

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

AND

IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT AGAINST  
AN OFFICER OF THE VANCOUVER POLICE DEPARTMENT

**NOTICE OF DISCIPLINE AUTHORITY'S DECISION**

TO: [REDACTED] ( the "Complainant")

AND TO: Constable [REDACTED] ("Cst. [REDACTED])  
Vancouver Police Department

AND TO: K. Woodall, Counsel for Cst. [REDACTED] ("Counsel")

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

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

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## I Executive Summary of Decision

As a result of reported erratic driving, the Complainant was the subject of a roadside stop in July of 2021. The stop was unusual in that the officers involved performed a “box and pin” maneuver to forcibly contain the Complainant’s car which had been stopped at a red light. The principal investigating officer, Cst. ■ believed that the Complainant’s vehicle needed to be stopped so that he could determine whether or not the Complainant was operating the vehicle while impaired.

Immediately after the Complainant’s vehicle was stopped, she was directed by Cst. ■ to exit the vehicle and handcuffs were applied. As well, the Complainant was issued a demand for her to provide a mandatory breath sample through an approved screening device test.

The Complainant was engaged in discussion with Cst. ■ and other officers for an extended period of time, ultimately never complying with the demand to complete the ASD test. As a result of the Complainant’s “refusal” to complete the ASD test, Cst. ■ issued an initial roadside prohibition order for 90 days. Cst. ■ also ordered the impoundment of the Complainant’s vehicle for 30 days.

In reviewing the allegations of misconduct concerning Cst. ■ the records set out in the Final Investigation Report have been considered, as well as the testimony provided at the Discipline Proceeding, and the submissions of Counsel. The evidence of Cst. ■ provided new evidence on the issue of his decision to handcuff the Complainant and the decision to proceed with a mandatory approved screening device demand.

This review has concluded that the misconduct allegation relating to Cst. ■ oppressive conduct in handcuffing the Complainant has been not been substantiated. Although Cst. ■ handcuffing of the Complainant did not comply with the law with respect to Cst. ■ use of force on the Complainant, in all of the circumstances, the actions of Cst. ■ did not evidence serious blameworthy conduct.

A second misconduct allegation of Cst. ■ possible oppressive conduct in issuing a roadside prohibition order to the Complainant and the impoundment of her vehicle has not been substantiated based on the Final Investigation Report , as augmented by the evidence of Cst. ■ provided in the course of the Discipline Proceeding.

## **II Introduction and Overview**

- (1) This is a Discipline Proceeding convened pursuant to sections 123-125 of the *Police Act*.
- (2) These proceedings relate to a complaint filed September 14, 2021 ( the “Complaint”) on behalf the Complainant.
- (3) Two disciplinary breaches of trust arising from the Complaint were considered involving Cst. ■ namely that:

***On July 17, 2021 Cst. ■ committed:***

*(i) Abuse of Authority as a result of oppressive conduct pursuant to section 77(3)a(ii)A of the Police Act by recklessly using unnecessary force on the Complainant through the application of handcuffs without good and sufficient cause (“Misconduct Allegation #1”); and*

*((ii) Oppressive conduct towards members of the public, pursuant to section 77(3) (a) of the Police Act, as a result of the Member’s order for the suspension of the Complaint’s driver’s license for 90 days and seizure of her motor vehicle without apparent authority, or good and sufficient cause; (“Misconduct Allegation # 2*

***(collectively, “The Misconduct Allegations”)***

- (4) In accordance with section 117 of the *Police Act*, a review of the Misconduct Allegations was undertaken. The review concluded on September 8, 2022 reported that there appeared to be evidence set out in the Final Investigation Report dated July 7, 2022 (the “FIR”) which, if proven, could substantiate Misconduct Allegations # 1 and # 2 with respect to Cst. ■ and potentially require the taking of disciplinary or corrective measures.

## **III History of Proceedings**

- (5) As noted above, on July 17, 2021 a traffic stop took place at in Vancouver relating to a vehicle driven by the Complainant. The stop appears to have arisen out of report of a possible impaired driver resulting in the detention and handcuffing of the Complainant by Cst. ■

- (6) The traffic stop did not result in the arrest of the Complainant, however, an Immediate Roadside Prohibition order was issued by Cst. ■ along with the impoundment of the Complainant's vehicle for 30 days.
- (7) On September 14, 2021 the OPCC received the Complaint from counsel acting on behalf of the Complainant.
- (8) The Commissioner accepted the Complaint as admissible and ordered an investigation into the conduct of several VPD officers, including Cst. ■
- (9) As noted in the Complaint, the misconduct alleged related to the authority of the various officers to stop the Complainant's vehicle using a "box and pin" maneuver, including Cst. ■ detention and handcuffing of the Complainant.
- (10) Counsel on behalf of the Complainant also specifically argued that in the context of an impaired driving investigation, what happened to the Complainant was not the norm, and would not have happened but for the Complainant's African heritage and ethnicity.
- (11) On July 7, 2022 the Investigator submitted the final version of the FIR to the initial Discipline Authority and the OPCC.
- (12) On July, 21, 2022 the initial Discipline Authority issued her decision pursuant to section 112 of the *Police Act*. The decision confirmed that the allegations of misconduct against the various VPD members, including Cst. ■ did not appear to be substantiated.
- (13) The Commissioner reviewed the decision of the Discipline Authority August 17, 2022 and determined, pursuant to section 117 of the *Police Act*, that the decision was, in part, incorrect.
- (14) Specifically, the Commissioner expressed the view that the Discipline Authority:  
  
*"...erred in finding that (Cst. ■ conduct in handcuffing the Complainant did not constitute misconduct"*
- (15) As noted above, a review of the Misconduct Allegations was undertaken in accordance with section 117 of the *Police Act* resulting in the conclusion, without deciding, that there appeared to be evidence which could, if proven, potentially substantiate such allegations.
- (16) As part of the section 117 decision, a pre hearing conference was offered to Cst. ■ That offer was not accepted.
- (17) A Discipline Proceeding commenced November 7, 2022 and, with adjournments, concluded with written and oral submissions March 6, 2023.

#### **IV Misconduct and the Police Act**

(18) Section 77 of the *Police Act* sets out the definition of “misconduct” relevant to the allegation concerning Cst. █ Specifically, subsection 77 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 delay, obstruct or interfere with investigating officer], or*

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

*(2) A public trust offence is an offence under an enactment of Canada, or of any province or territory in Canada, a conviction in respect of which does, or would likely*

*(a) render a member unfit to perform her or his duties as a member, or*

*(b) discredit the reputation of the municipal police department with which the member is employed.*

*(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,*

*(i) intentionally or recklessly making an arrest without good and sufficient cause,*

*(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) 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 allegations of misconduct defined by subsection 77 of the *Police Act*, as qualified by subsection 77(4).

(21) Unlike the section 117 decision process, the test in a discipline proceeding is proof of the alleged misconduct based on clear and cogent evidence, not simply the appearance of evidence that might substantiate possible misconduct.

## **V Governing Legal Principles**

(22) The authorities provided by Counsel for Cst. ■ augment a number of other authorities widely known in consideration of *Police Act* misconduct allegations. Notable are the decisions in *Lowe v Diebolt*, *Scott v OPCC* and *Lobel & Hoang*.

(23) I have reviewed all of the authorities submitted and summarized some of the materials below in my analysis.

(24) All authorities are set out in the FIR, or submissions, and have each been marked as exhibits in these proceedings.

(25) In summary, the authorities confirm that as Discipline Authority, my assessment of a member's arrest and use of force actions, must:

- (a) Consider whether or not the member had subjectively determined that there were reasonable grounds to handcuff the Complainant, to issue an IRP and to seize her vehicle;
- (b) Consider whether or not the member had subjectively determined that the use of force, by immediately handcuffing the Complainant on exiting her vehicle, was not an unnecessary use of force;
- (c) Determine whether or not the member's beliefs were objectively reasonable taking into consideration the member's training, experience and the circumstances at hand viewed through the perspective of a reasonable officer of similar experience;
- (d) Take account the exigencies and immediacy of the moment facing the member before action was taken;
- (e) Consider the fact that members 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;
- (f) Not evaluate the actions of a member with the benefit of hindsight, but rather through the perspective that might reasonably be taken by an officer with equivalent training and experience facing similar circumstances, in a practical, non-technical common sense manner;
- (g) Consider that at law, there is no requirement that a member perfectly calibrate their use of force to a perceived threat; and
- (h) Consider whether or not in taking the action in question, there was a "serious blameworthy" aspect to the conduct in question in that the member either acted knowing that there was no legal authority to do so, or reckless as to whether or not such authority existed.

- (26) Counsel has made specific submissions, both in writing and orally, that speak to the need for additional evidence on the use of force by Cst. ■. Citing the *Lowe* and *Tiwana* decisions, among others, Counsel submits that the circumstances of this case require additional expert evidence on the use of force evidence before any decision can be made in my role as Discipline Authority.
- (27) Having regard to the authorities referenced by Counsel, I find that the facts of this case are in no sense complex enough that independent expert evidence is required to assist in considering Cst. ■ use of force .
- (28) I am satisfied that the application of “common sense” to the facts of this case is more than adequate to ascertain whether or not misconduct has taken place intentionally, or recklessly and in circumstances where there is serious blameworthy conduct.
- (29) As such, I do not accept that any further evidence on the use of force is required to adjudicate this matter.

## **VI Records submitted for review**

- (30) The following records were entered as exhibits in this proceeding:
- (a) The FIR, dated July 7, 2022, comprises 73 pages of narrative, plus related attachments. The report details the evidence of relevant parties concerning the conduct of several VPD officers on the date in question. The FIR also provides background on law considered relevant by the Investigator, VPD policies and procedures;
  - (b) A flash drive containing the FIR records;
  - (c) A google map showing the path of the Complaint’s travel prior to the traffic stop; and
  - (d) The submissions of Counsel for Cst. ■ including several relevant authorities.
- (31) These materials, and the testimony of the witnesses, collectively comprise the record with respect to these proceedings (the “Record”).

## **VII Position of Counsel for Cst. ■**

- (32) The position of Counsel for Cst. ■ was set out in considerable detail in written submissions, subsequently augmented by oral submissions during the course of this Discipline Proceeding.

- (33) With respect to the facts surrounding the Misconduct Allegations, the submission of Counsel for Cst. ■ can be summarized as follows:
- (a) Cst. ■ and Cst. ■ were dispatched to investigate reports of an erratic and possibly impaired driver. The reports had been received from a community safety officer who had been following the subject vehicle for some time;
  - (b) Given the pattern of dangerous driving through a series of busy major roads, Cst. ■ who was en route to intercept the subject vehicle recommended a “box and pin” maneuver to isolate and stop the car in question. That strategy was specifically approved by the on duty VPD supervisor;
  - (c) Cst. ■ had prior experience with traffic stops involving unrestrained potential impaired drivers that had resulted in assaults and a loss of police control;
  - (d) Cst. ■ believed that he had a clear legal duty to investigate the erratic driving and eliminate the risk to the public that could potentially arise if it continued unabated. Discharging that duty to prevent further risk to the public was, in the view of Cst. ■ best served by a “box and pin” maneuver followed by a robust investigation of the reasons behind the reported erratic driving, including the possibility of impaired driving;
  - (e) The traffic stop was put into effect by a marked police car moving ahead of the subject vehicle, followed by another marked vehicle behind the car. The police car operated by Cst. ■ and assisted by Cst. ■ was unmarked and stopped immediately adjacent to the passenger door of the subject vehicle;
  - (f) Prior to the stop, none of the officers concerned had any information as to the identity or ethnicity of the driver or any of her passengers;
  - (g) Furthermore, under no circumstances did the ethnicity of the driver play any role in the actions or decisions of Cst. ■ or any of the other attending officers;
  - (h) As the subject vehicle was stopped, Cst. ■ exited the passenger side of his vehicle and politely directed the driver, the Complainant, to exit her vehicle;
  - (i) At the same time, Cst. ■ moved to begin a risk assessment of the other occupants of the vehicle;
  - (j) As soon as the Complainant exited her vehicle, Cst. ■ placed her in handcuffs while briefly holding her arm to ensure stability;
  - (k) Cst. ■ had placed the Complainant in handcuffs briefly to allow the risk assessment to be completed in order to ensure officer safety, and in recognition of the fact that the traffic stop had taken place at a busy intersection with other traffic;
  - (l) Cst. ■ had been trained in handcuff protocols, including the VPD policies then in effect, noted in the FIR. (Counsel specifically notes that this policy predates the changed and more comprehensive policy on handcuffing that is now in effect);
  - (m) Once Cst. ■ determined that there were no risks to the parties present or officer safety, he immediately advised Cst. ■
  - (n) At that point Cst. ■ was in the middle of reading a mandatory demand for the Complainant to provide a breath sample through an Approved Screening Device then in Cst. ■ possession;



- (o) Counsel submits that Cst. █ interrupted his reading of the demand and immediately removed the handcuffs from the Complainant. The ASD demand was then read again;
  - (p) Counsel submits that the Complainant had been in handcuffs for between two and five minutes when the risk assessment was completed and she was released;
  - (q) The Complainant refused to complete the ASD test despite multiple demands made by Cst. █ Furthermore, Cst. █ and Cst. █ both took the time to explain the process to the Complainant and assure her that the device was authentic and operating properly;
  - (r) Notwithstanding those assurances, the Complainant proffered multiple excuses for not providing a sample including the need to talk to a lawyer, a suggestion that her religion prevented her from blowing into such devices, and questions as to the legitimacy of the officers on scene;
  - (s) Counsel submits that after approximately 45 minutes, Cst. █ took the Complainant's actions as a refusal to provide a mandatory ASD sample. As a result, the Complainant was issued an immediate roadside prohibition order for 90 days and her vehicle was impounded;
  - (t) Counsel submits that at the Discipline Proceeding Cst. █ confirmed that the impoundment decision was based in large measure on the Complainant's complete failure to explain her erratic and possibly dangerous driving; and
  - (u) Counsel further submits that there are no facts in evidence confirming that the Complainant ever made known to Cst. █ or any other officer that she was suffering from either some form of concussion or the effects of prescription drugs taken earlier in the evening.
- (34) Counsel for Cst. █ submits that police officers do not have to be perfect in the application of force, such as handcuffing they must only be reasonable: *R. v. Nasogaluak*, 2010 SCC 6; *Anderson v. Smith*, 2000 BCSC 1194.
- (35) In this regard, Counsel further submits that Cst. █ use of force in handcuffing the Complainant was completely justified under VPD policy and law to ensure officer safety.
- (36) Counsel further submits that:
- "..Section 25 of the Criminal Code authorizes to use force in carrying out lawful duties, but only as much force as is necessary to carry out said duties Officers are not required to use only the absolute least amount of force that will achieve a desired objective, nor is the use of force that an officer employs to be assessed to a nicety.."*
- (37) Counsel further notes that an adjudicator:
- "..must not assess conduct with the benefit of hindsight and must not substitute his or her judgment as to what could or should have been done in the circumstances for that of the officer. The question is whether any belief the officer had with respect to the need for force and the"*

*amount of force required was reasonable and is not to be answered by reference to what others might have done in similar circumstances” (PH 2010-3, Part 1, p. 13, Pitfield, Ret.J.)..”*

- (38) Counsel submits that the new evidence arising in these proceedings, beyond that set out in the FIR, confirmed that:
- (a) Cst. ■ had specific concerns with respect to the traffic stop of a possible impaired driver based on earlier experiences with unrestrained subjects. As a result, it is submitted that Cst. ■ experience as an officer led him to believe that briefly restraining the Complainant while a risk assessment took place was essential for officer safety;
  - (b) Furthermore, Cst. ■ confirmed that an additional concern in leaving the Complainant unrestrained was the fact that the traffic stop had taken place adjacent to a busy intersection. His concern was that until he had stabilized the situation, the movements of the Complainant may well have been unpredictable, leading to possible risks to the public and officer safety;
  - (c) With respect to the risk assessment dynamic, Cst. ■ testified in detail with respect to his concern as to the other adult passenger in the Complainant’s vehicle. His evidence was that based on his prior experience, he felt the need to maintain control and observation of the Complainant and the other front seat passenger to ensure officer safety until the risk assessment was complete;
  - (d) With respect to the nature of the inquiries made in this investigation, Cst. ■ confirmed that although an impaired investigation was possibly required, the key issue was to identify the cause of the erratic driving that had been reported. As such rather than a demand to complete provide a sample of breath in an impaired investigation, Cst. ■ had decided to invoke a mandatory ASD demand. Furthermore, being on duty and in possession of an ASD, and having observed the Complainant driving the subject vehicle, Cst. ■ believed that he had lawful grounds to issue the demand in the context of his investigation.
- (39) In summary, the submissions of Counsel are that Cst. ■ had both the duty and lawful grounds to stop the Complainant’s vehicle to investigate the reported erratic driving.
- (40) Furthermore, it is submitted that Cst. ■ subjectively believed that he was authorized to briefly handcuff the complainant and that such actions was objective correct based on VPD policy and National Use of Force training received by Cst. ■
- (41) As such Counsel submits that there is no evidence of misconduct on the part of Cst. ■ with respect to the handcuffing of the Complainant, nor evidence of any reckless misconduct that can be characterized as serious blameworthy conduct.

- (42) With respect to Misconduct Allegation # 2, Counsel submits that there is clear evidence of a refusal to complete a Mandatory ASD demand on the part of the Complainant justifying the issuance of an immediate roadside prohibition and vehicle impoundment.
- (43) Again, Counsel submits that Cst. ■ subjectively believed that he had lawful grounds to issue the immediate roadside prohibition supported by objective evidence provided by the other officers on scene, and even the Complainant's passenger, Mr. ■
- (44) As such, on the second misconduct allegation, it is submitted that there was no evidence of recklessness or serious blameworthy conduct and hence, no misconduct.
- (45) I will address the further specific submissions of Counsel for Cst. ■ on each of the two Misconduct Allegations as I consider those matters below.

### **VIII Submissions of the Complainant**

- (46) Although duly notified of her right to make submissions, the Complainant did not provide any response with respect to this matter, other than as set out in the Complaint and the interview of the Complainant set out in the FIR.
- (47) I have carefully reviewed the evidence of the Complainant as set out in the FIR. It is clear that the dramatic box and pin traffic stop provided an understandable concern as to what was taking place. This concern was further enhanced by the Complainant's first view of Cst. ■ who was not in uniform and exiting an unmarked car.
- (48) However, although the patrol car operated by Csts. ■ and ■ was unmarked and the officers not in uniform the vehicle was operating its emergency lights. As well, all other police vehicles were marked, operating emergency lights and the officers in uniform. As such, it is unclear how the Complainant continued to maintain the position that she was uncertain as to the legitimacy of the officers on scene.
- (49) The reasons articulated by the Complainant for not complying with the ASD demand were varied and unusual:
- (a) Firstly, the Complainant said she "refused" the ASD demand because she was not sure that what was proffered was in fact a "breathalyzer". The Complainant maintained that she "*wanted to talk to someone about it*". In fact, at law, the Complainant had no such right. However, in practice Cst. ■ Cst. ■ and Cst. ■ a certified ASD and breathalyzer operator, all talked to the Complainant about the machine and its processes. A sample run was even completed to convince the Complainant that the simple test machine worked properly;

- (b) Second, the Complainant said she needed to talk to a lawyer before completing the ASD test. At law again, of course, the Complainant had no such right in relation to a mandatory demand for a sample of breath in an approved screening device;
  - (c) Third, the Complainant questioned the legitimacy of the officers on scene, including Cst. [REDACTED] taking the position that people can buy police uniforms anywhere;
  - (d) Fourth, the Complainant told the officers that she could not comply with the ASD demand as “her religion did not permit her to blow into things” while refusing to identify the religion in question; and
  - (e) Fifth, the Complainant reported in her interview that she may have refused because at the time of the incident she was suffering from a concussion and taking medication to help her sleep. However, none of the other witnesses reported hearing the Complainant articulate such a concern to Cst. [REDACTED] or anyone else on scene.
- (50) There is no evidence to support any of the excuses offered by the Complainant to exempt her from the obligation to provide a breath sample, beyond the varying assertions made by the Complainant herself.
- (51) One of the more significant concerns raised by the Complainant related to her report that the only reason she had been stopped and investigated was as a result of her African heritage. Needless to say these assertions are incredibly important in the context of considering a police misconduct hearing.
- (52) In the course of the Investigator’s interview with the Complainant, she was asked to identify anything the police officers did or said that demonstrated prejudice against her because of her ethnicity:
- [REDACTED] *Right, okay. Um, now, did, did any of the officers that dealt with you, did, you know, did they say anything to you that, um, you know, that sort of directly, um, I guess, I guess what I’m trying to say is did any of the officers involved in, in, in dealing with you directly, you know, did they make any sort of, um, um, inflammatory statements about your African heritage or, um, say anything to make you feel like they were, um, you know, targeting you because of your race?*
- [REDACTED] *Well, they did not say it, but they were very, very rude to me like and treating me like animal.*
- [REDACTED] *Mm-hmm.*
- [REDACTED] *And them squeezed my arm so there were bruises all over my arm. So, uh, why would, why will someone be, uh, stop someone and, uh, squeeze their, their hands. So I feel that’s the way because of who I am.*
- [REDACTED] *Right, okay.*

█ *That, that's the reason.*

█ *Okay. And just, just so I'm clear. And, listen, I'm, I'm not, I'm not trying to minimize any of this, I just, I just wanna make sure I'm sure that, you know, I understand your perception of what happened is always gonna be your perception, um, but I just wanted to clarify that there was no sort of very overt, um, comments or, or words or anything by the police officers that were, you know, directed at your race particularly. Does, does that make sense?*

█ *Well, I, I don't think they will do, but they have it in their heart and their mind."*

*(Statement of Ms. █ set out in the FIR, Tab 4, p. 13-14)*

- (53) Having considered all of the evidence in the FIR, I find that Cst. █ briefly held the Complainant's arm while handcuffed to ensure her stability. However, there is no evidence of any injuries or bruises arising from that encounter, beyond the Complainant's report.
- (54) The evidence that I have accepted, including that of Mr. █ the Complainant's passenger, is that all officers on scene treated the parties in the Complainant's vehicle with respect and patience. There was no evidence of any racism, intolerance or capriciousness directed to the Complainant or any of her passengers beyond the general assertions made the Complainant and suspicions held by Mr. █ Nor does the evidence available demonstrate any reasonable perception of such conduct on the part of any of the attending officers, including Cst. █
- (55) The evidence does confirm that Cst. █ had worked patiently to explain the ASD process to the Complainant. Cst. █ had done the same and also maintained dialogue with Mr. █ and the child in the car to keep them safe and to ensure that they understood what was taking place. Cst. █ remained professional in trying to provide the Complainant with a chance to comply with the demand made for almost 45 minutes.
- (56) Although both the Complainant and Mr. █ were suspicious that the aggressive traffic stop and handcuffing of the Complainant may have resulted from a computer search of the vehicle license plate identifying the Complainant as a person of African heritage, such was not proven to be a fact in any of the evidence.
- (57) Furthermore, Mr. █ confirmed that there was nothing that the police said or did that in fact led him to believe they were targeted because of their race.
- (58) Overall, the suspicions of the Complainant and Mr. █ of being singled out as a result of their African heritage was understandable. However, those perceptions were not born out in any of the evidence. In fact, the evidence is clear that none of the

officers were aware of the heritage or ethnicity of either the Complainant or Mr. [REDACTED] before the traffic stop took place.

- (59) With respect to the assertion that the Complainant did not know whether or not the ASD device was genuine, her own evidence confirms that she in fact had prior experience with just such a machine in an earlier roadside stop. As such, in the absence of a further explanation, it is difficult to understand the Complainant's concern with the legitimacy of the ASD operated by Cst. [REDACTED].
- (60) Considering the totality of the evidence, I find that the excuses articulated by the Complainant justifying her reluctance to comply with the mandatory ASD demand do not have the ring of truth. I am not satisfied that any of the excuses were genuinely advanced by the Complainant as facts warranting a legitimate reason to not comply with Cst. [REDACTED] ASD demand.

#### **IX Evidence not in Dispute**

- (61) The Record does not disclose any dispute with respect to the many of the facts relating to Misconduct Allegations #1 or #2, namely that:
- (a) At all material times Cst. [REDACTED] was acting as a patrol officer with the VPD. He had four years of experience at the time the incident in question took place;
  - (b) Cst. [REDACTED] was at all times acting in the normal course of his duties as a police officer. He was not in uniform and travelling in an unmarked police car with Cst. [REDACTED];
  - (c) After pulling up next to the Complainant's stopped vehicle, Cst. [REDACTED] motioned for the Complainant sitting in the driver's seat to exit the vehicle;
  - (d) Immediately after complying with Cst. [REDACTED] direction, the member handcuffed the Complainant;
  - (e) After a few minutes of detention, Cst. [REDACTED] advised Cst. [REDACTED] that the vehicle had been "cleared" and that there was no ongoing risks from the other parties. As such, the Complainant was immediately released from handcuffs;
  - (f) Cst. [REDACTED] made a mandatory screening device demand of the Complainant immediately after she was handcuffed;
  - (g) The Complainant's son, who had been seated in a rear car seat, was visibly upset by the handcuffing of his mother, Cst. [REDACTED] worked with Mr. [REDACTED] to settle the child and provide ongoing information on what was taking place;
  - (h) At the conclusion of Cst. [REDACTED] dealings with the Complainant, she was issued a 90 day Immediate Roadside Prohibition from driving (the "IRP") and a 30 day impoundment order for her vehicle;
  - (i) Cst. [REDACTED] called for a taxi to allow the Complainant and her passengers to get home. Cst. [REDACTED] personally arranged for payment of the taxi fare.

(62) The remaining facts are, at least to some extent, in dispute. There are minor, but important, differences in the evidence of the various parties on several key issues.

### **X Misconduct Allegation # 1 – Finding of Facts**

(63) The first misconduct allegation relates to the roadside handcuffing of the Complainant.

(64) My findings of fact in relation to that allegation follow.

(65) The chain of events leading to the Complainant's handcuffing began with reports from Community Safety Officer [REDACTED] ("CSO [REDACTED] July 17, 2021 at approximately 22:45.

(66) CSO [REDACTED] reported a pattern of driving that he considered unusual for the Complainant's vehicle. In particular he noted one apparent run of a stale red light and another roll through during a turn.

(67) After following the Complainant's vehicle for several blocks, CSO [REDACTED] reported to VPD dispatch that he was following a suspected impaired driver.

(68) However, in a subsequent interview with the Investigator, CSO [REDACTED] was frank in acknowledging that he had no training in the identification of impaired drivers.

(69) After monitoring CSO [REDACTED] reports, VPD dispatch put out a call for "any units to assist".

(70) Cst. [REDACTED] a passenger in an unmarked police car driven by Cst. [REDACTED] responded to the dispatch call at 22:50:44 "from Grandview and Renfrew", approximately 20 blocks from the Complainant's last reported position.

(71) At 22:51:25 while en-route to meet CSO [REDACTED] position, Cst. [REDACTED] broadcast that "we're going to be treating it (indiscernible) gross impaired because they're running red lights". Cst. [REDACTED] further elaborated in his broadcast that "call it gross impaired driving. They're going through lights and swerving".

(72) At 22:51:41 Cst. [REDACTED] broadcast a decision to stop the Complainant's vehicle using a "Box and Pin" strategy also asking "Can we get another unit for a front pin?" A positive response was received from another VPD unit operated by Cst. [REDACTED] ("Cst. [REDACTED]") and Cst. [REDACTED] ("Cst. [REDACTED]"). Another response was received from Cst. [REDACTED] ("Cst. [REDACTED]").

- (73) At 22:52:08, Sgt. [REDACTED] ("Sgt. [REDACTED]"), Cst. [REDACTED] supervisor, broadcast that he had been monitoring the radio traffic and ordered that *"In the event we get the opportunity, box and pin is authorized"*.
- (74) It appears that Cst. [REDACTED] and his partner Cst. [REDACTED] having listened to CSO [REDACTED] reports, had jointly decided, en-route to the interception of the Complainant's vehicle, that a controlled stop by way of "Box and Pin" was necessary to reduce the potential for an uncontrolled escape of a possible impaired driver, and to eliminate any further acts or erratic driving that might place the public at risk.
- (75) At 22:52:14 Cst. [REDACTED] broadcast that the unit driven by Cst. [REDACTED] had just caught up to the Complainant's car. Cst. [REDACTED] asked for confirmation of the license plate of the Complainant's car that had been reported by CSO [REDACTED] at 22:52:54 which was immediately provided.
- (76) Csts. [REDACTED] and [REDACTED] had been following immediately behind the Complainant's car. Further discussion took place between the two VPD vehicles then in pursuit on the strategy to perform the box or pin maneuver.
- (77) At 22:53:22 Sgt. [REDACTED] broadcast a warning not try to pull over the Complainant's car until resources were available at the front of the stop.
- (78) At 22:53:35 Cst. [REDACTED] next broadcast that the Complainant's vehicle was signaling a right turn southbound at Tyne off Kingsway where there was a stale red light.
- (79) The police units followed the right turn of the Complainant's vehicle south on Tyne.
- (80) None of the police observers witnessed any erratic driving of the Complainant's car beyond the roll through right turn on Tyne at the stale red light.
- (81) Furthermore, there were not any reports of speeding by the Complainant's vehicle.
- (82) The three police units, including that driven by Cst. [REDACTED] continued to follow the Complainant's vehicle until it stopped at the red light at the intersection of Tyne and 49<sup>th</sup>.
- (83) At that point, at 22:55:54, the vehicle with Csts. [REDACTED] and [REDACTED] moved to block the front of the Complainant's vehicle, the vehicle operated by Cst. [REDACTED] blocked the driver's side, and that operated by Cst. [REDACTED] blocked the rear.
- (84) The elapsed time from first observation of the Complainant's vehicle by CSO [REDACTED] to the roadside stop appears to have been approximately six minutes.



- (85) The Complainant and her adult male passenger disagreed that her pattern of driving was in any way unusual or improper. As well, both denied that the Complainant was either impaired, or had consumed alcohol before driving;
- (86) The investigative interviews did not put specific driving issues to either the Complainant or her passenger. However, CSO [REDACTED] had provided his detailed narrative of the driving he witnessed.
- (87) I am satisfied that the general denials of erratic driving from the Complainant and her passenger were not reliable. I accept CSO [REDACTED] reports as the more accurate and reliable report of the Complainant's pre stop driving activity.
- (88) I am also satisfied that in deciding to stop the Complainant's vehicle, Cst. [REDACTED] was beginning an impaired driving investigation. However, in doing so, and before he had dealt with the Complainant in person, Cst. [REDACTED] knew that the erratic driving reported could well have been attributable to a number of other possible causes including distracted driving, mechanical issues, medical issues or simple poor driving. As such, Cst. [REDACTED] knew that further investigative steps were required to narrow the focus of the actual issue.
- (89) It has been alleged by the Complainant that the box and pin maneuver, and indeed the traffic stop undertaken by Cst. [REDACTED] and other officers, was the result of the Complainant's African heritage. The Investigator reports that the Complainant stated that *"it was the only way to explain the aggressive way the stop took place"*.
- (90) I have reviewed all of the evidence, including the material in the FIR. I cannot find any evidence to support the Complainant's concern. There is no evidence that any of the officers dealing with the Complainant's traffic stop were aware of her heritage or ethnicity before her vehicle was stopped.
- (91) I find that that the attending officers, including Cst. [REDACTED] had reasonable grounds to stop the Complainant, based on the reported pattern of driving.
- (92) I further find that given that reported pattern of driving, the use of a "box and pin" maneuver was, in all of the circumstances, a considered decision taken to mitigate possible risk to other drivers. Furthermore, the maneuver was reviewed, and approved, by Sgt. [REDACTED] before implementation, as required by VPD policy.
- (93) As to knowledge of who was in the Complainant's vehicle, I also cannot find that any of the officers were aware of that detail until the car had been stopped.
- (94) Once stopped, however, I find that Cst. [REDACTED] was aware that not only was there a front seat passenger in the Complainant's vehicle, but also Cst. [REDACTED] would have known of the existence of a rear car seat in that car as result of observations broadcast by Cst. [REDACTED] immediately after the stop.

## **XI Interaction with the Complainant and Passengers**

- (95) Immediately after the Complainant's vehicle was stopped, Cst. █ exited the passenger side door of his unmarked police car. He noted at that point that the driver of the subject vehicle was female.
- (96) I am satisfied that through hand gestures and verbal commands, Cst. █ instructed the Complainant to exit her vehicle. I am not satisfied that Cst. █ was overly aggressive or demanding in communicating with the Complainant.
- (97) I am satisfied that the immediate aftermath of the "box and pin" stop of the Complainant's vehicle was confusing for all concerned. Cst. █ had uncertainty as to who he was dealing with as driver. The Complainant had no idea why she had been stopped in such an aggressive manner.
- (98) I accept the Complainant's stated confusion as to what she was being asked to do, and by whom, immediately after the traffic stop. Cst. █ was not in uniform and the car immediately to the Complainant's left was an unmarked police vehicle.
- (99) Although emergency lights had been activated on the police car operated by Cst. █ and Cst. █ I find that the Complainant may well have had legitimate concerns about who had cornered her vehicle, and for what purpose.
- (100) Immediately after exiting her vehicle as instructed, the Complainant was handcuffed by Cst. █ and advised that she was being detained for the investigation of the impaired operation of a motor vehicle. Cst. █ also held onto the Complainant briefly while Cst. █ cleared the Complainant's vehicle.
- (101) I find that the "clearing" was limited to a visual inspection of the Complainant's vehicle's interior by Cst. █ and confirmation that the passengers were "cooperative" in a brief discussion with Mr. █. There was no search of the Complainant herself or Mr. █ nor any comprehensive "risk assessment" involving a computer search of records relevant to the parties in the Complainant or her vehicle.
- (102) I find that Cst. █ decided to handcuff the Complainant because:
- (a) She was unknown to him, and suspected of impaired and/ or erratic driving;
  - (b) Cst. █ and the Complainant were on a public street raising the risk of unpredictable moves;

- (c) Cst. ■ prior experience with impaired persons led him to believe that they were often unpredictable, possibly creating a risk of harm to the member or others;
- (d) Cst. ■ believed that there were unknown possible risks arising as a result of the other person in the passenger seat of the Complainant's vehicle;
- (e) Cst. ■ believed that the convergence of those facts could potentially make the Complainant's future behaviour unpredictable, creating risks for her and Cst. ■ and
- (f) Cst. ■ believed that he had to split his attention between the Complainant and her passenger in case he might be called on to assist other officers.

(103) However, I further find with respect to the handcuffing of the Complainant that:

- (a) The Complainant was contained physically by three police cars and Cst. ■ immediately in front of her;
- (b) The Complainant had fully complied with Cst. ■ instructions and submitted to handcuffing without resistance;
- (c) No additional use of force was required to control the Complainant throughout her dealings with officers on scene;
- (d) The Complainant had not been arrested by Cst. ■ nor were there any grounds to do so on the limited facts known to Cst. ■
- (e) There were no apparent exigent circumstances raising the prospect of a genuine and material risk to Cst. ■ the other members, the public or the Complainant herself;
- (f) There were no indicia of impairment evidenced by the Complainant. In particular, no evidence of the smell of alcohol either on the Complainant's breath or arising from her vehicle;
- (g) There was no evidence of any threat posed by the Complainant's passenger. Indeed almost immediately Cst. ■ had determined that Mr. ■ was fully cooperative and advised Cst. ■ of that fact;
- (h) Cst. ■ had first engaged Mr. ■ in a discussion in the car, before asking him to exit and in that manner, was able to determine his level of cooperation. For reasons that were not articulated, Cst. ■ did not follow that pattern, but rather immediately ordered the Complainant to exit her vehicle without any prior discussion; and
- (i) Any potential risk that might have arisen from the Complainant's passenger, or indeed the Complainant, was being covered by Cst. ■ Cst. ■ Cst. ■ and Cst. ■ As such the reality of any potential need for Cst. ■ to render assistance to the other four officers then on scene was remote at best.

(104) Taking into consideration all of the foregoing, I find that there were no facts supporting the inference or conclusion that the Complainant posed any risk to Cst. ■ or any other person, once her vehicle had been stopped.

**XII Misconduct Allegation # 1 -Unnecessary use of force – Handcuffing – The Law**  
**S. 77(3)(a)(ii)A of the Police Act**

(105) The first allegation of misconduct relates to the unnecessary use of force by Cst. ■ in handcuffing the Complainant immediately upon exiting her vehicle. The specific allegation is that Cst. ■

*Committed Abuse of Authority by oppressive conduct pursuant to section 77(3)(a)(ii)A of the Police Act by recklessly using unnecessary force on the Complainant through the application of handcuffs without good and sufficient cause.*

*("Misconduct Allegation #1")*

**(a) Analysis - Handcuffing**

(106) There is no dispute that Cst. ■ was at all times engaged in the lawful execution of his duty and that the handcuffing of the Complainant was a use of force on a member of the public.

(107) In order to consider the use of force allegation of misconduct concerning Cst. ■ arising under section 77(3)(a)(ii) (A) of the *Police Act*, I have considered the following factors in the context of the findings of fact set out above:

- (a) Did Cst. ■ subjectively believe that the use of force on the Complainant by handcuffing was necessary and part of his duty?*
- (b) Did Cst. ■ subjectively believe the use of force by handcuffing was not excessive?*
- (c) Objectively, were Cst. ■ beliefs about their use of force reasonable?*
- (d) Were the actions of Cst. ■ in handcuffing the Complainant undertaken recklessly using unnecessary force? and*
- (e) Did the actions of Cst. ■ reflect serious blameworthy conduct?*

**(b) Did Cst. ■ subjectively believe that the use of force by handcuffing was necessary and part of his duty?**

(108) The first issue is a subjective consideration of Cst. ■ belief that the use of force on the Complainant by handcuffing was necessary in the circumstances of this case.

- (109) As noted above, I am not satisfied as to the reality of the risks facing Cst. █ as he began dealing with the Complainant. Nor am I satisfied that Cst. █ genuinely undertook a subjective assessment of the same before deciding to handcuff the Complainant.
- (110) The evidence of Cst. █ however, is that he subjectively believed that the handcuffing of the Complainant immediately upon her exiting her vehicle was essential based on his prior experience and duty.
- (111) I therefore find that Cst. █ subjectively believed the use of force by handcuffing the Complainant was necessary.

**(c) Did Cst. █ subjectively believe that the use of force by handcuffing was not excessive?**

- (112) The next issue relates to a further analysis of Cst. █ subjective beliefs with respect to the amount and nature of force used to control the Complainant by applying handcuffs as an impaired driving investigation began.
- (113) As noted above, considering all of the circumstances, I cannot find that Cst. █ seriously considered the actual risks posed by the Complainant as she exited her car. Nor can I find that he subjectively believed the use of such force by the application of handcuffs was appropriate in the circumstances existing roadside.
- (114) I find that the actions taken by Cst. █ to apply force by immediately applying handcuffs to the Complainant did not arise from a genuine subjective belief in the need to use such force.
- (115) Subjectively, I find that Cst. █ simply assumed that handcuffing was the appropriate use of force for a person who was to be investigated for impaired driving and was, therefore, not excessive under the VPD policy then in effect to ensure officer safety.
- (116) However, I cannot find that Cst. █ took the time to consider if the use of force was, in all of the circumstances required, or excessive to deal with the Complainant.
- (117) Rather, I find that Cst. █ subjectively considered the handcuffing process to be a routine part of his duties while he confirmed that the Complainant's vehicle was being cleared. In contrast, Cst. █ under similar circumstances did not appear to consider the handcuffing of Mr. █ necessary for officer safety.
- (118) In handcuffing the Complainant, I find that Cst. █ acted without actually considering whether or not his decision to use force by handcuffing was excessive in all of the circumstances under law and VPD policy.

(119) Having considered all of the foregoing, I have concluded that subjectively Cst. ■ believed, but without analysis, that the use of handcuffs was a reasonable use of force tool in all of the circumstances, and not an excessive use of force.

**(d) Were Cst. ■ beliefs about the use of force reasonable?**

(120) With respect to this issue, I must consider whether or not in all of the circumstances, Cst. ■ beliefs were reasonable in that the use of force by handcuffing the Complainant on detention was necessary and reasonable taking into consideration his training, experience and duty.

(121) This is not simply an assessment of what I might consider reasonable, but rather the reasonableness of Cst. ■ beliefs about his use of force that must be measured against the common sense standard of acceptable behaviour from the perspective of a reasonable police officer with the same level of training and experience, confronted by similar circumstances.

(122) 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”.*

(123) 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.

(124) I have also considered the training of Cst. ■ and the provisions of the National Use of Force Framework. However, simply because such training and 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.

(125) Officers are required to consider the facts and law before using force on a member of the public through the appropriate exercise of judgment. Clearly there will be circumstances where such decisions are made very quickly, as with possible violence or risks to the officers or other persons.

(126) As noted above, however, there were no exigent or emergency circumstances facing Cst. ■ as he first encountered the Complainant roadside. Her vehicle had been securely stopped, she remained inside and there were no indicia of overt risk to anyone absent to alleged pattern of driving. And there was no further risk of erratic driving until police released the vehicle.

(127) Considering all of the evidence in the Record, and specifically Cst. ■ training history, his policing experience and the National Use of Force Framework, I find that it is common sense that a reasonable officer of similar training and experience, confronting the circumstances apparent to Cst. ■ would recognize that:

- (a) A member's lawful duty with respect to Impaired driving investigations does not routinely begin with the immediate handcuffing of a suspect roadside;
- (b) No information had been received by Cst. ■ prior to the stop of the Complainant's vehicle of any potential risks posed by the Complainant beyond erratic driving;
- (c) There were no reported overt acts of resistance, violence or property destruction associated with the Complainant. As such, there was no urgency to remove the Complainant from the subject vehicle nor to immediately handcuff the Complainant. Cst. ■ and the other officers on scene had ample time available to conduct a basic risk assessment to identify the any issues that might be present. In particular, there was no urgency to order the Complainant to exit her vehicle.
- (d) There was no risk the vehicle would be driving and the vehicle very effectively secured both the Complainant and her passenger between three police cars and 5 police officers;
- (e) Cst. ■ had not conducted any computer checks on the Complainant's vehicle en route using the information provided by CSO ■ that resulted in any risk issues ;
- (f) The Complainant had dutifully complied with Cst. ■ direction to move to the street from her driver's seat. Mr. ■ had similarly exited the vehicle in accordance with Cst. ■ directions after a brief discussion;
- (g) There was no genuine air of "*unpredictability*" confronting Cst. ■ as dealt with the Complainant. There were no overt risks evident and no genuine concerns as to flight for the Complainant;
- (h) The Complainant evidenced no indicia of impairment;
- (i) There was no evident risk to officer safety or indeed the safety of any other party, including the Complainant while the Complainant was seated in her car, or after she exited;
- (j) The need to proceed with a move of the Complainant out of her vehicle to the roadside was not explained by Cst. ■ nor did he comment on the possible increased the risk of a loss of control with that move;
- (k) On being handcuffed, the Complainant showed no resistance or negative reaction. Although the Complainant engaged in protracted debate with Cst. ■ and others over the basis for the roadside stop and ASD demand, she was otherwise cooperative presenting no risk whatsoever; and
- (l) As noted above, reasonable and probable grounds for the arrest of the Complainant had not been established at any point.

(128) Considering all of the foregoing, I find that a common sense assessment of the anticipated response from a reasonable officer of similar experience and training to that of Cst. ■ confronting similar circumstances and considering their duty at law, would conclude that the rapid order to demand that the Complainant exit her vehicle

and the immediate subsequent handcuffing of the Complainant was unnecessary, excessive and an unreasonable use of force unjustified by VPD policy and law.

- (129) Following the decision to detain the Complainant for an impaired investigation, Cst. ■ acted almost automatically to handcuff the Complainant as she exited her vehicle. I am not satisfied that there was in fact compliance with VPD policies to take the time to consider and articulate whether or not in all evident circumstances, any use of force, or handcuffing, was required to allow Cst. ■ to complete his investigation and discharge his duty.
- (130) I am not satisfied that the required justification for the handcuffing decisions by Cst. ■ arose before the direction for the Complainant to leave her vehicle. Nor am I satisfied that the decision to use force and handcuff the Complainant was supported by the objective facts then in existence.
- (131) Considering all of the foregoing, I find that there is in fact clear, compelling and cogent evidence to support a finding that Cst. ■ acted unreasonably without due consideration of his lawful authority in applying excessive force to the Complainant by applying handcuffs.

**(e) Serious Blameworthy Conduct**

- (132) As noted above, the concept of “*serious blameworthy conduct*” implies deliberate or intentional action to act improperly or, alternatively, action that is reckless in the same manner.
- (133) 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 even if officers act contrary to their legal authority.
- (134) 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.
- (135) 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.
- (136) Such is the case with the use of handcuffs and the former VPD policy on the use of force. VPD policy on handcuffing in effect at the time of the incident in question notes as follows:



*“Being placed in handcuffs by a police officer can be a deeply stressful event. Members should, where practicable, seek to maintain the dignity of the arrested detained or apprehended person and take such steps as are reasonable in the circumstances” (Policy, para 2)*

*“Absent a compelling justification (eg. Clearly articulable safety concern) members shall not place a person in handcuffs who has been detained solely for an investigative detention” (para 4)*

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- (137) Nowhere in the law or directions provided by VPD policy to all officers is a general principle established that handcuffs will always be applied on detaining an individual for investigation, or even on arrest. Rather, the law and policy requires a considered decision, genuinely undertaken with the exercise of appropriate judgment, to establish lawful grounds for the use force on a member of the public.
- (138) As noted above, in the circumstances of this case, I find that the actions of Cst. ■ in handcuffing the Complainant were not lawful. However, I am satisfied that the handcuffing decision taken by Cst. ■ was not taken in bad faith, but rather was an error in judgment.
- (139) In his evidence at the Discipline Proceeding, Cst. ■ provided important new details on his experience with prior impaired driving investigations and the possible unpredictability of both drivers and passengers.
- (140) I am satisfied that although the facts presented by the encounter with the Complainant do not seem comparable to the prior experiences recounted by Cst. ■ nonetheless the member took that earlier encounter seriously.
- (141) The Complainant also viewed the handcuffing experience seriously. For the Complainant and Mr. ■ the aggressive “box and pin” roadside stop and immediate handcuffing that took place reinforced their suspicion of improper police actions.
- (142) The Complainant suddenly found herself standing between three police cars and multiple police officers on a busy street in handcuffs. For the Complainant, there can be no doubt that such was a serious event in her life.
- (143) The Complainant’s young son was also negatively affected by the handcuffing of his mother and questioned why such would be happening.

- (144) Considering all of the facts, I am satisfied that Cst. ■ did not take the time necessary to exercise discretion and judgment in making his handcuffing decision in accordance with VPD policy. Instead, Cst. ■ was acting on limited information from a third party describing an erratic pattern of driving. The possibility of encountering an impaired driver existed, however, had not been investigated or confirmed in any way. The Complainant, in the seconds she had before being handcuffed, evidenced no indicia of impairment and presented no apparent risks to officer safety.
- (145) In considering serious blameworthy conduct, I am mindful of the fact that Cst. ■ released the Complainant from handcuffs within minutes and immediately upon being advised by Cst. ■ that the subject vehicle had been cleared and was safe.
- (146) I am also mindful of the patience shown by all members, and in particular Cst. ■ in attempting to encourage the Complainant to comply with the ASD demand that had been issued.
- (147) Although those actions followed the decision to handcuff the Complainant, they are relevant in considering the context of “serious blameworthy conduct”.
- (148) Considering all of the circumstances, I find that the handcuffing of the Complainant was indeed serious, particularly to her, her son and Mr. ■■■■■.
- (149) However, I have found that Cst. ■ simply made an error of judgment in moving quickly to handcuff the Complainant. The handcuffs were released quickly and matters proceeded from that point with no restraints on the Complainant.
- (150) Considering all of the foregoing, including, in particular, Cst. ■ testimony at the Discipline Proceeding, I find that Cst. ■ decision making that resulted in the handcuffing of the Complainant was serious, and an error in judgment.
- (151) However, taking into consideration all of the evidence of Cst. ■ actions, the circumstances roadside and the detailed explanation provided in the Discipline Proceeding, I find that Cst. ■ simply made a mistake, a mistake that I find did not rise to the level of blameworthy misconduct.

**(f) Conclusion – Misconduct Allegation # 1**

- (152) As a result of the foregoing analysis, I have determined that Misconduct Allegation # 1 is not substantiated with respect to Cst. ■

### **XIII Misconduct Allegation # 2**

(153) The second allegation of misconduct concerning Cst. ■ alleges that he committed:

*((ii) Oppressive conduct towards members of the public, pursuant to section 77(3) (a) of the Police Act, as a result of the Member's order for the suspension of the Complainant's driver's license for 90 days and seizure of her motor vehicle without apparent authority, or good and sufficient cause; ("Misconduct Allegation # 2)*

(154) With respect to Misconduct Allegation # 2, there is no dispute that:

- (a) The handcuffs were removed from the Complainant by Cst. ■ at approximately 22:59. Cst. ■ then informed the Complainant that she was being detained for the investigation of "Impaired Operation of a Motor Vehicle".
- (b) Cst. ■ next read a mandatory demand for the Complainant to undertake a roadside screening device ("ASD") test pursuant to section 320.27(2) of the Criminal Code of Canada. The details of the legal framework for this demand do not appear to be set out in the FIR. However, Cst. ■ provided supplemental evidence during the Discipline Proceeding confirming the that he was acting pursuant to section 320.27(2) of the Criminal Code. Cst. ■ further confirmed that in his view, he had met the conditions for issuing such a demand. Unlike prior law which required some suspicion of impairment, Cst. ■ and Counsel acting on his behalf, clearly explained that the mandatory demand required no such pre-conditions. I cannot find that Cst. ■ was in error on this point. His authority to issue the mandatory demand was clear.
- (c) Cst. ■ at some point requested a driver's license from the Complainant, which was provided, however, when and under what circumstances are unclear;
- (d) However, from the moment of her detention, there is no doubt that the Complainant was questioning why the police had stopped her vehicle and asking for explanations as to what was taking place;
- (e) Cst. ■ attempted to explain to the Complainant that he needed to determine when the Complainant had last had an alcoholic drink or chewed gum to ensure ASD operational accuracy. Cst. ■ also attempted to explain how the ASD functioned several times, again without apparent success;
- (f) The FIR details how other members, including Cst. ■ came on scene to engage the Complainant to explain the ASD process, again without apparent success;
- (g) Cst. ■ also attempted to encourage the Complainant to complete the ASD test, without success, explaining why completing an ASD was, in his view, a better option than a refusal, based on potential consequences;

- (h) In the final result, Cst. ■ ultimately took the Complainant's apparent lack of cooperation as a refusal to comply with an ASD demand;
- (i) At 23:45 Cst. ■ served the Complainant with a 90 day Immediate Roadside Prohibition from driving (the "IRP") and a 30 day impoundment order for the Complainant's vehicle;
- (j) Csts. ■ and ■ assisted the Complainant in removing personal items from her vehicle prior to the tow;
- (k) Cst. ■ also personally paid for a taxi to take the Complainant and her passengers home;
- (l) Cst. ■ went to such great lengths to explain the ASD process to the Complainant because he did not observe any overt signs of impairment at any point;
- (m) I am satisfied that Cst. ■ believed that he needed some explanation from the Complainant for the driving behaviour allegedly noted by ■ and ■;
- (n) The Complainant never actually addressed the specific driving issues that had been raised, leaving Cst. ■ with no explanation for the erratic driving that had been witnessed by CSO ■

(155) The same tests and law relevant to Misconduct Allegation # 1 apply to consideration of this allegation.

(156) In addressing those tests, and having considered the totality of the evidence, including the testimony of Cst. ■ I am satisfied that the member was at all times engaged in his lawful duty to complete an impaired driving investigation.

(157) It is also evident that Cst. ■ subjectively believed it was appropriate, and indeed lawful, to issue the IRP and order the impoundment of the Complainant's vehicle. Cst. ■ believed it appropriate to issue the IRP based on his assessment of the totality of the Complainant's actions which resulted in her failing to comply with the many demands issues lawfully by Cst. ■

(158) On the issue of the objective reasonableness of Cst. ■ decision in this regard, the facts before the member were as follows:

- (a) The Complainant denied having consumed any alcohol before being detained;
- (b) The Complainant had cooperated with Cst. ■ however, repeatedly questioned his actions and the need to complete a mandatory ASD test;
- (c) Cst. ■ did not note any indicia of impairment, slurred speech or glazed eyes in his lengthy dealings with the Complainant. Cst. ■ did have reports of erratic driving from CSO ■ however, had not observed any problematic driving by the Complainant himself;
- (d) Cst. ■ had noted some indicia of impairment, such as impaired motor skills, glazed eyes and slurred speech, however, had not conveyed those observations to Cst. ■
- (e) Although a partial bottle of wine had been located by Cst. ■ in the Complainant's vehicle, once again, that information had not been made known to Cst. ■ nor does

there appear to be any indication where in the vehicle the bottle was found or it's possible relevance, if any, to the issue of the Complainant's possible state of impairment; and

(f) Cst. ■ felt that he did not want to allow a possible impaired driver to drive from the scene with a passenger and child in the car.

(159) In the circumstances, I am satisfied that after a lengthy exchange with the Complainant, Cst. ■ was having doubts as to whether or not the Complainant was in fact impaired. However, the member still had no explanation for the poor driving that had been reported.

(160) Ultimately, after having dealt with the Complainant for almost fifty minutes, Cst. ■ decided to resolve his uncertainty by issuing an IRP and 30 day vehicle impoundment order based on his belief that the Complainant had refused to complete an ASD test.

(161) I am satisfied that Cst. ■ decided to issue the IRP to ensure that if actually impaired, the Complainant would not be left to drive away with a child in the car creating a potential risk.

(162) It appears that a reasonable officer of equivalent training and experience to Cst. ■ would conclude, considering the totality of the evidence, that the Complainant had in fact refused to complete the ASD test as she was lawfully required to do.

(163) I find that such an officer would also conclude that although the Complainant was not exhibiting indicia of impairment, her pattern of unexplained erratic driving raised a risk associated with her further operation of a motor vehicle. The possible risk arising would extend to the Complainant, her passengers and the public.

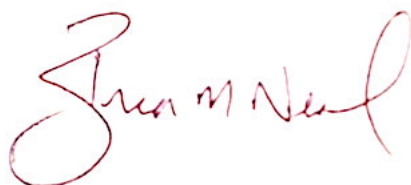
(164) With respect to the impoundment of the Complainant's vehicle, an officer of equivalent training and experience would note that the roadside prohibition order would not address the risks associated with the Complainant operating her motor vehicle. Such an officer would reasonably conclude that lawful authority existed to impound the Complainant's vehicle.

(165) It appears, therefore, that Cst. ■ actions in issuing the IRP and vehicle impoundment orders in the circumstances noted above was not an oppressive act taken recklessly, without good and sufficient cause.

(166) In the result, it appears that considering the totality of the circumstances relevant to the Complainant, the evidence referenced in the FIR as augmented by the testimony at Cst. ■ during the Discipline Proceeding does not appear sufficient to substantiate Misconduct Allegation # 2 in relation to Cst. ■ potentially requiring the taking of disciplinary or corrective measures.

**XIV Conclusion – Misconduct Allegation # 2**

(167) As a result of the foregoing analysis, I have determined that Misconduct Allegation # 2 is not substantiated with respect to Cst. ■ based on the material in the FIR augmented by Cst. ■ testimony in the Discipline Proceeding.



Brian M. Neal, K.C.(rt)  
Discipline Authority  
March 13, 2023  
Victoria, B.C.

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