

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

AND

IN THE MATTER OF ACTING SERGEANT [REDACTED],  
CONSTABLE [REDACTED] AND CONSTABLE [REDACTED] OF THE  
VANCOUVER POLICE DEPARTMENT

SECTION 117 DECISION

NOTICE TO: [REDACTED] Complainant

AND TO: Acting Sergeant [REDACTED]  
Constable [REDACTED]  
Constable [REDACTED]

c/o Vancouver Police Department  
Professional Standards Section

AND TO: Clayton Pecknold, Police Complaint Commissioner

AND TO: Corporal [REDACTED], North Vancouver RCMP

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*”). Acting Sergeant [REDACTED] and Constables [REDACTED] and [REDACTED], all of whom are members of the Vancouver Police Department (“VPD”), were investigated for misconduct under s. 77 of the *Act* following an incident involving the complainant, [REDACTED] on July 30, 2019. On that date, A/Sgt. [REDACTED] and other officers attended at the [REDACTED] Hotel on East Hastings Street in Vancouver in response to a 911 call regarding a man behaving in an intimidating way. At the scene, A/Sgt. [REDACTED] and Cst. [REDACTED] found [REDACTED] acting somewhat erratically. Other officers arrived soon after. At a certain point, [REDACTED]

apparently attempted to assault A/Sgt. [REDACTED] causing Cst. [REDACTED] to deploy a Conducted Energy Weapon (“CEW”), against him. [REDACTED] fell to the ground but was not compliant with police commands to stay down and instead got up and moved toward Cst. [REDACTED]. Cst. [REDACTED] ultimately “cycled” the CEW multiple times, and Cst. [REDACTED] who arrived after the CEW deployment, fired multiple beanbag rounds from a Less Lethal Shotgun (“LLS”) at [REDACTED] thigh as [REDACTED] was lying on the ground, before members ultimately moved in to handcuff and restrain [REDACTED].

2. On this review, it is alleged that Cst. [REDACTED] committed misconduct in the form of abuse of authority under s. 77(3)(a)(ii)(A) of the *Act* by intentionally or recklessly using unnecessary force on a person – [REDACTED] – in the performance or purported performance of duties. In particular, it is alleged that Cst. [REDACTED] wrongfully deployed the LLS against [REDACTED]. The issue before me is whether, on a review of the record, Cst. [REDACTED] conduct appears to constitute misconduct under the *Act*. If so, I will become the discipline authority in respect of this matter and I must convene a discipline proceeding unless the matter is resolved through an approved and accepted disciplinary or corrective measure following a prehearing conference pursuant to s. 120(16) of the *Act*. Conversely, if I find Cst. [REDACTED] conduct does not constitute misconduct, then that concludes the proceedings under Part 11 of the *Act* in this matter, pursuant to s. 117(11).

## II. PROCEDURAL HISTORY

3. On August 1, 2019, the Police Complaint Commissioner (“PCC”) ordered an investigation into the conduct of A/Sgt. [REDACTED] and Constables [REDACTED] and [REDACTED] based on information provided by the VPD pursuant to s. 89 of the *Act*. [REDACTED] subsequently sought to become a complainant in the investigation and, on September 5, 2019, he was formally added to the record and recognized as a complainant with the attendant reporting and appeal rights under Part 11 of the *Act*.

4. Corporal ██████████ of the North Vancouver RCMP serious crime unit was assigned to conduct the investigation. Cpl. ██████████ investigated A/Sgt. ██████████ for neglect of duty contrary to s. 77(3)(m)(ii) of the *Act* for allegedly neglecting, without good and sufficient cause, to promptly and diligently do anything it is one's duty as a member to do. Specifically, it was alleged that A/Sgt. ██████████ did not establish incident command as the senior officer on the scene while the police were dealing with ██████████. Constables ██████████ and ██████████ were investigated for abuse of authority contrary to s. 77(3)(a)(ii)(A) of the *Act* for allegedly intentionally or recklessly using unnecessary force on ██████████ in the performance or purported performance of duties.

5. Cpl. ██████████ completed his investigation and submitted his Final Investigation Report ("FIR") to the Discipline Authority, Acting Inspector ██████████ of the Delta Police Department (the "DA") on February 3, 2020. On February 13, 2020, the DA issued his decision pursuant to s. 112 of the *Act*, in which he determined that the allegations against A/Sgt. ██████████ Cst. ██████████ and Cst. ██████████ did not appear to be substantiated based on the evidence in the FIR.

6. By Notice of Appointment dated March 12, 2020 (the "s. 117(4) Notice"), the PCC gave notice that he considered there was a reasonable basis to believe the DA's decision was incorrect. The PCC wrote as follows in the s. 117(4) Notice:

Acting Inspector ██████████ found that Acting Sergeant ██████████ actions at the scene were "indicative of taking command." Acting Inspector ██████████ also found that, once Acting Sergeant ██████████ had been the target of an attempted assault by ██████████ his ability to maintain command was diminished. This command role then switched to Sergeant ██████████ who was on scene.

In relation to Constable ██████████ Acting Inspector ██████████ found that the Conducted Energy Weapon (CEW) was cycled multiple times and found that use was proportionate to the incident, which evolved rapidly, given the aggressive actions by ██████████ toward Acting Sergeant ██████████ toward Constable ██████████ himself, and ██████████ lack of compliance despite police commands. Acting Inspector ██████████ found Constable ██████████ appropriately used his experience, training, and assessment of ██████████ size, combative behaviour and potential for harm and the CEW use was based on calculated decision-making by Constable ██████████

With respect to Constable ██████ Acting Inspector ██████ found that Constable ██████ conducted an independent assessment into the use of the less lethal shotgun, which was used multiple times against ██████ Acting Inspector ██████ found that Constable ██████ articulation for the use of the less lethal shotgun was consistent with his training, including using it multiple times against ██████.

### **OPCC Decision, Section 117 of the *Police Act***

Based on the evidence in the Final Investigation Report, it is my view that Acting Inspector ██████ erred in finding that Constable ██████ deployment of the less lethal shotgun was consistent with both his training and the requirements of section 25 of the *Criminal Code*. In particular, when Constable ██████ arrived on the scene, ██████ was lying on his back with his hands on his head and midriff exposed. Although ██████ was not complying with verbal directions to roll onto his stomach, deploying the less lethal shotgun was not consistent with Constable ██████ training on the threshold for using intermediate weapons in accordance with the National Use of Force Model. Further, deploying the less lethal shotgun as a method of gaining compliance of a non-combative subject is inconsistent with its purpose and not a justifiable use of the weapon.

With respect to the lawful authority to deploy the less lethal shotgun, Constable ██████ subjective grounds were based on the limited information he had received prior to arriving on scene and the brief observations he made upon arrival. Those subjective grounds do not, in my view, render the deployment of the less lethal shotgun objectively reasonable in the circumstances. In particular, ██████ position and behaviour when Constable ██████ arrived and the presence of numerous other officers suggest that there was no urgency or imminent threat that would support immediate escalation to the deployment of an intermediate weapon.

7. The PCC accordingly appointed me, pursuant to s. 117(4) of the *Act*, to review the record and arrive at my own decision on the matter. Section 117(8)(c) of the *Act* provides that I must list or describe each allegation of misconduct that I have considered in this review. The s. 117(4) Notice states that I am not limited or constrained in my review to the allegations articulated and considered by the DA, nor the PCC's assessment of those allegations. However, the PCC does not seem to take issue with the DA's conclusions that the allegations against A/Sgt. ██████ and Cst. ██████ do not appear to be substantiated. Based on my review of the record, the issues raised in the s. 117(4) Notice, and the provisions of s. 117 of the *Act*, I conclude it is appropriate that I not interfere with the DA's conclusions as regards A/Sgt. ██████ and Cst. ██████.

██████████ and instead limit my analysis to the allegation that Cst. ██████████ intentionally or recklessly used unnecessary force against ██████████ in the performance of his duties and thus committed abuse of authority, contrary to s. 77(3)(a)(ii)(A) of the *Act*.

### III. EVIDENCE ON THE RECORD

8. The record before me in this matter includes transcribed statements from Cst. ██████████ and numerous other police witnesses who were asked about the events of July 30, 2019 as part of Cpl. ██████████ investigation, as well as a video that captures parts of the encounter between ██████████ and the police, including Cst. ██████████ deployment of the LLS against ██████████. Before describing that video and reviewing the relevant aspects of Cst. ██████████ statement, I will first describe other parts of the record in order to provide the necessary context. I should note that Cpl. ██████████ attempted to contact ██████████ ██████████ in order to obtain a statement from him, but he encountered some difficulties in doing so and ultimately submitted his FIR within the time required under the *Act*, without obtaining ██████████ statement, rather than seeking an extension for that purpose.

9. At approximately 11:04 am on July 30, 2019, ██████████, a staff member at the ██████████ Hotel, called the police to report a disturbance at the hotel. A transcript of the 911 call is included in the record before me. ██████████ advised that a man (later identified as ██████████) had come into the lobby of the hotel and was “behaving in a way that was quite intimidating.” She said the man was walking back and forth in front of the hotel and looking into the lobby, and then advised he had come back into the hotel and was standing in the front door, blocking the entrance and stopping somebody from entering the hotel. She further advised that she recognized him from a previous incident where he had been arrested at the hotel, and that on that occasion it had taken seven police officers to “take him down” and that “they had to use the Tasers on him.” At a certain point during the call, ██████████ relayed that the man’s first name was ██████████

10. ██████ had, in fact, been arrested at the ██████ Hotel several months before, on February 20, 2019. According to the police reports of that incident, which were included in the record before me, officers attended at approximately 10 am in response to two separate calls regarding an unruly man at the hotel. The officers encountered ██████, who did not respond to their attempts to speak with him. The officers told ██████ they were there to assist staff in removing him from the hotel, and that he was under arrest for trespassing. The officers believed based on his behaviour that he may have been suffering “some sort of drug induced psychosis,” and decided to place him in handcuffs and remove him from the hotel. ██████ began clenching his fists and assumed what the officers believed to be an “assaultive, fighting stance.” ██████ then moved behind some furniture in the lobby, and one of the officers pointed a Taser at him and directed him to get on the ground. The officer commanded ██████ to get on the ground and warned that if he did not then the officer would use the Taser. ██████ did not get on the ground, nor did he appear to recognize the commands being given to him, according to the officer. Without additional warning, the officer fired his Taser at ██████ lower left torso, causing ██████ to fall to the ground. As other officers moved in to take him into custody, ██████ got up onto his hands and knees. There ensued a fracas during which ██████ was shocked with the Taser again and struck multiple times by numerous members, including being struck in the face with the Taser after he apparently tried to grab it away from the police. Ultimately more officers arrived and ██████ was taken into custody and transported to the hospital, ██████

11. A/Sgt. ██████ was the first officer to respond to the call from the ██████ Hotel on June 30, 2019. According to his statement, he was advised by dispatch that the suspect he was going to deal with had been arrested at the hotel on February 20 and it had taken approximately seven police officers to take him into custody. A/Sgt. ██████ arrived at the hotel and spoke to ██████, who pointed out ██████ standing some distance away from the hotel. A/Sgt. ██████ described ██████ as being about 6’3” tall and appearing to weigh between 290 and 300 lbs, which was “a lot larger” than A/Sgt.

██████████ told A/Sgt. ██████████ that ██████████ had been acting strangely, including obstructing people from going into or out of the hotel, and that she did not want him back in the hotel. A/Sgt. ██████████ then saw that ██████████ was walking back toward the hotel.

12. At about this time, Cst. ██████████ arrived on the scene. According to his statement, Cst. ██████████ attended from a nearby location to check on A/Sgt. ██████████ who had not been responding to his radio. Cst. ██████████ found A/Sgt. ██████████ inside the hotel lobby and remained at the scene as ██████████ was returning to the hotel. Cst. ██████████ described ██████████ as being approximately 6'3" and 260 lbs.

13. A/Sgt. ██████████ attempted to engage ██████████ in conversation, asking him what he was up to that day. According to A/Sgt. ██████████ statement, ██████████ replied that he was doing "nothing" and stared blankly at the officers. A/Sgt. ██████████ says he then advised other members over the police radio that everything at the scene was "okay so far," but he requested another unit to attend as ██████████ behaviour seemed "a bit out of the ordinary." A/Sgt. ██████████ asked ██████████ some questions about his being in the hotel that day, and ██████████ responded in part by saying he was attacked by officers the last time he was there. ██████████ then walked to the intersection of Hastings and ██████████ then stopped and watched A/Sgt. ██████████ and Cst. ██████████ from there.

14. According to A/Sgt. ██████████ ██████████ then walked back towards the police and asked why A/Sgt. ██████████ did not have an earpiece, before realizing he did have one. ██████████ then walked back and forth past the police multiple times, looking at them and their vehicle each time. A/Sgt. ██████████ formed the belief that ██████████ was under the influence of drugs based on his appearance and behaviour. Two more members, Sgt. ██████████ and Cst. ██████████ arrived separately around this point.

15. A/Sgt. ██████████ informed ██████████ that he was not welcome at the hotel. ██████████ replied, "yeah," and then walked past the officers to the front of the hotel and looked inside before moving along further down the street. A/Sgt. ██████████ remained in front of the hotel with the other officers, as he believed ██████████ might return if the police

left. After several minutes, ██████████ walked back in the direction of the hotel and past the officers. A/Sgt. ██████ said he then walked back and forth past the police and the front of the hotel several times, looking into the hotel as well as at the officers who were gathered there each time he passed.

16. In their statements, Sgt. ██████ Cst. ██████ and Cst. ██████ similarly described ██████████ as walking back and forth away from the hotel and past the officers who were standing there. Both Sgt. ██████ and Cst. ██████ said ██████████ was giving the officers a “thousand-yard stare.” Cst. ██████ explained this meant an intense stare with “a clear intent to intimidate or... incite a fight” and which is “a precursor to potential violence.”

17. According to A/Sgt. ██████ at a certain point ██████████ quickly pivoted and approached him in an aggressive manner while staring at him and clenching his fists. Sgt. ██████ described ██████████ as suddenly lunging toward A/Sgt. ██████ without provocation, and raising his arms. Cst. ██████ said ██████████ “quickly spun around” and “started making his way towards” A/Sgt. ██████ with his “fists up.” Cst. ██████ said he saw ██████████ suddenly turn toward A/Sgt. ██████ and that ██████████ “drew his fists back and started to charge” towards A/Sgt. ██████ ██████████ was interviewed as part of this investigation, and similarly said she saw ██████████ start “running towards” one of the officers, in a way that she described as “quite aggressive.”

18. A/Sgt. ██████ recalled taking two steps back but said ██████████ continued walking toward him, clenching his fists at his waist and coming within two feet of him. A/Sgt. ██████ said he pushed ██████████ in the middle of his chest with an open hand, which stopped ██████████ momentum but did not move him backward. A/Sgt. ██████ then took two more steps back and one or two steps to his left. ██████████ continued to walk toward A/Sgt. ██████ while looking directly at him, and began to raise both of his fists in what A/Sgt. ██████ described as an “obvious attempt to grab or punch me.” A/Sgt. ██████ then observed ██████████ go to the ground, as Cst. ██████ had deployed his CEW at him.



19. In his statement, Cst. [REDACTED] said he drew his CEW after [REDACTED] charged toward A/Sgt. [REDACTED] and at the same time Sgt. [REDACTED] and Cst. [REDACTED] moved in to help A/Sgt. [REDACTED]. Cst. [REDACTED] moved around those officers and deployed the CEW at [REDACTED] whom he believed was actively trying to assault A/Sgt. [REDACTED] as he had his fist and arm up as if he was going to throw a punch. Sgt. [REDACTED] said he could not recall whether any of the officers gave any commands to [REDACTED] before the CEW was deployed, saying "it all happened very quickly." Cst. [REDACTED] also could not recall whether any commands were given to [REDACTED] before the CEW was deployed. He said [REDACTED] "made a quick advancement and it was very fast movements," and that Cst. [REDACTED] deployed the CEW as [REDACTED] was "about to make contact" with A/Sgt. [REDACTED].

20. Cst. [REDACTED] explained that, because he had to get close to [REDACTED] to avoid hitting the other officers, the two probes or points of the CEW struck [REDACTED] upper middle back about six to eight inches apart, which he said was not enough distance for the electric current to travel across an entire muscle group so as to incapacitate the person through "neuromuscular interruption," but would still result in "intense pain" due to the "shock of the electricity going from point to point." Cst. [REDACTED] recalled that the CEW cycled for one or two seconds before it appeared to have any effect on [REDACTED], but that [REDACTED] did eventually yell and fall to the ground. A/Sgt. [REDACTED] Sgt. [REDACTED] Cst. [REDACTED] and Cst. [REDACTED] all said [REDACTED] was directed to lay down on his stomach while he was on the ground. Sgt. [REDACTED] said that initially Cst. [REDACTED] was giving commands but then he (Sgt. [REDACTED] took over and gave commands for [REDACTED] to roll onto his stomach.

21. Cst. [REDACTED] recalled that [REDACTED] got back up after the initial CEW deployment and stepped toward him. A/Sgt. [REDACTED] described [REDACTED] as getting up and trying to run towards Cst. [REDACTED]. Believing that [REDACTED] was now trying to assault him, Cst. [REDACTED] cycled the CEW again, and [REDACTED] fell to the ground a second time. [REDACTED] then got up a second time and again started stepping toward Cst. [REDACTED] prompting him to cycle the CEW a third time. At that point [REDACTED] fell onto his back before rolling away in what Cst. [REDACTED] believed was an attempt to break

or pull out the CEW probes. Sgt. ██████ described ██████ as “rolling around... trying to pull the barbs out.” Cst. ██████ said he believed that ██████ was actively rolling towards one of the other police officers who was on the scene and that, “without controlling him at this point... someone was definitely going to get hurt.” Cst. ██████ then cycled the CEW a fourth time, which stopped ██████ from rolling on the ground.

22. ██████ described these events similarly. In her statement, she said that after ██████ went down the first time, he was directed to get on his stomach, and instead “got up and... charged the officers again.” She said that after this the police “used... a Taser on him and he was down on the pavement again.” She said ██████ was again told to get on his stomach, but instead he “started to try and roll away down the street.”

23. Sgt. ██████ recalled in his statement that at a certain point he made a “request for cover” and advised over the radio that a Taser had been deployed but was not working, and asked a “less lethal option of... the beanbag.” He said in his statement that the CEW was not having the desired effect and the police had “no control of this situation whatsoever.” Cst. ██████ said in his statement that he also requested the LLS or beanbag, since the CEW “was momentarily effective but not effective in gaining control” over ██████, and “the beanbag would likely afford us an opportunity to create a window where that could be done.” Sgt. ██████ said he felt it would not have been safe for the members to approach ██████ after the CEW deployment since he thought, based on his behaviour to that point, that “the minute we go hands-on... the fight’s gonna be on.” A/Sgt. ██████ and Cst. ██████ also did not consider it safe for the police to approach ██████ up to this point. A/Sgt. ██████ said he did not believe it was safe to approach ██████ as he did not know whether he had any weapons and had already displayed assaultive behaviour towards the police. Cst. ██████ similarly said he was concerned with ██████ size and previously-exhibited “intent to assault police.” Cst. ██████ said he was concerned about the prospect of a “prolonged

physical struggle” and possible injury to ██████████. Ultimately more members arrived, including Cst. ██████████ who was responding to the request for a beanbag operator.

24. Cst. ██████████ in his statement to Cpl. ██████████ said he responded to this incident after hearing a dispatch over the radio with a member calling for “code cover” or “code three cover” and for a beanbag shotgun operator, which he was. He explained that a “code cover” is a request to attend a scene at “emergency speed with lights and sirens” to assist an officer or member of the public in trouble. Cst. ██████████ further said he recognized it was Sgt. ██████████ requesting the code cover from his voice. Cst. ██████████ said this elevated his assessment of the situation’s risk, since Sgt. ██████████ was a senior, experienced member and thus less prone to make an unwarranted request for code cover. Cst. ██████████ also said he remembered being informed en route that the subject of the call had recently been involved in a similar incident where it had taken multiple members to arrest him.

25. Cst. ██████████ said he arrived and saw several officers on scene. He immediately got out of his car and retrieved the LLS from the trunk. He then approached the scene and saw a “large male lying on his back on the ground.” Cst. ██████████ described him as a “solidly built male.” Cst. ██████████ observed that other officers had their batons out, and one officer had his pistol drawn and pointed at the male. Cst. ██████████ did not identify the member with his pistol drawn, and I am unable to determine who it was from my review of the record. Another officer (Cst. ██████████ had a CEW out and displayed, with wires coming from the CEW to the subject ██████████). Cst. ██████████ said this was significant because, as a CEW operator himself, he knew a threat of at least imminent bodily harm was required before a CEW could properly be deployed. Cst. ██████████ said he was unaware of the exact situation but inferred from these circumstances that the subject had presented at least a threat of imminent bodily harm before his arrival. In particular, the fact that an officer had a pistol drawn and pointed at ██████████ suggested there may have been a risk of grievous bodily harm or death. In addition, Cst. ██████████ said that in his experience he had never been to a “beanbag call” where there the subject of the call had not had a weapon. He acknowledged in his statement that he did not see a weapon on ██████████, but said he could not see ██████████ back and did not know

whether he may have used a weapon before he arrived. Cst. [REDACTED] said “my risk assessment at this point is telling me that there’s a high likelihood of a weapon being present that I’m not able to see at this point.” He later said he assumed a weapon was involved, based on the request for a beanbag shot gun. He said he was not able to ask the other officers on the scene any questions to clarify what happened or whether [REDACTED] had a weapon because “the situation’s very dynamic” and “it’s unfolding very quickly.” He said he inferred there was a “need to maintain our distance” from the fact that the other officers had weapons drawn but were not approaching [REDACTED].

26. Cst. [REDACTED] said he noticed that Sgt. [REDACTED] was issuing commands to [REDACTED] to roll over, and that [REDACTED] was “not responding to any of the commands” but instead was “lying on his back” with his hands “straight up over his head and he’s kind of got a thousand-yard stare in his eyes.” Cst. [REDACTED] recalled that upon arriving either he or his partner told [REDACTED] to “roll over,” and that Sgt. [REDACTED] said, “one person giving commands,” which Cst. [REDACTED] explained was a way for Sgt. [REDACTED] to maintain “control over this situation to make sure that it doesn’t get confusing.” Cst. [REDACTED] recalled Sgt. [REDACTED] then giving [REDACTED] “repeated commands for him to roll over and that if he doesn’t roll over, he’ll be beanbagged.”

27. Cst. [REDACTED] said at this point he feared for [REDACTED] safety, and for that of the public “if the subject decides to get up and... run at officers or at the public.” He said [REDACTED] appeared unpredictable, was not responding to de-escalation techniques, and was not responding to commands to roll over. Cst. [REDACTED] said that “given all this and that he’s still actively resisting our attempts to arrest him, I made the decision to deploy the beanbag shot gun.” Cst. [REDACTED] said he called out, “beanbag,” before deploying the first round, consistent with his training, as a warning to other members so they would be aware the LLS was about to be deployed and would not think another weapon had been fired. He said he did not specifically give a warning to [REDACTED] but had heard Sgt. [REDACTED] warning to “roll over or you will be beanbagged.” In response to questions from Cpl. [REDACTED] Cst. [REDACTED] agreed it was fair to say he was “implicitly following the instruction of Sgt. [REDACTED] for the deployment” even though he was not expressly told

by Sgt. ██████ to deploy the LLS. However, he later clarified that he made the final decision to deploy the LLS on his own in light of all his observations.

28. Cst. ██████ said he “deployed one round to the subject’s upper right thigh,” and that ██████ did not “move or cry out” or appear to respond at all. Cst. ██████ said he “took this in” for “probably a second or two,” and “waited to hear that Sgt. ██████ was issuing commands.” Cst. ██████ said ██████ “did not respond to the commands, did not roll over so fairly quickly after that, given all the reasons that I’ve just stated are still in place... for my deployment, I made a decision to deploy a second round to the same location, the upper right thigh.” Cst. ██████ said he “again reassessed the situation” and noticed that again there was no reaction. ██████ continued not to comply with commands from Sgt. ██████ to roll onto his stomach. Cst. ██████ said that all “the same risks to the public and the subject [were] in place for me so I made the decision to deploy a third round to the same location.” Cst. ██████ said that the third round “appeared to... initiate a reaction” in that ██████ “appeared to hunch or... gravitate towards where the beanbag had struck him,” and his “eyes shifted direction, so he was no longer fixated staring straight forward with a thousand-yard stare... his focus seemed to be changing and... he had this mental distraction now.” Cst. ██████ said he believed this created an opportunity for the police to effect a safe arrest. He recalled Sgt. ██████ giving the command to move in and arrest ██████. He said other members moved in and he moved in with them to “give cover in case that needed to be deployed again.” He said he “noticed that members had a hold of his limbs and were turning him over to his side,” and that they “had control of him and were effecting arrest and... were able to get him into handcuffs after a few moments” despite the fact that ██████ “was struggling with them.”

29. In his statement to Cpl. ██████ Cst. ██████ explained that the LLS or beanbag shot gun is an “intermediate weapon,” and that it is also referred to as a “flexible baton.” He said it “has a similar effect to... our batons that we carry where it basically allows us to effect an arrest in a safer manner where we can gain compliance from our subject... whether that be from pain stimulus or distraction by... hitting them in safe zones on their legs or... lower torso... to get compliance from them... when they’re not complying with

commands or they're not giving up their weapon." He said the LLS "allows us the same effects of a baton, however it allows us the benefit of distance." Cst. █████ said this was significant because when he arrived he saw "other members had batons in their hands, but they weren't approaching the subject, which told me that there was an aggravating factor that was calling for distance if possible, which the beanbag allows us."

30. Cst. █████ confirmed in his statement that the VPD uses the National Use of Force Framework, and when asked where the LLS falls into that framework, he responded that "it falls on intermediate weapons... so that's gonna be, um, resistant, active resistant into assaultive. Uh, uh, bodily harm and grievous bodily harm or death." When asked to describe the difference between active and passive resistance, Cst. █████ described passive resistance as "someone that's not... showing any signs of violence, not showing any signs of trying to assault police or the public or necessarily run away, but they are just not following instructions." He said the situation with █████ was different from this because █████ had "shown clear signs of not complying with police instructions" and had "presented... behaviour that was assaultive right up into grievous or to bodily harm... and... appeared not to even be hearing the police." Cst. █████ said █████ conduct "didn't seem to be passive in my... opinion" due to the "expression on his face, the thousand-yard stare, and his refusal to comply... despite the application of... stimulus." Cst. █████ said that to him, "that is actively resisting arrest" and that "refusing to roll over is... for me, was actively resisting" because he was "not... simply just lying there" but was "rigid" and had "that thousand-yard stare." Cst. █████ said that he did not witness any other actions that he would describe as attempts to frustrate the attempts of the police to get control of █████

31. As part of Cpl. █████ investigation, several other officers who were present at the scene were interviewed as to Mr. █████ behaviour before Cst. █████ deployed the LLS at him. Detective █████ who was a patrol member at the time, said there were "multiple people screaming at him to turn around, to get on his stomach and he was not listening." Det. █████ said she could not say that █████ "understood

but he was definitely hearing what we were asking” and that he was “just not listening.” When asked whether [REDACTED] was doing anything that made it difficult for the officers on scene to control him, she said he was “rolling around on the ground” and that she did not see him take any other actions to frustrate his arrest while she was there. Cst. [REDACTED] who was partnered with Det. [REDACTED] that day and who had also coincidentally been involved in arresting [REDACTED] on February 20, 2019, said that when he arrived [REDACTED] was “sweating profusely” and “rambling, not making sense.” He said [REDACTED] was not following commands and that he “was just sorta yelling nonsense.” Cst. [REDACTED] said it was a “very agitated stated” and suspected this was possibly due to drugs and/or mental health issues. Cst. [REDACTED] who was partnered with Cst. [REDACTED] that day, said [REDACTED] “wasn’t showing signs of aggression but he wasn’t obeying commands,” and “that can be just as dangerous.”

32. As mentioned, there is in the record before me a video that portrays some of the events described by the officers. The video appears to capture the events from sometime after the third CEW deployment by Cst. [REDACTED] up to the point that members move in to arrest [REDACTED] after Cst. [REDACTED] deployed the LLS. The video is entitled “VANDU\_Video” and was apparently taken by a civilian bystander, presumably on a smartphone, and posted to Twitter by one [REDACTED]. In investigating this matter, officers learned that VANDU stands for the “Vancouver Area Network of Drug Users.” The police contacted VANDU in an attempt to reach the person who posted the video to potentially learn more information, but were unsuccessful.

33. The video is 1 minute and 49 seconds long. At the beginning of the video, [REDACTED] is seen lying on his back on the sidewalk near the intersection of what appears to be East Hastings Street and Dunlevy Avenue, with his feet toward East Hastings and his head toward a building at the corner of the intersection. The person holding the camera appears to be standing near the curb of the sidewalk on East Hastings, several metres to [REDACTED] left. A police cruiser is seen parked along Dunlevy, to [REDACTED] right, and an officer can be seen standing several feet away from [REDACTED] legs, off to [REDACTED] left and in between [REDACTED] and the camera. The officer has his baton out and in a ready position resting on his shoulder. Another

officer can be partially seen standing to that officer's right. [REDACTED] is initially seen with his hands behind his head and then pointing his right arm at something or someone to his right. A voice then says, "hands up," and [REDACTED] puts his hands in the air.

34. At this point a voice can be heard telling [REDACTED] repeatedly to "get on your stomach" and repeating the command, "stomach, stomach, stomach." The camera then shifts perspectives slightly and an officer, presumably Cst. [REDACTED] can be seen standing several feet away from [REDACTED] legs, slightly to [REDACTED] right, with what appears to be a CEW pointed in [REDACTED] direction. I am unable to see the wires coming out of the CEW in the video. Another officer can be seen standing immediately to Cst. [REDACTED] left. [REDACTED] is told again to "get on your stomach" and "roll over," but remains in place on his back with his hands up in the air. The sound of an approaching siren can then be heard, and multiple voices can be heard in the video referencing a "beanbag."

35. As the siren continues to get louder, [REDACTED] is seen rolling to his left and resting momentarily on his stomach, before immediately rolling back to his right and rolling over several times in that direction towards the police cruiser parked along Dunlevy. A voice is heard saying "stop," and [REDACTED] appears to briefly lift his head and chest off the ground and give a short yell, before then rolling back again to his left and coming to a rest on his back. Although not entirely clear, it appears this part of the video may show the fourth time Cst. [REDACTED] cycled the CEW. The officers around [REDACTED] then move toward his new position on the sidewalk. Two officers can be seen between [REDACTED] and the camera with their batons out and held up, seemingly at the ready, by their shoulders. A voice can be heard telling [REDACTED] to "stop moving" after he comes to a rest on his back, and another voice appears to say "stop talking." [REDACTED] is then given a further direction to "roll over." The officer to Cst. [REDACTED] left can be seen at this point with his firearm drawn and pointed at [REDACTED] (again, I am uncertain of this officer's identity). Cst. [REDACTED] CEW remains pointed at [REDACTED] as well. Another officer can be seen entering the right-hand side of the frame from further down Dunlevy Avenue.



36. As [REDACTED] is given more commands to roll over and get on his stomach, he appears to point his left arm in the direction of one of the officers and lift the back of his head off the ground. He then rolls onto his right side and comes to a rest propped up on his right elbow and looking in the direction of the officer with his firearm drawn and pointed at him. More officers can be seen arriving on the scene from the right-hand side of the frame, as [REDACTED] lifts up the front of his shirt to expose his stomach and continues to look in the direction of the officer with his gun drawn. [REDACTED] then rolls back to his left, onto his back again, and looks in the direction of another group of officers, with the back of his head lifted up off the ground. He then rests his head on the ground and puts his left hand over his face. His right hand is resting near his waist and his shirt remains lifted up to expose his stomach.

37. At this point in the video another police cruiser arrives, entering on the left-hand side of the frame and parking in the intersection behind the officer with his gun drawn. The sound of the siren then stops as an officer, Cst. [REDACTED] can be seen quickly getting out of the passenger side door and going to the trunk of the car. Cst. [REDACTED] then approaches the sidewalk holding the LLS, which appears to resemble a normal shotgun.

38. An officer can be heard telling [REDACTED], “get on your stomach” and then saying “roll over on your stomach now, you’re going to get beanbagged, right now” (the “First Beanbag Warning”). [REDACTED] then rolls slightly onto his right side and then back onto his back, with his hands by the sides of his head and his stomach still exposed. Voices can be heard telling [REDACTED] to “roll over” and “do it now”, and an officer then aggressively yells “on your stomach!” Further intermingled voices can then be heard, including what sounds like a voice saying “one talking.” Two further commands can then be heard to “roll on your stomach” and “roll on your stomach now, you’re gonna get beanbagged” (the “Second Beanbag Warning”). The camera then zooms in on Cst. [REDACTED] who seems to be aiming the LLS in the area of [REDACTED] upper legs. A new voice, presumably Cst. [REDACTED] is heard saying “beanbag” and then the sound of a gunshot is immediately heard.

39. Less than two seconds pass on the video between the Second Beanbag Warning and when Cst. [REDACTED] apparently says “beanbag” and fires the LLS. Approximately 15 seconds pass between the First Beanbag Warning and when Cst. [REDACTED] says “beanbag” and fires the LLS. Approximately 35 seconds pass in the video between Cst. [REDACTED] arrival on the scene and when he first deploys the LLS. When Cst. [REDACTED] fired the first LLS shot, [REDACTED] was lying flat on his back, with his hands by the sides of his head and the back of his head on the ground. His shirt was lifted up to expose his stomach. More than ten officers can be seen around [REDACTED] at that point, all standing at or in the intersection of East Hastings and Dunlevy so they are facing [REDACTED]

40. [REDACTED] does not appear to react in any way to the first beanbag shot in the video. About one second after the first shot, [REDACTED] can be seen rolling slightly onto his right side before lying back flat on his back. His hands remained by the sides of his head. As he rolls back onto his back, about three seconds after the first shot, the sound of the second shot can be heard. The person holding the camera is then directed to back up, and as they do so the camera view shifts away from the scene briefly. A few more seconds pass until the person resumes filming the scene. When they do, [REDACTED] can be seen still on his back but again rolled slightly over to his right, with his left foot on the ground and his leg bent so that his knee is in the air. The third LLS shot can then be heard, about six seconds after the second shot. Between each LLS shot, further commands can be heard for [REDACTED] to get on his stomach.

41. It is unclear from the video whether [REDACTED] reacted differently to the third shot right away. The camera is further away from him than it was before, and there is an officer standing directly between the camera and [REDACTED] upper torso and head, obstructing them from view. That officer soon moves out of the way, however, and it can be seen that [REDACTED] is holding his arms above his head such that they are bent and his hands appear to be above his face. Several officers appear to cautiously approach [REDACTED] at this point. One of them moves in to stand on [REDACTED] right side and reaches across his body to grab his left arm. The officer pulls on [REDACTED]

██████████ arm, causing him to roll over to his right, as several other officers move in. The officers then surround ██████████ and move in to arrest him, and the video ends after he is apparently turned onto his stomach. I am not able to discern any command being given in the video for the officers to move in and arrest ██████████.

42. As mentioned, Cst. ██████████ accepted responsibility for the decision to deploy the LLS in his statement, saying the final decision was his. He did say however that Sgt. ██████████ was the one to warn ██████████ that if he did not roll over he would be “beanbagged.” Again, in the video only a few seconds pass between the Second Beanbag Warning and Cst. ██████████ announcing “beanbag” and firing the LLS. The voice giving the First and Second Beanbag Warnings sounds different from the voice giving the final “beanbag” announcement (i.e., Cst. ██████████ voice), and appears to be the same primary voice that is giving commands to ██████████ throughout the video. It seems likely that was Sgt. ██████████ voice. Cst. ██████████ said Sgt. ██████████ was giving commands and that he said only one person should be giving commands when someone else tried to direct ██████████ to comply. Cst. ██████████ also said in his interview that he thought Sgt. ██████████ was in charge that that he was the one “giving commands.” Cst. ██████████ also remembered Sgt. ██████████ saying “only one person give commands” when another officer “tried to pipe in a few commands.” Cst. ██████████ remembered Sgt. ██████████ being the one who said “roll over, you’re gonna get... beanbagged.”

43. In Sgt. ██████████ interview, however, he did not mention saying only one person should be giving commands, nor did he mention giving any warnings to ██████████ that he would be beanbagged. Sgt. ██████████ was not asked about these matters directly. Sgt. ██████████ said that Cst. ██████████ arrived and “took over” and “gave his commands” before deploying the LLS. When asked what commands were given when Cst. ██████████ arrived with the LLS, Sgt. ██████████ said “from my recollection he’s... beside me... he yells beanbag... I let him... do his thing... and then he just yelled, ‘beanbag’... and then... deployed the beanbag.” Cst. ██████████ said that ultimately the “beanbag operator” arrived and “began taking over and giving commands.” A/Sgt. ██████████ said the LSS was deployed after ██████████ continued to disobey police instructions, with “clear commands being given constantly.”

44. Regarding incident command, A/Sgt. [REDACTED] said there was nothing in the VPD's policies that says "a senior person or anyone of a certain rank has to be the one that takes command of a situation," but instead "anyone can take the primary role of being the primary person giving commands." He said that he did not think any of the responding officers' conduct was inappropriate, excessive, or unreasonable, but if it had been he would have gone to a superior and discussed it, or discussed it at the scene if the circumstances had permitted.

45. As to the decision to move in and arrest [REDACTED], Sgt. [REDACTED] recalled that this was an instinctive decision made by the members on scene as a group, once there were "sufficient resources there." He said "it was that opportunity where... it's one's instinctive things... everyone kinda looked at each o-, okay, move in." He further said "after the third [shot] he kinda like he, it was, was able to subdue him... then again as I say, just one of those instinctive things when other members are there. Everyone just looks at each oth-... everyone's on the same page as far as instinctively it's safe to move in." Sgt. [REDACTED] did not mention giving the command to move in and arrest [REDACTED] as described by Cst. [REDACTED] and was not asked directly about it. Cst. [REDACTED] in describing the police actions in moving in to arrest [REDACTED], did not mention any command from Sgt. [REDACTED] but rather said he was "not sure who was the first person to kinda begin moving in on him... but I began to move in when about three or four members in front of me also began to move in" to arrest him.

46. After he was arrested and handcuffed, [REDACTED] was taken to St. Paul's Hospital by EHS. Cst. [REDACTED] rode in the ambulance with him. Cst. [REDACTED] travelled to the hospital separately. Cst. [REDACTED] said [REDACTED] appeared to be in "what we would call psychosis" and "didn't seem like what was happening around him was registering with him." He said [REDACTED] "didn't seem to fully understand what was happening around him." Cst. [REDACTED] said that, while at the hospital, he was directed by Sgt. [REDACTED] to arrest [REDACTED] for assaulting a police officer. According to Cst. [REDACTED] [REDACTED] did not respond appropriately when informed of his rights under the *Charter*. Cst. [REDACTED] said that, when he was informed of the reason for his arrest, [REDACTED] said,

“president, sunglasses, yep.” When asked if he wished to speak to a lawyer, ██████ said, “street thugs, yeah not here.” When asked if he understood the official police warning, ██████ said, “no I don’t.” Cst. ██████ said that shortly after this a ██████ ██████, and advised that ██████ ██████ ██████ ██████ Cst. ██████ and Cst. ██████ were cleared to leave the hospital soon after that. Cst. ██████ recalled seeing two red, circular bruises visible on ██████ mid-upper right thigh at the hospital, which he believed were caused by the LLS beanbag rounds.

47. The police ultimately recommended that ██████ be charged with assaulting a police officer, but the Crown did not approve charges.

#### IV. LAW AND ANALYSIS

48. The scope of the analysis on a s. 117 review was explained by Affleck J. in *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970. The 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 inappropriate 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.

49. 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 rubric 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.

50. I also respectfully adopt 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.

51. These comments are consistent with the Supreme Court of Canada's guidance in *R. v. Nasogaluak*, 2010 SCC 6, where LeBel J., writing for the court at para. 35, said that it "must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these circumstances." Nevertheless, as stated at para. 32 of *Nasogaluak*, "the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness."

52. Finally, I am mindful of the remarks of Affleck J. at para. 36 of *Scott, supra*, 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 a seriously blameworthy state of mind on the part of the officer, beyond a simple mistake of legal authority.

53. Having regard to these legal principles and standards, measured against the material and information before me, I am respectfully of the view that Cst. [REDACTED] conduct in deploying the LLS against [REDACTED] satisfies the threshold under s. 117(9)

of the *Act* of appearing to constitute misconduct, based on my preliminary review. Adopting the language of s. 117(8)(d)(i), the evidence summarized above appears sufficient, at this stage, to substantiate the allegation that Cst. █████ committed abuse of authority under s. 77(3)(a)(ii)(A) of the *Act* by intentionally or recklessly using unnecessary force on █████ in the performance of his duties, such that disciplinary or corrective measures are required.

54. The complainant was lying on his back and did not seem to pose any kind of imminent threat when Cst. █████ arrived and fired the beanbag rounds at him. Cst. █████ justification, in his interview in this matter, that █████ was not complying with police demands to roll onto his stomach despite the application of “stimulus,” and was staring intensely at the police, does not seem compelling in support of deploying the LLS. The same is true of Cst. █████ belief, based on the call for a LLS operator and the circumstances he encountered on arrival, that █████ may have had a weapon hidden on him and must have posed a threat of at least imminent bodily harm at some point before he (Cst. █████ arrived. The issue, in my view, is whether the degree of force involved in using the LLS against █████ was justified each time a round was fired. Based on my preliminary review, without reaching any final conclusion, Cst. █████ conduct in firing the three rounds appears to have been misconduct, in that the use of force appears to have been objectively unnecessary, and there was no apparent reasonable basis to believe the force was necessary or less than excessive.

55. This preliminary review does not foreclose the possibility of a finding, after hearing evidence and submissions at a discipline proceeding, that no misconduct has been proven against Cst. █████ However, on this record it is not clear to me why Cst. █████ could not communicate with the other officers in order to better understand the situation, or else wait and conduct a more fulsome assessment of the level of risk on his own before deploying the LLS. Nor is it clear to me why other actions or lesser levels of force short of firing the three beanbag rounds would not have been appropriate, given the police significantly outnumbered █████, who was apparently lying still on the ground and who seemed to be demonstrating a potentially diminished ability to

understand what the police were telling him to do at this point. I appreciate the risks that many of the responding officers articulated in moving in and going “hands on” with [REDACTED]. However, it appears there may have been insufficient consideration given to further attempts at communication and de-escalation before using an intermediate weapon equivalent to a baton strike in order to gain compliance.

56. Finally, while I would not disturb the DA’s determination that A/Sgt. [REDACTED] conduct in allegedly failing to establish incident command did not constitute misconduct, and bearing in mind that Cst. [REDACTED] was ultimately responsible for the decision to deploy the LLS, I do note that the circumstances of this incident would appear to reveal a potentially problematic lack of clarity in the policy or protocol within the VPD as to who should take charge in such a situation. I am referring in particular to the apparent confusion among the responding officers as to who was in command after Cst. [REDACTED] arrived, and when it was appropriate to approach [REDACTED] in order to physically restrain him and effect his arrest.

## V. CONCLUSION AND NEXT STEPS

57. Having determined on a preliminary review that the conduct of Cst [REDACTED] appears to constitute misconduct, in my view the apparent misconduct does not warrant dismissal or reduction in rank, and a prehearing conference would not be contrary to the public interest, and I will therefore offer a prehearing conference to Cst. [REDACTED] pursuant to s. 120 of the *Act*. The prehearing conference might include consideration of the concerns I have mentioned regarding the lack of a clear incident command policy: see s. 120(12)(b) of the *Act*. Should this result in a resolution under s. 120(16) of the *Act*, then such resolution will be final and conclusive. Otherwise, pursuant to s. 117(9), I must convene a discipline proceeding within the 40 business days contemplated in s. 118(1). Having regard to the timelines provided under the *Act* in relation to the procedures that flow from my decision on this review, I direct that Cst. [REDACTED] must advise whether he will accept the offer of a prehearing conference within 5 business



days after the later of (1) the date on which he advises he will not request witnesses in the discipline proceeding, or (2) the date on which he is advised of my decision in relation to his request, if he makes one, that witnesses be called in the discipline proceeding: see Adjudicator Baird Ellan's s. 117 review notice in OPCC File 17-13143. I will further direct that I be notified if Cst. ██████ decides to accept a prehearing conference before the offer expires.

58. Section 117(8)(d)(iii) of the *Act* stipulates that if I consider that there was apparent misconduct, I must include my determination as to the range of disciplinary or corrective measures I am considering in the case. The range is set out in s. 126(1) of the *Act*. In this case, the measures I would consider range from s. 126(1)(c) through (k).

59. Finally, I am obligated pursuant to s. 117(8)(b) to include a statement of a complainant's right to make submissions under s. 113 of the *Act*. ██████, as the complainant in this matter, has the right to make written or oral submissions, or both, in relation to the complaint; the adequacy of the investigation; and 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). Pursuant to s. 120(6) of the *Act*, if Cst. ██████ accepts a prehearing conference, and ██████ has not yet exercised his right to make submissions to the discipline authority under s. 113, then the discipline authority must notify ██████ in writing of his right to make written or oral submissions, or both, and any such submissions must be made to the prehearing conference authority within 10 business days after he receives such notice: s. 120(7).

Dated at Vancouver, British Columbia, this \_\_\_\_\_ day of April, 2020.

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Ronald McKinnon, Retired Judge

Pursuant to s. 120(6) of the *Act*, if Cst. [REDACTED] accepts a prehearing conference, and [REDACTED] [REDACTED] has not yet exercised his right to make submissions to the discipline authority under s. 113, then the discipline authority must notify [REDACTED] in writing of his right to make written or oral submissions, or both, and any such submissions must be made to the prehearing conference authority within 10 business days after he receives such notice: s. 120(7).

Dated at Vancouver, British Columbia, this 16 day of April, 2020.

A handwritten signature in blue ink, reading "Ronald McKinnon", written over a horizontal line.

Ronald McKinnon, Retired Judge