#### Form 3

#### FINDINGS OF DISCIPLINE AUTHORITY

[Section 125 (b) Police Act]

Discipline authority file number: **18-1806** 

Police complaint commissioner file number: **2018-15276** 

Name of member/former member involved:

, Constable,

Police department, designated policing unit or designated law enforcement unit:

#### **Vancouver Police Department**

Date of discipline proceeding:

#### 2020, September 14, 15, December 2, 3.

In relation to each allegation of misconduct against you, my findings are as follows:

Misconduct: Abuse of Authority by unlawful entry, section 77(3)(a) of the Police Act

Member/former member's reply to allegation: [admit/deny] **DENY** 

Findings and reasons: **PROVEN**, see attached Reasons

Misconduct: Abuse of Authority by arrest of section 77(3)(a)(i) of the Police Act

Member/former member's reply to allegation: [admit/deny] **DENY** 

Findings and reasons: **PROVEN**, see attached Reasons

Misconduct: Abuse of Authority by unnecessary force against , section

77(3)(a)(ii)(A) of the *Police Act* 

Member/former member's reply to allegation: [admit/deny] **DENY** 

Findings and reasons: **PROVEN, see attached Reasons** 

Misconduct: Neglect of Duty, section 77(3)(m)(ii) of the Police Act

Member/former member's reply to allegation: [admit/deny] **DENY** 

## Findings and reasons: **PROVEN, see attached Reasons**

Signature of discipline authority:	2021 March 17	
I acknowledge service of this form:		
Signature of member/former member	Date:	[www/mm/dd]

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Findings and reasons: **PROVEN**, see attached Reasons

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I acknowledge service of this form:			
Signature of member/former memb	oer:	Date:	[yyyy/mm/dd]

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Findings and reasons: **NOT PROVEN, see attached Reasons for Decision** 

Misconduct: Abuse of Authority by arrest of section 77(3)(a)(i) of the Police Act

Member/former member's reply to allegation: [admit/deny] **DENY** 

Findings and reasons: **NOT PROVEN, see attached Reasons** 

Misconduct: Abuse of Authority by unnecessary force against , section

77(3)(a)(ii)(A) of the *Police Act* 

Member/former member's reply to allegation: [admit/deny] **DENY** 

Findings and reasons: **PROVEN, see attached Reasons** 

Misconduct: Neglect of Duty, section 77(3)(m)(ii) of the Police Act

Member/former member's reply to allegation: [admit/deny] **DENY** 

## Findings and reasons: **PROVEN, see attached Reasons for Decision**

Signature of discipline authority: .	2021 March 17	
I acknowledge service of this form:		
Signature of member/former member	Date	[www/mm/dd]

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Findings and reasons: **NOT PROVEN, see attached Reasons** 

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Member/former member's reply to allegation: [admit/deny] **DENY** 

Findings and reasons: **NOT PROVEN, see attached Reasons** 

Misconduct: Abuse of Authority by unnecessary force against, section

77(3)(a)(ii)(A) of the *Police Act* 

Member/former member's reply to allegation: [admit/deny] **DENY** 

Findings and reasons: **PROVEN, see attached Reasons** 

Misconduct: Neglect of Duty, section 77(3)(m)(ii) of the Police Act

Member/former member's reply to allegation: [admit/deny] **DENY** 

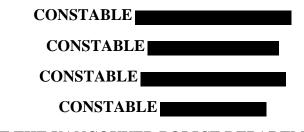
ndings and reasons: NOT PROVEN, see attached Reasons
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ember/former member's reply to allegation:[admit/deny] <b>DENY</b>
ndings and reasons: NOT PROVEN, see attached Reasons
gnature of discipline authority: 2021 March 17
cknowledge service of this form:
gnature of member/former member:

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

#### **AND**

# IN THE MATTER OF ALLEGATIONS OF MISCONDUCT

#### **AGAINST**



#### OF THE VANCOUVER POLICE DEPARTMENT

# ON DISCIPLINE PROCEEDING

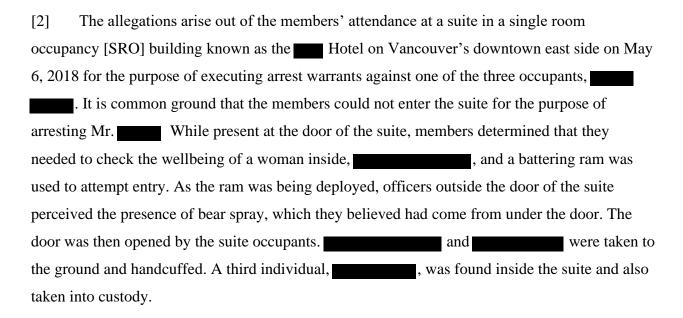
To: Constable Constable Constable Constable (Members) c/o Vancouver Police Department **Professional Standards Section** AND TO: Mr. Clayton Pecknold (Commissioner) Mr. AND TO: (Discipline Representative) AND TO: (Counsel for Csts. Mr. AND TO: (Counsel for Csts. Ms. AND TO: (Investigator) Sergeant Vancouver Police Department **Professional Standards Section** 

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#### A. Introduction

[1] These are my reasons for decision on a discipline proceeding relating to six allegations of misconduct against the named members. Section 125(1)(a) requires me to make a finding as to whether the misconduct has been proven in relation to each allegation.



- [3] As a result of his arrest Mr. incurred significant injuries described in police records as a possible separated shoulder, a broken nose, a laceration to his scalp requiring 10 staples, and six stitches under his left eye. A search incidental to his arrest at the scene failed to locate a knife in his waistband and a package of drugs in his armpit, which were later discovered by medical personnel attending to his injuries. A further search by one of the officers at the hospital located drugs and cash in his sock.
- [4] The issues to be determined are whether the officers involved committed misconduct by unlawfully entering the suite, arresting Ms. \_\_\_\_\_\_ or Mr. \_\_\_\_\_ without cause, using unnecessary force against them, or neglecting to sufficiently search Mr. \_\_\_\_\_.

#### **B.** Allegations

[5] In a decision delivered on September 19, 2019 under Section 117(8), I found the following six allegations against the officers to be apparently substantiated.

- [6] In relation to Constables and 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.
- - 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, of
  - 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
- [8] In relation to Constables and
  - 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 \_\_\_\_\_\_ 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,

#### C. Legal Framework

- [9] For the purposes of these allegations, Section 77(3) of the *Police Act* defines the following as misconduct:
  - (a)"abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,
    - (i) intentionally or recklessly making an arrest without good and sufficient cause,
    - (ii) in the performance, or purported performance, of duties, intentionally or recklessly
      - (A) using unnecessary force on any person...

. . .

(m) "neglect of duty", which is neglecting, without good or sufficient cause, to do any of the following:

...

- (ii) promptly and diligently do anything that it is one's duty as a member to do...
- [10] An allegation of abuse of authority under the *Police Act* requires proof not simply that the officers or any of them exceeded their authority, but that they did so knowingly or recklessly, or their conduct was otherwise blameworthy. In the case of neglect of duty, the issue is whether it occurred "without good and sufficient cause."

<sup>&</sup>lt;sup>1</sup> Scott v. Police Complaint Commissioner, 2016 BSCS 1970

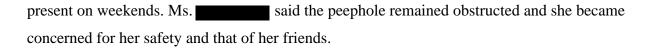
#### D. Evidence

- This discipline proceeding originally convened on November 14, 2019. On October 25, 2019, I granted the members' application to call the three occupants of the suite as witnesses, which necessitated the appointment of the Discipline Representative, Mr. The matter was originally scheduled for hearing during a block of time in February 2020, but adjourned for various reasons from that time block, and then adjourned several further times due to the coronavirus pandemic. The hearing eventually proceeded via videoconference for two days in September 2020 and a further two days in December 2020. Counsel filed written submissions in January and February 2021, and made oral submissions via video on March 4, 2021.
- [13] Pursuant to Section 124, the evidence on the discipline proceeding consists of the Final Investigation Report and the evidence and records referenced in it, all filed by the investigator at a teleconference in June 2020, as well as the testimony from the three non-police witnesses and the four police officers.
- [14] I proceed to a summary of the testimony in the order in which the witnesses testified. Where relevant, I will refer to the portions of the Final Investigation Report and evidence and records filed with it as they relate to the testimony. Following that I will summarize any additional materials in the record that I consider to bear on the issues to be decided.

1.

[15] Ms. was a friend who was visiting on the incident date. She described the suite as a main room with a kitchen area on the left as you enter from the door, a bedroom, and a small loft. She recalled hearing a knock on the door on the morning of the incident. She said they were not expecting anyone, and she did not understand it was the police. She looked out the peephole, but believed it was being obstructed by someone's hand. The knocking continued. She or another of the occupants asked who it was and she heard someone say it was "the manager." Ms.

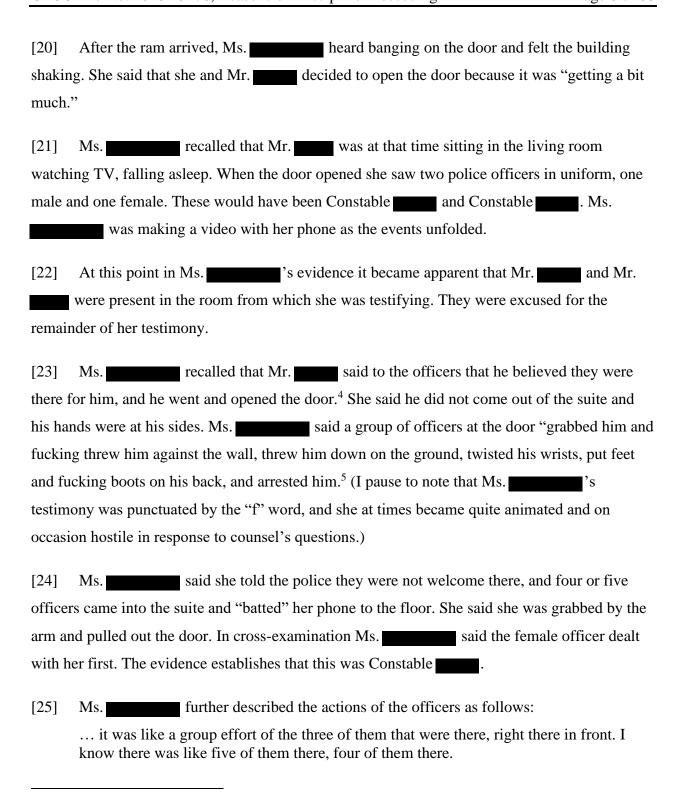
believed this was a ruse, because she did not know a manager named the manager was a female. In addition, this was a Sunday, and she knew there was no manager



- [16] Ms. denied hearing any announcement that it was the police at the door, but said that even if she had, she would not have believed them because they had lied about being the manager. She called the office to see if they could tell her from their cameras who was at the door. She talked to a staff member, who told her it was the police. She wondered why they were blocking the peephole if they were the police.
- [17] Ms. called 911 because she felt threatened. She reported that someone was trying to break into the suite. She believed this call had taken place about 20-25 minutes after the first knock. She said that until that point she had not heard anyone say "police" from outside the door.
- [18] The 911 recording and transcript are contained in the materials filed with the FIR.<sup>2</sup> Vancouver Police records reflect that the 911 call was placed at 9:02 a.m.<sup>3</sup> Ms. told the 911 operator that someone was banging on the door and blocking the peephole and she had no idea who it was. The operator, apparently not knowing at that time that it was Vancouver Police officers who were outside the suite, suggested Ms. call the building staff to help her, and she agreed to do that.
- recalled being told by someone outside the door at some point that they were going to bring in the battering ram. She asked why. She reiterated that at this point she did not understand who they were; they had not told her who they were, why they were there or why they wanted her to open the door; and they had lied to her and obstructed her view.

<sup>&</sup>lt;sup>2</sup> FIR Attachment J Tasks, Audio 632021

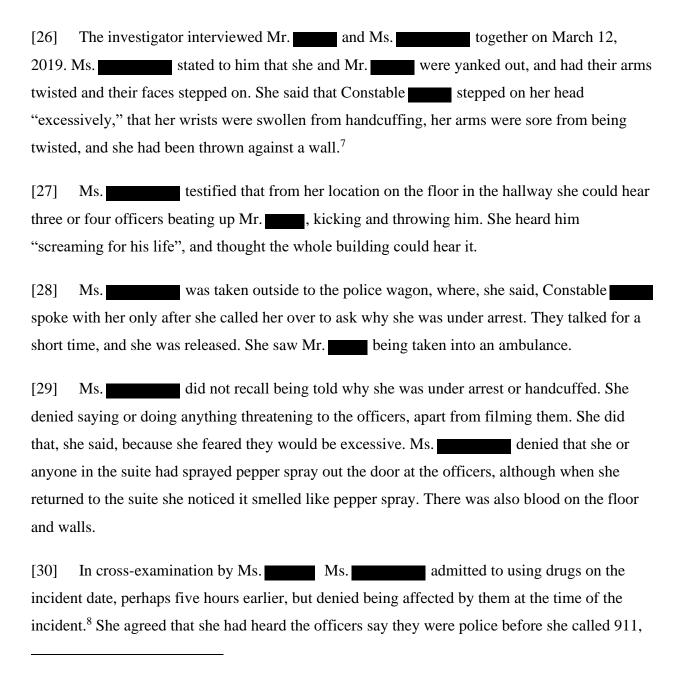
<sup>&</sup>lt;sup>3</sup> FIR Attachment J Tasks, VR19-1084 Recording Detail



<sup>&</sup>lt;sup>4</sup> September 14 Transcript, page 10, lines 36 – 37.

<sup>&</sup>lt;sup>5</sup> September 14 Transcript, page 12, lines 6-9.

...they grabbed my arm, they pulled me out, they -- they brought me to the ground, twisting my arms behind my back, and putting my face on the ground, putting boots on my face and my neck, and fucking putting cuffs on me and holding me there.<sup>6</sup>



<sup>&</sup>lt;sup>6</sup> September 14 Transcript, page 13, lines 10 - 23

<sup>&</sup>lt;sup>7</sup> FIR, pages 80 and 134.

<sup>&</sup>lt;sup>8</sup> September 14 Transcript, pages 20 – 21.

but said she did not believe them. She agreed that she called 911 about 5 minutes after the officers first knocked on the door. Ms. did not believe that Mr. knew she called 911, and said that he did not say he believed they were there for him until he went to open the door.

[31] Ms. Hotel office staff named who was working on the incident date, but she denied that he had come up to the suite and talked to her through the door. She agreed that when she called the office he had told her it was the police outside her door, but she said, "...why would I open the door to somebody who's lied to me, and has their hand over the door obstructing my view?"

[32] Ms. said that she had a deadbolt and a lock on her door that would both be locked when she was present. She denied that anyone jammed the lock, or that she knew the office staff had tried to unlock it. She said that she came to understand it was the police outside her door, but by that point she felt threatened. They obstructed the peephole and lied to her about being the manager, so she felt unsafe opening the door. She agreed that they told her that they wanted to check her safety, but she told them she was fine and that she was worried about her safety with respect to them. She agreed they told her they just needed to see her and they would leave, but, she noted, "when we got the door open... that's not what they displayed." 10

[33] Ms. said it was after the battering ram had hit the door about 12 times that Mr. said they were probably there for him. He said through the door that he was in the suite and was going to open the door. She denied that he used any pepper spray.

[34] Ms. said she did not resist being arrested or handcuffed, although she did not expect to be taken into custody when the door opened nor to have her phone batted out of her hand. She agreed she was a little upset but denied swearing at the officers or refusing to put her

<sup>&</sup>lt;sup>9</sup> September 14 Transcript. page28, lines 4 − 6.

 $<sup>^{10}</sup>$  September 14 Transcript, page 30, lines 41 – 47, page 31, lines 1 – 32, page 32, lines 7 – 9.

arms behind her back. She recalled the officer telling her they may have just saved her life, but not that she was arrested for obstruction or assault of a police officer.

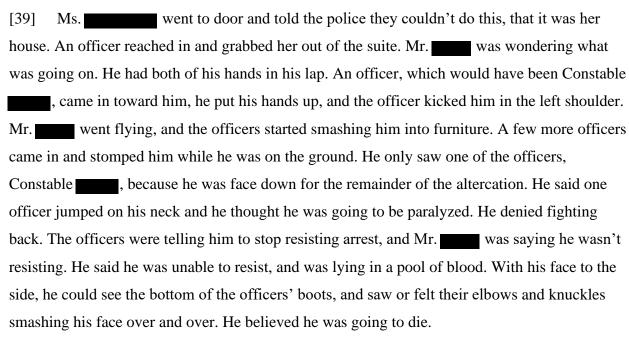
[35] Ms. believed that none of the occupants had sprayed pepper spray before she left the suite, and suggested it could have been the police. She admitted she did not mention in her statement to the investigator that the officer had stepped on her neck, although she mentioned a boot on her head. She believed that the video footage from the hallway would confirm that. She acknowledged that she did not seek medical assistance from the ambulance at the scene.

[36] In cross-examination by Mr. , Ms. confirmed that she was the one who went to open the door and looked through the peephole when they heard the knock. Mr. did not come to the door at that point although she had suggested he did in her statement to the investigator. She agreed the suite smelled like bear spray when she returned to it, and she mentioned that to a nurse who visited her later that day. She resumed making a video when she returned to the suite and saw the condition it was in but had been unable to locate the video for evidence.

Ms. believed it was about 20 minutes after the first knock that the police first identified themselves, and then over an hour after the knock until the door was opened. She agreed that she knew it was the police before the door was opened, but she didn't trust them. She denied that she was trying to prevent Mr. from being arrested. Her resistance to opening the door was due to mistrust. She was not trying to create a way for Mr. to escape by calling 911; he could have gone out the window to the adjacent She agreed she had sworn during her testimony but maintained that she was not swearing at the police.

## 2.

testified that on the incident date he was awoken from sleeping in front of the TV by the sound of banging on the door of the suite. Mr. said the police were there and Mr. told him he better open the door; it would be worse if he didn't. Mr. told them to stop, and that he would open the door. Mr. was still waking up, but heard a back and forth conversation between Mr. and the police and then saw hands reach in, grab his arm and pull him out.



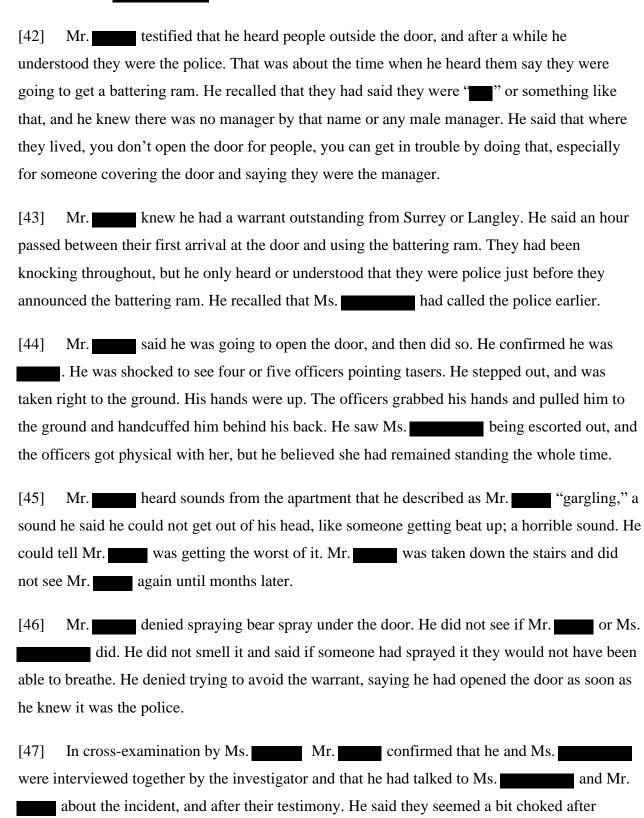
[40] Mr. confirmed that he received 10 staples to the top of his head on the right side, and 6 stitches under his left eye. After his arrest he was taken to the ambulance and then to VGH. He was in jail for two days after that but was released without charge. He said he has lasting memory problems and anxiety from the incident.

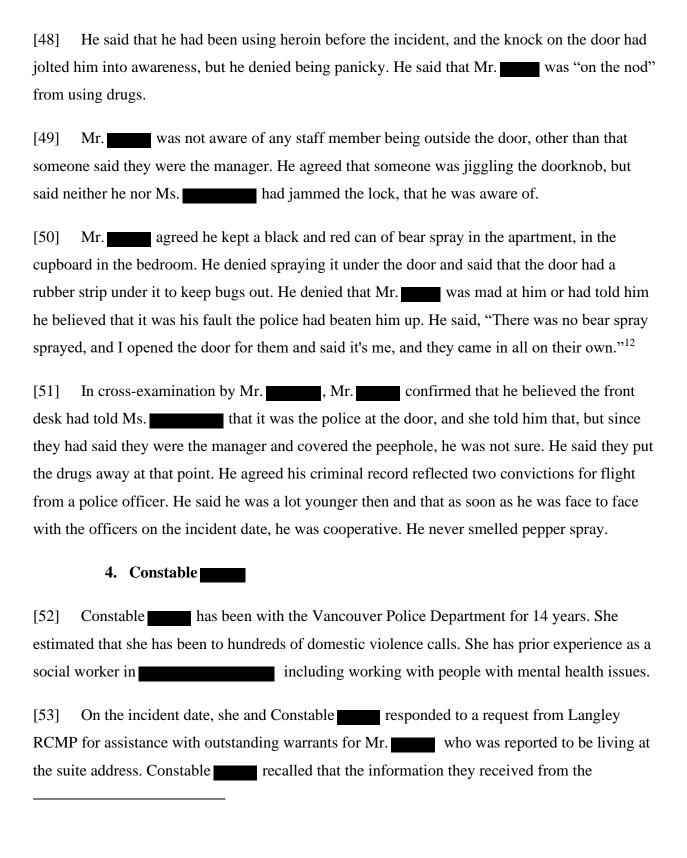
[41] In cross-examination by Mr. , Mr. admitted somewhat reluctantly that he had drugs on him at the time of the incident. He agreed he had a small knife, although he first described it as nail clippers. He denied that he was concerned that the police might find those things. He said he did not have time to be concerned before he got kicked out of the chair and stomped on. He did not recall being arrested for obstruction but the police had threatened various charges. He disagreed that Constable initially told him he was under arrest. He said he put his hands up and said he had nothing on him, and Constable said nothing before knocking him off the chair. He denied that Mr. sprayed pepper spray before opening the door, and denied that while in the ambulance he said, "Fucking why did he do that?" as reported by Constables and

 $^{11}$  September 14 Transcript, page 67, lines 19-27, and see paragraph 127, below.



testifying.





<sup>&</sup>lt;sup>12</sup> September 15 Transcript, page 17, lines 35 - 37

Computer Aided Dispatch [CAD] record was that they were warrants in relation to "violent domestic assault". She had not seen a CAD report that highlighted "violent" domestic assault before, so it stood out to her and indicated it was beyond the push-and-shove kind of violence. She recalled that one or more of the warrants were for breach of no contact, which indicated Mr. had a lack of respect for court orders and had contacted the victim on the file. She did not recall the dates of the incidents from which the warrants arose. In relation to the information available to them, Constable stated:

-- Constable was passenger, and he was working the laptop, but ...you can bring up photos of people if they're on record, and ...so we both had a look at what a recent photo of was. ...I recall that we tried to access the original file, but there's difficulty with like outside agencies in accessing RCMP files and things like that, so I don't recall ...what the hiccup was, but I do recall from being inside the building and when Dispatch tried to access the file as well, they were having trouble doing so. We never actually ...got to.<sup>13</sup>

[54] Constable reported in the General Occurrence [GO] Report written on the incident date that she and Constable confirmed the warrants, viewed a 2016 photograph of Mr.

and were able to ascertain that the name of the victim on the files relating to the warrants was

[55] In relation to the Langley call, the CAD shows that it was received at 7:43 a.m. and states, "Attend ALOC [above location] to attempt to arrest male on outstanding warrant from Langley, see attached." The CAD record does not contain the attachment.<sup>15</sup>

[56] Constables and were dispatched at 8:38 a.m. and arrived at the building at 8:46 a.m. They spoke first with the on-duty staff member, identified as who confirmed that he had seen Mr. and another male in a common area. He advised that they were high and were causing a disturbance in the common area, and were asked to go back to their suite. In the GO Report Constable reported that Mr. had told the officers

<sup>&</sup>lt;sup>13</sup> December 2 Transcript, page 9, lines 1 - 17.

<sup>&</sup>lt;sup>14</sup> FIR, Attachment F, General Occurrence Report No. 2018-90292, pages 16 – 17.

<sup>&</sup>lt;sup>15</sup> FIR, Attachment F, CAD 18-90292

that he had let the two males into the suite earlier with a key because they did not have theirs, but that had occurred some time ago and he was not aware of whether they were still in the suite.<sup>16</sup>

[57] The officers checked the common area and did not find them there, so they went to the suite number that had been provided to them. They understood that Ms. rented the room and that Mr. was staying or living with her there. Constable noted that in her experience with SROs it was difficult for staff to control occupants. A lot of the rules, like that of single occupancy, went unenforced, and the tenancy lists were often outdated.

[58] When the officers attended the suite, they did not have information from the staff that Ms. was present. Constable described their purpose at the time as assisting Langley by knocking to confirm an address for Mr. and to see if he would cooperate and answer for his warrants.

[59] When they knocked on the door, Constable clearly heard a female voice. She did not know it was Ms. at the time. Constable recalled knocking and explaining that they were Vancouver Police. She did not remember exactly what the conversation was, just that they were there to speak to and she asked whether he was there.

[60] Constable described the ensuing exchange as follows:

I know we said we can hear him in the room, because we could hear a male voice, and then it just went back and forth for quite some time. There -- there were -- she was very reluctant and very -- there were moments where she would whisper or he -- like you could hear whispering, I shouldn't say she or he, I don't know, but there was whispering. There was just a very -- not defiant, but a very secretive reluctance to even speak with us."<sup>17</sup>

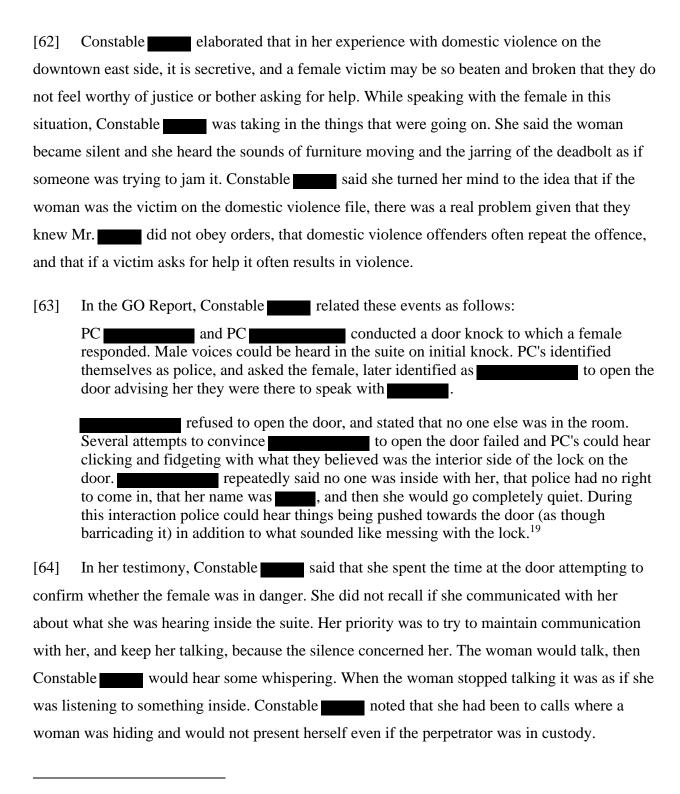
[61] In explanation of her rising concerns, Constable stated:

...initially when I was speaking to her, I -- my issue was I knock on the door and there's a female in there, and I don't know who she is, and I know the purpose of why we're there is -- is for the warrants, yes, but the nature of the warrants were inherently disturbing. 18

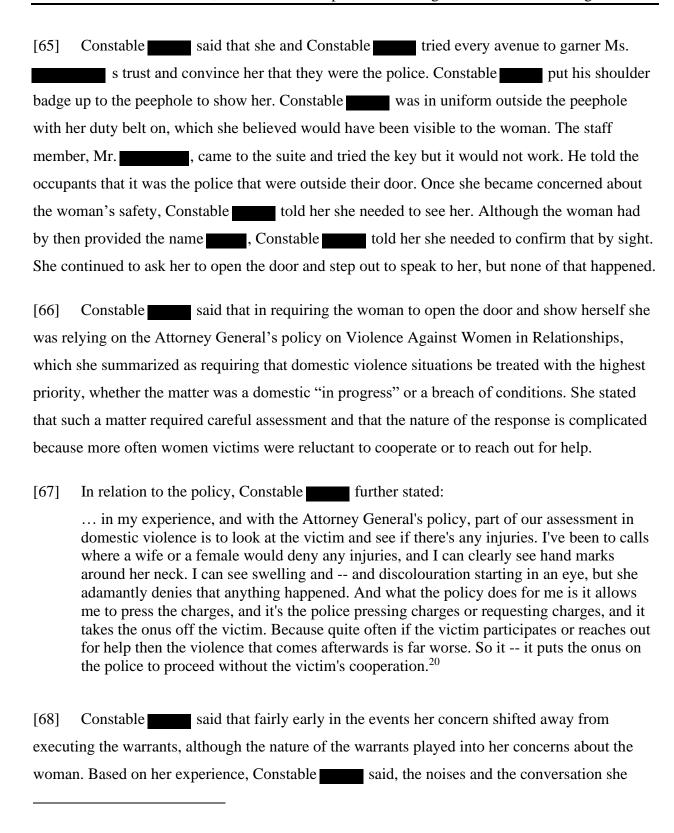
<sup>&</sup>lt;sup>16</sup> FIR, Attachment F, General Occurrence Report, supra, page 1.

<sup>&</sup>lt;sup>17</sup> December 2 Transcript, page 12, lines 16 - 25.

<sup>&</sup>lt;sup>18</sup> Page 12, lines 35 - 40.



<sup>&</sup>lt;sup>19</sup> FIR, Attachment F, GO 2018-90292, page 17.



<sup>&</sup>lt;sup>20</sup> December 2 Transcript, page 16, lines 37 to 47, and page 17, lines 1-6.

heard caused her to believe the situation could be unravelling in front of her such that the woman was not in a safe place.

[69] Constable did not hear Ms. place the 911 call but she heard a broadcast about a break-in in progress at their location, on her radio. She told the dispatcher that it was the same call they were on. She recalled telling the dispatcher to slow the other units down and stop the emergent response, because it was not a home invasion, it was them at the door, and they had spent a lot of time trying to explain to Ms.

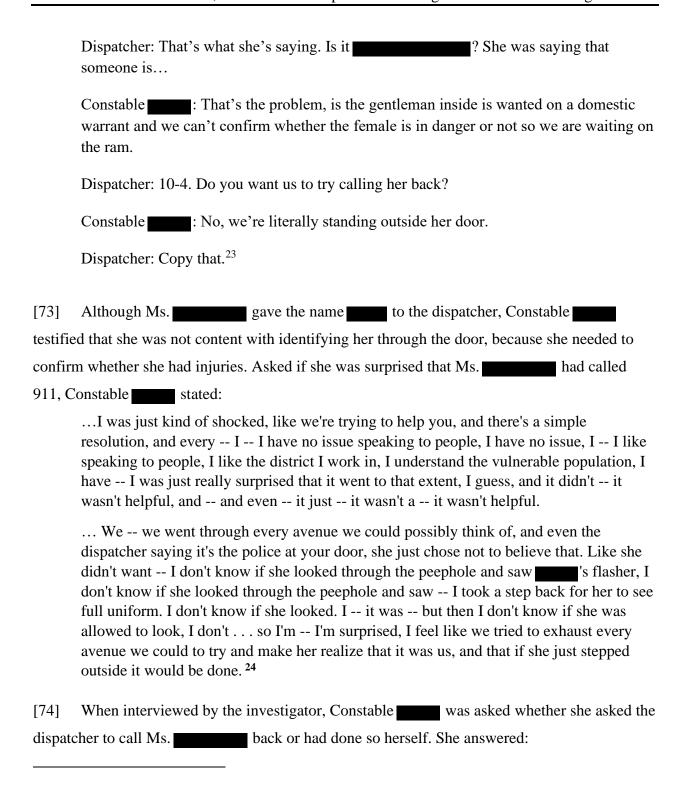
### [70] Constable further stated:

- [71] As previously noted, Constable and had arrived at the suite at 8:46 a.m. and the 911 was placed at 9:02 a.m. In her interview with the investigator, Constable said she heard the dispatch and realized it was for their location. The investigator advised her that the dispatch call went out at 9:51 a.m.<sup>22</sup>
- [72] The recordings of the police radio transmissions from the scene reflect the following exchange between Constable and the dispatcher:

Constable : ...sorry, is she saying that we are knocking at her door and blocking the peephole?

<sup>&</sup>lt;sup>21</sup> December 2 Transcript, page 19, lines 5 - 23.

<sup>&</sup>lt;sup>22</sup> FIR, page 62.



<sup>&</sup>lt;sup>23</sup> FIR, Attachment I, Photo and Video, Radio Broadcasts, Audio\_563323 to 563327

<sup>&</sup>lt;sup>24</sup> December 2 Transcript, Page 20, lines 3 - 28.

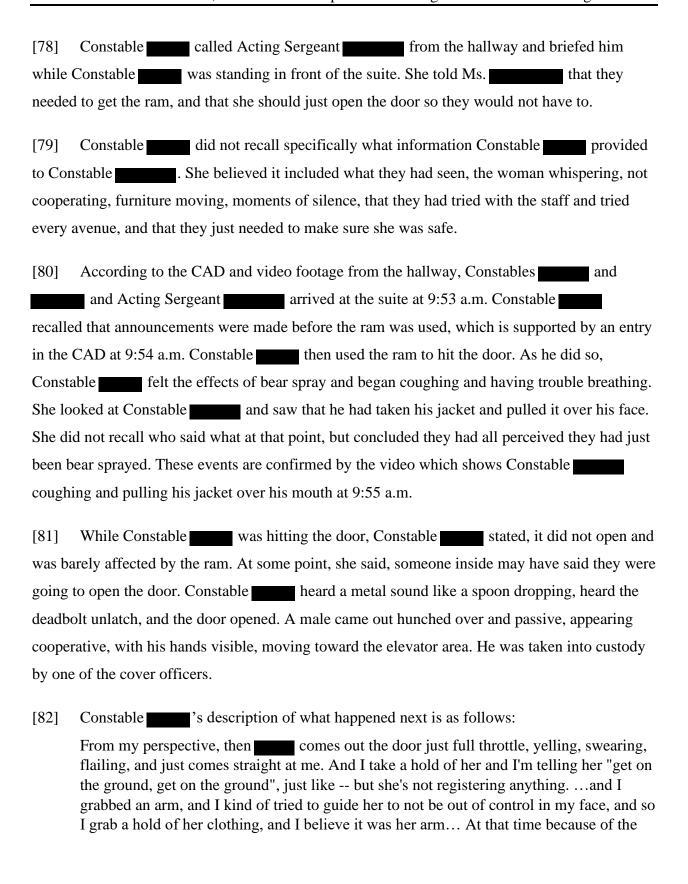
No, I had gone back with dispatch to say it's us outside. Typically, they would have said "no, ma'am, it's the police outside your door." It's no different than when somebody is unsure it's the police, we'd tell them "call 911, and give them my badge number" and they will confirm that it is in fact me knocking on your door. Because sometimes people are afraid to open the door for us if we're just there to investigate something, or they've been broken into, or it's late at night, or whatever.<sup>25</sup>

Constable testified that while she did not hear any obvious sounds of distress, not all domestic violence situations played out that way. Many are quite secretive, and the victim tries not to draw attention to it. If she was being threatened not to let the police in, there would not be overt signs of that. Constable said there was a moment when she thought what if he was holding a knife to her saying not to let them in, and maybe the 911 call was a distraction so that he could do something to her. She likened it to a perpetrator who tries to draw police attention to one location while they commit a crime at another. She told Ms. that they could not leave and then come back to find her beaten. She believed the 911 call might be a last ditch effort to get the police to leave and may have been instigated by the person who was with her. She was at the same time mindful that the suite occupants might be in drug psychosis or suffering from mental health challenges.

[76] Constable said her training was that she could force entry if she believed the woman was in danger. She made that call as they were addressing her through the door and telling her they could not leave without seeing her. She stated that she was not going to have it cost her job. She had heard of files where police leave and come back to a bad situation.

said she "started that conversation" with Constable and they started to line up their resources. They called for additional units to attend with the wagon and discussed their course of action, which included getting the ram on site to breach the door. They decided to consult with their Acting Sergeant, Constable , to figure out what to do and how to do it. She reiterated that they were not going to leave and come back to an injured or dead woman, knowing the vulnerability of the women in the downtown east side.

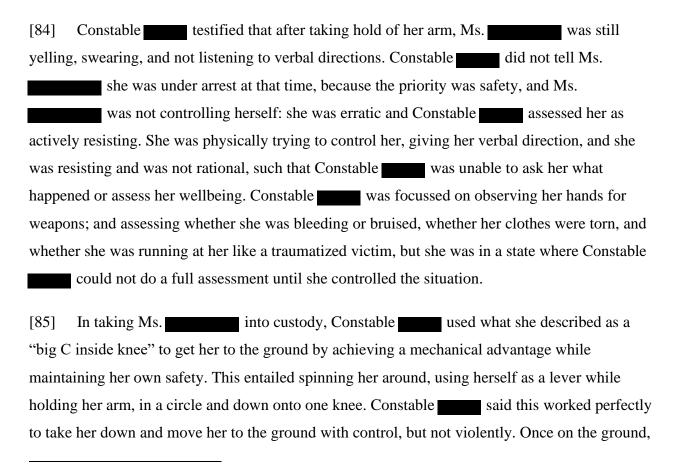
<sup>&</sup>lt;sup>25</sup> FIR, page 62.



bear spray, I was intending on arresting her... [f]or assaulting a police officer, and obstruction for not opening the door after the bear spray was deployed.<sup>26</sup>

[83] In her Duty Statement, Constable described Ms. as "flailing and yelling at police". 27 She further described Ms. s arrest as follows:

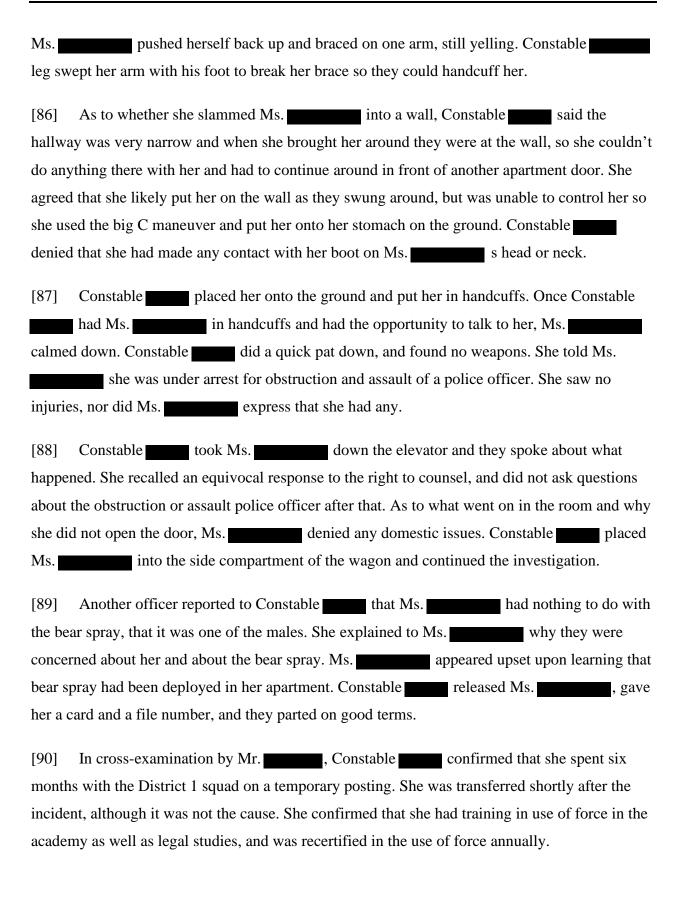
I can't remember off the top of my head what she was yelling, but she was uncooperative in her body when I was telling her – when she came out of the suite, she kind of came directly in front of me. And I grabbed, I think it was her right arm, and I was telling her to get on the ground, and we kind of did a full circle, and, given the bear spray that had come under the door, whoever was in the suite at that time was now arrestable for assault police, until we could sort out who actually did it. It was impossible to know who actually sprayed it from under the door, but somebody sprayed it from under the door. So, she was under arrest for that, despite her potentially being a victim. <sup>28</sup>



<sup>&</sup>lt;sup>26</sup> December 2 Transcript, pages 27 – 29

<sup>&</sup>lt;sup>27</sup> FIR, Attachment D Member Statement, Duty-Statement-Notes-Cst page 3.

<sup>&</sup>lt;sup>28</sup> Supra, page 63



[91] Constable said that her experience as a social worker before becoming an officer permitted her to relate with people and gain their cooperation. She agreed that sometimes it was necessary to show the uniform and use force. She described the takedown maneuver she used as a mechanical advantage rather than a lot of force. She believed it was the least appropriate amount of force with the least likelihood of injury.
[92] As to Constable s leg sweep, Constable described it as not intended to
break bones or injure, rather to use an advantage to bend the arm and permit the individual's
hands to be controlled in order to handcuff them behind their back. She said in training they
called it breaking the table leg.
[93] Constable agreed her notes made after the incident had no reference to bear spray.
She said it was about a minute from the door opening to Ms.  see 's being taken into
custody. She acknowledged that the initial concern was that Ms.
said, "when the pepper spray was deployed under the door all the occupants in the room
became the subject of an arrest for assault police."29
[94] Constable agreed that there was more than one person in the room at the time the
pepper spray was deployed. She explained her reasoning for the arrest as follows:
At the time of the deployment of bear spray, there was a criminal offence of assaulting a police officer, and in taking custody of all the occupants in the room, they were all under investigation, they were all being arrested for assaulting the police officer because we can't decipher who did it, but while they're in custody, I have a responsibility to try and investigate and determine who played what role, and I did exactly that. <sup>30</sup>
[95] Constable did not detain Ms. as opposed to arresting her because the
offence had occurred, and the investigation was to determine the finite details of it. Once she
learned Ms. had no role she was removed from the process and no longer held in
custody. Constable said she had grounds to believe someone in the room had sprayed the

December 2 Transcript, page 50, lines 15 - 17
 December 2 Transcript, page 51, lines 17 - 26.

bear spray and just as she would arrest all of the occupants of a vehicle in which a gun had been found, all of the occupants were arrested while the investigation proceeded.

Regarding the amount of force used in conducting the arrest, Constable said that Ms. would have been put in handcuffs "regardless of whether she was the victim or not, because her behaviour was so erratic that it required control in order to make the scene safe for everybody, including her." Constable believed she used only the force that was reasonable to control her behaviour and once she was calm, she took the handcuffs off. Where there was deployment of a weapon that could render her unable to communicate or see, she would not leave people free to access the same weapon again. She did not know whether any bear spray had been found in the room after the incident.

[97] Constable went back up to the room and saw Constables and with Mr. and a circle of blood on the floor beside his head. He had a towel on the left top of his head. He was face down and handcuffed. Constable had heard a commotion in the

[98] Mr. was taken to the hospital. Constable went with him in the ambulance and Constable followed. When she arrived they were moving him onto a hospital bed, and a paramedic found a pouch in his armpit. She understood that hospital personnel had also found a vial in his sock and wads of cash while they were processing him.

[99] Constable told Constable that Mr. had refused to show his hands and that Constable was "concerned in the moment because Mr. put up quite a fight with him."

room while she was in the hall with Ms.

<sup>&</sup>lt;sup>31</sup> December 2 Transcript, page 52, lines 28 – 31.

 $<sup>^{32}</sup>$  December 2 Transcript, page 58, lines 12 - 14.

[100] Constable denied being frustrated with Ms. during the exchange at the door, but said she was flustered and "running out of ideas for how to garner her cooperation" and get her to understand Constable "s position."

#### 5. Constable

[101] Constable testified that he had been a police officer for 5 years at the time of the incident. He transferred from to the Vancouver Police in 2016, and has been to hundreds of domestic violence calls.

[102] He confirmed that he and Constable were dispatched to the apartment to attempt an arrest of Mr. for warrants for domestic assault. He did not recall knowing how recent the underlying offence was. They had information that Mr. had been seen in the building 10 or 15 minutes before their arrival and was living in the suite.

[103] On arrival he heard a male and female voice inside the suite. The female was saying she did not believe they were police officers. They tried to convince her, and at one point Constable put his shoulder crest up to the peephole to show her. He said he "did not recall" putting a hand over the peephole and said, "That wouldn't be …something that I would do commonly, and like I said, we were trying to ensure that in fact they could see who we are, and see our uniforms, and see that we are in fact police officers."<sup>34</sup>

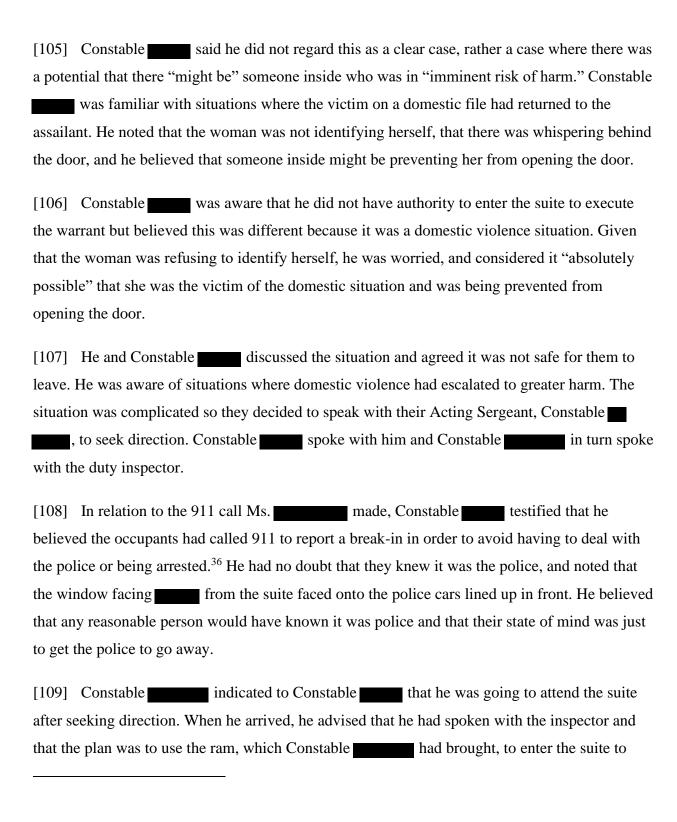
[104] Constable became concerned that the woman might be the victim to whom the domestic violence warrants referred. He referred to police policy in and Vancouver requiring that domestic violence cases be given a high priority, with an emphasis on protecting and assisting the victims. Constable described his understanding of the legal power to enter a private residence without a warrant as follows:

...if there's a reasonable basis to -- to believe that someone inside is in imminent risk of harm or danger ...with common law authority we are able to enter without a warrant.<sup>35</sup>

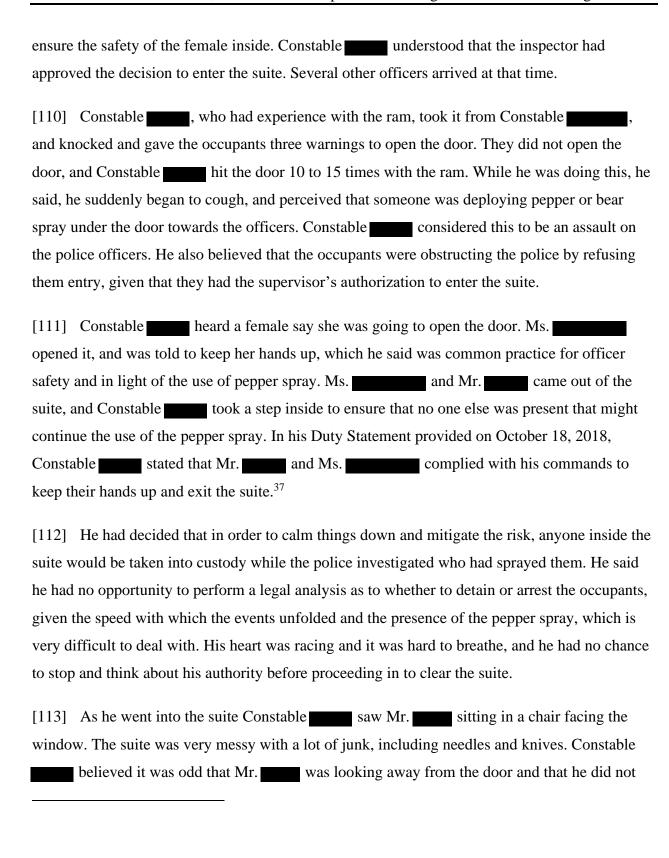
 $<sup>^{33}</sup>$  December 2, Transcript, page 59, lines 15 - 18.

<sup>&</sup>lt;sup>34</sup> December 2 Transcript, page 72, lines 20 - 24.

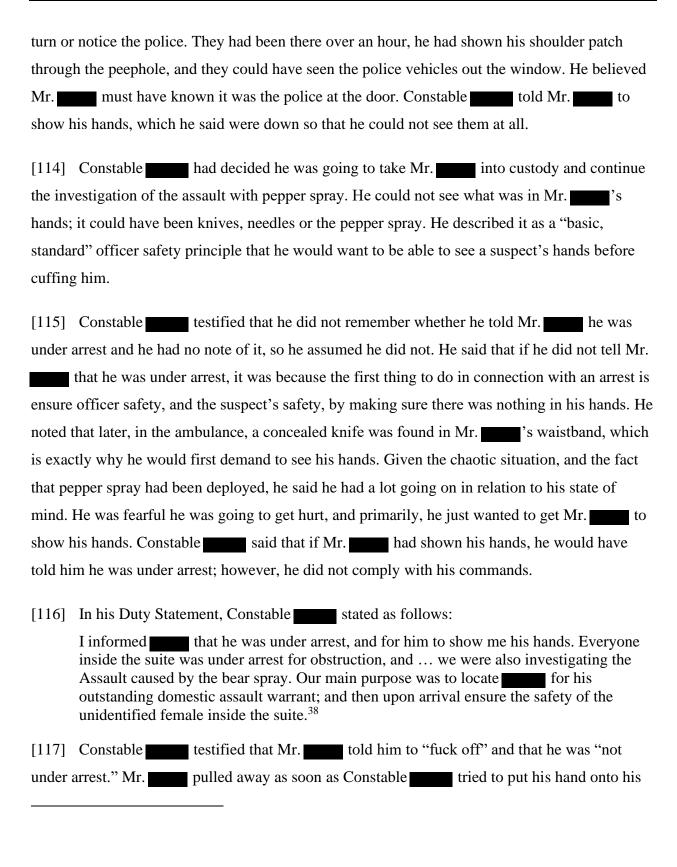
 $<sup>^{35}</sup>$  73, 17 – 21



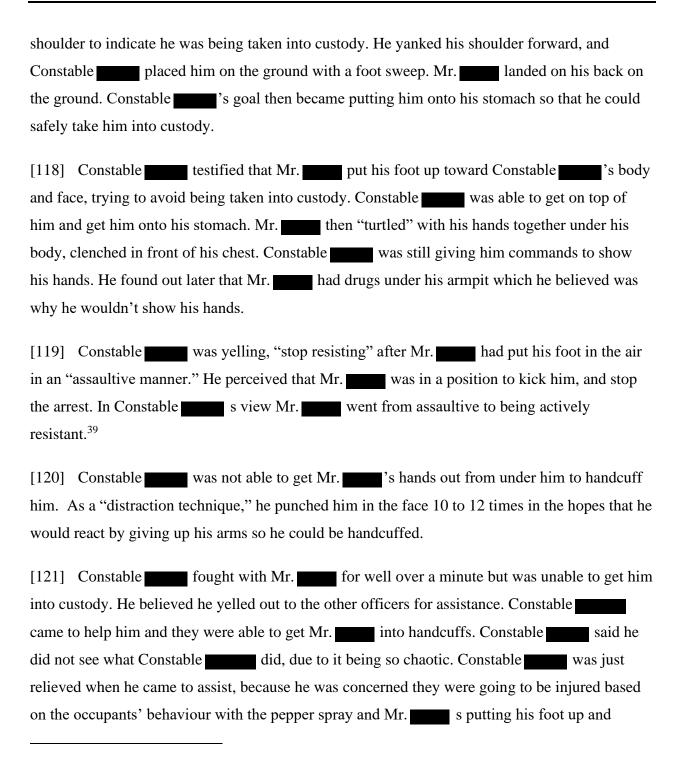
 $<sup>^{36}</sup>$  December 2 Transcript, page 80, line 13 - 18.



<sup>&</sup>lt;sup>37</sup> FIR, Attachment D, Member Statements, Duty-Statement\_Cst. page 3.



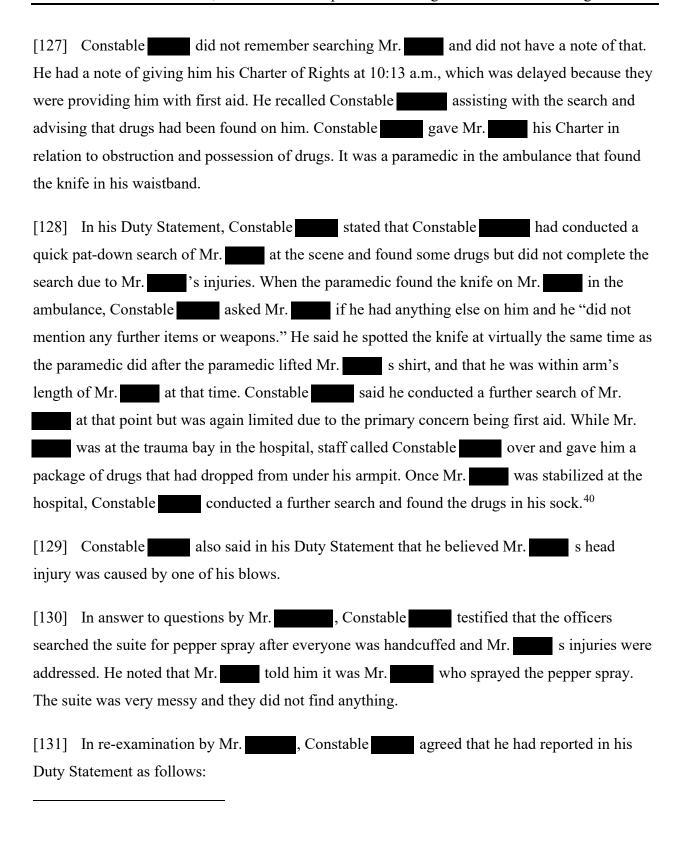
<sup>&</sup>lt;sup>38</sup> Supra, page 4.



 $<sup>^{39}</sup>$  December 2 Transcript, page 85, lines 8-25.

becoming assaultive and actively resistant. He said that in his years of policing he had not been in a situation where he felt as vulnerable to injury.

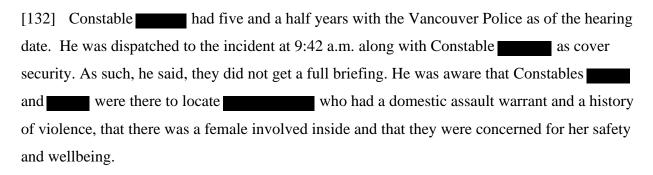




 $<sup>^{40}</sup>$  Supra, pages 6-7.

While waiting for ambulance, repeatedly shouted "fucking why did he do that?", and stated that he had observed some bear spray being deployed and that it was red in colour with black electrical tape around it. stated he did not know what happened to it. ...I took a look around the suite, however, there was clutter everywhere and I was unable to locate any bear or pepper spray cannisters.<sup>41</sup>

6. Constable

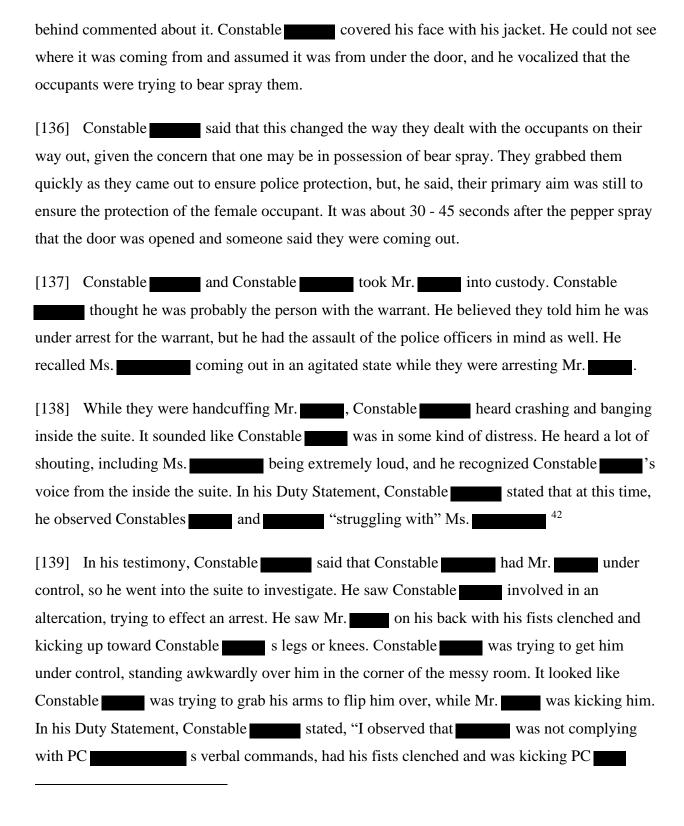


Constable arrived. Constable attended with the ram. Constable understood there was a plan to gain entry to check the wellbeing of the occupant. He understood the woman had been quiet for some time and when he arrived it was completely quiet as well. He was unaware of who decided to use the ram.

[134] He understood the entry was pursuant to the common law duty to protect life, similar to a wellbeing check where there was no answer and they could not contact the occupant. He trusted the decisions of the other officers He said he did not ask about grounds as he had worked for some time with the other members, and trusted their decision-making process. He had no reason to question what they said and it made complete sense, so he would have agreed with their decision.

[135] After they started ramming the door, Constable started to cough and his eyes started to water. He smelled bear or pepper spray, saw Constable coughing, and someone

<sup>&</sup>lt;sup>41</sup> December 3 Transcript, page 55, lines 18 – 31.

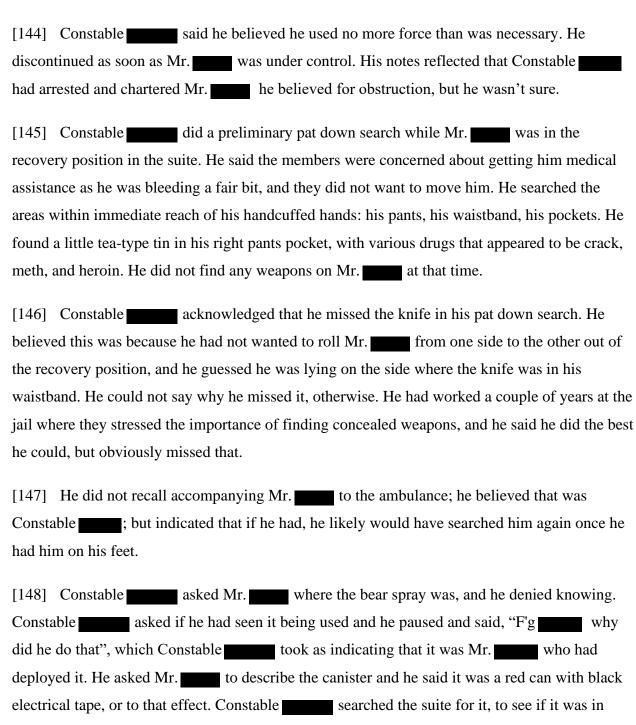


<sup>&</sup>lt;sup>42</sup> FIR, Attachment D, Member Statements, Duty\_Statement\_Cst\_ page 1.

s legs." He also said he was uncertain at that time as to who Mr. was and
whether he might be the violent male with the warrant. <sup>43</sup>
[140] Constable walked over to Mr. and tried to grab his arm but he kicked up
toward his shins a couple of times. This kind of shoved him back so he went in and delivered a
couple of punches, to assist in getting Mr. onto his stomach to gain control. They
struggled, with Constable holding Mr. arm, but Mr. was holding it close
to his body so that he couldn't break it loose. Mr. remained on his back most of the time
with his hands clenched to his body up below his chin with knees up, "turtling". Eventually they
got him onto his stomach but he kept his hands in front of him, clenched.
[141] Constable said he saw a crowbar and a hammer on the ground and some used
needles on the bed and on the floor as he stepped into the suite. These items, Mr.
resistance, and the prior use of bear spray, which could be on Mr. resistance, all gave
Constable a reason to establish immediate control over Mr. , so that he could not
have used or reached for a weapon.
[142] Constable did not specifically know Constable s reasons for arrest, but in
his mind everyone was arrestable for assault with a weapon. He would have given the Charter for
that, and when he entered and saw sactions, he would have arrested him for resisting
arrest and assaulting a police officer. He would have categorized him as "assaultive active
resistant" on the national use of force framework. Constable described himself as
applying six to seven knee strikes and punches. He estimated that from first laying hands on Mr.
it took 35 to 45 seconds to get him under control and that Mr. was on his back for
half of that time.
[143] Constable said no single strike was effective in controlling Mr. but they
were ultimately collectively effective. He believed about four of his punches were to the head

<sup>&</sup>lt;sup>43</sup> Supra, page 2

and three or four knee strikes were toward his shoulders. These were all intended to distract him and permit the officers to handcuff him.



plain view. He understood the residents still had some expectation of privacy and he was not going to open drawers or shelves. He searched for about five minutes without success.<sup>44</sup>

[149] He believed that he needed judicial authorization for any further search, which would have taken the rest of the day and which he did not consider an appropriate use of time. In addition, it was not his investigation and he did not want to overstep.

[150] In cross-examination by Mr. \_\_\_\_\_\_, Constable \_\_\_\_\_ said that when he arrested Mr. he understood him to have been identified as the person with the warrants although he agreed that when he left the suite neither Constable \_\_\_\_\_ nor Constable \_\_\_\_\_ identified him as such, because "it was instantaneous". He came out with his hands up, as would a guilty party.

the suite. He believed he saw him punch Mr. once or twice in the face area, while

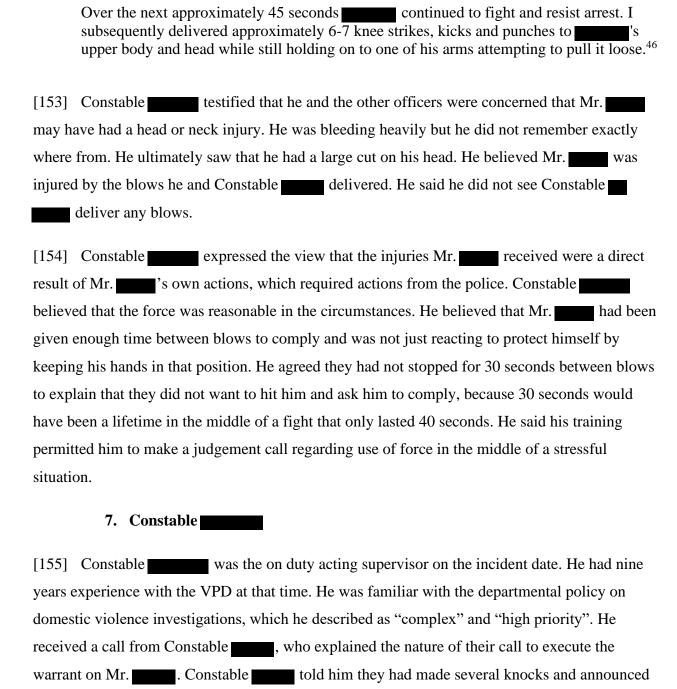
Constable was also striking him, from the opposite side. Constable also may have kicked him in the shoulder. Knee strikes involved swinging the legs back and onto the individual with the hard part of the knee. Constable said he was not using full force and was cognizant of the force he was using. He used his fist for the punches. He confirmed his estimate of three to four knee strikes and three to four punches, and denied it could be five or six.

One of the knee strikes may have been to Mr. shead although the majority were aimed at his shoulder and the mid-section of his upper body. The main aim was to get his arm freed and gain control of that.

[152] In Constable 's Duty Statement he described his interaction with Mr. as as follows:

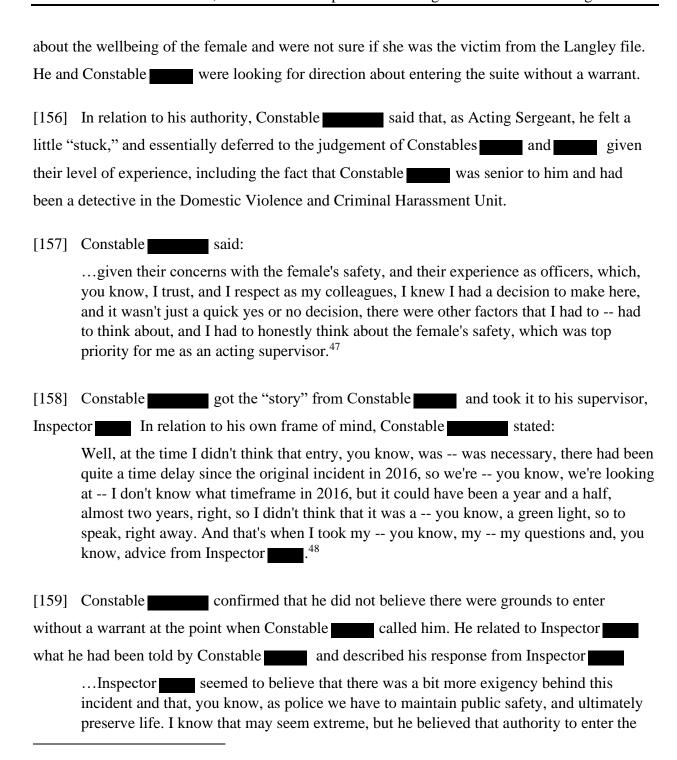
<sup>&</sup>lt;sup>44</sup> December 3 Transcript, page 37.

<sup>&</sup>lt;sup>45</sup> December 3 Transcript, page 41, line 37 – 42.



that they were VPD and heard a female voice inside. Constable said they were concerned

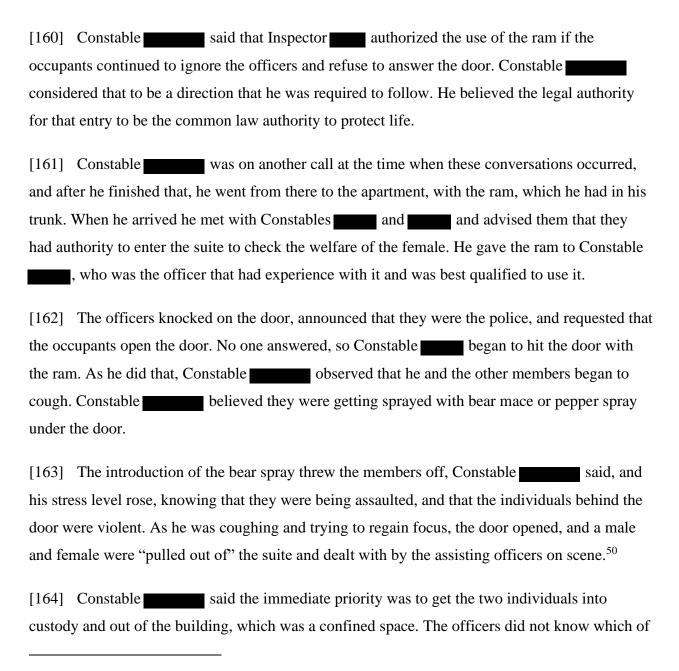
<sup>&</sup>lt;sup>46</sup> FIR, Attachment D, Member Statements, Duty\_Statement\_Cst\_ page 2.



<sup>&</sup>lt;sup>47</sup> December 3 Transcript, page 60, lines 13 - 21

<sup>&</sup>lt;sup>48</sup> December 3 Transcript, page 60, lines 31 – 40

suite was there under common law duties to protect safety, and he expected me to follow through with checking the welfare of the female.<sup>49</sup>



<sup>&</sup>lt;sup>49</sup> December 3 Transcript, page 61, lines 18 - 26

<sup>&</sup>lt;sup>50</sup> December 3 Transcript, page 64, lines 12 – 19.

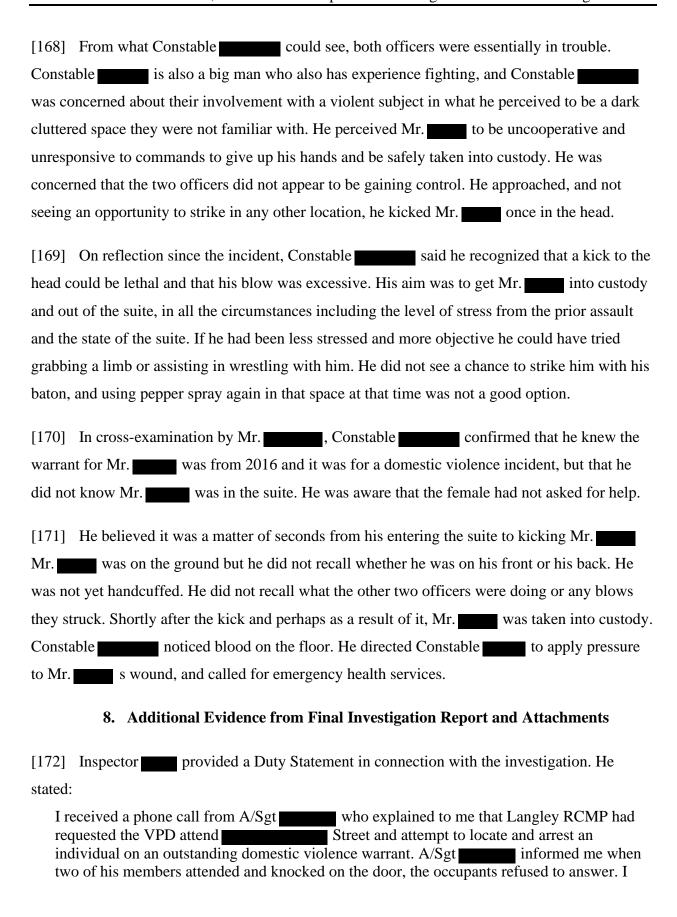
them had used the bear spray, so they needed to effect the arrests and notify the individuals that they were under arrest for assaulting police with a weapon.

[165] Constable did not get confirmation of the two individuals' identity at that time, and he wanted to make sure no one else was hiding in the suite that could pop out with more bear spray and contaminate the members, or access other weapons. In his experience in the downtown east side, there are items in suites that can be very hazardous. He said he did not have the luxury of time to go through a legal analysis regarding detention versus arrest, as things were happening quickly and he needed to communicate with the dispatcher as well as the officers present, as well as deal with the effects of bear mace. He described himself as stressed and fearful, and mindful "since day one at the police academy" of the emphasis on officer safety and the need to take care of his fellow officers.<sup>51</sup>

[166] Constable told Constable to do a secondary search of the suite, which he described as common practice, to make sure they were not in further danger and that it was empty. The purpose was to locate any additional suspects and remove potential weapons. He considered that the legal authority to enter the room at that point was the common law duty to protect of the life of the members, given that they had just been assaulted, and the need to protect anyone else on scene.

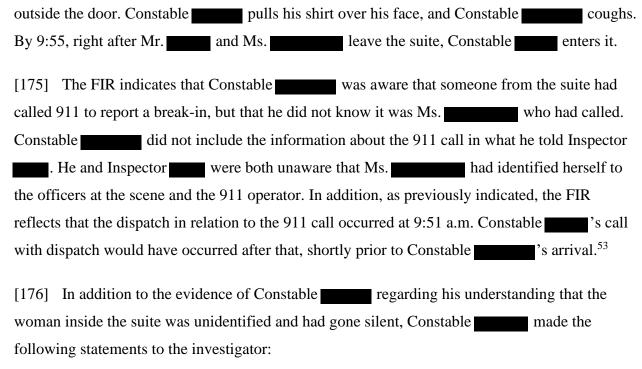
Constable went in. Constable heard a commotion, from which he knew Constable had encountered someone inside the suite. He saw Constable struggling with a male and was concerned that he could not see what was going on. He said given the bear spray experience his emotions were high and he was stressed. The fact that Constable was in a struggle was concerning given his size, and the fact that Constable knew he had been an Constable said his fight or flight response kicked in, and he entered the suite to encounter Constables and on the ground with Mr.

<sup>&</sup>lt;sup>51</sup> December 3 Transcript, page 65, lines 34 – 47.



was also told the members could hear a female voice coming from inside the suite and they were worried that she might be the victim in the domestic case and thus were concerned for her wellbeing. A/Sgt asked for my opinion regarding forcing entry into the suite. As a trained Level II Critical Incident Commander I am often called upon to make decisions on whether or not a warrantless entry into a dwelling house is justified and/or appropriate. Based on my training and experience I advised A/Sgt the following: 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. 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. A/Sgt stated he understood and would be present for the "announce and entry" and would advise me regarding the outcome. [Emphasis added.] [173] The investigator interviewed the office staff member at the building, Mr. confirmed that he attended the suite with the key to attempt to open the door but was not successful. He stated that Ms. had told the police she was fine and said that Mr. was not in the suite. He attempted to persuade Ms. to open the door, so the police did not have to take it down.<sup>52</sup> [174] The video footage shows a portion of the hallway including the corner of the suite door frame, but not the front of the door. The footage was continuous throughout the police attendance, but it is not clear that it reflected the events in real time. It shows Mr. attending early in the process, around 9:06 a.m., and returning at 9:13 a.m. He appears to try to use a key on at least one of those occasions. Constable can be seen on the phone at various times between 9:12 and 9:31, and adjusting a mirror outside the door at 9:40. Constable arrives at 9:53; Constables and at 9:54. Constable appears to have a taser in his hand. Constable can be seen ramming the door by 9:54 and the occupants come out of the suite by 9:55. Between those two events, the members in the hallway can be seen apparently experiencing the effects of bear spray or a substance in the hallway

<sup>&</sup>lt;sup>52</sup> Fir, page 90.



At no point was I aware that the female had identified herself as such. We were never informed of that.

We knew that the suite was registered to a male who, as we discussed had an outstanding warrant for assault in relation to a domestic incident, that was currently outstanding, and then I had been informed by Cst. and Cst that they were making contact with the female, or a female, through the suite door. Just verbally – they had never made any visual contact with her, and then suddenly she stopped talking to them.<sup>54</sup>

#### E. Submissions

[177] I invited the Discipline Representative to provide submissions. I pause to note that Section 124, which governs the conduct of the discipline proceeding, does not specifically provide for the Discipline Representative to either cross-examine the members or provide submissions. The section does not specifically provide for any role in the proceeding other than that provided by Section 123(8) of examining or cross-examining the investigator or the non-

<sup>&</sup>lt;sup>53</sup> FIR, pages 19, 68, and 124 - 125.

<sup>&</sup>lt;sup>54</sup> FIR, page 74.

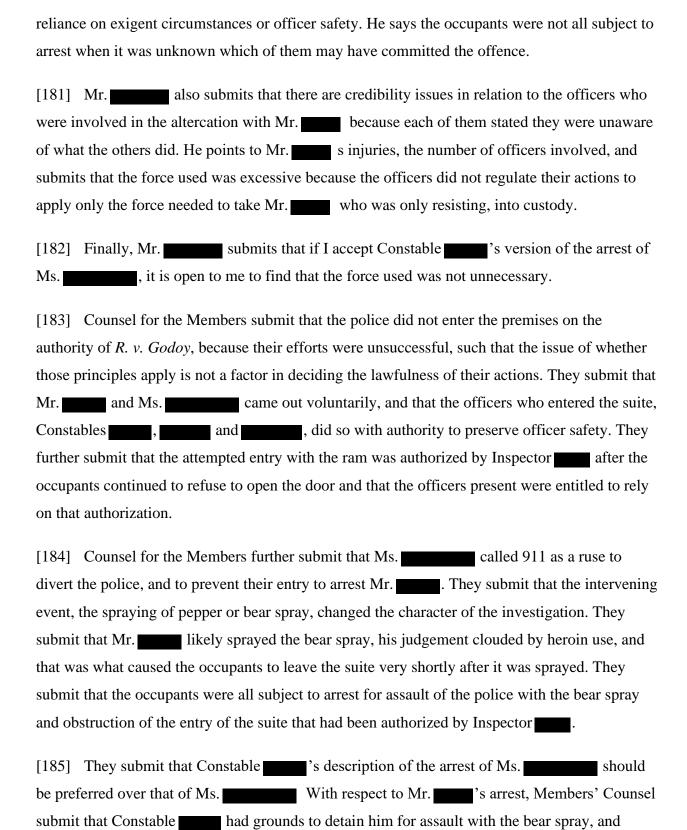
police witnesses. Section 123(9) provides that the members may testify and make submissions but is silent about submissions by a discipline representative.

[178] The role of a discipline representative is defined in Section 121(1)(a), as "to present to the discipline authority at the discipline proceeding the case relative to the alleged misconduct of the member or former member." To my mind that would naturally encompass cross-examining the members and making submissions regarding "the case relative to the alleged misconduct". Indeed these roles were assumed by the Discipline Representative in this matter without objection by Members' Counsel or even a second thought as to whether that authority was provided by the Act.

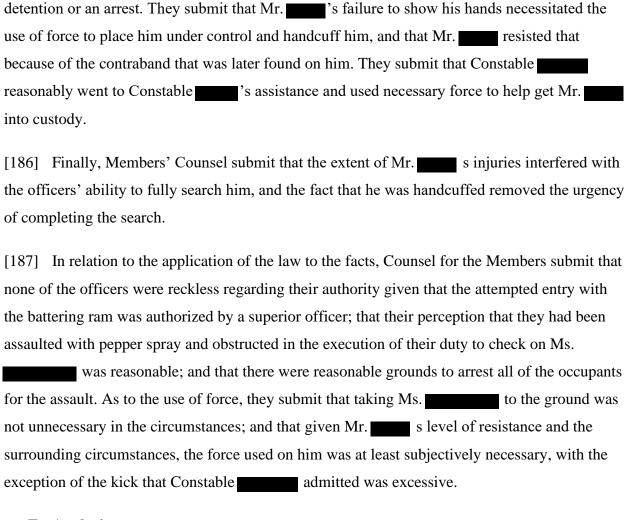
[179] Because the scope of a discipline representative's role is vague under the Act, I will be mindful of my role as discipline authority, which is to make findings as to whether the misconduct has been proven, and of the role of the Discipline Representative, which is to present the case relative to the alleged misconduct in a matter where an application to call witnesses has been granted under Section 119. With this in mind, while I found the Discipline Representative's submissions helpful in providing a summary of the evidence of the civilian witnesses and comments in relation to the testimony of the members, I am mindful that my duty under Section 125 is to perform a full review of all of the evidence including the FIR and the evidence and records contained in it.

[180] The Discipline Representative submits that there were no reasonable grounds for the officers to conclude that Mr. or the victim of the 2016 assault were in the suite, or that anyone in the suite was in distress, such that the officers' entry was not justified by the principles of *R. v. Godoy*. He submits that the fact that the door was not opened by the occupants did not raise the concern to the level required by that case. He points to the fact that the arrest of Ms. were premised upon the assault of the police with bear spray, not in

<sup>&</sup>lt;sup>55</sup> R. v. Godov, 1999 SCR



should not in the exigency of the circumstances be required to have assessed whether it was a

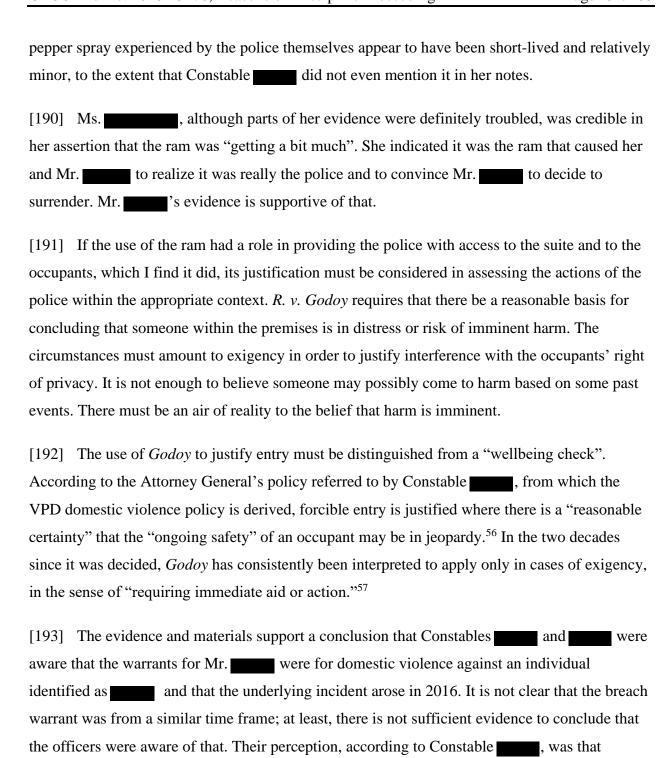


## F. Analysis

[188] I will conduct the analysis of the allegations chronologically as the events unfolded, rather than in the order in which they are set out in Part B.

## 1. Unlawful Entry

[189] The circumstances of this matter clearly engage the issue of whether the decision to enter the suite by force was properly or recklessly made, whether or not the attempt to enter was successful. It would be difficult to conclude on the evidence that the use of the battering ram was not a significant factor in causing the occupants to open the door, even if pepper spray was deployed within the premises. The evidence of the non-police witnesses does not suggest that they opened the door because they were overcome; nor is there evidence that they appeared to be experiencing significant, or any, effects after the door was opened. I note that the effects of the



 $<sup>^{56}\ \</sup>underline{https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/victims-of-crime/vs-info-for-professionals/info-resources/vawir.pdf, p.~9.$ 

<sup>57</sup> https://www.merriam-webster.com/dictionary/exigent

warrants tend to be recent when they are asked to assist another jurisdiction. I am not in a position to reject that the officers believed Mr. may have breached a no contact order with the victim more recently than 2016. [194] Based on their inquiries at the building I am also of the view that the evidence supports a reasonable conclusion that Mr. was probably in the suite when they arrived at the door. had advised them that he let him and Mr. in, earlier that morning, when they did not have their key. According to both officers, they had checked the common room before going to the suite. In any event, hearing a male voice behind the door, given the prior information that Mr. was living there, would lead to a reasonable inference that he was present, as did the apparent reluctance of the occupants to open the door. [195] Accordingly, the initial issue in terms of authority to enter the premises is whether it was reasonable for the officers to conclude that someone inside was in need of immediate assistance. and heard a woman's voice apparently whispering to someone inside, and sounds of furniture moving and tampering with the door. The sounds in relation to the lock may have been consistent with applying the deadlock. Logic would suggest that the woman was the registered occupant, but I accept that the officers did not know that, when they arrived. However, even adding the nature of the warrants, the unidentified woman's reluctance to open the door, and some periods of silence on her part, the observations described by the officers at that point fell far short of the threshold set by the case law and the VPD policy. [196] The occupants were entitled to refuse entry, and both officers acknowledged that they knew they could not enter to execute the warrants. The actions of the occupants up to this point were only consistent with a lawful refusal to permit entry. Nonetheless, based only on those initial observations, they apparently firstly demanded that the woman open the door, and then, not achieving their aim, determined that it would be appropriate to have the staff member, Mr.

[197] As pointed out by Mr. all that happened after that was that time passed. Time, it would appear, without any additional information that would indicate exigent circumstances. Constable 's expressed fears about what might be happening behind the door were, with

indicate the woman was in distress.

I, attempt to unlock it. There was nothing in their observations up to that point to

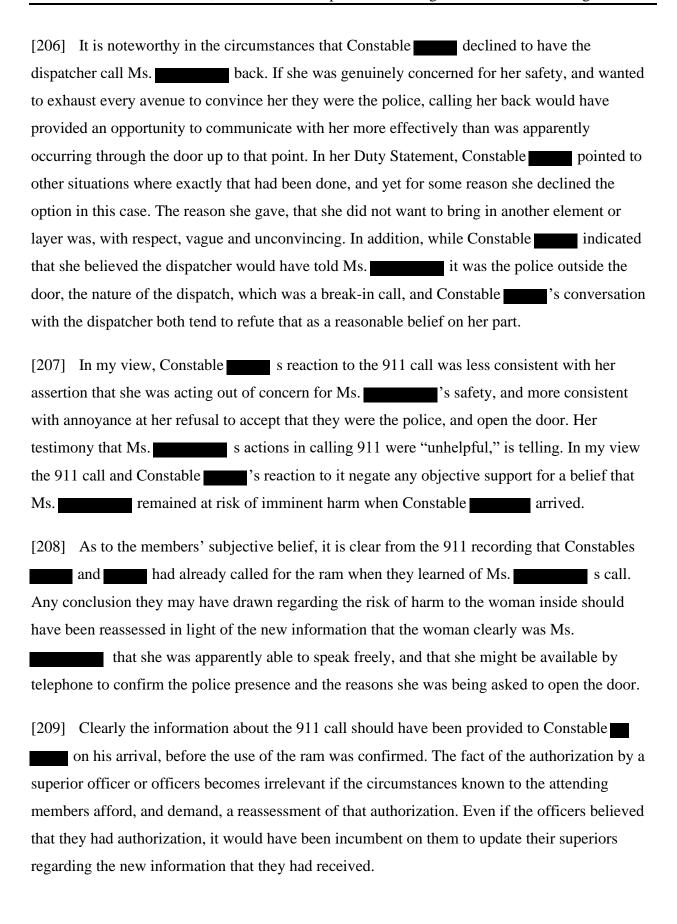
respect, mere speculation, elevated at best to supposition based on the nature of the warrants. It did not meet the departmental standard of reasonable certainty, or even come close. In describing his state of mind, Constable stated only that there "might be" someone inside who was at risk, but he did not believe it was a clear cut case.

both said that based on those circumstances they believed they needed confirmation from a supervisor before entering. I note that they did not have a ram in their possession and would have needed to call for Constable to bring it. In any event, the suggestion that they needed authorization to force entry is inconsistent with having already demanded that the door be opened, and then having asked Mr. to use his key. It is clear that the members made the determination that they would be entering the suite before they called Constable Constable similar in the situation may not justify forced entry when they called him was apt.

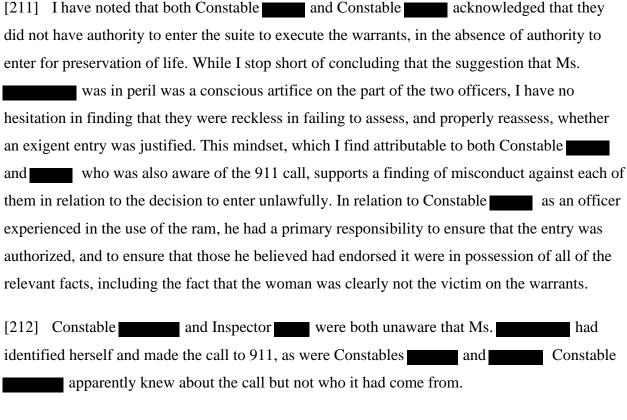
[199] The question that arises then is twofold: were the officers entitled in these circumstances to rely on the apparent endorsement of their superiors that a forced entry was authorized, and did anything change before the ram arrived that would affect that authorization. With respect to the first question, I note that both Constable and Inspector deferred to the decision of the members at the scene as to whether departmental policy applied. It is important to note the terms of the direction that Inspector says he provided, which frame the responsibilities and training of the officers at the scene. As noted, he described his advice to them as follows: "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."

[200] It is clear from that direction and from Constable assessment of whether there were exigent grounds to enter the suite by force depends on the perceptions of the attending officers; in this case, Constables and As I understand the evidence of both superior officers, the decision to bring in the ram was dependent on the factual scenario related by Constable to Constable I would expect that to be the case, as neither superior officer was present when the decision was made.

[201] If there was a policy that members in the field needed a superior's authorization before making an entry under Godoy principles, I did not hear about it. Moreover, that would be inconsistent with the officers' prior unauthorized decision to ask Mr. to let them in. In the absence of evidence indicating that line members are not tasked with applying principles of exigent entry to the facts in the field, I must conclude that the policy was as articulated by the two superior officers, that the facts at the scene are assessed by members who are present, who must be satisfied that they have reasonable and probable grounds to believe a person inside the premises is in need of immediate aid or assistance. [202] Both Constables and testified to sufficient experience to make a reasonable assessment of the application of the principles to the situation. I do not take Constable statement to the dispatcher that they were just "waiting for the ram" to indicate they believed they were seeking direction. [203] The lawfulness of the decision to force entry must therefore be assessed from the state of mind of the members who were present at the scene, in my view. As I have indicated, based on what they knew by the time they first attempted to force entry, with respect, those grounds fell far short of the threshold set by the case law and the VPD policy, and nothing had changed in that respect by the time they called Constable [204] The second issue, then, is whether anything changed between the call to Constable and the arrival of the ram. In my view, the circumstances can only be said to have deescalated in terms of any possible conclusion that an exigent entry was required. Two of the concerns that had been articulated to Constable were that the officers were not sure whether the female inside was the victim on the warrant file, and that she had fallen silent. The 911 call placed by Ms. clearly refutes both of those concerns. [205] Constable was made aware of the call shortly before Constable arrived with the ram. As a result of her conversation with the dispatcher, she was aware that it was Ms. who had called 911, that she had reported a break-in, and that she was professing not to understand that it was the police who were outside her door. Whether or not that was a ruse, which seems likely, it certainly established that she was not the Langley victim, and detracted from concerns about her periodic silence within the premises.



[210] There is no other available conclusion on these facts than that the ram was used more because of the refusal of the occupants to open the door than for the purpose of rendering immediate aid to anyone inside the premises. This would be a clear disregard for, and recklessness as to, the existence of authority to enter. Although I have found that grounds were lacking from the outset, even if the use of the ram was merely attributable to a failure to reflect on the obvious change in circumstances, it amounted to a reckless disregard for the need to reassess whether the dramatic measure of forcible entry continued to be justified.



[213] While I am concerned that Inspector seemed prepared to rubber stamp the use of the battering ram in the circumstances as related to him; in particular, as he states in his report, to conduct a "wellbeing" check based only on the presence of an individual with domestic violence warrants and an unnamed female, his involvement is not at issue in these proceedings.

[214] When Constable arrived, he had what he understood to be Inspector authorization essentially overriding his own assessment, as well as Constable 's assessment as an officer with more experience than him. While in my view he should also have independently reassessed the situation when he arrived, in the absence of knowledge that Ms.

had identified herself and spoken with a 911 operator, he was entitled to rely on both the understanding that the woman inside had gone silent and that her identity was unknown. The evidence supports a conclusion that she did not respond to the warnings before the ram was deployed. While I do not believe the circumstances at that point to have been sufficiently exigent to justify the use of the ram, given the facts known to Constable I am not equipped to find that he was reckless in failing to recognize that, before it was deployed. For the same reason, I do not find that Constable was a party to the unlawful entry effected or attempted through the use of the ram.

[215] I remain concerned that the VPD policy, or at least the collective understanding of it, appears to permit forcible entry where an occupant's wellbeing is merely questioned or "possibly" at risk, and as articulated by Constable, despite her refusal to cooperate. The illogical result of that kind of blind policy is that a victim becomes arrestable for obstruction, and subject to harm at the hands of the officers who are there to protect her.

[216] However, my task in this matter is not to address policy, rather to assess whether the conduct of the members amounts to an abuse of authority. In the case of Constables and I am satisfied that it does. In the case of Constables and I am not.

[217] I am mindful of Members' Counsel's submissions that the entry was unsuccessful, and did not have a causal role in the ensuing events. I have indicated that I consider it to be a causal element in the officers' obtaining access to the suite and to the occupants. In any event, the use of the ram was obtrusive, violent, and unjustified, and it was in my view clearly an abuse of authority whether or not it was successful in breaking open the door.

# 2. Arrest of

<sup>&</sup>lt;sup>58</sup> See paragraph 67 above.

[218] As I have observed, the arrest of the occupants was not achieved directly through the use of the ram. Two events intervened between the ramming of the door and the arrests: the perception of pepper spray in the hallway, and the opening of the door by the occupants.

[219] It is clear that there was something in the hallway that caused the police to be affected as the ram was being used. At least four of the officers present detected it, and Ms. confirmed that she smelled it when she returned to the suite. According to both Constables and Mr. said something consistent with being aware of it, after the incident, and described a canister similar to that later described by Mr. The effects of the substance on the officers are visible in the video from the hallway. The presence of some kind of repellent substance must be accepted on the facts, and there is no basis to conclude, as suggested by Ms. that the police deployed it. Perhaps it came from another suite; nonetheless, it was reasonable for the officers to conclude that the occupants of the suite were using pepper spray in an attempt to prevent them from entering.

[220] If the attempted entry with the ram was unlawful, the occupants were entitled to repel it: *R. v. Sulyk.*<sup>59</sup> While that may provide the occupants with a defence to the charge of assault police officer, it is not determinative in relation to the reasonableness of the arrests, which are dependent on the perceptions of the officers at the time they were made.

[221] It is clear from the video that, moments after the effects of the spray were evident, the suite door was opened by Mr. or Ms. I bear in mind that at that point the members found themselves in a narrow hallway, experiencing the effects of a noxious substance, and now confronted by one or more of the suite occupants, whom they could reasonably assume might be in possession of bear spray or some other weapon.

[222] It is equally clear, however, that each one of the occupants was not subject to arrest for assault of a peace officer in response to the use of pepper spray by one of them. The officers assert that they did not have time to assess the level of grounds at that moment; however, one

<sup>&</sup>lt;sup>59</sup> https://canlii.ca/t/1ngsx.

would expect the distinction between investigative detention and arrest based on reasonable and probable grounds to be elementary, given the significant difference in the degrees of police authority that flow from making that distinction accurately in the field: *Akintoye v. White*. <sup>60</sup> The scope of the incidental search is but one example.

[223] Constable in her evidence likened the situation to several occupants in a car where a weapon is located, but with respect, that is a situation that has long been understood to justify detention, not arrest: *R. v. Clayton*. Again, in my view, the distinction should be elementary, because so much flows from it. There was no basis for arrest of Ms.

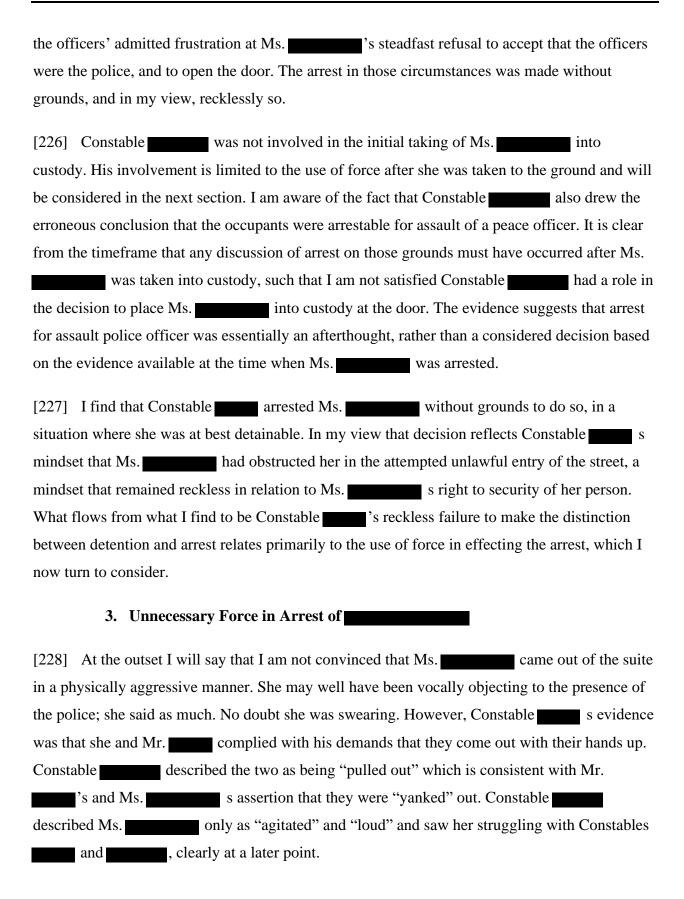
[224] I am mindful that a finding of lack of grounds to arrest does not automatically result in a finding of misconduct: *Lowe v. Diebolt*.<sup>62</sup> The question is whether the officer knew or was reckless as to the existence of grounds to arrest, or in this case, as to the distinction between arrest and investigative detention. As in each allegation of abuse of authority, the facts must be considered from the viewpoint of the officer in the circumstances as they existed at the time of the decision.

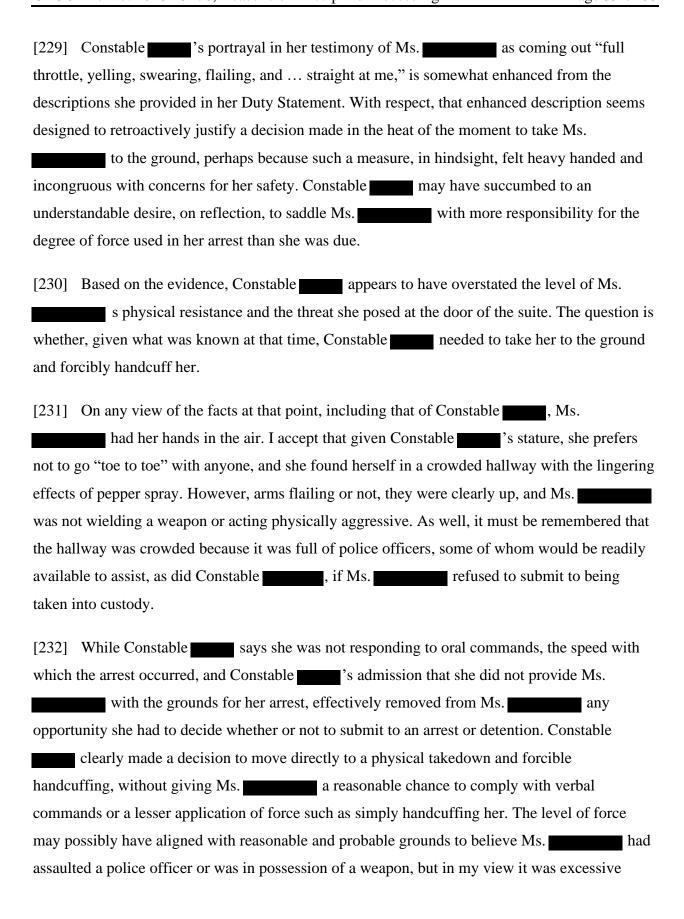
I note in this respect that, as pointed out by the Discipline Representative, Constable did not seek to justify the arrest of Ms. on officer safety grounds nor on the grounds of assault police officer, at the time when she took Ms. into custody. As noted earlier, she did not mention the use of pepper spray in her own notes. She did not provide her grounds for arrest at the time when she took Ms. into custody. Constable 's primary focus, I find, based on all the circumstances, was a belief that Ms. had obstructed the officers' efforts to get the suite door opened. That purpose rested on a premise that I have found to be faulty and reckless, that Ms. was in need of immediate aid. Moreover, her arrest for that purpose was inconsistent with the premise and more consistent with

<sup>60 2017</sup> BCSC 1094 (CanLII)

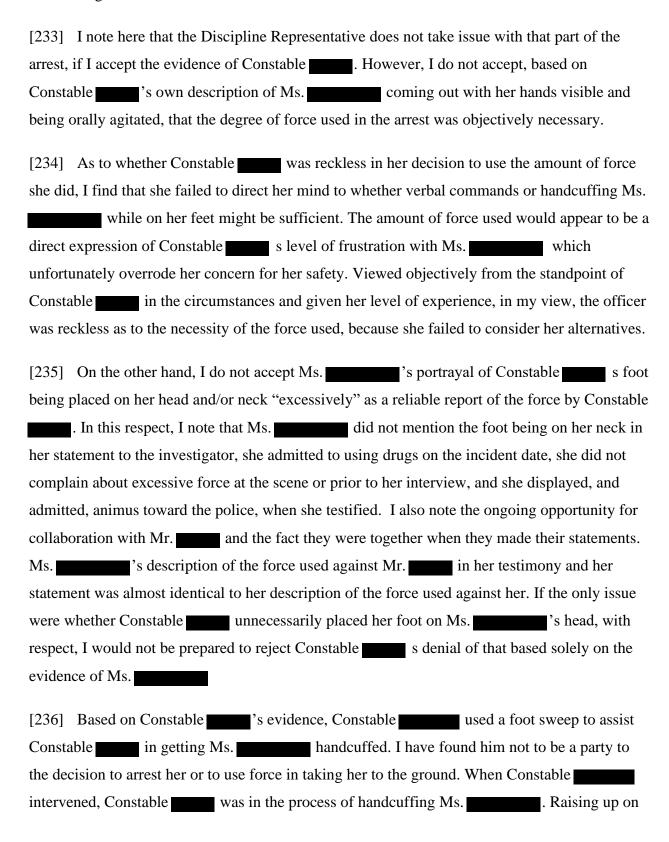
<sup>&</sup>lt;sup>61</sup> 2007 SCC 32

<sup>62 2013</sup> BCSC 1092 (CanLII).





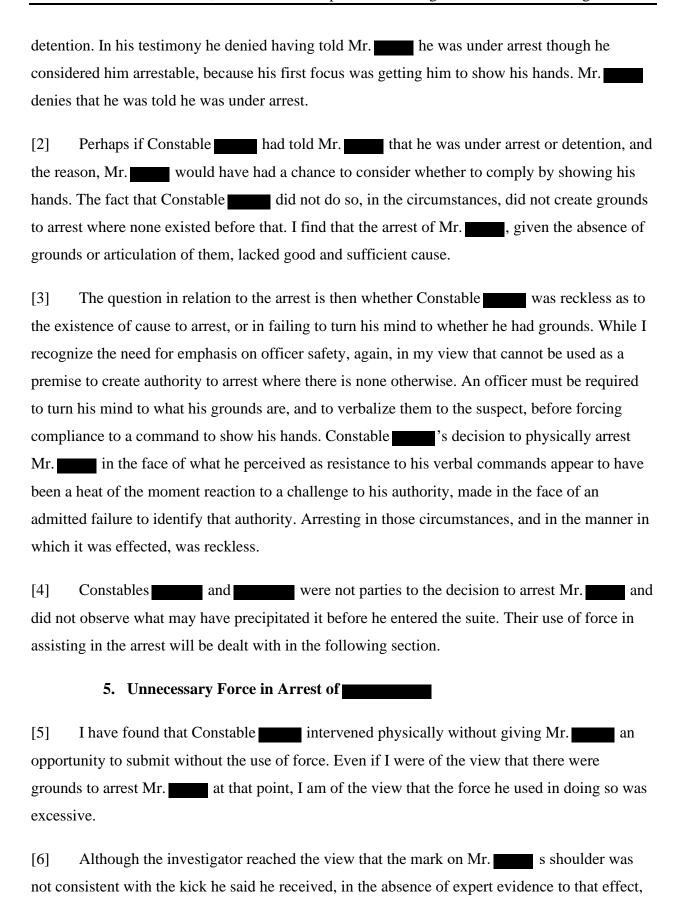
where she was at best under suspicion because of her presence, and also ostensibly the subject of a wellbeing check.

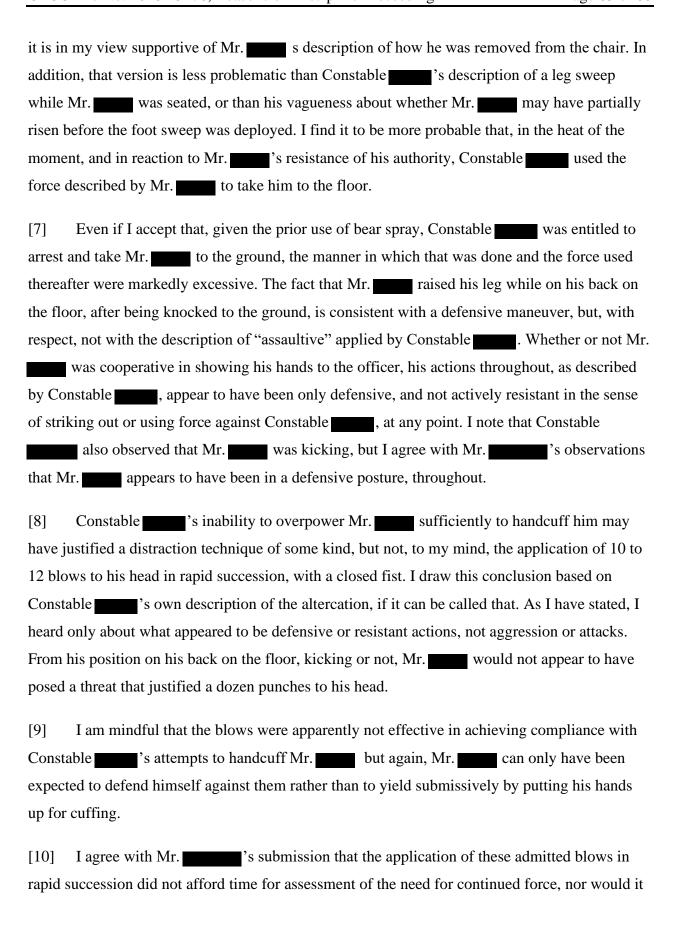


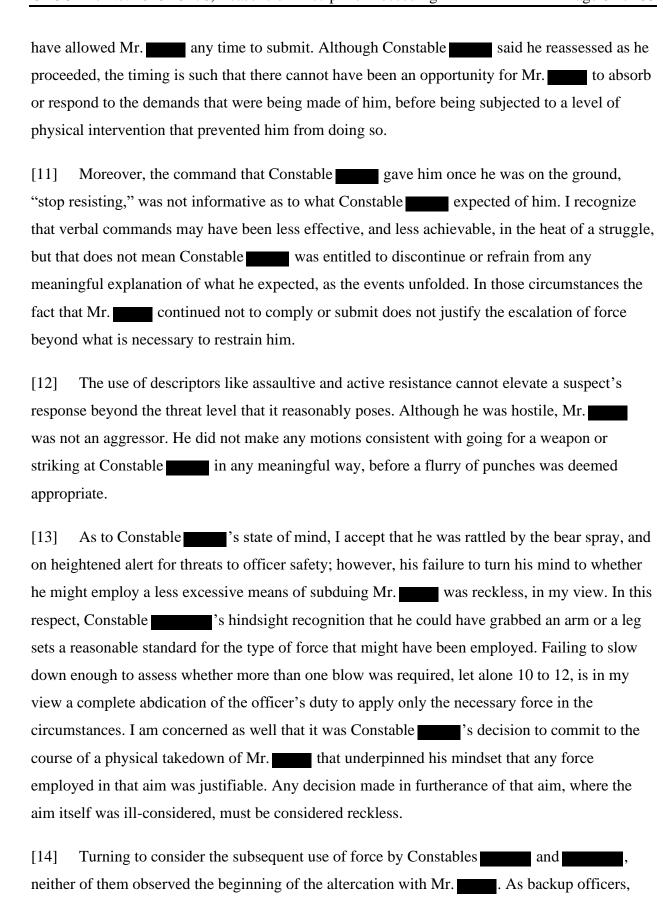
one arm would objectively appear to be resistance, at that point, whatever preceded it. Constable had already committed to her course of conduct, and Constable "s primary duty" at that point would arguably have been officer safety. The use of a single foot sweep to gain compliance would not seem to be excessive in the circumstances, at least, I am not prepared to find that it was a reckless use of unnecessary force on Constable spart. 4. Arrest of [237] Constable entered the suite to check for other occupants and officer safety, having been directed to do so by Constable . Ms. had told the officers there was another person in the suite. Based on what Constable knew as the suite door opened, one of the occupants had deployed bear spray and could well still be armed with it. I accept that officer safety had reasonably replaced the wellbeing check as the primary focus, for him, at that point. [238] Similarly with my conclusion in relation to Ms. Constable did not have reasonable and probable grounds to arrest Mr. either for obstruction or for assault of a peace officer. He had grounds to detain for investigation based on the use of the bear spray. I have already observed that the distinction between arrest and investigative detention is one I would expect officers in the field to consider second nature. [239] What Constable encountered in Mr. was a strangely unresponsive individual, in light of the considerable commotion that had been occurring at the door of the suite, and apparently inside, with the use of the pepper spray. Constable was entitled to assume that Mr. was being deliberately unresponsive, and then, given his remarks, overtly resistant, to Constable s commands to show his hands. Constable would have been entitled to reiterate to Mr. (or explain to him, if he had not already done so), that he was going to be detained, provide him with the reason, and request that he put his hands up or submit

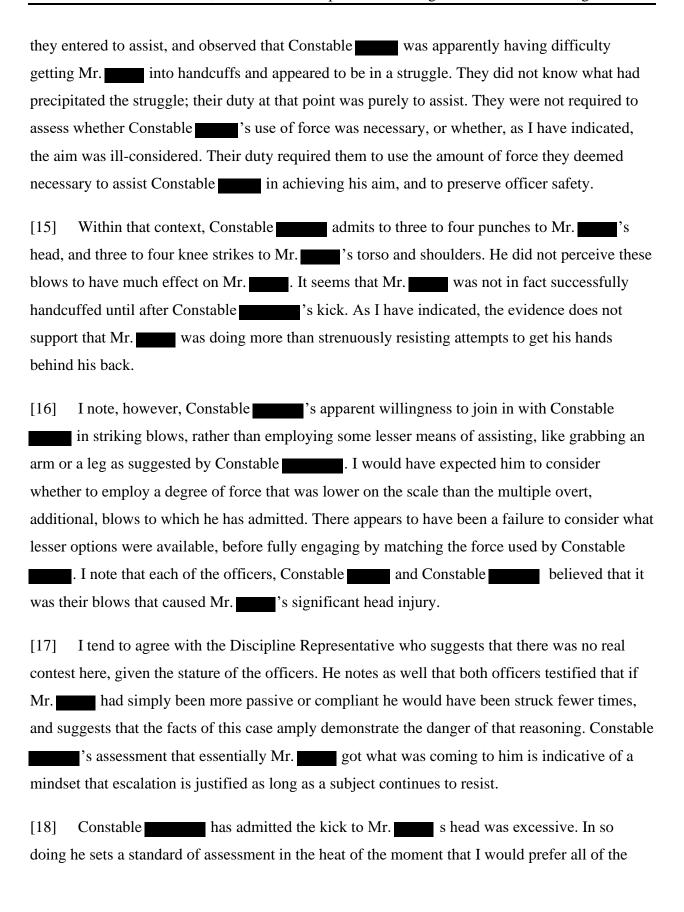
[1] Unfortunately, that is not what Constable did. Constable s evidence as to whether he arrested Mr. is vague and equivocal, perhaps because in hindsight it is apparent that he did not have grounds for arrest. He did not suggest that he had considered

to being handcuffed.









officers to have adhered to in this matter, rather than gauging their force by the yardstick of what was deemed necessary to achieve the objective of control in the most expedient way.

[19] I have previously observed that in considering the subjective reasonableness of an officer's use of force it is of assistance to have testimony about training and policy. In some cases, other officers who were present at the incident assist in the assessment of what is reasonable in the circumstances. Where more than one officer acts unreasonably, it may raise questions about policy and training. In my view, however, if an officer's failure to adhere to an objectively reasonable standard in relation to the use of force is attributable to departmental culture or a misinterpretation of the applicable law based on training, it is incumbent on the officer to advance that as evidence to refute a finding of recklessness. In the absence of that, a police officer must be taken to understand the limits of her or his authority and to be capable of adhering to them.

I have not heard evidence in this case pertaining to how or whether the officers' actions relate to departmental policy. In my view, they amount to misconduct. Whether the department has ensured that line officers are equipped to make appropriate assessments as to their authority and the necessity of force while under stress in the field will be for the department to consider in their reflection on whether this or other matters involving excessive force on the part of their officers could have been handled differently. For these purposes, I am satisfied in relation to Constables and and that they each recklessly used unnecessary force against Mr.

## **Neglect of Duty in Search of**

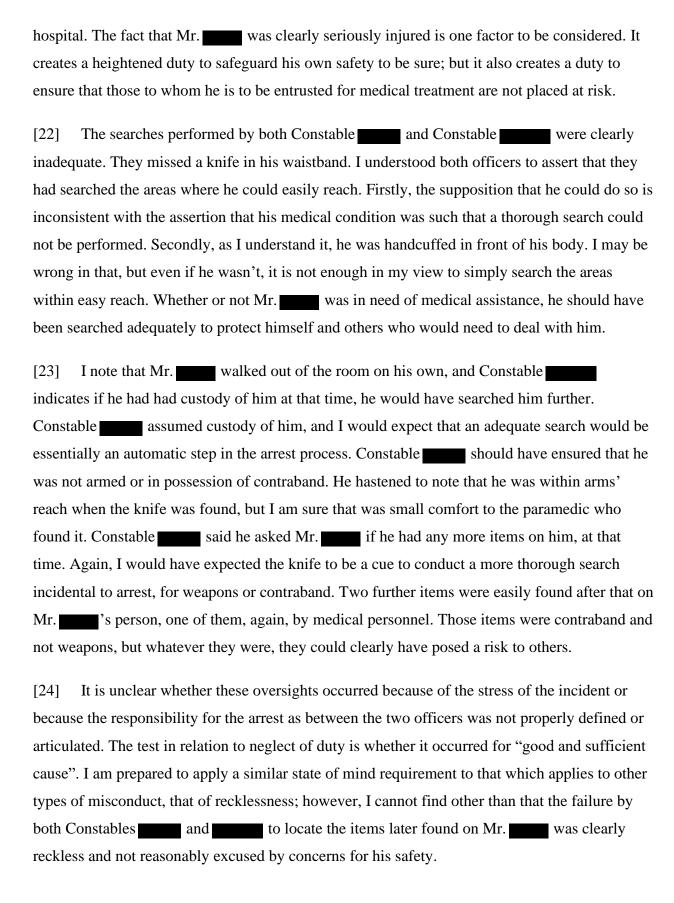
As arresting officer, Constable had the primary responsibility of searching Mr.

Having come to his assistance and then participated in the pat-down search at the scene,

Constable also had a duty to ensure that a thorough search was performed. This duty

relates not only to officer safety but to the safety of medical personnel at the scene and in the

<sup>63</sup> Tiwana Public Hearing, OPCC No. PH 14-02



[25] Constable , although the on-scene supervisor, did not participate in the searches, nor do I find that he had any duty to oversee them. He was entitled to assume that the members who performed the searches did so in an adequate fashion.

### **G.** Conclusions

[26] I find as follows in relation to the allegations, in the order set out in Part B:

- 1. Unlawful Entry: proven as against Constable and Constable , not proven as against Constable or Constable ;
- 2. Arrest without Good and Sufficient Cause of Proven as against Constable or Proven as against Constable
- 3. Unnecessary Force in Arrest of proven as against Constables and ;
- 5. Arrest without Good and Sufficient Cause of : Proven as against Constable ; ;
- 6. Unnecessary Force in Arrest of Proven as against Constable not proven as against Constable

Delivered at Sechelt, British Columbia, this 17th day of March, 2021.

Carol Baird Ellan

Retired Provincial Court Judge

Discipline Authority