OFFICE OF THE
POLICE COMPLAINT COMMISSIONER

British Columbia, Canada

REPORT OF THE POLICE COMPLAINT COMMISSIONER
PIVOT COMPLAINTS AGAINST VPD

I. Background

On 27 March 2003, representatives from the Pivot Legal Society (Pivot) attended my office and advised me that Pivot had gathered a collection of complaints against members of the Vancouver Police Department (VPD) from various marginalized members of the Downtown Eastside (DTES) of Vancouver. These complaints covered a period of about a year and involved various complainants and various respondent police officers. Pivot stated that the reason it had chosen not to send each of the complaints to our office individually was because Pivot believed that this collection of complaints demonstrated a systemic problem in relation to the way in which members of the VPD treated marginalized residents of the DTES.

In addition to requesting that this office ensure that these complaints were taken seriously and investigated thoroughly, Pivot requested that I order the complaints to be investigated by an external agency. The allegation was that neither Pivot nor the complainants they represented had any confidence or faith in the fact that the VPD would properly investigate their complaints. In support of that belief, Pivot referred to statements attributed to Chief Jamie Graham of the VPD on the February 13, 2003 Bill Good radio talk show to the effect that some of the claims by these complainants were "preposterous". This statement led Pivot to conclude that Chief Graham, who has a statutory decision-making role about complaints only after they are properly reviewed and investigated, had already made up his mind and had prejudged the validity of the complaints.

Briefly stated, I advised Pivot that it ought not to delay formally lodging any complaints while awaiting a decision as to whether I was disposed to ordering an external investigation. I brought to Pivot's attention that Part 9 of the *Police Act* confers discretion to summarily dismiss a complaint if the act or omission complained of, to the knowledge of the complainant or third party complainant, occurred more than 12 months earlier. I indicated that I would review the complaints, apply the appropriate

criteria to exercising my discretion as to whether or not to order an external investigation, and advise Pivot of my decision thereafter.

Subsequently, on 9 June 2003, Pivot filed a collection of affidavits under an umbrella Form 1 complaint, for review by my office. I reviewed the complaints, considered the circumstances, the provisions of ss. 55.1(2) of the *Police Act*[1], the public statements made by the VPD Chief about the allegations and the fact that a member of the VPD Internal Investigation Section may have been either a respondent or witness officer in one of the complaints. I decided that it was in the public interest to make an order for an external investigation into the Pivot complaints.

Having made this decision, I was faced with the dilemma of finding a police agency that had the resources to undertake such a huge task. The reality is that most municipal police departments (other than Vancouver) have no more than two or three officers dedicated to internal complaint investigations. Furthermore, most police departments are understaffed and have finite financial resources that would prevent them from hiring additional staff to undertake such a project. Although I accept that the VPD had the talent, resources and ability to conduct such investigations, the problem as I saw it was that in light of the allegations and the circumstances, VPD should not be the ones to do it. Accordingly, I had no choice but to request assistance from the provincial police force in this province – the RCMP. I consequently on 7 July 2003 provided the RCMP with an Order for External Investigation.[2] On 16 July 2003 I physically handed the collection of complaints to the RCMP to begin the process of external investigation.

Despite the fact that such a request for assistance had significant ramifications for the RCMP with respect to both cost and personnel, as well as perhaps affecting professional relationships between the provincial police force and the largest municipal police force in the province on certain matters involving integrated policing or joint forces operations, the RCMP agreed to undertake this project. Their response to my request was superb. Deputy Commissioner Busson selected Inspector (now Superintendent) Ken Handy to head up the investigation. By 9 September 2003, he in turn selected six of the most experienced investigators available to assist him with this task that the RCMP named as "Project E-Pivot". These seasoned investigators had collective knowledge and experience in municipal (uniform) policing, drug, major crime and internal investigations. Following the approval of an operational plan and budget, and securing premises, they obtained the necessary office equipment and computers and commenced operations on 31 October 2003.

On 17 November 2003 the RCMP team raised two mandate issues with me:

a) whether Chief Graham ought to continue in his role as Discipline Authority (DA) given his initial response to these complaints in the media; and
b) requesting a narrower mandate than contained in my original Order for External Investigation.

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[1] Section 55.1(2) authorizes the police complaint commissioner to order another municipal police force or the commissioner of the provincial police force to undertake an external investigation if the police complaint commissioner considers that such an investigation is "necessary in the public interest".
[2] Order for External Investigation, 7 July 2003

On or before 30 December 2003, I provided the RCMP with responses to those issues. With respect to Chief Graham's continuing role as DA, I indicated that Chief Graham did not agree with my suggestion that he ought to recuse himself and appoint an external DA. I further indicated that Part 9 of the *Police Act* did not currently provide authority for me to order the appointment of an external DA. Consequently, unless Chief Graham was self-persuaded to do so, he would remain as the DA in this case. With respect to the second issue, I provided the RCMP with an Amended Order[3] that in essence narrowed the focus to four matters (paraphrased):

a) focus on events alleged to have occurred between 1 May 2001 and 31 May 2003;

b) if while investigating complaints under the *Police Act*, the RCMP determine that a potential criminal offence may have been committed, that they investigate the matter as a criminal offence;

c) in addition to investigating individual incidents the RCMP were requested to investigate allegations of systemic abuse by members of the VPD; and

d) while investigating allegations that the VPD had not thoroughly investigated public complaints to determine whether the VPD had followed the legislated process under the Police Act.

With those clarifications made, the RCMP commenced the external investigation.

II. Complainant Co-Operation and Evidence

Complicating the RCMP's task was the fact that many of the complainants were homeless or transient, many were addicts or substance abusers, and most were marginalized individuals, some with physical or mental disabilities. Additionally, many were, for various reasons, distrustful of any police organization, including the RCMP. The RCMP report states that: "the mosaic of the DTES includes many persons with physical/mental disabilities, substance abusers, single person households, sex trade workers and the elderly." Accordingly, the investigation of these complaints required the RCMP to take into account the unique circumstances of the complaints and the complainants.

The RCMP made significant efforts to ensure that complainants were re-interviewed. This was necessary not only as a matter of best policing practices, but also because many of the affidavits themselves lacked precision and detail. Through discussions between Pivot and investigators, a consensus was therefore achieved that, wherever possible, the complainants and witnesses who provided affidavits would be interviewed by police. For its part, Pivot requested that support persons be made available for the

[3] Amended Order for External Investigation, 30 December 2003.

complainant or witness during an interview. For the RCMP's part, to further reduce fear and/or anxiety for some witnesses, a secondary interview site was located in the DTES.

Investigators were challenged with locating complainants and witnesses given their transient lifestyles and the time lapse between the alleged incidents and the reporting of them. Locating and interviewing the complainants proved to be difficult. Many of the complainants who were successfully located, missed scheduled appointments as well as subsequently rescheduled appointments. After three missed appointments the RCMP drew the inference that the complainant did not wish to pursue the complaint. This in fact occurred with respect to nine complainants.

Sometimes, the evidence gathered did not support the allegation or indeed, refuted the allegation in the affidavit. As indicated, some chose not to participate in an interview or decided to withdraw their complaint. The passage of time sometimes adversely affected the ability to locate potential witnesses, relevant evidence or identify respondent officers. Some were unwilling or unable to identify respondents or other witnesses while others failed to provide a meaningful account. Of the 50 Public Trust investigations, RCMP interviewed the majority of the complainants. 12 did not provide a further statement. In the result, the RCMP disposed of several of the complaints as unsubstantiated, either because a complainant missed three scheduled appointments (9 complaints) or because the civilian interviews themselves raised serious questions of reliability:

> *No summary of this investigation would be fair or complete without acknowledging that the quality of civilian complainants'/witness' statements varied markedly. While some provided statements that were credible, others provided statements that were fraught with issues that adversely impacted their credibility. Issues that diminished evidentiary value of statements included illicit drug dependency, internal and external contradictions, as well as vague or incomplete identifications or recollections of events.*

III. Brief Summary of RCMP Investigation Results

I will not go into excessive detail in these Reasons concerning the investigation itself. It will suffice to summarize by stating that the investigation addressed some 50 public trust investigations, and took 14 months to complete. Superintendent Handy's team was assisted as and when required by a legal advisor and other resource personnel, both from within the RCMP and the private sector. In excess of 22,000 pages were scanned to the electronic file, and more than 220 interviews were conducted by the investigators. In excess of 600 persons were carded to file. In all, I am told that the RCMP costs of this investigation exceeded $800,000.00 paid from the RCMP Provincial Policing Budget. Their final Report to the DA and to my office contained more than 6,000 pages.

In the end result, the RCMP arrived at the following conclusions based on its assessment of the 55 allegations contained within the 50 complaints on a civil standard of proof:

- 29 (58%) were determined to be unsubstantiated based on the evidence acquired in each investigation.

- 6 (12%) were summarily dismissed as being impractical to investigate pursuant to section 54(1) of the Police Act.

- 6 (12%) were withdrawn by the complainant and, therefore, summarily dismissed pursuant to section 54(1) of the Police Act.

- 3 (6%) were recommended to be re-characterized as service or policy defaults, pursuant to Division 5 of the Police Act.[4]

In the end, the RCMP found that the evidence substantiated 11 (22%) complaints, which were referred to Chief Constable Graham in his role as discipline authority.[5] It should be noted that at the conclusion of the investigation the RCMP determined that:

1. No evidence was obtained that supported a Report to Crown Counsel (for a criminal offence) respecting any person;

2. The evidence did not confirm "systemic abuse or misconduct" by members of the VPD as contained in the Pivot complaints; and

3. Of the 6 complaints of instances where the VPD failed to thoroughly investigate complaints or follow the complaint process properly, the RCMP found one complaint that they would have found to be substantiated, but for the fact that the Respondent had retired. The RCMP brought this to the attention of Chief Graham on 28 July 2004, but the Chief did not reply.[6]

I will deal with the 9 of the 11[7] complaints the RCMP found to be substantiated in more detail in a separate Appendix attached to these reasons. Each appendix will analyze both the RCMP report for each of the nine complainants and the VPD report provided by Chief Graham's Review Team. I have highlighted the issues and the differences in each report. I have then provided my own comments regarding each case.[8]

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[4] See RCMP Investigative Summary

[5] These substantiated complaints will be discussed in more detail later in these Reasons for Decision.

[6] In my view the fact that an officer retires or resigns ought not to result in the investigation being prematurely concluded. Proposed amendments to the complaint process would ensure that the investigation continues to its conclusion and the result is recorded on the file.

[7] In 2 of the 11 complaints (relating to the Woodward Squat) the RCMP determined that they were substantiated but could not identify a respondent officer.

[8] The Pivot Legal Society had at the time of the submission of the complaints, requested that the names of the complainants and all identifying information be kept confidential.
In order to protect the confidentiality of the identity of both the complainants and 3rd party interests, I have chosen to not name them, but rather assign pseudonyms. In fairness to the VPD officers involved (both witness and respondent officers), I have accorded them the same practice.

I turn then to the remaining 41 complaints respecting which the RCMP recommended no disciplinary action. In the Executive Summary of the Pivot Report *To Serve and Protect*, Pivot claims that the affidavits report conduct by members of the VPD that meets the legal definition of abuse of authority. They go on to claim that "beatings, torture, unlawful detention, illegal strip searches, illegal entry into homes, abusive language and unlawful confinement…paint an ugly picture of a police force that routinely abuses the legal rights of the very citizens it is sworn to protect."

I have reviewed all of the evidence in this matter with extreme care. Even taking account of the investigative impediments I will describe below in great detail, I feel I can confidently state that these allegations are overstated and allegations of torture and kidnapping are misleading and histrionic. Within the context of the time and resources available to it, the RCMP was unable to confirm evidence of systemic abuse of authority regarding marginalized residents of the DTES.

In my view the public therefore should be reassured that the vast majority of members of the VPD conduct themselves properly, with honesty, integrity and live up to their oath of office and the code of ethics which includes a "recognition of their fundamental duty to protect lives and property, preserve peace and good order, prevent crime, detect offenders and enforce the law."

IV. The Complaints the RCMP Found to be Substantiated

As will be discussed in more detail below, Chief Constable Graham, after receiving the RCMP's report, ordered the VPD to undertake a second and supplementary investigation of the files where discipline was recommended, and ultimately concluded (March 31, 2005) that none of those complaints was in fact substantiated.

I have undertaken my own review of those files in light of both the RCMP's report and the supplementary information collected by VPD. The product of those reviews is outlined in Appendices I-IX of this Report.

As will be seen, I have concluded that, with respect to five of those complaints, very serious problems are evident in Chief Constable Graham's conclusions. For reasons outlined below, I believe that Chief Constable Graham did not understand his jurisdiction as discipline authority, and as such I propose to give Chief Constable Graham an opportunity to reconsider his decision respecting those complaints before I make a decision whether to order a public hearing in respect of them.

V. VPD Co-Operation During the Investigation Process

The RCMP's process of investigating the 50 complaints, and my process of reviewing them, were greatly complicated by several serious problems that arose in respect of the attitude and degree of cooperation that VPD members and management displayed toward the external investigation. Unfortunately, these problems are not new. But because of their very serious nature, the very real potential to threaten the integrity of

an external investigation process, and the fact that they cry out for reform of the *Police Act*, I consider it necessary to report on them in some detail.

I begin by observing that the VPD served notice on Superintendent Handy and his team very early on in the project that the RCMP could expect VPD resistance to its efforts. On 26 February 2004, at a meeting with Chief Graham, a number of issues were raised by the VPD and discussed. As summarized by the RCMP, these included the VPD's concerns that the OPCC appeared to be "bending the rules" in relation to these complaints - a perception that Chief Graham cautioned may provoke resistance to the investigation by some members of the Department.

Chief Graham's warning of possible "lack of co-operation" by some of his members toward the RCMP investigation proved in hindsight to be a prophetic statement which, viewed today, may by some be interpreted as a declaration of lack of cooperation by his department as a whole. To arrive at a fair and objective conclusion on this question, it is instructive to refer to certain conclusions arrived at by the RCMP in its investigation summary.

Witness officers:

> RCMP investigators determined on a case-by-case basis whether it was necessary to personally interview a witness officer or whether a written duty report would suffice. The RCMP reported that the "duty report" became the common form of response by Witness officers even when the RCMP requested an interview.
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> This office's clear expectation that witness officers will meet with investigators when asked to do so has been clearly set out in an October 2000 practice directive. Unfortunately, the *Police Act* contains no provision for either an investigator or the Commissioner to enforce compliance with this directive. As a result, VPD members often refused personal interview requests on the basis that VPD Internal Investigation Section (IIS) uses duty reports as "accepted practice", and on the basis that the OPCC Directive was "not binding". Thus, it became apparent that only a direct order from the Police Chief himself could found an obligation to submit to an interview. As noted below, in two cases, RCMP investigators asked Chief Graham to issue such an order.
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> The RCMP made 39 requests to interview specific Witness Officers. Only 11 agreed. Of these, 8 provided "KGB statements".[9] Only 3 more attended for interviews even after the "KGB" format was waived by the RCMP only one week after receiving an objection to this format from the Vancouver Police Union.
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> Of the 28 Witness officers who refused to attend for interview, 27 provided various forms of written accounting, including prepared statements to questions forwarded

[9] The "KGB" reference is taken from the style of cause of a 1993 decision of the Supreme Court of Canada, *R. v. K.G.B.*, [1993] 1 S.C.R. 740. In that case the Court held that interview statements are most reliable where they are given (a) under oath; and (b) on videotape. As such, they may be used and relied upon respecting potential witnesses who may at some later time either not be available to testify or if the witness at a later time gives inconsistent evidence.

by the investigator, duty reports or General Occurrence reports. One Witness officer never accounted to the RCMP in any form.

The RCMP reported that the quality and content of Duty Reports ranged from well-structured detailed accounts which fully articulated the actions of the police involved in the complaint, to simple one sentence statements that were, effectively, a non-response. The timeliness of the responses from officers also ranged greatly. This varied from prompt and immediate response to no response. The RCMP stated that the quality of many of those Duty Reports varied inversely with the merit of the allegations. The RCMP also stated that some Duty Reports "did not adequately address the allegation(s) and, therefore, were of limited or no value to the investigation."

In two cases, the RCMP was not content to accept duty reports as a substitute for a personal interview with the Witness officer in all the circumstances of the case. The RCMP insisted on witness interviews in these cases, and after twice orally requesting same of the Chief to no avail, specifically asked Chief Graham to order such interviews in a letter of September 23, 2004. The Chief never replied to this RCMP request. Chief Graham sought to explain this in his March 31, 2005 report by stating that he was satisfied with having been informed that they provided duty reports. In my view, this explanation is unsatisfactory. I will have more to say about this below.

Respondent officers:

Of the 50 public trust investigations, the RCMP was able to identify 62 Respondent officers, covering 36 of the 50 cases.

Under the existing OPCC practice directive, Respondent officers are not required to attend for personal interviews, but they are required to provide duty reports.

Of the 62 identified Respondents, 59 were asked to provide duty reports (of the remaining three, one was not asked to provide a duty report, and in the other two cases, the complaints were dismissed on other grounds before the duty report was received).

Of the 59 Respondents who were asked to provide duty reports, 56 respondents did so. Three in fact agreed to provide KGB statements, while the other 53 provided duty reports of varying quality. Three Respondents never provided duty reports.

The foregoing review demonstrates that the RCMP received less than the full and prompt cooperation that ought to have been expected in this investigation. Through hard work, skilled investigation and persistence, the RCMP was in most cases able to arrive at proper conclusions that gave rise to investigative results one way or the other. The question arises, however, as to why these complications arose, and in particular,

(a) how it is any respondent officer would be permitted not to provide a proper duty report? and

(b) how any witness officer would be permitted by his police chief not to attend for an interview when the investigator considered such an interview necessary?

It is to these critical questions that I turn next.

VI. Attitude of the VPD Toward This Investigation

I have earlier noted Chief Graham's February 26, 2004 statement to the RCMP that it might encounter resistance from VPD members due to a perception that the OPCC was "bending the rules" in relation to these complaints. Chief Graham's March 31, 2005 report expressed the matter even more transparently: "By the time the RCMP investigation began, rumours were rampant throughout the Department that the whole complaint process had been hi-jacked by PLS [Pivot Legal Society]." Chief Graham had also, in the interim (July 26, 2004) advised the RCMP of an even broader "mistrust of the OPCC by the VPD membership".

Since it was the Chief Constable himself who recognized and warned the RCMP at the outset of possible resistance to the investigation by VPD members, it was the Chief Constable – as discipline authority - who was obviously in the best position to issue an effective warning to his own members right at the outset that, whatever their subjective perception as to the validity or motivation behind the complaints, the investigation ordered under law must be respected and all members must cooperate fully and properly. I have seen no evidence that such a direction was given at the outset of the investigation.

What we do know is that RCMP ultimately reported the very regrettable circumstance of a lack of cooperation on the part of "certain VPD members", also incidents of non-responsiveness by the police chief himself.

Before turning to those details, however, I wish to address the Chief's statement to the investigators that resistance was precipitated by VPD's perception that the OPCC was "bending the rules" in relation to this investigation. It is not entirely clear to me what rules the VPD was referring to. I have never received any substantive objection from VPD regarding that subject. If the concern was with the decision to call the external investigation, section 55.1 of the *Act* clearly confers on me the authority to do. If it was the decision to authorize the RCMP to investigate complaints regarding acts that arose more than 12 months earlier, that too is permissible under the Act, as s. 54 makes clear that the time limitation is not an absolute one and the external investigation power does not refer to any time limits.

Given the absence of any plausible legal objection that could be made to my decision, it becomes apparent that the real concern was not so much with whether rules had been bent. The real concern was with how I chose to exercise my discretion under the *Act*.

The Chief's March 31, 2005 report makes clear that VPD considered Pivot's complaints to be politically ill-motivated and conspiracy-driven; from this, a belief appears to have existed that for me to give the Pivot complaints any credence by even entertaining them, let alone referring them to an outside force, reflected a position by this office "against" VPD by giving those complaints a credibility they did not deserve. Chief Graham, in his 31 March 2005 media release even stated the belief that Pivot managed to leverage the media coverage "by putting pressure on the OPCC to force an investigation…." This belief, and the other "rampant rumours" referred to by the Chief, served only to fuel historic concerns arising from past VPD interactions with the Police Complaint Commissioner's office.[10] The end product was an ethos within the VPD of hyper-vigilance, extreme defensiveness and outright resistance. This was an ethos which, if it was not actively shared by senior management, was not challenged or quelled in any effective way by management.

I have already outlined the considerations that led to my decision to order an external investigation. I, and the RCMP investigators who investigated this matter, have at all times understood the fact of life that not all complainants tell the truth or the whole truth. Some exaggerate, some fabricate, and some make false complaints for various reasons. Our experience in this office has taught us that we sometimes receive frivolous and vexatious complaints. The motives of complainants and those who represent them are not always beyond reproach. By the same token, experience also shows that it is a fact of life that police officers sometimes commit discipline defaults. This can happen on a regular day in a rich neighbourhood, or in what the RCMP described as the "rare urban microcosm that is the Downtown East Side". It is also a fact of life that even if certain persons in the Downtown East Side were the subject of a discipline default, they would not necessarily come to the OPCC with a complaint without support.

I found myself in the position of having received sworn affidavits taken by an officer of the court alleging misconduct against law enforcement agents of the most serious nature. I did not presume to accept these allegations on their face and move directly to public hearings, as I could have done under s. 60(4) of the *Police Act*. I did not call for a formal public inquiry, as I could have done under s. 50. I did not accede to what Chief Graham has described as the "… expectation by PLS that the original affidavits would be accepted at face value without corroboration or investigation…". But if any VPD member or manager believes that I could dismiss out of hand a large swatch of sworn affidavits alleging torture and police brutality, without requiring them to be properly investigated in circumstances where the Chief Constable had already effectively dismissed them publicly without investigation, those persons simply do not understand the *Act* or the police complaint commissioner's role under the *Act*.

The great respect that I, and the vast majority of our citizens have for all police officers, and frankly the enormous debt that we owe these brave and committed men and

[10] Within a relatively short period of time, our office released Reasons for Decisions in the Frank Joseph Paul matter; ordered a Public Hearing in the Guns 'n Roses incident; declared the VPD investigation into the "Riot at the Hyatt" to be flawed and incomplete and therefore ordered an external re-investigation of the matter be performed by the New Westminster Police Department; declared the VPD investigation into the death of Jeffrey Berg to be flawed and ordered a Public Hearing in that matter, and then ordered the external investigation by the RCMP into this matter. Media coverage of those and other matters was extensive.

women, does not give them immunity from investigation when they are alleged to have done wrong. The very circumstance presented by this unique case underscores why we do not prejudge complaints. The very reason for the *Police Act* is to provide a legal process for separating the wheat from the chaff in these sorts of cases. For the reasons I have already described, I determined that wheat could be best separated from chaff through an investigation process where the investigation process would be above reproach.

This is why it is so critically important for the Police Complaint Commissioner to be institutionally independent of the police and the Government. Without this institutional independence from police, politics and parochial self-interests, I could not properly carry out my mandate to ensure that complaints are thoroughly, fairly and impartially investigated. I was appointed upon the recommendation of a unanimous all-party committee. My sole interest is to serve the public interest and to comply with the legislation governing the police complaint process.

I cannot simply dismiss a Form 1 complaint, nor can I ignore it. The legislation requires that I ensure that it is properly investigated. Given that these 50 plus complaints came in as a large package; that the allegations were contained in sworn affidavits; that there was an allegation of systemic abuse and statements that could only be construed as prejudgment by the VPD Chief, the only practical choice was to send the package of complaints to an external agency such as the RCMP for investigation. Similarly, the RCMP did not have any option other than to take the allegations seriously and investigate them thoroughly.

As an oversight officer I am acutely aware that those being overseen do not typically welcome oversight. As such, oversight agencies have a solemn duty to be fair and impartial to all persons affected by their oversight. Oversight agencies are well aware that there will inevitably be a degree of defensiveness on the part of those being overseen. That is why the process exists, why it is so critical for those subject to investigation to trust the process and why legislative means must exist to ensure that persons not properly engaged are still required to cooperate.

Any suggestion that my decision was either politically motivated, manipulated, or was a response to media pressure, or that I was unfair to the VPD, is therefore ill-informed, and simply wrong.

Oversight is a reality in all professions that affect the public. The obligation to cooperate with such oversight is a professional responsibility. No professional is given the right to determine which complaints he or she thinks "deserve" his cooperation and response. If that is what a professional believes, he should not be in the profession. In this context, I was troubled to be see a communication dated 19 August 2004 from the Vancouver Police Union (VPU) on the issue of Duty Reports:

> *… our members will continue to cooperate with this or any other investigation of any complaint <u>that has merit</u>. However it remains our expectation that our members be treated fairly and with respect.* [emphasis added]

Although this communication at first blush appears to be a statement of intended co-operation, the co-operation is a qualified one – and appears to be limited to those cases the members (the persons under investigation or perhaps the union) believe to have merit. This is fundamentally flawed in principle. It is not for the Respondent to decide if a complaint has merit. That duty belongs to the investigators who must gather the evidence upon which to found a fully-informed decision. To accede to the position that VPD members will only co-operate if they feel the investigation is justified undermines the whole purpose for which an external investigation is ordered. As I stated in my White Paper:

> *Police power is necessary to ensure that free people are protected and that their duly enacted laws are enforced. Police must be authorized to do things that would be illegal for ordinary citizens, and police must not be unduly fettered in the exercise of those powers. But the extensive power of police and the realities in which they exercise their power also means that everyone – the public and the police – must appreciate the critical importance of safeguarding proper standards of police conduct by civilian oversight of any complaints process in which police investigate police. Free and democratic societies must have effective civilian oversight processes for addressing allegations of individual or systemic breaches of proper police conduct. The processes for doing so must be fair to police officers, but they must also be effective in getting to the truth. Police accountability is as important for police as it is for the public*.

A police officer's duty of enforcing the law includes complying with the law, whether or not the officer agrees with the law.

In the best case scenario, one would hope the VPD's full cooperation and compliance in this case would have been informed by an understanding of my uncompromising belief in fairness to all parties, and to my conclusion as to why this investigation was in my view necessary. But to be blunt, such understanding or agreement is not a precondition to police cooperation. Cooperation with investigations, even of frivolous complaints, is part of a police officer's job. A police officer who does not understand that should not be a police officer. This is why it is so deeply disappointing for me to have read the following statement in the RCMP report:

> *Some Respondent and Witness officers failed to substantively and meaningfully fulfill their legislated duty to account during this Public Trust investigation. These defaults contravene provincial legislation, a municipal officer's Oath, the Department's Personnel Code of Ethics and a public expectation of accountability in matters of public trust.*

The circumstances reflected in this case and others reflect why in my view the time has come to legislate a formal and enforceable duty to cooperate and an enforceable power to require all police officers, including respondent officers, to give reports and

statements in connection with any public trust investigation. In the circumstances, I consider it appropriate to quote in full my discussion on this point in the White Paper:

> *It is in my view inappropriate for respondent officers to be protected from the usual obligation to provide evidence in a regulatory discipline process. As made clear in the preamble to this White Paper, the police complaint process is not properly understood to be a quasi-criminal proceeding. It is an error to assume that respondents have, or that the process requires the respondent to have, the right to remain silent. The discipline process is a civil regulatory proceeding. As with other civil proceedings and modern regulatory statutes dealing with professional conduct, the obligation to respond promptly, fully and truthfully to allegations of misconduct is a legal and ethical duty properly attached to the privilege of being a professional. This is so especially for police officers, who have a choice whether to become police officers, and who have a special duty to the truth and to the rule of law. It is inappropriate for respondent police officers to be able to avoid the truth by standing behind a legally authorized wall of silence.*
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> *It is no answer to assert that this would cause police to have "lesser rights" than the criminals they investigate. If a police officer is accused of a crime, the officer will have all the rights attendant on the criminal process. The police complaint process is not a criminal process, and so the proper comparison is not with criminals, but with other professionals who enjoy and protect the public trust.*
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> *Professor Lustgarten has correctly noted that the requirement to tell the truth is a necessary incident to the acute public interest in the proper conduct of members of the police. The Australian Law Reform Commission has described the obligation to give evidence as "the perfectly natural consequence of membership in a disciplined force whose very duty is to uphold and enforce the law, if not of the quasi-employment relationship alone". Professor Stenning has concluded that constitutional and legal parameters in which to draft such reforms are "quite permissive".*
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> *The very existence of the adverse inference that "may" be drawn in s. 61.1(1) of the present Act reflects the drafters' own ambivalence about using a quasi-criminal model in the complaint process. Unfortunately (but not surprisingly), the "adverse inference" has been an entirely unsatisfactory substitute for a duty to cooperate. The circumstances in which it is appropriate to draw an adverse inference are not clear. It is seldom used. But even where an adverse inference can properly be drawn, an adverse inference is a far cry from the accountability that would be gained from an officer's statement regarding what happened.*
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> *The object of the complaints process, as with other civil or administrative processes, is to arrive at the truth and to deal with that truth in a statute designed to educate, correct and, where appropriate, to discipline. The wall of silence encouraged by s. 61.1 undermines that object. It is not unfair to*

> *require officers to tell the truth. Apart from serving the narrow self-interest of certain respondents whose interests might be incompatible with the truth, no valid rationale has been given to support it. The present section thus serves to create inefficiency and cost, and jeopardizes public confidence in the process. This is why, of all the reforms proposed in this paper, compellability is foundational.*
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> *The compellability of respondents should of course be limited to its purpose, i.e., the police complaint process. Evidence adduced in discipline proceedings should not be admissible in other administrative, civil or criminal proceedings. For this reason, I have proposed in subsections (4) and (5) a strong "use immunity" that would supplement other existing legal protections for the same purpose, and thus ensure that that the testimony of officers in the discipline process is not used against them in other proceedings.* [footnotes omitted]

The clarification of the duty of police officers, together with the clarification of other matters that have created controversy between this office and VPD in the past, will not only improve the administration of the *Police Act*, but also assist in minimizing future conflicts between this office and the VPD arising from differing views of the authority conferred by the Act.[11]

I have found it necessary to address this issue at some length in these reasons, and to underline the profound need for reform, because this was not the first file where external investigators have met with resistance and lack of co-operation from VPD in attempting to investigate complaints. I will list three other external investigations where external investigators ran into the same problems.

<u>The Hyatt External Investigation</u>:

> Early in my tenure as Police Complaint Commissioner, I determined that I should cancel the Public Hearing called by the former Commissioner in light of the fact that proceedings had stalled for nearly four years due to legal battles at various levels of Court concerning the authority of the Commissioner to do certain things under the *Police Act.* It became clear to me that it would better serve the public interest to order a re-investigation of the incident referred to as the "Riot at the Hyatt" by the New Westminster Police Department. Deputy Chief Judd in his letter of transmission dated 24 February 2004 attaching his Report, stated:[12]
>
> > *In the context of overall cooperation received by this investigation, it is my duty to report one disappointment. This relates to the fact that VPD failed to ensure that sixteen of its non-CCU members on duty at the event – five bicycle member and eleven "others" – provide this*

[11] For example, the extent and nature of my authority as PCC and our right to conduct independent investigations, interview witnesses and use the services of the RCMP Crime Detection Laboratory, among other issues

[12] New Westminster Police Final Report on Hyatt Page 7

> *investigation with duty reports as requested. In the case of three of those sixteen members, this investigation made specific requests for a member's report and was met with no reply… I am not pleased about the absence of these duty reports. I recommend that appropriate steps be taken in respect of members and their supervisors who failed to comply with their duty to assist a Police Act investigation. I also recommend that the Discipline Authority take steps to obtain these reports prior to making his final decision regarding how to proceed with this matter.*

This problem was similar to the one encountered by the RCMP in Pivot, except that all DCC Judd was requesting was duty reports, not personal interviews. Chief Graham was put on specific notice of the problem, and was advised to obtain those reports prior to making his final decision. On March 17 2004 Chief Graham rendered his decision as DA, confirming the New Westminster Police investigation that the complaints were unsubstantiated.

On 8 September 2004 I wrote to Chief Graham referring to the passage quoted from Deputy Chief Judd. I indicated to him in that correspondence that I wished to know what steps he had taken with respect to the members and supervisors who failed to comply with their duty to assist a *Police Act* investigation, and secondly to determine whether or not Chief Graham had obtained the missing reports prior to making his final decision. I further advised that the reason I wanted to know this information, was to determine "whether or not members of the VPD cooperated with their own police department when ordered to provide the reports." I went on to say in that letter:

> *Nevertheless, I wish to ensure that not only are members of the VPD who have failed to cooperate with this investigation not left with the impression that they need not cooperate, but also that those in authority over those officers have also followed up with those officers to obtain that which is their duty to provide.*

I received no reply to that letter. On October 19 2004, I sent a follow up letter to Chief Graham referring to my September 8th correspondence. I reminded him I had not yet received a reply. On 2 November 2004, I received a detailed letter from the VPD Internal Investigation Section, responding to my inquiries. He described all the steps he took during the course of the investigation in his attempt to assist the New Westminster Police department in obtaining the requested reports. The letter advised that of the 66 members who had been requested to provide witness reports, 55 of them complied.

> *Nine members who were either retired, resigned or on long term disability did not provide reports. <u>Two remaining members still had not provided reports</u>. Members who were late in submitting their witness reports have been given managerial advice regarding the timeliness of providing reports*. [emphasis added]

He further advised that as of 2 November 2004, two of the witness officers still had not provided reports. All but seven of the sixty-six reports had been reviewed prior to the final decision being made by the Discipline Authority.

It is significant to note that it appears that Chief Graham tolerated what appears to be insubordination by his members. Despite Deputy Chief Judd's recommendation and my request, he made his decision without those reports. His solution to the tardiness was to merely issue "managerial advice". That advice appears to have been ignored by the two remaining officers who have ignored instructions from the Chief. He gives no indication that he has followed up on the matter or disciplined them for neglect of duty or insubordination. That kind of tolerance or permissiveness sets the stage for further problems with investigation of complaints. It either signals to the officers that they can get away without cooperating or, that the Chief is really not that interested that they cooperate in the first place. Regardless of which is correct, the effect is the same.

Jeffrey Berg Public Hearing

I called for a Public Hearing in this case because in my view the internal investigation of this matter was flawed and completely inadequate. Jeffrey Berg had died two days after sustaining a blow to his neck during the course of an arrest. The VPD had completed its investigation and concluded that no disciplinary default had been committed. The circumstances of the death were, in my opinion not properly investigated. As a consequence, I ordered a public hearing. Since the VPD had concluded their file, our staff set about conducting our own independent inquiries including attempting to interview witnesses and send exhibits to the Crime Detection Laboratory for analysis. During this process we encountered numerous difficulties including interference and resistance from some members of the VPD Internal Investigation Section.

The problems were myriad. I will describe only two. First, we noted that the VPD had not seized the service weapon of the officer involved in the arrest, and, although they had seized his boots they had not forwarded them for analysis by the lab[13]. This was so despite the fact that there were allegations that the officer had kicked Mr. Berg during the course of the altercation. There were also reports that the officer may have struck Mr. Berg in the neck with his service weapon. We wanted to test the boots and the weapon, as well as certain items of clothing for any trace evidence by sending them to the RCMP Crime Detection Laboratory, since the VPD had not done so in the first instance.

After months of arguing, delays and insistence by the VPD that we had to tell them what we wanted to do and the reasons for doing so, we finally had to contact the

[13] Unfortunately, it was also discovered later that the VPD had potentially contaminated the evidence by taking the officer's boots to the autopsy and placing them near Mr. Berg's body during the autopsy procedure, thereby nullifying the evidential value of any DNA found on the boots by the lab.

RCMP in Ottawa to have them rule that our office was recognized as a law enforcement agency that was permitted to independently forward exhibits to be analyzed by the Crime Detection Laboratory. Even then, since the exhibits had to be seized by the VPD at our request and they were therefore in their custody, arguments ensued as to whether we were permitted to fill out the appropriate forms and send the exhibits directly to the Lab, or whether we had to send a copy to the VPD to forward the exhibits. Concerns were also raised as to who would receive the lab results, the VPD or our office. The VPD objected to that process alleging "*it is not acceptable that you subvert this process by making your own direct representations to outside assisting agencies*".[14] Our office had concerns about advising the VPD IIS about the specifics of the forensic testing that we were having conducted because we had been given cause to believe that certain investigative work-product of our office and our investigative strategy may not be held in confidence and might accordingly be compromised.[15] Ultimately, after much unnecessary delay, these issues were resolved and both the VPD and our office received a copy of the report simultaneously. Incidentally, relevant DNA evidence was found.

Even more troublesome, the VPD interfered in our attempt to independently investigate this case. Our Senior Investigative analyst and commission counsel interviewed an independent witness employed at the Vancouver City garage concerning the damage sustained to the police vehicle in the incident. During the course of that interview the witness agreed to provide supporting documentation to our office. We were advised by the witness that after the interview, a member of the VPD IIS had attended upon him, had questioned him as to what he had been asked, and took possession of the documentation that was intended to come to us. The police officer made it clear to the witness that he was not to speak to our staff, but should speak only to the VPD. She then took possession of the documents advising the witness that she was due to see our investigative analyst the following day. This was not the case. The VPD IIS officer had no scheduled appointment with our office staff. Our office was never advised by the VPD that they had intercepted our documentation and it was not until at least three weeks later that we received the documents, after we advised that we knew they had possession of documentation intended for us. In my view that was a form of active obstruction.

After discussions with Chief Graham[16] concerning my displeasure with the interference from VPD IIS in our preparation for the public hearing, and having clarified my authority to conduct independent inquiries after a public hearing is called, Chief Graham offered to assign two investigators to "assist" commission counsel's requests in order to prepare for the public hearing. This seemed to be a step in the right direction. Unfortunately however, the first task assigned to the VPD investigator who had been requested to interview one of the witness officers who had since retired, resulted in what I deemed to be a "tainted" interview liberally

[14] 8 October 2003 letter to OPCC by VPD IIS
[15] We refer to a 26 August 2003 letter by VPD IIS Insp. Rothwell with copies to all counsel (including Respondent's counsel) respecting investigative issues.
[16] Meeting on 9 January 2004 at VPD HQ

spiced with leading questions and the investigator volunteering unnecessary information.

As a consequence, Commission Counsel Dana Urban Q.C., wrote an e-mail to the IIS Inspector on 10 March 2004 with the following explicit instructions:

> *Please direct Sgt. P. to immediately cease any further interviews with any potential witness in this case or have any further contact with them.*

He went on to say:

> *Please do not assign any other member of the VPD to assist me in preparation for the public hearing.*

Unfortunately, the VPD could not be dissuaded from "assisting". This prompted another e-mail to be sent by Mr. Urban on 25 March 2004 to the VPD IIS Inspector:

> *It has come to my attention that Sgt. P. is making contact with my witnesses subsequent to my past email stating that I no longer wished him involved in this matter.*

The Inspector responded by email on the same date. After confirming that Sgt. P. was still contacting witnesses, he asserted:

> *I have acknowledged your assertion that you do not wish [Sgt. P.] to continue to investigate on your behalf. However I have authorized [Sgt.P.] to complete the tasks that I assigned to him. This includes interviewing the occupants of the suspect vehicle*.

It is clear from this response that the VPD (who had three years to complete their investigation and had closed their file) were now suddenly intent on re-interviewing people that they had had ample opportunity to interview earlier. They were acting completely contrary to commission counsel's directions and defied his request that they stop any further contact with our potential witnesses. In my view, the assistance provided by the VPD proved to be more of a hindrance.

Consequently, since the VPD had effectively stymied any attempts by our office to launch our own investigation utilizing our own staff, and were not complying with directions from commission counsel as to what he wanted done or not done, I had no choice but to request assistance from the RCMP to provide us with investigative assistance.

On 29 March 2004, I requested assistance from Deputy Commissioner Busson, Commanding Officer Pacific Region of the RCMP, and provided her with an order pursuant to s. 55.1(2) of the *Police Act* indicating that a re-investigation was necessary in the public interest. The RCMP appointed two senior investigators to

assist commission counsel. They were of great assistance in interviewing witnesses prior to the public hearing.

The Bagnell/Taser Investigation

On 5 August 2004 I ordered an external investigation into an incident that had occurred in Vancouver on 23 June 2004 when an unidentified member of the VPD had "tasered" Robert Bagnell in order to subdue him. Bagnell died at the scene while still in police custody. I had concerns about the month's delay in disclosing to Mr. Bagnell's family the manner in which Mr. Bagnell met his death, including the fact that the VPD did not disclose that the TASER was involved. I was concerned about the adverse perception of the ability of the VPD to conduct an impartial investigation so I requested assistance from Chief Battershill of the Victoria Police Department to conduct an external investigation. At the same time I requested Chief Battershill to review the present use of force protocol and to make interim recommendations for the appropriate use of the TASER.

The Victoria Police Department embarked on this task with skill and professionalism. They undertook their investigation and were told by the VPD IIS Inspector[17] that any further contact with the Vancouver Police Department in relation to the Robert Bagnell investigation should be done through the Vancouver Police Internal Investigation Section. In that correspondence, Inspector Naughton summed up their frustrations with delays encountered in their dealings with the VPD as follows:

> *I believe that the Victoria Police Department has been respectful and patient while trying to proceed with the Police Complaint Commissioner Ordered Investigation and that further delays will seriously affect our ability to complete the investigation. In the event that the requested information is not forthcoming by December 17th, 2004, we will have no option but to withdraw from the investigation and advise the OPCC accordingly.*

Victoria Chief Constable Battershill followed up on that correspondence with a letter addressed to Chief Constable Graham.[18]:

> *I am writing to ensure that you are aware of difficulties arising since this external investigation was commenced after the Police Complaint Commissioner's External Review order on August 5, 2004.*
>
> *The primary investigator advises me that he has made measured and reasonable requests for information over a period of many months and has consistently met with what appears to be a passive form of obstruction. It has escalated to the point where Inspector Naughton has written without apparent success."...*

[17] Letter December 8 2004 from Victoria Inspector Naughton to VPD confirming conversation of 18November 2004.
[18] Letter December 20,2004 from Victoria Chief Battershill to VPD Chief Graham.

> *…Given the prolonged difficulties which have occurred so far, if the interviews do not take place satisfactorily we will withdraw from the investigation on the basis that we cannot conduct a proper investigation in an atmosphere of obstruction.* [emphasis added]

Hyatt, Berg and Bagnell reflect three separate incidents of failure to co-operate with independent external investigative bodies in addition to the E-Pivot investigation by the RCMP. This pattern of behaviour cannot be tolerated. It must be addressed immediately and urgently in order for there to be confidence in the police complaint process. One cannot merely dismiss the Pivot problem on the basis that VPD membership resented that the investigation was carried out by the RCMP or because they felt that the OPCC decision to order an external investigation was unfair. The other investigations were carried out by municipal police forces that encountered similar problems. In my view, the real problem is deeper. The real systemic problem here is not with the VPD members who police the DTES; the real systemic problem appears to be with VPD management and its accountability within the police complaint process.

VII. The Role of Union agents, the Chief Constable and the Liaison Officer

Union Agents:

The President of the Vancouver Police Union (VPU) met with the RCMP team on 24 October 2003 and offered his cooperation and assurances of assistance. Unfortunately some of the VPU agents appear to have not shared that philosophy and instead actively discouraged some Respondent and Witness officers from co-operating.

Of the many officers who failed to account, six in particular are unique in that although they were initially co-operative, they later withdrew their co-operation, citing VPU agent advice.

One of the issues informing this union agent concern was an objection to the RCMP's proposal to conduct interviews in a format known as "KGB" statement, described above. The VPD members apparently thought that this process was demeaning to their integrity. The RCMP position was that all witnesses - complainants, respondents and witness officers - would be treated equally and impartially and that therefore all statements would be recorded and given under oath. However, within a week of receiving the union's objection, the RCMP stated that it would no longer insist on KGB format statements. Even so, the problem persisted.

Chief Constable:

At the 26 July 2004 meeting between the RCMP and VPD, Chief Graham was presented with a list of some 28 Respondent officers (nearly half of the Respondent officers identified to date) and 15 witness officers who had yet to comply with several RCMP requests for Duty Reports and/or Witness interviews. Chief Graham was asked to ensure that these officers complied with their duty to co-operate. I had earlier written to Chief Graham (21 June 2004) expressing concern that the RCMP had requested an extension of time to complete the investigation largely due to the fact that the majority of VPD officers had delayed in meeting their responsibilities under the *Police Act*. In my correspondence I referred him to several authorities including a recent decision of the Supreme Court of Canada[19] dealing with implied authority and requested that he "ensure that officers under his command shall cooperate fully with investigators in the conduct of investigations in public trust complaints". I reminded him that he had made public statements to the effect that the VPD will cooperate fully with investigations ordered by our office, and expressed the confidence that he would do his utmost to ensure that his officers cooperate fully with the RCMP investigation.

The memo sent by the VPD Inspector then in charge of internal investigations directed the named VPD members to "contact the investigator for an interview or submit a duty report for the incident under investigation"...by August 16th 2004. This direction lacked "teeth". Officers who ignored this direction were not subsequently held accountable by management. As already noted, the current *Police Act* does not provide the requisite authority for the RCMP investigators to compel the attendance of witnesses for interview. The Legislature's presumption that all witness officers would readily comply without being formally compellable has turned out, with experience, to be wrong.

When the inspector's memo did not have the desired effect, the RCMP asked Chief Graham in writing to order two witness members to attend for interviews. Significantly, the RCMP made this written request after making the same request in person on two previous occasions. Chief Graham never responded to this request for an order.

Chief Graham's March 31, 2005 decision sought to explain his lack of response by stating that it was unnecessary because the two members the RCMP asked him to order to be interviewed had provided duty reports. I do not find this explanation to be satisfactory. An interview is very different thing from a duty report: the RCMP knew the difference, and so did the Chief Constable.

A police chief clearly has the authority to demand accountability from his employee police officers. That same view was expressed in an independent legal opinion provided to the VPD as early as 28 November 2002, a copy of which was reviewed by the RCMP in the course of their investigation. Chief Graham should have given the order, because it was the right thing to do, and because it would have been consistent with the expectation that all members should be taken to have been

[19] Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners 183 D.L.R. (4th) 14

aware since 2000, when the Office of the Police Complaint Commissioner issued this Practice Directive on statements of police officers relating to public trust complaints. The relevant Practice Directive states:

> *Within a reasonable time upon being requested to be interviewed by an investigator, where a police officer who might reasonably have knowledge of matters pertaining to a complaint or report shall meet with the investigator and answer all questions.*[20]

It is noted as well that Chief Graham also did not reply to the RCMP suggestion on another file that he should re-characterize the complaint to one of service or policy.[21]

As noted, Chief Graham has stated that he did not issue an order because he was told the two witness officers provided duty reports. In addition to giving this unsatisfactory response, Chief Graham goes on to indirectly criticize the RCMP for taking any negative connotation to any members' failure to respond because of "legitimate reasons" for an initial refusal. Chief Graham stated that: "VPD members were well versed and knowledgeable about their rights".

In my opinion, there is <u>no</u> legitimate reason for a witness officer to refuse an initial interview. Nor is there, for a respondent officer, a legitimate reason to refuse to provide a duty report when that member has been given all existing statements in relation to the complaint. The belief that these obligations could be delayed and in some cases evaded altogether is deeply troubling, and entirely contrary to a properly functioning statute.

<u>The Liaison Officer</u>:

Early on in the investigation, Chief Graham assigned a member of the VPD Internal Investigation Section to act as a liaison officer with the RCMP. The stated role of this liaison officer was to assist the RCMP investigators in gaining access to the VPD operational records and access to witness/respondent officers. My understanding is that as part of her role, this liaison officer was asked by the RCMP to send the various Notices of Complaint to the relevant VPD officers.

The liaison officer did indeed send out an envelope containing the Notice of Complaint, along with the Form 1 (Official complaint under the Police Act by the complainant) and/or a copy of the signed affidavit submitted by Pivot for each complainant to each of the Respondents. However, the VPD liaison officer also authored a covering memorandum attached to the contents of the envelope, which stated:

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[20] OPCC Practice Directive on Statements by Police Officers relating to Public Trust (24 Oct. 2000) S. 6. It should be noted that this Practice Directive was created as a result of consultation and input by all municipal police departments including the VPD.

[21] See P17 RCMP Investigative Summary

Attached is a Notice of Complaint, naming you as a respondent. The RCMP investigators have requested a copy of your notebook entries, pertaining to the incident as well as a duty report. They have supplied you with a copy of the complaint which, at the present time consists primarily of the sworn affidavit.

I would request that you fax a copy of your notebook entries to the RCMP investigator as soon as practicable. <u>You may, however want to delay your submission of a duty report until the complainant has been located and interviewed. You are entitled to the complaint particulars prior to making a response. If you choose to delay your submission, please advise the RCMP investigator accordingly ….</u> [emphasis added]

Two points must be made about this letter:

1. The substantive advice it gives, underlined above, is inaccurate. The members had sufficient complaint particulars in the affidavits to justify sending their duty reports. They were given all existing statements.[22] It would obviously undermine the complaint process if a member had to wait for any and all future statements from a complainant before providing a duty report.

2. The liaison officer's broad interpretation of the OPCC practice directive regarding when to provide duty reports may be contrasted with her explanation that the "duty to account" contained in a different section of the same practice directive for witness officers was not of serious concern because the practice directive was "not binding".[23] It is difficult to avoid the implication that the same OPCC Practice Directive was either interpreted narrowly, or ignored, depending on which approach protected the self-interest of members. Clearly, if there was doubt as to the intention or proper application of the VPD directive, this office should have been contacted.

Not surprisingly, this memorandum had a significant delaying effect on the investigation. After this memorandum went out, a number of VPD officers chose to delay providing any duty report or statement or agreeing to meet with the RCMP investigators. Having made this point, I wish to be clear that I do not believe the liaison officer intended to impede the investigation. Indeed, at least one memorandum from the officer to the VPU president states "In my personal opinion, it would be a travesty if the content of their final report gets overshadowed by the fact that our members failed to assist in the investigation." Prophetic words, again.

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[22] OPCC Practice Directive "On Statements By Police Officers Relating to Public Trust" states as follows in paragraph 5: "Where an investigation into a public trust complaint is underway, and prior to requesting a respondent to provide a statement, the investigator shall advise the respondent of the details of the public trust complaint and shall provide the respondent with copies of the Form 1 and all <u>existing</u> statements made by the complainant." [emphasis added]

[23] The RCMP proceeded on the basis that the "duty to account" is a fundamental obligation of all police officers serving in a free and democratic society. Section 6 of the Practice Directive states: "Within a reasonable time upon being requested to be interviewed by an investigator, where a police officer who might reasonably have knowledge of matters pertaining to a complaint or report shall meet with the investigator and answer all questions."

VPD Members "Self-Determining" their Status:

> I should add that the RCMP report shows instances where VPD members arbitrarily interpreted the OPCC practice directive to suit themselves. Some officers even "self-determined" their status as Respondent officers and on this basis refused to provide an interview with the investigator. In my view, a subject officer does not have the right to self-determine their status as either a witness or respondent officer. It is for the police investigator to determine the status of the subject they are dealing with, based on the evidence.

VIII. Conclusions Regarding VPD Co-Operation

In fairness, a number of officers are reported to have co-operated fully. The RCMP noted that their co-operation in substance and spirit was both "refreshing and heartening". However, others did not.

The attitude and approach portrayed by those members who did not comply with their duty to be accountable is in my view an adverse reflection on those members, on VPD management and some members of the VPU. The self-fulfilling prophesy by Chief Graham that the RCMP would likely encounter "resistance" by some members of the department seems to have pervaded the way in which management dealt with this matter as well. I can only describe the approach by VPD management as a half-hearted, ineffective instruction to the VPD membership to co-operate with the external RCMP investigators.

IX. The VPD Supplementary Investigation

Chief Graham and I both received the E-Pivot RCMP Executive Summary and the Investigative Summary on the same day in November 2004. Additional material was received by both of us over the next few months.

Since Chief Graham had decided to remain as the Discipline Authority (DA), it became his task to review and analyze the RCMP Report and decide what discipline, if any, to impose on those officers. Instead, Chief Graham took it upon himself to instruct senior members of his management staff to further investigate the very issues that had been ordered by me to be externally investigated.

I anticipated that Chief Graham would have assistance in reviewing the RCMP report. However, I did not anticipate that it would become a "second stage of the investigative process", as he describes in his March 31, 2005 report. It would not have been necessary for Chief Graham to obtain "substantial additional evidence" had he ordered his members to comply with the RCMP investigation in the first instance. The very reason for the external investigation was because of my judgment that it should not be undertaken internally by VPD. The decision to undertake a second and supplementary

investigation internally represented in effect, if not in purpose, a challenge to my earlier decision.

All this sets a very bad precedent because it leaves the impression that all a police member or department has to do is simply not cooperate with the external agency and then do their own internal investigation when the external agency quits out of frustration or concludes their investigation without having been able to obtain all the information they requested. The drafters of the *Police Act* probably assumed that once an order for external investigation was made by the OPCC, the police department being investigated would honour the fact that the matter would remain as an external investigation. It appears that on this subject, as with the duty to cooperate, the Legislators were wrong to so assume.

I note that the VPD team did not report encountering the same resistance as did the RCMP in obtaining the information working diligently for 14 months. That it was able to acquire information the RCMP was not able to acquire, calls for an explanation.

The decision to order a re-investigation by his own department after the RCMP report came in critical of his members, in my view violated the principle of an independent external investigation. The ease with which his senior officers subsequently obtained the information that the RCMP pleaded for and waited for in vain during the previous investigation, is an indication that he could have ordered his members to provide that information to the RCMP much sooner.

Chief Graham's March 31, 2005 letter suggested that he directed the further investigation because of the requirements of the *Police Act*. He states: "The *Police Act* requires that the DA must be satisfied with the thoroughness of the investigation before submitting it to the OPCC as part of the next stage of the process." Chief Graham cites no statutory authority for this statement. As I read ss. 57 and 57.1 of the *Police Act*, the discipline authority's contemplated role on receiving a final investigation report is to decide, not order a second investigation. That Chief Graham found it necessary to do so in the face of a lengthy external investigation is itself proof that his membership did not provide the RCMP with all the necessary facts.

What would have best honoured the investigation would have been for the discipline authority to make the decision based on the final report submitted by the RCMP. It should have been through the discipline process that a member who chose not to cooperate provided any additional information, including an explanation for why he or she did not cooperate. In that context, the discipline authority would have been able to consider the additional issue whether any of those members ought to be disciplined for neglect of duty.

To undertake a second investigation process when I earlier ordered an external investigation precisely because of a reasonable perception of VPD partiality, to combine that with a decision that rejects the results of the external investigation, and to then have that decision informed by fundamental errors in law which coincide with the conclusions he expressed on a radio talk show before the complaints were ever investigated – none of this does much to enhance public confidence in the process. In

my view, it was an error in judgment for the Chief Constable not to have referred this matter to another DA, a practice which has substantial precedent under the *Police Act*.[24]

X. The Substance of the Chief Constable's Decision

As to the Chief's substantive conclusions regarding whether any defaults had been substantiated, on 31 March 2005, Chief Graham announced his decision, first to the media, and then to me later that afternoon. He also released publicly, his 31 March 2005 letter to me wherein he outlined a summary of both the history of the process and his decision.[25] Chief Graham came to a different conclusion than did the RCMP on each and every one of the complaints that the RCMP had deemed to have been substantiated.

In the course of that letter, and in his media releases[26], Chief Graham made statements which, although perhaps technically correct, are potentially misleading by their phraseology. One such statement read as follows:

> *Both the RCMP and the VPD investigators concluded that there was not a single case of criminal activity by a VPD officer, nor was there a single incident that required substantive disciplinary measures*.[27]

I regret to have to take issue with this statement. Although it is true that both the RCMP and VPD concluded that there was no criminal conduct meriting the submission of a Report to Crown Counsel, it is not true to say that both the RCMP and the VPD determined that there was not a single incident that required substantive disciplinary measures. That latter conclusion was solely the opinion of the VPD, and Chief Graham in particular. In fact, the RCMP concluded that 11 of the complaints had indeed been substantiated and recommended that the DA find them to have been substantiated.

According to Part 9 of the *Police Act,* when a DA has decided that public trust complaint has been "substantiated", the next step is for him to determine what disciplinary or corrective measures (if any) should be imposed. In this case it was only Chief Graham, not the RCMP, who concluded that: "there was not a single incident that required substantive disciplinary measures." In my view it was therefore potentially misleading to combine those two issues in one sentence. One might excuse it as an unintentional grammatical error but for the fact that the same purport is stated in different language later in the letter[28]. He states:

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[24] It is noteworthy that other department chiefs are often self-persuaded to refer matters for external investigation, not because their office is not capable of doing a good job, but rather to ensure that the public confidence is maintained in the independence and impartiality of the investigation. These actions by other Departments have demonstrated to me that the present civilian oversight system is not irreparably broken, and is capable of working. But where cooperation is not forthcoming, as has unfortunately been the case in BC's largest municipal police force, legislation must provide the "teeth" to ensure cooperation.

[25] VPD letter to OPCC March 31, 2005

[26] VPD Media Release 2005-03-31

[27] VPD letter to OPCC March 31 2005, p.2

[28] ibid, p.3

The RCMP external investigation and my own review determined that no criminal offences and no substantive disciplinary defaults were found from the nearly 60 affidavits.

Again, that sentence suggests that both agencies determined that there were no substantive disciplinary defaults found. That is simply not so.

Even within his own media release, Chief Graham's logic and judgment is difficult to understand. He acknowledges that: "two VPD officers searched a drug dealer with insufficient grounds.... Six officers in two separate incidents didn't follow policy on handling persons arrested for criminal breach of the peace". Yet he finds that none of the complaints were substantiated. That is not logical. If these officers are found to have acted in breach of the governing law or in violation of the department's policies, and it relates to the very issues comprising the complaint, then surely the complaint should be determined to be "substantiated." What consequences should follow from such a finding is a different matter.

Chief Graham's reasoning process for coming to the conclusion that none of the complaints are substantiated was in my judgment fundamentally and legally flawed. The reasoning in question confuses the question of whether a complaint is "substantiated" with what the appropriate consequence should be. The desired consequence inappropriately dictated the finding.

XI. Next Steps

Under the *Police Act*, where I am not satisfied with the decision of a discipline authority, I have the authority to arrange a Public Hearing and appoint an independent adjudicator to hear the evidence and make a final ruling. I do not have the authority to overrule the DA or to substitute my opinion for that of the DA. Only an adjudicator has that authority under the *Police Act*.

To some, the decision as to what to do next may seem obvious. It is not. A simplistic view of this matter would simply be to conclude that since the external RCMP investigation recommended that 11 complaints[29] should be determined to have been "substantiated", and VPD Chief Graham disagreed, ruling that all the complaints were without merit and were "unsubstantiated", that I should just call a public hearing and let the adjudicator decide.

Tempting though that proposition may be, I am duty bound to consider a number of factors in determining whether it is indeed in the public interest to arrange for a public hearing for any or all of the complaints, where there is substantial disagreement between the external investigative body and the police department being investigated.

[29] 11 incidents involving 9 different complainants

Part 9 of the *Police Act* outlines my authority to call a public hearing. Section 60 (5) states:

> *(5) In deciding whether a public hearing is necessary in the public interest, the police complaint commissioner must consider all relevant factors including, without limitation, the following factors:*
>
> *(a) the seriousness of the complaint;*
> *(b) the seriousness of the harm alleged to have been suffered by the complainant;*
> *(c) whether there is a reasonable prospect that a public hearing would assist in ascertaining the truth;*
> *(d) whether an arguable case can be made that*
> *(i) there was a flaw in the investigation,*
> *(ii) the disciplinary or corrective measures proposed are inappropriate or inadequate, or*
> *(iii) the discipline authority's interpretation of the Code of Professional Conduct was incorrect;*
> *(e) whether a hearing is necessary to preserve or restore public confidence in the complaint process or in the police.*

In the particular circumstances here, I have decided to defer the decision whether to arrange one or more public hearings. I do so on the basis that I believe that Chief Constable Graham fundamentally misapplied the statute and failed to understand and properly exercise his jurisdictional when he arrived at his March 31, 2005 decision. The fundamental jurisdictional error lay in (a) his understanding of what is a substantiated complaint; and (b) his apparent belief that if a complaint is substantiated, formal discipline must necessarily follow in each and every case.

In my view, a discipline authority is not *functus officio* when he has made a determination under section 57.1(b) that is tainted by a fundamental jurisdictional error.[30] Where such an error has been made, there are good legal and practical reasons to give the discipline authority an opportunity to reconsider the matter prior to my making a decision whether to order a public hearing. Reconsideration may make a public hearing unnecessary. Alternatively, it will provide a better foundation for a decision whether to hold a public hearing. I trust that my comments in respect of each of the complaints where Chief Graham chose not to accept the RCMP investigation recommendations will assist the discipline authority during any reconsideration process. I trust that any reconsideration process would also give him the opportunity to consider whether any officers ought to be subject to potential discipline for neglect of duty in failing to cooperate with the investigation, and perhaps even whether he ought to reconsider his position to remain as discipline authority respecting these files.

[30] *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

XII. Other Steps

The proper resolution of these particular complaints is, as already noted, a separate question from what to do about the pattern of resistance and lack of cooperation that the VPD continues to display in any high profile investigation of its members.

As already noted, the only longstanding solution to this problem is for the Legislature to act quickly and effectively to carry out the legislative reforms I have recommended in the White Paper, which proposals I intend to put in final form after further stakeholder consultation. Amendments are absolutely necessary in order for our office to be able to provide effective civilian oversight over the police. I have devoted a great deal of time and energy to not only pointing out what the problems with the present legislation are, but in actually proposing concrete solutions. My staff and I, assisted by our counsel Frank Falzon, have prepared a White Paper for reform of the current legislation and have drafted a proposed *Police Complaint Act*[31]. Just referring to two specific examples, our draft legislation proposes that the Commissioner may appoint an external DA in certain cases (such as this one) and the draft *Act* also propose that the police be required to provide statements and interviews during such investigations, with of course, appropriate safeguards that the information provided is limited to disciplinary matters and is not admissible in other proceedings.

Are there any steps which might be taken pending legislative reform?

> Chief Graham indicated that he would follow the RCMP's recommendation that he conduct a Managerial Review of the VPD's Internal Investigation Section. That is the department that conducts investigation of complaints by the public unless the Police Complaint Commissioner orders an external investigation. He indicated that an internal audit is nearing completion and should be submitted to my office by May 15, 2005.[32]
>
> With respect, I am not persuaded that an internal audit conducted by the VPD of their own staff gives me much assurance that the public would have confidence in it. In light of the Chief Constable's "re-investigation" of this matter and the results of that exercise, I believe that the public interest would be better served if such an audit were performed by an independent body under the auspices of the Director of Police Services for the Ministry of the Solicitor General, or such other independent agency directed by either the Attorney General or the Solicitor General.
>
> In my view, I am therefore of the opinion that I should avail myself of the provisions of s. 50(3)(e) and refer this matter to both the Attorney General[33] and the director of Police Services that an audit be undertaken of the Vancouver Police Department.
>
> In addition to referring the matter for an external audit, I am also of the view that I should recommend to the Vancouver Police Board that it consider the matters of

[31] White Paper and Police Complaint Act

[32] As of the date of writing, this internal audit has not been received. For the reasons set out herein, however, the receipt of this report will not affect my recommendation, below, for an independent audit.

[33] A recent Order in Council has made the Solicitor General responsible for this and other sections in the Police Act where reference is made to the Attorney General.

service or policy recommended by the RCMP. Many of the problems identified by the RCMP regarding the conduct of certain VPD members on the streets of DTES, in my opinion raise training and policy issues. These officers need better training on what they can legally do and what goes beyond the pale. Furthermore, they need to have policy clearly outlined and enforced. I have serious concerns about Vancouver's breaching policy and the way that it apparently is being utilized. I have commented on this in my Frank Joseph Paul Reasons for Decision and in my Stanley Park Reasons for Decision. It appears from evidence currently being led before the adjudicator in that public hearing that members of the VPD routinely use the breaching policy in ways that are in some cases, inappropriate or illegal. Even some of the officers under investigation in this case admit to routinely "breaching" people out of the area contrary to VPD policy.

THEREFORE, I HEREBY RECOMMEND:

1. That the Director of Police Services of the Ministry of the Solicitor General and Public Safety, appoint a retired Judge or Justice, or other highly-regarded professional who is familiar with policing issues to preside over an independent and comprehensive audit of the Vancouver Police Department's handling of Police Act complaints, including external complaints. Such audit should address all aspects of the VPD's processing of public complaints against their members, including the diligence and resources committed to such investigations, the VPD's compliance with Police Act requirements, the role of the Vancouver Police Union in the complaints process and compliance by members with the duty to account. Furthermore, the audit should not be limited to the practices of the Internal Investigation Section, but should encompass the management practices of the Chief Constable in supervising, managing and ensuring a proper internal investigation process. The audit in question would also helpfully examine various service or policy issues including the propriety of use of the VPD breaching policy; use of force; seizure of property, provision of Charter rights; use of police notebooks and especially all police officers' duty to account.

2. That the Attorney General and the Solicitor General initiate within the Executive Council immediate discussions to bring forward legislative amendment of the current Police Act as an urgent priority, as reflected in this Report and the OPCC White Paper.

3. In the interim, until such time as legislative amendments are enacted, I recommend that the British Columbia Municipal Police Chiefs agree to create (with the approval of the Solicitor General) an Integrated Municipal Internal Investigation Team. Such a team should be utilized only in certain cases where the nature of the complaint warrants an external investigation. Furthermore, in such cases, the Municipal Chiefs should also designate an external DA from among their number to decide the issue of whether the complaint is substantiated or unsubstantiated. The imposition of corrective measures or discipline may be left to the Chief of the respondent's department if the external DA finds the complaint to be substantiated. This division of labour preserves the independence of the decision concerning substantiation and

will thereby enhance the public's confidence in the complaint process. By the same token, allowing the respondent officer's Chief to impose the appropriate corrective measure or discipline maintains the right of the Chief Constable to discipline his officers appropriately with full knowledge of any mitigating circumstances or unique issues affecting the Chief Constable's department.

I ALSO REFER:

1. The recommendations by the RCMP in their Final Investigation Report for a reconsideration of the VPD use of force policy and the "breach policy" to the Vancouver Police Board;

2. To the DA the opportunity to reconsider three files[34] that were determined by him as DA to be "unsubstantiated" to be "substantiated" by him in light of my observations in this Report; and

3. To the DA reconsideration of two files[35] which the RCMP recommended be re-categorized as service or policy complaints regarding the use of knee-strikes in the determination of appropriate use of force.

I CONFIRM the decision of the DA in the remaining files as "unsubstantiated".

Dated this 1st day of June, 2005, AD.
At the City of Victoria, BC

Dirk Ryneveld, Q.C.
Police Complaint Commissioner for BC

Attachments:
1. White Paper and proposed Police Complaint Act
2. RCMP Executive Summary and RCMP Investigative Summary

[34] Appendix I – Complainant DM; Appendix II – Complainant EA; Appendix VI – AA;
[35] Appendix VIII – Complainant MT; and Appendix IX – Complainant DB.

Appendix 1

APPENDIX 1

Complainant:	**DM**
Respondent Officers:	**Cst K and Cst KI**
Witness Officers:	**Cst D, Cst C and Sgt P**

The Allegations:

- According to the complaint, DM was a 35 year-old landed immigrant from El Salvador who was waiting at approximately 6:00 pm on Aug. 9 2002 a the corner of Seymour and Georgia for the Catholic Charities Men's Hostel to open. His companions left when they saw three police officers approaching. DM did not leave.

- The officers checked DM's identity and told him to leave the area. An argument concerning DM's right to be in the city ensued, following which the police allegedly told DM that they would call for a paddy wagon to transport him to the beach. DM said he was waiting to get into to the Catholic hostel. The officers handcuffed and searched him. They cut his belt with a knife, took off his shoes, and cut his shoelaces. Approximately twenty to thirty minutes later, the wagon came and he was transported out of the area to Kitsilano. Before he left, the officers told him that if they caught him again, they would have him transported further.

- DM made his way back to the Downtown area and checked into the hostel at about 9:00 pm. He had a dollar with him and was hungry. He went out to find something to eat, making his way through back alleys to find a pizzeria. He encountered the same three officers upon reaching the alley beside the park at Dunsmuir Street and Richards Street.

- One of the officers grabbed DM and slammed him against a wall. The other two officers joined him and they handcuffed him. He then claims that they started punching him and forced him to his knees and then face-first into the ground.

- The officers yelled at him that they told him not to come back. They punched and kicked him in the head and rib areas for several minutes while he was handcuffed on the ground. Then one of the officers grabbed his hair and slammed his face into the ground. DM believes that he then passed out.

- When DM regained consciousness, there was blood covering his left eye and running into his ear. He was told not to move. One of the officers had his boot against the side of his face, pressing it into the ground.

- One officer told the others that DM still had his belt. He started to take his belt off, but the buckle got stuck on the belt loops. The officer was pulling so hard that he nearly pulled DM to his feet. Another officer cut DM's belt with a knife.

He cut the buckle that was holding up his pants, cut open the zipper, and cut the two pockets on the side of his pants. They also took his shoes and socks.

- The officers started yelling at DM again that they had warned him they didn't want him in the area. They called for another wagon. It took the wagon ten minutes to arrive. While they were waiting, one of the officers pressed DM's face into the ground with his boot. DM couldn't see which officer it was.

- When the wagon arrived, DM was put inside. Before he was dropped off, DM saw that the officers had arrested other Latino men as well. They were put into a different compartment in the wagon.

- DM was dropped off at Main Street and Terminal Avenue, where he got his belt and shoes back. He returned to the hostel, but by the time he arrived, it was closed. He slept on the street that night.

- About ten days later, DM visited a doctor. He examined DM's ribs, wrist and nose. He told him that he had a broken nose.

The RCMP Investigation Findings:

The Officer in Charge of the RCMP E-PIVOT PROJECT, Inspector K. Handy, reported that the assigned external investigator had found DM to be a credible witness: [36]

> *The stories told by DM in his affidavit and in his KGB statement were consistent with each other and internally consistent. The general details were accurate: he gave the correct date, the correct times, the correct locations, an accurate description of the three officers (including the fact that Cst. D appeared to defer to the two more senior officers), the correct locations where he was dropped off, and even an accurate estimate of how long it took the wagon to get to his location on each occasion. He also gave fine details that were corroborated: there was an unmarked car that pulled up the second time, he was held face-down on the ground the second time, Cst K was walking behind the other two officers just before he arrested DM. DM checked into the hostel but couldn't get back there before the doors closed for the night, and some other Hispanic males were arrested immediately after he was arrested and they were put in the same wagon. He also told the doctor a story that was consistent with what he told Mr. Richardson and Sgt. McDonald.*

RCMP Inspector HANDY summarized the evidence corroborating the complaint allegations as follows: [37]

- The officers themselves corroborate many of the details given by DM.

[36] Ibid pg. 30
[37] RCMP Final Report (DM) 04-11-23 pg. 31

- DM is about 5'4" tall, and about 125 pounds.

- DM was alone that night.

- There were three officers working together that night.

- Cst's KI and D were described, respectively, by DM as "tall" and "stocky."

- The investigator believed that DM received the injuries to his nose, wrist and ribs during his second arrest on the night of August 9, 2002. The evidence in this investigation was that DM was walking away from Cst K. DM was pushed against a wall and taken to the ground. The investigator found that the amount of force used by the officers to arrest DM was unjustified and unnecessary.

- The one officer that could definitely be identified as being involved in that second arrest was Cst K.

- The Duty Reports of Cst's K and KI did not directly address the allegations made in DM's account of events, including the force used against DM after he was arrested and, particularly, the cutting of his clothes with a knife.

- Cst D's first Duty Report avoided that same contentious portion of events. Cst D added more detail in his second Duty Report. It differed from his first report by addressing issues that were ignored in his first Duty Report. Cst D did not deny that those things happened: instead, he did not recall them happening or he didn't think they would have happened. Considering the fact that there were differences between Cst D's two Duty Reports and the unknown circumstances under which DM' affidavit was shown to him, the investigator could not rely on Cst D's accounts of events.

- The three officers on scene gave accounts that did not mention Cst KI, or in the case of Cst KI, inferred he was not involved. However, Sgt P stated that he saw Cst KI standing over DM.

- Almost every detail of DM' accounts was corroborated. There were only three portions of his evidence that did not have corroboration: his purpose for being in the area, the use of force against him after he was arrested the second time, and the cutting of his clothes on both occasions. He was proven accurate as to the details on all other matters.

The RCMP reported that they were satisfied on a balance of probabilities that the DM complaint has been 'substantiated' and recommended:[38]

i. A finding of the disciplinary default of Abuse of Authority, contrary to section 4(l)(f) of the *Police Act - Code of Professional Conduct Regulation* against Cst's K and KI, specifically Using Unnecessary Force on a Person; and

[38] RCMP Final Report (DM) 04-11-23 pg. 32

ii. A finding against Cst D of the disciplinary default of Discreditable Conduct, contrary to section 4(1)(a) of the *Police Act - Code of Professional Conduct Regulation, s*pecifically - Failing to Report Material Evidence.

The RCMP noted that the failure by Cst D and Sgt P to report for interviews precluded the best evidence being provided to the discipline authority on which to make a decision, and pointed out the failure of all the officers to satisfy their obligations under the VPD Breach of the Peace policy, characterizing it as a 'dereliction of duty'. [39]

- No General Occurrence Report created
- No reporting of the grounds for arrest
- No reporting of the supervisor's grounds for authorizing the arrest
- No record of DM or his name appeared anywhere.

VPD Review Team Follow-Up Summary:

The VPD Review Team conducted a follow-up investigation that included:

- Obtaining a CPIC/CNI printout of DM's background.
- Obtaining supplemental Duty Reports from Cst's K, KI and D.
- Speaking with three senior officers with experience in the DTE for background on the drug problem in District 1.
- Consulting with Vancouver Police Department Legal Advisor for a legal opinion regarding the grounds for arrest on breach arrests.
- Interviewing Sgt P to obtain his perspective and knowledge of this incident.[40]

The Review Team noted the following inconsistencies in the evidence of DM:

- During his KGB statement, DM stated during the second breach arrest, all three officers were wearing uniforms. Yet the notes of the officers indicate they were all working in plain clothes.

- In an interview with Sgt Argent, the District 1 Neighbourhood Policing Coordinator, it was confirmed that it was common for 'Beat Teams' to work in plainclothes, especially when working on projects involving drug dealers.

- DM claimed his shoelaces, belt, belt loops, pockets and zipper were cut with a pocket knife by one of the officers. There are no witnesses to this alleged action and there is no indication that he showed these cut items to anyone.

[39] Ibid
[40] VPD Review Team Report 05-02-22 pg. 5/6

- The first time DM was arrested he was in the company of his Hispanic friends, yet he could not give the investigator their names so they could be interviewed. In addition, they ran off when the police officers approached them.

- In the second arrest, DM was found in area of the 500 Richards Street, a heavy drug trafficking area. When he was spotted, numerous suspected Hispanic drug dealers were observed scattering from the area.
- DM's story that he was hungry and was just trying to get to a pizza shop to get something to eat is not believable. He was seven blocks away from the Hostel he was staying at. He was a convicted drug trafficker in an area of Downtown notorious for its drug dealing. He had been observed in the company of other Hispanic drug dealers.

- He had already been breached out of the area earlier in evening. His attempt to get away, when spotted by the same officers implies a guilty mind and a continuation of the offence.

The Discipline Authority's Conclusions:

On March 31, 2005, Chief Constable Graham provided his disposition report to the Police Complaint Commissioner, concluding the complaint as 'unsubstantiated' – relying upon the findings of his review team of senior officers, noting: "*Additional work had to be done on this matter. Follow-up interviews with several people assisted greatly.*" [41]

Chief Constable Graham challenged the medical evidence and concluded that 'injury alone after 10 days is not sufficient to concluded the circumstances as alleged by DM' and questioned the weight of the medical report and the credibility of the complainant as follows:

> *In his report, the doctor is only stating what DM alleges 10 days later and no conclusion should be drawn by the external investigator that the doctor is corroborating the circumstances of how DM was injured, other than what was stated by him. The three police officers deny assaulting DM and due to his dangerous lifestyle and risky behaviour, it is quite possible that he received his injuries as a result of another altercation or possibly incurred his minor injury due to resisting arrest. He did not tell the doctor he had been pushed to the ground.*[42]

Chief Constable Graham also challenged the RCMP characterization of DM's criminal record as 'a minor criminal record for drug trafficking' – suggesting DM had an *extensive criminal record* – and concluding that:

[41] GRAHAM Disposition Report (DM) 05-03-30 pg, 5
[42] Ibid pg. 4

The life of a street level drug trafficker and user means that he leads an inherently risky lifestyle and he is probably the "giver and receiver" of violence on a daily basis.[43]

The Review Team had reported on the criminal record of DM:

While reviewing DM's background I noted that he had been convicted of assault four times over a seven-year period. During that same period he was also convicted of possession of a controlled substance and two more convictions for trafficking in a controlled substance. At the time of his breach arrests he had a no go condition to a portion of the Downtown Eastside as a result of a drug arrest. [44]

In my view, it is not appropriate to place undue weight on the complainant's criminal record in assessing their credibility. Under the approach I have taken, each case should turn on its own unique facts and credibility must be assessed on the evidence available in each case.

Chief Constable Graham also took exception to the fact that the investigator found DM credible but not the officers:

The fact that none of the officers saw a knife and all denied seeing any cutting of any of DM's property was given no weight. That DM said it happened, even with no supportive evidence (belt, trousers, laces) to support this claim, was believed in its entirety.[45]

Chief Constable Graham gave weight to the evidence of Cst D, the police wagon driver on the second transport of DM. Chief Graham stated:

He remembered nothing out of the ordinary and during questioning he said that blood from the head would have been noted. He also said that cut trousers/pant pockets or a belt would also have been noted.[46]

In fact, the Review Team reported that Cst D was unable to comment in any detail on the DM breach arrest - as he had no specific memory of it.[47]

Chief Constable Graham noted 'critical information' provided in a supplemental duty report supplied to the Review Team by Cst K. as follows:

In detail he outlined the frustrations from people that live and operate businesses in the area with the plague of drug traffickers. He was encouraged by his supervisors to deal with drug dealers on a more global scale when insufficient evidence was present for an arrest by encouraging

[43] GRAHAM Disposition Report (DM) 05-03-30 pg, 6
[44] VPD Review Team Report 05-02-22 pg. 6. It should be noted that at the time of his arrests, DM was not in the "no go" zone as defined by the Court order.
[45] GRAHAM Disposition Report (DM) 05-03-30 pg, 4/5
[46] Ibid pg. 5
[47] VPD Review Team Report 05-02-22 pg. 6

them to leave the area. He recalled that he had breached probably hundreds of individuals a year with the intent that, because of their lifestyle, if left unattended, they would commit a drug offence or other criminal act. [48]

Chief Constable Graham reported to the Police Complaint Commissioner that:

It therefore becomes a judgment call whether anticipated trafficking in drugs satisfies the evidentiary requirements of committing an anticipated breach of the peace. Considering the unique circumstances of the area and what the officer and his colleagues are being asked to do, a liberal interpretation of the law in his area is necessary.[49]

The Review Team reported to Chief Constable Graham that VPD legal consultant surmised that the members, believing they had the grounds to arrest, were acting in good faith but, in actual fact, they did not quite have the grounds and therefore the arrest of DM for Breach of the Peace, in her opinion, was unlawful.[50]

It appears after reviewing this complaint that the issue of breaching drug dealers out of the District 1 area was more of a Service and Policy issue, as opposed to a Public Trust issue. Police officers, NCOs and Management believed that 'breach arrests' were a legitimate tool to be used as a last resort to move drug dealers from the area when a more substantive charge could not be developed.

In relation to the concern that proper procedure was not followed in 'reporting' a Breach of the Peace arrest, the Review Team recommend that 'all members involved' be given management advice regarding appropriate reporting procedures, as per Section 2.03 of the Vancouver Police Department Regulation and Procedures.

Based on all the evidence available to me, I am not satisfied that a convincing case has been made to support the use of excessive force by the officers against M.

However, I do not take the same view regarding the breaching practices of the police officers in question.

The supplemental report by Cst K does provide critical information in that it provides evidence of a police department promoting a questionable practice – the practice described as "breaching" by which police officers arrest individuals, take them into custody and move them to a different part of the city - to respond to a social / criminal problem.

[48] GRAHAM Disposition Report (DM) 05-03-30 pg, 5
[49] GRAHAM Disposition Report (DM) 05-03-30 pg, 5
[50] VPD Review Team Report 05-02-22

The reference to "breaching" derives from section 31 of the *Criminal Code*, which provides as follows in subsection (1):

> *31(1) Every peace officer who witnesses a breach of the peace and every one who lawfully assists the peace officer is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable grounds, he believes is about to join in or renew the breach of the peace.*

These provisions do not create an offence of breach of the peace. They merely provide a right of arrest where a breach is occurring or there is a reasonable belief that it will be renewed. The practical utility of the section is clear, as it allows for a proactive exercise of police power. Further, a person arrested for breach of the peace can be released without any further consequences.

The right to arrest for breach of the peace includes, at common law, the power to arrest for an apprehended breach of the peace, i.e., a breach of the peace which is reasonably apprehended in the immediate future, even though the person arrested has not yet committed any breach.[51] However, as the Courts have cautioned, this proactive arrest power, while necessary, must have limits. In particular, it "[does] not afford police officers some sort of roving commission to arrest all those whom they think they should arrest".[52] In this regard, our Court of Appeal in the case of *R. v. Khatchadorian* (1998) quoted with approval from a 1996 Ontario decision outlining the limits of this power, and emphasized the importance of reasonable grounds as the proper foundation for an arrest for breach of the peace:

> *Any time a suspicious person is stopped and questioned by the police, there is a danger of abuse of process. The police officer has a great deal of prestige and authority in our community. He or she may seriously restrain the liberties of individuals and unless the officers act in a very prudent fashion, they are open to all sorts of allegations of abuse. I have no doubt, that in this situation, all their antennae were out and they had good reasons to suspect the accused of trafficking in narcotics. However, they had no reasonable and probable grounds to charge him with anything until they started patting him down as part of the process of arresting him for under the alleged breach of the peace. That he was being very uncooperative was made very clear to everyone. On the other hand, no suspect is ever forced to be cooperative with police officers investigating his conduct. It should not be open to a police officer simply to arrest for a breach of the peace an individual who demands even vociferously to be told what he has done wrong in the eyes of the law.*

Further, the question as to what is a "breach of the peace" has, for reasons relating to the need to balance police power against personal liberty, been defined narrowly. In particular, the reasonable grounds must relate to an act or acts which would result in

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[51] *Hayes v. Canada (Royal Canadian Mounted Police)*, [1985] B.C.J. No. 1904 (C.A.)
[52] *R. v. Khatchadorian*, [1998] B.C.J. No. 1867 (C.A.) at para. 11.

actual or threatened harm to someone.[53] A desire by police to "check out" a person known to be a drug user has been held to be insufficient to exercise the power of arrest.[54] As noted by the Ontario Court of Appeal in *Brown v. Durham Regional Police Force*, at paras. 74-75:

> *Two features of the common law power to arrest or detain to prevent an apprehended breach of the peace merit emphasis. The apprehended breach must be imminent and the risk that the breach will occur must be substantial. The mere possibility of some unspecified breach at some unknown point in time will not suffice. These features of the power to arrest or detain to avoid a breach of the peace place that power on the same footing as the statutory power to arrest in anticipation of the commission of an indictable offence. That is not to say that the two powers are coextensive. Many indictable offences do not involve a breach of the peace and, as indicated above, conduct resulting in an apprehended breach of the peace need not involve the commission of any offence. Both power are, however, rooted in the recognition that intervention is needed to avoid the harm which is likely to flow in the immediate future if no intervention is made. To properly invoke either power, the police officer must have reasonable grounds for believing that the anticipated conduct, be it a breach of the peace or the commission of an indictable offence, will likely occur if the person is not detained.*
>
> *Neither the power to arrest in anticipation of the commission of an indictable offence nor the power to arrest for an apprehended breach of the peace is meant as a mechanism whereby the police can control and monitor on an ongoing basis the comings and goings of those they regard as dangerous and prone to criminal activity.*

In this context, one returns to the supplemental duty report submitted to Chief Graham by Constable K after refusing to cooperate with the RCMP investigators:

> *He was encouraged by his supervisors to deal with drug dealers on a more global scale <u>when insufficient evidence was present for an arrest</u> by encouraging them to leave the area*. [emphasis added]

If the "encouragement" Constable K was given was the instruction to breach persons he had no grounds to arrest, then it is clear to me that Constable K's supervisors, and Constable K himself, ought to have known better.

Constable K's actions of breaching M. cannot be reconciled with the law. In particular, I concur with the legal advice VPD received from its counsel. Despite the frustration of

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[53] *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223 (C.A.) at 249

[54] In *R. v. Griffith*, [2003] A.J. No. 312 (P.C.) at para. 20, the Court stated: "In the case at Bar, no crime had been detected. All the police knew was that a person whom they knew to be a drug user had entered a vehicle operated by a person then unknown to them. No traffic violations had occurred. The sole purpose in stopping the vehicle was to "check" [the known user]. All that attracted the attention of the police was that [the drug user] walked away from police when she saw them. In my view, there was nothing that justified the police in their detention either of [the known user] or the accused, and its resultant interference with the accused's liberty of movement within the community. It was not a proper exercise of police ancillary powers."

policing in an area rife with drug use and trafficking, such conduct requires reasonable grounds for arrest.

Police have no legal justification to breach suspected drug dealers where there is no reasonable apprehension of harm to a person or damage to his property. Yet, it appears that police routinely use this vehicle. Perhaps an amendment to the *Code* is necessary to provide police with the legal means to combat this problem.

Equally troubling to me in my review of this issue was the Chief Constable's own statement that, given the challenges facing police, it is appropriate to apply a "liberal interpretation of the law". A "liberal interpretation of the law" may be appropriate where the law is genuinely ambiguous. But I have been unable to find any ambiguity in the law when it comes to the question whether police can breach a person they have no reasonable grounds to arrest. If this is senior management policy, it raises serious service and policy issues that must be urgently be addressed by the Police Board.

In my view it is embarking upon a dangerous "slippery slope" to apply such a "liberal interpretation". The law is there for everyone. Police are sworn to uphold the law, not to bend it to suit their circumstances. If these officers are being trained that it is appropriate to take a liberal approach to the law, they run the risk of running afoul of both the *Criminal Code* and the provisions of the *Police Act*. If management is condoning that behaviour through policy and training before the fact, and ruling that it is all right to exceed their lawful authority after the fact, then they bear major responsibility for the violations committed by their officers.

The Issue of Cooperation:

The RCMP requested in writing that Chief Constable Graham order the attendance of witness officers Cst D and Sgt P to participate in an interview. Cst D had requested a list of questions that would be asked of him and was advised that because the RCMP wanted a "pure version" of the events from Cst D, the RCMP elected not to forward any questions in advance.[55]

In regards to cooperation of the respondent and witness officers, the Review Team noted that both Cst D and Sgt P provided Duty Reports as requested; that Cst D had provided supplemental Duty Reports; and no request for interview of Cst D was made, "based on the fact that Sgt. McDonald believed he had committed an offence under the Police Act."

> *Sgt P did submit to an interview regarding this investigation. He was cooperative and responsive to my requests, as were all the officers I contacted in this matter. His reason for not responding to the RCMP E-Pivot request for an interview was that he was advised by Inspector McKenna not to submit to a KGB statement.* [56]

[55] RCMP Correspondence to GRAHAM 04-09-23
[56] Ibid

The VPD Review Team requested supplemental duty reports from Respondent Officers Cst's K, KI, and witness officers D and forwarded questions for response.

Cst K provided a supplemental report to the Review Team and advised that when there was insufficient evidence to establish beyond a reasonable doubt the commission of a drug offence, he and other police officers were encouraged to move individuals out of the area: [57]

> *When working, I was breaching drug dealers out of this area on an almost daily basis. …My fellow officers were doing the same. I only "breached" individuals when I had reasonable grounds to believe that they would commit a drug offence or other serious criminal offence if left in the area.*

In regards to his grounds for the initial arrest of DM, Cst K reported that he arrested DM because:

> *I believed I had reasonable grounds to conclude that if I permitted him to remain in the area, he would commit a drug offence. I formed this belief based on a number of factors. First, I believe when I ran his name on CPIC that I was advised that he had a record for drugs. I also believe that I was advised that he had an area restriction to stay out of the downtown eastside as a result of this record. Second, DM was in an area in my District that had become the core of the drug trafficking business. He had no apparent reason for being in this area, other than to deal drugs. Thirdly, he defiantly told me that he was there to deal in drugs and he could do as he wished.*[58]

If one accepts the Constable's written statement that "he defiantly told me that he was there to deal in drugs and he could do as he wished", plausible grounds might potentially exist to arrest the accused for breach of the peace, as it could form grounds for an imminent risk of activity that could harm others.

The difficulty I have with the Constable's remarkable degree of recall in his written statement is that it is inconsistent with the reality that, when searched, no drugs were found on M. It is also inconsistent with his statement that Constable K was regularly breaching individuals on lesser grounds. It was not corroborated by any of the other witness statements. In all the circumstances, the statement should have been open to serious question by the discipline authority.

When asked to describe the resistance to arrest by DM in the second incident, and what level of force was used and by whom. Cst K reported:

> *I can state unequivocally that at no time during either arrest of DM was he slammed against a wall, or his face shoved on the ground, or was he punched or kicked in the head and ribs or anywhere else on his body. I can also state unequivocally that neither myself, nor any other officer in my*

[57] Cst K. Supplemental Duty Report
[58] Ibid

presence, used excessive force or gratuitous violence on DM. I was trying to enforce the law, not violate it.[59]

Cst D reported in his supplemental duty report that he believed DM:

> *... was taken to the ground dynamically using a straight arm bar then a wrist look by me. At no time did I punch, kick, or grab DM by the hair and/or slam his face into the ground as he alleges in his complaint*.

The RCMP expressed concern about the fact that Cst D, as a witness officer, had been provided a copy of the complaint details. The supplemental report appears to corroborate that Cst D has been made aware of the complaint allegations.

Cst KI reported that he observed Cst's K and D handcuffing DM but did not see what preceded the arrest, nor did he observe how Cst's K and D arrested DM.[60]

The RCMP reported that Cst KI did not directly address the complaint allegation that he [KI] had cut the clothing of DM. However, his supplemental report to the Review Team disclosed that he had previously cut the clothing of arrested persons:

> *I do not recall cutting anything of DM's. In the past I have had to cut an accused's pockets because I could not see what was in the pockets after I have arrested him. For my safety I would cut the pockets to ensure that I did not get hurt putting my hand in the pocket and to ensure that the accused did not have any possible weapons on him. I have also in the past cut an accused's belt loop because I could not get the belt out of the loops. The reason that I have done this is for the safety of the accused. Once the accused is placed into the wagon it is possible to use the belt to hang himself. I have never cut the belt or shoelaces after arresting a person. I would simply remove the person's shoes or belt rather than cut it.*

Cst D reported that he does not recall any cutting of the belt or belt loops of DM, believing that he would remember that being done. Cst D also admitted that he has cut open pockets, but only for safety reasons.[61]

Conclusions of the Police Complaint Commissioner:

- The practice of "breaching" must take place in a lawful way and on proper grounds. As employed by some VPD members in the DTES, and supported by VPD management and the Chief Constable, the practice is highly questionable if not unlawful. This practice raises a systemic issue which must be addressed by the Police board and by the Ministry.

[59] Cst K. Supplemental Duty Report
[60] Cst KI. Supplemental Duty Report
[61] Cst D. Supplemental Report

- It is difficult to accept that patrol officers and Vancouver police management did not appreciate that their "liberal interpretation of the law" was anything other than "the ends justifying the means" thinking, especially in light of frequent complaints regarding VPD breach arrests over the years and recently.

- I am also concerned that the Respondent officer admitted to the apparently regular practice of cutting pockets for officer safety, as one that he relied on as a reasonable practice. If true, that practice needs re-evaluation. Any practice that destroys personal property should be reviewed, especially where it is not otherwise recognized as established police practice, and where there are other proper, reasonable and customary ways to assure officer safety.

- The 'core transaction' of arresting DM for an apprehended breach of the peace was in my view unlawful. Accordingly, while I agree that sufficient evidence does not exist to substantiate the excessive force allegations, there is clear and convincing evidence that the breach itself, and thus the actions involved in the breach procedure, were not lawful. In all the circumstances, I would determine that this part of DM's complaint to be substantiated.

Appendix 2

Complainant:	**EA**
Respondent Officers:	**Cst M**
Witness Officers:	**Cst G**

The Allegations:

- EA alleged an incident occurring on June 19th, 2002. EA stated that, on this date at approximately 11:00 pm, he and his wife had just left the Vancouver Aboriginal Friendship Centre and were waiting for a bus in the 1600 block of East Hastings.

- EA suffers from a bladder condition, which causes him to urinate frequently. Due to this he could not wait to find a public washroom and relieved himself in an alley near the bus stop. He had already finished urinating when a patrol car pulled up beside him with the lights flashing. Two officers got out and asked EA what he was doing. He explained he had a bladder problem and couldn't wait to use the washroom. Cst M insisted he find a washroom anyway and started writing EA a ticket. He asked the officers why they didn't chase the real criminals who were smoking crack and shooting up in the Downtown Eastside. The officers ignored him and asked him for his identification which he turned over to them.

- While the officers were dealing with EA a young aboriginal couple walked by. The male asked the officers what was going on. Cst M told them it was police business and to move on and if they refused they would be charged with "harassment." Cst M finished writing the ticket and then crumpled up EA's drivers licence and threw it on the ground. EA picked it up and was about to return to the bus stop when Cst M blocked his way.

- Because Cst M had stepped directly in his way, EA bumped into him. The officer yelled that was assault and told him he was under arrest. Cst M grabbed him by the left arm and the back of his neck and tried to throw him to the ground. The officer could not accomplish that because EA had stiffened up which made it difficult to knock him down.

- EA's wife had been watching the whole incident from just outside the alleyway. He alleges he gave his glasses and wallet to his wife and lay down on the ground of his own volition. Cst M put his boot in the middle of his back to hold him down and handcuffed him.

- Cst M radioed for a police wagon and commented he was going to take EA to Stanley Park. At this time EA's friend GN and a few other people arrived from the Friendship Centre. The officers threatened to throw them in jail for harassment. The police wagon arrived and the officers put EA inside. The wagon took him a block away from Broadway and Clark. He asked the wagon driver

why he was being dropped off there and the wagon driver said it was the end of his jurisdiction.

- The next morning EA went to see his doctor for pain in his neck, back and legs, where the officers had applied pressure.

The RCMP Investigation:

I intend in this review to deal only with those aspects of the investigation where the RCMP and the VPD disagreed, so I will limit my remarks to the following four headings:

1. Arrest:

There is no authority to arrest for a by-law offence. A person can be detained for the purpose of identification so that a violation ticket can be issued. If a person fails or refuses to identify himself then an arrest could be made for obstruction.

Clearly this is not the case as EA produced a driver licence. In my view EA was not committing a criminal offence as Cst M. contends. Even if it were a summary conviction offence Cst M. would not have the authority to arrest in these circumstances.

Section 495 (2)(c) of the *Criminal Code* states:

> *A peace officer shall not arrest a person without warrant for and offence punishable on summary conviction, in any case where he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to:*
>
> *i) Establish the identity of the person*
>
> *ii) Secure of preserve evidence of or relating to the offence, or*
>
> *iii) Prevent the continuation of the offence or the commission of another offence, may be satisfied without so arresting the person, and he has reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law*.

None of these grounds for arrest existed with respect to this set of circumstances: EA provided identification; there was no evidence to secure relating to the offence; and it is highly unlikely that the offence was going to continue, nor was another offence likely to be committed.

There is no legal obligation to appear in court with respect to a by-law ticket. Voluntary penalties are imposed and civil remedies exist should the fines not be paid. Cst M.'s contention that EA was only being detained is not borne out in these

circumstances. When a person is wrestled to the ground and placed in handcuffs the line between detention and arrest has in my view, been crossed.

2. Use of Force:

There is no argument denying that force was used in this instance as Mr. EA was wrestled to the ground and handcuffed by Cst's M. and G. The issue is whether any legal authority existed to use force against him in the first place.

3. Abuse of Authority:

EA had been legally detained for investigation of the by-law offence of Urinating in Public. EA fulfilled his legal obligation by identifying himself to the officer by way of a driver's license and there was no further requirement for him to remain at the scene. If he so desired, he could leave. The narrative of the General Occurrence Report for this incident read:

> *Cst M. reached out and put his hand on EA's chest to stop him from leaving.*

Cst M. stated in his supplementary Duty Report as follows:

> *... EA attempted to leave while Cst M. was still writing the ticket. When EA first moved to leave, Cst M. stepped towards the fence so that EA would not have room to leave. EA pushed Cst M. with an open hand and it appeared he was trying to push Cst M. out of the way so he could get away.*
> ...
> *I believe that detaining EA so that he could be served with a by-law ticket is within a police officer's powers, and EA's attempts to leave constituted the offence of obstruction of a police officer, at the very least.*

Cst G. in his initial Duty Report stated, "Cst M. put up his hand telling EA he was not going anywhere*".* EA then pushed Cst M. As previously mentioned, EA was under no obligation to remain at the scene and there is no authority to arrest for a by-law offence. The act of Cst M. preventing him from leaving was therefore an unlawful detention and EA would be justified in attempting to walk away. Any force used to detain him would have been unlawful. The fact Cst M., in good faith, thought he was justified in detaining EA does tend to mitigate this situation. Regardless, the arrest of EA was unlawful and therefore any use of force against him in this instance would also be unlawful.

4. Injuries:

The injuries complained of by EA are minor in nature and consist of some bruising to his arms, soft tissue injury and irritation of an existing arthritic condition. It is extremely difficult to confirm or deny the existence of a soft tissue injury.

In the opinion of the RCMP, the use of force against EA was unlawful it would follow that any injuries he sustained as a result would be as a result of an unlawful act on the part of the officers. However, it is the opinion of the RCMP that EA should accept a portion of the blame for his misfortune. By his own admission EA was urinating in the alley. By his own admission he said the officers were justified in investigating what he was doing. He admitted he was using foul language towards the officers. He admitted he tried to leave and when grabbed by the officers held himself rigid making it difficult to be taken to the ground. Had EA simply waited, and accepted service of the violation ticket, in all likelihood, this would have been a non-event. EA went to court to fight the ticket. This reflects his knowledge that there was a forum available to him to dispute the ticket.

The RCMP concluded that while the role of witness officer Cst G. in the arrest and subsequent use of force against EA appeared to be simply that of assisting Cst M., Cst G. might be complicit in the injuries of the complainant.

Co-Operation Issue:

The RCMP noted that Cst G. failed to participate in the investigation in a substantial or meaningful way, reporting that he declined to be interviewed. In a letter to the Inspector of the Internal Investigation Section, Cst G. stated:

> *...my status in the matter was changed from Respondent to Witness officer. Since that change I have been requested a number of times to participate in a video and audio taped interview: a KGB interview which in reality is an interrogation style interview. Due the unusual nature of this request I consulted with Sgt 1001 WADLEY a Vancouver Police Union agent to determine whether this type of interview was in keeping with the Collective Agreement, labour laws of this province and principals of Natural Justice as between an employer and its employee. Upon the advice of Sgt Wadley and recent comments made by the Vancouver Police Union, that Union members should not subject themselves to this type of inappropriate and demeaning type of interview, I have declined the RCMP's request to submit to a KGB interview.*
>
> *As you can see I have clearly complied with my legal obligation* (by providing his original duty report while a respondent officer) *regarding the complaint, pursuant to the Police Act, accounting for my time at work during the day in question and I will continue to cooperate in this investigation by having informed Sgt Pridday that I would entertain any written questions or concerns he has with my Union agent.*

It appears that the officer considered that by providing his original duty report while he was a respondent officer he had complied with his legal obligation to account. Nevertheless, he did not meet his further obligations to cooperate once his status changed to that of a witness officer.

VPD Review & Discipline Authority's Decision:

On March 30, 2005, Vancouver Chief Constable Jamie Graham submitted his Disposition Report, concluding the complaint of EA as unsubstantiated.

The VPD Review Team disagreed with the RCMP that there was no authority to arrest for a by-law offence, by providing particulars of a City of Vancouver traffic by-law, that contains an arrest provision where a pedestrian fails to stop and provide his or her name and address:

> *City of Vancouver Street and Traffic By-Law No. 2849 Section 16 (2) states "Any police officer is authorized to arrest without warrant any pedestrian whom such police officer finds committing a breach of any provisions of this by-law, if such pedestrian shall fail to stop and state correctly his or her name and address when so requested by a police officer.*

The Review Team detailed court transcripts as evidence of 'good faith' on the part of respondent Cst M, disclosing the officer's belief that he had issued the violation ticket under the appropriate by-law. Although acknowledging that the officer was incorrect and that the violation ticket should have been issued under the City of Vancouver Health By-law, the Review Team proposed that the respondent's (albeit incorrect) belief that he was entitled to arrest EA under the Traffic By-law that he believed he was operating under mitigated any fault by the officer.

In my view, even if the officer had the honest but mistaken belief that he was entitled to arrest under the appropriate bylaw, that does not make the act of wrestling the complainant to the ground and subsequently arresting him and removing him from the area permissible at law. As reported by the RCMP, the complainant provided his driver's license by way of identification to the police officers, thereby nullifying any arrest provision that might have been engaged under the appropriate bylaw.

The Review Team concluded that the intention of Cst M was to enforce a by-law and:

> *… it does not appear to be unreasonable to detain a person for a brief period of time to serve the Notice of By-Law Violation once EA's identity was determined*.

Although again I sympathize with the officers on the street who have difficulty in dealing with people who seem to be impolite and uncooperative, my sympathy cannot be transformed into condoning a violation of the law by police officers. If the law does not permit an arrest in certain circumstances, then it is inappropriate to turn a blind eye when use of force by police is applied in effecting an illegal arrest.

The VPD Review Team provided the legal advisor for the Vancouver Police Department with a copy of the RCMP investigation for her review and asked her to comment specifically in regards to the authority of Cst M to detain EA in order to establish his identity and serve him the Notice of By-Law Violation.

In their report to Chief Graham the VPD Review Team indicated:

> *Ms. Boblin provided me with cases of similar fact including R. vs Mulder. In this case the Transit Authority Police were detaining and issuing a ticket for fare evasion. The accused Mulder was acquitted on two counts of assaulting a police officer but only because the judge felt that the officer was detaining the accused for a longer period than necessary so that arrest warrants on other matters could be enforced by municipal police members who had not arrived on the scene yet.*

The Review Team reported that is was the opinion of Ms Boblin that Cst M., like the transit police, was performing duties and functions respecting the preservation of peace, the prevention of crime and offences against the law when he was detaining EA while he served him with a Notice of By-Law Violation. They went on to advise Chief Graham that:

> *The advice of Ms. Boblin was that even if these circumstances are somewhat different, it is not clear that Cst M. was executing his duties in a manner that would cause the Discipline Authority to find blame in his actions.*

From my own reading of the case, *R.v. Mulder*[62] stands for the proposition that officers act outside the scope of their duties when they try to detain an individual in order to issue him with a violation ticket. In the *Mulder* case the police had stopped Mulder to check his identification with respect to outstanding search warrants. Mulder refused to stop and struck one of the officers with his bicycle. Both officers then attempted to subdue Mulder who in turn punched the first officer. The accused was charged with assault and acquitted by the Court. The court found that initially the officer was acting in the execution of his duties when he carried out the records check. However, the court held that once the accused had confirmed his identity, it was inappropriate to detain Mr. Mulder. The court indicated that the violation ticket could have been mailed to him; served by a process server; or handed to him as he left the platform. In essence the Court held that the officer was no longer engaged in the performance of his duties when he detained the accused (after having checked his identity). The Court also cited the Supreme Court of Canada case of *R. v. Biron*[63], a seminal case on resistance to unlawful arrest.

> *…It has been part of our criminal law from the beginning and is reflected in the provisions of the Criminal Code, which has sought to balance the competing interest in freedom and order by giving the peace officer protection in specified circumstances where he has exceeded his authority to make an arrest. His resistance may be at his own risk if the arrest proves to be lawful, but so too must the police officer accept the risk of having effected a lawful arrest. Of course, even if the resisted arrest is unlawful, the person resisting may still become culpable if he uses excessive force*.

[62] [2002] BCJ No.3009; 2002 BCSC 585; Vancouver Registry No. 127984
[63] (1975) 30 CRNS 109 at p. 123

Consequently, in my respectful view, Chief Graham erred when he concluded that the officers were acting within the scope of their duties and therefore found the complaint to be unsubstantiated.

I am also concerned that both senior management of the VPD (Chief Graham and his Review Team) as well as the members on the street, are under the mistaken impression that it is appropriate to utilize a "liberal interpretation of the law"[64] in carrying out their duties.[65]

In my view it is embarking upon a dangerous "slippery slope" to apply such a "liberal interpretation". The law is there for everyone. Police are sworn to uphold the law, not to bend it to suit their circumstances. If these officers are being trained that it is appropriate to take a liberal approach to the law, they run the risk of running afoul of both the Criminal Code and the provisions of the *Police Act*. If management is condoning that behaviour through policy and training before the fact, and ruling that it is all right to exceed their lawful authority after the fact, then they bear major responsibility for the violations committed by their officers.

It may be argued that the right of arrest in these circumstances is a "grey area" and that the officers ought not to be faulted for misinterpreting the law as to whether they were entitled to arrest in these circumstances. But that was not the only aspect of this complaint that raises concerns. It must be remembered that after effecting the questionable arrest, the officers also took it upon themselves to "breach" the complainant out of the area. There is in my view no legitimate legal ground to have done so. It cannot therefore be said that the complaint was unfounded. Even by the officers' own admission, they breached the complainant without the appropriate grounds or authority to do so, and apparently in violation of VPD policy. Accordingly, I would determine that complaint to be substantiated.

[64] Chief Graham's comments at P5 of his Mar 30 2005 report to the OPCC

[65] See also Appendix 1 where Chief Graham wrote, "*…Considering the unique circumstances of the area and what this officer and his colleagues are being asked to do,* ***a liberal interpretation of the law in this area is necessary.***" [Emphasis added]

Appendix 3

Complainant:	**KH**
Respondent Officers:	**Cst W**
Witness Officers:	**Cst B, Cst D**

The Allegations:

- KH was a member of the Vancouver Area Network of Drug Users (VANDU) for the previous two years. He volunteered for a number of programs, including street alley patrols.

- On Tuesday, May 7, 2002, he was walking with a Ms. BW on the south side of Hastings Street west of Main Street, approaching the west lane of Main Street. As they approached the alley, KH saw a police officer walk up behind a man in the alley. The officer grabbed the man by the arm and shoulder, and tried to force him to the ground. The man stiffened his body. The officer punched him in the head and kneed him in the side. He wrestled the man to the ground, and kneed him in the head a few times. The officer then forced the man's arms behind his back and handcuffed him. After that the officer walked the man toward the police station.

The RCMP Investigation:

The RCMP reported outstanding concerns regarding identified respondent officer Cst W. citing: no notes, no duty report, no acknowledgement of documentation or telephone contact, no evidence from Cst W. explaining his grounds for the arrest of the person identified by the RCMP as SP, no justification for the level of force used; and that Cst W had not met his duty to account.

The RCMP also reported that significant delays were experienced in receiving a duty report from possible witness officer Cst B, and that SP, the arrested person, refused to participate in the complaint investigation.

The RCMP concluded that on a balance of probabilities, (the civil standard of proof) the complaint had been substantiated. They based their finding on the fact that the statements of KH and his companion BW were consistent with each other and internally consistent, as well as the fact that their recall of the arrest of SP was corroborated by the actual facts of the arrest - the location, the officer involved, and the approximate date.

The evidence of KH and BW was that the Respondent Officer punched SP several times, and then kneed him several times while he was on the ground. SP was not doing anything that could justify that amount of force. There was no evidence to contradict what they alleged in their various statements.

There was no evidence from the lone Witness Officer, as she could not recall the event. The Respondent officer did not respond to any requests for a Duty Report and he did not take the opportunity to explain his actions or fulfill his duty to account. The RCMP appear to have drawn an adverse inference from the officer's failure to account that may have factored into their decision that the complaint was substantiated.

The VPD Review & Discipline Authority's Decision:

On March 30, 2005, Vancouver Chief Constable Jamie Graham submitted his Disposition Report, concluding the complaint of KH as unsubstantiated.

Chief Constable Graham cited numerous discrepancies and indicated that he was not convinced that the arrest SP by Cst B. and Cst W. was the arrest witnessed by KH and BW:

- Although the PIN and description provided by KH and BW fit Cst W., the May 7th 2002 date of the alleged incident reported by KH and BW does not match with any arrests logged on the book-in sheet.

- Cst W. did arrest SP on May **6**th 2002 in the west lane of the 400 Block of Main Street.

The VPD Review Team report formed the basis for the conclusions of the Chief Constable and reported that interviews were conducted of respondent Cst W., witness officer Cst B. and wagon driver Cst D.

- Cst D could not recall any event on May 6th or May 7th 2002. Cst D was asked to comment on the arrest style of Cst W, whom he knew and had worked with. Cst D reported that Cst W was "very much into drug arrests" and "drug investigations" and "would gain an observation position to watch drug activity" "...formulate grounds to make an arrest" and "...would run across the street and take the drug dealer into custody."[66]

- Questioned about the 'element of surprise' associated with such arrests, Cst D confirmed that such arrests did produce an element of surprise:

> ...*when he was teaching me or, or telling me about his, his tactic, it, it was to prevent the drug dealer or the drug suspect from uh, escaping or from uh, disposing of the evidence or the drugs or the money which they, which they often do. So the element of surprise in his mind was very important.*[67]

- Cst B. reported in her duty report to the RCMP that her notebook indicates that she and Cst W. had dealings with SP on May 6th, 2002 at 0658 hours in the 400

[66] D'O. Interview Transcript 05-01-06 pg.4/5

[67] Ibid pg.5

block of Main Street – and that he was dealt with as a SIIP arrest. Despite her notebook entries, Cst B. reported that she had no recollection of the incident or of SP.[68] For the purposes of her interview by the Review Team, Cst B was permitted to read the affidavit of KH and to review the CAD printout and Vancouver Jail arrest report.

- Cst B. advised that her review of those documents helped to 'jog' her memory and recalled several details, including that SP was a black man, extremely agitated and verbally confrontational. When shown the jail arrest report and asked to comment on report notations regarding 'alcohol', 'rock' and 'fighting' – in particular fighting – Cst B. suggested that SP was arrested because he was believed to be impaired by either alcohol or drugs and, because 'they' didn't know if it was one or the other or a combination of both, she indicated accordingly on the report.[69] Despite recalling the incident more clearly and providing many details about her reasoning around the grounds for arrest, and that she thought that SP or someone said his father was a politician, she 'did not recall' how SP was taken into custody.[70]

- The Review Team reported that Cst B recognized her handwriting on the Jail arrest report. Their report also suggested that Cst B was unable to articulate why she indicated he was fighting and violent on the report, except that it indicated some form of physical aggression. That report appears to be incorrect and misleading. In fact Cst B stated in her interview that she was one hundred percent certain that the entry regarding 'violent and fighting' was not in her handwriting.[71]

Cst W. was reportedly interviewed in the presence of a union agent on January 20, 2005. However, the transcript of the interview of Cst W. was not included in the hard copy interview transcripts provided to the OPCC by the Review Team and was not contained in the KH complaint file binder prepared by the Review Team.

My staff requested a copy of that transcript and on 14 April 2005 received what appears to be an edited document. Contained within that document was a reason for failing to provide a duty report. When asked why he failed to respond to RCMP requests for a duty report, the response from Cst W is reported as stating:

> *I was off sick leave for a full year. As a result of an on duty police involved MVA. I was off from December 3, 2002 to January 1st, 2004. When I received sporadic documents from RCMP, I forwarded it on to Tom Stamatakis. (VPU President) I was planning to respond but only on the direction of the VPU. I never got a directive by RCMP regarding time frame for a duty report.*

[68] B Interview Transcript 04-12-29
[69] Ibid
[70] Ibid
[71] Ibid

Cst W reported that he had no memory of an incident as described by KH, and no notes or report regarding the alleged incident on May 7th or any other day. Cst W did not know if he had ever had contact with KH or BW.

The Review Team reported that their clerical support person who transcribed the interviews deleted the digital audio wave files for all the interviews, it is therefore not possible to review the actual interview of Cst W.

The Review Team noted discrepancies in regards to the date and time of the incident, description of the arrested person, disposition of arrested party, and direction of witnesses prior to observations of arrest, amongst other discrepancies.

Conclusions of the Police Complaint Commissioner:

This was a third-party complaint about the arrest of another person (SP). The Review team did have additional information available to them that was unavailable to the RCMP. I do not fault the RCMP for not having that information because it was the failure of the VPD members to provide that information and the absence of being ordered to provide that information by VPD management that was the cause of the incompleteness of the investigation. The RCMP were forced to make their decision on the information that he had available at the time.

What greatly concerns me is that the VPD team did not encounter the same resistance as did the RCMP in obtaining the information that was necessary to complete the investigation. The RCMP worked diligently for 14 months on these complaints and were stymied in getting cooperation of the police witnesses. Once the RCMP report was submitted, Chief Graham directed three senior VPD officers to conduct a further investigation. The fact that they apparently were able to in a relatively short period of time obtain the requisite information from their members leads me to conclude that the VPD could have insisted that their members provide the information to the RCMP, but did not do so.

Although I have grave concerns about the process by which this information was finally obtained, I must review the issue on its merits. I am satisfied that although I suspect that the complainants referred to the wrong date and that they indeed witnessed the arrest of SP by Cst W, without further information by either independent witnesses or the subject of the arrest himself, it is difficult to assess whether this incident involved the use of excessive force. The subject of the arrest (SP) has clearly indicated through his behaviour that he is unwilling to participate in this investigation. Accordingly, I would give the benefit of the doubt to the police officer in this case and conclude that I should concur with the DA that the complaint be determined to be unsubstantiated.

Appendix 4

Complainant:	**WH**
Respondent Officers:	**Cst B**
Witness Officers:	**Cst A**

The Allegations:

The complaint of WH. was summarized in the PIVOT LEGAL SOCIETY publication "To Serve and Protect" - a Report on Policing in the Downtown Eastside.[72]

> *They told me and four other people to get up against the wall. They said, "Stop. Get up against the wall, you're getting checked out." They searched me second. I gave the officer my Undertaking to Appear papers. I recognized the officer, he's arrested me a couple of times. He was a big guy, his badge number was [#]. The officer read my papers, and seemed quite angry at the sentence that I had been given. He said something about the fucking judges. He didn't think I was given enough time. He said, "If I find a fucking rig on you … "just as he reached for my front pocket. He pulled a rig out of my pocket. As he did it, he wound up, and gave me a huge kick in right shin.*

The RCMP Investigation:

The Final Investigation Report of the RCMP Project E-PIVOT was received by the OPCC on October 6, 2004 and stated:

> *WH is a 44-year old former prison guard who has become a hardcore drug addict in the Downtown Eastside. He is now the subject of very frequent interactions with a large number of Vancouver police officers. He did not have any criminal record until 2002.05.07, when he pled guilty to a host of accumulated criminal charges. With regards to sentencing, he advised, "the judge was merciful", and he served four months concurrent from the original nine charges.*
>
> *…*
>
> *WH'S complaint of injury is corroborated by medical evidence and by the affidavit of David Eby, a former Pivot volunteer who saw the injury when WH made his original complaint. Cst. B denies this assault and advised that he does not hold a negative viewpoint of the judiciary. Cst. A advised he has no recollection of the event and he would not provide a statement to Cpl. Splinter.[73]*

[72] To Serve and Protect - Pivot Legal Society – 2002: pg. 19
[73] RCMP Final Report 2003E-5480 Tip 110 (WH) pg. 1/2

RCMP Inspector Handy recommended the complaint of unnecessary/excessive force be substantiated and included this comment:

> *Based on the evidence of all parties to date, Cpl. Splinter believes the complaint of Abuse of Authority has been substantiated. I support his assessment of the known facts. If Cst A. had participated in a more meaningful manner it would have benefited the investigation and it may have altered the outcome. As the written submissions of Csts. B. and A. stand in stark contrast to the allegation of WH, if the Discipline Authority substantiates this complaint, it would also be in order to review their submissions for further investigation under the Code of Professional Conduct….*

The RCMP Report recommended that WH's complaint against Cst B., based on statement evidence and medical evidence corroborating the alleged injury, be substantiated. They characterized the cooperation of Cst A. as 'marginally cooperative."

The VPD Review and Decision of the Discipline Authority:

The Disposition Report of Chief Constable Jamie Graham was received by the OPCC on March 31, 2005. Chief Graham concluded:

> *I reviewed the RCMP external investigation, which recommended a substantiated finding of abuse of authority. I further considered the points made by my senior officer review team (Boyd/Woods/Wager), especially the follow up interviews with Constable A. I have found the allegations against the respondent officers were unsubstantiated.*[74]

In support of his decision, Chief Graham reported on the findings of his appointed Review Team as follows: [75]

> *The review team re-interviewed Constable A. in the company of a union representative. Constable A. knew WH from many previous dealings. He emphatically denied that Constable B. kicked or otherwise assaulted WH. He also denied that Constable B. used any profane language. Constable A. said that he and Constable B. had an encounter with WH in August 2003 when he was arrested after being taken to the ground and handcuffed. He was "knee struck" by Constable B. during that arrest.*
>
> *The re-interview addressed the perceived delay or lack of cooperation in Constable A. supplying a duty report. The taking of a KGB statement was raised and Constable A. felt that his unwillingness to attend for this kind of interview drew a negative inference against Constable B. There appeared to be emails exchanged with this topic of negative inference being discussed. Constable A. felt that the interview in any format would be biased and there*

[74] GRAHAM Disposition Report 30-03-05: pg. 1
[75] GRAHAM Disposition Report 30-03-05: pg. 2

is some indication that the agent advice he received somewhat supported that.

The VPD Review Team reported on their interview of witness officer A in a January 20, 2005 memorandum to Chief Graham, commenting on the credibility of the complainant and the police officers: [76]

> *It appears that Cpl. Splinter found this complaint to be substantiated based on WH's statement and the medical report from the Native Health Contact Centre. Cpl. Splinter makes a negative inference due to the lack of cooperation by Cst B. and Cst A. to attend for interviews. Cst A. did attend for an interview with me where he passionately denied that this incident ever took place. Cst B. denied the incident as well in his duty report. I found Cst A. to be honest and forthright and he was totally cooperative. I do not believe WH is credible and I do not believe that his statement without independent corroboration would withstand a challenge by the Respondent officer.*

Chief Graham reflected those conclusions in his concluding report as follows:

> *I have to examine the credibility of the witness in this matter. WH is a drug addict with a serious criminal record. He was drinking the night of the incident and he has a "history" with the two respondent officers in this matter. They have arrested him in the past. The two police officers are credible.* [77]

The Review Team commented on the cooperation of the police officers with the RCMP investigation:

> *Respondent officers are not compellable under the Police Act, so Cst B. met his obligation to account by providing a Duty Report. Neither Cst A. nor B. was ever ordered to participate in an interview though certainly Cst A. could have been.* [78]

At this point I feel compelled to comment on this assertion by the VPD. Had Cst B. and Cst A. attended for an interview with the RCMP as requested, it may well be that the conclusion reached by the RCMP would have been different. The RCMP were entitled to expect not only cooperation by the officers in their duty to account, but also Cst A. as a witness officer should have been ordered by Chief Graham to participate in an interview. It was unreasonable for the VPD or the VPU to suspect that the "interview in any format would be biased". The RCMP are experienced investigators who conducted their investigation in a totally impartial, professional manner. To proffer that excuse for not

[76] REVIEW TEAM Memo 20-01-05: pg. 7
[77] GRAHAM Disposition Report 30-03-05: pg. 3
[78] REVIEW TEAM Memo 20-01-05: pg. 7

participating is in my view unreasonable and unacceptable. To lend it some credence and accept it as an excuse as Chief Graham appears to do, is in my view, appalling.

Chief Graham forwarded a Summary Investigation Report to the complainant WH, in care of the Office of the Police Complaint Commissioner, informing him that his complaint had been concluded as unsubstantiated. That Summary Report includes:

> *The RCMP interviewed two different doctors on two separate occasions confirming that you had suffered an injury, but it was not clear when those injuries occurred. During the first visit you said the injury occurred when you were kicked by a police officer and during the second visit you said it occurred when someone at a cocaine binge "stomped" on your right foot. The police Computer Aided Dispatch system indicated that the officers you claim were involved in the assault against you were, in fact, a block away from your location.* [79]

Chief Graham also advised WH that all the evidence in the matter had been reviewed, noting that:

> *… during your interview with the RCMP you told the investigator regarding Mr. Richardson taking affidavits that, "he did a great job of talking me into it, I was totally against it.*

The Review Team conducted an interview of Cst A. and Chief Graham relied upon that interview and the findings of the Review Team to overturn the substantiated finding of the RCMP.

Despite repeated requests by the RCMP for an interview, Cst A. only provided a one sentence Duty Report. That Duty Report stated:

> *After carefully reviewing my notes and memory, I have absolutely no recollection of any interactions with WH on or about May 22, 2002.*

RCMP communications to Cst A. suggested that his duty report did not speak to the allegation in the detail required. In response, Cst A. advised the RCMP that his duty report "*had been carefully reviewed by a police act agent well versed in law", and "it stands as it is."* The RCMP then specified exactly what was required from Cst A. to dispute the use of force allegation against Cst B., and in a final effort to obtain an interview advised Cst A:

> *Just because you don't recall any personal interaction with WH, it doesn't necessarily follow that you also don't know anything about WH'S allegation that he was kicked by Cst B. on or around that time, unless you are willing to say unequivocally that you have never seen Cst B. kick WH and you do not believe that Cst B. has ever kicked WH. It would also help if you could state that you have never seen Cst B. kick anyone at any time in the manner described by WH, in an any other unlawful manner. If swearing the*

[79] GRAHAM Summary Report 30-03-05: pg.

statement in KGB form is the big obstacle then lets just do it the normal way – no KGB.

The final response from Cst A. was to provide an addendum to his Duty Report, stating only that he had "*no recollection of Cst B. kicking WH on the date alleged or any other day."*

The Review Team reported to Chief Graham that Cst A. "*was never ordered to participate in an interview - though he certainly could have been".*

It is my position that not only "**could**" he have been, but he "**should**" have been. That failure to order the cooperation by a VPD member with external investigators rests squarely with the VPD Chief.

Records reflect that VPD Inspector Woods forwarded an email to Cst A. (copied to the President of the VPU) advising:

> *The RCMP Investigator, Cpl. Splinter finds that the results of his investigation do not support Criminal charges as the burden of proof has not been met under the Criminal Code however he does recommend discipline under the Police Act. He is also very critical of you in particular for being "marginally cooperative."*
>
> *I have been directed by the Chief Constable to review these findings and seek further information from any of our members where there is a question as to whether they cooperated fully with the RCMP. As a witness officer, it is expected that you will comply with my request to come in for an interview. You may bring an agent with you. I am going to ask you the following questions but depending on your answers, I may have supplemental questions as well. I have read your Duty Report and some of the answers are contained in that document but I am going to ask you the questions again.* [80]

Inspector Woods set out five questions intended to confirm if Cst A. was working with respondent Cst B. on the dates in question; whether Cst A. and Cst B. had contact with WH at that time; whether Cst A. had any knowledge of or observed Cst B. using force on WH; and whether Cst A. had heard Cst B. make statements attributed to him by WH.[81]

On January 12, 2005, Inspector Woods, in the presence of VPU President Stamatakis, conducted a taped interview of Cst. A review of that interview reveals the following:

[80] Email: WOODS to A. 04-12-24
[81] Ibid

- Cst A. confirmed, by reviewing his notebook, that he had worked with Cst B. on the dates identified in the RCMP investigation, but stated that he had "*no recollection of ever interacting or conversing with WH on those dates.*"[82]

- Asked if he had knowledge of or observed Cst B. use force on WH, specifically on May 21, 2002, Cst A. stated, "*I have no recollection.*" [83]

Chief Graham noted that he considered the points made by his senior officer review team, "*especially the follow-up interview with Constable A.*" [84]

Conclusions of the Police Complaint Commissioner:

Despite my ongoing concerns about the marginal cooperation the RCMP received in their investigation and the way in which the VPD conducted the re-investigation, I must necessarily decide each case on its own merits. In my view, although the RCMP decision appears to rely to a certain degree on an adverse inference drawn from the lack of cooperation by the respondent officer, in this case, I do not believe that I am satisfied that there is clear and convincing evidence upon which I could conclude that this complaint is substantiated. It also appears that the complainant WH. was a reluctant complainant in the first place, who in his statement said that he was "talked into it" (making the complaint) by Pivot. I therefore confirm Chief Graham's conclusion in this case as being unsubstantiated.

[82] Ibid pg. 2
[83] A. Interview Transcript 05-01-12: pg. 2
[84] GRAHAM Disposition Report 05-03-30: pg.1

Appendix 5

Complainant:	**SP**
Respondent Officers:	**Cst I and Cst K**
Witness Officers:	

The Allegations:

- The Complainant, SP, has been diagnosed with clinical depression and was using crack cocaine for two years previous to her complaint.

- SP was in her room at the Arno Hotel on the evening of June 24th, 2002. SP and her ex-boyfriend, BL, had two weeks earlier been served with an eviction notice.

- At approximately 4:30 pm, BL knocked on her door. She told him to come back in two days when she'd be moving out, but BL refused to leave and threatened to break the door down. The shouting stopped and SP went back to sleep.

- Approximately 15 minutes later, there was another knock at SP's door, with a male voice identifying himself as a police officer and asking her to open the door. SP opened the door and saw two officers standing in the hallway. The Caucasian officer who was standing in front said he wanted to check to make sure there was no one else in the room. He said they wanted to make sure there was no threat to them if they should enter.

- SP opened the door wide, allowing the officer to look over her shoulder into the room. The Caucasian officer asked if he could come in. SP replied that she had just woken up, needed to go to the bathroom and asked them to wait a few moments.

- The officer said no and came into the room. He said something to the effect that SP was a "no good drug user" and that she shouldn't be sleeping during the day. The Caucasian officer grabbed her left shoulder and right forearm very tightly with both hands and started pushing SP forcefully back into the room.

- SP reacted and tried to bite the officer's left forearm. Before she had a chance to bite him very hard, she realized what she was doing and stopped. SP apologized to the officer for trying to bite him.

- The Caucasian officer pushed SP over to the bed, twisted her left arm behind her back and pushed her face down on the bed, holding her hair with one of his hands. The officer then started twisting the knuckles of his clenched fist into my ear. He would stop and start again about four or five times and at one point SP believes both officers were involved as both her ears were being "knuckled".

- When the "knuckling" stopped, the officers took SP out into the hallway, made her lay face down and handcuffed her. They interrogated her, but wouldn't let

SP look at them. The handcuff on her left wrist was too tight, but the officers refused to loosen it.

- BL then went into the room and removed what he wanted to take out. When he was finished, the officers released SP.

- SP spoke with the hotel manager the day after the incident he told her that he had called the police to remove BL from the hotel because of his loud threats to break the door down.

The RCMP Investigation:

On 2002.06.24 at 16:50 hours, a request to stand by and keep the peace was made by AR, the hotel manager at the ARNO HOTEL, 291 East Georgia Street, Vancouver. Constables I and K. attended on a routine basis and arrived at 1719 hours, 29 minutes after the complaint was made. They spoke to the hotel manager, and to BL, an ex-boyfriend of SP who was trying to retrieve his belongings from her suite after their relationship had ended. SP had allegedly told BL to come at around this time but the two argued loudly after BL arrived. Thereafter, AR, the hotel manager called the police.

After some discussion through the closed door, SP eventually opened the door to Csts I. and K. and immediately asked to go to the bathroom. Cst I. identified several reasons as to why he did not allow her to go (i.e. flight, concealed weapons, "dump drugs"), including the fact that he believed this would only take a few minutes to resolve.

According to Cst. I, he asked SP if she was alone and to step back so he could see if anyone was behind the door, which was approximately 3/4 open. SP did not respond so he asked again more forcefully and heard Cst K. identify a knife nearby inside the suite. Cst I. tried to move SP away from the knife in a moderate manner by pushing her upper right arm with his left hand, with the intent of having her sit on her bed.

The interaction deteriorated quickly at this point as SP reacted and attempted to bite Cst I. on his arm. She was handcuffed and placed prone on the floor in the hall while BL removed some of his things from the room. SP apologized immediately and Cst I. did not require medical attention. SP was not charged and Csts I. and K. cleared the scene at 1808 hours.

SP advised that she bit Cst I. Cst I. advised that she tried to bite him, but he does not state that she bit him. Cst I. stated that Cst K. delivered approximately two strikes to SP but that he didn't see where the strikes landed, but felt they would have hit SP's upper body. SP complained of "knuckling" and tight handcuffs, but she did not identify these alleged blows.

The RCMP reported that the alleged injuries complained of by SP were not confirmed by an acceptable standard of proof. However, they concluded that there was evidence that the complaint may constitute an Abuse of Authority under the *Code of Professional*

Conduct by reason of the entry into SP's apartment and her subsequent detention by the police. Inspector Handy reported:

> *Based on the evidence of all parties to date, Cpl. SPLINTER considers the complaint as requiring further review. I support his assessment of the known facts.* [85]

The RCMP commented on the failure of Cst K. to participate in the investigation, and remind that there was recourse under the *Police Act* to address his failure to meet his responsibility to account by way of Duty Report. [86]

The VPD Review and Decision of the Discipline Authority:

On March 31, 2005, Chief Constable Graham provided his disposition report to the Police Complaint Commissioner, concluding the complaint as unsubstantiated.

Cst K. provided a Duty Report to the Review Team, addressing the issue of detention and entry into the complainant's residence:

> *When SP was arrested and placed in handcuffs, she remained restrained for approximately 10 minutes before she was released. During her time in handcuffs, Cst 1855 was assessing her injuries, BL was retrieving his belongings and I was discussing with Cst 1855 if he wanted to criminally charge SP. with assault PO. When SP was released, I observed no visible injuries on her. Cst 1855 explained to SP why we had to physically restrain her. SP stated that she understood and kept apologizing for biting Cst 1855.*

Cst K. further explained:

> *The grounds to enter BL and SP's suite were based on our common law duties as police officers. Assistance was requested by one of the legal tenants of the room and permission was given by the same party to enter the room. The unfortunate incident that transpired inside the suite was a result of SP's actions and we responded accordingly with the full intention to preserve safety for all involved.*

Cst I. provided a supplemental Duty Report to the Review Team, addressing the issue of detention and entry into the complainant's residence:

> *BL stated that he and SP were involved in a relationship and that they both resided in the apartment. This assertion was supported by the onsite building manager who was present during our conversation with BL. The authority to attend BL's and SP's apartment would be found in my common law duties as Police Officers to keep the peace, preserve life and property and prevent crime. My authority for detaining SP was to protect myself and*

[85] RCMP Final Report (SP.) 04-09-23 pg. 20
[86] RCMP Final Report (SP.) 04-09-23 pg. 21

my partner from physical attack. SP was detained under authority of the Criminal Code of Canada as SP was attempting to assault me. By SP's admission she was attempting to bite me.

Conclusions of the Police Complaint Commissioner:

I accept Cst I.'s honest belief in his explanation for his actions. He stated that assistance was requested by one of the legal tenants of the room and permission was given by the same party to enter the room. It is a well-established principle that the consent of an occupant is a proper basis for police entry onto premises.

Further, this was in effect a request for police attendance at a "domestic dispute". It is accepted that these kinds of emotionally-charged disputes are often very dangerous for attending officers. The fact that there was a knife within plain sight when the door was opened raised the spectre of both officer safety and the safety of other persons. It is apparent that the officer believed that he was entitled to enter these premises in these circumstances without a warrant based on BL's consent and based on the duty to protect life and property.

The difference of opinion between the RCMP and the VPD on this topic is likely due to the interpretation of the 1999 Supreme Court of Canada decision in *R. V. Godoy*[87]. As in most cases, each decision turns on its own unique facts. In *Godoy*, the SCC ruled that public policy requires that the police be allowed to enter dwelling houses to investigate 911 calls when certain conditions exist. Those conditions include entry that is justified by statute or common law. Where it appears that the 911 caller is in distress or the call is prematurely terminated, then the police may enter the premises on the basis of a duty to protect life. The second consideration is whether the exercise of that duty involves an unjustifiable use of those powers. However, the reason that the police may enter the premises in those situations is to ascertain the health and safety of a 911 caller.

In the facts of this case, the call was from a hotel manager (there is no indication that this was a 911 call) and the police were able to ascertain (by speaking to AR) that the caller himself was not in danger. According to *Godoy*, their authority for being on the premises ends where they have located the caller, determined the reason for the call, and have provided such assistance as is required. Nevertheless, in this case, the argument could be made that this was a call by a third party from which the officers believed that someone inside the premises was in trouble. If they could have ascertained the fact that no one was in danger without entering the premises, they ought not to have entered. It becomes a question of judgment as to whether the nature of the complaint was such that the officers honestly believed that circumstances inside the premises necessitated their intervention "for the protection of life or property." That is a judgment call that I am not prepared to second-guess. I accept that the officers honestly believed that it was necessary to enter in order to ascertain that there was no such threat to life or property. I believe that in this case their cautionary response was in the public interest.

[87] R.v. Godoy [1999] 1 SCR 311; 168 DLR (4th) 257

Accordingly, although I understand why the RCMP would suggest that this matter warranted "further review", I have now undertaken that review and have given the benefit of the doubt to the officers responding to this call.

In the result, I confirm the DA's decision that this complaint is unsubstantiated.

Appendix 6

Complainant:	**AA**
Respondent Officers:	**Cst M and Cst MAC**
Witness Officers:	

The Allegations:

- AA stated on May 19th, 2003, at approximately 2:00 pm, while walking on EAST HASTINGS in Vancouver, between BOUNDARY and KOOTENAY, he observed two undercover police officers questioning three teenaged boys. AA walked by the group and stopped at a nearby bus stop. The officers finished their dealings with the boys and let them go.

- As the boys passed by his location, AA told them they had to know their rights. AA advised the boys they did not have to show their identification if they were not being charged with anything. The police officers drove by as he was speaking to the boys. The boys continued walking and were stopped again by the same officers. They spoke for less than a minute.

- A moment later the same officers pulled up in front of AA and got out of their car. One, an "East Indian officer" asked AA why he was trying to sell drugs to the children. AA denied the allegation. AA explained that he told the boys they had the right not to say anything to the police unless they were being charged with something. At this point the police told AA he had to show his identification because they were going to charge him for dealing drugs. AA produced his identification. The other officer, "a Caucasian", searched AA's backpack and found some pills. The officer asked if they were the pills AA was going to sell to the kids. AA told the officer it was his medication. The Caucasian officer continued to search his bag and made a comment about AA not liking the police. AA commented what they were doing looked more like harassment than the investigation of a drug dealer.

- AA states the East Indian officer made comments about how he needed to respect the law. This same officer checked AA on the car computer and called the Caucasian officer over. They asked AA if he belonged to Pivot. At this point AA stopped responding to the officer's questions.

- The officer returned the identification and said that the last time AA had called the police was for a missing person. AA recalled this had occurred approximately 3 years before when his daughter went missing. The officer then told AA not to call the police again if he ever needed them. AA asked the officers for their badge numbers. The East Indian officer replied, "1886, and I don't care if you call Pivot." The Caucasian's number was 20 - -. AA. Did not get the last two

digits and the officer would not repeat it. The officers did not search AA's person nor did they read him his rights or charge him with anything.[88]

The RCMP Investigation:

The RCMP reviewed the complaint and addressed the following issues arising out of the incident**:** [89]

- Grounds for Detention - substantiated
- Grounds for Search - substantiated
- Failure to Provide Charter Rights - unsubstantiated
- Racial Profiling - unsubstantiated
- Attitude - unsubstantiated

For the purposes of these Reasons for Decision I shall detail those aspects of the complaint that were found to have been substantiated by the RCMP and subsequently determined to be unsubstantiated by the DA of the VPD.

1. Grounds for Detention:

The street check for this incident that was authored by Cst M does not mention the three boys saying AA had tried to sell them drugs, or the fact AA was searched for drugs on the basis of what the boys had told them.

The street check report stated:

> *- police were checking three teenage youths that looked suspicious in the 3600 block of Hastings St.*
> *- the sus interfered with members as they were trying to investigate*
> *- the sus advised the males not to talk to police*
> *- the sus was very anti-police and uncooperative*
> *- the sus demanded our badge numbers and we provided them*
> *- the sus told us he was going to talk to PIVOT about it*

In his statement AA denied interfering with the police. He said he did not say anything to the boys when the police were dealing with them. He said he was "looking." He also said, "looking is not illegal." He further denied any drug involvement whatsoever. AA said the police approached him "with a lie" by saying the boys had told them he was trying to sell them drugs. This was the reason the police used to search his belongings.

> *In his Duty Report Cst MAC recalls Cst M telling AA to move back. According to Cst M, AA reluctantly complied. Both Cst MAC and Cst M indicated in their Duty Reports that AA was observed speaking to the three males after the officers were driving away.*

[88] RCMP Final Report (AA.) 04-10-19 pg. 1/2
[89] RCMP Final Report (AA.) 04-10-19 pg. 11

In his Duty Report Cst MAC stated he was suspicious as to why AA was so interested in their dealing with the boys. In his Duty Report Cst M stated he and Cst MAC were suspicious as to what was going on between the boys and AA.

Cst MAC indicated in his Duty Report, "one of the kids also stated he thought the man was trying to sell them drugs". Cst M indicated in his Duty Report, "one of the other males said AA had asked them if they wanted to buy drugs." Cst M went on to say in his Duty Report that he verified this fact with the boys who nodded in agreement.

However, it appears that all three of the boys deny making any reference at all to the police about AA trying to sell them drugs. It does not appear AA was being anything other than an annoyance to Cst's MAC and M.

Being an annoyance does not necessarily equate with interfering in an investigation. Cst MAC and Cst M both stated in their Duty Reports they were suspicious of AA as to why he was so interested in their dealings with the boys. The street check authored by Cst M makes no mention at all of drug involvement. Mere suspicion does not amount to reasonable grounds.

In the opinion of the RCMP investigator, the three boys had nothing to gain by not telling the truth with respect to AA and whether or not he tried to sell them drugs. The RCMP also expressed the opinion that AA was a believable witness and referred to the logic at page 23 of his statement:

> *Give me a break, how can I sell drugs to the boys when they were in talking with the police? It's a very simple conclusion ... it's the most stupid drug dealer ... to sell drug in front of the police, give me a break.*

The RCMP investigator expressed the opinion that AA was undoubtedly,

> ... *irritating Cst MAC and Cst M by standing there and watching what they were doing. The officers no doubt realized they had insufficient grounds to take any action*.

The RCMP concluded that:

> ... *there was no evidence that AA was speaking to the boys while the police were dealing with them and therefore was not obstructing the officers in the course of their duty.*[90]

As previously noted merely being annoying is not sufficient to qualify as "interfering in an investigation. AA was told to move back and he complied. There was no evidence that AA was speaking to the boys while the police were dealing with them and therefore was not obstructing the officers in the course of their duty.

[90] Page 12 RCMP report Re: AA.

It is also the opinion of the RCMP investigator that the officers saw AA's speaking with the boys as an opportunity to determine that there were reasonable grounds to take action against him. The investigator went on to conclude:

> *In my opinion however, Cst's MAC and M had no reasonable grounds to detain AA. It is further my opinion the officers knew they had no grounds to detain AA and ultimately fabricated the grounds that AA asked the boys if they wanted to buy drugs, when the opportunity presented itself. Having said this I would draw your attention to the fact both Cst's MAC and M documented their "grounds" in their Duty Reports. The evidence questions the integrity of Cst Mac and Cst M.*

The RCMP recommended that based on the civil burden of proof and on a balance of probabilities, this allegation is substantiated.

I note that the above opinions by the RCMP are stated in rather strong language. The investigator did his independent investigation, spoke to all individuals involved, (except the officers who merely provided Duty Reports) and made an assessment of credibility. Trained police investigators are frequently required to make credibility assessments in the course of their profession. At the conclusion of the investigation they accumulate a body of evidence from which they then make an assessment as to whether or not they believe a person has committed an offence or disciplinary default. As a result of the conclusions they draw (including an assessment of credibility), investigations are concluded either with recommendations for file closure or the commencement of formal legal proceedings as the case may be. In this particular case the RCMP investigator assessed the information available to him and concluded that not only did he believe AA and the three boys, but that he disbelieved the officers.

2. Grounds for Search:

On the issue as to whether there were reasonable grounds to conduct a search of AA, the RCMP investigator reported:

> *As noted above it is my opinion there were no grounds for the detention. As no grounds for detention existed it would follow that any subsequent search would be unlawful. Again, based on a balance of probabilities, this allegation is made out and I recommend a finding of "SUBSTANTIATED*".

The VPD Review and Discipline Authority's Decision:

On March 31, 2005, Chief Constable Graham provided his disposition report to the Police Complaint Commissioner, concluding the complaint as unsubstantiated[91].

Chief Constable Graham reported that:

[91] AA. Disposition Report 05-03-30

> *The facts are complicated and there is conflict and a considerable divide between what AA alleges, the three youth's account of the events and the reports of the two police officers.*[92] *The officers were all interviewed and were very adamant in their denial of any wrongdoing. At the early stage it appeared to be the word of the three boys and AA against that of the two officers. The review team also analyzed the witnesses' version of events in detail.*[93]

The Review Team alleged that the RCMP investigator was leading the witnesses during their interviews, in particular, the three youths. The Review Team suggested that one of the boys, AM, had a poor memory of the incident and was being led by the investigator.

Despite having suggested AM had a poor memory of the incident, the Review Team commented on an unsolicited reference to drugs made by the witness: "*I guess they thought he'd asked us if we wanted drugs or something."* [94]

The Review Team noted that there had been no mention of drugs up to that point, so questioned why the witness would make the statement. [95]

The Review Team also expressed concerns about the interview of witness KW, suggesting that the leading nature of the interviews and use of many closed questions had produced the adamant responses from him. [96]

It is noted that the Review Team did not refer directly to any portion of the interview of KW. A portion of his interview is worth noting:

Q: Okay. Um, did the man ever try to sell you drugs?
A: No.
Q: Okay.
A: I know that.
Q: Did you ever tell the police that the man had tried to sell you drugs?
A: No. No.
Q: Did you tell the police anything that they may have interpreted as him trying to sell drugs?
A: No…nothing. We didn't even talk about the guy to the police. Just when they pulled up to us, they said, what did he say to you? And we said, he, he told, he told us we had our rights.[97]

The Review Team reported that BM was also vague in his recollections. However to my observation, he appears very definite in his responses to questions early in the interview:

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[92] Ibid pg.1
[93] Ibid pg.2
[94] Ibid pg. 3
[95] Review Team Report (AA.) 04-11-25 pg.2
[96] Review Team Report (AA.) 04-11-25 pg.2/3
[97] WERTS Interview Transcript 04-09-16 pg. 3

Q: Um, so, then you kept walking and the police came by again. Is that correct?
A: Yes.
Q: And spoke to you?
A: Ya.
Q: And what did you tell them?
A: Ah, they are like, hey, what did that guy say to you? And we're just like, nothing.
Q: Okay. Um, at anytime, did you or your friends, ah, tell the police that this fellow was trying to sell you drugs?
A: No.
Q: No?
A: No.
Q: Okay, um, did you say anything to the police, or did your friends say anything to the police that they might have interpreted as, ah, this fellow was trying to sell you drugs?
A: Um, no.
Q: No? Okay, um, so did the police ask you if this man was trying to sell you drugs?
A: Um, no, they just asked us like, what he said.[98]

It appears to me that the question cited by VPD as "leading" is merely a re-statement by the officer of a previous answer that had already been given by the witness, and therefore is not objectionable as "leading". It merely drew the focus of the interviewee to the area that the officer was interested in pursuing. It is clear that the RCMP investigator had prefaced this impugned passage by suggesting he was going to "re-cap". In my view, for the VPD Review Team to single out that latter portion of the transcript and cite it as being "leading" is therefore unfair and misleading.

The Review Team took exception to the RCMP reporting on the believability of the complainant and the witnesses, but providing no material upon which to base that assumption:

> *There is no comment on their backgrounds, potential criminal pasts, or any other issues which may have some bearing on this issue*. [99]

However, the Review Team does not provide any material upon which to challenge that assessment of credibility. I suspect from the absence of any such material being presented by the Review Team, that none exists. Had there been such evidence, I anticipate that the VPD would have highlighted it.

The VPD Review Team concluded that there was no question in their mind (from the perspective of statement analysis) '*that the complainant and one of the teenagers, most*

[98] Ibid pg. 3/4
[99] Review Team Report (AA.) 04-11-25 pg. 3

certainly AM, had some discussion about drugs, at some level.' [100] I disagree with that conclusion. There is unequivocal denial by all parties that no such discussion took place.

The evidence leads me to conclude that the conversation between AA and the boys transpired the way the witnesses said it did. It would be highly speculative and mere "wishful thinking" in my view to suggest otherwise.

One final comment concerning this matter is warranted. None of the material supplied to me discloses any further attempt by the VPD Review team to either request additional duty reports or to conduct clarifying interviews with either of the officers, something that they did do with respect to other respondent officers on other files.

For all of the above reasons, I agree with the RCMP that this file should have been determined to be substantiated, and furthermore that Chief Constable Graham's approach to this file reflected a jurisdictional error in his understanding of his legal mandate as discipline authority.

[100] Ibid pg. 3

Appendix 7

Complainant:	**HVH**
Respondent Officers:	**Cst V**
Witness Officers:	**Cst S, Cst N**

The Allegations:

- HVH states that on July 20th, 2002, at approximately 9:00 pm, he was parked in his vehicle behind the library at Fraser Avenue and 46th Street in Vancouver, British Columbia. He was with a friend named "James", who was in possession of a crack pipe, but did not have any crack on him.

- A police car pulled in front of his car and a male officer got out. James got out of the vehicle and was questioned by the officer. The police officer physically searched James and verbally directed him to leave the area, which he did.

- The officer physically searched HVH outside the vehicle. The police officer advised him that he had been dealing dope out of his car.

- Another police car arrived, occupied by a male and female police officer. The male police officer wore badge number 1934. Police officer 1934 told HVH he did not want to see him around the area anymore. The first police officer searched HVH's car and found a crack pipe. HVH denied it was his and told the officer he did not smoke crack. The officer told him that it was his because it was in his car.

- Police officer 1934 went back to his car, opened the trunk and took out a big gun with hazard signs on it. HVH believes it was a TASER. Police officer 1934 told HVH that he was tired of dealing with him. He gestured to the female officer and said to HVH that he had better tell her the truth.

- Police officer 1934 turned on the TASER's laser-aiming device and pointed it at HVH's chest. HVH observed a red dot on his chest. Police officer 1934 asked, "Do you want to know how this feels?" HVH said, "No, I don't want to know." Police officer 1934 said, "That is a very smart answer." Police officer 1934 asked HVH how much wattage the TASER had to which HVH responded with "500 watts." HVH was told not to watch them search his car.

- The first police officer told HVH that they found a flap of heroin in his car. HVH stated that it was not his.

- HVH asked why they were searching his car and Police officer 1934 told him that he had given them the reason mentioned in a previous incident of June 27th, 2004. Police officer 1934 told him he could ask for the search of his car to be

stopped, but HVH told him they could continue. HVH subsequently changed his mind and asked them to stop but they did not.

- HVH was told not to be anywhere near Main Street between Knight and Fraser, or between 33rd Avenue and Marine Drive. If the officers saw him they would tow his car.

The RCMP Investigation:

The RCMP investigated thoroughly, and had their investigator travel to Calgary to interview the complainant HVN. In the course of their investigation they encountered what can only be described as a frustrating lack of co-operation from the respondent officers.

They ultimately recommended a finding that the Disciplinary Default of Abuse of Authority had occurred, contrary to s. 4 (1) (f) of the *Police Act - Code of Professional Conduct Regulation*. Among their considerations for coming to that recommendation were:

- The Duty Report of Cst S never stated that Cst V did not point the TASER at the complainant;

- The Duty Report of Cst S contained inaccuracies of date and incorrect name of the second police officer - in spite of her VPU agent being advised of the correct information prior to her authoring this report. This served to lessen the veracity of her account;

- The Duty Report of Cst N did not directly state that Cst V did not point the TASER at the complainant;

- The first Duty Report of Cst V provided no detail;

- The second Duty Report of Cst V denied the pointing of the TASER;

- The VPD TASER log report confirmed Cst V had the TASER for his shift on July 19, 2002;

- Both Cst V and Cst S make account that Cst V demonstrated the use of the TASER to occupants of 619 Kingsway;

- The content and theme of the complainant's affidavit and recorded statement were consistent. Significant reliance can be made of the veracity of the affidavit, as it was recorded only 11 days after the alleged incident. The only mistake made by the complainant was stating the date of occurrence of this incident as July 20, 2002, rather than July 19, 2002;[101]

[101] RCMP Final Report (VAN HVH) 04-11-15 pg. 12/13

- The details provided by the complainant in regard to the description of the TASER and the pointing of it were accurate and remained consistent between his affidavit and recorded statement;

- The complainant provided detail of a police search of him at 619 Kingsway on June 26, 2002, by Cst V and Cst S. The complainant denied having any other contact with the police involving the use of the TASER.

The RCMP reported that the complainant was reluctant to participate in the process because of the time delay in the reporting and the fact that the money associated to this other complaint had been returned to him by the RCMP[102]. The investigator reported the complainant:

> *… also felt some emotional indebtedness to PC V. and PC S., as he felt this assisted him in seeking help for his problem.*[103]

The VPD Review and Discipline Authority's Decision:

On March 31, 2005, Chief Constable Graham provided his disposition report to the Police Complaint Commissioner, concluding the complaint as unsubstantiated[104].

Chief Graham stated:

> *The conclusions from the RCMP were that the allegation, based on a balance of probabilities, should be substantiated. Sergeant Kennedy drew substantial negative inference from the lack of cooperation by the Vancouver police members in providing a detailed and meaningful account. In my master report I describe the situation with the taking of KGB statements. Suffice it to say that more detail was needed from the officers. All three were interviewed by the Review Team.* [105]

Chief Constable Graham reported on the results of the interview of respondent officer:

- Cst V vaguely recalled the incident as it happened almost thirty months previous;

- Cst V recalled HVH from previous encounters and suggested HVH was a suspected drug dealer;

- Cst V recalled questioning HVH while another member searched the vehicle;

- Cst V confirmed that he probably had his TASER in the trunk of his patrol vehicle;

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[102] See footnote 122
[103] In my view this shows that the complainant HVH was neither "out to get the cops", admitted to his drug problem, and is therefore of assistance in assessing his credibility.
[104] VAN HVH Disposition Report 05-03-30
[105] Ibid pg. 2

- Cst V denied ever pointing the TASER at HVH and supplied an alternative explanation as to why HVH would have a clear knowledge and description of the TASER. Cst V noted a previous demonstration of the TASER at a crack shack at 619 Kingsway and recalls HVH being present when he demonstrated how the weapon operated and laser sighting system worked; and

- Cst V provided the names of two individuals who could support his version of events. Chief Graham reported that the two potential witnesses were flagged on CPIC, but had not yet been located.

Chief Constable Graham detailed the results of the interview of witness officer Cst S as follows:

- Cst S had little knowledge of the incident due to the passage of time;

- Cst S denied that Cst V ever pointed the TASER at HVH;

- Cst S remembered the incident at the crack shack on Kingsway and confirmed that the TASER was shown to people. HVH was present;

- Cst S reported that she was told by her union agent not to participate in a KGB interview; and

- Cst S recalls receiving 30-day progress reports but did not interpret them as directives to attend for interview.

Chief Constable Graham also detailed the results of the interview of witness officer Cst N:

- Cst N did not remember the incident at all;

- Cst N has worked with Cst V for many years and spoke very highly of his character;

- Cst N noted that Cst V is a Deacon in his church and committed to his religious beliefs; and

- Cst N thought that Cst V was incapable of being untruthful and that if he had pointed the TASER at anyone, he would admit it.

Conclusions of the Police Complaint Commissioner:

I can understand why the RCMP were left with the impression that the officers may have been attempting to escape culpability for their actions as was evidenced by their apparent lack of cooperation with the RCMP investigators. This lack of co-operation, however should not necessarily be construed in such a way as to adversely affect the

credibility of the police officers involved. In fact, it appears from the RCMP report that Cst S initially had agreed to participate in a full interview with the RCMP, but was ultimately dissuaded from doing so on advice from the VPU agent. She instead provided a prepared statement or Duty Report that the RCMP investigator found to be unhelpful. He indicated that he had been limited in his investigation "by the lack of detailed and meaningful account by the police".[106]

It must also be noted that the RCMP had determined that although the complaint concerning the pointing of the TASER was in their view substantiated, they also pointed out that the complainant did not feel threatened by that event. HVH thought that they were merely trying to persuade him to give drug information, but he did not do so. The RCMP properly found that the pointing of the TASER in such circumstances was not an acceptable police practice. They recommended that a verbal reprimand would be the most suitable corrective measure to address this issue. If the allegation can be proved, I would agree. However, the RCMP's conclusion seems to have depended largely on the adverse inference they were entitled to draw based on lack of cooperation by the officers. The officers did, however, subsequently provide statements to the VPD Review Team that provides a suitable explanation. Had the RCMP had the benefit of that evidence, their recommendation may well have been different. Without further corroborative evidence, I am not persuaded that the complaint would meet the legal test to be substantiated. Accordingly, I find the complaint is unsubstantiated.

[106] RCMP Final Report (HVN) page 11

Appendix 8

Complainant:	**MT**	
Respondent Officers:	**Cst KT**	**Cst DC**
	Cst CB	**Cst RM**
Witness Officers:	**Cst DB**	**Cst RM(2)**
	Sgt SA	**Cst CT**
	Cst MM	**Cst DC(2)**
	Cst F	

The Allegations:

- On Sunday, January 20, 2002, at approximately 9:00 p.m., MT ran into his friend, PC. They attended and socialized at different hotels in the Downtown Eastside for the next few hours.

- When MT decided to go home, PC offered to give him a ride. As they began to drive, PC saw a marked police car and told MT to put on his seatbelt. It appeared to MT that the car PC was driving was stolen. There was a brief chase before PC stopped the car. Both of them exited the stolen car and fled on foot.

- As they ran around a corner, they ran into four police officers waiting for them. The four waiting police officers identified themselves as Vancouver Police and told MT and PC to stop immediately. They put their hands up.

- The four police officers approached MT and PC. One officer kicked PC in the testicles. An unknown number of police officers started kicking and punching MT and yelled for him to get down. MT fell to the ground and they rained punches and kicks on him. He asked the police officers to stop, but they continued kicking and punching.

- The two police officers who had been chasing them came up from behind and also started kicking and punching MT and PC. These actions went on for several minutes, with kicks and punches coming from all directions. MT was lying face-down and was kicked in the testicles from behind. More police officers arrived and also kicked and punched MT and PC.

- When a police wagon arrived, the beating stopped. The driver did not strike them. MT described the driver as an Asian officer. MT and PC were transported to cells. MT was in pain with blood running down his face as he was walked into cells and booked in.

- For a period of time afterward, MT attempted to retrieve his driver's license, which was seized that night by the arresting officers. Through those contacts

with the department, he discovered that the arresting officers were PCs 1955 and 1889.[107]

The RCMP Investigation:

The RCMP located a General Occurrence report relating to the incident, identified as a recovery of a stolen vehicle, and identified five officers involved in the recovery and arrest of PC and MT.

Cst KT, Cst DC, Cst CB and Cst RM were identified by the RCMP as Respondents. The RCMP investigation also identified six Witness officers: Cst DB, Cst RM(2), Sgt SA, Cst CT, Cst MM and Cst DC(2).

I deem it necessary to note at this point that the investigative material that I have available to me with respect to this complaint is in the hundreds of pages. It is extremely difficult to provide a detailed summary of the circumstances, since the material is so voluminous. It is also complicated by the fact that the complainant was the subject of criminal charges that went to trial. A number of the officers gave evidence in this case and findings of credibility were made by the Court. The court was in a much better position to make findings of fact based on credibility than would either Chief Graham or myself. I would defer to the Court on those issues. In these circumstances, therefore, I propose to give only a brief synopsis of the facts.

The RCMP had some difficulty in contacting MT. After some missed interview appointments, on 17 March 2004 the complainant finally provided a KGB format statement to the RCMP. In addition to the facts provided in his Affidavit, MT stated the incident occurred next to a residence and one of the officers noted an older woman looking out of a window. After seeing the woman, the officer told the others to stop. The beating resumed when she closed the curtains. When it was over, they "high-fived" each other. During the course of giving his statement MT admitted to having had heroin that night. His recollection of the sequence of events was somewhat uncertain.

The RCMP compared his evidence at trial with his affidavit and subsequent KGB statement and found that with a few minor exceptions, they were consistent.

PC, the companion of MT and driver of the stolen vehicle, did not testify at the criminal trial, however the RCMP investigator obtained a KGB interview with PC. During this interview, PC stated the following:

- That he had no contact with MT prior to being interviewed by the RCMP;
- PC admitted to having smoked some crack cocaine and drinking beer that evening;
- That he and MT fled the stolen vehicle on foot and ran into two police officers in an unmarked car;

[107] RCMP Final Report (MT) 04-11-30 pg. 1/2

- PC then described a beating similar to MT's description. He claimed to have lost consciousness from the blows he received. PC also referred to an officer telling the others to stop because someone was looking. PC had to be carried to the police wagon for transport to the cells;

- PC was examined by a doctor in cells, as he was in extreme pain for what he believed to be a broken rib, however he received no treatment for his injuries; and

- PC did not give evidence at the criminal trial.

There were many delays and difficulties encountered by the RCMP in obtaining duty reports from respondents and statements from witness officers. These were in many cases vague and incomplete.

Ultimately, the RCMP received duty reports from most of the officers. The duty report received from Respondent Cst TK indicated the following:

- He and Respondent Cst DC ordered MT and PC to stop but they did not;

- He saw PC fighting with Cst CB. He noted that his partner, Respondent Cst DC, was dealing with the passenger of the stolen car, MT. Once MT and PC were handcuffed, he and his partner Respondent Cst DC left the area to attend to other matters;

- Respondent Cst KT denies kicks or punches were delivered to the complainants. He says that PC was resisting and some difficulty was experienced in applying the handcuffs.

> *I don't recall exactly what I did, but I would have struck him as a pain distraction technique. I may have struck his legs with my knees, and elbow, the heel of my hand, or with an open hand. I would also lean on him with my knee, leaning on the back of his leg or legs. I did not punch him with a closed fist and I did not kick him*.

Respondent Cst KT testified at MT's trial and the RCMP Report analyzed the evidence given at trial in some detail. Under cross-examination by defence counsel, PC T was asked if he remembered an ambulance at the scene. He replied that he was not at the scene and did not recall anyone calling for an ambulance. When asked if there was anything that happened that may have required an ambulance to be called, he admitted that perhaps during the struggle with the police something might have happened that would warrant calling an ambulance. When asked to agree that the two men appeared to be quite badly hurt, he said he had left the scene.

Respondent Cst CB provided a Duty Report with the notation that he had been ordered by the Inspector of the VPD Internal Investigations Section to do so. He related his

dealing with PC, indicating that he had merely brushed by MT and had no further contact. The RCMP Report notes that many of the questions they had asked were left unanswered by Respondent Cst CB's Duty Report. The RCMP also note that Respondent Cst CB did not deny MT's claim that one officer had told the other officers to stop because someone was watching.

Respondent Cst CB also gave evidence at trial. The RCMP noted some discrepancies between his evidence at trial and what was contained in his Duty Report. In my view they were minor, merely reversing the identities of the persons whom he body-checked and the one whom he kicked.

Respondent Cst DC initially had not provided a duty report and did not do so until after being ordered to do so by the Inspector in charge of the Internal Investigations Section. In his duty report Respondent Cst DC indicated:

- that he believed MT was resisting arrest by Respondent Cst RM, and he went to his assistance;

- that he used a series of knee-strikes to MT to attempt to get him to stop resisting and enable the handcuffs to be placed on him.

The RCMP indicate that Respondent Cst DC's Duty Report was "quite detailed and unambiguous", however, because he would not be interviewed they could not clarify a number of very relevant issues, such as:

- What happened once the handcuffs were on;

- whether anyone punched or kicked MT after the handcuffs were on;

- whether anyone looked out an adjacent window;

- whether any officers said to stop because someone was watching; and

- whether he noted if MT had sustained any injuries.

In essence, the duty Report adequately dealt with what happened prior to and during the arrest and handcuffing, but did not address the allegations of impropriety concerning what occurred after the arrest had been effected.

Respondent Cst DC gave evidence at trial, and indicated that he did not recall seeing either MT or PC with any injuries. When shown a photo of MT's face displaying injuries, he replied he did not recall seeing those injuries. He also said he did not recall anyone telling anyone to stop because someone was watching. He also denied making an alleged remark to MT concerning "finding sharps" on him. His evidence was consistent with his Duty Report.

Respondent Cst RM also provided a Duty Report, albeit late. Respondent Cst RM indicates:

- that he grabbed MT, tackled him to the ground and told him he was under arrest. MT had landed face-down. A struggle ensued because MT's hands were under his body and he was not able to handcuff him. Respondent Cst DC assisted.

- he denied kicking or punching MT, nor did he see Respondent Cst DC do so.

- He denied the allegations by MT that the kicking and punching went on for several minutes; that MT had begged the officers to stop; that anyone had kicked MT in the groin and that other officers also joined in.

- He claimed most of the allegations to be "a lie".

Respondent Cst RM did not address the allegation that someone told anyone to stop because someone was watching, nor that MT was kicked in the face. However, I take the overall denials to include those allegations as well.

At the criminal trial of MT, Respondent Cst RM testified that he saw no injuries on either MT or PC. When shown the photograph of MT, he said he saw the mark but thought it was just a bad case of acne. He denied MT's allegation that he had surrendered just prior to being tackled.

As I mentioned earlier, the learned trial judge had the opportunity of observing the demeanor of the witnesses and made findings of credibility. I do not have that advantage, nor did Chief Graham.

The Court acquitted MT of the charge of possession of stolen property relating to the stolen car, and convicted PC. He found that when the two men fled on foot they ran into Respondent Cst's CB and RM. They were apprehended, handcuffed, arrested, Chartered, warned at taken to the police station. Judge Warren then assessed credibility. He found MT's evidence to be vague with some internal inconsistencies. He found the officer's evidence to be internally consistent. He was satisfied with the evidence of Respondent Cst's KT, DC, and CB. Judge Warren was not satisfied with Respondent Cst RM's evidence, noting that the officer was impatient and was mistaken regarding the race of one of the suspects and that he changed his evidence regarding MT's facial injury. The Court found that where his evidence differed with the other three officers, he preferred their evidence. Where the evidence of MT differed with the three officers, he preferred their evidence. However, he believed that MT did not know that the car was stolen until after the police arrived and acquitted him.

The RCMP obtained a copy of the book-in sheet and prisoner photograph of MT. They noted a cut visible above MT's right eye and a larger abrasion surrounding it. They also note what appears to be an abrasion on his left cheek.

In assessing the amount of force used in effecting the arrest of MT, the RCMP found that it could be justified as it was not a precise science. Nevertheless, the RCMP determined that once MT and PC were handcuffed, unnecessary force was used thereafter. The problem is that it is difficult to determine which officers used unnecessary force.

The RCMP subsequently concluded their investigation with the determination that the complaint by MT be substantiated in part regarding the use of unnecessary force by Respondent Cst RM. They also recommended a re-characterization of the knee-strike used against complainant PC as a Service and Policy complaint, since it resulted in a broken rib. They suggest that knee-strikes that lead to broken ribs might not be an appropriate option for use.

The VPD Review & Discipline Authority's Decision:

On March 31, 2005, Chief Constable Graham provided his disposition report to the Police Complaint Commissioner, concluding the complaint as unsubstantiated. In his report, Chief Graham states:

> *There were problems for the RCMP in obtaining statements and other evidence from the respondent officers. Inspector Handy made several critical observations against* [witness officers] *Sergeant A and Constables T, M, F, and MM. Additional evidence was collected and further analysis completed during the review of this case and when considered together with the RCMP report, I have determined the allegations against the respondent officers were unsubstantiated.*

Chief Graham further states that:

> *Contrary to the RCMP' view, I find from the evidence that MT. was not credible. He claimed later at trial that he did not know the car was stolen, yet he was in the passenger seat of a car with a punched out ignition*.

Chief Graham made this comment despite the fact that Judge Warren, who heard evidence under oath and which had been subjected to cross examination, believed the evidence of MT that he didn't know the car was stolen until it was too late to get out. Significantly, Judge WARREN noted that, "*it was the owner's evidence that the ignition had not been tampered with."*

As I indicated earlier, I chose to defer to the assessment of credibility made by the learned trial Judge. Chief Graham, for whatever reason, did not.

Chief Constable Graham expressed concern that the RCMP proceeded with the KGB interview of MT when it was determined that he was "on the nod" - under the influence of mind-altering drugs (heroin). He suggested that his credibility is diminished and, as

he admitted to drinking beer and taking heroin the night of the complaint incident, his recollection of what happened has to be brought into question. [108]

The RCMP qualified the KGB statement of MT by reporting on the complainant's addiction to heroin. However, the RCMP reported that while his recollection of the chronology and sequence of events during the earlier part of the night was uncertain, the KGB interview account was similar to the details sworn by MT in his original affidavit. [109]

Despite the concerns expressed by Chief Graham over accepting the KGB evidence of MT given while under the influence of heroin, his Review Team chose to rely upon that same evidence to challenge the credibility of MT:

> *MT. stated in court he did not know the car he was a passenger in was stolen. Yet in his affidavit he said he had his suspicions that it was. In his KGB statement he stated he saw the ignition was punched.* [110]

There was extensive analysis of the statements, duty reports and evidence of all of the witnesses, including the officers involved in this matter. Minor inconsistencies were noted. That is to be expected. Rarely do witnesses agree on all details. Memories differ. Observations differ. I place no great significance on inconsistencies of minor matters, provided that on material issues the evidence is persuasive.

In addition to finding that the allegations were unsubstantiated, Chief Constable Graham also disagreed with the RCMP Inspector Handy that the use of knee-strikes by the Vancouver Police Department should be the subject of a Service or Policy referral to the Vancouver Police Board. He does so without providing reasons, merely stating:

> *I do not agree that there is any issue regarding an injury to either prisoner that falls within the category of being "Service or Policy".*

Inspector Handy had made the recommendation in light of PC's complaint of having sustained a broken rib as a result of knee-strikes delivered as a pain-compliance technique. The authorized type of force to be used in different situations is governed by policy. Policy is to be approved by the relevant Police Board. Modifications to policy come about when the Board is informed about events that need examination. To simply dismiss the recommendation that the matter should be referred to the Police Board gives the impression that Chief Graham is summarily dismissing the authority of the Police Board in the same way that he appears to be dismissing the external RCMP investigation and the oversight function of the Office of the Police Complaint Commissioner.

I would not in all of the circumstances conclude on the basis of clear and convincing evidence that the complaint has been substantiated, however I would agree with the

[108] MT Disposition Report 05-03-30 pg. 3
[109] RCMP Final Report (MT) 04-11-30 pg. 6
[110] Review Team Report 05-02-11 pg.4

RCMP that the complaint had a service and policy component related to the use of knee-strikes that should be referred to the Vancouver Police Board.

Appendix 9

Complainant:	**DB**
Respondent Officers:	**Cst T, Cst M, Cst C and Cst DC**
Witness Officers:	

The Allegations:

- DB was a founding member of the Vancouver Area Network of Drug Users and was involved in developing the Saferide Program and re-establishing the Pender Detox working group. He lived in Alberta as a younger man and had spent a great deal of time in jail there. He moved to Vancouver in 1987 and has not been charged with any offences since.

- On or about December 12, 2001, DB returned home from work and met his roommate's acquaintance. He could not remember this male acquaintance's name. When male enquired about the location of a certain store, DB offered to provide directions in exchange for a ride to Oppenheimer Park.

- DB accompanied the male to the male's car parked in the rear parking lot of the Washington Hotel on East Hastings Street. While DB was seated in the front passenger seat of the car, nine to twelve police officers, some with their guns drawn, suddenly approached from both sides. As the officers ordered them out of the car and to the ground, the male seated in the driver's seat informed DB that the car was stolen.

- DB described that as he was lying on the ground with his arms and legs spread, one police officer approached him from the front. He described this officer as having been in his early twenties, about 5'9" tall, with dark short hair and dressed in full uniform. DB advised that when he saw the officer lift his foot to kick him, aiming for his head, he twisted his body to his left and the kick hit DB's right ribs. The officer immediately repositioned himself and kicked DB's left ribs. He was yelling and berating DB the entire time. None of the other officers present intervened to stop the kicking.

- The aforementioned officer then placed his knee into the right side of DB's back and instructed him to put his hands behind his back. His arms were however, being restrained by other officers standing on them. These police officers then stepped off his arms and wrenched them behind his back. He was then handcuffed and pulled to his feet.

- DB was then made to walk to the police station. Once there, he told the arresting officers that they had to call an ambulance, as he was unable to breathe, believing they had punctured his lungs. The officers placed him into a holding cell, strip searched him and told him a nurse would be seeing him. No nurse attended to him.

- DB told a guard that there was something wrong with his ribs, that he couldn't breathe and that he needed medical attention, the guard told him that he would arrange for someone to see him. The guard returned to DB's cell ten minutes later telling him he was being released without charges and would have to make his own way to the hospital.

- DB went to AL's residence near the jail, upon his release. She then contacted an ambulance on his behalf. The police accompanied the ambulance attendants and a female officer insisted that DB was not in need of medical attention. He ended up staying at AL's residence for the following two days.

- DB attended the Native Health Clinic on about December 14, 2001. X-rays determined that two of his "floating ribs" on his left side were broken, one of his front right ribs was cracked and one of his back ribs was bruised.

- Approximately two months latter DB wrote a letter to the City of Vancouver, informing them that he intended on suing the City of Vancouver, and the Vancouver Police Department (VPD) for assault and false arrest. In his affidavit he indicated that:

> *…the detective that worked for the Police Complaints Commissioner sent him a letter with Crime Stoppers stamped on it on three occasions. The hotel management held the letter for him, knowing his safety was in jeopardy should the other hotel residents have seen it*.

- DB called the above referenced detective informing him he would be dropping his suit and told him not to send any further correspondence. DB called him again after receiving a second letter and repeated that he would no longer be pursuing the matter. DB did not hear from the detective again.

The RCMP Investigation:

The RCMP investigator, after reviewing the General Occurrence Report, the audio VPD Dispatch and Info Channel recording excerpts relating to the incident, and CAD histories of the units involved, determined the following event occurred:

- On December 10th, 2001, at approximately 6:00 pm, Cst DC and Cst M, while working in uniform on foot patrol in the 300 block of Main Street, observed a parked blue Ford Focus. Cst M checked the vehicle on CPIC and determined the vehicle had been reported as stolen earlier that day from Burnaby and had been involved in a police pursuit.

- Cst's M and DC arranged to have plainclothes officers (Cst T and Cst C) disable the vehicle and set up surveillance on the car. At approximately 8:00 pm, Cst's T and C informed Cst's M and DC that two males had returned to the vehicle, entered it and attempted to start it.

- Plainclothes officers Cst's T and C crossed the street to apprehend DB and the driver (GF), with the assistance of uniformed officers Cst's M and DC.

- All four officers took GF and DB into custody. GF was in the driver's seat, DB was in the passenger seat. Cst M immediately informed DB he was under arrest for possession of stolen property, and Cst DC arrested GF.

- Both GF and DB were then walked to jail, where DB was later released without charges.

The RCMP identified three separate issues set out in the complaint of DB:

1. That during his arrest on December 10, 2001, one of the arresting VPD officers kicked him in such a grievous manner as to break one of his ribs;

2. That one of these arresting officers took possession of his apartment door keys and then in the company of other officers attended his suite and in the process of what may have been an illegal search, "trashed it"; and

3. That on an undetermined date in early to mid 2002, DB initiated a complaint with the City Clerk of Vancouver relative to his December 2001 arrest and that subsequent to this, a VPD officer sent "Crime Stoppers" stamped envelopes addressed in his name to his residence at the Sunrise Hotel. DB perceived this as an intimidating tactic which forced him to draw his complaint as the officer persisted in sending these envelopes even after DB telephoned him requesting he cease this mailing practice.

The RCMP investigation determined that the arrest of DB was lawful and that the injury to DB's ribs was sustained during that arrest. The RCMP noted the 'operational necessity' and 'degree of force used' to affect this arrest was at issue. [111]

The RCMP investigation acknowledged the fact that DB'S description of certain aspects of the incident differed considerably in his affidavit and his subsequent audio-taped statement, however they found those dissimilarities to be a consequence of:

- the passage of time between the complaint incident and the swearing of his affidavit, some fifteen months;

- the diminished visibility in the parking lot due to lighting and inclement weather;

- the positioning of DB's body in regards to lying on his stomach on the gravel ground;

- the inability for anyone to describe with complete exactitude and chronology the simultaneous actions of many others at a time; and

[111] RCMP Final Report (DB) 04-11-30 pg. 30

- DB'S credibility or lack thereof. [112]

The RCMP reported that Respondent officers Cst T, Cst C, Cst MM and Cst DC failed to provide a clear accounting of their actions and, from an evidentiary perspective, their participation in the investigation was 'negligible'. [113]

Cst T states in his Duty Report, dated September 7, 2004, that he did not deal with either accused other than indicating to the arresting officers that they had the right individuals. Cst T recalls a number of officers closed in, with a dog car. He is not sure which officers arrested the two suspects. [Note that the VPD Dispatcher excerpts spoke to the dog unit being some distance away at the time of the event.]

Cst C states in his Duty Report that he and other officers moved in towards the vehicle, apprehended and searched the two suspects. Cst C could not recall which of the suspects he dealt with.

The Duty Report submitted by Cst DC was the most substantive of all, however Cst DC dealt with GF exclusively and it is understandable that his attention would not have been on DB at the time.

Cst M's admits in his Duty Report that he "delivered several knee-strikes" to DB's "upper leg/mid-section". In the opinion of the RCMP investigator, Cst M's explanation in support of using the knee-strikes is insufficient and they question the veracity of this claim, given that Dr. Henderson had agreed that kicking had in all probability caused DB's rib fracture.

The RCMP recommended that this component of DB's complaint be substantiated. Inspector Handy summarized that:

> *There is no countering evidence presented that could explain the level of force Cst M used in effecting DB's arrest, nor any justification provided for using such force as to fracture one of DB's ribs. Absent as well, is evidence to the contrary rationalizing this action as an operational necessity given the situation and officer safety concerns inherent in this type of investigation.*

Regarding the allegation that the arresting officers took possession of DB's apartment keys and then in the company of other officers attended his suite and, n the process of what may have been an illegal search, the officers "trashed" DB's apartment, the RCMP recommended the allegation was unfounded. DB did not refer to this incident in his Affidavit and only made reference to this in his statement to the RCMP investigator. DB stated that he had been unable to return to his apartment because he did not have his keys and that he was sure the police were there. DB advised that his keys were never returned to him and that he had asked his brother to go to his apartment. The landlord informed DB's brother that DB was not getting his apartment back as it had been "totally trashed".

[112] Ibid pg.30
[113] Page 31 RCMP Report

DB was not willing to provide the investigator with sufficient information in order to look into this further. DB refused to provide the full name of his roommate, deeming that line of questioning to be irrelevant.

A review of the VPD Dispatch Radio excerpts show that Cst's T and C advised they had the key to the residence and the attendance by the officers is reflected on their respective CAD Unit Histories. What is unknown is whether DB's roommate was present and consented to the officers' entrance into the residence or if they entered illegally with DB's key. There is no mention of this in either Cst T or Cst C's duty reports.

Inspector Handy concluded by stating:

> *Irrespective of the foregoing, it has been DB's lack of participation in delving into this particular aspect that has prompted me to find this allegation to be unsubstantiated.*

With respect to DB's allegation that a VPD officer had sent "Crime Stoppers" stamped envelopes addressed in his name to his residence at the Sunrise Hotel, with the intent of intimating DB to withdraw his complaint with the City, there was insufficient evidence upon which to substantiate the allegation.

It should further be noted that DB is obviously mistaken about the working relationship between the Vancouver Internal Investigation Section (IIS) and the OPCC. The detective who contacted him was not a member of the OPCC. Our office did not receive a complaint directly from DB. The complaint we received was forwarded by Pivot. Our office records show no contact or correspondence directly with DB. Any correspondence from our office to anyone would not bear the Crime Stoppers logo.

The VPD Review and Discipline Authority's Decision:

On March 31, 2005, Chief Graham provided his disposition report to the Police Complaint Commissioner, concluding the complaint of DB to be not substantiated.

Although the RCMP investigation revealed several discrepancies in DB's affidavit and subsequent interview, they did not place as much weight on those discrepancies as it appears Chief Graham has. Chief Graham noted the following differences:

- Medical documentation confirms that DB's left 7th rib was fractured, not two fractured ribs and one cracked as reported by DB;

- DB had stated he did not know the name of the driver, however when pressed during his interview, he stated he did not want anyone else involved;

- DB was adamant that the officer who had assaulted him was the same officer involved in the Stanley Park incident. DB was "99%" sure;

- DB had stated in his Affidavit that the police had put him in a holding cell and strip searched him. DB later admitted in his interview that he was not strip searched, but that the officers had wanted to.

Chief Graham determined the stolen car incident was well documented and that the officers had conducted the surveillance and arrest according to standard operational procedures.

Cst T's duty report indicated that he observed the suspects approach the vehicle, walk away, but then sprint back and get in the vehicle. As the driver attempted to start the car, Cst T broadcast to the other members to move in and apprehend the two suspects. Cst T does not remember which officers arrested DB and GF and he had no physical dealings with either. He did not know their names and only noted their descriptions in his notebook.

Cst C's duty report is similar to that of Cst T. Cst C could not recall which of the suspect's arrest he assisted with, however he denied striking or kicking DB during the arrest, and he did not see any other officer strike or kick DB.

Cst DC's duty report states that he and Cst M were in uniform that evening and requested the assistance of Cst's T and C (plainclothes) to conduct surveillance on a stolen vehicle. Cst DC arrested GF, who offered no resistance. Cst DC notes that rather than calling a police wagon to transport GF to the jail, he walked GF directly there himself. Cst DC did not have any dealings with DB.

Cst M had provided his notes to the RCMP investigator promptly, but had then resigned from the VPD and was working with the Nelson Police Department. While in Nelson, Cst M received incorrect advice regarding complying with the RCMP investigation and did not submit a duty report when requested. Cst M returned to the employ of the VPD and in September 2004, he provided his duty report to the RCMP investigator. When Cst M was later contacted by the VPD Review Team regarding the delay and apparent vagueness of his duty report, Cst M explained the poor advice that he had received, and the fact that at the time he wrote the duty report he was still in Nelson without access to VPD reports or even his notebook. Cst M requested his Sergeant in Nelson review his duty report, but without any knowledge of the incident, the Sergeant advised Cst M that it was sufficient. Once he had submitted the duty report, Cst M was of the belief that the RCMP investigator would contact him if they had further questions.

After meeting with the VPD Review Team, Cst M provided a supplementary duty report, specifically addressing the use of force issue:

> *I had dealt with numerous suspects in stolen vehicles up to the time of this arrest. I was aware that stolen vehicles were commonly used in the commission of other serious violent crimes such as robberies and break and enters. I was aware that the occupants of the stolen vehicles commonly carry tools such as screw drivers to enter and start the vehicles. I was also aware that the criminals that steal vehicles are often drug addicts and have*

hypodermic needles in their possession. I was very aware that both the tools and needles can be used as weapons.

I opened the passenger door, verbally identified myself as the police and took DB from the passenger seat to the ground. Once on the ground DB tucked both hands and arms under him in the area of his waistband. I could not see his hands and was concerned that he may have a weapon/tool/needle secreted that I could not see and that he had access to. I yelled at DB several times to put his hands out to his sides. DB failed to comply with my verbal demands to put his hands out to his side. I then delivered several knee strikes to DB's mid section, in the area of his waist and upper arm. This technique is taught as a use of force technique to distract or stun non-compliant suspects so they can be controlled. After several knee strikes to DB's mid section I was able to gain control of his arms and hands.

Chief Graham accepted that Cst M employed knee-strikes against DB in order to gain compliance:

> *Our use of force experts have advised me that knee strikes are a common method used to gain compliance to directions to show hands and submit to handcuffing. This is a common occurrence and usually results in minimal short-term pain. Knee strikes can be used against nerves in the upper thigh and against a suspect's ribs. The explanation by Cst M, while tardy, is believable and understandable. While the use of force by this officer appears to have caused injury to DB's ribs, the question is whether the level of force was excessive in these circumstances. Was the knee strike technique an acceptable level of force? I believe it was. Cst M was taking a non-compliant prisoner into custody.* [114]

Belief of Cst M's version of events is fundamental to concluding the complaint as unsubstantiated. DB's contention was that he was kicked by arresting officers stands alone in contrast to the evidence of the four officers present. Cst M reports use of force, but all other officers do not report or claim they did not witness the event.

It is therefore important, in my view to look at the independent evidence to determine whether the complaint is corroborated. In this regard one must consider:

- Jail nurse records reflect 'ribs on his left side *reported* as painful and sore'.
- EHS Crew Report reflects DB reported he was "kicked in ribs by VPD" and indicates DB reporting increased left rib pain, but the paramedic found nothing to support. It was the paramedic who determined DB did not need to be taken to the hospital, not the officer as alleged by DB.
- X-rays taken approximately 2 days after the incident confirmed a broken 7th rib on the left side.

[114] DB Disposition Report 05-03-30

- Dr. Henderson confirmed that the injury was consistent with being kicked as reported by DB. In light of the fact that the officer admitted to delivering knee-strikes to DB's mid-section, this may account for the injury.

In addition, there are other considerations:

- RCMP found lack of specifics in the duty reports submitted (even considering the time lapse) to be unacceptable.

- RCMP questioned Cst M's explanation of knee-strikes and the veracity of his statement.

- Chief Constable Graham finds that the use of force was acceptable in the circumstances for a non-compliant person in custody.

- Cst T provided a supplemental report stating specifically that he did not observe any force applied to DB

- Cst C was not contacted for clarification or interview on arrest and use of force, although he reported that he assisted in the apprehension and search of suspects.

- Cst C, despite not knowing which suspect he assisted in apprehending and searching states that he did not kick or strike DB during the arrest.

As with several other files, the issue of cooperation by both Respondent and Witness officers with the RCMP investigation is of concern. I have not referred to those specifics in this summary, however I address this concern globally in my Reasons for Decision.

There is little doubt that the broken rib suffered by DB occurred during his arrest on December 10th, 2001 by members of the VPD. The issue to be determined is whether the amount and type of force used by the officer was appropriate to the circumstances. Although this file raises grave suspicions that the officer committed a disciplinary default, after taking everything into consideration, I do not have sufficient evidence to transform that suspicion into a conclusion that the complaint regarding the use of force is substantiated.

Chief Graham has dismissed the matter of the appropriateness of knee-strikes as not warranting referral to the Vancouver Police Board as a service and policy issue. For the reasons discussed earlier, I disagree with his refusal to refer the matter to the Board and propose to recommend that he reconsider that decision.