

IN THE MATTER OF THE POLICE ACT
 AND
 IN THE MATTER OF A PUBLIC INQUIRY INTO
 A COMPLAINT BY MR. CHARAN SINGH AUJLA
 AGAINST

COPY

SERGEANT 247 A. HOVBRENDER AND CONSTABLE 1541 S. CARROLL

DECISION OF THE VANCOUVER POLICE BOARD

Vancouver Police Board:	Ms. Elizabeth Watson, Chair Mr. William Yee Ms. Arlene Gladstone
Appearing for the Complainant:	Paul Kent - Snowsell
Appearing for Sgt. Hovbrender:	Jim Jardine, Q.C.
Appcaring for Cst. Carroll:	Jim Jardine, Q.C.
Counsel to the Board:	George Macintosh, Q.C.
Date of Hearing:	March 27, 1996, April 15, 1996 and April 22, 1996

NATURE OF COMPLAINT

Mr. Aujla made a complaint in writing dated February 4, 1994.

As against Sgt. Hovbrender, the complaint is as follows:

"After the search, the counter officer ordered me to sign a document acknowledging my present personal belongings. Being upset over the beating incident and my being naked searched, I intended to write down at the signature spot 'I was naked searched'. At the words of 'I

POLICE/1332614

- 2 -

was nake...' the officer suddenly punched hard at my face with his left hand. He immediately grabbed my chest, dragged me into a small cell, slammed me violently against the wall and followed with two right hand punches to my face. The pain on my cheek bones was excruciating. He shrieked, 'you want to go there with him?' pointing at the cell of the beaten prisoner."

The complaint against Cst. Carroll is as follows:

"After having my picture taken, I asked to make a phone call home when the officer yelled, 'go inside!'. He pushed me into the cell and quickly slammed the door when it caught my right middle finger and caused it to bleed heavily. Despite my plight for medical attention, I was ignored."

COMPLAINT INVESTIGATION

The complaint was received by the internal investigation section on February 9, 1994 and assigned to Detective McKnight on February 19, 1994. Detective McKnight did the following:

1. seized a copy of the video/audio tape which contained recordings of part of the jail area during the incident;
2. obtained a photocopy of the log book completed by Sgt. Hovbrender;
3. obtained photocopies of the nurse's log;
4. obtained the jail photos;
5. took a statement from Oscar Pineda, another prisoner in the jail;

POLICE/132614

- 3 -

6. obtained statements from Sgt. Hovbrender, Cst. Carroll and other officers on duty at the relevant time; and
7. watched the jail video.

After gathering all information, Detective McKnight forwarded the file to Crown Counsel.

On October 12, 1994 Inspector Grandia of the Internal Investigation Section wrote a concluding letter to Mr. Aujla. He advised Mr. Aujla as follows:

"On 94.08.26, the investigation file was returned by Regional Crown Counsel with the following opinions.

In regards to the incident which resulted injury to your finger, there is insufficient evidence to find any wrong doing on the police officer's part in this matter. Therefore, no criminal charges are appropriate.

In regards to the incident which occurred at the counter where you stated that you were punched. It was noted that there was nothing on the video which indicated that you were about to spit on the police officer and it clearly showed that you were struck once and acted completely surprised when this occurred. This act alone could be considered an assault however, there were other factors which were considered and reviewed.

Based on the video tape and medical evidence it was apparent you had exaggerated the extent of this assault. It also seems clear that you gave an unreliable account of the incident leading up to the injury to your

POLICE/135261:4

- 4 -

finger and to the role of the police officers involved with the other prisoner and as a result no criminal charges would be appropriate.

Based on all the evidence no charges under the B.C. Police Act will be laid against any of the police officers involved in these incidents however after reviewing all of the evidence it was concluded that the police officer who slapped you should be a subject of an employee interview. This interview will be conducted by Inspector Grandia of the Internal Investigation Section.

This concluded the investigation into this matter, therefore no further action will be taken.

If you are not satisfied with the results of this investigation, you have the right to request an inquiry. If you desire an inquiry, your request must be in writing and received by the Chief Constable within 30 days of your receipt of this letter."

The October 12, 1994 letter was sent to Mr. Aujla pursuant to Section 59 of the *Police Act*. It was sent by registered mail and signed for by Mr. Aujla's daughter.

By letter dated November 9, 1994, Mr. Aujla requested a public inquiry. The letter dated November 9, 1994 was signed by Mr. Aujla in blank and composed by Mr. Tam Tran of the Asia Pacific Justice Liaison Society.

JURISDICTION OF THE BOARD

Sections 59 and 60 of the *Police Act* provide as follows:

59. *Where a disciplinary authority has investigated a complaint, he shall, not more than 7 days after the investigation is completed, send a notice to the complainant, the complainant commissioner and the constable against whom the complaint is made, setting out*

POLICE/1357614

- 5 -

- (a) *a summary of the investigation and the results of the investigation,*
- (b) *any disciplinary action intended to be taken by the disciplinary authority, and*
- (c) *the right of the complainant or constable against whom the written complaint is made to request an inquiry.*

60.(1) *A complainant who alleges he is personally affected by an act or omission set out in the complaint, or a constable against whom the complaint is made, may, not more than 30 days after the date he receives a notice under section 59, send the disciplinary authority a notice requesting an inquiry.*

(2) *Where a notice requesting an inquiry is not sent within the time limited by subsection (1), the disciplinary authority may deal with the complaint as an internal disciplinary proceeding under a prescribed code of discipline.*

(3) *Subject to subsection (2), the disciplinary authority shall promptly submit a copy of the notice to the complaint commissioner, the minister and, where the inquiry is requested in respect of a complaint against a municipal constable, the disciplinary tribunal responsible for the municipal police force.*

(4) *Where the minister receives a copy of a notice requesting an inquiry in respect of a complaint against a provincial constable, the minister shall direct that the inquiry be held by a disciplinary tribunal consisting of the commission, a committee the minister designates or jointly by the commission and a committee the minister designates and shall give a copy of the notice to the tribunal.*

(5) *A disciplinary tribunal shall, forthwith, after it receives a copy of a notice requesting an inquiry, send a notice specifying the date and place of the inquiry to*

- (a) *the complainant,*
- (b) *the constable against whom the complaint is made,*
- (c) *the disciplinary authority, and*
- (d) *the complaint commissioner,*

and the disciplinary tribunal shall hold the inquiry on the date and at the place specified in the notice.

(6) *An inquiry shall be a new hearing at which the persons referred to in subsection 5(a), (b), and (c) may, and shall if required by the disciplinary tribunal, give evidence, viva voce.*

POLICE/13721:4

- 6 -

Mr. Jardine, on behalf of the two police officers, argued that this panel did not have jurisdiction to hold a public inquiry because Mr. Aujla did not comply with ss. 60(1) of the Police Act. He argued that Mr. Aujla did not actually receive the notice as referred to in s. 59 nor did Mr. Aujla send the disciplinary authority a notice requesting an inquiry as referred to in ss. 60(1).

Specifically, Mr. Jardine argued:

1. that Mr. Aujla had no knowledge of the letter dated October 12, 1994 signed by Inspector Grandia;
2. that Mr. Aujla signed a blank piece of paper which was subsequently filled out by Mr. Tran (the November 9, 1994 letter);
3. that Mr. Aujla had no knowledge of the contents of the November 9, 1994 letter; and
4. that the person who wrote the November 9, 1994 letter (Mr. Tran) was not the person referred to in ss. 60(1) of the *Police Act* because he was not a person "personally affected" or the complainant.

Mr. Jardine argued that it follows that, because Mr. Aujla did not meet the "condition precedent" to invoke the jurisdiction of the disciplinary tribunal, this tribunal had no jurisdiction to conduct a public inquiry.

Both Mr. Aujla and Mr. Tran testified as to their knowledge in respect of the October 12, 1994 letter and the November 9, 1994 letter. Although Mr. Aujla was somewhat confused as to the sequence of events, we found Mr. Tran's evidence to be very clear and forthright. We accept Mr. Tran's evidence in its totality.

POLICE/133261-4

- 7 -

Mr. Tran stated that he was provided with a copy of the October 12, 1994 letter and that Mr. Aujla asked him to prepare a written response requesting a public inquiry. At that time, Mr. Tran was working for the Asia Pacific Justice Liaison Society. He had helped Mr. Aujla write the initial letter of complaint and was willing to help him write a letter requesting an inquiry.

Mr. Aujla was leaving for India and was to meet with Mr. Tran prior to departing. Mr. Tran was not able to arrange his schedule in order to meet with Mr. Aujla prior to Mr. Aujla's departure. Therefore, Mr. Tran spoke with Mr. Aujla over the phone. During that telephone conversation, Mr. Aujla told Mr. Tran the nature of what he wanted to say in the letter and Mr. Tran took notes. Mr. Tran also made arrangements to have Mr. Aujla attend at a particular office for the purpose of signing a piece of paper in blank which would then be used by Mr. Tran to prepare the letter requesting an inquiry. Once receiving that piece of paper, Mr. Tran composed the November 9, 1994 letter using his own words but expressing the spirit and ideas of what Mr. Aujla wanted to say.

Given the fact that Mr. Aujla discussed the October 12, 1994 letter with Mr. Tran and instructed Mr. Tran to prepare a letter requesting an inquiry, we find that Mr. Aujla did receive the notice pursuant to s. 59 of the *Police Act*. We also point out that s. 59 does not require as a condition precedent to an inquiry that the complainant receive the s.59 notice. Therefore, in our view, even if this letter was received in the first instance by Mr. Aujla's daughter, this has no bearing on the jurisdiction of this panel to conduct the inquiry.

Ss. 60(1) of the *Police Act* requires that a complainant, after receiving a notice under s. 59, "send the disciplinary authority a notice requesting an inquiry". Mr. Jardine

POLICE/135261:1

- 8 -

essentially argues that the notice referred to in ss. 60(1) must be a notice containing words written by the complainant and signed by the complainant.

We do not find that the requirements of subsection 60(1) are as onerous as Mr. Jardine suggests. The subsection itself does not require any particular form of notice and does not specify that the notice must be signed by the complainant.

In our view, the wording of ss. 60(1) is clear and the letter dated November 9, 1994, standing on its own, is a proper notice given under ss. 60(1).

While we do not find it necessary to rely on the principles of agency to support our interpretation, we also conclude that a complainant may use an agent for the purpose of complying with ss. 60(1) and that, on this basis, the November 9, 1994 letter also complies with ss. 60(1).

We further conclude that the requirements of ss. 60(1) are regulatory, not mandatory as these terms are discussed in the case of Re Narain 1983 45 B.C.L.R. 191 (SCBC) and, as such, even if there is a technical breach of the requirements by the complainant this does not deprive this tribunal of its jurisdiction to conduct a public inquiry.

In Re Narain, Madam Justice McLachlin (as she then was) had occasion to consider a petition brought by a police officer seeking a declaration that failure to notify the police officer pursuant to a section of the Police Act similar to the present ss. 60(5) deprives a police board of jurisdiction to inquire into a complaint. The facts were clear that the police officer had not received a notice within the prescribed time limitation.

POLICE/135261-4

In the decision, Madam Justice McLachlin stated at page 197:

"Notwithstanding the sympathy one must feel for both Mr. Narain and the police board in the situation in which they found themselves, the fact remains that the requirements of section 40(5) were not fulfilled. The only question is whether this omission deprived the board of its jurisdiction to hold an inquiry. If the provisions are mandatory, failure to comply with them is fatal to the board's jurisdiction. If, however, they are merely directory, breach of the requirements does not deprive the board of its powers."

After considering the nature of complaints against the police and accepting that the purpose of public inquiries is "to provide means by which the public may lodge and pursue complaints against the police" Madam Justice McLachlin concluded at p. 198:

"I therefore conclude that the duties imposed by ss. 39 and 40 [similar to the present ss. 59 and 60] of the *Police Act* are essentially public. It follows that the court may interpret the provisions of these sections as to the manner in which the duty is to be discharged as regulatory if viewing them as mandatory would work injustice or cause inconvenience to others who have no control over those who exercise the duty: *Ans v. Paul* (1980) 41 N.S.R. (2d) 256 at page 269. In the case at bar, interpretation of the provisions of s. 40 as mandatory would interfere with Mr. Narain's legitimate desire to have the public inquiry under the *Police Act* delayed until the criminal proceedings against him had been concluded. Such an interpretation could work an injustice against him. I cannot think that it was the intention of the legislature to impose mandatory requirements which would frustrate the process of public complaint and inquiry which it was concerned to foster. The Act confers a right of public inquiry on a person aggrieved by the conduct of the police. To construe s.40(5) as mandatory would mean that that right is lost if the police board makes even a small technical error. That, in my view, would be neither reasonable nor just. For these reasons, I conclude that the provisions as to service in s. 40(5) should be read as regulatory, not mandatory"

We adopt the reasoning of Madam Justice McLachlin as to the proper interpretation to be given to the present ss. 59 and 60.

For all of the reasons stated above, we conclude that we have jurisdiction to conduct this public inquiry into Mr. Aujla's complaints.

- 10 -

FACTS REGARDING COMPLAINT AGAINST SGT. HOVBRENDER

Mr. Aujla gave evidence that on the evening of January 26, 1994 two police constables arrived at his home with a warrant for his arrest. They told him that he was charged with making threatening calls to his wife. They put Mr. Aujla in a paddy-wagon to transport him to the station. On the way, they stopped at the 29th Avenue Sky-Train station. Mr. Aujla stated that the police officers went into the Sky-Train station and that five police officers returned carrying an individual (later identified as Mr. Holman) who they threw into the paddy-wagon. Mr. Aujla further testified that when the parties arrived at the jail at 312 Main Street the officers roughed up Mr. Holman after they had lodged him in a cell.

After being put in a cell for a period of time, Mr. Aujla was asked to attend at the booking desk and to take everything out of his pockets. He was also told to take off all of his clothes. He said that when he resisted taking off his pants in the middle of the booking area he was taken a few steps away by Cst. McInnes (still within the view of others) and asked to drop his pants and bend over whereupon he was given an anal search. He was then asked to do up his pants and return to the booking desk to sign the booking sheet.

Mr. Aujla said that he was very upset about being searched in that manner. He said that he wanted to make a complaint about the search and therefore decided to write on the booking sheet. He intended to write "I was naked searched". He said that he was in the middle of writing on the booking sheet when all of a sudden he was struck in the face by Sgt. Hovbrender who was standing behind the desk watching him write on the booking sheet. He said that Sgt. Hovbrender said to him "What the fuck are you doing" and that Sgt. Hovbrender then came around from behind the desk, grabbed him by the shirt and pushed him into a cell. Mr. Aujla said that Sgt.

POLICE/1252614

- 11 -

Hovbrender then punched him twice in the face and said to him "Do you want to go in with him?" (referring to Mr. Holman).

Police nurse Fanstone testified that when she observed Mr. Aujla later that night she did not observe any swelling on his face which she would have expected if he had been hit in the face.

On the morning of January 27, 1994, after Mr. Aujla was released, Mr. Aujla went to see his doctor, Dr. Aziz. Dr. Aziz subsequently provided a medico-legal report dated April 6, 1994.

Mr. Aujla's complaint to Mr. Aziz as noted in Dr. Aziz's letter is as follows:

"He gave a history of being punched in the face then thrown and jammed against the wall and finally a heavy cell door being slammed on his finger and his finger being caught in the door."

Dr. Aziz's findings were as follows:

1. there was a slight tenderness over Mr. Aujla's right cheek bone but no obvious bruising;
2. slight swelling over the right cheek area;
3. slight swelling of the left cheek bone;
4. Mr. Aujla's back showed no obvious bruising, swelling or any abrasions;
5. the tip of Mr. Aujla's right long finger showed a crush type injury of the distal phalanx and nail and a subungual hematoma and clinically there was a fracture of his distal phalanx of that finger.

Sgt. Hovbrender testified that he was working in the jail in a supervisory capacity on the night of the incident. He said that the night of the incident was one of the busiest nights in the jail and that he was concerned about keeping the jail area under control. He said that Cst. MacInnes was booking Mr. Aujla and that he was there to expedite the booking procedure. Sgt. Hovbrender said that he filled out the booking form and

POLICE/15241

- 12 -

was standing on the opposite side of the booking desk watching while Mr. Aujla started to write on the booking sheet. He said that he thought Mr. Aujla started to write an obscenity on the booking sheet and that he heard Mr. Aujla make a "swill of spittle". He said that he thought Mr. Aujla was going to spit on him and, therefore, as a distracting blow, he struck Mr. Aujla on the right cheek with his left palm. He then grabbed the pen from Mr. Aujla with his right hand and went around the counter to remove Mr. Aujla from the booking area.

Sgt. Hovbrender said that he then took Mr. Aujla from the booking area and put him into a cell. Sgt. Hovbrender stated that, in his own words, he "lost his cool". Sgt. Hovbrender denied that he struck Mr. Aujla in the cell or at any time other than at the booking counter.

Sgt. Hovbrender said that he was concerned about contracting AIDS as a result of Mr. Aujla spitting on him.

On cross-examination by Board counsel, Sgt. Hovbrender maintained that he heard the swirl of spittle from Mr. Aujla although upon reviewing the video/audio he admitted that there was no gesture on Mr. Aujla's behalf to indicate that Mr. Aujla would spit during the relevant time.

Sgt. Hovbrender said that when he was looking at the booking sheet he was looking at it upside down and that, from that vantage point, Mr. Aujla's words "I was nake..." looked like an obscenity. He said that he thought it was the word "fuck" and that, combined with the swirl of spittle, certainly indicated to him that Mr. Aujla was about to do something.

Sgt. Hovbrender prepared a report to internal investigation dated March 12, 1994. This was written by Sgt. Hovbrender before he saw the video tape. The statement

POLICE/1352614

- 13 -

said that "at this time [at the booking desk] Mr. Aujla mumbled, "fuck you" or "fuck off" and started to print something over the signing line. I believed he was in the process of writing an obscenity." At the inquiry, Sgt. Hovbrender said he originally believed Mr. Aujla had mumbled an obscenity but that, upon reflection after viewing the video tape, he believed that he was mistaken and that he had actually thought at the time that Mr. Aujla was writing down an obscenity.

Sgt. Hovbrender admitted that he may have pushed Mr. Aujla against the wall of D cell which was where he put Mr. Aujla after taking him away from the booking counter.

The booking sheet was entered as an exhibit at the inquiry and it shows in the signature area the words: "I was nake...". The sentence is not finished. There are no obscenities written on the sheet.

At the beginning of the inquiry, the Board watched a portion of the jail video/audio tape which had been provided by the Internal Investigation Section. It was plain from the video that Mr. Aujla was compliant during the booking procedure and passive while signing the booking sheet. Mr. Aujla made no physical gestures whatsoever to suggest that he was about to spit on Sgt. Hovbrender. It was clear from this video that Sgt. Hovbrender hit Mr. Aujla and that when Sgt. Hovbrender was leading Mr. Aujla away from the booking desk he said to Mr. Aujla in a highly agitated tone: "Do you want to go in there and join your buddy? Huh? Do you want to go in there with your buddy?".

When the inquiry resumed on April 22, 1996 the Board was able to review an improved version of the video/audio. This version was clearer visually and covered a longer period of time after the incident at the booking counter. From one of the camera angles it could be seen that Sgt. Hovbrender struck Mr. Aujla in the face with

POLICE/1352614

- 14 -

his left hand in an open position. This version also revealed that after Sgt. Hovbrender led Mr. Aujla away from the booking area he said to Mr. Aujla "You stay in here. And you think about what you are writing, okay?". The extended audio portion of the tape, which was initially not made available to the inquiry, supports Mr. Aujla's allegation that Sgt. Hovbrender hit him at the booking desk because of what he was writing on the booking sheet.

With respect to the allegations against Sgt. Hovbrender, we find that a disciplinary default has been proven.

The extended version of the video tape which we observed on April 22, 1996 makes it very clear that Sgt. Hovbrender struck Mr. Aujla at the booking desk apparently as a result of Mr. Aujla writing the words "I was nake...". There is no evidence from the video/audio that Mr. Aujla was preparing to or was about to spit at Sgt. Hovbrender. To the contrary, Mr. Aujla's demeanor as revealed in the video tape shows him to be a subservient and compliant prisoner at that point in time. To strike a blow in these circumstances, even if Mr. Aujla was thought to be writing an obscenity on the booking sheet is clearly a disciplinary default contrary to s. 7(b) of the Police Discipline Code.

We also find that Sgt. Hovbrender further assaulted Mr. Aujla when he took Mr. Aujla into D cell . Although we could not see what happened in D cell from the video tape, because it does not cover that area, we accept Mr. Aujla's version of events. Sgt. Hovbrender was clearly in a highly agitated state as he led Mr. Aujla away from the booking counter. Also, Mr. Aujla's injuries as confirmed by Dr. Aziz are consistent with Mr. Aujla's version of events. FACTS REGARDING

- 15 -

COMPLAINT AGAINST CST. CARROLL

Mr. Aujla said that after some time he had been put in D Cell by Sgt. Hovbrender, Cst. Carroll took him back to the cell he was in originally and then to another cell. Mr. Aujla said that approximately 1/2 hour later, Cst. Carroll took him to another area of the jail for photographs and finger-prints. Mr. Aujla said that when he and Cst. Carroll were on the way back to the cell Cst. Carroll said to him "Get the fuck in there." and threw Mr. Aujla towards the cell, at the same time slamming the cell door on Mr. Aujla's finger.

Mr. Aujla said that Cst. Carroll looked through the glass window in the cell whereupon Mr. Aujla held up his finger and said it was broken. Mr. Aujla says that after 2 1/2 hours he was taken to a nurse who put a bandage on his finger.

Cst. Carroll testified that he was the assistant jailer and that he was present when Mr. Aujla was brought into the jail. He said that Mr. Aujla was cooperative and did not say much. He said that he removed Mr. Aujla from his cell to photograph and fingerprint him. He said that he walked Mr. Aujla back to F cell and placed Mr. Aujla in it. He said that he closed the cell door and was about to lock it when he dropped his jail keys. He said he knelt down in front of the cell door to pick up the keys and at the same time he felt the door being pushed from the inside. He said he was very concerned about security in the jail and therefore he pushed hard on the door in order to keep it closed. He said that he then looked through the window and saw Mr. Aujla screaming and that he then opened the door and saw that Mr. Aujla's finger was bleeding. He said that he subsequently told Sgt. Hovbrender about the incident and the nursing staff was notified.

Cst. Carroll admits that the cell door was closed on Mr. Aujla's finger but says that it was completely an accident on his part.

POLICE/33/2614

- 16 -

Police nurse Fanstone testified. She said that she did rounds of the jail every hour and saw Mr. Aujla at approximately 2:00 a.m. in response to a request from an officer. She said that she cleaned Mr. Aujla's finger wound and put a dressing on it. At that time Mr. Aujla complained of pain in his right ear and right zygoma (cheek bone).

With respect to the allegations against Cst. Carroll, we are not satisfied beyond a reasonable doubt that Cst. Carroll intentionally shut Mr. Aujla's finger in the cell door. Mr. Aujla's evidence on this point is directly contradicted by Cst. Carroll's. We are unable to conclude what actually happened and therefore we are not satisfied beyond a reasonable doubt that Cst. Carroll's actions were intentional rather than accidental. Accordingly, we find that no disciplinary default has been proven against Cst. Carroll.

DISCIPLINARY ACTION

All parties agreed that the issue of disciplinary action should not be addressed until we made our findings as to whether any disciplinary defaults had been proven.

Section 63 of the *Police Act* provides:

63.(1) After holding an inquiry respecting a complaint against a municipal constable, the disciplinary tribunal shall

- (a) approve, or approve subject to the terms it specifies, the disciplinary action intended to be taken by the disciplinary authority,*
- (b) reject the disciplinary action intended to be taken by the disciplinary authority and order that it take the disciplinary action the disciplinary tribunal specifies,*
- (c) request the commission to order that a further investigation be made of the complaint, or*
- (d) make an order it considers appropriate in the circumstances.*

Accordingly, since we have found that Sgt. Hovbrender committed a disciplinary default we direct that the parties be reconvened to consider what directions, if any, we shall make pursuant to s.63 (1) with respect to Sgt. Hovbrender.

Sept 19/96
Date

Elizabeth Watson
Elizabeth Watson

Sept. 26/96
Date

William Yee
William Yee

Sept: 19/96
Date

Arlene Gladstone
Arlene Gladstone