

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

**AND**

**IN THE MATTER OF CONSTABLE [REDACTED]**

**NOTICE OF DISCIPLINE AUTHORITY'S DECISION**

TO: Mrs. [REDACTED] Complainant  
AND TO: Constable [REDACTED] Member  
AND TO: Sergeant [REDACTED] Investigator  
AND TO: Mr. Clayton Pecknold Police Complaint Commissioner

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The circumstances that give rise to the complaint:

At about 8:00 PM on Friday, November 22<sup>nd</sup>, 2019, [REDACTED], his wife, [REDACTED] and their six-year old son were returning to their residence when they were stopped at a police roadblock on Bear Mountain Parkway. Constable [REDACTED] approached their vehicle and asked [REDACTED] if he had consumed any alcohol that evening. [REDACTED] answered in the negative. He was then asked to produce his driver's licence. He had moved to Canada just a month earlier so he gave the officer his Chinese licence together with the translation document he had downloaded from the Insurance Corporation of British Columbia's (ICBC's) website. [REDACTED] expressed doubts about the validity of the Chinese licence but ultimately seemed to have been satisfied that the licence was not forged. He was of the view, however, that all fields on the accompanying MV2943 translation form needed to be completed before it could be used to authenticate the foreign licence it related to. He returned the documents to [REDACTED] but issued a traffic violation ticket for driving without a licence based on the fact that the form MV2943 had not been signed by an ICBC representative. [REDACTED] drove home but understood that he was not to drive again until his licensing documents were regularized.

When ■ was pulled over, the complainant, ■ and her young son were seated in the rear of the vehicle. Her English is better than her husband's so at one point she exited the vehicle and approached ■ hoping to help him understand what ■ was trying to explain. She says that the officer made rude and racist comments. ■ also reports that at one point, ■ told his wife to "fuck off." ■ has no independent recollection of this traffic stop. His very brief notes did not refresh his memory.

On November 25, 2019, ■ submitted a complaint to the Office of the Police Complaint Commissioner. On December 19, 2019 the OPCC served a notice of admissibility pursuant to s.83(2) of *the Police Act* having found that, if substantiated, ■ s allegations that ■ had said that Chinese tended to fabricate their licences would amount to an abuse of authority as set out in s.77(3)(a)(iii). The notification directed the Chief Constable to process the allegation as required by Division 3 of the *Police Act*.

The file was assigned to Sergeant ■ who commenced an investigation. During the course of that investigation, ■ identified three further allegations that, if substantiated, would amount to misconduct. In his Final Investigative Report of July 20, 2020, he considered the following counts:

1. *Abuse of Authority*, pursuant to s.77(3)(a)(iii) of the *Police Act*, which is when on duty, or off duty but in uniform, using profane, abusive or insulting language to any person including, without limitation, language that tends to demean or show disrespect towards the person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or economic and social status.
2. *Discourtesy*, pursuant to s. 77(g) of the *Police Act*, which is failing to behave with courtesy due in the circumstances towards a member of the public in the performance of duties as a member. (This count refers to the allegation that ■ told ■ to "fuck off.")
3. *Neglect of Duty*, pursuant to s. 77(m)(ii) of the *Police Act*, which is neglecting, without good or sufficient cause, to promptly and diligently do anything that it is one's duty as a member to do. (This count relates to the allegation that having issued a ticket to ■ for having no license, he allowed ■ to drive home.)
4. *Neglect of Duty* pursuant to s. 77(m)(ii) of the *Police Act*, which is neglecting, without good or sufficient cause, to promptly and diligently do anything that it is

one's duty as a member to do. (This count relates to the alleged inadequacy of [REDACTED] notes on this incident.)

[REDACTED] concluded that counts one to three had not been substantiated. He found that count four did appear to be substantiated. The Discipline Authority adopted these findings. On August 24<sup>th</sup>, 2020, the Police Complaint Commissioner, having concluded that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect appointed me pursuant to s.117 of the Act to review the matter and arrive at my own decision based on the evidence.

### Analysis and Findings Count 1

S.77(3)(a)(iii) of the *Police Act*, provides that if an officer, when on duty, or off duty but in uniform, uses profane, abusive or insulting language to any person including, without limitation, language that tends to demean or show disrespect towards the person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or economic and social status that this amounts to an abuse of his authority.

The allegation that [REDACTED] used abusive and profane language toward [REDACTED] will be dealt with under a separate heading. (Allegation #2) The issue for consideration under Allegation 1 is whether [REDACTED]' multiple references to his belief that a Chinese licence might be forged were comments that were abusive, insulting, demeaning or disrespectful towards [REDACTED] and [REDACTED] based on their race, ancestry or place of origin. On the evening of Friday, November 22, 2019, the Integrated Road Safety Unit had set up a roadblock on Bear Mountain Parkway in Langford. They were checking drivers for alcohol consumption and that is what [REDACTED] asked about when he first approached the [REDACTED] vehicle. It was not until [REDACTED] had presented his Chinese drivers' licence that he was told to pull over. [REDACTED] says he even noticed a difference in the officer's demeanor when he saw that the licence in question was from China.

[REDACTED] has no independent recollection of this stop at all but when he was interviewed, he did provide significant background about why, in his view, a Chinese drivers licence would require extra scrutiny. In the year or so prior to this incident ICBC had given notice that they were encountering an influx of counterfeit China Driver's Licences. Officers, including [REDACTED] were given a brief training session on how to

recognise these counterfeits which were often high-quality cards mimicking the appearance and containing some of the security features found on genuine licences. The complainant was very offended by the fact that several times in his discussions with them ██████ had singled out China as a country whose licences were often fabricated or fake. This was understandable given the information ICBC had provided to the police about the problems they were encountering. I note that an influx of fake Chinese licences is not an indictment of the Chinese people or their government. For a period of time there were alerts out about counterfeit American currency. The criminal element tends to duplicate those documents that are easiest to mimic. Governments worldwide have adopted ever more stringent security features in an attempt to thwart these efforts.

S.77(3)(a)(iii) of the *Police Act* references, “language that tends to demean or show disrespect towards **the person** on the basis of that person’s race, colour, ancestry, place of origin.” (Emphasis mine.) If ██████ comments were limited to saying that some or even many Chinese licences were fake, that would not be a reflection on ██████ or ██████. If, however, ██████ using the information he had about these licences said or implied that all Chinese including ██████ and ██████ were dishonest that would amount to demeaning and showing disrespect towards them based on their race, colour, ancestry and place of origin.

In *R v. Byrnes (2019)* ONSC 1287, the Honourable Judge D.E. Harris examined racial profiling and subconscious bias. Although the *Police Act* does not use the words “racial profiling,” demeaning and showing disrespect to a person because of their racial background would fall within the scope of any definition of racial profiling and that the tests proposed by Harris J is applicable to this case. He said that in determining whether there is racial profiling or bias there is a two- step process.

1. The first step is a pejorative characterization of individuals from a particular racial group.
2. From this pejorative conclusion, an all-encompassing generalization is made to cover each individual of the racial group. The individual is attributed the group characteristics.”

The Evidence Relating to ██████ Statements at the Scene:

1. From ██████ - the officer has no recollection of this stop. He does not remember what he said and though he denies making the comments that have been attributed to him, this can, at best, be a statement which reflects his usual practise.
2. ██████ is still learning English and his lack of fluency may have impacted his understanding of what was said. He says that ██████ said all Chinese were liars. That is precisely the type of generalization that is deemed to be misconduct under S77(3)(iii). He also says that though he could not understand much of what was being said he made out some words and phrases. He thought ██████ had said "Chinese driver's licence." "It's fake," and "something like 'fuck off'". He also heard the words "may" and "arrest." While ██████ was speaking to her husband, ██████ was trying to act as interpreter and explain what was being said to ██████. Given the positions that the parties say they occupied, ██████ should have been able to hear all of these comments.
3. ██████ has a good command of English and seems satisfied that she understood all of what ██████ was saying even if she did not agree with it. The interaction with police left her feeling insulted and angry but she does not report having been told to "fuck off" or that all Chinese were liars. I am satisfied that had these words been said they would not have escaped her notice. For this reason, I find that on a balance of probabilities ██████ did not swear at ██████ or say that all Chinese were liars. I turn then to the content of ██████'s complaint.
  - a. She says that after ██████ showed his licence and the translation to ██████ ██████ still had questions about the licence. ██████ said it was only a Chinese driver's licence and he asked ██████ if he was a full-time student. ██████ responded no, he and ██████ were not students. ██████ said that if he was not a student ██████ could not use the Chinese driver's licence to drive as it was not legal.

- b. Mrs. █████ said when she told him she just wanted to help, █████ emphasized that without a full-time student Visa they could not use their Chinese driver's licences.
- c. Mrs. █████ said *"it so much astonished me, this officer said, you know, I, I, I, I think the, the Chinese driver's licence ... more likely to fabricate, or maybe they [sic] use to fake, use fake driver licence, and, they, they fabricate their driver licence. He especially talk about the Chinese driver licence, for, I think for at least two or three times. It, it just shocked..."*
- d. █████ said she couldn't understand why █████ would ignore her explanations and instead say, *"all the reason you give me is the Chinese driver licence is prone to fabricate their driver licence*
- e. █████ asked if, in relation to Chinese driver's licences, █████ used the words, *"most of them are fake."* Mrs. █████ said she was trying her best to remember. He may have used different words but definitely they had the same meaning.

Without having any explanation from █████, we are left to guess at what he might have been thinking. He was obviously very aware that there had been some problems relating to counterfeit Chinese driver's licences and so made reference to the possibility that █████s might be fake. Whatever his view of the validity of their documents he seemed to feel that the licence would have been acceptable had █████ been a full-time student. He returns to this question several times.

In his interview he explained that he would not have returned the licence to █████ if he thought it was counterfeit. Still unless all fields on the accompanying MV2943 translation form were completed he did not think it could be used to authenticate the foreign licence.

█████ was offended because █████ kept repeating the fact that it was Chinese licences that were of questionable validity. This was no reflection on her or her husband but simply acknowledged the fact that there had been a recent influx of counterfeit licences purportedly issued by that country.

Applying the test set out in *R. v Bryne*, the first step is a pejorative characterization of individuals from a particular racial group. The counterfeit production of Chinese driver's licence might well stem from criminal activity of Chinese nationals whether in China or elsewhere. It is also possible that people from other countries might find the Chinese licence one of the easier ones to fake and start producing counterfeits.

Did ██████ go beyond discussing the problem with counterfeit Chinese driver's licences and suggest that the Chinese were more inclined to fabricate their licences or use fake licences than other people? It is here that ██████'s evidence is hard to decipher. She says *"this officer said, you know, I, I, I, I think the, the Chinese driver's licence ... more likely to fabricate, or maybe they [sic] use to fake, use fake driver licence, and, they, they fabricate their driver licence.*

Struggling a bit with English as a second language, ██████ tries to remember the words ██████ spoke but from this quote it is hard to say whether he was talking about the licences or the individuals making or using them. Did he mean the Chinese are more likely to fabricate their licences or that the Chinese driver's licence is more likely to be fabricated? If we take the view that it was the Chinese people rather than just their driver's licences, that ██████ was speaking about in a pejorative manner, the first of the criteria in Harris J.'s two step process is met. An examination of the words that ██████ attributes to the officer shows though that ██████ had not made an all-encompassing generalization that covered each individual in the racial group. She says he spoke of the Chinese licences being "more likely" or "prone" to be fabricated. He did not assume that all of them were fake. ██████, the investigator in this matter, checked ██████ history as it related to his dealings with Chinese driver's licences. He found that the officer had seized some of them and recommended fraud charges because he thought they were counterfeit. In other cases, he noted that the driver he had stopped had a Chinese licence but he did not treat that as a concern and after he had checked the driver, he allowed him to go on his way. ██████ permitted ██████ to keep his Chinese licence because though he thought the certificate of translation was incomplete, he had satisfied himself with respect to the authenticity of the licence itself. Though ██████ and ██████ were offended by the officer's comments about Chinese driver's licenses, it is evident then that ██████ did not make an all-encompassing

generalization and assume that [REDACTED] s licence and those of all his countrymen were fake. For these reasons I find that the allegation that [REDACTED] abused his by using language that tended to demean or show disrespect towards the person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or economic and social status has not been substantiated.

### Analysis and Findings Count 2

Count two alleges that [REDACTED] in his dealings with [REDACTED] and [REDACTED] was guilty of *discourtesy*, pursuant to s. 77(g) of the *Police Act*, which is failing to behave with courtesy due in the circumstances towards a member of the public in the performance of duties as a member. (This count refers to the allegation that [REDACTED] told [REDACTED] to "fuck off.")

It was [REDACTED]'s evidence that after his wife got out of the car, [REDACTED] walked in front of the car and around to meet her. [REDACTED] was trying to approach [REDACTED]. [REDACTED] raised his hand to show her not to get too close "*and then swore at her and my wife was not too happy about it.*" [REDACTED] said he could clearly hear [REDACTED] say **something like "fuck off"** to his wife. (emphasis mine.) [REDACTED] estimated the distance between [REDACTED] and his wife at about a meter when [REDACTED] said "*fuck off.*" [REDACTED] said he couldn't hear anything very clearly because he was still in the driver's seat but he knew both of them "*kind of raised their voice*'.

As previously noted, since the alleged comment was directed at [REDACTED] and since she was by [REDACTED]'s estimate, only a meter away from [REDACTED] when he spoke, it does not seem possible that she did not hear what he said or that she would forget such an inflammatory statement.

She confirms that as she approached, [REDACTED] raised his hand to warn her to stay away from him. She says he said "'Oh, oh, oh, stay, stay, stay there you can't walk near me, it's too close to me."

[REDACTED] said she realized maybe she'd done the wrong thing by walking too close to [REDACTED] and she might have been seen as a danger. She stopped and told [REDACTED] she was sorry. This is not a response one would expect had the officer just sworn at



her. One could speculate. In warning ██████ to stay away from him, could ██████ have used the expression, "Back off?" Had ██████ heard those words he might well conclude that it sounded something like "fuck off."

Regardless of what his exact words were, I find that on a balance of probabilities, ██████ did not use the discourteous language attributed to him by ██████. The second allegation against him is not substantiated.

### Analysis and Findings Count 3

The third allegation against ██████ is that he neglected his duty by allowing ██████ to drive home after he had issued him a ticket for having no licence.

When he was interviewed by ██████, ██████ said,

"I don't think I would allow, if somebody, if I'd issued a No Driver's Licence ticket to somebody, I typically don't let them drive, cuz I know that, if they don't have a licence, and they get in an accident ... they're liable for their insurance is [indecipherable – either 'essentially' or 'potentially'], they can cancel your insurance and all the other stuff that goes along with it so, I don't I let people drive away. Like I said I don't remember this, I don't remember this specifically but if I've issued a ticket for No Driver's Licence, I've said 'you ain't allowed to drive.' Whether they choose to after that, on their own volition, and I'm busy at the roadblock, I don't know but I, once I issue a ticket, I'm back in the roadblock checking cars and I don't necessarily watch to see who's driving away. So he may have driven away for all I know.

It is ██████ and ██████'s evidence that they did drive away and that, in fact, ██████ told them they could drive home but were not to drive again until their licence had been regularized. They both remember him making inquiries about how far they were from home before telling them they could drive home but were not to drive again. I accept their version of events. Notwithstanding ██████'s comments about what he would usually do, he is not able to contradict the evidence of the complainant and her husband. Circumstantial evidence also tends to corroborate ██████ and ██████'s version of events. They were new to this country and had gone to some lengths to assure that they were in compliance with the British Columbia driving regulations. ██████ in particular expressed a fear of this officer arresting him or causing harm to him or one of his family.

He constantly noticed if the officer's hand was near his firearm. He has had nightmares about the incident. In the circumstances it is unimaginable that he would have defied [REDACTED] directions and tried to drive away from the scene.

I find on a balance of probabilities that [REDACTED] issued a ticket to [REDACTED] for having no licence and then allowed him to drive his vehicle home.

But was [REDACTED] unlicensed? In the miscellaneous notes that [REDACTED] attaches to his PRIME report, he says that [REDACTED] produced a non-reciprocal Chinese driver's licence with incomplete translation documents.

Section 34(1.1) of the Motor Vehicle Act provides that:

Subject to subsection (1.2), the following persons are exempt, for the period specified, from the requirements respecting the holding of a driver's licence issued to him or her under this Act:

(a) a person who has a validly issued and subsisting driver's or operator's licence or permit issued according to the laws where he or she is ordinarily resident, for 6 months from the date he or she last entered British Columbia;

(b) a person who has become ordinarily resident in British Columbia and who has a validly issued and subsisting driver's or operator's licence or permit issued according to the laws of the jurisdiction where he or she was most recently ordinarily resident, for 90 days after he or she became ordinarily resident in British Columbia;

(c) a person who has a validly issued and subsisting driver's or operator's licence or permit issued according to the laws where he or she is ordinarily resident, for the period that the person is registered as a full time student at and attends any of the educational institutions listed in section 21 (2) (b);

When interviewed, [REDACTED] explained his belief that in addition to a foreign licence an individual who meets the requirements of either Section 34(1.1) (a) or (b) had a duty to produce a completed form MV2943. This is a document that accompanies a translation of a licence from another language into English. Translators must meet certain qualifications and the ICBC web site lists many of those who meet their requirements. [REDACTED] had chosen a translator from this list. Instructions at the top of the form make it clear that this document must be presented when the applicant returns to the Driver Licensing Office. [REDACTED] said that he had concluded that [REDACTED]'s Chinese Licence was valid and

returned it together with the MV2943 because he knew these documents would be needed when ■ went to apply for his B.C. Driver's licence.

Section 34(1)(2) requires that an individual claiming an exemption under S34(1)(1) must carry a valid and subsisting driver's or operator's licence or permit on his or her person while operating a motor vehicle referred to in subsection (1) and must produce that driver's or operator's licence or permit to a peace officer on demand. It says nothing about the need for a translation, let alone one that has been verified by ICBC.

■■■■ also says:

I've written 'incomplete translation documents,' and I can tell you from my experience that most of the time the information filled out by the translator is there but the information that ICBC ... to approve those documents is not done. It's a ... very common thing to happen."

This is not surprising because this translation of the original licence required as part of the package which will be processed by ICBC when application is made for a BC Driver's Licence. That is when they will assign a BC Driver's Licence number and verify that they are satisfied with the credentials of the translator. Once that is done, a new BC licence will be provided to the applicant and ICBC will retain the MV2943 as well as the foreign licence.

■■ was legally driving on his Chinese licence and the paperwork he presented to ■■■■ met the statutory requirements. He was not driving without a licence so need not have been prevented from driving home.

Pursuant to s.77(m)(ii) of the *Police Act*, *Neglect of Duty* is defined as "*neglecting, without good or sufficient cause, to promptly and diligently do anything that it is one's duty as a member to do.*" Had ■■■'s licence been inadequate to meet the requirements of S. 34(1)(2) of the Motor Vehicle Act and had he thus been driving without a licence, ■■■■ would have had a duty to take reasonable steps to prevent him from driving home. It is, however, the underlying offence that triggers the duty and since that offence has not been made out, there can be no duty arising from it. Given those circumstances I find that the third allegation of misconduct against ■■■■ has not been substantiated.

#### Analysis and Findings Count 4

The fourth allegation against ██████ is that he neglected his duty by failing to make adequate notes of this stop and his interaction with ████ and ██████.

Police officers are often referred to as professional witnesses because typically they have made contemporaneous notes and are thus able to provide more detailed evidence than the unprepared layman. While the note taking that accompanies a roadblock where many vehicles are stopped in a short time and where several traffic violation tickets may be issued cannot be expected to be as thorough or detailed as what an officer might make as part of a stand-alone criminal investigation there are still some minimal standards. If the notes were sufficient to refresh the officer's memory and allow him to give a coherent account of what happened, that would probably be sufficient. In this case, ██████' total lack of recall is the strongest evidence that his notes were inadequate. ██████ and ████ are newcomers to Canada and were horribly distressed by this episode. They may well find it insulting that something that was so important to them could be passed over so completely by the officer who charged ████. Apparently, a notice of dispute has been filed. ██████ seems confident that his case will be made since in a drive without a licence prosecution the onus is on the disputant to prove that he was licensed. Given his absence of notes or any recollection of the events of that evening, the case will never get that far. He has not provided himself with the evidence he needs to show that ████ was driving. He certainly would not recognise him if he were to see him again. He returned the Chinese licence that had a photo on it and did not make a note about whether that photo was a good likeness of ████ or whether he was satisfied that ████ was the person shown. Without evidence like that he cannot put ████ behind the wheel.

Since few police stops give rise to them later facing disciplinary action, this is probably not one of the issues on an officer's mind when he makes his notes. Still in this case, ██████ inability to explain his actions of answer to the charges against him has complicated the process of fairly examining the complaint. This may even weigh against his own interests since he is the one who might have been able to explain if there had been some good and sufficient cause for him to have neglected making notes. As it is, he has nothing to say about that.

In summation then, I find that the allegation that ██████ neglected his duty by failing to make proper notes appears to be substantiated.

Next steps:

For the reasons set forth herein, the evidence referenced in the Final Investigation Report does not appear sufficient to substantiate the following allegations.

1. *Abuse of Authority*, pursuant to s.77(3)(a)(iii) of the *Police Act*, which is when on duty, or off duty but in uniform, using profane, abusive or insulting language to any person including, without limitation, language that tends to demean or show disrespect towards the person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or economic and social status.
2. *Discourtesy*, pursuant to s. 77(g) of the *Police Act*, which is failing to behave with courtesy due in the circumstances towards a member of the public in the performance of duties as a member. (This count refers to the allegation that ██████ told ██████ to "fuck off.")
3. *Neglect of Duty*, pursuant to s. 77(m)(ii) of the *Police Act*, which is neglecting, without good or sufficient cause, to promptly and diligently do anything that it is one's duty as a member to do. (This count relates to the allegation that having issued a ticket to ██████ for having no license, he allowed ██████ to drive home.)

Pursuant to the provisions of section 117(11) of the *Police Act* where the retired judge finds that allegations have not been substantiated that decision:

- (a) is not open to question or review by a court on any ground, and
- (b) is final and conclusive.

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

- a. For the reasons set forth herein, the evidence referenced in the investigation report appears sufficient to substantiate the allegation of *Neglect of Duty* pursuant to s. 77(m)(ii) of the *Police Act*, which is neglecting, without good or sufficient cause, to promptly and diligently do anything that it is one's duty as a member to do. This constitutes misconduct and requires the taking of disciplinary or corrective measures;

- b. A prehearing conference will be offered to Constable [REDACTED]  
[REDACTED]
- c. Constable [REDACTED] has the right pursuant to s. 119 to request permission to call, examine or cross-examine witnesses at the discipline proceeding, provided such request is submitted in writing within 10 business days following receipt of this notice of decision.
- d. The range of disciplinary or corrective measures being considered include:
  - i. Giving Constable [REDACTED] advice as to his conduct;
  - ii. Reprimanding Constable [REDACTED] verbally
  - iii. Reprimanding Constable [REDACTED] in writing.

Dated at Surrey, British Columbia this 8<sup>th</sup> day of September, 2020.



Hon. Carole D. Lazar, Discipline Authority