



Office of the
Police Complaint Commissioner

British Columbia, Canada

NOTICE OF APPOINTMENT OF RETIRED JUDGE

Pursuant to section 117(4) of the *Police Act*

OPCC File 2020-17875

April 21, 2021

To: Mr. [REDACTED] (Complainant)

And to: Constable [REDACTED] [REDACTED] [REDACTED] [REDACTED] (Member)
c/o Vancouver Police Department
Professional Standards Section

And to: Inspector [REDACTED] [REDACTED]
c/o Vancouver Police Department
Professional Standards Section

And to: The Honourable Judge Carol Baird Ellan, (ret'd) (Retired Judge)
Retired Judge of the Provincial Court of
British Columbia

And to: His Worship Mayor Kennedy Stewart
Chair, c/o Vancouver Police Board

On May 4, 2020, our office received a complaint from Mr. [REDACTED] [REDACTED] describing his concerns with members of the Vancouver Police Department. The OPCC determined Mr. [REDACTED] complaint to be admissible pursuant to Division 3 of the *Police Act* and directed the Vancouver Police Department to conduct an investigation.

On March 8, 2021, Sergeant [REDACTED] [REDACTED] completed his investigation and submitted the Final Investigation Report to the Discipline Authority.

On March 22, 2021, Inspector [REDACTED] [REDACTED] issued his decision pursuant to section 112 in this matter. Specifically, Inspector [REDACTED] identified one allegation of misconduct against Constable [REDACTED]. He determined that the allegation of *Abuse of Authority* pursuant to section 77(3)(a) of the *Police Act* against Constable [REDACTED] did not appear to be substantiated.

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Police Complaint Commissioner

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Pursuant to section 117(1) of the *Police Act*, having reviewed the allegation and the alleged conduct in its entirety, I consider that there is a reasonable basis to believe that the decision of the Discipline Authority is incorrect.

Background

Mr. ██████ was stopped on May 4, 2020, by Constable ██████ while walking near ██████ ██████. Constable ██████ advised Mr. ██████ that he was being detained for a drug investigation and Mr. ██████ provided his first name to Constable ██████. Constable ██████ handcuffed and searched Mr. ██████. The search including a pat-down of Mr. ██████ looking into Mr. ██████ pants pocket, opening his wallet, obtaining his identification, and querying him on CPIC. Sergeant ██████ took two photographs of Mr. ██████ without his consent while he was handcuffed, and Mr. ██████ was released.

DA Decision

Inspector ██████ found that Constable ██████ had reasonable suspicion that Mr. ██████ was involved in unlawful drug activity and lawfully detained Mr. ██████.

Inspector ██████ further found that Constable ██████ had reasonable suspicion to believe that Mr. ██████ might possess a weapon. In assessing the search, Inspector ██████ relied on *R v Crocker*, 2009 BCCA 38 in support of the search of Mr. ██████ wallet for officer safety. Inspector ██████ found that once Constable ██████ located Mr. ██████ identification during that search, he was not required to ignore it.

Inspector ██████ then assessed whether the overall conduct, including the search, was oppressive, and found that it was not.

OPCC Decision, Section 117 of the *Police Act*

Based on the evidence in the Final Investigation Report, it is my view that the detention and search of Mr. ██████ violated his Charter rights against arbitrary detention and unreasonable search or seizure.

With respect to the Discipline Authority's analysis of the detention and search, I am of the view that he erred in relying on the definition of oppressive conduct from judicial precedent that did not consider the provisions of the *Police Act*, rather than by applying the test for Abuse of Authority pursuant to section 77(3)(a)(ii)(B) of the *Police Act*, which is detaining or searching any person without good and sufficient cause.

I am also of the view that the Discipline Authority erred in relying on *R v Crocker* to support the search, specifically, that the officers had concerns that there might be weapons in the wallet. In their evidence, the members articulated no safety concerns in relation to the wallet, including the potential that there might be weapons contained therein.

Therefore, pursuant to section 117(4) of the *Police Act* and based on a recommendation from the Associate Chief Justice of the Supreme Court of British Columbia, I am appointing Carol Baird

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Ellan, retired Provincial Court Judge, to review this matter and arrive at her own decision based on the evidence.

Pursuant to section 117(9), if the appointed retired judge considers that the conduct of the member appears to constitute misconduct, the retired judge assumes the powers and performs the duties of the discipline authority in respect of the matter and must convene a discipline proceeding, unless a prehearing conference is arranged. The allegations of misconduct set out in this notice reflect the allegations listed and/or described by the Discipline Authority in their decision pursuant to section 112 of the *Police Act*. It is the responsibility of the retired judge to list and/or describe each allegation of misconduct considered in their decision of the matter pursuant to section 117(8)(c) of the Act. As such, the retired judge is not constrained by the list and/or description of the allegation as articulated by the Discipline Authority.

The Office of the Police Complaint Commissioner will provide any existing service records of discipline to the Discipline Authority to assist him or her in proposing an appropriate range of disciplinary or corrective measures should a pre-hearing conference be offered or a disciplinary proceeding convened. If the retired judge determines that the conduct in question does not constitute misconduct, they must provide reasons and the decision is final and conclusive.

Finally, the *Police Act* requires that a retired judge arrive at a decision **within 10 business days after receipt of the materials** for review from our office. This is a relatively short timeline, so our office will not forward any materials to the retired judge until they are prepared to receive the materials. I anticipate this will be within the next 10 business days.

Take Notice: That on April 8, 2020, the Minister of Public Safety and Solicitor General issued Ministerial Order No. MO98, the Limitation Periods (COVID-19) Order, pursuant to section 10(1) of the *Emergency Programs Act*. That Order is in effect from the date of the Order until the end of the state of emergency the Provincial Government of British Columbia declared on March 18, 2020, in response to the COVID-19 pandemic. Should the appointed Retired Judge require further time to issue her decision, we refer her to section 3 of the Limitation Periods (COVID-19) Order.



Clayton Pecknold
Police Complaint Commissioner

cc: [REDACTED] Registrar