

October 31, 2019

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

AND

IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT AGAINST
CONSTABLE [REDACTED], CONSTABL [REDACTED] AND CONSTABLE
[REDACTED] OF THE VANCOUVER POLICE DEPARTMENT

AND

IN THE MATTER OF A REVIEW OF AN ALLEGATION OF MISCONDUCT AGAINST
CONSTABLE [REDACTED] [REDACTED] OF THE VANCOUVER POLICE DEPARTMENT

NOTICE OF ADJUDICATOR’S DECISION

TO: Mr [REDACTED] Complainant

AND TO: Constabl [REDACTED] Member
Constable [REDACTED] Member
Constable [REDACTED] [REDACTED] Member
Constable [REDACTED] [REDACTED] Member
c/o Vancouver Police Department
Professional Standards Section

AND TO: Sergeant [REDACTED] [REDACTED] Investigating officer
c/o Vancouver Police Department
Professional Standards Section

AND TO: Mr. Clayton Pecknold Police Complaint Commissioner

Introduction

1. This matter arises from a complaint made by [REDACTED] [REDACTED] regarding the circumstances surrounding his detention and arrest by members of the Vancouver Police Department on July 8, 2018. The police were dispatched to attend a call in the [REDACTED] of [REDACTED] that a male suspect was yelling and threatening to damage vehicles. Constables [REDACTED] [REDACTED] [REDACTED] and [REDACTED] located the male, later identified as [REDACTED] [REDACTED] and arrested him for Breach of the Peace. Mr. [REDACTED] was forcefully taken into custody and received some injuries. He was treated at hospital and then transported to the Vancouver city jail by police van driver Constable [REDACTED] [REDACTED]
2. Mr. [REDACTED] filed a complaint on October 15, 2018 alleging misconduct against the officers who arrested him. The Police Complaint Commissioner determined the complaint was admissible. He directed an investigation into the matter after concluding that the conduct of Constables [REDACTED] [REDACTED] [REDACTED] and [REDACTED] would, if substantiated, constitute misconduct pursuant to section 77(3)(a)(ii)(A) of the Police Act (intentionally or recklessly using unnecessary force on any person). Sergeant [REDACTED] [REDACTED] of the Vancouver Police Department was assigned to conduct the investigation.
3. Sergeant [REDACTED] considered the evidence and delivered her Final Investigation Report on March 26, 2019. On April 9, 2019, the Police Complaint Commissioner rejected the Final Investigation Report and directed further investigative steps be taken pursuant to section 98(9) of the Police Act to include an additional allegation of misconduct pursuant to section 77(3)(a)(i) (intentionally or recklessly making an arrest without good and sufficient cause).

4. Sergeant [REDACTED] continued her investigation, which resulted in her identifying two additional allegations of misconduct. The evidence suggested that the conduct of Constables [REDACTED] [REDACTED] and [REDACTED] would if substantiated constitute misconduct pursuant to section 77(3)(g) (behaving discourteously towards members of the public). As well, the evidence suggested that the conduct of Constable [REDACTED] [REDACTED] would if substantiated constitute misconduct pursuant to section 77(3)(h) (discreditable conduct).

5. On August 12, 2019 Sergeant [REDACTED] resubmitted her Final Investigation Report. She concluded that the evidence did not prove the alleged misconduct against Constables [REDACTED] [REDACTED] [REDACTED] and [REDACTED]. She recommended the allegations be deemed unsubstantiated.

6. On August 26, 2019 Inspector [REDACTED] [REDACTED] as the Discipline Authority, issued his decision pursuant to section 112 of the Police Act. Inspector [REDACTED] assessed four allegations of misconduct and determined that the evidence in the Final Investigation Report did not appear to substantiate the allegations. The allegations considered by Inspector [REDACTED] were:
 1. *Abuse of Authority* pursuant to section 77(3)(a)(i) of the *Police Act*, for intentionally or recklessly making an arrest without good or sufficient cause against Constable [REDACTED] Constable [REDACTED] and Constable [REDACTED]

 2. *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act*, for intentionally or recklessly using unnecessary force on any person against Constable [REDACTED] Constable [REDACTED] and Constable [REDACTED]

3. *Discourtesy* pursuant to section 77(3)(g) of the *Police Act*, which is failing to behave with courtesy due in the circumstances towards a member of the public against Constable [REDACTED] Constable [REDACTED] and Constable [REDACTED]

4. *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act*, which is when on or off duty, conducting oneself in a manner that the member knows or ought to know, would likely bring discredit on the police department. Specifically, that Constable [REDACTED] dropped or smeared the personal property of Mr. [REDACTED] in his blood at the scene.

7. The Police Complaint Commissioner reviewed the allegations and the alleged conduct and considered that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect.
8. On September 23, 2019 the Police Complaint Commissioner appointed me to review the investigating officer's report, the evidence and the records pursuant to section 117 of the Police Act.

Section 117

9. The statutory authority governing this review is set out in Section 117 of the Police Act. If, on review of a discipline authority's decision under section 112(4) or 116(4) that conduct of a member or former member does not constitute misconduct, the Police Complaint Commissioner considers that there is a reasonable basis to believe that the decision is incorrect, the Police Complaint Commissioner may appoint a retired judge recommended under subsection (4) of this section to do the following:

- (a) review the investigating officer's report referred to in section 112 or 116, as the case may be, and the evidence and records referenced in that report;
 - (b) make her or his own decision on the matter;
 - (c) if subsection (9) of this section applies, exercise the powers and perform the duties of discipline authority in respect of the matter for the purposes of this Division.

- (6) The Police Complaint Commissioner must provide the appointed retired judge with copies of all reports under sections 98, 115 and 132 that may have been filed with the Police Complaint Commissioner before the appointment.

- (7) Within 10 business days after receiving the reports under subsection (6), the retired judge appointed must conduct the review described in subsection (1)(a) and notify the complainant, if any, the member or former member, the police complaint commissioner and the investigating officer of the next applicable steps to be taken in accordance with this section.

- (8) Notification under subsection (7) must include:
 - (a) a description of the complaint, if any, and any conduct of concern,
 - (b) a statement of a complainant's right to make submissions under section 113,
 - (c) a list or description of each allegation of misconduct considered by the retired judge,
 - (d) if subsection (9) applies, the retired judge's determination as to the following:
 - (i) whether or not, in relation to each allegation of misconduct considered by the retired judge, the evidence referenced in

the report appears sufficient to substantiate the allegation and requires the taking of disciplinary or corrective measures;

(ii) whether or not a prehearing conference will be offered to the member or former member under section 120;

(iii) the range of disciplinary or corrective measures being considered by the retired judge in the case, and

(e) if subsection (10) applies, a statement that includes the effect of subsection (11).

(9) If, on review of the investigating officer's report and the evidence and records referenced in them, the appointed retired judge considers that the conduct of the member or former member appears to constitute misconduct, the retired judge becomes the discipline authority in respect of the matter and must convene a discipline proceeding, unless section 120 (16) applies.

(10) If, on review of the report and the evidence and records referenced in it, the retired judge decides that the conduct of the member or former member does not constitute misconduct, the retired judge must include that decision, with reasons, in the notification under subsection (7).

10. A review of the Section 117 case law and the case cited as 2016 BCSC 1970 defines my role as the adjudicator. I must review the material delivered under subsection 117(6) and determine whether or not the conduct of the member appears to constitute misconduct. The law is clear that, because the adjudicator may become the discipline authority in relation to discipline proceedings, my job is not to reach conclusions about the conduct of the

member; rather, it is to assess only whether it appears to constitute misconduct.

11. The review is a paper-based process of the record provided by the Commissioner. There are no witnesses or submissions. Section 117(1)(b) directs the adjudicator to make “her or his own decision on the matter.”

Reports and Material Considered

12. Pursuant to sec. 117 (6) the Commissioner provided the following materials for my review.
 - (a) Final Investigation Report of Sergeant [REDACTED] and attachments described as: registered complaint, progress reports, OPCC notices, civilian statements, members’ statements, supporting documents, and legislation/case law.
 - (b) Additionally, I have considered the Notice of Appointment of Retired Judge dated September 23, 2019, the Direction For Further Investigative Steps dated April 9, 2019 and the relevant case law and statutory authority.

Section 117(8)(a) Description of the Complaint and Conduct of Concern

13. The conduct of concern relating to Constables [REDACTED] [REDACTED] [REDACTED] and [REDACTED] arose out of the detention and arrest of [REDACTED] [REDACTED] on July 18, 2018. The members were dispatched to investigate a complaint that a male, later identified as Mr. [REDACTED] was yelling and arguing with his friend [REDACTED] [REDACTED] Ms. [REDACTED] had thrown Mr. [REDACTED] wallet out of her ninth floor apartment and he was in the parking lot yelling up to her. A neighbor heard Mr. [REDACTED] threaten to damage vehicles if she did not come down and look for the wallet. When the members arrived, Constable [REDACTED] [REDACTED]

attempted to speak to Mr. [REDACTED] Mr. [REDACTED] was described by the officer as hostile and aggressive. Mr. [REDACTED] said he did not have to speak to police and turned away from Constable [REDACTED] [REDACTED] who then grabbed Mr. [REDACTED] arm. The complainant shook free from the officer's grasp and turned facing Constable [REDACTED] [REDACTED] Within seconds Constable [REDACTED] [REDACTED] who was joined by Constables [REDACTED] and [REDACTED] was involved in a physical altercation with Mr. [REDACTED] Mr. [REDACTED] was punched and kneed several times before being subdued. He was described by the officers as being actively resistant and assaultive. He was eventually taken to the ground, handcuffed and placed in a leg hobble to prevent him from kicking the officers. Mr. [REDACTED] was arrested for breach of the peace. The conduct of concern here is whether the members had good and sufficient cause to arrest Mr. [REDACTED] and whether they used unnecessary force in doing so. The incident attracted neighbours and bystanders who gathered to watch what was happening. Some of these people complained that the members verbally abused and bullied them. This conduct forms the basis of the allegation that Constables [REDACTED] [REDACTED] [REDACTED] and [REDACTED] were behaving discourteously towards members of the public.

14. Constable [REDACTED] arrived on scene as Mr. [REDACTED] was being subdued. She was driving a police wagon and later transported Mr. [REDACTED] to the Vancouver city jail. While Mr. [REDACTED] was being held on the ground by the male officers a civilian witness observed a female officer wipe Mr. [REDACTED] bloody face with his fanny pack. The pack ended up in a pool of blood. The alleged conduct of concern here is that Constable [REDACTED] wiped Mr. [REDACTED] s bloody face with his fanny pack and in doing so conducted herself in a manner that she knew or ought to have known would likely bring discredit to the police department.

Section 117(8)(c) - Allegations of Misconduct Considered

15. Having reviewed the evidence referenced in the Final Investigation Report, I identify the following allegations of misconduct against Constable [REDACTED] [REDACTED] Constable [REDACTED] and Constable [REDACTED] that could appear to be substantiated:

1. Abuse of authority by intentionally or recklessly arresting Mr. [REDACTED] without good and sufficient cause contrary to section 77(3)(a)(ii) of the Police Act.
2. Abuse of authority by intentionally or recklessly using unnecessary force on Mr. [REDACTED] contrary to section 77(3)(a)(ii)(A) of the Police Act.
3. Discourtesy which is failing to behave with courtesy due in the circumstances towards a member of the public in the performance of duties as a member contrary to section 77(3)(g) of the Police Act.

16. Having reviewed the evidence referenced in the Final Investigation Report, I identify the following allegations (the allegation considered by Sergeant [REDACTED] and an additional allegation that arises from my consideration of the reports, evidence and materials) of misconduct against Constable [REDACTED] that could appear to be substantiated:

1. Discreditable conduct which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department contrary to section 77(3)(a)(h) of the Police Act.
2. Damage to property of others which is when on duty, or off duty but in uniform, intentionally or recklessly damaging any

property belonging to a member of the public contrary to section 77(3)(e)(i) of the Police Act.

17. I am mindful of the limitation to the definitions of misconduct in Section 77 found in Section 77(4):

77(4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.

Section 117(8)(d)(i) Whether the Evidence Appears Sufficient to Substantiate the Allegations

The allegations against Constable [REDACTED] Constable [REDACTED] and Constable [REDACTED]

18. Sergeant [REDACTED] obtained duty statements from the members and interviewed each member as part of her investigation of the complaint of [REDACTED]. The officers' duty statements were prepared in September 2018, shortly after the incident and they contain a brief summary of each officer's involvement in the arrest of Mr. [REDACTED]. The members were interviewed in December 2018 and February 2019 prior to Sergeant [REDACTED] completing her first Final Investigation Report. Constables [REDACTED] and [REDACTED] were interviewed again in May 2019 before the Final Investigation Report was released on August 12, 2019.
19. Upon a review of the Record I am satisfied the following circumstances are not in dispute:

- a) On July 18, 2018 [REDACTED] [REDACTED] was in the parking lot of an apartment building the [REDACTED] of [REDACTED]. He was looking for his wallet that had been thrown out the window of one of the upper level apartments by [REDACTED] [REDACTED] during an argument the couple had had.
- b) Mr. [REDACTED] was upset and angry and his yelling was disturbing neighbours including [REDACTED] [REDACTED] [REDACTED] and [REDACTED] [REDACTED]. Mr. [REDACTED] telephoned 911 to complain. The Vancouver Police department dispatched police units to respond to the complaint.
- c) Constable [REDACTED] [REDACTED] and Constable [REDACTED] responded to the dispatch. Both were dressed in plain clothes and Constable [REDACTED] was driving their unmarked police car. They were the first officers to arrive. Constable [REDACTED] and Constable [REDACTED] [REDACTED] arrived shortly thereafter. They were in police uniform and driving a marked police car.
- d) As Constable [REDACTED] pulled his car into the parking area both officers saw Mr. [REDACTED]. Constable [REDACTED] [REDACTED] quickly exited the passenger seat and walked towards Mr. [REDACTED].
- e) Constable [REDACTED] [REDACTED] identified himself as a police officer and asked Mr. [REDACTED] to speak to him. Mr. [REDACTED] said that he didn't have to speak to the officer and turned away, at which point Constable [REDACTED] [REDACTED] took hold of Mr. [REDACTED] arm in an attempt to prevent Mr. [REDACTED] from leaving. Mr. [REDACTED] shook free and turned to face Constable [REDACTED] [REDACTED]. Within a few seconds Constable [REDACTED] [REDACTED] punched Mr. [REDACTED] and the two men engaged in a physical altercation.

- f) Constable [REDACTED] went to assist his partner and Constable [REDACTED] arrived and joined the fray. The three officers eventually subdued Mr. [REDACTED] on the ground and handcuffed him. Mr. [REDACTED] was kicking at the members and was placed in a hobble.
- g) Mr. [REDACTED] was punched and kned by the members. He had a facial injury and was bleeding.
- h) Constable [REDACTED] was present but did not get involved in the altercation. She did see another officer wipe Mr. [REDACTED] bloody face with a fanny pack.
- i) [REDACTED] [REDACTED] a friend of the [REDACTED] family, was staying in [REDACTED] [REDACTED] apartment. She had come down to the parking lot and witnessed the police arriving and taking Mr. [REDACTED] into custody. [REDACTED] [REDACTED] did not see the incident but she did come down later and spoke to the police.
- j) Mr. [REDACTED] was driven to the hospital, treated there and then driven to the Vancouver City jail by wagon driver Constable [REDACTED] [REDACTED]. He was released a few hours later without being charged.
20. Constable [REDACTED] [REDACTED] in his May 23, 2019 interview was asked by Sergeant [REDACTED] to describe his initial interaction with Mr. [REDACTED]. He said:

B Okay. And tell me what your lawful authority was to interact with Mr. [REDACTED]

D My common law duties.

B Okay. And did you feel that he was detained or detainable?

D Yes.

B Okay. And can you explain that to me.

D Um, I believed that, uh, you know, I was on scene to conduct an investigation of a domestic. Um, whether it was an assault or just a verbal argument, I needed to determine that. I didn't know if it was physical or if anyone was injured. Um, and also to obviously investigate the allegation of mischief to, to cars, parked cars in the parking lot.

21. In the same interview Constable [REDACTED] [REDACTED] said:

B Did you, um, w-, and what did you assess his behavior to be at that... How would you describe that behavior just sort of walking away?

D Active resistant.

B Okay. Um, tell me what your purpose was for grabbing him.

D My purpose for grabbing Mr. [REDACTED] was to, you know, gr-, uh, gain attention from him. I, I wanted to talk to him. My main goal was to have a conversation with Mr. [REDACTED] and to investigate, um, what had just happened. I don't go into situations like this looking to fight. I go into these situations lookin' to talk to somebody and to see what had occurred. Um, Mr. [REDACTED] had absolutely none of that. His, he was resistant from the start until the, the, the, the end, until he had to be hobbled into the wagon.

22. Constable [REDACTED] [REDACTED] was interviewed on February 27, 2019 and asked to describe how the fight with Mr. [REDACTED] started. He said:

B Okay. So, I guess what I'm trying to get at, I suppose, I'm

trying to figure out, so once you grab him and then he squares off with you, what happens? How, how does, how does the, the fight start?

D Well, he squares off with me.

B Okay.

D Um, I have no time to get into a, you know, big verbal de-escalation situation. I, I don't need to get punched first.

B Mm-hmm.

D If I'm punched first, then I put other, my partners at risk and other members of the public at risk, so...

B Okay.

D Um, that is him saying that he needs to fight, that he, sorry, that he wants to fight. And that's me being like, okay, I need to do my job and act here before he acts on me.

B Okay. And then so tell me then how it is that you, what action did you take?

D I believe I punched him.

B Okay. And do you know where?

D I believe in the head.

B Okay.

D Yeah.

B And tell me what was the purpose of punching him in the head?

D Well, I needed to subdue this male, and I've been trained wherever the head goes, the male goes. And I wanted to gain control of this guy. He'd been resistant since the point, um, since I pulled up on scene, and I needed to deal with him. I didn't want him to get away, so I punched him.

B Okay. And then what, what happened after that first punch?

D After the first punch, he, the fight was on. He just continued

to resist.

B Okay.

D And I struggled getting him into handcuffs.

B Okay.

D I couldn't get him into handcuffs at this point.

B And how was he resisting?

D He was fighting back. He was pulling away. He was refusing to give up his arms...

B Okay.

D ...and continued to be assaultive towards me.

B Was he punching?

D I believe so.

B Okay. Do you recall any other actions that he was doing?

D (No audible response)

B You said he was assaultive. How was he assaultive?

D Well, he was refusing to give up his hands.

B Mm-hmm.

D Um, and getting in a fight with me. Pushing away. Trying to get away.

B If, if you look at the National Use of Force Scale, where does he sort of fall in for you as, as far as his demeanour, uh, before the fight?

D He was actively resistant.

23. Constable [REDACTED] was asked whether he recalled having a conversation with [REDACTED]. He said he spoke to her and didn't remember there being any issues. He couldn't recall being approached by a citizen and raising his voice or swearing.

24. Constable [REDACTED] told Sergeant [REDACTED] that as he got out of the police car he heard Constable [REDACTED] [REDACTED] say "Police stop" to [REDACTED] [REDACTED] who was walking away from the officers. Constable [REDACTED] said that Mr. [REDACTED] was facing Constable [REDACTED] [REDACTED] with his fists raised and that they were fighting. He said he ran toward the altercation, tried to take Mr. [REDACTED] to the ground using a leg sweep and ended up on the bottom of a human pile. Constable [REDACTED] told Sergeant [REDACTED] that there was no time to say anything or communicate with Mr. [REDACTED] because Mr. [REDACTED] behavior had, based on the member's training and understanding of the National Use of Force Model, moved to the assaultive stage. Constable [REDACTED] denied using any profanity.
25. Constable [REDACTED] told Sergeant [REDACTED] that when he got to the parking lot he saw Constable [REDACTED] [REDACTED] and Constable [REDACTED] standing in a triangle pattern facing Mr. [REDACTED] Mr. [REDACTED] fists were clenched and he was yelling at the officers. He said he moved in to help subdue Mr. [REDACTED] whom he described as actively resistant and assaultive. Constable [REDACTED] struck Mr. [REDACTED] with his fist three or four times. He also delivered two or three knee strikes to Mr. [REDACTED] midsection after the complainant was being held on the ground. Constable [REDACTED] said the knee strikes were necessary because Mr. [REDACTED] had "turtled" and the members could not get his hands free to handcuff him. He was also concerned that Mr. [REDACTED] may have had a weapon. Constable [REDACTED] denied using any profanity.
26. In the Final Investigation Report, Sergeant [REDACTED] carefully analyzed the issues of whether the members had good and sufficient grounds to detain and arrest Mr. [REDACTED] and whether, in doing so, the members used unnecessary force. She considered the members' powers to arrest in section 495(1) of the Criminal Code and the use of force provisions in section 25(1). Her conclusions were that the members had proper grounds to detain and

arrest Mr. [REDACTED] and that they did not use unnecessary force.

27. Section 117(1)(a) and (b) of the Police Act requires me to review Sergeant [REDACTED] report and the evidence and records and then make my own decision on the matter. I agree with the comments of the Adjudicator Baird Ellan in OPCC 2016-11867 where she said:

“While my task is not to review his decision, rather to consider the issues and reach my own conclusion, I find it instructive to consider the matter from the perspective of a trained officer, particularly in assessing the reasonableness of the member’s response from a policing perspective. In doing so I nonetheless bear in mind that the test has an objective component”

28. In R v. Mann 2004 SCC 52, the Court held that there is no general power of detention for investigative purposes. The police may stop and detain an individual without arresting him if there are reasonable grounds to suspect in all the circumstances that the person is connected to a particular crime and that the detention is reasonably necessary. The Mann decision held that the officer could detain a person provided there was “articulable cause”. The decision holds that while the officer’s subjective opinion regarding reasonable grounds to suspect is relevant, the court must consider all of the circumstances to assess objectively whether what the officer believed and did was reasonable.
29. Having considered the Final Investigation Report and the evidence and records, I am satisfied that the conduct of Constables [REDACTED] and [REDACTED] does not constitute misconduct pursuant to section 77(3)(a)(i). The members attended the scene in response to a complaint by a citizen of a male yelling and threatening to damage vehicles. The information

dispatched to the members was that a male and female had been arguing for several hours. The male was angry, yelling and threatening to damage vehicles in the area. Constable [REDACTED] [REDACTED] was the first officer to encounter Mr. [REDACTED]. I accept that the officer identified himself as a police officer and said he wanted to talk to Mr. [REDACTED]. I find Mr. [REDACTED] knew the police were there because he said he did not have to talk to the officer and walked away. Constable [REDACTED] [REDACTED] said that he needed to talk to Mr. [REDACTED] to determine what was happening and to “get his side of the story”. The officer said he did not know if the domestic dispute was ongoing, whether the female had been injured and whether Mr. [REDACTED] had or was intending to damage vehicles. Constable [REDACTED] [REDACTED] said that he had a common law duty to maintain order and protect citizens and property. Constable [REDACTED] [REDACTED] needed to speak to Mr. [REDACTED]. Mr. [REDACTED] was uncooperative and walked away. To prevent this, Constable [REDACTED] [REDACTED] attempted to restrain Mr. [REDACTED] by grabbing his arm. Mr. [REDACTED] pulled his arm away. I find that the force used up to this point was both reasonable and necessary.

30. Constables [REDACTED] and [REDACTED] each heard the dispatch and were aware of the complaints regarding the suspect’s behavior. Constable [REDACTED] identified himself as a police officer and Constable [REDACTED] was in his police uniform. I am satisfied the evidence proves they were attending in the proper execution of their police duties which include preventing a breach of the peace pursuant to section 31 of the Criminal Code and I accept that all the members had reasonable grounds to suspect that Mr. [REDACTED] was connected to a particular crime and that his detention was reasonably necessary.
31. When all of the circumstances are objectively considered, I am satisfied it was reasonable for the members to be concerned about the risk of injury to property or persons had they not detained Mr. [REDACTED]. The police would

have been criticized had they not intervened. Mr. [REDACTED] conduct on July 8, 2018 obliged the members to detain him. There is no evidence of misconduct up to this point.

32. The second allegation against Constables [REDACTED] [REDACTED] and [REDACTED] is that they intentionally or recklessly used unnecessary force against Mr. [REDACTED]. Sergeant [REDACTED] conclusion in her Final Investigation Report was that the members did not use more force than was reasonably necessary. She considered the provisions of section 25 of the Criminal Code (use of force), the Vancouver Police Department's policy on use of force and the National Use of Force Model/Force Options Theory in arriving at her conclusion.
33. The evidence and the records would appear to support the members' subjective belief that they needed to gain control of Mr. [REDACTED] whom they described as angry, hostile and resistant. Constable [REDACTED] [REDACTED] said that Mr. [REDACTED] shook out of the officer's grasp and turned to face the officer in a fighting stance with his fists raised. Constable [REDACTED] [REDACTED] said Mr. [REDACTED] was actively resistant, that there was no time to verbally de-escalate the situation and that a hand strike was his only option. The member said:
- B Okay. And just so I understand, why choose a punch over some other, uh, use of force?
- D On this day, I was plainclothes. I wasn't wearing my duty belt. I had no OC spray, no baton. Um, it was really my only option I had that day.

Constables [REDACTED] and [REDACTED] described Mr. [REDACTED] as resistant, angry and verbally abusive. They said Mr. [REDACTED] appeared ready to fight the police with his fists raised and that their training had taught them that the situation was beyond the option of attempting a verbal de-escalation. All

the members stated that the force they used (punches and knee strikes) from this point on was reasonable and no more than necessary to gain control of and arrest Mr. [REDACTED]

34. The members subjective beliefs regarding their use of force are not however determinative of the matter. Mr. [REDACTED] told Sergeant [REDACTED] that he had turned around and started to get beaten up. He said he did not do anything, did not throw a punch and that he was defenseless. [REDACTED] [REDACTED] was in the parking lot with Mr. [REDACTED] when the police arrived. She told Sergeant [REDACTED] an officer ran past her and started swinging and hitting Mr. [REDACTED]. She said Mr. [REDACTED] had just been standing there. It is important to consider that the altercation in the parking lot happened very quickly, the members were reacting to a fast-moving, dynamic situation and the incident would have been emotionally upsetting for everyone involved. It is not surprising then that the members' and the witnesses' subjective perceptions of what occurred are different. Those perceptions may eventually be resolved following an assessment of the credibility and reliability of their testimony.
35. While the subjective beliefs of the members must be considered, this allegation of misconduct must be assessed objectively to determine whether what the members believed and did was reasonable. In OPCC File No. 2016-11505 the Adjudicator discussed the meaning of recklessness in the context of the Police Act. He said:

I would add that the use in the Police Act of the word "reckless" (in both of the s. 77 subsections at issue here) is consistent with the fact the Police Act disciplinary matters involve an objective component. That is to say, the assessment of a misconduct allegation is not dictated by the individual officer's personal intention of "good

faith", rather it also involves an objective question as to the reasonableness of what the officer believed and did. While an officer's subjective belief will always be relevant, and may mitigate a misconduct allegation, the analysis does not start and end with the subjective component. It is necessary to assess objectively whether what the officer believed and did was reasonable.

36. After a consideration of the evidence, it appears there are questions as to whether it was objectively reasonable for Constable [REDACTED] Constable [REDACTED] and Constable [REDACTED] to conclude Mr. [REDACTED] was actively resistant and assaultive and posed a threat serious enough to justify the force used upon Mr. [REDACTED]. The evidence objectively considered raises questions whether the members were reckless as to whether it was necessary and reasonable to use the force they did in controlling and subduing Mr. [REDACTED].
37. The issue to be determined at this stage is whether the evidence appears sufficient to substantiate misconduct. Based on the materials and evidence, I find the evidence appears sufficient to substantiate the allegation that Constables [REDACTED] and [REDACTED] recklessly used unnecessary force.
38. The third allegation against Constables [REDACTED] and [REDACTED] is that they behaved discourteously towards a member of the public. Sergeant [REDACTED] conclusion in the Final Investigation Report was that the members were not discourteous. Sergeant [REDACTED] interviewed [REDACTED] and [REDACTED]. Ms. [REDACTED] told her that the Asian officer was rude. Ms. [REDACTED] said the plainclothed Asian officer swore at her. The members told Sergeant [REDACTED] they did not swear, did not recall swearing at the women and did not hear any other police officers swearing. The investigator concluded that there was no other evidence to support the allegation and that there was no evidence or additional witnesses to corroborate what Ms.

██████ and Ms. ██████ told her.

39. An assessment of this allegation of misconduct requires a consideration of all the circumstances surrounding what, if anything, the members said, whether the testimony of the members and the women is determined to be credible and reliable and whether what was said was discourteous. Corroborative evidence is often helpful but is not necessary and a lack of such evidence is not determinative of the issue.
40. After considering the evidence, it appears there are questions as to whether Constables ██████ ██████ and ██████ behaved in a discourteous manner towards Ms. ██████ and Ms. ██████. Based on the materials and reports, I find the evidence appears sufficient to substantiate an allegation of discourtesy.
41. The allegations of misconduct against Constable ██████ ██████ are that she conducted herself in a manner that the member knows, or ought to know, would likely bring discredit on the police department and that Constable ██████ when on duty, intentionally or recklessly damaged property belonging to a member of the public. Sergeant ██████ concluded the evidence did not support the allegation of discreditable conduct. The other allegation of misconduct (damage to property of others) is one that I have considered pursuant to section 117(8)(c) of the Police Act.
42. ██████ ██████ told Sergeant ██████ that a female police officer rubbed Mr. ██████ fanny pack in a pool of his blood. Constable ██████ ██████ who was Constable ██████ partner, was the only other female police officer present other than Constable ██████. Constable ██████ said she saw a bloody fanny pack at the scene. She explained in an email to the Investigator that the blood got on the fanny pack because a member wiped

- Mr. [REDACTED] face with it and put it in the pool of blood that was on the ground. She did not recall which member did this. Constable [REDACTED] said she did not place Mr. [REDACTED] fanny pack in any blood at the scene.
43. Constable [REDACTED] told Sergeant [REDACTED] she could not recall many of the details of the incident because as the wagon driver she was not directly involved. She did remember Mr. [REDACTED] was wearing a fanny pack and that he was on the ground bleeding. She speculated that is how the pack may have got blood on it. She could not recall placing the fanny pack in the blood at the scene and said she would have no reason to do so. She said she did not drop the pack into the blood and did not use the pack to wipe blood from the face of Mr. [REDACTED]. Constables [REDACTED], [REDACTED], and [REDACTED] did not recall seeing a fanny pack during the incident.
44. Sergeant [REDACTED] concluded that there was no evidence to identify the member that Constable [REDACTED] saw wiping Mr. [REDACTED] bloody face with a fanny pack and therefore there was no way to objectively assess whether such conduct may be discreditable.
45. After considering the Final Investigation Report and the records, it appears there are questions regarding the identity of the police officer who wiped Mr. [REDACTED] face with a fanny pack. This issue might be resolved by drawing logical inferences from the evidence. If the inference were drawn that it was Constable [REDACTED] who wiped Mr. [REDACTED] bloody face then questions arise whether, viewed objectively, such conduct was discreditable and whether Constable [REDACTED] intentionally or recklessly damaged Mr. [REDACTED] property.
46. The issue to be determined at this stage is whether the evidence appears sufficient to substantiate misconduct. Based on the materials and evidence

contained in the report, I find the evidence appears sufficient to substantiate the allegations that Constable [REDACTED] conducted herself in a manner that she knew, or ought to have known, would likely bring discredit on the police department and that Constable [REDACTED] intentionally or recklessly damaged property belonging to a member of the public.

Conclusion and Next Steps

47. After reviewing the Final Investigation Report and the evidence and records I am satisfied of the following:
- a) Abuse of Authority for intentionally or recklessly making an arrest without good or sufficient cause; for the reasons noted above, I find the conduct of Constables [REDACTED] [REDACTED] [REDACTED] and [REDACTED] does not constitute misconduct. Pursuant to section 117(11), this decision is not open to question or review by a court on any ground and is final and conclusive.
 - b) Abuse of Authority for intentionally or recklessly using unnecessary force; the evidence appears sufficient to substantiate this allegation against Constables [REDACTED] [REDACTED] [REDACTED] and [REDACTED] and requires the taking of disciplinary or corrective measures.
 - c) Discourtesy which is failing to behave with courtesy due in the circumstances towards a member of the public; the evidence appears sufficient to substantiate this allegation against Constables [REDACTED] [REDACTED] [REDACTED] and [REDACTED] and requires the taking of disciplinary or corrective measures.
 - d) Discreditable Conduct which is when on or off duty, conducting

oneself in a manner that the member knows or ought to know, would likely bring discredit on the police department and Damage to Property of Others which is when on duty, or off duty but in uniform, intentionally or recklessly damaging any property belonging to a member of the public; the evidence appears sufficient to substantiate these allegations against Constable [REDACTED] and requires the taking of disciplinary or corrective measures.

48. I hereby notify the relevant parties of the next steps pursuant to sections 117(7) and (8) of the Police Act.
- a) The complainant has the right pursuant to section 113 of the Police Act to make submissions at the discipline proceeding.
 - b) I have determined that the range of disciplinary or corrective measures being considered for Constables [REDACTED] [REDACTED] [REDACTED] and [REDACTED] includes:
 - i. Suspend the member without pay for not more than 30 scheduled working days.
 - ii. Require the member to undertake specified training or retraining.
 - iii. Verbal or written reprimand.
 - c) I have determined that the range of disciplinary or corrective measures being considered for Constable [REDACTED] includes:
 - i. Verbal or written reprimand.
 - ii. Giving advice to the member as to her conduct.
49. Considering the factors in section 120 of the Police Act, I am willing to offer the members a prehearing conference.

50. The members may, pursuant to section 119(1) file with the discipline authority a request to call and examine or cross-examine one or more witnesses listed in the Final Investigation Report. Such a request must be made within 10 business days of this notification.

Dated at Victoria British Columbia

October 31, 2019

David Pendleton

David Pendleton

Adjudicator