

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

AND

IN THE MATTER OF [REDACTED] D  
[REDACTED] OF THE SOUTH COAST BRITISH COLUMBIA  
TRANSPORTATION AUTHORITY POLICE SERVICE

DECISION ON SECTION 117 REVIEW

NOTICE TO: [REDACTED]

AND TO: [REDACTED]

c/o South Coast British Columbia Transportation Authority Police  
Service, Professional Standards Section

AND TO: Clayton Pecknold, Police Complaint Commissioner

AND TO: [REDACTED] RCMP Investigative Support Team

I. INTRODUCTION

1. This is my decision following a review pursuant to s. 117 of the *Police Act*, R.S.B.C. 1996, c. 367 (the "*Act*") in this matter. [REDACTED] and [REDACTED] (the "Members"), of the South Coast British Columbia Transportation Authority Police Service ("SCBCTAPS"), are alleged to have committed misconduct under s. 77(3)(a)(ii)(A) of the *Act* by intentionally or recklessly using unnecessary force against [REDACTED] in the performance of their duties on [REDACTED]. On that date the Members arrested [REDACTED] at the [REDACTED] SkyTrain station. The issue before me is whether, following a review of the record before me, the Members' conduct in their dealings with [REDACTED] appears to constitute misconduct. If so then I will

become the Discipline Authority in respect of this matter and I must convene a Discipline Proceeding, unless s. 120(16) applies. Conversely, if I find the Members' conduct does not constitute misconduct then that is the end of this matter, pursuant to s. 117(11) of the *Act*.

## II. PROCEDURAL HISTORY

2. On May 1, 2018, after receiving information from SCBCTAPS pursuant to s. 89 of the *Act* concerning the Members' arrest of [REDACTED] the Police Complaint Commissioner ("PCC") ordered an investigation into the Members' conduct. [REDACTED] from the [REDACTED] RCMP Detachment's Investigative Support Team, was assigned to conduct the investigation. The investigation centred on allegations that each of the Members committed abuse of authority, contrary to s. 77(3)(a)(ii)(A) of the *Act*, by using unnecessary force against [REDACTED] and that each committed deceit, contrary to s. 77(3)(f)(i)(B) of the *Act*, by making false or misleading statements in their written reports of the arrest.

3. [REDACTED] completed his investigation and submitted his Final Investigation Report ("FIR") to the Discipline Authority, SCBCTAPS [REDACTED], on July 2, 2019. On July 9, 2019, the Discipline Authority issued his decision pursuant to s. 112 of the *Act*, in which he determined that the allegations against the Members did not appear to be substantiated. By Notice of Appointment dated August 2, 2019 (the "s. 117(4) Notice"), the PCC gave notice that he considered there was a reasonable basis to believe the Discipline Authority's decision was incorrect in concluding that the force the Members used did not constitute abuse of authority. The PCC also noted that the Discipline Authority had not considered whether, in the alternative, the Members breached their duty of care towards [REDACTED] once he was in their custody. The PCC wrote as follows in the s. 117(4) Notice:

The evidence indicates that the officers were in the lawful execution of their duties and that [REDACTED] was trying to evade them. However, when [REDACTED] is on the ground and the officers are on top of him, the video depicts [REDACTED] applying force to [REDACTED] head resulting in it striking on



the concrete. [REDACTED] then lays motionless for a brief period. There is a reasonable basis on the evidence to conclude that application of force was unnecessary and excessive.

There is also a reasonable basis on the evidence to conclude that the force, when escorting [REDACTED] out of the station, was also unnecessary and excessive, or in the alternative, a breach of the officers' duty of care with respect to a person in their custody. [REDACTED] appears in the video to be having difficulty walking, yet the officers do not attempt to assess his condition. Rather, they continue to lift up on his handcuffs, at one point forcing his arms above his head as they take him down the escalator without reasonable regard for any injuries he may have suffered when he was arrested.

With respect to whether the officers' conduct can be characterized by a blameworthy element, I have considered the fact that this was a minor infraction that led to significant use of force and injury to [REDACTED]. There is evidence that the officers were both reckless in their assessment of the circumstances and the proportionality of the force used, or, minimally, neglectful in their duty of care towards [REDACTED].

4. The PCC accordingly appointed me to review this matter and arrive at my own decision based on the evidence, pursuant to s. 117(4) of the *Act*. I received the FIR as well as the underlying evidence and records on September 17, 2019. Section 117(7) of the *Act* provides that I must conduct my review and notify the parties of the next steps to be taken in accordance with s. 117 within 10 business days of receiving those materials.

5. I note that the s. 117(4) Notice is silent on the Discipline Authority's determination that the allegations of deceit against the Members did not appear to be substantiated. In my view, based on a review of the record and the issues raised in the s. 117(4) Notice, it is appropriate that I limit my analysis to the complaints that the Members intentionally or recklessly used unnecessary force against [REDACTED] in the performance of their duties and thus committed abuse of authority, contrary to s. 77(3)(a)(ii)(A) of the *Act*. I will therefore say nothing further about the deceit allegations against the Members.

### III. EVIDENCE ON THE RECORD

6. [REDACTED] of SCBCTAPS was the first Transit Police officer to deal with [REDACTED] on the night in question. According to his interviews with [REDACTED] on

October 1, 2018 and November 22, 2018, as well as his written notes and reports following the relevant events, ██████ first encountered ██████ around midnight, when he stopped him in the ██████ SkyTrain station (the "Station") for a fare infraction after ██████ apparently went through a fare gate without tapping a payment card as required. ██████ was 17 years old at the time. ██████ gave ██████ a Fare Infraction Notice for "Failure to Produce" and escorted him outside the fare paid zone. ██████ described ██████ as appearing highly intoxicated, with slurred speech and being unsteady on his feet. He was also apparently fairly confrontational from the outset of his encounter with ██████. Upon being escorted out, ██████ was asked to leave but returned several times, using abusive language and challenging ██████ and a SkyTrain Attendant, ██████ to fight him. ██████ told ██████ he was prohibited from entering the transit system for 24 hours.

7. After ██████ refused to leave and continued to behave in an aggressive fashion for several minutes, ██████ decided to arrest him for breach of the peace. When ██████ went to arrest ██████ the latter ran away and a foot chase ensued in the area surrounding the Station. Ultimately ██████ managed to get away from ██████ who called dispatch for assistance. The Members were sent to the Station in response.

8. Upon attending at the scene, the Members were informed by the Attendant ██████, that ██████ had returned to the station and gone upstairs to the upper platform. The Members found ██████ standing by the elevator on the upper platform. The events that followed were captured by CCTV cameras inside the Station.

9. The CCTV footage in the video entitled "CC06\_Elev1\_Platform 6" shows that ██████ was wearing a tee-shirt, jeans, and a backpack, and he is depicted bent over and resting his hands on his legs as he waits for the elevator. Just as the elevator arrived on the upper level, ██████ ran up to ██████ slowing down to approach the final few steps just before the elevator doors. ██████ then attempted to run past ██████ moving away from the elevator first to his right and then spinning around to



his left. [REDACTED] followed him to the right and, when [REDACTED] spun the other way, [REDACTED] shot out his arm and his hand made contact with [REDACTED] head. At this point in the footage [REDACTED] can be seen entering the frame, running towards [REDACTED], who at the same time went to the ground on the platform, apparently under his own power, several feet from the SkyTrain tracks. Both Members immediately followed [REDACTED] to the ground. [REDACTED] can be seen apparently kicking [REDACTED] on the side of his right leg as the latter turned his body away from the Members and lowered himself face-down onto the platform. At virtually the same time, [REDACTED] forced [REDACTED] body down and pressed down on his back with his knee. [REDACTED] quickly moved on top of the back of [REDACTED] legs and lower back, keeping them down with his knees while positioning himself so as to face forward towards [REDACTED] upper body and head.

10. The rest of the encounter between the Members and [REDACTED] is best observed in the video entitled "CC07\_PTZ\_IB\_E ! 7". This video footage depicts a different angle of [REDACTED] going to the ground and the subsequent events. In this footage, [REDACTED] is seen kneeling on the ground beside [REDACTED], after initially placing his knee on [REDACTED] back, and he appears to forcefully hit the right side of [REDACTED] head against the platform surface. [REDACTED] was in the process of getting on top of [REDACTED] legs and lower back while this occurred.

11. [REDACTED] then appeared to hold [REDACTED] head against the ground, while moving himself around [REDACTED] shoulders to position himself in a kneeling position on the platform in front of [REDACTED] head, while [REDACTED] applied a handcuff to [REDACTED] left arm. [REDACTED] then appeared to straddle [REDACTED] head on his knees while helping [REDACTED] pull [REDACTED] right arm around to apply the other handcuff. [REDACTED] can be seen twisting the lower half of his body to the left during this struggle and appeared to be resisting the Members' attempts to control his right arm. Ultimately the Members did apply the handcuffs to [REDACTED]. At one point during the struggle it appeared as though [REDACTED] possibly placed his knee or shin on the back or side of [REDACTED] head. [REDACTED] backpack remained on throughout this



encounter; other than an initial tug by [REDACTED] the Members did not appear to try to remove it. It is unclear from the video whether and to what degree [REDACTED] was resisting the Members' attempts to control him on the ground at various stages throughout these events.

12. The entire encounter between [REDACTED] and the Members to this point – from the time he was initially confronted by [REDACTED] to the time both handcuffs were in place – lasted approximately 40 seconds. Over 30 of those seconds were comprised of the events that occurred after [REDACTED] went to the ground.

13. After the Members had [REDACTED] handcuffs in place, they paused for a few seconds. During this time [REDACTED] appeared to possibly apply force to the back of [REDACTED] neck as he lay prone on the platform. The Members then lifted [REDACTED] up off the ground, with [REDACTED] lifting [REDACTED] by his left arm and [REDACTED] lifting him up by his right. [REDACTED] then appeared to stumble and struggle to find his footing while the Members continued to lift him up, with the result that [REDACTED] arms were lifted up and out behind his back and around his backpack. The Members then proceeded to walk [REDACTED] along the edge of the platform while the latter was bent over forward and still apparently struggling to get his feet under him. [REDACTED] shoulders and arms were pulled out and up behind him at various points as he was walked to the top of the escalator. It is unclear from the footage whether [REDACTED] was actually trying to stand and walk or whether he was trying to go back to the ground or simply going limp.

14. The CCTV footage then shows the Members guiding [REDACTED] around a pillar and onto the top of an escalator to the lower level of the Station. [REDACTED] appears hesitant to get on the escalator and can be seen crouched down in front of the Members and leaning back into their legs as he got on and as they were going down. The Members then lifted [REDACTED] arms straight up into the air, while [REDACTED] bent forward from the waist. At the bottom of the escalator it appears [REDACTED] began walking more under his own power as he was led out of the Station (this is in the video file entitled "CC09\_Esc2\_Plat ! 9").

15. Emergency Health Services were requested to attend at the Station and they later took [REDACTED] to [REDACTED] Hospital. [REDACTED] apparently stated he had used fentanyl and Xanax. Blood was found on his inner lips, which were determined to have been cut by his braces. There was also dried blood found in his nose.

16. [REDACTED] interviewed [REDACTED] and [REDACTED] separately as part of his investigation. Both [REDACTED] and [REDACTED] stressed the dangerous and unpredictable nature of the circumstances, with a non-compliant and reportedly aggressive suspect in a hazardous environment, including potentially an inbound train if [REDACTED] was not subdued quickly.

17. [REDACTED] stated that [REDACTED] was resistant throughout the encounter, and felt that the force the Members used was justified given [REDACTED] behaviour both when dealing with the Members and from earlier in the evening, as communicated through dispatch. [REDACTED] did not remember delivering a kick to [REDACTED] and denied any intention to kick him. [REDACTED] also stated that his training in respect of moving a handcuffed suspect from a prone to a standing position did not involve how to deal with a non-compliant detainee. [REDACTED] said [REDACTED] continued to be non-compliant while in handcuffs and he and [REDACTED] picked him up in a controlled manner as best they could.

18. [REDACTED] acknowledged using his right hand to push [REDACTED] head down to the ground but disagreed with the description of this technique as a "head slam", and said he applied a pressure point to his right ear while [REDACTED] struggled on the ground. [REDACTED] could not say what training he had with respect to head strikes. [REDACTED] said he was not trained by SCBCTAPS but previously received training with the [REDACTED] Police with respect to the handling of handcuffed subjects and stated his belief that he had ample grounds to use the force he did based on the departmental and provincial policies he was familiar with.



19. [REDACTED] also interviewed [REDACTED]. He admitted to being under the influence of fentanyl, Xanax, and crack cocaine, and said he was acting aggressively towards [REDACTED] and [REDACTED] as a result. He said he was unable to remember anything after being struck in the head while trying to manoeuvre around [REDACTED] until waking up in the hospital. He said that after the incident he had bruises on his face, the side of his head, his cheeks, under his eyes, and on his legs, as well as scratches on his arms and knees.

#### IV. LAW AND ANALYSIS

20. As explained by Affleck J. in *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970 ("*Scott*"), the scope of the analysis on a s. 117 review is limited to considering whether, on a preliminary review based on the record created during the investigation of a police complaint, the conduct of the member who is the subject of the complaint appears to have been misconduct. It is not appropriate at this stage to go further and form a view as to whether the member actually committed the misconduct alleged. This is supported by the language of ss. 117(8) and (9) of the *Act*, and by the structure of the processes established in Part 11 of the *Act* for dealing with police complaints. It is also clear, from the language of s. 117(1)(a) and (b), that I am to reach my own conclusion about whether the materials support a finding of apparent misconduct. This is not a review of the correctness or reasonableness of any earlier findings in this regard.

21. With respect to the concept of "unnecessary force" under s. 77(3)(a)(ii)(A) of the *Act*, I respectfully adopt, for purposes of this decision, the test applied by Adjudicator Carol Baird Ellan in the Tiwana Public Hearing Decision, indexed at PH 2014-2. That is, unnecessary force will be made out where:

- The officer's use of force was objectively unnecessary; and any of the following three statements is true:
  1. The officer did not subjectively believe the force was necessary;
  2. The officer subjectively believed the force was excessive; or



3. The officer subjectively believed the force was necessary and/or not excessive, but this belief was not reasonable.

22. I also respectfully agree with the comments of Adjudicator Ian H. Pitfield at p. 13 of the Dickhout Public Hearing Decision, indexed at PH 2010-3, Part 1 (dated March 9, 2012), where he said:

The adjudicator must not assess conduct with the benefit of hindsight and must not substitute his or her judgment as to what could or should have been done in the circumstances for that of the officer. The question is whether any belief the officer had with respect to the need for force and the amount of force required was reasonable and is not to be answered by reference to what others might have done in similar circumstances.

23. Finally, I am mindful of the remarks of Affleck J. at para. 36 of *Scott*, and of Myers J. in *Lowe v. Diebolt*, 2013 BCSC 1092, at para. 46, to the effect that a finding of "intentional or reckless" misconduct under the *Act* requires an element of mental blameworthiness on the part of the subject member.

24. Having regard to these legal principles and standards, I am respectfully of the view that the evidence concerning each of the Members' conduct appears sufficient, based on my preliminary review, to substantiate the allegations against them and require the taking of disciplinary or corrective measures. Their apparent actions in the CCTV footage, in particular [REDACTED] apparent strikes to [REDACTED] as he was going to the ground and [REDACTED] apparent actions in using force against [REDACTED] head and neck while he was on the ground, would appear at first blush to constitute objectively unnecessary force in the circumstances, based on the information available in the record before me. The same might be said of both Members' actions in lifting [REDACTED] off the ground by his arms once his handcuffs were on, and in apparently continuing to raise him up by the arms as [REDACTED] was escorted to and down the escalator.

25. Moreover, despite the Members' stated beliefs about the necessity and proportionality of their use of force in their interviews with [REDACTED] it would appear that

there is a basis in the record on which to conclude such beliefs were not reasonable. From the CCTV footage, ██████ appeared to be going down to the ground under his own power when ██████ arrived at the end of the SkyTrain platform to assist ██████. While it is difficult to tell from the CCTV footage, it does not appear that ██████ level of resistance after he went to the ground called for the Members to use the degree of force they seemed to use in the ensuing struggle. Likewise, it would appear from the record before me that the Members may not have had a reasonable basis to believe it was necessary to manipulate or control ██████ arms in the way they did when they lifted him up and escorted him out of the Station. At that time, it appears from the footage that ██████ did not pose a threat to the Members or an impediment to their actions such that this use of force was required.

26. I appreciate that these events unfolded quickly and the circumstances would have been stressful for the Members. Any assessment of the Members' conduct must account for the fact that the incident unfolded in real time, without the opportunity for careful reflection or perfect calibration of the use of force to the perceived threat. However, for the reasons stated above, in my view the record supports a finding of apparent misconduct given the ostensible nature of the threat and degree of force used.

#### V. CONCLUSION AND NEXT STEPS

27. I find the evidence in the record before me appears sufficient to substantiate the allegations that ██████ and ██████ committed abuse of authority by intentionally or recklessly using unnecessary force against ██████ in the course of their duties on April 30, 2018. Accordingly, pursuant to s. 117(9) of the Act, I will now become the Discipline Authority in respect of this matter.

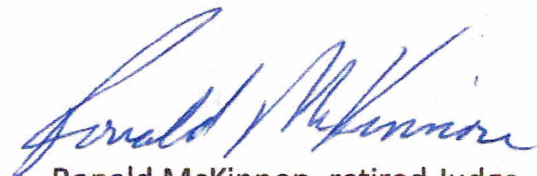
28. I will offer a prehearing conference under s. 120 of the Act to ██████ and to ██████. Should this result in a resolution under s. 120(16) of the Act in respect of either or both members, then such resolution will be final and conclusive. Otherwise, pursuant to s. 117(9), I must convene a Discipline Proceeding.



29. Section 117(8)(d)(iii) of the Act stipulates that if I consider there was apparent misconduct, I should advise the members as to the range of discipline or corrective measures being considered. The range is set out in s. 126(1) of the Act. I can advise that I would not consider imposing any of the sanctions under s. 126(1)(a), (b), or (c). The sanctions I would consider range from s. 126(d) through (k).

30. Finally, while this matter came to the attention of the PCC pursuant to s. 89 of the Act, it appears I am obligated pursuant to s. 117(8)(b) to include a statement of a complainant's right to make submissions under s. 113. A complainant may make written or oral submissions, or both, to the Discipline Authority in relation to a complaint; the adequacy of an investigation; or the disciplinary or corrective measures that would be appropriate at any time after receiving a report under s. 112(1)(b)(i) or s. 116(1)(b)(i), but such submissions must be delivered at least 10 days before the date of a Discipline Proceeding specified in a notice under s. 123(1)(b).

Dated at North Vancouver, British Columbia this 26<sup>th</sup> day of September, 2019.



Ronald McKinnon, retired Judge