

**REVIEW ON THE RECORD  
DECISION**

**PURSUANT TO SECTION 141 *POLICE ACT*, R.S.B.C 1996, c.267**

In the matter of a Review on the Record into  
a Registered Complaint concerning

**Constable Jag Ghuman (#3005)**  
of the Vancouver Police Department

To: Constable Jag Ghuman, Vancouver Police Department (the "Member")  
And to: Chief Constable Adam Palmer, Vancouver Police Department  
And to: Mr. Clayton Pecknold, Police Complaint Commissioner (the "Commissioner")  
And to: Mr. Kevin Woodall, Counsel for the Member ("Counsel for the Member")  
And to: Mr. Trevor Martin, Counsel to the Commissioner ("Counsel to the Commissioner")  
And to: Mr. Joe Doyle Q.C., Counsel to the Disciplinary Authority  
And to: Deputy Chief Constable Dean Duthie, Discipline Authority  
And to: [REDACTED], [REDACTED] and [REDACTED] (the "Complainants")

Review hearing date: August 17,18, 2021, Vancouver BC

Decision date: September 15, 2021

Place: Lake Country, BC

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**Executive Summary**

This Review has concluded that the decision of the Discipline Authority was incorrect, in part.

The decision was incorrect in relation to the allegations of Abuse of Authority pursuant to section 77(3)(a)(i) of the *Police Act*, Abuse of Authority pursuant to section 77(3)(a)(ii)(A) of the *Police Act*, Neglect of Duty and Deceit.

Contrary to the decision of the Discipline Authority, the Review finds that the Member committed:

- a. the misconduct of Abuse of Authority pursuant to section 77(3)(a)(i) of the *Police Act* by intentionally or recklessly making an arrest of [REDACTED] without good and sufficient cause,
- b. the misconduct of Abuse of Authority pursuant to section 77(3)(a)(ii)(A) of the *Police Act* in the performance, or purported performance, of duties, by intentionally or recklessly using unnecessary force on [REDACTED] and
- c. the misconduct of Neglect of Duty pursuant to section 77(3)(m)(ii) of the *Police Act* by failing to promptly and diligently providing [REDACTED] with his Charter Rights following his arrest.

The Review finds that the misconduct of Deceit has not been substantiated.

The Review concurs with the Discipline Authority that the Member committed Discreditable Conduct by not providing fulsome information on a submitted Report to Crown Counsel, in particular in regard to the force used on an arrested subject.

Submissions have been requested with respect to appropriate disciplinary sanctions or corrective measures.

### **Reasons For Decision**

#### **I. Overview and History of Proceedings:**

- (1) On December 12, 2018 the Office of the Police Complaint Commissioner (the "OPCC") received registered complaints from three persons (the "Complainants") describing their interaction with members of the Vancouver Police Department on April 30, 2018 at approximately 3:45 AM.
- (2) A general summary of the complaints is as follows,
  - (a) The Complainants reported that they left the McDonald's on Davie Street, near Cardero Street, and observed two Vancouver Police Department officers, now known to be Constable Ghuman and Constable [REDACTED] issuing a ticket to a cyclist for not wearing a helmet. One or more of the Complainants commented, "come on guys, it is only a helmet" and, "that is a shitty way to end the night". The Complainants then continued on their way.
  - (b) As the Complainant's crossed Cardero Street the two police officers jumped into their marked police vehicle, activated their lights, and pulled up beside the Complainants. The Complainants reported that the police officers exited their police car and told the Complainants they were under arrest for jay walking. The police officers demanded that the Complainants provide their identification.

- (c) One of the Complainants, [REDACTED] provided his identification as requested but [REDACTED] questioned the officer's authority to arrest them for jaywalking. An altercation then ensued as the two officers attempted to arrest [REDACTED]. The Complainants alleged that the officers punched, kicked and kneed [REDACTED] and deployed oleoresin capsicum spray ("OC spray"), also known as pepper spray, against [REDACTED] and [REDACTED]. The two officers had called for backup and upon their arrival the Complainants were arrested. [REDACTED] was handcuffed, had his head slammed against the police car and was allegedly subsequently thrown to the ground and beaten. It is also alleged that two of the Complainants had threatening comments made to them while they were under arrest.
- (3) Further details as to the incidents described above will be discussed in relation to each allegation at issue in this Review.
- (4) On January 9, 2019 the complaints were deemed admissible and on February 11, 2019 a Notice of Complaint and Initiation of Investigation was filed in relation to all three Complainants. Four allegations of misconduct were identified including,
- (a) Abuse of Authority pursuant to section 77(3)(a) of the *Police Act*, which is oppressive conduct towards a member of the public,
  - (b) Abuse of Authority pursuant to section 77(3)(a)(i) of the *Police Act* which is intentionally or recklessly making an arrest without good or sufficient cause,
  - (c) Abuse of Authority, pursuant to section 77 (3)(a)(ii)(A) of the *Police Act*, which is in the performance or purported performance of duties intentionally or recklessly using unnecessary force on any person, and
  - (d) Abuse of Authority, pursuant to section 77(3)(a) of the *Police Act*, which is oppressive conduct towards a member of the public.
- (5) The Vancouver Police Department was asked to investigate.
- (6) On April 18, 2019 the OPCC deemed it necessary in the public interest that the matter be investigated by an external police department pursuant to section 92(1)(a) of the *Police Act*. Inspector Newton of the Delta Police Department was assigned as the external investigator and pursuant to section 135 of the *Police Act* Inspector Dean Duthie of the Saanich Police Department was designated as the Discipline Authority (the "Discipline Authority"). Inspector Newton was in an acting capacity at the time of designation and Inspector Duthie became a deputy Chief during the course of the proceedings.
- (7) On October 11, 2019 based on the initial investigation an additional potential misconduct was identified with regard to the Member, Constable Ghuman: Discreditable Conduct, pursuant to section 77(3)(h)(iii) of the *Police Act*, which is without lawful excuse, failing to report to a peace officer whose duty it is to receive the report, or to a Crown Counsel, any information or evidence, either for or against any prisoner or defendant, that is material to an alleged offence under an enactment of British Columbia or Canada.
- (8) On January 10, 2020 a Final Investigation Report (the "FIR") was completed by Inspector Newton. He identified three additional potential allegations of misconduct:

- (a) one in respect to the Complainant, [REDACTED], pursuant to section 77(3)(a) of the *Police Act*, which is oppressive conduct to a member of the public, and
  - (b) two with respect to the Complainant, [REDACTED]
    - i. Neglect of duty, pursuant to section 77(3)(m)(ii) of the *Police Act*, which is failing to promptly and diligently do anything that it is one's duty as a member to do by not providing [REDACTED] with his Charter Rights, and
    - ii. Deceit pursuant to section 77(3)(f)(i)(A) which is in the capacity of a member, making or procuring the making of any oral or written statement that to the member's knowledge, is false or misleading. Specifically, the allegation was that Constable Ghuman provided contradictory oral and written evidence during the investigation.
- (9) On January 24, 2020 following his review of the FIR the Discipline Authority found that five allegations of misconduct appeared to be substantiated with respect to the conduct of the Member, Constable Ghuman and notified him that a Discipline Proceeding would be held in relation to the substantiated allegations. Those five allegations were generally as follows:
- (a) Abuse of Authority relating to the arrest of [REDACTED],
  - (b) Abuse of Authority relating to the use of force on [REDACTED] in furtherance of his arrest,
  - (c) Discreditable Conduct,
  - (d) Neglect of Duty, and
  - (e) Deceit
- (collectively, the "Misconduct Allegations").
- (10) On August 5, 2020 the Discipline Authority conducted a discipline proceeding with respect to the Misconduct Allegations. The evidence considered included the FIR, cell phone video taken by [REDACTED] the oral evidence of Inspector Newton and the oral evidence of the Member. The Discipline Authority's reasons were provided to the parties on December 15, 2020. After considering the evidence and all submissions the Discipline Authority substantiated two allegations:
- (a) Discreditable Conduct pursuant to section 77(3)(h)(iii) of the *Police Act*, and
  - (b) Deceit pursuant to section 77(3)(f)(i)(A) of the *Police Act*.
- (11) On March 3, 2021 the Discipline Authority imposed a written reprimand for the offence of Discreditable Conduct and a suspension without pay for 15 working days on the misconduct offence of Deceit.

- (12) On March 10, 2021 the Commissioner received a request from the Member for a Review on the Record. The Commissioner concluded that a Review on the Record was necessary in the public interest. In reaching the conclusion that he did the Commissioner considered that Deceit is one of the most serious findings of misconduct under the *Police Act* and, additionally, that there was a significant use of force incident involving the deployment of an intermediate weapon (the OC spray).
- (13) On April 23, 2021 I was appointed as Adjudicator by the Commissioner to conduct the Review on the Record. The Commissioner directed that the Review should consider the following disciplinary defaults, pursuant to section 77 of the *Police Act*:
- i. Abuse of Authority, pursuant to section 77(3)(a)(i) of the *Police Act*, which is intentionally or recklessly making an arrest without good and sufficient cause. Specifically, the arrest of [REDACTED].
  - ii. Abuse of Authority, pursuant to section 77(3)(a)(ii)(A) of the *Police Act*, which is in the performance, or purported performance, of duties, intentionally or recklessly using unnecessary force on any person. Specifically, the use of force on [REDACTED]
  - iii. Discreditable Conduct, pursuant to section 77(3)(h)(iii) of the *Police Act*, which is without lawful excuse, failing to report to a peace officer whose duty it is to receive the report, or to a Crown counsel, any information or evidence, either for or against any prisoner or defendant, that is material to an alleged offence under an enactment of British Columbia or Canada. Specifically, not providing fulsome information on a submitted Report to Crown Counsel, in particular in regard to the force used on an arrested subject.
  - iv. Neglect of Duty, pursuant to section 77(3)(m)(ii) of the *Police Act*, which is failing to promptly and diligently do anything that it is one's duty as a member to do. Specifically, failing to provide [REDACTED] with his Charter Rights following his arrest.
  - v. Deceit, pursuant to section 77(3)(f)(i)(A) of the *Police Act*, which is in the capacity of a member, making or procuring the making of any oral or written statement that, to the member's knowledge, is false or misleading. Specifically, the Member providing contradictory oral and written evidence during the investigation.
- (14) On May 19, 2021 an administrative conference was conducted to canvass the matter of written submissions. Mr. Kevin Woodall, counsel for the Member, indicated that he was prepared to rely on the extensive written submissions he presented to the Discipline Authority but wanted to augment those submissions with oral submissions, particularly so that he could explore the cell phone video. Mr. Joe Doyle, counsel for the Discipline Authority, wanted to be present during oral submissions but indicated he would not be making a written submission. Mr. Trevor Martin, counsel for the Commissioner, indicated that he would be making written and oral submissions.
- (15) Written and oral submissions were considered on August 17 and 18, 2021. The Complainants, although provided the opportunity to make written submissions, chose not to. No notice of application to consider additional evidence was given by any party.

## II. Standard of Review and Documents Reviewed

- (16) The standard to be applied in relation to the review of a discipline decision under section 141 of the *Police Act* is correctness as expressly stated in section 141(9). The test for the standard of correctness supplied by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 50, requires the reviewer to undertake a fresh analysis of the case, and substitute their view of the correct answer for the original decision, without requiring deference to the reasons of the decision-maker. The burden of proof is the balance of probabilities, which requires evidence that is sufficiently clear, convincing and cogent.
- (17) Further guidance is found in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para. 54:
 

[54] When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision makers determination or to substitute its own view: *Dunsmuir* at para 50. While it should take the administrative decision-makers reasoning into account-- and indeed, it may find that reasoning persuasive and adopt it-- the reviewing court is ultimately empowered to come to its own conclusion on the question.
- (18) The documents reviewed, as disclosed by the OPCC, include a flash drive and hard copies of the FIR, attachments to that report, the cell phone video taken by [REDACTED] concurrently with the incident, the submissions of parties as well as Forms 3 and 4 produced in this proceeding (collectively, the "Record").

## III. Credibility and Reliability of Record

- (19) The nature of several of the Misconduct Allegations, particularly those related to Abuse of Authority and Discreditable Conduct, require consideration of the conflict in evidence between the initial complaints authored by the Complainants, the Complainant's subsequent statements, the cell phone video taken by [REDACTED] and the various statements and evidence provided by the Member, Constable Ghuman.
- (20) Through the course of these proceedings, Constable Ghuman has provided multiple statements and/or reports as to the events that occurred on April 30, 2018. Numerous inconsistencies or conflicts arise between those various reports that will be analyzed in detail in this decision. Unfortunately, the analysis becomes somewhat repetitious as each allegation is considered on its own merits. However, it is helpful to outline the chronology of Constable Ghuman's evidence at the outset for clarity:
  - (a) April 30, 2018 – General Occurrence Report authored by Constable Ghuman – approximately one hour after the incident that is subject of this Review
  - (b) August 27, 2018 – Subject behaviour officer response form [SBOR] authored by Constable Ghuman
  - (c) April 8, 2019 – Constable Ghuman interviewed by Sgt. Bill Nadalin (1<sup>st</sup> Interview)
  - (d) July 4, 2019 – Constable Ghuman interviewed by Inspector Newton (2<sup>nd</sup> Interview)

(e) December 12, 2019 – Constable Ghuman interviewed by Inspector Newton (3<sup>rd</sup> interview)

(f) August 5, 2020 – Constable Ghuman gave evidence in the Discipline Hearing.

- (21) The Complainants were not called as witnesses at the Discipline Hearing.
- (22) The provision of the cell phone video taken by [REDACTED] at the scene of the incident is an important part of the Record that is critical to the ultimate determinations of several of the Misconduct Allegations. It provides clear context to the incident itself and to the various statements that have been made subsequently. [REDACTED] 911 call reporting the attempted arrest is also part of the evidentiary Record.
- (23) Constable Ghuman was not aware of the cell phone video prior to authoring the General Occurrence Report.
- (24) The brief cell phone video starts part-way through the incident, while the two Constables are in the midst of arresting [REDACTED] and prior to the arrest of [REDACTED], who is taking the video. It shows the following:
- (a) The arrest of [REDACTED] is taking place in the middle of the street. It is dark and very quiet; there is no traffic and there are no people about.
  - (b) [REDACTED] is not being co-operative with the arrest but he is not being aggressive or physically abusive.
  - (c) [REDACTED] is videotaping the events and verbally offering to help calm down [REDACTED]
  - (d) [REDACTED] is out of frame. However, the 911 call that [REDACTED] made is useful evidence in setting the parameters of the incident. The video was 37 seconds long. [REDACTED] call to 911 was two minutes and 21 seconds. [REDACTED] can be heard describing the incident of the attempted arrest and the recording indicates that what occurred during the 37 second video clip was being witnessed by [REDACTED] and relayed by [REDACTED] to the dispatcher. One minute and 22 seconds into the call the backup police officers can be heard to arrive.
  - (e) There are no directions by either Constable for [REDACTED] or [REDACTED] to move away during the course of the video and during the arrest of [REDACTED].
  - (f) Constable Ghuman takes hold of his OC spray and points it between [REDACTED] and [REDACTED] before firing it without verbal warning at [REDACTED]. The reddish blast of OC spray in the direction of [REDACTED] is clear but no similar reddish blast in the direction of [REDACTED] is apparent.
  - (g) [REDACTED] takes a stride or two towards Constable Ghuman and [REDACTED] during the course of the video while recording the video and offering to help de-escalate the situation.

- (25) The cell phone video, while not a complete recording of the events as they happened, is in direct conflict with some of Constable Ghuman's reporting of the incident, including his reporting about the aggressiveness of the Complainants during the incident and the threat to the Constable's general safety.
- (26) The overall context of this stop is important, as it impacts the necessity and reasonableness of the actions of Constable Ghuman that come after. This was a late night/early morning stop of the three Complainants for jaywalking after the Complainants made some critical comments towards the Constables. There is no evidence on the video that the Complainants were violent or posed a risk to the officers' safety. [REDACTED] was cooperative in providing his identification and the video showed he was offering to help calm [REDACTED]. The duration of the interaction between the Constables and the Complainants was brief. Backup officers arrived at the scene within minutes and one of the Complainants was on the phone with 911 dispatch for the majority of the interaction.
- (27) Constable Ghuman's evidence in the Record included key inconsistencies, which may be due to the time between statements, the short duration of the incident itself, the stressful nature of the incident, the impact of OC spray and the benefit of viewing the video after his initial reporting. However, some of the inconsistencies were particularly self-serving. While the reasons for the conflict in evidence may be understood, the inconsistencies do negatively impact the reliability of Constable Ghuman's evidence as it relates to several of the Misconduct Allegations.
- (28) I am satisfied that the video provides the most reliable evidence as to the nature of the interaction between the Complainants and the Constables during the incident.
- (29) The timing of the various statements and reports of Constable Ghuman that relate to the OC spray directed at [REDACTED] which is the basis for the Misconduct Allegation of Deceit, and the timing of the Constable's review of [REDACTED] video, are central to my determination on the matter of Deceit.

#### **IV. The Allegations & Analysis**

- (30) As is evident from a review of the history of this matter, many allegations of misconduct arising from the April 30, 2018 incident have been examined and for one reason or another dismissed prior to this Review. For example, allegations that [REDACTED], once handcuffed, was beaten by members of the Vancouver Police Department who arrived as backup were dismissed based on the fact that none of the officers took notes and [REDACTED] was unable to identify the specific officers who administered the blows.
- (31) Ultimately the allegations I must consider relate only to the Member, Constable Ghuman. My task is to determine whether or not the conclusions reached by the Discipline Authority were correct. I must consider the allegations afresh, based upon the complete Record, without deference to the Discipline Authority's reasons. The context of my Review on the Record has been defined by the Commissioner and is limited to those allegations of misconduct set out in my letter of appointment.



- i. **Abuse of Authority, pursuant to section 77(3)(a)(i) of the *Police Act*, which is intentionally or recklessly making an arrest without good and sufficient cause. Specifically, the arrest of [REDACTED].**

- (32) In his written submissions Mr. Woodall concedes that the Member did not have the grounds to arrest [REDACTED] for obstructing a police officer. The issue to be decided is whether or not the Member made the arrest intentionally or recklessly without good and sufficient cause.
- (33) An unlawful arrest by a police officer does not automatically constitute misconduct, there must also be an element of bad faith. The principles in this regard were summarized by the Hon. Ian MacKinnon sitting as an adjudicator in the public hearing of Lobel and Hoang OPCC File No. 2016-11766. In that case, police officers searched a person for identification during an investigative detention. The power to detain for investigation does not include the power to search for identification. Therefore, the search was unlawful. The 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 and 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 the circumstances requires a conclusion that the Members exercised powers of detention and/or search either knowing that they had no lawful authority or not caring whether they did.

- (34) Under section 495(1) of the *Criminal Code*, R.S.C., 1985, c. C-46 (the "*Criminal Code*"), an arrest without warrant requires analysis of both subjective and objective criteria: *R. v. Storrey* [1990] 1 SCR 241 ("*R v. Storrey*"). The recent British Columbia Court of Appeal decision of *R. v. Henareh*, 2017 BCCA 7 confirms the test at paragraphs 38-42 as follows:

[38] In *R. v. Storrey*, [1990] 1 S.C.R. 241 at 250-251, the Court held that there is a subjective and objective element to the test for a lawful arrest under s. 495(1)(a):

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.

[39] The reasonable grounds standard requires something more than mere suspicion, but something less than the standard applicable in civil matters of proof on the balance of probabilities: *Mugesera v. Canada (Minister of Citizenship & Immigration)*, 2005 SCC 40 at para. 114. The appropriate standard is one of reasonable probability: *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166. Reasonable or credibly-based probability contemplates a practical, non-technical and common

sense evaluation of the probability of the existence of facts and asserted inferences: *R. v. Sanchez* (1994), 93 C.C.C. (3d) 367 at 367 (Ont. Ct. (G.D.)).

[40] Determining whether reasonable and probable grounds exist requires an assessment of the “totality of the circumstances”: *R. v. Debot* at 1168.

[41] A trial judge’s ruling on whether objectively reasonable grounds to arrest have been shown is a question of law subject to a correctness standard: *R. v. Shepherd*, 2009 SCC 31 at para. 20. Factual findings and inferences made in the course of the analysis are, however, entitled to deference and fall within the exclusive domain of the trial judge absent palpable and overriding error: *R. v. Mann*, 2004 SCC 52 at para. 49; *R. v. Cornell*, 2010 SCC 31 at para. 25; *R. v. Bush*, 2010 ONCA 554 at para. 48.

[42] Trial judges are obliged to assess the objective reasonableness of an arresting officer’s belief that he or she had reasonable grounds to arrest from the perspective of a reasonable person standing in the arresting officer’s shoes. The analysis takes account of the arresting officer’s knowledge and experience with respect to the matter under investigation: *R. v. Luong*, 2010 BCCA 158 at para 24; *R v Wilson* 2012 BCCA 517 at para.26.

- (35) Further, in *R v. Storrey*, the Supreme Court of Canada considered reasonable and probable grounds for arrest as follows:

Section 450(1) of the *Criminal Code* 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.

- (36) Finally, the Supreme Court of Canada in *Fleming v. Ontario*, 2019 SCC 45, confirms “that there is no common law power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace” and goes on to provide guidance as to the balance between the powers of arrest and a person’s liberty:

[98] ...For an intrusion on liberty to be justified, the common law rule is that it must be “reasonably necessary”. If the police can reasonably attain the same result by taking an action that intrudes less on liberty, a more intrusive measure will not be reasonably necessary no matter how effective it may be. An intrusion upon liberty should be a measure of last resort, not a first option.

- (37) The incident giving rise to the allegations began at approximately 3:45 AM on April 30, 2018. Constables Ghuman and [REDACTED] were on duty and engaged in a police check of a cyclist in the area of Davie Street and Cardero Street in Vancouver. The Complainants

were exiting the nearby McDonald's restaurant when they encountered the two police officers and the cyclist. In passing, either [REDACTED] or [REDACTED] made comments to the two police officers questioning why they were targeting the cyclist. One of the comments, detailed by Constable Ghuman in a General Occurrence Report he prepared at 5:02 AM, approximately one hour after the incident, suggested [REDACTED] said:

"If you do not wear a helmet for riding a bike yourself why would you ticket someone who does not."

- (38) Constable Ghuman is a turbaned Sikh police officer. In that same General Occurrence Report Constable Ghuman stated that he has never throughout his career, encountered an individual who has had such disrespect for his faith as [REDACTED].

- (39) Constable [REDACTED] reported that the comments he heard were:

"Wow! Riding a bicycle without a helmet! Have nothing better to do?"

"There are crackheads selling shit on the street and look at what you are doing"

"Got nothing better to do eh?"

- (40) The three Complainants crossed the street and the Constables observed that they had "jay walked". It was dark, the street was very quiet and there was no one around. The Constables returned to their marked police vehicle, activated the emergency lights and repositioned the vehicle in front of the Complainants. The Constables stated that they "detained" the three for the bylaw offence of jaywalking. The three Complainants insisted that the Constables had shouted "freeze you are under arrest" for jaywalking. The Constables asked the three to provide identification. According to the officers, all three males were intoxicated and belligerent. In fact, [REDACTED] was not intoxicated and subsequent cell phone video shows, at least later in the encounter, that he was not belligerent. [REDACTED] provided his identification and the other two Complainants did not.
- (41) Vancouver Bylaw 2849, Section 16(2) provides police the authority to obtain the identification of a pedestrian who contravenes the Bylaw and authority to arrest any pedestrian for failing to identify themselves.
- (42) The Constables advised [REDACTED] that he could be arrested for obstructing a police officer if he did not cooperate and provide identification. [REDACTED] refused to provide identification or to turn around and put his hands behind his back so he could be handcuffed. The two police officers then attempted the arrest. [REDACTED] was a large man and actively resisted by stiffening his arms and refusing to place his hands behind his back. He never overtly attempted to strike either officer during the struggle. Both Constables used force to control and arrest him including close fist punches, a knee strike, a kick to the shin, attempted arm holds and applying body weight.
- (43) The two Constables called for backup and at one point Constable [REDACTED] could be heard on the video recording telling the backup officers to hurry ("step it up please") just prior to punching [REDACTED] in the head with a closed fist. At this point, Constable Ghuman unholstered his OC spray and pointed it at [REDACTED]. He then pivoted and pointed it at

██████████ who was using his cell phone to video record the attempted arrest of ██████████. The video clearly shows a blast of pepper spray in ██████████ direction. ██████████ who was also observing the attempted arrest of ██████████, had called 911 to report the incident. Approximately one minute elapsed between the attempted arrest and the arrival of backup officers.

- (44) According to ██████████, after pepper spraying him, Constable Ghuman approached him. ██████████ put his hands in the air and said "I am not resisting". Constable Ghuman told him to put his "fucking hands" behind his back, handcuffed him and pushed him over the police car. ██████████ continued to say "I am not resisting" as Constable Ghuman slammed his head into the car. Although Constable Ghuman stated that he administered OC spray to ██████████ because he thought he was going to interfere with the arrest of ██████████, it is clear that prior to administering the OC spray he never directed ██████████ to stop or to back off. Constable Ghuman maintains that he never saw ██████████ recording the incident or heard him trying to calm down the situation. By this time, a number of other police officers had arrived on the scene and assisted in the arrest of ██████████ and ██████████.
- (45) ██████████ insisted that he was subsequently struck in the head, thrown to the ground and beaten by the backup police officers. During the course of his encounter with these officers he told them he was a paramedic. They requested and inspected his identification. He was placed in the paddy wagon but the officers, after questioning him about his status as a paramedic, returned his identification (some of it had to be retrieved from Constable Ghuman) and let him go without charge, telling him he was lucky.
- (46) In his General Occurrence Report Constable Ghuman had virtually nothing to say about why ██████████ was arrested. His remarks in this regard were brief:
- "Shortly thereafter more units arrived on scene and assisted with taking ██████████ and ██████████ into custody".
- (47) In that same report Constable Ghuman commented on the struggle to arrest ██████████ and explained that he was fearful that he or his partner, Constable ██████████ would receive serious, potentially life altering injuries if ██████████ was not controlled immediately. He also stated that he could hear ██████████ yelling profanities at them.
- (48) In the first statement he provided on April 8, 2019 to Sgt. Bill Nadalin of the Vancouver Police Department, Constable Ghuman said he did not know who handcuffed ██████████
- (49) In his second statement provided to Inspector Newton on July 4, 2019 Constable Ghuman was asked again whether he had taken control of ██████████. He said that he could not remember and that he tried to take control of somebody but did not know whether it was ██████████ or ██████████. He explained that he could barely see, felt like he was going to put himself in harms way, and knew there were other units attending so backed off.
- (50) In his third statement provided to Inspector Newton on December 12, 2019 he was asked at page 17, line 366 "[c]an you tell me what offence you arrested ██████████ for?". He replied:

Answer: When we are dealing with [REDACTED], as video shows [REDACTED] begins to close the distance on us at one point as video shows we have as far as I am concerned, I feel like we have pretty good control of [REDACTED] when [REDACTED] decides to interject himself in the entire situation and begins to clearly, as is shown on video walks towards us to the point where he is within metres of, or within feet of me and Constable [REDACTED] so we did, we did my, mind was that I was going to arrest [REDACTED] for obstructing a police officer.

Question: and your grounds for that, or for, as you have indicated, based on his, him coming forward towards you

Answer: that's right

- (51) When Constable Ghuman prepared the General Occurrence Report he was not aware that [REDACTED] had been recording the encounter on his cell phone. The cell phone video shows clearly that [REDACTED] was, although resistant, never aggressive and [REDACTED] was not shouting profanities, rather he was expressing to the officers that he would assist in their attempts to restrain [REDACTED]. [REDACTED] comments in this regard came after Constable Ghuman and his partner, Constable [REDACTED] were attempting to affect the arrest of [REDACTED] with the use of significant force including closed fist punches to the head and torso as well as kicks to the torso of [REDACTED].
- (52) It is clear from the statements of [REDACTED], the General Occurrence Report and statements of Constable Ghuman that [REDACTED] was never told why he was arrested and handcuffed and was never provided with his Charter Rights. Constable Ghuman was very vague as to when or how he turned [REDACTED] over to the backup officers or what he may have told them.
- (53) The Discipline Authority concluded that the allegation of abuse of authority with respect to the arrest of [REDACTED] had not been proven. In reaching this conclusion he commented on the fact that Constable Ghuman was a junior officer with only 1.5 years of service and little experience with obstruction charges. He commented on the significant stress generated by the attempted arrest of [REDACTED]. He also noted that Constable Ghuman's attention would have been on [REDACTED]. He accepted Constable Ghuman's statement that he did not know that [REDACTED] was video recording the incident. He concluded that [REDACTED] attempts to video the incident could have been misinterpreted by Constable Ghuman as an effort by [REDACTED] to intercede in the arrest of [REDACTED]. He noted that there was no suggestion that Constable Ghuman had ever uttered a verbal command or direction for [REDACTED] to stay back during the time when police were trying to control and arrest [REDACTED]. The Discipline Authority did not comment on the seriousness of the issue giving rise to the arrest.
- (54) Mr. Woodall, on behalf of Constable Ghuman, maintains that the test set out in Lobel and Hoang, *supra*, has not been met. He points to the fact that Constable Ghuman had very limited service and had not had a case of obstructing a police officer that he had taken to court prior to this incident. He points to the action of [REDACTED] in approaching the encounter between the officers and [REDACTED] as he recorded the incident as being potentially threatening as perceived by Constable Ghuman. He maintains that I cannot infer from the circumstances that Constable Ghuman knew he had no authority to arrest [REDACTED] or just did not care.

- (55) I accept the statement of [REDACTED] that it was Constable Ghuman who arrested and handcuffed him. I note that Constable Ghuman never told [REDACTED] why he was arrested and never read him his Charter Rights. This was a case under a Vancouver City Bylaw of jaywalking. The initial encounter between the three Complainants and the officers was brief. When asked to provide identification [REDACTED] complied. I find he was cooperative and there was nothing in his actions to suggest that he did anything to obstruct the officers in their attempt to arrest [REDACTED]. In fact, his words recorded on the video show that he was attempting to calm the situation. The video shows that prior to being pepper sprayed he was never directed to back away. If that direction had been made and he had disobeyed the direction then Constable Ghuman may have had cause for concern.
- (56) I have also considered the fact that in his General Occurrence Report Constable Ghuman made no mention of arresting [REDACTED] for obstruction. Although it was an evolving and dynamic situation the arrest of [REDACTED] was clearly reckless; OC spray had been administered to him and he was backing away with his hands up insisting that he was not resisting. The subsequent handcuffing and arrest was without good and sufficient cause and Constable Ghuman was reckless in not applying his mind to whether he had appropriate grounds to affect the arrest.
- (57) In my view the Discipline Authority was incorrect in concluding that this allegation had not been proven to the requisite standard.
- ii. Abuse of Authority, pursuant to section 77(3)(a)(ii)(A) of the *Police Act*, which is in the performance, or purported performance, of duties, intentionally or recklessly using unnecessary force on any person. Specifically, the use of force on [REDACTED]**
- (58) Under section 25 of the *Criminal Code* an officer who is authorized in law to do something may use force for that purpose however, the use of force must be reasonable. Moreover, the use of force is not limited to those situations where a police officer has the power to arrest or detain. If force is reasonably necessary to carry out the police officer's duties, they are authorized to use that force.
- (59) There are numerous authorities that stand for the proposition that police actions should not be judged against a standard of perfection. Police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. There is no requirement that a police officer use the least amount of force necessary.
- (60) During the course of the encounter between the officers and [REDACTED], Constable Ghuman utilized OC spray on [REDACTED]. He also handcuffed and arrested [REDACTED] and slammed his head into the roof of the police car. Mr. Woodall and Mr. Martin both submit that this Review should be limited to whether or not Constable Ghuman was justified in pepper spraying [REDACTED]. They maintain that the initial investigation and subsequent Discipline Authority decisions did not address the slamming of the head into the police car and therefore in the interests of fairness the matter should not be considered on a Review and that my consideration should be limited to the application of the pepper spray. In my view, I am also entitled to consider Constable Ghuman's arrest and handcuffing of [REDACTED] however to do so is largely unnecessary as a result of my determination relating to the use of OC spray as outlined below.

- (61) In his written submissions on behalf of the OPCC Mr. Martin argues that rather than judging the member's actions with the benefit of hindsight and detached reflection, I should analyse the use of force from the perspective of the members "doppelgänger", meaning a member with the same training and experience faced with the same situation. Under the "doppelgänger" analysis, the test for a finding of unnecessary force does not involve an entirely subjective test of good faith on the part of the member. The member's own view is not determinative. Instead, the "reasonableness of that view must be assessed against the yardstick of acceptable behaviour from the perspective of an officer with the same level of training and experience". I agree.
- (62) Constable Ghuman had approximately 1.5 years of experience when the incident occurred. He had taken all of the prescribed training required of a Vancouver Police Department officer.
- (63) The video taken by [REDACTED] depicts approximately 37 seconds of the altercation between the officers and the three Complainants. It shows a portion of the officer's use of force in their attempt to restrain [REDACTED] and also shows [REDACTED] position relative to the officers. [REDACTED] voice can also be heard as he attempts to speak to the officers and [REDACTED]. The video clearly shows that while [REDACTED] is resisting the officers' attempts to handcuff him, he is not aggressive. He is not throwing any punches or attempting to otherwise assault either of the officers. As the attempt to arrest [REDACTED] unfolds it is apparent that [REDACTED] is continuing to try and capture the attempt on video and in doing so is moving towards the officers and [REDACTED]. As Constable Ghuman turns towards the camera, [REDACTED] can be heard saying "guys, just stop. Here, I will get him to stop." He can also be heard shouting "[REDACTED] [REDACTED]". He was not, as Constable Ghuman asserted in his Occurrence Report shouting profanities at the officers. Constable Ghuman also stated that he considered [REDACTED] a threat prior to discharging pepper spray. [REDACTED] was on his phone talking to the 911 operator trying to get help.
- (64) The video shows Constable Ghuman taking the OC spray off his belt and preparing to use it. He first pointed the spray at [REDACTED] and then turned in the direction of [REDACTED] and [REDACTED]. An important point for consideration is whether or not Constable Ghuman ever directed [REDACTED] to back away. I noted in paragraph 44 that the video did not record such a direction. Since it is an important issue in determining whether or not Constable Ghuman felt it necessary to OC spray [REDACTED], a closer examination of the evidence is required.
- (65) Constable Ghuman, in addition to his Occurrence Report, completed a SBOR form. In the narrative portion of that form, he had this to say:
- "While attempting to deal with an aggressive subject this subject began to close the distance on me even when directed to move back. The subject was subsequently sprayed with OC which resulted in the subject staying back and not interfering in the arrest"
- (66) In that same report he noted that [REDACTED] was agitated/erratic and yelling/swearing. He also wrote that [REDACTED] was moving in his direction closing the distance while "glaring at myself with the 1000-yard stare".

- (67) It is important to note, that the statement made in the SBOR report was made before Constable Ghuman had reviewed the video.
- (68) In his first interview with Inspector Nadalin on April 8, 2019, Constable Ghuman said that he used OC spray in the direction of [REDACTED] and [REDACTED] as he felt they might assault him unexpectedly based on their demeanour and their actions in walking towards him. He said he did not realize [REDACTED] was filming him. In his first interview with Inspector Newton, Constable Ghuman stated that he did not recall giving any commands to [REDACTED] or [REDACTED] prior to discharging the pepper spray. The Constable explained that it was a “dynamic situation” and “things are evolving very quickly” and he could not remember why he did not give any commands. He went on to observe that given the set of circumstances and given what [REDACTED] and [REDACTED] were seeing he would assume that they would not try to interject themselves. Further he stated that he did not believe they would need the police to tell them that they needed to get back.
- (69) In his final interview with Inspector Newton, he said that it was “a dynamic situation where everything was happening superfast” and he “did not have the opportunity to stand there for 4 to 5 seconds” considering what commands he should give to [REDACTED] and [REDACTED]. He went on to say that in his mind he was not processing that “I gotta give these guys commands.” He said he was just thinking how he was going to get out of the situation in one piece or how was he going to help his partner get out of the situation in one piece.
- (70) The Discipline Authority accepted that Constable Ghuman felt that his safety was potentially at risk because [REDACTED] was yelling and approaching him. He also accepted that at some point [REDACTED] and [REDACTED] had been told to remain on the sidewalk even if it was only when they were first detained. He found that the discharge of OC spray at [REDACTED] did not constitute misconduct in the circumstances.
- (71) Mr. Woodall argued that Constable Ghuman, a very junior police officer, was faced with a dynamic situation and, approached by [REDACTED] and [REDACTED] from behind, would have a justifiable fear that he might be sucker punched. Although a command to get back might have worked, the law does not require a police officer to select the least possible force in order to achieve a lawful purpose. Constable Ghuman had a lawful purpose in trying to get [REDACTED] and [REDACTED] to back away from the attempt to arrest [REDACTED]. The option that was used to achieve this lawful purpose was a brief burst of pepper spray in the general direction of [REDACTED] and [REDACTED] and was not a spray of even moderate duration that might have incapacitated either man. (It should be noted that Constable Ghuman reported that it had significantly affected him and impacted his interaction with the Complainants.)
- (72) It is significant that the entire interaction between the two police officers and the three Complainants was triggered by comments made by the three to the police officers who were in the process of ticketing a cyclist. The video clearly depicts the scene of the stop: there was nobody else around and no traffic on the street. [REDACTED] when asked for identification, produced it. [REDACTED] was clearly inebriated and uncooperative, but he was not aggressive. The police officers had called for backup and repeated their request during the course of their attempted arrest on [REDACTED]. Backup was on the way. [REDACTED] seeing the altercation between the officers and [REDACTED] was busy calling 911 to report the incident. [REDACTED] was not belligerent and was not using profanity at the officers as alleged in Constable Ghuman’s Occurrence Report.



- (73) It is clear that Constable Ghuman did not take the time to assess the situation, nor did he direct [REDACTED] to stay where he was. Such a direction would have been the most basic first step. This was not the arrest of a dangerous offender. With backup on the way the officers clearly had the option of backing off and waiting for help. Constable Ghuman's use of OC spray on [REDACTED] in this set of circumstances was unnecessary and reckless. He never applied his mind to other options. Despite the fact that Constable Ghuman had limited years of service, Inspector Newton confirmed that he had taken the most recent Use of Force Training provided to recruits. That training provided by the Justice Institute of British Columbia is consistent with the principles established in the National Use of Force Framework (NUFF), the *Criminal Code* and case law. Inspector Newton also confirmed that Constable Ghuman had received in service use of force and de-escalation training.
- (74) Constable Ghuman failed to undertake the necessary analysis of the situation, in particular, the options available to him, and how the situation could be de-escalated without resorting to the use of force. All of these considerations should have been entertained before discharging OC spray. In my view the Discipline Authority was not correct in deciding that this allegation was not substantiated. There is more than sufficient clear, cogent and convincing evidence that Constable Ghuman, even given his limited experience, acted recklessly in pepper spraying [REDACTED] in these circumstances.
- (75) I find that the Discipline Authority's determination was not correct. This allegation is substantiated.
- iii. Discreditable Conduct, pursuant to section 77(3)(h)(iii) of the *Police Act*, which is without lawful excuse, failing to report to a peace officer whose duty it is to receive the report, or to a Crown counsel, any information or evidence, either for or against any prisoner or defendant, that is material to an alleged offence under an enactment of British Columbia or Canada. Specifically, not providing fulsome information on a submitted Report to Crown Counsel, in particular in regard to the force used on an arrested subject.**
- (76) Section 77(3)(h)(iii) states that "discreditable conduct" occurs when a member conducts themselves in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department, including, without lawful excuse, failing to report to a Crown counsel, any information or evidence, either for or against any prisoner or defendant, that is material to an alleged defence under an enactment of British Columbia or Canada.
- (77) In *Mancini v. Constable Martin Courage*, OCCPS #04-09, the Ontario Civilian Commission on Police Services adopted the following definition:
- The concept of discreditable conduct covers a wide range of potential behaviours. The test to be applied is primarily an objective one. The conduct in question must be measured against the reasonable expectation of the community.
- (78) Shortly after the April 30, 2018 incident, Constable Ghuman (at 5:02 AM) prepared an Occurrence Report that together with an Occurrence Report from Constable [REDACTED] formed a formal report to Crown counsel ("RTCC"). In arriving at his conclusion that this allegation had been substantiated, the Discipline Authority noted that Constable Ghuman

did not report to Crown counsel that he used multiple closed fist strikes and a knee strike to [REDACTED] in order to attempt to gain control and affect an arrest. The Discipline Authority noted that Constable Ghuman's Occurrence Report included many detailed observations about [REDACTED] active resistance and pre-assaultive cues along with detailed information about various comments he made to the officers. No such detail was provided regarding the multiple closed fist strikes or the knee strike that Constable Ghuman inflicted on [REDACTED]. This stood in stark contrast to the statement submitted by Constable [REDACTED].

- (79) The Discipline Authority also noted that Constable Ghuman's narrative did not include any information about the arrest of [REDACTED] and [REDACTED] other than the fact that they were both taken into police custody. The narrative also did not include any information about the release of [REDACTED] at the scene, without any violation tickets or pending charges. The narrative did detail some of the injuries Constable Ghuman suffered but not mention those suffered by [REDACTED].

- (80) The RTCC was designed to support a charge of obstruction with respect to [REDACTED]. In addition to the observations made by the Discipline Authority I note that, in an obvious attempt to influence the Crown in its charge approving function, Constable Ghuman went on to state:

"Throughout the incident it was apparent to PC's that all three males had a complete disregard for the law, believing they were above the law and that the same rules that apply to the rest of the citizens of Vancouver did not apply to them. For much of PC Ghuman's career he cannot recall a time where he has encountered a individual who has resisted arrest in the way [REDACTED] did. In addition PC Ghuman has never throughout his career, encountered an individual who has had such disrespect for his faith (Sikhism) as [REDACTED] did. PC 3005 Ghuman found the comments [REDACTED] made to be disrespectful and ignorant".

- (81) Constable Ghuman also described [REDACTED] as goal oriented, in an assaultive state and actively resisting. He described himself as fearful that he and his partner would receive serious, potentially life altering injuries if [REDACTED] was not controlled immediately. He stated that as the Constables were attempting to take [REDACTED] into custody, they could hear [REDACTED] yelling profanities at them.

- (82) This report was prepared by Constable Ghuman before he was aware that the encounter had been videotaped by [REDACTED]. The video shows that his comments were clearly misleading and an apparent attempt to ensure that a charge of obstruction was laid with respect to [REDACTED]. Although resisting, [REDACTED] was not assaultive. [REDACTED] was clearly not shouting profanities. [REDACTED] cooperated and provided identification as requested. There is no doubt that the three Complainants thought they were being harassed as a result of the comments to the officers when they were questioning the cyclist but the alleged comments were certainly not as described by Constable Ghuman. It is crucial to the administration of justice that Crown counsel when reviewing an Occurrence Report and RTCC can rely upon and trust that the facts detailed in that report by the investigating members are accurate.

- (83) With respect to this allegation I find the reasoning of the Discipline Authority persuasive. Constable Ghuman's RTCC was deliberately misleading and did not contain information

crucial to a decision to lay a charge of obstruction with respect to [REDACTED]. Further, it did not provide important details concerning the arrests of [REDACTED] and [REDACTED]. There was no lawful excuse for these omissions. I find this allegation substantiated.

**iv. Neglect of Duty, pursuant to section 77(3)(m)(ii) of the *Police Act*, which is failing to promptly and diligently do anything that it is one's duty as a member to do. Specifically, failing to provide [REDACTED] with his Charter Rights following his arrest.**

- (84) Section 77(3)(m)(ii) of the *Police Act* provides that it is a disciplinary breach of public trust for a member to commit neglect of duty, which is neglecting, without good and sufficient cause, to promptly and diligently do anything that it is one's duty as a member to do.
- (85) The fact that Constable Ghuman did not read [REDACTED] his Charter Rights is not in dispute. The issue is whether or not he neglected to provide [REDACTED] with his Charter Rights without good and sufficient cause.
- (86) Retired Judge Carol Lazar in OPCC File No. 2018-15634 dealt with an allegation of neglect of duty under the same section. A similar issue was raised by counsel for the member who argued that a Charter breach does not necessarily amount to misconduct under section 77 of the *Police Act*. In reaching her decision retired Judge Lazar considered the case of *Lowe v Diebolt*, 2013 BCSC 1092, an oft cited decision in cases arising under the *Police Act* of British Columbia. In *Lowe v Diebolt* Justice Myers had this to say:
  - [45] The petitioners conflating the legality of the search and misconduct under section 77(3)(a)(ii)(B) is shown starkly in his argument....
  - [46]...The question of misconduct is different from whether a Charter breach occurred, and also from whether evidence obtained from an illegal search should be excluded. That is clear from the definition of the charged misconduct, which requires recklessness or intent.
- (87) Mr. Justice Myers goes on to say that the failure to provide a Charter warning was more in line with negligence.
- (88) Retired Judge Lazar found that the failure to read the charter warning did amount to neglect of duty. By implication she determined that the failure to Charter was more in line with negligence rather than requiring the additional elements of recklessness or intent.
- (89) The Discipline Authority concluded that the Neglect of Duty allegation was not proven to the requisite standard. In reaching his decision the Discipline Authority noted:
  - (a) That a dynamic, physical altercation occurred that involved police control tactics, and use of force including OC spray.
  - (b) Constable Ghuman was experiencing the effects of the OC spray.
  - (c) Constable Ghuman attempted to provide Charter rights to [REDACTED] and [REDACTED]. This demonstrated his attention and action to the duty of providing an arrested person the right to counsel and official warning. The Discipline Authority

found that the evidence to suggest that Constable Ghuman knowingly chose not to provide [REDACTED] with his Charter rights was not clear. He concluded that Constable Ghuman made an inadvertent error and that errors of judgement do not in and of themselves constitute serious misconduct.

- (90) Constable Ghuman conceded that he never read [REDACTED] his Charter rights nor did he ask anybody else to provide them. In fact, Constable Ghuman did not communicate with any of the arriving officers who took custody of [REDACTED] after Constable Ghuman had pepper sprayed [REDACTED] handcuffed him and then forcefully forced his head into the top of the police car. There is no evidence to suggest that Constable Ghuman ever told [REDACTED] why he was being arrested. While I appreciate that Constable Ghuman was affected by the OC spray he had directed towards [REDACTED] and that it was a dynamic and ongoing situation, he nonetheless attempted to provide Charter warnings to [REDACTED] and [REDACTED]
- (91) Again, context is important. [REDACTED] had cooperated and provided identification. I have already concluded that there were no grounds to arrest [REDACTED] and indeed that was conceded. The heightened circumstances Constable Ghuman relies on for his submissions on this point were largely due to the officers' handling of this stop and the arrest of the Complainants. In my view Constable Ghuman's failure to provide [REDACTED] with the reason for his arrest, and in particular his Charter rights, was negligent and reckless in the circumstances and the explanation provided does not amount to good and sufficient cause. I find that the decision of the Discipline Authority with regard to this allegation was incorrect and that the allegation is substantiated.

**v. Deceit, pursuant to section 77(3)(f)(i)(A) of the *Police Act*, which is in the capacity of a member, making or procuring the making of any oral or written statement that, to the member's knowledge, is false or misleading. Specifically, Constable Ghuman providing contradictory oral and written evidence during the investigation**

- (92) Retired Justice Smart had occasion to deal with this section, and in particular the elements of the discipline offence of Deceit, in OPCC PH File 2014-01(In the Matter of the Public Hearing into the Conduct of Constable Christopher Charters of the Vancouver Police Department, July 30, 2014). He had this to say:

"There is both a conduct element and a fault element to the disciplinary default of deceit. The conduct element is that the statement must be false or misleading. The fault element is that the member must know that the statement is false or misleading. It is not enough to prove that what was said or written by the member is false or misleading. The member must know it is false or misleading; otherwise, the member does not have the requisite mental state or intention required to ground a finding of deceit".

- (93) The Discipline Authority found that this allegation had been proven to the requisite standard. He made a number of specific findings:
- (a) That Constable Ghuman discharged OC spray directly at [REDACTED] and in doing so, contaminated [REDACTED] with the OC spray. As a result of that finding some of Constable Ghuman's subsequent statements were false or misleading and therefore the conduct element of deceit had been established.

- (b) That Constable Ghuman prepared an Occurrence Report at 5:02 AM on April 30, 2020, approximately one hour and 17 minutes after the event occurred. In that report he stated that he discharged his OC spray at [REDACTED] and then turned around and also discharged it at [REDACTED]. Constable Ghuman completed a SBOR on August 27, 2018 which noted that he discharged OC spray at [REDACTED].
  - (c) On April 8, 2019, just prior to his first interview with Sgt. Nadalin of the Vancouver Police Department, Constable Ghuman viewed the cell phone video taken by [REDACTED] for the first time. After viewing the video Constable Ghuman stated that he did not discharge OC spray at [REDACTED]. At the discipline proceeding Constable Ghuman stated that after seeing the video he determined that he made an error in his General Occurrence Report and his SBOR report. He explained that he made this determination based on what could be seen in the video.
  - (d) On July 4, 2019, Inspector Newton interviewed Constable Ghuman. Constable Ghuman was adamant in saying that he never deployed OC spray at [REDACTED] and only “displayed” the pepper spray. He explained that he did not deploy the spray because he would have likely contaminated his partner Constable [REDACTED].
  - (e) On December 12, 2019 Constable Ghuman was interviewed for a third time by Inspector Newton. In the interview, Inspector Newton attempts to clarify the discrepancies between the Occurrence Report, SBOR and the first two statements. Constable Ghuman now maintained that he did in fact pepper spray [REDACTED] but did not think it connected in the way he wanted it to connect. He went on to say that the spray was directed at [REDACTED] but it did not necessarily work on him. “It may have hit his shoulder or something like that.”
  - (f) At the discipline hearing, at one point Constable Ghuman suggested that he had mixed up [REDACTED] and [REDACTED] in terms of who was pepper sprayed. The Discipline Authority concluded that Constable Ghuman had not mixed up the two and that he made the suggestion that he did as a “convenient attempt” to mirror one instance in which he had confused the two, in order to explain away the inconsistency.
- (94) The Discipline Authority observed that at the time Constable Ghuman made the false and misleading statement that he did not directly discharge pepper spray at [REDACTED] he was facing possible sanction for Abuse of Authority in relation to [REDACTED]. The Discipline Authority concluded, on the basis of the inconsistent statements and explanations that the discipline offence of Deceit had been made out.
- (95) The position of the Commissioner is that the offence of deceit has been proven to the requisite standard. Constable Ghuman twice admitted using OC spray on [REDACTED] watched the video and changed his story in the next two interviews denying the use of pepper spray. Then in a third interview when confronted with the inconsistency between the SBOR and his prior interview statements, he tried to “explain and rationalize”. It was only later at the discipline proceeding that he offered the explanation that he had inferred that he discharged pepper spray at [REDACTED] because he observed that [REDACTED] was suffering from the effects of contamination. This statement, of course, is also

inconsistent with the statements he made during the third interview where he admitted that he did discharge but it did not connect well.

- (96) The possible deceit lies in the false or misleading statements Constable Ghuman made in the third interview when he said he discharged the OC spray at [REDACTED] but it did not connect well, and said he had previously denied discharging OC spray at [REDACTED] because he had not hit him directly in the face.
- (97) Mr. Woodall, on behalf of Constable Ghuman, maintains that deceit has not been proven. He argues that Constable Ghuman initially admitted the most serious use of force in his Occurrence Report and SBOR; the use of OC spray on both [REDACTED] and [REDACTED]. Mr. Woodall maintains that a close, frame by frame, viewing of the video shows that Constable Ghuman did not discharge pepper spray at [REDACTED]. The video clearly shows a blast of a red substance when the spray was discharged at [REDACTED] but no such blast is apparent when the OC spray is pointed at [REDACTED]. Constable Ghuman's story changes after he has seen the video and notes the fact that it does not show the red plume discharged at [REDACTED]. Thereafter his story remains relatively consistent until confronted with the fact that [REDACTED] was contaminated with the spray. The story then changes as Constable Ghuman struggles to respond to Inspector Newton who at this point has concluded that OC spray was in fact deployed and his questions reflect that conclusion. Mr. Woodall argues that Constable Ghuman believed he had not directed pepper spray at [REDACTED] because he would not have directed OC spray at [REDACTED] with his partner Constable [REDACTED] so close. However, once it appeared that [REDACTED] had been contaminated Constable Ghuman erred on the side of over reporting rather than underreporting and reported that he had sprayed [REDACTED].
- (98) Mr. Woodall notes that even with the inconsistencies Inspector Newton initially believed to exist within Constable Ghuman's statements and the video, Inspector Newton concluded that Constable Ghuman had made honest mistakes rather than lying deliberately.
- (99) I have carefully reviewed all of the evidence. It is clear that Constable Ghuman's report that he pepper sprayed [REDACTED] changed after he had had an opportunity to review the video. I have closely and carefully viewed the video, literally frame by frame, and I am unable to agree with the Discipline Authority's conclusion that there is definitive evidence that pepper spray was used on [REDACTED]. It is apparent that after Constable Ghuman's own review of the video he reached the same conclusion and changed his story to reflect what he had seen. Thereafter, confronted with assertions that the video showed that pepper spray had been used, he tried to explain and rationalize what had occurred. In my view it is important to remember that this was a very brief encounter, something less than a minute, and that the final statements were taken from him nearly two years later.
- (100) I have no hesitation in concluding that the conduct element of the offence of deceit has been established, however on a balance of probabilities I am unable to say that the fault element, that the member knew the statement is false or misleading, has been established to the requisite standard. On the evidence I have reviewed it is not clear to me that Constable Ghuman definitively knew what actually did happen with respect to the pepper spray on [REDACTED]. His attempts to provide an explanation that fits with what he has seen and is being told do not rise to the level necessary to establish the offence of Deceit.

- (101) I find that the Discipline Authority conclusion that the offence of Deceit had been proven was incorrect.

## **V. Analysis & Conclusion**

- (102) My role in this Review on the Record has been to determine whether or not the Discipline Authority was correct, considering the Record before me, the submissions of the parties and the analysis of the Discipline Authority.
- (103) Having concluded the Review, I find that the Discipline Authority was in part, incorrect as outlined above.
- (104) I find that the Member, Constable Ghuman, has committed the following misconduct pursuant to the *Police Act*:
- (a) Abuse of Authority, pursuant to section 77(3)(a)(i),
  - (b) Abuse of Authority, pursuant to section 77(3)(a)(ii)(A),
  - (c) Discreditable Conduct, pursuant to section 77(3)(h)(iii), and
  - (d) Neglect of Duty, pursuant to section 77(3)(m)(ii).
- (105) I find that the allegation against the Member, Constable Ghuman, of Deceit pursuant to section 77(3)(f)(i)(A) has not been substantiated.

## **VI. Disciplinary or Corrective Measures**

- (106) In order to determine what disciplinary or corrective measures are appropriate, I invite further submissions from the parties and their counsel on the findings in this Review.
- (107) I am ordering that any submissions as to disciplinary or corrective measures are to be made by:
- (a) The Commissioner, or counsel for the Commissioner, in writing on or before October 12, 2021, and
  - (b) The Member, or counsel for the Member, in writing on or before October 26, 2021.



Signature of Adjudicator  
Judge John (Jim) James Threlfall (rt.)

Date: September 15, 2021

