

Drafted on May 31, 2021

OPCC File No. 2020-18168

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

AND

IN THE MATTER OF A REVIEW OF

ALLEGATIONS OF MISCONDUCT AGAINST  
CONSTABLE [REDACTED]

OF THE VANCOUVER POLICE DEPARTMENT

**NOTICE OF DECISION**

TO: [REDACTED]  
c/o Vancouver Police Department  
Professional Standards Section

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

AND TO: Chief Constable Adam Palmer  
c/o Vancouver Police Department  
Professional Standards Section

AND TO: Inspector [REDACTED]  
c/o Vancouver Police Department  
Professional Standards Section

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

AND TO: Clayton Pecknold  
Commissioner of the Office of Public Complaint Commission

## INTRODUCTION

1. This review pursuant to section 117 of the *Police Act*, R.S.B.C. 1996, c. 367, arises out of a demonstration that took place on July 1, 2020, in the [REDACTED] area of the City of Vancouver. At approximately 6:30 p.m. on that day, a large group of people had assembled in order to protest the existence of the [REDACTED], a well known landmark in the City. The protesters were met by a number of members of the Vancouver Police Department (VPD) who were surrounding the [REDACTED] apparently to protect it from impending damage.
2. The objective of the demonstrators was to remove the [REDACTED]. A melee consisting of some pushing and shoving took place. It is alleged that an officer who was subsequently identified as Constable [REDACTED] grabbed an unarmed protester in an attempt to remove a sign from her hands and in so doing he pulled her into a circle of police officers. The allegation is that Constable [REDACTED] committed misconduct by an *Abuse of Authority* pursuant to s. 77(3)(a)(ii)A of the *Police Act* (the Act).
3. On the following day, [REDACTED] reported the incident by filing a formal complaint with the Office of the Police Complaint Commissioner (OPCC). The OPCC found that [REDACTED] complaint was admissible under the Act and directed the VPD to conduct an investigation.
4. On September 3<sup>rd</sup>, 2020, Sgt. [REDACTED] was appointed to conduct an investigation into the allegations.

## EVIDENCE

5. I will review the evidence. It is estimated that the demonstration was attended by two to three hundred people. It is not in dispute that the intent of the demonstrators was to remove the [REDACTED] because of the apparent legacy of [REDACTED]. The protestors alleged that [REDACTED] was a settler who married or had children with a young indigenous woman from the Squamish Nation.

6. On October 16, 2020, Sgt. [REDACTED] conducted an audio-recorded telephone interview of [REDACTED]. She told the officer that she had taken part in a peaceful demonstration that started outside the [REDACTED] before moving on to [REDACTED]. Her statement, in part, reads as follows:

"Upon arrival, we were met with numerous police officers who are surrounding the [REDACTED] protecting it from any damage. And they were quite hostile as we came around, peaceful, we had a drum circle, we were demanding that the City of Vancouver takes down the [REDACTED] to respect indigenous sovereignty. And as we were surrounding the [REDACTED] police officers got a little bit more aggressive, started shouting, started to provoke the crowd, started to engage with the protestors and that is when I noticed to my left directly, there was a female with a sign, who came face to face with an officer [REDACTED] - and he tried to grab her and pull her into .... the circle of cops around the [REDACTED]. And as she pulled back he lashed out and grabbed her by the neck and that is when multiple people came between them and then we had the tall officer - [REDACTED] yell at everyone to "relax". And everyone stopped, and the officer that grabbed the protester had been whisked off to the back to deal with something else. ... This officer is clearly incapable of handling stress in the field and has proved himself to be a liability to the police force, as well as a threat to the public. He needs to be re-evaluated .."

It is not in dispute that the female was identified by Sgt [REDACTED] and herein after she will be referred to as "AF" to be consistent with the materials provided to me.

7. Sgt. [REDACTED] asked her how the police were "hostile". She replied:

"They were hostile by being unresponsive to us asking them to move away from the [REDACTED]. It was just personal property. They were hostile by being aggressive with their body language. By being so numerous for just a piece of property that everybody would like to see removed."

8. On January 26, 2021, Sgt. [REDACTED] interviewed AF with a support worker present. She was a part of the demonstration having proceeded there from the [REDACTED]. Her oral statement reads in part as follows:

"I was kind of in the front area facing north, and I saw that there was a woman that was behind the [REDACTED] on the other side ... She was affiliated with the demonstration, she was wearing a vest that denoted her as a Marshall. So I saw two Vancouver PD officers who were just kind of harassing this woman, and she was alone, right. So I described that there was a big group of people on one side, but she was ... isolated on the other side of the [REDACTED] and the people would have had limited sight lines to her. She was like ... 5 feet tall.

So I see this woman kind of getting hassled and I just point and I say 'Hey, what's going on over there?' and this VPD officer grabbed me by the coat at my neck, and I was pretty surprised and pushed his hand away, and he attempted to grab me again, and at that point with people around me, pulled me back away from him and I was kind of like absorbed into the crowd ... So that I think is the underlying incident that led to the complaint. ... I didn't initiate contact or anything like that with the officer. ... I really don't know but he did grab me by the neck and he was attempting to kind of pull me out of the crowd as well. So that, I think, is the underlying incident that led to the complaint."

9. It is AF's belief that the whole incident lasted between 1 to 2 minutes. The officer identified as Cst. [REDACTED] was [REDACTED]

10. On July 12, 2021, Sgt. [REDACTED] interviewed Constable [REDACTED]. It is not all together clear why there was such a lapse in time from the incident that took place on

July 1, 2020. In any event, in his statement Constable ██████ stated that he was advised that the crowd was going to attend in order to tear down the ██████. He said that, that act would constitute mischief under the *Criminal Code*. He said the officers formed a line or a perimeter around the ██████ to prevent the ██████ from being damaged or torn down. He said:

"The group appeared relatively hostile, anti-police and anti-state just with their demeanor and the statements that they were showing that day. The tone of that group from what I could compare to other protests or demonstrations that I have been at was significantly more negative and anti-police and others that I have attended in the past." He went on to say, "a specifically small group of people – three to four individuals in front of me – began to shout 'Get your fucking hands off her', they were shouting at a direction behind me, and I believe that they were shouting at what I could only interrupt as an officer placing their hands on someone, one of the protestors, possibly to effect an arrest. This group tried to rush past me which would have resulted in breaking our PSU line. The line we formed to keep ourselves not only safe but to prevent any offences from occurring to that ██████. The push in question would have considered assault, as they didn't have the right to push in any capacity. I pushed that smaller group of the larger crowd back and advised them to get back. It was my interruption that they were trying to push past me to possibly prevent an officer from conducting what he was lawfully allowed to do, which would have been an arrest. It was a huge safety concern for me if that line was broken and the crowd was able to get past us that could have resulted in officers or other people of the public getting injured."

11. He went on to state that:

"The small group in front of me that I pushed back, it was one or two individuals that I pushed. One of them was a female. That female then looked at me and deliberately pushed me as an individual – no longer a part of the group pushing forward – what I considered an assault against me, a *Criminal Code* offence. ... That female that pushed me, given that she had just assaulted me – an officer ... working lawfully that day – I grabbed her instinctually [*sic*] from being assaulted. He went on to state that "the grabbing of that

female I felt was lawful as I was in the capacity of a working constable in uniform that day. I felt that the force I used was a minimal amount of force necessary as a result of being assaulted by that female, and that it was reasonable."

12. He said that he used "a minimal amount of force" on the protestor and he would have "likely would have grabbed clothing and likely held on to her between five to ten seconds. During that time, the people around her were pulling her away."

13. He told Sgt. [REDACTED] that upon request of the protestors he provided his badge number.

14. He went on to say that "there were a number of individuals that had signs, 'Death to Pigs'. There was an individual carrying around a fake severed pig's head that had a police hat with blood coming from the neck. That kind of set the tone for what the group ... was doing that day."

15. Constable [REDACTED] has been a member of the VPD since September 2015 and had been with the Public Safety Unit ("PSU") for approximately three to four years. Sgt. [REDACTED] also interviewed Constable [REDACTED]. When asked what Constable [REDACTED] was doing Constable [REDACTED] response was, "I think he was just trying to hold the line and to keep the people at bay, just back. From what I could see the protestors ... kind of reached in towards him, and that was my fear and that is when I decided to step in – just because my fear was that Constable [REDACTED] was getting dragged into the crowd."

16. Sgt. [REDACTED] interviewed Sgt. [REDACTED] who was the supervisor on duty. She was in charge of seven (7) constables. She said the crowd was hostile. There was no barrier between the police and the protestors. She went on to say that:

"Initially it was very precarious and I was quite concerned. At one point there was a scuffle, a commotion to the right of me. I didn't know what I was, what here, because here I'm trying to ... facilitate the protestors and try to protect my people from what's going on."

17. She did not see the incident in question because of the number of people who were present. She said the police purpose at the [REDACTED] was to:

"protect the [REDACTED] and to facilitate a peaceful protest"

She estimated the crowd to be between 200-300 people.

### **Final Investigation Report (FIR)**

18. In his report, Sgt. [REDACTED] concluded that Cst. [REDACTED] had acted appropriately in the whole of the circumstances. Sgt. [REDACTED] examined s. 25(1) of the *Criminal Code* which authorizes a police officer, when acting on reasonable grounds, to use as much force as is necessary in the circumstances. The section justifies the use of force where an officer acting in the lawful execution of his duties acts on reasonable grounds and uses only as much force as is necessary for the purpose of carrying out his duties. As well, he examined the Vancouver Police Department Regulations and Procedures regarding the use of force. He also reviewed the National Use of Force Model ("NUFM") that is applicable to all police forces.

19. In considering the whole of the circumstances he concluded that on a balance of probabilities Cst. [REDACTED] conduct did not meet the standard required for a finding of misconduct.

20. He completed his investigation and submitted his Final Investigation Report ("FIR") to the Discipline Authority ("DA"). In his analysis he concluded that the evidence was not clear, convincing and cogent to satisfy the balance of probabilities test with respect to the allegation of abuse of authority against Constable [REDACTED]. He recommended the allegations be deemed unsubstantiated. He concluded that it was likely AF had come into contact with Cst. [REDACTED] who assumed he had been assaulted by AF and therefore he used force that was necessary to carry out his duties. Sgt. [REDACTED] acknowledged that there was a clear divergence on the accounts provided by AF and Cst. [REDACTED]. AF's perspective was that Cst. [REDACTED] actions were sudden and escalated without provocation. Cst. [REDACTED] said that he acted

lawfully in respect to any force he applied to any protester. Sgt. [REDACTED] concluded that Cst. [REDACTED] had acted appropriately in all of the circumstances.

21. On March 3, 2021 Sgt. [REDACTED] completed his final investigation report (FIR) and submitted it to the Discipline Authority.

### **DISCIPLINE AUTHORITY (DA)**

22. Under section 112 of the Act the Discipline Authority, in this case Insp. [REDACTED] has a duty to review the FIR. Insp. [REDACTED] considered the circumstances and concluded that Cst. [REDACTED] was in the lawful execution of his duty to protect property and to keep the peace. He concluded that it was reasonable for Cst. [REDACTED] to conclude that the pushing of protestors was an attempt to breach the police cordon as well as an assault on himself. He concluded that Cst. [REDACTED] used "soft physical control" with only as much force as was necessary, reasonable and proportionate in the circumstances.

23. In his findings Insp. [REDACTED] found that AF was credible, reliable and did not appear to be "attempting to mislead the investigation". He concluded that the allegation of misconduct was not substantiated.

### **SECTION 117 REVIEW**

24. A decision of a Discipline Authority is subject to review by the Police Complaint Commissioner (see 112(5)(b)). After a review of Insp. [REDACTED] decision, the Commissioner stated:

"I have concerns that Insp. [REDACTED] has not properly considered all the available evidence in his assessment and his decision. I note that Insp. [REDACTED] found AP's statement to be credible in that she appears forthright and does not appear to be attempting to mislead the investigation. ... However, despite Insp. [REDACTED] finding that AP's statement to be credible, as well as reliable, he



does not sufficiently consider and reconcile her evidence as against the evidence of Cst. [REDACTED] in the assessment of the allegation. In addition, Insp. [REDACTED] noted that AP did not appear to be 'attempting to mislead the investigation' yet Insp. [REDACTED] does not make the same assessment of Cst. [REDACTED] evidence."

25. Accordingly, the Commissioner ordered a review under section 117 of the Act.

26. In particular, he made reference to the fact that Insp. [REDACTED] found AP's statement "to be credible in that she appears forthright and does not appear to be attempting to mislead the investigation". The Commissioner goes on to state that Insp. [REDACTED] failed to reconcile her evidence as against the evidence of Cst. [REDACTED]. Moreover, the Inspector did not make a similar assessment regarding Cst. [REDACTED] evidence. The Commissioner went on to state that:

"AP's evidence brings into question the lawful authority to Cst. [REDACTED] to arrest AP and therefore the authority to use force on her to effect that arrest."

### **APPLICABLE LAW**

27. The law is not in dispute. Pursuant to the provisions of section 117 it is my duty to determine whether the conduct of the member "... appears to constitute misconduct" (per s. 117(9)). I must make that determination based on the evidence that is before me in the form of the Final Investigation Report, statements solicited by Sgt. [REDACTED] as well as all documentary evidence. It is unfortunate that there is no video recording of the incident. In a review under section 117, I do not hear oral evidence or live witnesses or consider any additional evidence or submissions by any of the participants involved. This is not an appeal from any previous finding that a missed conduct allegation was not substantiated. This is commonly called a paper-based review. My focus under section 117, if not on the correctness of the earlier finding but rather I am to reach my own conclusion about whether, based on the evidence before me, there is evidence to support a finding of apparent misconduct. Section 117(1)(b) is clear that a retired Judge conducting a review is "to make her or his own decision on the matter".

## ANALYSIS AND CONCLUSION

28. The issue in this review is whether the conduct of Cst. [REDACTED] appears to constitute misconduct within section 77(3)(a)(ii)(A). That section reads as follows:

"'Abuse of authority', which is oppressive conduct towards a member of the public, including without limitation ...

(ii) in the performance, or purported performance, of duties, intentionally or recklessly, ...

(A) using unnecessary force on any person, or ..."

29. I have reviewed the whole of the evidence as disclosed by the materials provided to me in the Final Investigation Report under the provisions of the Act. Sgt. [REDACTED] has prepared a comprehensive report wherein he has provided lengthy and comprehensive statements from all the relevant witnesses. It is clear from the material that with 200-300 demonstrators approaching the [REDACTED], the circumstances were chaotic. While the demonstrators were making demands to have this [REDACTED] removed, the police were attempting to prevent damage. Not surprisingly, the evidence is not at all reconcilable. On the material before me it appears that the parties did their best to give an accurate account of the events. I have carefully considered the written evidence that is before me. As I stated earlier, it is both unfortunate and surprising that there is no video evidence to consider. In the circumstances I am not satisfied that the conduct of Cst. [REDACTED] appears to constitute misconduct under the Act.

  
The Honourable Wally Oppal, Q.C.

This 31<sup>st</sup> day of May, 2021.