful arrest, the arresting officer must have both a subjective belief in grounds and objective support for that belief. Here, the subjective component for an arrest under the *Trespass Act* is clearly missing. Cpl. Norman did not understand or believe that she was acting under that authority....

The court went on to conclude that it would be inappropriate to find a defence under a statutory authority that the officer did not know existed or declined to utilize in effecting an arrest.

59. I have carefully reviewed the evidence in the Record. I can find nothing in the two statements of Constable [REDACTED] or in his sworn testimony that indicated that he had ever applied his mind subjectively to whether or not he had reasonable and probable grounds to arrest the Complainant. He did not obtain any background information from Constable [REDACTED] and had no conversation with Constable [REDACTED]. He knew absolutely nothing about why the Complainant and her mother were in the secure area of the Vancouver Police Department headquarters and did not feel any obligation to inquire. He certainly did not ask either one of them.
60. Objectively, on the evidence before this disciplinary hearing, no grounds exist to have arrested the Complainant. Constable [REDACTED] had invited the Complainant and her mother into the secure area of the Vancouver Police Department headquarters and had decided to allow them to stay even after they resisted his attempts to persuade them to leave. It was clear on the evidence of Constable [REDACTED] that he understood that they had waited a significant period, in the cold, before even being assisted by a member of the Vancouver Police Department. He understood that they were distrustful of police and afraid. He was also aware that the Vancouver Police Department did not have the necessary resources to allow him to attend at their residence with them to ensure that it was safe for them to go home.
61. It was also clear on the Record that the Complainant and her mother were sitting quietly in the secure area, bothering no one. In my view if anyone was an authorized person as that phrase is used under section 4(3) of the *Trespass Act*, it was Constable [REDACTED] who had been dealing with the Complainant and her mother throughout the course of the early morning. Constable [REDACTED] did not purport to exercise a statutory jurisdiction under the provisions of the *Trespass Act*.
62. Constable [REDACTED] attempt to remove the Complainant by taking her by the arm, lifting her out of her chair and pulling her towards the door as she resisted were, in my view, an action that interfered with her individual liberty. I have found that those actions were not authorized by statute, because reasonable and probable grounds did not exist under either the *Trespass Act* or the *Criminal Code*.
63. I have also concluded, applying the test set out by the Supreme Court of Canada in *Fleming v. Ontario*, 2019 SCC 45 ("*Fleming*"), that the actions were not authorized at common law under the ancillary powers doctrine.

- b. **If Constable [REDACTED] did not have the authority to remove the Complainant, did he make a non-culpable error of law that does not amount to misconduct under the *Police Act* because there is no evidence that his conduct was blameworthy, reckless or that he knew he had no authority?**

64. In *Fleming*, supra, the Supreme Court of Canada had this to say about the role police officers play in Canadian society:

Police officers are tasked with fulfilling many important duties in Canadian society. These include preserving the peace, preventing crime, and protecting life and property. The execution of these duties sometimes necessitates interference with the liberty of individuals. However, a free and democratic society cannot tolerate interference with the rights of law-abiding people as a measure of first resort. There is a line that cannot be crossed. The rule of law draws that line. It demands that, when intruding on an individual's freedom, the police can only act in accordance with the law.

65. Discipline hearings under the *Police Act*, particularly where misconduct is alleged, focus on the actions of the police officers involved. In this case the actions of Constable [REDACTED] must be put into an appropriate context. From Constable [REDACTED] perspective the Complainant and her mother were in a secure area, were not welcome and had to be removed. What is not highlighted in any of the evidence is that the Complainant and her mother were in a secure area at Vancouver Police Department headquarters seeking refuge. Their continued presence was only because the Vancouver Police Department did not have the necessary resources to accompany them to their home to see whether it was secure. In my view, Constable [REDACTED] role was not simply to ensure a secure lobby but rather to serve the public by preserving peace, preventing crime and protecting life and property. The Complainant was a member of the public that Constable [REDACTED] was sworn to serve. His role was larger than simply securing a lobby. Attempting to remove, by force, these women, one 51 years of age and the other 81 years of age, at 4 AM in the morning with absolutely no idea why they were there, nor any idea as to where they would be able to go is, in my view, oppressive and not in accordance with law.

66. In *Scott v. British Columbia* (supra) the Supreme Court of British Columbia introduced the concept of a blameworthy element when considering section 77(3) of the *Police Act*. The court differentiated between a Charter breach, an honest but mistaken belief, and misconduct amounting to abuse of authority under the *Police Act*. In the Adjudicator's Decision in the Lobel and Hoang Matter, File No. 2016-1 1766, under the *Police Act*, the Hon. Ian McKinnon sitting as an adjudicator summarized the requisite mental element as follows:

32. Accordingly, even if I conclude that the Members exceeded their lawful authority in the course of their detention in search of Mr. McDonald, I must go on to consider whether they did so in an intentional or reckless manner such that their conduct has a serious blameworthy element and did not simply result from a mistake of legal authority. In this respect I agree with the submission by the Member's counsel that a finding of misconduct in these

circumstances requires a conclusion that the Members exercised powers of detention and/or search either knowing they had no lawful authority or not caring whether they did.

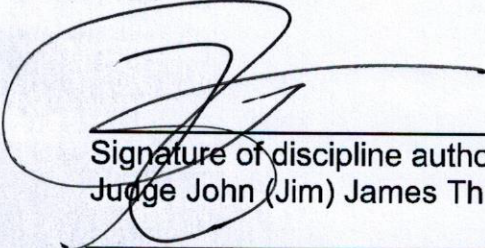
67. I have no hesitation in concluding that Constable [REDACTED] had no lawful authority to take the actions he did against the Complainant. Through his actions in not making any inquiry as to why the women were in the secure area before attempting to physically remove the Complainant, he was reckless in terms of caring whether he had any lawful authority. I agree that recklessness in this context means that Constable [REDACTED] did not turn his mind to consider whether he had grounds for his actions in circumstances where he should have done so.
- c. **If Constable [REDACTED] reasonably believed he had authority to use force to remove the Complainant, did he use excessive force?**
68. In *Fleming* (supra) the Supreme Court of Canada dealt with the issue of excessive force. Although the section of the *Police Act* at issue here, section 77(3)(a)(ii)(A), uses the phrase “unnecessary force” I find the courts reasoning applicable in this case.
69. In *Fleming* the court was dealing with section 25(1) of the *Criminal Code* which authorizes police officers to use as much force as is necessary in the execution of their duties. That provision however will not shield officers from liability if the force they use is found to be excessive. The court concluded that police officers cannot rely on section 25(1) to justify the use of force if they had no legal authority either under legislation or at common law for their actions. The court concluded that because the police officers in that case were not authorized at common law to make an arrest “**no amount of force would have been justified for the purpose of accomplishing that task**” (para. 118) [Emphasis added].
70. Accordingly, I do not find it necessary to make specific findings of fact as to how much force was actually applied to the Complainant. Under the circumstances no amount of force would have been justified.

#### **IX. Has the Allegation of Misconduct Been Established**

71. In summary, I find that Constable [REDACTED] did use some degree of force in attempting to remove the Complainant from the premises in purported performance of his duties; that the Complainant was a member of the public; that he did not have a reasonable and probable grounds to proceed in the manner which he did under the *Trespass Act* (or alternatively the *Criminal Code*); that in taking the actions that he did he was reckless in applying force to the Complainant; and that any amount of force in this situation was unnecessary.
72. I find that the allegation of abuse of authority under 77(3)(a)(ii)(A) of the *Police Act* has been substantiated on a balance of probabilities.



73. Pursuant to section 125(1)(d) of the *Police Act*, I invite submissions from Constable [REDACTED] as to appropriate disciplinary or corrective measures in relation to my findings.



\_\_\_\_\_  
Signature of discipline authority  
Judge John (Jim) James Threlfall (rt.)

Date: Sept 9, 2020

**I acknowledge service of this form:**

\_\_\_\_\_  
Signature of Constable [REDACTED]

Date: \_\_\_\_\_, 20\_\_