

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

AND

IN THE MATTER OF A DISCIPLINE PROCEEDING CONCERNING AN ALLEGATION OF
MISCONDUCT AGAINST CONSTABLE [REDACTED]
OF THE VANCOUVER POLICE DEPARTMENT

REASONS FOR DECISION: DISCIPLINE PROCEEDING

TO: Mr. [REDACTED] (the "Complainant")
c/o [REDACTED], Counsel ("Counsel for the Complainant")

AND TO: Constable [REDACTED] (the "Member")
Vancouver Police Department
c/o [REDACTED], Counsel ("Counsel for the Member")

AND TO: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section

AND TO: Sgt. [REDACTED], Investigator (the "Investigator")
c/o Vancouver Police Department
Professional Standards Department

AND TO: Mr. Clayton Pecknold (the "Commissioner")
Police Complaint Commissioner

I Executive Summary of Decision

The decision outline below concludes that the allegation of the use of unnecessary force on the Complainant by the Member has been proven on the evidence. As such, the allegation of misconduct against the Member under section 77(3)(a)(ii) (A) of the Police Act has been substantiated.

The disciplinary sanctions associated with this decision will be considered once submissions have been received from Counsel for the Member.

II Discipline proceeding – The allegation of misconduct relating to the Member

- (1) This is a Discipline Proceeding convened pursuant to sections 123 to 125 of the *Police Act* relating to a complaint of misconduct concerning the Member.
- (2) On February 20, 2019, an incident took place at the ████████ Hotel (the “Hotel”) in Vancouver that resulted in the arrest of the Complainant and ultimately, his hospitalization, in part to deal with injuries arising during the arrest process.
- (3) On August 26, 2019, Counsel acting on behalf of the Complainant submitted a registered complaint to the Office of the Police Complaint Commissioner (the “OPCC”) with respect to the circumstances of his arrest (the “Complaint”). The Complaint included a very brief summary of allegations made by the Complainant detailing injuries allegedly sustained during the course of his arrest by the members then present.
- (4) Following a review by OPCC staff, the Complaint was accepted as admissible and forwarded to the Professional Standards Section of the Vancouver Police Department (“VPD”) for investigation.
- (5) The allegation of misconduct raised by the Commissioner involving several members of the VPD was as follows:

*That on March February 20, 2019, the members committed Abuse of Authority pursuant to section 77(3)(a)(ii) (A) of the Police Act by using unnecessary force on (the Complainant)
(the “Misconduct Allegation”)*

- (6) The specific details of the use of unnecessary force related to the actions of the Member, and others, in attempting to complete the arrest of the Complainant at the Hotel and, in particular, the display and deployment of a conductive energy device (“CEW”) by the Member during that process.

III History of Proceedings

- (7) The Investigator was tasked with reviewing the conduct of all Officers attending to the incident involving the Complainant, including the Member.
- (8) The Investigator completed her investigation and submitted the Final Investigation Report (the "FIR") to the relevant VPD discipline authority, Inspector [REDACTED] (the "Discipline Authority") on July 3, 2020.
- (9) On July 17, 2020, the Discipline Authority issued his decision pursuant to section 112 of the *Police Act* concerning this matter. The Discipline Authority found that the Misconduct Allegations were not substantiated for any of the Officers attending, including the Member.
- (10) In an order made August 11, 2020, the Commissioner determined that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect.
- (11) Specifically, the Commissioner expressed the view that the Discipline Authority was incorrect in finding that the use of force during the arrest of the Complainant by the attending Officers, including the Member, appeared to be justified in all of the circumstances, thereby negating any conclusion of misconduct.
- (12) I was appointed Adjudicator in connection with this matter as a result of the Commissioner's order of August 11, 2020 made in accordance with section 117(4) of the *Police Act*.
- (13) Following a review of the FIR, on September 15, 2020, I concluded that the Misconduct Allegation concerning the Member appeared to be substantiated and ordered that the issues be addressed in a Discipline Proceeding. A pre-hearing conference was offered to the Member.
- (14) In the same decision, misconduct allegations involving other Officers involved with the Complainant were not found to be substantiated.
- (15) Subsequent to my decision, Counsel for the Member advised that the Member would not accept the offer of a pre-hearing conference. I was also advised that applications were anticipated for additional investigation and, perhaps, the right to call witnesses at the Discipline Proceeding.
- (16) Counsel for the Member sought several adjournments to accommodate investigation of the need for the applications to proceed. Ultimately, I was advised that the Member would no longer be seeking additional investigation nor requesting the right to call

witnesses. Attention then focused on setting a date for the Discipline Proceeding. Ultimately, the matter was set to be heard on January 26, 2021 by video link.

- (17) At the Discipline Proceeding both the Investigator and the Member testified. Submissions were received in writing from Counsel acting on behalf of the Complainant and entered as an exhibit in the hearing. Proceedings were adjourned to allow for written submissions on the evidence adduced which were received March 8, 2021. Follow up oral submissions on those materials were made by video March 12, 2021.

IV Misconduct and the *Police Act*

- (18) Section 77 of the *Police Act* sets out the definition of “misconduct” relevant to the allegation concerning the Member. Specifically, subsection 77 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 [offence to harass, coerce or intimidate anyone questioning or reporting police conduct or making complaint] or 106 [offence to hinder, delay, obstruct or interfere with investigating Officer], or

(ii) a disciplinary breach of public trust described in subsection (3) of this section.

(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

(a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,

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

(A) using unnecessary force on any person.

- (19) An important overall limitation to the definitions 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.

- (20) It is an allegation of misconduct arising under subsection 77(3)(a)(ii)(A) of the *Police Act* concerning the Member’s interaction with the Complainant that is relevant to this Discipline Proceeding.

- (21) These proceedings are not an adjudication of claims or defences raised in other matters, or an appeal of other decisions under the *Police Act*. Rather, this decision reflects an examination of all of the evidence submitted in these proceedings related to the allegation of misconduct defined by subsection 77(3)(a)(ii)(A) of the *Police Act* as qualified by subsection 77(4).
- (22) The standard of proof with respect to the allegations of misconduct is evidence on a balance of probabilities.

V Records submitted for review

- (23) The following records were entered as exhibits in this proceeding:
- (a) The FIR dated July 3, 2020 with video links and related procedural documents; and
 - (b) Submissions from Counsel for the Complainant dated January 13, 2021.
- (24) The two witnesses testifying in these proceedings were the Investigator and the Member.
- (25) These materials, and the testimony of the witnesses, collectively comprise the record with respect to these proceedings (the "Record").

VI The Video of the incident

- (26) Before considering the evidence in detail, it is appropriate to describe the content of key videos of the incident in question contained in the Record.
- (27) On the night of the incident involving the Complainant, the Member and other Officers, part of the interaction was video-recorded on the Hotel house system (the "Video").
- (28) The Video begins with early interaction between the Complainant and staff of the Hotel before a call for police assistance was made. It continues through to the ultimate arrest of the Complainant after the taser incident with the Member.
- (29) The Video is an important part of the Record detailing part of the interaction between the Complainant, Hotel staff and the Officers responding to the 911 calls made for assistance in removing the Complainant. It therefore provides an objective perspective into some of the matters in issue.

- (30) I am aware, however, that the Video itself has limitations. Specifically, the Video only captures the view of a person standing to in front of the hotel lobby and reception desk, and does not provide a 360- degree perspective of all interactions.
- (31) Furthermore, the Video captures only a portion of the overall interactions between the Member and the Complainant in the Hotel lobby area.
- (32) Finally, the Video is limited in the reproduction of fine detail in some areas, particularly in relation to the lobby area near the windows.
- (33) Notwithstanding those limitations, the Video is a critically important part of the Record serving as cogent, objective and reliable evidence of much of what took place that is in issue. As such, it provides the opportunity to compare witness evidence with a reliable, objective record of the interactions between the parties for the period in question.
- (34) One final matter of importance concerning the Video is the issue of time. The Video record, the dispatch records, the CEW records and the records of the Officers present do not coincide as differing time settings seem to have been applied between the various applications. As well, the submissions of Counsel for the Member also rely on times reflected on the Video itself.
- (35) In reviewing these differences, I am satisfied that the general outline of events and the relevant timing associated with those events are substantially consistent between the various records. To resolve these issues, the times noted in the FIR video segment have been taken as a baseline for this decision.

VII Position of Counsel for the Member

- (36) The position of Counsel for the Member was set out in considerable detail in written submissions subsequently augmented by oral submissions on the record.
- (37) With respect to the facts surrounding the Misconduct Allegation, Counsel for the Member's submission can be summarized as follows:
- (a) The facts do not establish misconduct. All force used by the Member was both necessary and reasonable;
 - (b) The Member was at all times engaged in the lawful execution of his duty as a peace Officer;
 - (c) The Member initially used de-escalation techniques in dealing with the Complainant, but quickly determined that such was not likely to succeed;

- (d) The Member was justified in discontinuing further de-escalation efforts as a result of pre-assaultive cues given by the Complainant and his failure to comply with police directions;
- (e) The Member had good and sufficient cause to use force on the Complainant within the guidance of the National Use of Force Framework as a result of:
 - i The Complainant's failure to respond to police directions,
 - ii The pre-assaultive cues arising from the Complainant as the Member and other Officers attempted to complete an arrest,
 - iii The situation arising with the Complainant in a confined space, and
 - iv The Member's assessment that further de-escalation efforts to subdue and arrest the Complainant would not be successful.
- (d) The facts do not establish any serious blameworthy conduct on the part of the Member;
- (e) The Member acted reasonably in displaying and discharging his CEW in accordance with his training and did not do so recklessly or improperly in any manner.

- (38) Counsel for the Member submits that police officers do not have to be perfect in the application of force, they must only be reasonable: *R. v. Nasogaluak*, 2010 SCC 6; *Anderson v. Smith*, 2000 BCSC 1194.
- (39) Counsel further submits that reasonableness in the use of force is demonstrated in and supported by the National Use of Force Framework.
- (40) In considering the application of the National Use of Force Framework to the Member's position on the facts, the submission is that the Member's use of force in the circumstances he was facing was reasonable based on his training, experience and the framework.
- (41) In support of this position, Counsel for the Member relies on evidence of the other attending Officers which, it is submitted, support the Member's assessment of risk, and to a limited extent, the Video.
- (42) Counsel for the Member submits that the Member had the lawful authority to arrest the Complainant as a person unlawfully on the premises of the Hotel.
- (43) Counsel for the Member further submits that having determined that the Complainant was to be arrested, the Member had the common law power to take reasonable steps to ensure the safety of both Officers, the public and the proposed detainee.
- (44) It is specifically submitted that such reasonable steps included displaying and ultimately discharging the CEW towards the Complainant.

- (45) Counsel for the Member submits that the facts of the Dzienkanski case raised during the Discipline hearing are clearly distinguishable from those confronting the Member.
- (46) In the final result, Counsel for the Member submits that the Misconduct Allegation has not been proven against the Member.

VIII Submissions of the Complainant

- (47) Counsel for the Complainant makes submissions concerning the Misconduct Allegation that can be summarized as follows:
- (a) The actions taken by police, including the Member, were unprovoked resulting in serious injuries to the Complainant;
 - (b) An objective observer of the Video would have seen a fearful Complainant backing away from a group of approaching, and threatening, police officers;
 - (c) The Complainant's injuries resulting from his arrest could have potentially been life threatening; and
 - (d) There were no grounds to deploy the CEW or to injure the Complainant in the course of his arrest.

IX Review of the Record– Evidence not in dispute

- (48) The Record does not suggest any dispute with respect to the following facts, namely that:
- (a) At all material times the Member served as a patrol Officer with the VPD. He has done so for approximately 6 years;
 - (b) The Complainant's height was estimated to be approximately 6' - 3" and weighing approximately 250 lbs, apparently larger than any of the four attending Officers;
 - (c) The Member received training in the National Use of Force Framework as part of Justice Institute of BC training. (The specific details of that training have not been provided either in the Record or supplemental submissions);
 - (d) The Member successfully completed the Conductive Energy Weapon training course August 3, 2017 and recertified October 18, 2018. He also completed his firearms qualification February 7, 2019. As well, he appears to have completed training in Crisis Intervention and De-Escalation techniques;

(i) The Incident at the [REDACTED] Hotel

- (e) On February 20, 2019, at approximately 9:53 am, staff at the Hotel called 911 to report an unwanted male person in the hotel lobby. The complaint noted that the male was trying to gain access to the elevator, and being argumentative in doing so. The hotel staff confirmed that the individual of concern had done nothing physical of concern, but was harassing staff verbally. Staff requested assistance in removing the male from the hotel property;
- (f) A second 911 call was received from a Hotel tenant at approximately the same time. In this report, the caller stated that a male was “chasing a female in the lobby” and “grabbing and threatening” a male staff member. The caller did not report any violence or punches and confirmed that he had retreated to his room away from the lobby area;
- (g) In neither report was any advice provided that “weapons” were seen, injuries sustained or property damaged in association with the alleged disturbance involving the Complainant;
- (h) The Video shows, without audio, the Complainant moving through the lobby and reception area before the arrival of police. It does not show any material acts of aggression on the part of the Complainant, nor any grabbing or threatening behaviour;
- (i) What is apparent from the evidence of the Hotel staff, however, is that at this time, they were increasingly uncomfortable with the Complainant on their premises and had asked him to leave without response;

(ii) Call for Assistance

- (j) At 9:56:30 a 911 dispatch classified the calls as a “priority 3” relating to a “disturbance” and an “unwanted person”. A general dispatch broadcast was made to provide the Hotel with assistance;
- (k) The 911 dispatch noted that the subject male was large and being argumentative over requests to leave the premises of the Hotel, although no significant physical interaction was reported. Dispatch advised that Hotel management wanted the subject removed from the premises;
- (l) The first officer to respond to the general dispatch, Cst. G, advised that she would “head up”;
- (m) At 10:00:44 Cst. G arrived at the Hotel and entered the lobby;
- (n) Cst. G, in full uniform, approached the Hotel lobby reception desk and identified herself to the people at the counter. She asked staff behind the reception counter to identify the subject of their call for assistance. The Complainant, then standing at the front counter, was quickly pointed out. He was a large male, over six feet tall with an estimated weight of approximately 250 pounds, much larger than Cst. G;

- (o) Cst. G again identified herself as a police officer, addressed the Complainant and began a dialogue requesting that he confirm his identity. Cst. G's demeanor was calm, professional and focused on the Complainant;
- (p) The Complainant promptly responded to Cst. G, providing a first name and birthdate. However, when asked to spell his first and last names, the Complainant was unable to do so appearing confused to some degree;
- (q) Cst. G noted that the Complainant was calm but appeared focused on the person behind the lobby counter. Cst. G reported that in her discussion with the Complainant, she was attempting to talk him down from whatever he was fixated on, effectively attempting to de-escalate matters;
- (r) At 10:01 33 Cst. G took a moment and dispatched a brief report by radio that she was talking to the Complainant and that he appeared calm;
- (s) Cst. G continued her de-escalation dialogue attempts encouraging the Complainant to voluntarily leave the premises. However, Cst. G was receiving increasingly nonsensical responses in reply from the Complainant. As well no move was made by the Complainant to leave as requested. In fact, the Complainant had moved away from the counter and had his hands on his hips, an apparent defiant gesture;
- (t) Cst. G then made a second set of entries into her notebook recording the encounter;
- (u) At approximately 10:03:54, Cst. G directed a hand gesture to the Complainant indicating that he should leave, however, in response the Complainant did not leave but rather put his hands behind his back and moved closer to the Cst. G staring at her intensely;
- (v) In response, Cst. G put her hand up and clearly told the Complainant not to get too close to her. In response, the Complainant immediately backed away from the member, effectively complying with that direction from Cst. G;
- (w) The elapsed time on since Cst. G's arrival on scene at this point was approximately three minutes. Cst. G had not to this point succeeded in securing the removal of the Complainant from the Hotel, however, she had succeeded in diverting the Complainant's attention from the person behind the reception area desk and managed to do so maintaining relative calm and security for all concerned. Cst. G had also accomplished some communication with the Complainant resulting in him complying with her order to move away. It was, however, clear to all that something unusual was taking place with the Complainant's demeanor and responses to attempts at conversation. Cst. G believe mental health issues might be relevant in dealing with the Complainant;
- (x) At approximately 10:04, the Member and Cst. B, both in full uniform, arrived in the lobby area immediately flanking Cst. G. In apparent response to the arrival of the additional Officers, the Complainant moved further away from the lobby counter to the far west side of the lobby near the windows;

- (y) As well, at this point the Complainant began to demonstrate signs of increased agitation, including muttering to himself, pacing, clenching his fists and locking his eyes on Cst. G;
- (z) The Member was on duty that evening as an Officer specifically trained and equipped with a CEW.

(49) Beyond this stage most of the facts are in dispute.

X Credibility assessments with respect to evidence in dispute

(50) In reviewing the facts in dispute, it is evident that there are clear differences in the unfolding events as described by the various participants. The evidentiary issues arise with respect to four key areas:

- (a) The physical acts and movements of the parties subsequent to the arrival of the Member;
- (b) The demeanor of the Complainant throughout the incident;
- (c) The Member's subjective beliefs throughout the incident; and
- (d) The standards for the use of force on the facts of this case.

(51) In order to make findings of fact on the next stages of the interaction between the Member and the Complainant, I have considered the evidence of all parties with respect to these developments as set out in the Record. I have specifically considered the conflicts arising from the various reports, materials, statements, the Video and testimony of the participants.

(52) I am aware, of course, that my ability to assess the credibility of the various witnesses is limited to a review of the Record. I have not had the ability to personally observe or, indeed, raise questions of any of the witnesses, other than the testimony of the Member and the Investigating Officer.

(53) With those limitations taken into consideration, I have reviewed the evidence provided in the Record.

(i) The Investigator

(54) I have no credibility concerns with respect to the evidence of the Investigating Officer.

(iii) The Member

(55) With respect to the Member, concerns arise with respect to his ability to objectively observe, recollect and report on matters relating to his use of force. The key issues affecting the Member's credibility relate to the reliability of his evidence in relation to the description of his actions and observations on arrival at the Hotel and immediately thereafter.

(56) Specifically, on arrival at the Hotel, the Member immediately concluded with respect to the Complainant that:

"The male appeared to be agitated and nervous. The male had small pupils. The male appeared to be staring through Cst. G. The male appeared to be under the influence of some sort of intoxicant, drug/alcohol." (Transcript page 62)

(57) The Member also stated:

*"A. The sense that I got when I arrived when the -- Mr. [REDACTED] was speaking to Cst. G was that this -- just the situation felt very uncomfortable and very unsafe. It didn't feel like --
Q Why unsafe? Why unsafe? A It was, the best way to describe it is, it was the vibe, or the energy, I got from when I entered the hotel lobby. The fact that he had the pin-prick, (inaudible) eyes, he -- the behaviours he was exhibiting, it just seemed that he was not in a very good state." (Transcript Pages 62/63)*

(58) And further:

A. I felt that the way that the man was presenting himself, the state that he was in, his size, he was -- I believed him to be unpredictable. I didn't feel safe standing near him in that capacity with Cst. G, but I had a few options of where I could stand at that time. And I tried to take over communications because I just felt like things were unsafe at that moment. (Transcript page 64)

(59) A number of concerns arise from those threshold impressions and observations reported by the Member:

- (a) The Member had mere seconds to come to the conclusions he did resulting in the display of the CEW. In no sense had he undertaken a considered assessment of the situation facing Cst. G, Cst. B or himself or the risks inherent in dealing with the Complainant. The Member also had the same very short period of time to reach the conclusion that de-escalation techniques were unlikely to be successful in completing the arrest of the Complainant;
- (b) Notwithstanding a recognition of the obvious skills of an Officer with 6 years of street experience, it seems improbable that a snap impression could result in an

accurate assessment of the situation in the Hotel lobby portrayed by the Member, particularly when those conclusions are measured against the Video. The Video does not confirm the risk of violence described by the Member. These issues affect the reliability of the Member's evidence in describing that risk and reaching the conclusions he did;

- (c) The Member had made no attempt to debrief Cst. G before "taking over communication" with the Complainant. As such, his assessment was missing critical input from an experienced Officer who had been dealing with the Complainant for several minutes without evidence of obvious risk. For example, Cst. G had reported immediately before the arrival of the Member that the Complainant was "calm" and that she was trying to "talk him down" from whatever he was fixated on. Cst. G had managed to get basic identification information from the Complainant, albeit such was incomplete. She had also noted nonsensical replies from the Complainant and that his unexplained agitation appeared to be increasing, making her feel uncomfortable. Of significance, however, the Complainant had also complied with Cst. G's direction to back off when she felt that he had come too close to her;
- (d) On arrival the Member apparently knew none of the developments with Cst. G and the Complainant because he hadn't de-briefed or communicated with his colleague. By failing to consider such information, or make any enquiries of Cst. G as to what had taken place before his arrival, the reliability of the Member's observations and conclusions as to the risks posed by the Complainant were seriously compromised. The certainty of his conclusions appear to have been inaccurate and to some extent misleading in describing the actual risk facing Officers on the arrival of the Member and other colleagues;
- (e) The Member had inaccurately described a situation where "he had few options" as to where he could stand or move on entry. Such a conclusion appears to be inaccurate given that the Video clearly shows that the Member had several options in terms of movement. "Placement" of officers was an important part of defining Officer "presence", sending clear messages to those in the room. It is clear that the Member had choices in terms of placement;
- (f) In addressing the apparent inconsistency in placement options between the Member's testimony and the Video, the Member acknowledged that other placement options existed, however, maintained that in fact "*it was not advantageous for me to go to*" other locations due to his assessment of the situation at hand. Again, it appears that the Member has exaggerated the confined nature of the area he had to work with the result that there was a further enhancement of a somewhat misleading narrative of the initial risk posed by the Complainant;
- (g) By creating a false and somewhat exaggerated sense of the risk posed by the Complainant, the reliability of the Member's evidence at this point is further diminished;

- (h) The Member reported that as he was communicating with the Complainant in the initial moments after the Member's arrival, he noted that the Complainant had small pupils, appeared to be sweating and "*appeared to be getting more aggravated as time progressed*". (transcript page 66) The Member acknowledges that the progression of time relevant to these matters was seconds;
- (i) The Video does not show any overt risk to any person during this time. As well, the Member immediately concluded with respect to the Complainant that "*he kind of wiped his nose in that sort of a gesture like a boxer or a street fighter would*". The Member reported that this gesture was taken by him as an aggressive act. At a minimum, such a conclusion was an observation on a cue given by the Complainant that had dubious relevance to risk and was not reported by other Officers present. The Member's observation was speculation made in seconds and again diminished the reliability of his comprehensive assessment of the risk posed by the Complainant;
- (j) Although some of the Member's initial observations of risk cues were adopted by Cst. B, as noted below, he experienced the same issues in terms of the reliability of his reporting. However, not all of the Member's observations were confirmed by Cst. B such as the observation of small pupils or profuse sweating. Cst. G did not confirm the small pupils either but did observe that the Complainant was agitated and clenching his fists;
- (k) In terms of de-escalation efforts, the Member reported that he had dismissed that option as in his view it was not workable given the Complainant's "level of violence and mental state". None of the evidence confirms acts of violence on the part of the Complainant before deployment of the CEW;
- (l) In responding to that apparent inconsistency in the Member's evidence, he qualified his initial answer by saying that "*violence meaning the pre-assaultive cues I was seeing and interpreting from him*". Pre – assaultive cues were not overt violent acts and could have been consistent with not only possible future aggression, but also other physical or mental health issues. Again, the Member's evidence appears to have over dramatized the risk posed by the Complainant by attributing acts of violence to him that simply had not taken place. This further diminishes the Member's reliability as an objective and accurate reporter of events and assessor of risk;
- (m) The Member drew his CEW in less than thirty seconds of arriving on scene, and hence the conclusions he reached as to the risk posed by the Complainant in the first few seconds are critically important. Overall, I find that the Member inaccurately exaggerated the risks posed by the Complainant from the outset when contrasted with the Video record;
- (n) Unquestionably, the Complainant had not complied with orders to leave the Hotel lobby. As well, he had been inconsistent in complying with police directions and attempts at communication. Without doubt the Complainant was a challenge to deal with, however, Cst. G had been doing so for several minutes before the arrival of the Member without obvious heightened risk to individuals, the Hotel itself or Officers present. In fact, Cst. G had succeeded in diverting the Complainant's

attention from the person behind the lobby counter, an initial priority. It was unclear to all present whether or not they were dealing with overt possible criminality or an evolving physical or mental health issue; and

- (o) The Member's initial conclusions concerning the Complainant reflect inaccuracies that diminish the reliability of his evidence of risks posed by the Complainant and hence, his credibility as an objective witness.

(iv) Other Parties

- (60) The evidence of Cst. G, the first Officer on scene, paints a slightly different picture of the risks presented by the Complainant. Her initial impressions were of a large man who was acting irrationally, but not violently. Indeed, as noted above, Cst. G confirmed in her first radio dispatch after arriving on scene that "he (*the Complainant*) was calm" and that she was trying to talk him down from whatever he was fixated on (FIR p. 52).
- (61) Cst. G later confirmed that the fixation appeared to be on a female behind the counter and she acknowledged that such a fixation made her feel uncomfortable. Her discomfort was enhanced by the Complainant staring at her intensely clenching his fists.
- (62) However, Cst. G was able to establish the start of a dialogue with the Complainant eliciting his first name and birthdate. As well, when the Complainant moved too close to Cst. G, he complied with directions from the Officer to back off.
- (63) Cst. G had the longest time with the Complainant before deployment of the CEW. Her conclusion was that "*he was like someone under a drug psychosis*". (FIR p. 53) Had the Member known of that assessment, his risk assessment may well have taken a different path.
- (64) I find that Cst. G was a credible witness and accept her assessment of the situation involving the Complainant.
- (65) Cst. B accompanied the Member on arrival at the ██████████ Hotel. In his evidence, Cst. B largely confirmed the observations of the Member. Cst. B had joined Cst. G in believing that the Complainant was likely under the influence of drugs.
- (66) I find that Cst. B faced many of the same reliability issues arising from the Member's evidence, including the fact that he had mere seconds to observe before the Member acted. As a result, Cst. B's evidence faces similar reliability concerns to those articulated concerning the Member.
- (67) Cst. E was the last to arrive and did so as the Complainant was cornered by the other Officers with the CEW displayed. As such he had no evidence to offer on matters before that time other than being aware that the Complainant was subject to arrest for causing a disturbance.

- (68) The evidence of other hotel staff was of limited utility. Mr. [REDACTED] was not present before deployment of the CEW. As such his evidence on the issues of concern in this hearing is marginally relevant.
- (69) Mr. [REDACTED], a tenant of the Hotel, had initially reported to 911 that the Complainant was chasing a female staff member and grabbing a male staff member in the lobby. Mr. [REDACTED] provided a written statement however was never interviewed. His evidence was not credible given the lack of investigation of his reports. As well, Mr. [REDACTED] was not present when the Member arrived and deployed his CEW.
- (70) Mr. [REDACTED] the Hotel manager gave written and oral statements. He confirmed Cst. G's reports that the Complainant had ignored multiple requests to leave the premises. He also advised that there had been a similar incident with the Complainant two weeks earlier. On the 20th of February, Mr. [REDACTED] reported that the Complainant kept backing away from Officers present, his hands behind his back as they insisted he allow them to apply handcuffs and remove him from the Hotel. Mr. [REDACTED] also confirmed that in his view the Officers were "very calmly" asking an increasingly agitated Complainant to submit to arrest and leave the premises.
- (71) Mr. [REDACTED] s evidence was objective and largely confirms the Video record of events. I accept his evidence as credible on demeanor and prior history with the Complainant. However, this evidence lack details on the specific actions of the Member in deploying the CEW. It also does not detail Cst. G's de-escalation efforts before the Member's arrival on scene.
- (72) Finally, it is also clear that none of the prior history involving the Complainant was made known to the Member or other Officers. As such, this information while likely credible, has little relevance to the decisions made by the Member.
- (73) Finally, the evidence of Ms. [REDACTED] is important as she was apparently the focus of the Complainant behind the lobby desk.
- (74) Ms. [REDACTED] was understandably uncomfortable with the movements and actions of the Complainant, however, she left the lobby area as police arrived and saw very little of what subsequently took place. Ms. [REDACTED] was a credible witness on the issue of the Complainant's actions and demeanor before the arrival of police.
- (75) The Complainant himself provided limited input into the investigation of this incident. The evidence that does exist is largely limited to submissions advanced by Counsel for the Complainant.

- (76) However, even those limited submissions lack depth as key hospital records were never produced, nor did the Complainant submit to an interview by the Investigator or answer written questions submitted. Counsel submissions are no substitute for direct evidence from the Complainant's perspective.
- (77) In short, the absence of evidence of the Complainant on key issues has left both the Investigator and myself to consider the statements of other parties and the Video to ascertain the facts.
- (78) I can make no assessment of the Complainant's credibility on the limited material before me.

XI Findings of fact on evidence in dispute

- (79) Having considered the Record and the credibility of the parties noted therein, I find with respect to the evidence in dispute concerning the actions of the parties that:
- (a) On arrival at the [REDACTED] Hotel lobby at 10:05:08, the Member immediately took over communication with the Complainant from Cst. G. The Complainant was unknown to any of the Officers present, particularly the Member, nor were any aware of the Complainant's prior dealings with Hotel management or apparent criminal record;
 - (b) In taking over dealings with the Complainant, it is significant that the Member took no steps to ascertain what Cst. G had been doing with the Complainant, her perspective on the prospects for further de-escalation and any risks that might be posed by the Complainant. The Member had, however, immediately concluded, on very limited facts from dispatch and observations on arrival, that a different approach was necessary to achieve the removal of the Complainant from the Hotel lobby;
 - (c) The Complainant to this point had posed no imminent physical threat to anyone, nor had he damaged any property. He had refused multiple requests from the Hotel management to leave the facility, and as well refused to comply with similar orders from Cst. G. The Complainant evidenced some degree of agitation for unknown reasons and appeared at times confused and incoherent. Cst. G had been working with the Complainant for several minutes to de-escalate matters since her arrival and had achieved some degree of compliance from the Complainant with her demands for responses and movements;
 - (d) It was unclear to all present whether or not the Complainant was experiencing an adverse drug reaction, a health issue or mental health challenges. It was clear that effective communication with the Complainant was a major challenge;
 - (e) In taking over from Cst. G, the Member first confirmed his status as a police Officer and explained that he had to place the Complainant in handcuffs and remove him from the property. Counsel for Member has argued that the initial communications by the Member directed to the Complainant was in the spirit of de-escalation efforts. With respect, I cannot agree. The Member had decided on arrival that a firmer hand was

required and none of his efforts were intended to de-escalate matters. The Member intended to handcuff the Complainant and remove him from the Hotel Property from the outset;

- (f) The presence of three Officers in the confined space of the Hotel Lobby was an immediate substantial increase in member presence and an escalation from Cst. G's approach. In taking that approach, the Member had decided to effect removal of the Complainant from the Hotel rather than pursue de-escalation efforts. There was no evident urgency to achieve that goal. Based on the actions of the Member, I do not accept the argument that his efforts before displaying the CEW were targeted at de-escalation;
- (g) The Member justified this change of tactic away from de-escalation on an incomplete assessment of the situation involving the Complainant, the risks he posed and the prospects for de-escalation success with continued effort;
- (h) The Member began by clearly and calmly identifying himself as a police officer making direct eye contact with the Complainant. At that point he was flanked by the two other Officers facing the Complainant. The Member explained that the Complainant was under arrest and would be handcuffed and removed from the Hotel;
- (i) The Complainant did not appear to respond to the initial communication attempts of the Member, but rather stared intensely at the Member;
- (j) At 10:05:13 the Complainant initially put his hands on the lobby desk, then moved away from the three Officers;
- (k) At 10:05:27 the Complainant threw his arms into the air in apparent frustration. Cst. G moved to cover one of the exits from the lobby while Cst. B begin to put on his gloves, apparently anticipating physical contact with the Complainant;
- (l) At 10:05:34 the Complainant moved back to the counter placing his hands behind his back approximately five feet from the Officers then present. No overt aggression is observed on the Video arising from the Complainant, however, it is clear that he is not complying with directions to submit to arrest and handcuffing;
- (m) At 10:05: 43, approximately 35 seconds after arrival on scene, the Member drew his CEW, another escalation in presence with the implied use of force. At this point it is clear that the Complainant has failed to comply with directions of the Member, although he had complied with some directions of Cst. G. As well, the Complainant was exhibiting at least passive resistant behaviour, but at this point was not actively resisting;
- (n) At this point, I am satisfied that the Member had concluded that it would not be safe to try to control the Complainant with empty handed physical controls. However, the basis for the conclusion rested on an incomplete risk assessment and the absence of any immediate threat arising from the Complainant requiring urgent action. Unquestionably Hotel management wished the Complainant removed and police believed that the Complainant needed to be handcuffed to accomplish that outcome. However, there was no urgency to complete that objective and with three Officers on scene, soon to be joined by a fourth, no reasonable prospect of risk or violence, absent physical action taken by police;

- (o) The Member continued to issue verbal commands for the Complainant confirming that he was under arrest directing him to submit to being removed from the facilities, however, the orders now escalated to require that the Complainant lay down and submit to handcuffing. The Complainant did not comply;
- (p) At approximately 10:05:50 the Member snapped his fingers to get the Complainant's attention. In response, the Complainant briefly turned, looked towards the Member, and then turned away;
- (q) At this point the Complainant was at the lobby counter continuing to have his hands held behind his back, with the Member approximately five feet to his right. Cst. G and Cst. B were positioned behind the Complainant, each several feet away;
- (r) At approximately 10:06, the Complainant turned and moved away from the lobby counter in the direction of the lobby window and chairs;
- (s) Noted to be in that general area were an unspecified number of potted plants, some furniture and a large metal safe. The three Officers present, including the Member followed the Complainant, effectively encircling him in the window area;
- (t) At approximately 10:06:03 Cst. E arrived on scene, also in full uniform, and joined the other Officers encircling the Complainant. His first act was to escort an elderly gentleman from the lobby area. There is no evidence that the Complainant posed any risk to the elderly gentleman as he moved in and around the lobby window area. There were then four uniformed Officers confronting the Complainant, with the Member in the vanguard;
- (u) The Member continued his brief dialogue attempts and commands directed to the Complainant again, without response or compliance;
- (v) Slightly more than a minute after arriving on scene, and twenty-eight seconds after the Complainant had moved to the lobby window area, the Member drew his CEW, raised his right arm and directed the weapon towards the Complainant. The Member drew and displayed the CEW, because:

"I felt the need that it may need to be used, but also that if was drawn and present, that it may be some sort of indication that could bring about a conversation with the person where they may think that, that it may be used and it may present to them that they're be willing to talk to us moving forward the conversation could continue." (page 75 transcript)

(i) **Discharge of the CEW by the Member**

- (w) Fifteen seconds after the CEW was drawn and pointed at the Complainant, there was still no response to the Member's commands;
- (x) The Member maintains that at this point he believed that the Complainant displayed pre-assaultive cues including:
 - (1) Staring at the Member
 - (2) Not responding to the Member's demands
 - (3) Clenching his fists
 - (4) Pacing

- (y) The Member continued to issue firm commands to the Complainant to lay down and submit to handcuffing. The Member also issued at least two warning that if he did not comply with directions, the Member would discharge his CEW which would hurt;
 - (z) The Complainant did not comply, however, there was no apparent change in risk or any violent acts on his part other than the Complainant's unsettled and shuffling movements and clenching of fists;
 - (aa) At 10:06:59 the Member turned to consult briefly with the other Officers present, effectively confirming that the CEW would be discharged and ensuring that those present would be ready to move in;
 - (bb) At 10:07:13 the Member discharged the CEW hitting the Complainant in the lower left torso. All other Officers present immediately moved in to attempt to take the Complainant into custody;
 - (cc) The CEW appears to have partially succeeded in bringing the Complainant to his knees, however, did not immobilize him because the probes had not connected with his body. Although the Complainant initially fell to his knees, he immediately began to struggle with the Officers who had moved in to complete the arrest. The Member attempted to discharge a second time, however, that effort also failed to achieve a "lock up" of the Complainant. As such, the initial efforts at apprehension and the application of handcuffs did not succeed. It is clear that the Complainant was at that point actively resisting the Members as they tried, with considerable difficulty, to subdue and control the Complainant;
 - (dd) The CEW use records reported in the FIR at page 55 show that the weapon was "triggered" five times each for a 5 second duration. The Investigator concluded that the records were consistent with the Member's statements on the deployment of the CEW assigned to his use;
 - (ee) The Member appears to have immediately recognized that the initial CEW discharge was not completely effective in subduing the Complainant. As noted, up to 5 additional discharges were triggered by the Member, however, the result was not effective, likely due to an incomplete penetration of the CEW probes;
 - (ff) Recognizing that the CEW alone would not subdue the Complainant, the Member changed tactics and struck the Complainant in the head several times with the CEW unit in an attempt to stun or distract the subject. The Member also applied several kicks to the partially standing Complainant;
- (ii) **Arrest follow up, Transfer of Complainant to Hospital**
- (gg) Ultimately, after a significant struggle with the Members, the Complainant was subdued, cuffed and hobbled completing his apprehension;
 - (hh) The Complainant was then removed from the Hotel and placed in the care of Emergency Health Service ("EHS") paramedics who had just arrived on scene. The assessment of those professionals appears to have been that the Complainant was "delirious and agitated" with a Richmond Agitation Scale ("RAS") score of +4. (As detailed in the FIR, such a score equates to an assessment of extreme agitation with delirium with possible violent, aggressive and uncontrollable behaviour);

- (ii) With assistance of unnamed additional members, the Complainant was administered 500 mg of Ketamine by the paramedics to provide some degree of sedation. The Ketamine reduced the Complainant's RAS score to -1 within a short time.;
- (jj) The primary diagnosis of EHS paramedics was of possible mental health or psychological issues;
- (kk) The Complainant was transported to ██████████ Hospital and admitted for acute psychosis. The only injuries noted by EHS paramedics were minor lacerations to the Complainant's face; and
- (ll) The attending physicians advised that the Complainant had ultimately been certified under the *Mental Health Act*; and
- (mm) No report of the hospital treatment was provided to the Investigator despite several requests. As such there does not appear to be any independent corroboration of the serious injury claims advanced by Counsel to the Complainant.

XII The law

- (80) There are three key areas of law that must be considered in relation to the Member's conduct:
- (a) The Provincial Policing Standards for the use of CEWs (the "Provincial Standards");
 - (b) Section 77(3)(a)(ii) (A) of the *Police Act*; and
 - (c) Caselaw and adjudicative decisions relevant to allegations of misconduct involving the use of force.
- (81) To a large extent, the first two areas of law overlap and engage similar, if not the same, tests. I will begin by considering the relevant Provincial Standards and then consider whether or not the Member's conduct under those standards contravenes section 77(3)(a)(ii) (A) of the *Police Act* in light of the relevant authorities.

(i) Provincial Standards- CEWs

- (82) The Provincial Standards have two provisions directly relevant to the facts of this case set out in section 1.3.1 (1) and (2):

The standards :

- (1) Prohibit Officers from discharging a CEW against a person unless:*
- (a) The person is causing bodily harm to either themselves, the Officer, or a third party; or*
 - (b) The Officer is satisfied, on reasonable grounds, that the person's behaviour will imminently cause bodily harm either to themselves, the Officer, or a third party.*
- (2) In addition to Standard (1) above, prohibit Officers from discharging a CEW against a person unless the Officer is satisfied, on reasonable grounds, that:*

- (a) *Crisis intervention and de-escalation techniques have not been or will not be effective in eliminating the risk of bodily harm; and*
- (b) *No lesser force option has been, or will be, effective in eliminating the risk of bodily harm.*

(ii) The Braidwood Commissions of Inquiry - CEWs

- (83) The Provincial Standards evolved directly from an inquiry into the use of CEWs conducted by the late T. R. Braidwood, Q.C. Justice Braidwood's inquiry arose from his investigation into the circumstances surrounding the death of Robert Dziekanski involving a CEW completed in 2010. I am satisfied that a recounting of the general circumstances surrounding the incident involving Mr. Dziekanski and history of the issues surrounding the use of CEWs is relevant to these proceedings to give proper context and background to the Provincial Standards established for the use of CEWs.
- (84) As outlined in Justice Braidwood's report dated June 18, 2010 at page 7, the key facts associated with the deployment of a CEW toward Mr. Dziekanski were as follows:

" Mr. Dziekanski entered the semi-secure International Reception Lounge at 12:40 a.m. The Airport's closed-circuit video showed him pushing his luggage cart into the public Meeting Area, apparently looking around for someone.

Members of the public and people working at the Airport used various words to describe his behaviours — unusual, upset, nervous, angry, distraught, and bizarre. He was sweating, appeared to be talking to himself, and at one point hit the glass doors with his hands in an attempt to get back into the lounge. He used his suitcases and a chair to form a barrier. Several people approached and talked to him, but could not communicate with him. None felt threatened by him, although several were reluctant to encroach on his "territory."

Much of this interaction was caught on a bystander's video (the "Pritchard video"), which also showed Mr. Dziekanski smashing a small folding wooden table against a glass wall and throwing a computer on the floor, breaking it. However, one characterizes his agitation and frustration, it was not directed at other people. Several people who were in the public Meeting Area called 911 or the Airport's Operations Centre about the disturbance.

At 1:23 a.m., the Operations Centre called the RCMP about an apparently intoxicated 40-year-old male in the International Reception Lounge throwing suitcases and chairs around. The Airport's own security personnel were also dispatched to the scene, but on their arrival, they did not approach Mr. Dziekanski in accordance with their "observe and report" mandate.

The four RCMP Officers arrived at 1:28 a.m. As the four Officers approached the swinging glass doors that separated the public Meeting Area from the International Reception Lounge, they saw Mr. Dziekanski. Their descriptions paint a fairly consistent picture of a man who was unkempt and sweating,

breathing heavily, disoriented, agitated, perhaps emotionally disturbed, and with a wide-eyed, glazed look. He was calm and cooperative when the Officers first engaged him, with his hands at his side. There was debris on the ground, but no sign of broken glass. Cst. B assuming the role of contact Officer, took an appropriate first step by saying, "Hi, how are you, sir? How's it going, bud?" Owing to the language barrier, Mr. Dziekanski did not respond.

At that point, Cst. M unilaterally intervened as contact Officer, making hand gestures for Mr. Dziekanski to calm down, asking for "passport" and "identification," and miming writing with a pen. Although his intervention was not warranted, I am satisfied that it was well-intentioned and was a reasonable way of establishing whom they were dealing with.

The Pritchard video shows Mr. Dziekanski making a very tentative downward movement toward the nearby luggage, which I am satisfied was his attempt to comply with Cst. M's demand to retrieve his travel documents. As Mr. Dziekanski bent down (at 3:37 on the Pritchard video), Cpl. R stepped in and took charge. He said, "No. Stop" in a stern, authoritative voice, and made a pointing gesture with his arm. Mr. Dziekanski stopped going toward his luggage. According to the Pritchard video he returned to a normal upright stance, with his arms at his side, engaging in eye contact with the Officers. In my view he was complying with Cpl. R's direction. It was not necessary for Cpl. Robinson to intervene at all, and even if it was, given the circumstances it was an inappropriately aggressive reaction.

At 3:41, Mr. Dziekanski then threw up his arms, lowered his head and turned away from the Officers, moving toward a nearby counter. As he did so, Cpl. R moved closer behind him with his arm outstretched, pointing toward the counter. Mr. Dziekanski said, in translation (at 3:43): "Leave me alone. Leave me alone! Did you become stupid, or Have you gone insane? Why?" Although the Officers described Mr. Dziekanski's behaviour as defiant or resistant, I disagree. He took this action on his own initiative out of frustration, not in response to a command from any of the Officers. He had not been told to stay where he was, so in moving away he was not acting contrary to a direction or command. If Cpl. R wanted Mr. Dziekanski to put his hands on the counter, I am not satisfied that Mr. Dziekanski understood any such direction.

As Mr. Dziekanski moved toward the counter, Cpl. R followed close behind, pointing toward the counter. When he did so, the video shows that Mr. Dziekanski did in fact move to the counter, which I interpret as him acting in compliance with Cpl. R's direction. Mr. Dziekanski reached the counter at 3:44, turned and faced Cpl. R.

At 3:45 Mr. Dziekanski shuffled backward a step, rotated to his right, and picked up a stapler off the counter. At 3:46 Cst. B appeared to react to something he saw, and at 3:47 Cpl. R pulled out his baton. The Pritchard video shows Mr. Dziekanski with his upper arms against his torso, but his lower arms and hands are not visible. At 3:49 he may have said, "Police, police." Cpl. R raised his left arm and pointed at Mr. Dziekanski, and one hears the snap of Cst. M deploying the conducted energy weapon in probe mode.

I am satisfied that after Mr. Dziekanski picked up the stapler, he held it in his right hand, in front of him, and at or below his chest level. He did not brandish the stapler by either placing it above his head or motioning with it in an aggressive manner toward any of the Officers. Further, I have concluded that Mr. Dziekanski did not step toward one or more of the Officers while clenching the stapler. Attempts by Cst. R and Cst. B, during their testimony, to clarify their statements to IHIT investigators and in their police notes were patently unbelievable after-the-fact rationalizations.

Cst. M and Cpl. R gave three reasons for deploying the weapon: Mr. Dziekanski's combative nature or stance, his clenching the stapler in his raised fist, and his stepping toward the Officers. They testified that they believed he intended to attack. In my view, Cst. M was not justified in deploying the weapon against Mr. Dziekanski, given the totality of the circumstances he was facing at the time. Similarly, Cpl. R was not justified in instructing him to deploy the weapon. Further, I do not believe that either of these Officers honestly perceived that Mr. Dziekanski was intending to attack them or the other Officers.

Neither Officer carried out an appropriate reassessment of risk immediately before deployment of the weapon. They approached the incident as though responding to a barroom brawl and failed to shift gears when they realized that they were dealing with an obviously distraught traveler. I am equally critical of the policy and training paradigm that fosters such poor decision-making."

(85) As noted at page 5 in Justice Braidwood's final report of June 18, 2009 on the subject of the use of CEWs by police Officers:

"In October 2007, at the Vancouver International Airport, an Officer of the Royal Canadian Mounted Police used a conducted energy weapon (CEW) against Mr. Robert Dziekanski, who died within minutes. Public reaction to this incident was immediate and intense and, at a more general level, concern was expressed about the deployment and use of conducted energy weapons by policing bodies in British Columbia. In response to this public concern, the provincial government appointed me to conduct two separate inquiries under the new Public Inquiry Act. "

And further at page 15:

"Based on the presentations of psychiatrists, other mental health professionals, and emergency medicine physicians, I concluded that:

- *Police Officers are called upon, with increasing regularity, to deal with emotionally disturbed people who display extreme behaviours, including violence, imperviousness to pain, superhuman strength and endurance, hyperthermia, sweating, and perceptual disturbances.*
- *Such emotionally disturbed people are often at an impaired level of consciousness; may not know who they are or where they are; may be delusional, anxious, or frightened; and may be unable to process or comply with an Officer's commands.*
- *This cluster of behaviours is not a medical condition or a diagnosis. They are symptoms of underlying medical conditions that, in extreme cases, may constitute a medical emergency.*
- *The Officer's challenge is not to make a medical diagnosis, but to decide how to deal with the observable behaviours, whatever the underlying cause.*
- *It is not helpful to blame resulting deaths on "excited delirium," since this conveniently avoids having to examine the underlying medical condition or conditions that actually caused death, let alone examining whether use of the conducted energy weapon and/or subsequent measures to physically restrain the subject contributed to those causes of death.*
- *The unanimous view of mental health presenters was that the best practice is to de-escalate the agitation, which can best be achieved through the application of recognized crisis intervention techniques.*
- *Conversely, the worst possible response is to aggravate or escalate the crisis, such as by deploying a conducted energy weapon and/or using force to physically restrain the subject. It is accepted that there may be some extreme circumstances, however rare, when crisis intervention*

techniques will not be effective in de-escalating the crisis. But even then, there are steps that Officers can take to mitigate the risk of deployment. "

(iii) Position of Counsel for the Member on the Dziekanski case

(86) Counsel for the Member has raised in her submissions the argument that the facts of this case and that of Mr. Dziekanski are not strikingly similar. With respect, I cannot agree with that submission. Let me explain:

- (a) Counsel notes that Mr. Dziekanski was not compliant in any respect. In fact, Mr. Dziekanski did comply with some of the directions from police notwithstanding his language issues. Compliance included stopping a move towards his luggage when directed and moving to the counter when directed by hand gestures of an Officer.
- (b) Counsel notes that there was a known language barrier with Mr. Dziekanski and not the Complainant. The issue, however, is whether or not given the apparent mental issues facing the Complainant he was capable of understanding directions made by police. Having been ultimately certified under the *Mental Health Act* it is clear that at a minimum some mental health challenges existed for the Complainant. Simply put, the Member and other Officers present did not know what was being understood by the Complainant in the very brief time before the CEW was discharged;
- (c) It is also submitted that in the Dziekanski case, civilian witnesses were communicating with the police providing information that militated against a belief that Ms. Dziekanski had the potential to harm others. In the present case, there was one unconfirmed report from Mr. ██████ of assaultive behaviour. I have not found Mr. ██████ to be credible and the evidence of other witnesses really does no more than raise the prospect of an unwanted person on premises who made people feel uncomfortable. There is no evidence that any acts of violence had taken place;
- (d) With respect to display and discharge of the CEW in the Dziekanski case, it is submitted that the RCMP Officer involved provided no warning of intended use, and repeated use after Mr. Dziekanski was down. It is acknowledged that the unlike the RCMP officer, the Member provided warnings of his intention to use the CEW on the Complainant. However, as with the Dziekanski case, multiple discharges of the CEW unit took place as the Member attempted to subdue the Complainant; and
- (e) Finally, Counsel notes that unlike the Dziekanski case, the evidence of pre-assaultive cues provided by the Member and others has been established as credible and reliable. Again, with respect, I cannot agree such a conclusion is correct. I have found serious issues of reliability, and hence credibility, in the Member's assessment of risks posed by the Complainant, including his reports of pre-assaultive cues. While I do not go so far as to conclude as Justice Braidwood did that the Officer evidence of pre assaultive cues was "*patently unbelievable after-the-fact rationalizations*", I have found that all such cues were not shared by all

observers, and those that existed were potentially consistent with mental health or drug reaction issues being experienced by the Complainant.

(iv) Relevance of the Dziekanski case

(87) I find that the facts surrounding the Dziekanski case were serious and regrettably resulted in the death of the traveller as a direct result of the CEW deployment by police. I am satisfied that the circumstances of this case bear striking similarities to some of the circumstances surrounding the Complainant. These include:

- (a) An obvious confused, agitated and disturbed individual in a confined space demonstrating erratic behaviour;
- (b) Difficulties communicating effectively with the individual in question;
- (c) Sweating, staring and partial compliance with police directions;
- (d) Moves to and away from Officers in a confined space;
- (e) The presence of four Officers on scene; and
- (f) The lack of any meaningful assessment of the actual risk posed by the individual concerned before deployment of a CEW.

(88) Differences of relevance appear to be as follows:

- (a) The destruction of a computer and other property by Ms. Dziekanski before the arrival of police;
- (b) The movement of property to create barriers and the brandishing of a stapler by Mr. Dziekanski before being targeted by the CEW; and
- (c) A much longer time of police engagement before deployment of the CEW against Mr. Dziekanski, although it is clearly acknowledged that no warning of that deployment was provided to Mr. Dziekanski.

XIII Application of the Provincial Standards to the Facts of this case

(89) With respect to subsection (1)(a) of the Provincial Standards for CEWs, there is no evidence that the Complainant was causing bodily harm either to himself, any Officer or any third party before the discharge of the CEW by the Member.

(90) With respect to subsection (1) (b), the evidence confirms that the Member had concluded within seconds of arrival on scene that the Complainant's behavior would imminently cause bodily harm to the attending Officers or third parties.

(91) I am not satisfied, however, that the Member had reached that conclusion on reasonable grounds. The Member lacked reasonable grounds because no violence had resulted arising from the actions Complainant, nor was any such violence imminent absent forceful physical action by police. Some pre-assaultive cues had been given by the Complainant, as noted above, however:

- (a) The Member had not witnessed any acts of violence from the Complainant in relation to persons or property. Although some Officers maintained that pre-assaultive cues were evident, there is no evidence that the Complainant had actually acted to assault anyone or threaten such action;
- (b) The Complainant had retreated away from the four Officers that had arrived, seeking to put distance between himself and those attempting to enforce his removal; and
- (c) The Member had confirmed that there was no apparent urgency to force the removal of the Complainant from the Hotel, and as such no potential immediate risk to life or safety of any person. The only risk that was on the horizon was the risk of increased aggression if the Officers present pressed the issue of immediately handcuffing the Complainant. At the point where the CEW was displayed and later discharged by the Member, the Complainant was contained by four Officers in a defined area. There was therefore no urgency to immediately complete the arrest nor imminent risk to anyone.

(92) In terms of subsection 2 (a), the Member testified that he had concluded no further efforts at de-escalation were appropriate to deal with the Complainant almost immediately after his arrival. The Member said with respect to his decision not to pursue further de-escalation after his arrival on scene:

“At that point in time we'd been very calm and professional with him. We'd explained what was happening, we explained what we needed to occur and why, we explained the need to put him in handcuffs and escort him from the lobby. There'd been no sort of attempt at verbal communication on his end to acknowledge that he had understood or was willing to understand what was being told of him. Paired with the pre-assaultive cues that I noted, the intense stare, the strong, rigid stance, at this point he'd done fist clenching. It did not appear that ongoing communication and de-escalation attempts were going to be successful. I felt that his level of violence and his mental state were just occurring in a direction that was going to be problematic and dangerous to us and the public and himself.” (page 84/85 Transcript)

(93) The Member further explained with respect to the urgency to act:

*Q Okay. Did you feel a sense of urgency to get him out of the lobby?
A Not necessarily an urgency to get him out of the lobby at that point. My desire, my urgency, was to get him in handcuffs so that he could be in a state of control by police, so that we could dictate where he moved and how he moved, and that we could control him in that location.(page 86 Transcript)*

(94) In response to questions with respect to consideration of lesser force options to effectively eliminate the risk of bodily harm, the Member said as follows:

Q I want to direct your mind to the moment where you lift your taser and point it at Mr. [REDACTED]. At that point, taking you back to that moment, are you considering any lesser force options?

A Not at that point, no.

Q Okay. Why not? A Any lesser force option that would've been available to us, although I was continuing to engage in verbals, any other sort of lesser force option wouldn't have been appropriate. It would have required to us to get within arm's reach of Mr. [REDACTED]. It would have required us to then approach him in his position where it was advantageous to him and not advantageous to the police. That puts us at a disadvantage. In the state he's in, his apparent strength, his sheer physical size, I thought it was possible that if we did use some sort of lesser force that he'd be able to disarm or simply fight off those attempts. (page 87 Transcript)

(95) In considering whether or not the Member's conclusions on the factors in subsection 1(2) a & b were based on reasonable grounds, I have noted that:

- (a) The Member had not conferred with Cst. G on her communication or de-escalation efforts before deciding to intervene and abandon that tact. In fact, the Member does not appear to have given any serious consideration to the appropriateness of de-escalation efforts, which may have been appropriate given the possible mental health or medical issues that may have been affecting the Complainant;
- (b) The facts are that Cst. G had achieved some success with the Complainant in complying with directions to give his name and to move away from Cst. G;
- (c) The dramatically increased use of "presence" was available once the Member and Csts B and E had joined Cst. G in the lobby. Such presence might have provided a foundation to de-escalate while ensuring the safety of all person present; and
- (d) There was no imminent risk of bodily harm from the Complainant absent the potential for such risk if increased force were used by the four Officers present. Unlike the situation with Mr. Dziekański at the Vancouver Airport, there were no objects being thrown , nor property being upturned by an irrational subject. Here the Complainant was clearly agitated, uncooperative and acting in an unusual manner. However, he had retreated further from the four Officers who had arrived and was completely contained by those then in attendance. The prospects of risk of injury to anyone were minimal until further force was applied and there was no immediate compelling reason to do so.

(96) I find that in no sense did the Member have reasonable grounds to abandon de-escalation or lesser force efforts before deploying and discharging the CEW. Cst. G had been achieving some success in dealing with the Complainant and there was simply no urgency to abandon those efforts in pursuit of what had begun as the enforcement of a civil matter, the removal of the Complainant from the Hotel property.

(97) I find that it would have been reasonable in all of the circumstances to allow Cst. G to continue her efforts to try to determine what was causing the Complainant to act as he was. Ultimately, force may have been required to complete the arrest of the Complainant, however, not until a proper risk assessment had been undertaken and appropriate de-escalation attempts had been completed. In that regard, it is important to reflect on Commissioner Braidwood's observations noted above to the effect that:

"..the worst possible response is to aggravate or escalate the crisis, such as by deploying a conducted energy weapon and/or using force to physically restrain the subject. It is accepted that there may be some extreme circumstances, however rare, when crisis intervention techniques will not be effective in de-escalating the crisis. But even then, there are steps that Officers can take to mitigate the risk of deployment".

(98) In considering the foregoing, I find that the Member was not acting in accordance with the Provincial Standards for CEW deployment set out in subsection 1 and 2 of section 1.3.1.

(99) Determining that the Member had not complied with Provincial Standards for the use of his CEW does not, however, equate to a finding of misconduct. In order to consider that issue, I must now turn to a review of the provisions of section 77 of the *Police Act* and the key authorities that have interpreted that section.

XIV Misconduct – Section 77 of the Police Act

(100) I am grateful for the authorities provided by Counsel, augmenting a number of other authorities widely known in consideration of Police Act misconduct allegations. I have noted and summarized many of those authorities below.

(101) In considering whether or not misconduct has been established with respect to the Member, I have been guided by the principles established by earlier case law on the subject, including the Supreme Court of Canada decision in *Hill v. Hamilton Wentworth Police Services Board*, [2007] 3 S.C.R. 129.

(102) Section 25 of the Criminal Code provides that Officers have the authority to use as much force as is necessary to carry out their lawful duties. As well, Officers are not required to use only the absolute least amount of force to achieve a desired objective in law enforcement.

(103) In *Anderson v. Smith* 2000 BCSC 1194, the British Columbia Supreme Court heard a civil action that a police officer had used pepper spray unnecessarily. The argument was made that the officer could have effected an arrest using lesser force. The court ruled that there is no requirement at law that officers use the least amount of force that might be used to effect and arrest:

51 Consideration must be given to the circumstances as they existed at the time. Allowance must be made for the exigencies of the moment, keeping in mind that the police officer cannot be expected to measure the force with exactitude: *Wackett v. Calder* (1965), 51 D.L.R. (2d) 598 (B.C. C.A.) at 602; *Bottrell v. R.* supra at 218; *Allarie v. Victoria (City)* (1993), [1995] 1 W.W.R. 655 (B.C. S.C.) at para 20; *Levesque v. Zanibbi*, [1992] O.J. No. 512 (Ont. Gen. Div.); *Breen v. Saunders* (1986), 39 C.C.L.T. 273 (N.B. Q.B.) at 277; *Berntt v. Vancouver (City)*, supra at 217. This may include the aura of potential and unpredictable danger: *Schell v. Truba* (1990), 89 Sask. R. 137 (Sask. C.A.) at 140 (in dissent). There is no requirement to use the least amount of force because this may expose the officer to unnecessary danger to himself: *Levesque v. Zanibbi*, supra.

(104) The Court in *Anderson v. Smith*, supra, relied on the decision of the Ontario Court (General Division) in *Levesque v. Zanibbi*, [1992] O.J. No. 512 (Ont. Gen. Div.) In that case, the court also considered the argument that the police officers had not confined themselves to the least amount of force that might have accomplished their objectives:

14 The plaintiff argues that the officers should be found partially liable even if their versions are accepted. Mr. Zylberberg asserts that they had an obligation to determine and employ the least amount of force to effect their lawful purpose and that securing her hands behind her back caused some part of the injuries. He complains that the defendants failed to - 12 - determine if she would voluntarily and peacefully proceed to the back seat of the cruiser upon request after being told she was under arrest.

15 With respect, I disagree that the law imposes such an obligation on police officers effecting a lawful arrest. In my view, the test to determine whether the officers used only as much force as was necessary is best expressed by Stevenson J. in *Breen vs. Saunders et al*, [1986] 39 C.C.L.T. 273 N.B.Q.B. at pq. 277, where the following passage is found: Was it more force than was necessary? A policeman's job is not an easy one. However, it is his lot to have to deal with persons who, fortified by drink, obstruct and provoke them while they are carrying out their duties. Mr. Justice Dickson, in *Foster vs. Pawsey* [1980] 28 N.B.R. (2nd) 334 — said: "Some allowance must be made for an officer in the exigencies of the moment misjudging the degree of force necessary to restrain a prisoner." The same applies to the use of force in making an arrest or preventing an escape. Like the driver of a vehicle facing a sudden emergency, the policeman "cannot be held to a standard of conduct which one sitting in the calmness of a courtroom later might determine was the best course." *C.P. Ltd. vs. Gill*, [1973] S.C.R. 654 (emphasis added [by Court in *Levesque*])

16 It must be considered that the officers were having some difficulty with a strong, aggressive and intoxicated man in front of bystanders outside a bar. There were only two of them present. The plaintiff's aggressive conduct required them to split their efforts and control another hostile subject who was showing no signs of a pre-existing ailment. In such circumstances it was necessary for the policemen to take control of the situation as quickly as possible to prevent the situation from getting out of hand. While being restrained, the plaintiff was kicking and swearing at them. Their decision to restrain her further by securing her hands behind her back was necessary, both from a subjective and objective perspective.

17 It is both unreasonable and unrealistic to impose an obligation on the police to employ only the least amount of force which might successfully achieve their objective. To do so would result in unnecessary danger to themselves and others. They are justified and exempt from liability in these situations if they use no more force than is necessary having regard to

their reasonably held assessment of the of the circumstances and dangers in which they find themselves (emphasis added).

(105) In *R. v Nasogaluak* 2010 SCC 6 the Supreme Court of Canada confirmed that police officers cannot be expected to measure the use of force with exactitude:

35 Police actions should not be judged against a standard of perfection. It must be remembered that the 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. As - 11 - Anderson J.A. explained in Bottrell v. R. (1981), 60 C.C.C. (2d) 211 (B.C. C.A.): In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218].

(106) I have also noted *Berntt* [*Berntt v. Vancouver (City)*, 1999 BCCA 345] and *Anderson v. Smith*, 2000 BCSC 1194 the relevant law is summarized as follows at para 51:

[51] Consideration must be given to the circumstances as they existed at the time. Allowance must be made for the exigencies of the moment, keeping in mind that the police Officer cannot be expected to measure the force with exactitude: Wackett v. Calder (1965), 51 D.L.R. (2d) 598 at 602 (B.C.C.A.); R. v. Botrell supra at 218; Allrie v. Victoria (City), [1993] 1 W.W.R. 655 at para 20 (B.C.S.C.); Levesque v. Sudbury Regional Police Force, [1992] O.J. No.512 (QL) (Ont. Gen. Div); Breen v. Saunders (1986), 39 C.C.L.T. 273 at 277 (N.B.Q.B.); Berntt v. Vancouver (City), supra at 217. This may include the aura of potential and unpredictable danger: Schell v. Truba (1990), 89 Sask.R. 137 at 140 (Sask.C.A.) (in dissent). There is no requirement to use the least amount of force because this may expose the Officer to unnecessary danger to himself: Levesque v. Sudbury Regional Police Force, supra;

Where they differ is the effect of Lowe v. Diebolt on that line of cases. I do not see that Lowe v. Diebolt is inconsistent with that line of cases or establishes an entirely subjective test of good faith. Myers J. pointed repeatedly to the lack of evidence, and observed specifically that ignorance of the law might indicate a lack of training. Justice Myers appears to simply have been observing that the evidence in that case did not establish that the Officer had training, or had been taught a standard, that fixed her with knowledge that she was searching unlawfully. That is not the same as a purely subjective test; it means only that the adjudicator was not equipped to find that the Officer knew her options and intentionally or recklessly acted outside her authority.

What Lowe v. Diebolt highlights, in my view, is the need for expert evidence, or at least evidence regarding the knowledge and training available to the Officer, in cases where the trier of fact may not be equipped to assess the reasonableness of the Officer's belief. Lowe v. Diebolt was such a case, as is the one before me. In other cases, disproportion between the incident and the response may be so self-evident as to negate the need for testimony about what the reasonable Officer might have done or been trained to do in the circumstances, or, as in this case, about the surrounding events. In those cases, it may be enough for the adjudicator to point to the Officer's actions and using common sense, conclude the action was intentionally or recklessly taken without authority. In other cases

where reasonable lay people may differ as to whether a police response was appropriate, evidence will be required to show that the Officer failed to adhere to a general standard imposed by his or her training and available knowledge.

Clearly the Officer's own view regarding the necessity of force is not determinative; 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. But the doppelganger analysis prescribed by the cases requires that the adjudicator be equipped to understand the perspective of a reasonable Officer in the shoes of the respondent.

(107) In Re: Dickhout, OPCC PH 2010-03, Adjudicator Pitfield said this about the relevance of exigencies of decision making at paragraph 37:

"...The assessment of an Officer's conduct must respect the fact that his or her job is a difficult one and, in the heat of the moment, frequently does not allow for detached reflection when deciding to act: R. v. Nasogaluak, [cited earlier, paragraph 35] and In the Matter of Constable Smith, Victoria, January 28, 2009, p.21.

Southin J.A. provided the helpful description of the trier of fact's role as a "doppelganger" to the Officer at para. 24 of Berntt, and elaborated as follows at paragraph 25:

"The judge must go with the Officer, at least from the time the Officer first was sent to the place where the riot was in progress. I say "at least" because the Officer's training, experience, the orders of the day given to him, are all part of what goes into the answer to the question of "reasonable grounds".

(108) In *Scott v. Police Complaint Commissioner*, 2016 BCSC 1970 the Adjudicator held that in order to find misconduct, there must be a serious blameworthy element and not simply a mistake of legal authority alone.

(109) These principles were considered and summarized succinctly by the Honourable Ian McKinnon QC, sitting as Adjudicator in *Lobel and Hoang* OPCC File No. 2016-1766. The Adjudicator in that case 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 Members' 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. (emphasis added).

(110) In summary therefore, as Discipline Authority, my assessment of an Officer's use of force must:

- (a) Take account the exigencies and immediacy of the moment;
- (b) Consider the fact that Officers are often required to make decisions quickly in the course of an evolving incident, without the detached reflection that is available to those looking back on an incident;
- (c) Consider that at law, there is no requirement that the Officer perfectly calibrate his or her use of force to the perceived threat;
- (d) Consider what action a reasonable person would take facing the circumstances facing the subject of my review; and
- (e) Consider whether or not in taking the action in question, there was a "serious blameworthy" aspect to the conduct in question in that the Officer concerned either acted knowing that there was no legal authority to do so or reckless as to whether or not such authority existed.

XV Factors to Consider on Review of the Member's Conduct

(111) In order to consider the use of force allegations of misconduct concerning the Member arising under section 77(3)(a)(ii) (A) of the *Police Act*, I will consider the following factors:

1. *Was the Member engaged in the lawful execution of his duty in his use of force?*
2. *Was the use of force directed towards a member of the public?*
3. *Was the Member's use of force objectively necessary?*
4. *Did the Member subjectively believe the force was necessary?*
5. *Did the Member subjectively believe the use of force was not excessive?*
6. *Objectively, were the Member's beliefs about his use of force reasonable?*
7. *Did the actions of the Member reflect serious blameworthy conduct?*

(i) Was the Member engaged in the lawful execution of his duty?

(112) I am satisfied on the evidence before me that the Member was indeed engaged in the lawful execution of his duty at all times in his dealings with the Complainant. There is no doubt that the Member had the lawful authority to arrest the Complainant and remove him from the Hotel property.

(ii) Was the use of force directed towards a member of the public?

(113) I am satisfied on the evidence before me that the Member's use of force was directed towards a member of the public within the meaning of section 77 of the *Police Act*.

(iii) Was the Member's use of force objectively necessary?

(114) . The use of force in this case was discharge of the CEW by the Member in the context of attempting to handcuff and complete the arrest of the Complainant.

(115) The context of the Complainant's encounter with the Member and other attending Officers is highly relevant to consideration of objective necessity:

- (a) The Complainant had been asked by management to leave the [REDACTED] Hotel to no effect. Staff had reported feeling threatened and uncomfortable with the unpredictable movements and actions of the Complainant ;
- (b) The Complainant had fixated on a staff member behind the lobby counter, again raising safety concerns. A 911 call for assistance had been made by both management and a hotel resident;
- (c) Cst. G had initially responded to the 911 call and for approximately three minutes had been attempting to convince the Complainant to leave as requested. The engagement at this point was generally calm and consistent with de-escalation efforts. However, the Complainant had still not complied with directions to leave the Hotel;
- (d) As the Member and Cst. B arrived and moved to support Cst. G. In the small lobby area, the Complainant moved away from the counter to an adjacent area with chairs and plants. A fourth Officer, Cst. E, joined the three Officers effectively containing the Complainant in the seating area near the lobby front window;
- (e) As this group of four Officers faced the Complainant, the CEW had been drawn by the Member and pointed towards the Complainant. All of this took place less than a minute after the Member had arrived on scene and was accompanied by demands for the Complainant to lay on the ground and prepare to be handcuffed;
- (f) No acts of violence had taken place, nor had any property been damaged. As well, other than the request from management that the Complainant leave the hotel, there was no apparent urgency to achieve that result; and

- (g) A final important element of context is that for reasons unknown, the Complainant was not acting normally. He was agitated, muttering to himself, pacing, clenching his fists, sweating and appeared to have smaller than normal pupils. In many ways, the Complainant's demeanor mirrored that of Mr. Dziekański creating similar challenges in completing a risk assessment.
- (116) In the events leading up to the Video, I find that the Complainant exhibited argumentative and generally uncooperative behaviour in his dealings with the Member and the other attending Officers. However, I also find that the Complainant had to some degree complied with directions of Cst. G before the Member's arrival.
- (117) The question raised objectively is whether or not, given the attitude of the Complainant, and the objective absence of serious risk factors, the escalation to display and discharge of the CEW towards the Complainant was warranted as a use of force?
- (118) I have considered the Member's submissions concerning the existence of pre-assaultive cues and the National Use of Force Framework and his training. Clearly given the circumstances existing when the Member arrived the use of force could be justified. The question is whether or not it was objectively necessary. I find that it was not for the following reasons:
- (a) The Complainant's limited pre-assaultive cues were equally consistent with possible medical or mental health issues. In reality, the Complainant's agitation may have arisen from several factors. Without a meaningful risk assessment, it was not possible for the Member to accurately evaluate risk;
 - (b) The Complainant was contained within the Hotel lobby and posed no immediate risk of harm to anyone. Furthermore, the Complainant had not actually assaulted any person or threatened such an assault, nor had he demonstrated any acts of overt violence. Clearly, if no de-escalation efforts were continued or efforts made to turn down the heat associated with the Member's directions, the possibility for a confrontation existed. However, such was by no means certain; and
 - (c) There was no urgency to deploy the CEW or indeed to use force to safely contain the Complainant and allow de-escalation to continue. No over threat to person or property existed. The Member and Officers present were simply there to facilitate to removal of the Complainant from the Hotel and investigate whether or not any other crime may have been committed.
- (119) Considering all of the foregoing, I find that on this part of the analysis, the use of force by the Member in striking the Complainant with the CEW was objectively not necessary at the time it was displayed and deployed.

(iv) Did the Member believe that the use of force was necessary?

- (120) The next issue is a subjective consideration of the Member's belief that the use of force was necessary.
- (121) The evidence of the Member is that he believed that the use of force by deploying the CEW was necessary was in all of the circumstances. Specifically, the Member maintained that both the decision to display and discharge the CEW were required in order to address officer safety concerns and establish control over the Complainant.
- (122) The Member also maintained that he believed that all of the actions taken were consistent with training he had received in the use of force, taking into consideration his belief that:
- (a) The tone and demeanor of the Complainant;
 - (b) The Complainant was staring at the Member with increased intensity evidencing what the Member believed were pre-assaultive cues;
 - (c) The Member felt uneasy after his requests for the Complainant to move as directed to facilitate handcuffing were ignored;
 - (d) It appeared to the Member that the Complainant was becoming more agitated and more emotional;
 - (e) The specific location of the incident in the lobby of the Hotel could have posed further risk of injury in the event of a struggle; and
 - (f) He had to take the Complainant into immediate custody by a quick and decisive maneuver to establish control.
- (123) With respect to the Member's subjective beliefs on the events unfolding with the Complainant, I have found that there are credibility concerns in the facts outlined by the Member. I have not rejected the Member's evidence, but rather have doubts as to the accuracy of his expressed subjective beliefs as he approached the CEW deployment decision. Those concerns have arisen as a result of my finding that there have been exaggerations made in terms of the risks posed by the evolving situation facing the Member and the Complainant.
- (124) However, although I have doubts as to the objective reality of the risks presented by the Complainant, and have not found that the facts match the Member's position on several issues, I am not able to reject the Member's assertion that he believed the use of force by deploying the CEW was required to subdue the Complainant and ensure Officer safety.
- (125) I am therefore prepared to find that subjectively the Member believed that the use of force through deployment of the CEW was required to subdue the Complainant and complete his arrest.

(v) **Did the Member subjectively believe the force was not excessive?**

- (126) The next issue relates to a further analysis of the Member's subjective beliefs with respect to the amount and nature of force used to control the Complainant.
- (127) The main issue to consider is the Member's subjective beliefs in relation to the use of force to control the Complainant through the use of a CEW.
- (128) The Member has testified that he believed the use of force employed was not excessive and indeed necessary to achieve the Officer safety and control objectives that he had established.
- (129) My credibility concerns with respect to the Member's subjective beliefs remain as noted above.
- (130) With respect to display and use of the CEW, I am satisfied that the Member developed his plan to subdue the Complainant in less than a minute after arriving on scene. During that very brief time, the Member very quickly concluded that the Complainant posed a risk that would not be met by de-escalation efforts.
- (131) As noted earlier, I have concerns as to the objective reality of risks facing the Member. I cannot accept that the Member seriously considered the actual risks posed by the Complainant and the value of further assessment and de-escalation.
- (132) I am not satisfied that the Member took the time to consider if the use of force was, in all of the circumstances, excessive. Rather I find that the actions of the Member were a rapid escalation after his arrival on scene.
- (133) I have serious doubts as to the Member's actual subjective thought process, specifically his thoughts on the weighing of force options prior to the display and discharge of the CEW. And, of course, I have made findings of fact that result in very different circumstances than those advocated by the Member.
- (134) However, considering all of the foregoing, including the Member's training, I have resolved those doubts and differences by accepting that subjectively the Member had concluded that deployment and discharge of the CEW was a reasonable use of force tool in all of the circumstances.

(vi) Were the Member's beliefs about his use of force reasonable?

- (135) With respect to this issue, I must consider whether or not in all of the circumstances, the Member's beliefs were reasonable in that the use of force by discharge of the CEW was necessary.
- (136) This is not simply an assessment of what I might consider reasonable, but rather the reasonableness of the Member's beliefs about his use of force that must be measured against the standard of acceptable behaviour from the perspective of a reasonable person, and in particular, a police Officer with the same level of training and experience, confronted by similar circumstances.
- (137) Considering all of the evidence in the Record and specifically the Member's training history, his policing experience and the National Use of Force Framework, I find that the Member's use of force in discharging his CEW towards the Complainant was unnecessary and unreasonable. This was more than a simple error of judgment, rather it was a failure to fulfill the Member's duties with respect to risk assessment and consideration of de-escalation options. The actions taken by the Member took place without important key information from Cst. G and consideration of what was likely happening with the Complainant in terms of his mental health.
- (138) With respect to the discharge of a CEW towards the Complainant, I find that a reasonable person, particularly a reasonable officer of similar training and experience, would consider the foregoing facts, in the context of the guidance provided by the National Use of Force Framework, and note that:
- (a) Consultation with Cst. G was essential upon arrival on scene in order to understand the potential risks posed by the Complainant, de-escalation efforts that had been undertaken, the context of the matters in dispute and the state of the Complainant;
 - (b) The underlying issue involving the Complainant was a civil matter. There were no overt acts of violence or property destruction associated with the Complainant. As such, there was no urgency to handcuff and remove the Complainant. Time was available to assess the full risk and attempt de-escalation. As an example, the officers present, including the Member, had ample time to simply ask the Complainant to take a seat in the lobby while they continued a dialogue;
 - (c) The Complainant had been demonstrating irrational behavior which could have been consistent with drug abuse or mental health issues. However, some further investigation of those issues and the appropriateness of various de-escalation efforts was required;
 - (d) The area in which the Complainant had moved to was essentially secure containing him from further moves; and

(e) There were four Officers on scene to deal with the Complainant. Although it would be acknowledged by any reasonable Officer that the size of the Complainant and his state of agitation presented challenges, it would also be recognized that those challenges did not present an immediate risk of harm.

(139) In the context of the events of February 20, 2019, the Member's training and experience did not provide a reasonable basis for his belief that Officer safety was an issue prior to discharging his CEW towards the Complainant.

(140) Considering all of the foregoing, I find that a reasonable person, and in particular a reasonable officer of similar experience and training to that of the Member, would conclude that discharge of a CEW towards the Complainant was both unnecessary and an unreasonable use of force at the time that action took place.

(vii) Serious Blameworthy Conduct

(141) The concept of "serious blameworthy conduct" implies deliberate or intentional action to act improperly or, alternatively, action that is reckless in the same manner. Implicit in an assessment of such conduct is the exercise of judgment in decision making. As noted above, mere errors of judgment do not rise to misconduct as serious blameworthy conduct. Police officers are expected to use their training and experience to assess the situation they are facing and exercise judgment in taking appropriate action, often in challenging circumstances.

(142) However, the exercise of judgment by an officer requires due consideration of the facts and law relevant to the circumstances. It is not an appropriate exercise of judgment to ignore facts or information that may be relevant to decision making. This is particularly important where law or policy mandates consideration of such matters before acting to use of force against a member of the public. Such is the case with the use of CEWs and the Provincial Standards.

(143) In the circumstances of this case, the Member made three critical errors before acting to use his CEW:

- (a) He had failed to consult Cst. G, even briefly, to understand what she had learned about the Complainant and the risk he posed,
- (b) He had failed to take a reasonable time to assess the Complainant, his challenges and possible risks, and
- (c) He had failed to thoroughly complete the assessment duties he had under the Provincial Standards with respect to the use of force and potential foe de-escalation efforts.

(144) In the result, the Member was acting on incomplete facts and the incomplete discharge of his duties under the Provincial Standards before deploying his CEW. Such decision making was not an error in judgment by the Member, but rather a rush to action in circumstances where there was not real urgency to act immediately. In light of the apparent mental health issues afflicting the Complainant as confirmed by his subsequent assessment at hospital, it was important for the Member to have made a basic assessment of those matters before using force as he did.

(145) In all of the circumstances am satisfied that the action of the Member in discharging his CEW was reckless, thereby evidencing serious blameworthy conduct, not merely an error in judgment. It was reckless because the Member acted prematurely in using significant force against the Complainant contrary to Provincial standards. Specifically:

- (a) The Member had not witnessed any acts of violence from the Complainant in relation to persons or property. Although some Officers maintained that pre-assaultive cues were evident, there is no evidence that the Complainant had actually acted to assault anyone or threaten such action;
- (b) The Complainant had retreated away from the four Officers that had arrived, seeking to put distance between himself and those attempting to enforce his removal;
- (c) The Member had confirmed that there was no apparent urgency to force the removal of the Complainant from the Hotel, and as such no potential immediate risk to life or safety of any person. The only risk that was on the horizon was the risk of increased aggression if the Officers present pressed the issue of immediately handcuffing the Complainant;
- (d) At the point where the CEW was displayed and later discharged by the Member, the Complainant was contained by four Officers in a defined area. There was no urgency to immediately complete the arrest nor imminent risk to anyone;
- (e) The Member had not reasonably considered taking time for a risk assessment and the appropriateness of continuing the de-escalation efforts of Cst. G. Such action was required by section 1.3.1 (1) and (2) of the Provincial Standards for CEW use;
- (f) The Member had not conferred with Cst. G on her de-escalation efforts before deciding to intervene and abandon that tact. In fact, the Member does not appear to have given any serious consideration to the appropriateness of de-escalation efforts, which may have been appropriate given the possible mental health or medical issues that may have been affecting the Complainant;
- (g) The facts are that Cst. G had achieved some success with the Complainant in complying with directions to give his name and to move away from Cst. G;
- (h) The Member had not considered the applicability of a potential approach in dealing with the Complainant that was consistent with emerging mental health or other imminent medical issues before taking action. Other Officers present had noted the possibility of such issues affecting the actions of the Complainant;
- (i) The dramatically increased use of “presence” was available once the Member and Csts B and E had joined Cst. G in the lobby; and

- (j) There was no imminent risk of bodily harm from the Complainant absent the potential for such risk if increased force were used by the four Officers present.

XVI Conclusion

- (146) I have, of course, considered that *R. v. Asante-Mensah*, 2003 SCC 38, confirms at para. 73 that “a certain amount of latitude is permitted to police Officers who are under a duty to act and must often react in difficult and exigent circumstances”. As noted earlier in this decision, it is clear that the law recognizes that Officers are not required to measure the force they use with precision. I have also taken into consideration the provisions of section 77(4) of the *Police Act*.
- (147) I acknowledge that the Member took the decision to deploy and discharge his CEW in a very brief period of time believing that he had to do so to protect his colleagues. However, in addition to the duty owed to the Member’s colleagues, he owed a duty of care to the Complainant to properly assess the risk then in existence. The Member also had a duty to properly consider the applicability of de-escalation techniques and reduced use of force options. By moving prematurely past these checkpoints on the use of force, the Member did not simply misjudge his actions, I find that he acted recklessly.
- (148) Simply because the National Use of Force Framework indicates that a use of force option may be applicable, it may not always be appropriate in the discharge of an officer’s lawful duties. As Justice Braidwood explained, real harm can result from the premature discharge and use of CEWs particularly in situations where mental health issues are likely in issue. The checks implicit in the Provincial Standards mitigate against the routine application of the National Use of Force Framework in order to ensure that Justice Braidwood’s cautions are properly taken into consideration by officers enforcing the law. This enhances respect for the rule of law in general and the challenging duties associated with policing in particular.
- (149) Considering all of the foregoing in the context of the subjective and objective analysis outlined above, I find that:
- (a) The evidence does not substantiate the Member’s position that he used necessary and reasonable force in discharging his CEW towards the Complainant; and
 - (b) The facts relating to the encounter between the Complainant and the Member confirm that the force used by the Member in discharging his CEW towards the Complainant was, in all of the circumstances, unreasonable, at least premature and in any event, reckless.
- (150) I therefore find that the allegation of misconduct relating to the Member arising from the discharge of the CEW towards the Complainant is substantiated under section 77(3)(a)(ii)(A) of the *Police Act*.

XVII Next Steps

(151) Pursuant to section 125(1)(d) the Member may make submissions regarding disciplinary or corrective measures. Pursuant to section 125(2), those must be submitted in writing within 10 days business days of the Member receiving a copy of the Form 3 in this matter.

(152) In light of the filing date of this decision, those submissions will be due no later than April 1, 2021.

(153) If the Member wishes to make oral submissions in addition to written submissions, I ask that Counsel to the Member provide notice of this to me on or before March 30, 2021.

Brian M. Neal

Brian M. Neal, Q.C.(rt)
Discipline Authority
March 18, 2021
Victoria, B.C.

(Form 3 follows)

Form 3**FINDINGS OF DISCIPLINE AUTHORITY**

[Section 125 (b) *Police Act*]

Police Complaint Commissioner file number: 2019-16763

Name of member/former member involved: Constable [REDACTED]
Police department, designated policing unit or designated law enforcement unit:
Vancouver Police Department

Date of discipline proceeding: February 19, 2021

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

Misconduct: abuse of authority in using unnecessary force on a person, section 77(3)(a)(ii)(A) of the *Police Act*, substantiated.

Member/former member's reply to allegation: Denied

Findings and reasons: See Reasons filed with Registrar, OPCC, on March 18, 2021.

Signature of discipline authority:

Brian M. Neal

Brian M. Neal, Q.C. (rt)

Date: March 18, 2021

I acknowledge service of this form:

Signature of member/former member:

Date: