

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

AND

IN THE MATTER OF A REVIEW UNDER SECTION 117

AND

IN THE MATTER OF ALLEGATIONS OF MISCONDUCT

AGAINST

CONSTABLE [REDACTED]

CONSTABLE [REDACTED]

CONSTABLE [REDACTED]

CONSTABLE [REDACTED]

OF THE VANCOUVER POLICE DEPARTMENT

**NOTIFICATION OF MISCONDUCT AND NEXT STEPS PURSUANT
TO SECTION 117(7)**

- To: Constable [REDACTED]
Constable [REDACTED]
Constable [REDACTED]
Constable [REDACTED] (Members)
c/o Vancouver Police Department
Professional Standards Section
- AND TO: Mr. Clayton Pecknold (Commissioner)
- AND TO: Chief Constable Adam Palmer (Police Chief)
c/o Vancouver Police Department
Professional Standards Section
- AND TO: Sergeant [REDACTED] (Investigator)
c/o Vancouver Police Department
Professional Standards Section

1. Overview

[1] This is a review under Section 117 of the *Police Act*, R.S.B.C. 1996. c. 367 ordered by the Police Complaint Commissioner on August 1, 2019 against the four named members of the Vancouver Police Department.

[2] Because proceedings under Section 117 of the *Police Act* are not public, I will not refer to the members by name in this Notification; rather they will be identified as Officers A, B, C and D, respectively, in the order they are referred to on the first page.

[3] The review at this stage is a fresh consideration of the final investigation report and the evidence and records referenced in it to determine whether there is misconduct that appears to be substantiated and appears to require the taking of disciplinary action. Section 117 requires me to make my own decision on the issues, including what types of misconduct may arise from the facts. The legislative time frame and context of Section 117 dictate that while the review needs to be thorough, it is relatively cursory¹. The investigation took several months, and Section 117 provides for a 10-working day turnaround.

[4] In addition, if misconduct is identified, the reviewer under Section 117 becomes the discipline authority and must not at this stage appear to be pre-deciding the outcome, in the absence of an opportunity for the subject officers to respond. In-depth analysis and weighing of the evidence is reserved for the subsequent discipline proceeding, if one takes place².

2. History of the Proceedings

[5] This matter came to the attention of the Office of the Police Complaint Commissioner on May 7, 2018 as a result of a report by the Vancouver Police Department pursuant to Section 89 of the *Police Act* due to injuries sustained by a suspect in an arrest on May 6, 2018. That report was referred to the Independent Investigations

¹ Scott v. British Columbia (The Police Complaint Commissioner) 2016 BCSC 1970

² Scott v. B.C. op cit., para.30

Office, who declined to pursue an investigation. The former Commissioner subsequently reviewed the matter and ordered an investigation on September 19, 2018.

[6] After a supplementary investigation, the final investigation report was delivered on June 27, 2019. The Commissioner reviewed the report and issued a Notice of Appointment of Retired Judge under Section 117 on August 1, 2019. The report and related materials were delivered to me on September 3, 2019. Section 117(7) requires this Notification be delivered by September 17, 2019.

3. Conduct of Concern [Section 117(8)(a)]

[7] What follows is a brief summary of the incident for the purpose of identifying the conduct of concern. I will provide more detail in my later consideration of whether the evidence appears sufficient to substantiate the allegations.

[8] The incident at issue commences with the attendance on the morning of May 6, 2018 by Officers B and C at a staffed single room occupancy building on the downtown east side in Vancouver. The officers had been asked to assist another police agency to locate a male on an outstanding arrest warrant relating to a domestic violence incident that arose in 2016. The officers attended a suite they understood to be the subject's and knocked and announced their presence. They detected male and female voices within. The occupants refused to open the door. An attempt by a staff member at the residence to open the door with a key was unsuccessful. The officers obtained approval from Officer A to use a battering ram to enter the suite.

[9] Officer A attended with the battering ram and other officers arrived, including Officer D. Officer C struck the door with the battering ram. After several strikes, the officers perceived that bear spray had been deployed under the door. An occupant agreed to open the door. A male and female came out and were forcibly arrested.

[10] Officer C went into the suite and encountered a third occupant. That individual was arrested forcibly by Officers A, C and D. In the process of the arrest the individual sustained a broken nose, and lacerations to his temple and scalp requiring staples and stitches. While receiving medical assistance from the officers in the suite, the individual

was searched by Officer D, who found a canister containing drugs. The individual received medical attention from paramedics at the scene and was taken to hospital. While he was being treated at the scene a paramedic found on him a folding knife. Medical personnel at the hospital found a package of drugs on him. A further search by Officer C after that yielded a further package of drugs in his sock.

[11] The entry of the suite, the arrests of the occupants, the injury to one of the individuals, and the discovery of the weapon and drugs by medical personnel give rise to concerns regarding the conduct of the four named officers. The Commissioner in his Notice of Appointment expressed the concerns as follows:

...it is my view that the forced entry was not a justifiable use of their powers in the circumstances. There were no reports to police that suggested violence in the suite and no information was received at the scene to suggest a potential emergency or imminent risk of harm to any of the occupants. The officers' police reports and communications with Crown Counsel reflect a lack of certainty with respect to who was inside the suite. Any reliance on a risk to the safety of the occupants was speculative. Therefore, the warrantless entry was not in my view consistent with section 8 of the Charter.

Further I am of the view that not only was entry into the suite unlawful, but the conduct of the officers contained blameworthy elements that should properly have resulted in a recommendation of substantiation by the Discipline Authority. First, the evidence supports a conclusion that officers intentionally entered the suite and rapidly escalated the incident by using unjustified force on the parties inside, causing injuries to one of the occupants. Force was also used on the individual about whose safety the officers were purportedly concerned.

Although the members' evidence suggested that they believed they had been assaulted with a weapon, there was no effort to investigate those charges and the officers initially cited obstructing a peace officer as the reason for arrest. It is also noteworthy that the purported assaultive action - the deployment of bear spray - occurred after the officers had begun their efforts to unlawfully enter the suite.

Second, the evidence indicates a singular focus to access the suite and determine whether the subject of the warrant was inside and a disregard for the rights of the occupants. Notably, the officers' initial attempt to gain entry occurred only a few minutes after arriving at the scene, by obtaining a key from the landlord. The members were not deterred when those efforts were unsuccessful and determined

that they would breach the door. It is my view that the evidence supports a finding that the members either intentionally determined that they were going to enter the suite to achieve their objective, despite not having the authority to do so, or at minimum, were reckless regarding their authorities.

In my view, the conduct of the officers in this case is characterized by a blameworthy element, rather than a simple mistake of legal authority or an error forgivable because of a lack of training, and therefore constitutes Abuse of Authority pursuant to the Police Act.

4. Allegations Considered [Section 117(8)(c)]

[12] I have identified and considered the following allegations arising out of the conduct of the officers. Here I will name the officers so they receive proper notice of the allegations, and provide particulars with respect to the conduct and individuals involved.

[13] In relation to Constables ██████████ ██████████, ██████████ and ██████████

1. Abuse of Authority, pursuant to section 77(3)(a) of the Police Act; which is oppressive conduct towards a member of the public, by unlawful entry of a residence.

[14] In relation to Constables ██████████ ██████████ and ██████████

2. Abuse of Authority, pursuant to section 77(3)(a)(i) of the Police Act, which is oppressive conduct towards a member of the public, including, without limitation, intentionally or recklessly making an arrest without good and sufficient cause; to wit, ██████████
3. Abuse of Authority, pursuant to section 77(3)(a)(ii)(A) of the Police Act, which is oppressive conduct towards a member of the public, including, without limitation, in the performance, or purported performance, of duties, intentionally or recklessly using unnecessary force on any person; to wit, ██████████.

4. Neglect of Duty, pursuant to section 77(3)(m)(ii), of the Police Act, which is neglecting, without good or sufficient cause, to promptly and diligently do anything that it is one's duty as a member to do, in relation to the arrest of [REDACTED].

[15] In relation to Constables [REDACTED] and [REDACTED]

5. Abuse of Authority, pursuant to section 77(3)(a)(i) of the Police Act, which is oppressive conduct towards a member of the public, including, without limitation, intentionally or recklessly making an arrest without good and sufficient cause; to wit, of [REDACTED], and;
6. Abuse of Authority, pursuant to section 77(3)(a)(ii)(A) of the Police Act, which is oppressive conduct towards a member of the public, including, without limitation, in the performance, or purported performance, of duties, by intentionally or recklessly using unnecessary force on any person; to wit, [REDACTED]

5. Does the Evidence Appear Sufficient to Substantiate the Allegations? [Section 117(8)(d)(i)]

A. Review of the Evidence and Materials

i. Entry to the Suite

[16] The following summary of facts comes from the reports and duty statements of the members involved, 911 call records, and the investigator's later interviews with the suite occupants and officers involved. In light of the legal standard for assessing the officers' behaviour³ I have endeavoured at this stage of the proceedings to consider the facts from the perspective of the officers. I also bear in mind that I am not making findings as to misconduct at this stage; rather as to whether misconduct appears to be

³ Akintoye v White, 2017 BCSC 1094 (CanLII), paras. 103, 104

substantiated.⁴ Accordingly I will not weigh the evidence and will instead consider whether there is evidence which, if established on a discipline proceeding, would support that conclusion.

[17] Officers B and C were dispatched to the building to execute an outstanding domestic assault warrant on a 2016 Langley file. The officers had the name [REDACTED] for the complainant on that file, and had viewed a 2016 photograph of the subject male on their car laptop. They confirmed with staff at the building that the individual who was the subject of the warrant resided in the suite and that a female also lived there. They attended at the door of the suite.

[18] Later evidence from the individual who was the subject of the warrant discloses that there may have been two warrants, one for the original matter, and one for a failure to appear in court arising within a few months prior to the incident date. It is unclear how much of this information was available to Officers B and C when they attended at the suite. Officer B referred to the warrants in her duty report as “two warrants for assault against a female.”

[19] Officers B and C had been advised by the front desk staff that the male occupant of the suite had been in the suite earlier and may have been doing drugs. When they arrived at the suite door, they heard male voices inside. They knocked and announced that they were police and that they were looking for the warrant subject. A female voice responded and refused to open the door. The female initially declined to identify herself but later gave a first name which was not [REDACTED].

[20] The officers could hear clicking at the door latch as if it was being jammed. The staff member attempted to persuade the occupants to open the door, but they did not. The female expressed some doubt about whether the officers were in fact police, and Officer C told her to look out the peephole at his shoulder badge.

[21] The officers asked the staff member to use a key on the door, and he went to seek permission from the manager. While the officers were waiting at the door, the female from the suite called 911 to report an attempted break-in. She gave her name to the dispatcher; a different name from the complainant on the warrant file, and the same (first) name she gave to the officers at the door. She advised the 911 dispatcher that she was

⁴ Scott v. B.C. (The Police Complaints Commissioner), 2016 BCSC 1970

concerned about someone trying to enter her suite and that she did not know who they were. She said she could not see them as they appeared to be covering the peephole. She said nothing about being in distress or threatened by the suite occupants.

[22] Officer B spoke to the dispatcher, who told her the name of the complainant and that she was stating she did not know who was at the door. Officer B advised the dispatcher that she and Officer C were at the woman's suite. The dispatcher offered to call the woman back, but Officer B declined.

[23] The staff member brought the key but the lock would not open, as if it was jammed. According to the staff member, the complainant told the police at the door that she was fine.

[24] Officers B and C state in their police reports and duty statements that they concluded that the man or men in the suite might be preventing the woman from opening the door, that she might be the complainant from the assault file, and that they had concerns for her safety which they believed they had a duty to investigate. They concluded that they needed to enter the suite to confirm her safety.

[25] After that, Officers B and C sought direction by telephone from Officer A, the acting sergeant. According to Officer A's duty statement, the two advised him that they "did not know whether" the woman in the suite was the victim on the original domestic assault warrant, and "were concerned that [she] may be in danger and in need of police assistance".

[26] Officer A sought direction from an Inspector, relating to him the concerns of the officers on scene. In his statement, the Inspector says he was told the "officers were worried that [the female] might be the victim in the domestic case and thus were concerned for her wellbeing," and that Officer A sought his opinion regarding forcing entry into the suite. The Inspector states he advised Officer A that "if the members believe on reasonable and probable grounds that exigent circumstances exist and it is necessary to enter the dwelling to prevent imminent bodily harm or death to any person, then they should announce their presence and purpose and if the occupants are non-compliant they would be justified to enter using appropriate levels of force if required." He adds:

Warrantless entry to ensure the wellbeing of the occupants in a dwelling house has been upheld in court in cases such as R vs Godoy and R vs Nicholls. [Officer A] stated he understood and would be present for the ‘announce and entry’ and would advise me regarding the outcome.

[27] Officer A attended the building with a battering ram. Officer D and another officer also attended. The officers called out to the occupants of the suite that they needed to ensure the safety of the woman and that the ram would be used if they failed to open the door. The occupants did not respond. Officer C used the battering ram on the door of the suite, ramming the door a total of 10 – 12 times without success.

[28] While this was occurring the officers perceived that someone had deployed mace or bear spray under the door into the hallway. Video from the hallway shows the officers apparently reacting to this. After that, one of the occupants announced that they would open the door, and it was opened.

ii. Arrest of the Female

[29] The subject male and a female came out of the suite. Reports describe them alternatively as compliant or non-compliant. Officer B states that the female was flailing and yelling at the police, and says:

I immediately grabbed hold of her [at] which time she struggled and was not listening ... as I told her to get on the ground. I turned once full circle with her in the hallway next to the elevator before she partially laid down on the ground, still bracing with her right arm locked out and pushing up. It was at this time that [Officer A] commanded her to listen and get on the ground, leg sweeping her arm out from under her. I then handcuffed her and kept her in the hallway until the apartment could be controlled.

[30] Officer C stated that the male and female complied with his commands to put their hands in the air. Officer D described a scuffle between the female and Officers A and B. Officer A said the male refused to leave the suite and had to be dragged out and the female came out and was taken into custody by Officer B. The male was arrested by Officer D and another officer and in due course identified as the subject of the warrant. The female gave the name she had provided through the door and on the 911 call.

[31] The female described to the investigator in her interview that she and the male were “yanked out”, had their arms twisted and their faces stepped on, and that she was thrown against the wall. She further stated that she “had her head stepped on ‘excessively’,” and “that her wrists were swollen from handcuffing, [she had] soreness from her arms being twisted, and being thrown against the wall.” She described the actions of the police as going “overboard”. She believed it was the female officer who stepped on her head, and a male officer who twisted her arm.

iii. Arrest of Third Occupant

[32] Officers A and D state that the female informed them that there was another occupant in the suite. Officer A states that he authorized a secondary search of the suite to ensure there was no one left in it, having not yet positively identified the man in custody as the subject of the warrant. Officer C states that he entered the suite to confirm whether there were any other occupants.

[33] A third individual, whom I will call Mr. X, was seated in a chair facing away from the door. Officer C states that he observed multiple knives and needles near him, and was concerned about why he seemed unfazed by the commotion. He informed Mr. X that he was under arrest and to show his hands. Officer C states that “everyone in the suite was under arrest for obstruction, and that we were also investigating the Assault caused by the bear spray.”

[34] In response, Mr. X yelled, “Fuck off... I’m not under arrest... I don’t have to listen to you!”

[35] Officer C states:

I placed my hand on his shoulder to place him into handcuffs. [He] resisted arrest by pulling his hand away from me; I then executed a foot sweep to place [him] on the ground in order to safely gain control. [He] landed on his back and lifted his foot up towards me in an assaultive manner. It appeared to me that he was using his elevated foot and leg to stop me from gaining control of him. At this point, [he] had gone from actively resistant to Assaultive.

...I got on top of [him] when he was on the ground and holding his foot up towards me while trying to stop me from gaining control of him. There was a

struggle when I was on top of [him] and it was odd to me that [he] was holding his arms tight against his body but resisting at the same time.

...I was eventually able to turn him over to his stomach.

...he continued his odd violent resistant behavior and tucked in his arms tight to his body. He refused to comply with my demands and was actively resisting arrest. At that point, I delivered some strikes to [his] face as a distraction technique in hopes to have [him] begin complying with police. [Officer D] ...entered the suite to assist with the arrest.

After delivering approximately 10-12 stuns to [Mr. X's] face area, and with the assistance of [Officer D], I was finally able to place [him] into handcuffs. ...During those strikes, I noticed that [Mr. X] was continuously moving his head around as if he was trying to dodge the strikes. Oddly enough though, he was maintaining the tight arms tucked into his body.

[36] Officer C had called out for assistance from the other officers in the hallway. Officer D entered the suite and states that Mr. X was not complying with Officer C's verbal commands, had his fists clenched and was kicking Officer C's legs. Officer D also observed items in the apartment which caused him to believe that Mr. X may have a weapon in his possession or within arm's reach. In addition, he states, he was unsure who Mr. X was and whether he may in fact have been the "violent male with the warrant." Officer D states that he grabbed the man's arm and told him to show his hands. Officer D states that Mr. X "continued to clench his fists and pull toward his body and kicked us away from him striking my shins at least twice."

[37] Officer D further states:

Given [Mr. X's] assaultive behavior, the deploying of what I believed to be bear spray, [his] non-compliance with police commands, and his easy access to weapons, I felt there was an immediate need for control to prevent further violence and potential injury to [him] and the members on scene. I knew that if [he] were to have reached for one of the weapons available to him it may have resulted in grievous bodily harm or death or an escalation to a high level of force used by members.

Over the next approximately 45 seconds [he] continued to fight and resist arrest. I subsequently delivered approximately 6-7 knee strikes, kicks and punches to [his]

upper body and head while still holding on to one of his arms attempting to pull it loose.

[38] Officer A also entered to assist. He states that he observed Mr. X actively resisting the officers, and applied a single kick to Mr. X's head "to gain immediate control and compliance of a violent male." Mr. X was successfully handcuffed and determined to be in need of first aid treatment.

[39] Medical records subsequently disclosed that Mr. X's injuries consisted of a head laceration requiring 10 staples, an additional laceration to his temple requiring stitches, a fractured nose and a possible injury to his shoulder which was ultimately not confirmed.

iv. Search of the Third Occupant

[40] Officer C formally arrested Mr. X and Officer D searched him, finding a metal canister containing three baggies of drugs in his right pants pocket. Officer D states, "I searched his person for any weapons or escape aids, in particular focusing on the areas within reach of his hands such as his pockets and waistband."

[41] Officer C described this search as a "quick pat down search" due to Mr. X's injuries. Officer C states that he searched the area that was accessible to him while also attending to Mr. X's injuries, and was satisfied that Mr. X was not going to be able to cause any harm to anyone nearby.

[42] Officer D then placed Mr. X into the recovery position while they awaited emergency health services. Officer D states that while they waited, Mr. X blamed the warrant subject for using bear spray and described the container. Officer D states he took a look around the suite but it was too cluttered and he was unable to locate a container.

[43] Mr. X was taken into an ambulance at the scene and while Officer C was present, a paramedic found a folding knife in Mr. X's waistband. Officer C states that he asked Mr. X if he had any other weapons or items and he did not mention any.

[44] Mr. X was taken to the trauma bay at the hospital and treated there. While treating Mr. X, hospital staff observed a soft black bag containing narcotics fall from Mr. X's armpit, and brought it to Officer C's attention. Officer C then conducted a further search of Mr. X and found more drugs in his sock.

B. Analysis

[45] The issues raised by the Commissioner in his Notice were whether the forced entry of the unit was justifiable; whether the force used in effecting the arrests of the woman and Mr. X was excessive, and whether the officers failed in their duty to properly search Mr. X for weapons and contraband incidental to arrest. I agree with this characterization of the issues and will consider them in sequence, bearing in mind that at this point the analysis is whether the evidence appears to substantiate the allegations.

i. Entry to the Suite

[46] The question in relation to the entry of the suite without a warrant is whether the officers believed there were exigent circumstances requiring immediate entry. It is clear from the Inspector's and Officer A's reports that the officers were alive to the legal requirements; i.e. that entry of a residence without a warrant or consent may only be made if there are reasonable and probable grounds to believe that exigent circumstances exist, and that it is necessary to enter the dwelling to prevent imminent bodily harm or death to any person. This was the instruction Officer A received from the Inspector.

[47] The basis for entry was the police common law power to enter a residence to protect life and ensure public safety. This was defined in the case of *R. v. Godoy*, [1999] 1 S.C.R. 311, which was followed in *R. v. Brunskill*, 2010 BCSC 187, where Truscott J. stated:

[38] This is what I accept as the standard that must be met on the test of justifiability of the conduct under the second test of *Godoy*. The suspicion must be honestly held and objectively reasonable on the information known to the police before it can be said that their actions are justified.

[48] In considering the information known to police the officers' viewpoint is to be considered from the perspective of their training and experience and the circumstances that they are facing.

[49] Based on the officers' version of the events, and without weighing the evidence at this point, the entry to the suite would not appear to be objectively supported by exigent circumstances. The officers themselves speak only of confirming the safety of the female, and apart from the nature of the dated warrant, there were no surrounding facts to indicate that anyone within the suite was in distress.

[50] The conclusion that the female "might be" the victim on the 2016 assault file would appear to be speculative and not supported by the available facts, such as the 911 call, in which the woman was not expressing distress, rather complaining about the attempts of the police to enter her residence. Although the investigator in his report suggested it was immaterial whether she was or was not the complainant, a conclusion that she was or might be in distress and experiencing duress from the male occupants would have been that much more speculative, without that factor. The cases in which grounds have been upheld clearly involve something more substantive suggesting "imminent bodily harm," such as a report of an altercation or a disconnected 911 call.

[51] In this case, in fact, the 911 call and surrounding circumstances as disclosed in the reports objectively seem only to support a conclusion that the female was not the victim on the warrant file, and was not in distress, given her access to 911 and ability to articulate concerns regarding the attempted entry to her suite. The officers attending, Officers B and C, were aware of this 911 call, and Officer B declined the opportunity to have the dispatcher call back and ascertain whether the female was in distress. This decision would appear to detract from a conclusion that the officers' primary concern at that point was the woman's safety.

[52] The basis for the authorization of forced entry to the suite, being the initial officers' assertion that they were concerned for the woman occupant's safety, would appear not to be supported by the surrounding circumstances.

[53] I have considered whether the fact that the entry was authorized by two superior officers might support a finding of good faith on the part of the two officers who sought and obtained that approval. Similarly, the issue arises as to whether the opinion provided

by the Inspector that entry was justified could establish that Officer A was acting in good faith.

[54] The issue of good faith arises from the wording of Section 77(3)(a) of the Act, which refers to intentional or reckless behaviour. Considered at this stage of the proceedings and without submissions on the part of the officers, I would be of the view that the duty to determine whether there are grounds for the taking of an intrusive action like forcible entry with a battering ram, under the cloak of the authority of the common law duty to protect life, would lie at first instance with the officers in the field who are making the firsthand observations. Whatever may be said about the supervisors' authorization of the actions, that authority was based on Officers B and C's assertion of a belief that exigent circumstances existed and there was reason to believe that the woman was in danger of imminent harm.

[55] As noted by Adjudicator Oppal in the Section 117 Review on OPCC File No. 2016-11505, where an officer's actions go beyond misapplication of the law to a failure to apply the analysis that is required in relation to a decision to escalate his or her intervention, it can amount to recklessness. Good intentions or good faith are not a full answer to misapplications of force or authority, if, assessed against an objective yardstick, the proper analysis was not applied. I would add to that, the yardstick has been clearly established to be that of the trained officer applying the legal principles in the field, in the circumstances that exist at the time the decision is made or analysis is applied, which is why I have endeavoured to consider the evidence from the officers' point of view.

[56] Nonetheless, the evidence supports a conclusion at this stage of the proceedings that a decision that common law grounds existed was at best reckless on the officers' parts. Officer A relied on the belief in grounds conveyed to him by Officers B and C, but had an equal duty to satisfy himself that they were supported by the facts, by making sufficient inquiry both on the telephone call and again on arrival at the scene with the battering ram.

[57] It is not enough for the officers to have had the subjective belief that they had the authority to forcibly enter the suite, if it is not objectively supported by the observations they made. Similarly to the analysis below pertaining to the assessment of the need for force, the issue in relation to oppressive conduct under Section 77(3)(a) is whether the officer who took the action turned his or her mind to whether the underlying facts supported a conclusion that grounds existed. A failure to perform that analysis could substantiate a finding of recklessness.

[58] Officer D arrived after the decision to enter had been made and it would appear he did not participate in the forcible entry other than by standing by, before he entered the suite. He was, however, presumably aware of the basis for the investigation and the events that had transpired. He was present for the arrest of the first two individuals. Officer D would appear to have been part of the team that effected the forcible entry. He later entered the suite, after the commencement of the altercation between Officer C and Mr. X.

[59] At this stage of the proceedings, Officer D's entry of the suite would appear to fall with the unlawfulness of the initial attempt at forcible entry. Officer D would have the responsibility of performing his own assessment as to the existence of grounds and authority to enter the suite, when he did. Given the problems that may be substantiated in relation to the initial entry, the facts at this stage would appear to support a conclusion that Officer D did not perform that assessment.

ii. Arrest of the Female

[60] Once the officers gained entry to the suite, the issue becomes whether there were grounds for Officers A and B to arrest the female occupant, as she left the suite. The evidence would appear to support a conclusion that in doing so the officers were no longer relying on their common law duty to ensure her safety.

[61] According to the officers, the focus had become the obstruction by the occupants of the officers' entry, and investigation of the assault of the officers with bear spray. Without weighing the credibility of those assertions, the evidence would appear to

substantiate a conclusion that, if the basis for the officers' original entry was their belief that the woman was potentially in peril, nothing had changed in that respect, by the point at which she was arrested. The officers' first duty was arguably to satisfy themselves that the woman had not been in distress or under duress. A belief, as the door was opened and the woman left the suite, that she had been obstructing the police by refusing to open the door while they were attempting to do so would appear to be inconsistent with the asserted basis for their attempts, that she was in distress and acting under duress from the males in the suite.

[62] Perhaps the woman could have been detained and questioned in order to investigate whether she had a voluntary role in any offence the officers believed may have occurred, but the evidence does not appear at this stage to objectively support grounds for arrest, in the circumstances as the officers understood them at that point.

[63] Again, without weighing the evidence there would appear to be support for a conclusion that in effecting the arrest of the woman as she came out of the suite, Officers A and B were reckless as to the existence of their grounds for doing so. Viewed in light of the problems with the entry that would appear to be substantiated, the concerns regarding lawfulness of the arrest may be compounded.

[64] The degree of force described by the woman, and substantiated to some extent by Officer B's statement, would also seem to support a conclusion that it was objectively unnecessary. The evidence at this stage appears to substantiate a finding that there was an insufficient verbal attempt to have the woman submit to handcuffing before she was taken to the ground and placed forcibly into custody. There is support for a conclusion that neither Officer A nor Officer B performed an assessment as to whether any force was required, and then, what degree of force was necessary. Viewed in the context of the reasons for the officers' attendance at the suite and the basis for their forcible entry, recklessness would again appear at this stage to be substantiated.

iii. Arrest of Third Occupant

[65] Considering firstly the evidence relating to the decision to arrest Mr. X, I observe that there are objective concerns about the authority of Officer C to enter the suite at that

point, given the original basis for the officers' attendance. The police presence would arguably have permitted containment while the identity of the persons who had come out of the suite was confirmed, and the original reason for the entry was fulfilled. The grounds for entry would have dissipated with the knowledge that the female was not in distress. In addition, it would appear there was evidence available to the officers that would have permitted an early confirmation that the first male was the subject of the warrant, including the fact that Officers B and C had seen a photograph of him.

[66] Again, the officers each suggest that the focus had changed to arrest for obstruction and investigation of the assault by bear spray on the police, but as I have stated in relation to the arrest of the female, there appears objectively to have been no attempt to investigate, before the decision to forcibly arrest all the occupants. This would seem to reflect a failure to address the existence of grounds before making the arrests.

[67] Moreover, Officer C's entry of the suite directly following the perceived deployment of bear spray, the officers' later apparent disinterest in searching for the container, and the failure to subsequently investigate an obstruction charge against any of the occupants, all appear objectively inconsistent with a belief in grounds to arrest for either of those offences, upon entry. At the time of his arrest, Mr. X was an unidentified occupant of the suite, who appeared to be somewhat oblivious to the efforts of the police and the arrest of his colleagues. There would appear, on the evidence at this stage, to be no objective basis for a conclusion that he had probably committed an offence.

[68] Perhaps again detention for investigation may have been warranted, but the failure to assess the adequacy of grounds to make a forcible arrest at that point would appear to substantiate a finding of at least recklessness. Similarly to the case decided by Adjudicator Oppal referred to earlier, it would appear that the arresting officer failed to perform the analysis required to identify the grounds for his arrest of the individual. As in that case, Mr. X's verbal rejection of the arrest should have prompted a consideration on the part of the officer of the basis for his arrest, rather than an escalation of his efforts. His assertion that "everyone was under arrest" for obstruction and investigation of the assault with bear spray represented a blanket decision which, as I have observed, does not

appear to have an objective basis, nor does Officer C appear to have turned his mind to whether it did, on the facts as disclosed at this stage of the proceedings.

[69] The decision to arrest Mr. X at the time when Officer C made that decision would appear to substantiate a conclusion that Officer C was reckless as to whether he had sufficient grounds to forcibly arrest the individual for a criminal offence, at that point.

[70] In relation to the use of force in connection with an arrest or detention, Adjudicator Oppal noted that the use of force in connection with a bad arrest or detention was likely itself objectively unjustified, and that might be the end of the analysis. Continuing however to consider whether the use of force might have been justified from the officers' perspective if they believed the detention was authorized, the analysis is in any event a similar one to that related to the formation of grounds.

[71] I have had prior occasion⁵ to refer to the case of *Akintoye v. White*, 2017 BCSC 1094, which contains a comprehensive and current summary of the law relating to use of force:

[101] A subjective-objective or modified objective test is applied to assess the reasonableness of a police officer's belief that the force used was necessary: he or she must subjectively believe the force used was necessary and that belief must be objectively reasonable in all the circumstances.

[102] Recognizing police officers often engage in dangerous and demanding work that requires them to react quickly, they are not expected to measure the level of force used "with exactitude". Put another way, they are not required to use the least amount of force necessary to achieve a valid law enforcement objective. Although entitled to be wrong in judging the degree of force required, an officer must act reasonably (*Crampton v. Walton*, 2005 ABCA 81 (CanLII) at para. 22). The common law accepts that a range of use of force responses may be reasonable in a given set of circumstances (*Bencsetler v. Vancouver (City)*, 2015 BCSC 1422 (CanLII) at para. 153). The reasonableness, proportionality and necessity of the police conduct are assessed in light of those circumstances, not based on hindsight.

[103] The defendants suggest the approach taken in *Berntt v. Vancouver (City)*, 1999 BCCA 345 (CanLII), should be applied to determine whether the

⁵ https://opcc.bc.ca/wp-content/uploads/2017/06/11867_2017-07-14_Notice_of_Adjudicators_Decision.pdf

officers' use of force was justified. Justice Southin described the trial judge as adopting the role of a "doppelganger" at the moment of the impugned action:

[25] The judge must go with the officer, at least from the time the officer first was sent to the place where the riot was in progress. I say "at least" because the peace officer's training experience, the orders of the day given to him, are all part of what goes into the answer to the question of "reasonable grounds".

[104] More recently in *R. v. Pompeo*, 2014 BCCA 317 (CanLII), the Court of Appeal clarified that although the trial judge must consider the matter from the stand point of a person with the background, experience and training of the officer in question, the doppelganger "imagery" was simply an illustration of the nature of the subjective-objective test for assessing the reasonableness of the officer's belief the force used was necessary (at paras. 36 and 40).

[72] Because of the need to consider the matter from the standpoint of a trained officer in the heat of the moment, again, I have looked at this issue from the perspective reflected in the officers' duty statements.

[73] While I accept that the situation could have become volatile if Mr. X became aggressive, the evidence appears to substantiate a conclusion that he had not yet done so by the time Officer C took him to the ground, off his chair. At worst, at that point he would seem to have been verbally non-compliant, and then, perhaps, slow to comply. In addition, given the questionable grounds, Mr. X's verbal reaction to the suggestion he was under arrest would not have been unreasonable. The evidence available at this juncture would appear to substantiate a conclusion that Officer C was disturbed by Mr. X's firm verbal rejection of the arrest rather than that he perceived any immediate physical threat requiring the physical response he employed.

[74] The evidence appears to substantiate a conclusion that even if he had grounds to arrest, physically taking Mr. X into custody at that point, in the manner that Officer C did, may have been precipitous and unnecessary. Once Mr. X was on the ground it would appear that he may have been non-compliant, but not, from an objective standpoint, aggressive. Moreover, the description by Officer C of him putting his leg up does not seem to support the characterization of "actively resistant".

[75] The involvement of Officer D and then Officer A in the use of force came after Officer C's decision to arrest, so they were not a party to that decision; however the evidence supports a conclusion that the officers had made a collective decision to arrest all of the occupants, so they had their own duties to assess the grounds for doing so, in addition to assessing whether force was required..

[76] Officers D and A came in response to Officer C's request for assistance, at which time Officer C was on the floor, on top of Mr. X, who was either on his back or had been turned onto his front. The officers state that they observed he had his hands clenched and held tight to his sides, throughout the arrest process, until he was handcuffed.

[77] Was it reasonable on the part of the two officers who came in at that point to see the struggle to apply the force that they did, when they did? Relying on Adjudicator Oppal's reasoning the use of force could fall with the absence of grounds for arrest. I would however add to that the fact that based on the observations of the officers, Mr. X was on the floor with an officer on top of him, not up and on the attack, not even attempting to get up, it seems, nor apparently capable of doing anything other than resist the efforts to handcuff him. Officer B was apparently able to turn him over, and the primary issue appears to have been that he was unable to get him into handcuffs.

[78] While there is an indication that the man was kicking, the evidence would appear to substantiate a finding that the three officers could have managed to contain a man who was already on the floor without the application of the degree of force admitted by them: 10 – 12 punches to the head, 6-7 knee strikes, kicks and punches to his upper body and head, and a solid kick to the head. The very significant injuries that Mr. X experienced would also objectively appear to substantiate a conclusion of excessive force.

[79] The evidence appears to support a conclusion that all of the officers failed at the time to properly assess the degree of force that was required to contain the individual, if indeed they had a need or right to contain him. If that is the case, it would substantiate a conclusion of intent or recklessness.

[80] Viewed objectively, and considered from the perspective of the officers' observations and understanding of the situation, a conclusion of excessive force appears at this stage to be substantiated.

iv. Search of the Third Occupant

[81] Having made the decision to take Mr. X physically into custody, by force, in part due to a concern that he might have access to weapons in the suite, the arresting officer, Officer C, and Officer D who assisted him, would have had a duty to perform a search incidental to arrest.

[82] Officer D provides a description of the search he performed. Officer C describes the search as quick due to the extent of Mr. X's injuries. Although it is not clear whether Officer C also physically searched Mr. X while they were in the suite, he appears to suggest that he performed a search at some point at the scene, before the knife was discovered in Mr. X's waistband while he was in the ambulance. There is no detailed description of that search. Officer C was not primarily responsible for Mr. X's medical treatment once the paramedics arrived, although he appears to suggest that he felt required to prioritize that over searching Mr. X while in the suite. In any event, Officer C was present for the search performed by Officer D while they were in the suite and appears to have been primarily responsible for custody of Mr. X. Officer A was present and participated in the containment of Mr. X, and was the supervising officer on the scene. It does not appear however that he physically searched the suspect.

[83] While Officer D states that he searched Mr. X's waistband area in the suite, if that is the case, objectively considered, the search was inadequate, because he missed the folding knife which the paramedic in the ambulance found by lifting Mr. X's shirt. Officers A and C, being present for that search and involved in the arrest, would appear to have an equal duty to ensure that the suspect was properly searched, particularly given the officers' shared concern about Mr. X's ability to access weapons within the suite.

[84] It is not clear at this stage what departmental policy would dictate about the nature or timing of the searches or who should have "cleared" the suspect, but because both

Officer C and Officer D assert that they performed searches, it would seem the duty reasonably lay with each of them. Given Officer A's supervisory position and involvement in the arrest, there would appear to be substantiation for a conclusion that he also had responsibility. The surrounding circumstance observed by all three officers within the suite would appear to support a conclusion that they each had a duty to ensure that the suspect did not have weapons in his possession before emergency personnel took over his care, despite his injuries. The evidence suggests that he was conscious and mobile, albeit handcuffed.

[85] The discovery of the weapon in his waistband, in the ambulance, not only suggests the search within the suite was inadequate, but also that Officer C should have performed a more thorough search at that point., or at some point before the suspect was delivered into the care of further personnel at the hospital. The discovery of drugs under the suspect's arm and in his sock at the hospital would again appear to objectively substantiate the inadequacy of the prior searches, particularly, again, given the basis for the arrest having included professed concerns about access to (and use of) weapons, and then, the actual discovery of a weapon on the individual.

[86] Objectively considered, the evidence at this stage would appear to substantiate neglect of duty by the officers who performed the searches of Mr. X and by the supervising officer who was directly involved in the arrest and final containment of the suspect.

6. Notification of Misconduct and Next Steps [Sections 117(7) & (8)(d)]

[87] Following the requisite review I have determined that the allegations set out in Part 4 above appear to be substantiated.

[88] The range of penalties to be considered include all of those enumerated in Sections 126(1)(c) to (k) but do not include dismissal or reduction in rank.

[89] The members will each be offered a prehearing conference under Section 120;

[90] If the members or a member declines a prehearing conference, a discipline proceeding will be convened within 40 business days from the date of this Notification.

[91] Within 10 days of receipt of this Notification the members may file a request to call witnesses under Section 119.

[92] In accordance with prior authority relating to the time frames under this part of the Act⁶, I direct that the members advise me whether they will accept the offer of a prehearing conference within 5 days of the later of:

1. the date on which they advise me that they will not request witnesses under Section 119;
2. the expiry of the time for making a request for witnesses under Section 119(1); or
3. the date on which they receive a decision pursuant to Section 119(3)(a) rejecting a request to call witnesses.

[93] In the absence of a member's acceptance within the time frame set out in the paragraph above, the offer of a prehearing conference for that member is withdrawn and a discipline proceeding will be held.

DATED at Vancouver, British Columbia, the 17th day of September, 2019.



Carol Baird Ellan, Retired Judge

⁶ <https://opcc.bc.ca/wp-content/uploads/2017/10/13143-03-Nov-2017-S117-Decision.pdf>