

**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:

**[REDACTED], Constable, [REDACTED]**

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 [REDACTED], 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 [REDACTED], 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

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I acknowledge service of this form:

Signature of member/former member: ..... 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: .



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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: **NOT PROVEN, see attached Reasons**

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

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

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

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

Signature of discipline authority:



2021 March 17

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I acknowledge service of this form:

Signature of member/former member: ..... Date: .....*[yyyy/mm/dd]*



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

**AND**

**IN THE MATTER OF ALLEGATIONS OF MISCONDUCT**

**AGAINST**

**CONSTABLE [REDACTED]**

**CONSTABLE [REDACTED]**

**CONSTABLE [REDACTED]**

**CONSTABLE [REDACTED]**

**OF THE VANCOUVER POLICE DEPARTMENT**

**DISCIPLINE AUTHORITY'S REASONS**

**ON DISCIPLINE PROCEEDING**

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: Mr. [REDACTED] (Discipline Representative)

AND TO: Mr. [REDACTED] (Counsel for Csts. [REDACTED] & [REDACTED])

AND TO: Ms. [REDACTED] (Counsel for Csts. [REDACTED] & [REDACTED])

AND TO: Sergeant [REDACTED] (Investigator)  
Vancouver Police Department  
Professional Standards Section

## Table of Contents

A.	Introduction.....	3
B.	Allegations .....	3
C.	Legal Framework .....	4
D.	Evidence.....	6
1.	██████████ .....	6
2.	██████████ .....	11
3.	██████████ .....	13
4.	Constable ██████████ .....	14
5.	Constable ██████████ .....	27
6.	Constable ██████████ .....	34
7.	Constable ██████████ .....	39
8.	Additional Evidence from Final Investigation Report and Attachments .....	43
E.	Submissions .....	45
F.	Analysis .....	48
1.	Unlawful Entry.....	48
2.	Arrest of ██████████ .....	55
3.	Unnecessary Force in Arrest of ██████████ .....	58
4.	Arrest of ██████████ .....	61
5.	Unnecessary Force in Arrest of ██████████ .....	62
6.	Neglect of Duty in Search of ██████████ .....	66
G.	Conclusions.....	68

## **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.

[2] The allegations arise out of the members' attendance at a suite in a single room occupancy [SRO] building known as the [REDACTED] Hotel on Vancouver's downtown east side on May 6, 2018 for the purpose of executing arrest warrants against one of the three occupants, [REDACTED]. It is common ground that the members could not enter the suite for the purpose of arresting Mr. [REDACTED]. While present at the door of the suite, members determined that they needed to check the wellbeing of a woman inside, [REDACTED], and a battering ram was used to attempt entry. As the ram was being deployed, officers outside the door of the suite perceived the presence of bear spray, which they believed had come from under the door. The door was then opened by the suite occupants. [REDACTED] and [REDACTED] were taken to the ground and handcuffed. A third individual, [REDACTED], was found inside the suite and also taken into custody.

[3] As a result of his arrest Mr. [REDACTED] 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. [REDACTED] or Mr. [REDACTED] without cause, using unnecessary force against them, or neglecting to sufficiently search Mr. [REDACTED].

## **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 [REDACTED], [REDACTED] and [REDACTED]

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.

[7] In relation to Constables [REDACTED] and [REDACTED]:

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 [REDACTED].
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, [REDACTED].
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].

[8] 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].

### 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.<sup>1</sup> In the case of neglect of duty, the issue is whether it occurred "without good and sufficient cause."

[11] The issues in relation to the conduct in this matter are therefore as follows: (1) whether the decision to force entry to the suite by any of the officers was unlawful and amounted to abuse of authority; (2) whether the arrest of [REDACTED] was intentionally or recklessly made without good and sufficient cause by Constables [REDACTED], [REDACTED] or [REDACTED], or any of them; (3) whether Constables [REDACTED], [REDACTED] or [REDACTED], or any of them, intentionally or recklessly used unnecessary force against [REDACTED] (4) whether Constables [REDACTED] [REDACTED] or [REDACTED], or any of them, neglected without good and sufficient cause to properly search [REDACTED]; (5) whether the arrest of [REDACTED] was made intentionally or recklessly without good and sufficient cause by either Constable [REDACTED] or Constable [REDACTED]; and (6) whether Constable [REDACTED] or Constable [REDACTED] intentionally or recklessly used unnecessary force against [REDACTED]

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

#### **D. Evidence**

[12] 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. [REDACTED]. 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. [REDACTED]**

[15] Ms. [REDACTED] testified that she lived with Mr. [REDACTED] in the subject suite, and that Mr. [REDACTED] 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 "[REDACTED], the manager." Ms. [REDACTED] believed this was a ruse, because she did not know a manager named [REDACTED], the manager was a female. In addition, this was a Sunday, and she knew there was no manager

present on weekends. Ms. [REDACTED] said the peephole remained obstructed and she became concerned for her safety and that of her friends.

[16] Ms. [REDACTED] 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. [REDACTED] 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. [REDACTED] 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. [REDACTED] call the building staff to help her, and she agreed to do that.

[19] Ms. [REDACTED] 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.

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<sup>2</sup> FIR Attachment J Tasks, Audio\_632021

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

[20] After the ram arrived, Ms. [REDACTED] heard banging on the door and felt the building shaking. She said that she and Mr. [REDACTED] decided to open the door because it was “getting a bit much.”

[21] Ms. [REDACTED] recalled that Mr. [REDACTED] was at that time sitting in the living room watching TV, falling asleep. When the door opened she saw two police officers in uniform, one male and one female. These would have been Constable [REDACTED] and Constable [REDACTED]. Ms. [REDACTED] was making a video with her phone as the events unfolded.

[22] At this point in Ms. [REDACTED]’s evidence it became apparent that Mr. [REDACTED] and Mr. [REDACTED] were present in the room from which she was testifying. They were excused for the remainder of her testimony.

[23] Ms. [REDACTED] recalled that Mr. [REDACTED] said to the officers that he believed they were there for him, and he went and opened the door.<sup>4</sup> She said he did not come out of the suite and his hands were at his sides. Ms. [REDACTED] said a group of officers at the door “grabbed him and fucking threw him against the wall, threw him down on the ground, twisted his wrists, put feet and fucking boots on his back, and arrested him.”<sup>5</sup> (I pause to note that Ms. [REDACTED]’s testimony was punctuated by the “f” word, and she at times became quite animated and on occasion hostile in response to counsel’s questions.)

[24] Ms. [REDACTED] said she told the police they were not welcome there, and four or five officers came into the suite and “batted” her phone to the floor. She said she was grabbed by the arm and pulled out the door. In cross-examination Ms. [REDACTED] said the female officer dealt with her first. The evidence establishes that this was Constable [REDACTED].

[25] Ms. [REDACTED] further described the actions of the officers as follows:

... it was like a group effort of the three of them that were there, right there in front. I know there was like five of them there, four of them there.

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

<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>

[26] The investigator interviewed Mr. [REDACTED] and Ms. [REDACTED] together on March 12, 2019. Ms. [REDACTED] stated to him that she and Mr. [REDACTED] were yanked out, and had their arms twisted and their faces stepped on. She said that Constable [REDACTED] stepped on her head “excessively,” that her wrists were swollen from handcuffing, her arms were sore from being twisted, and she had been thrown against a wall.<sup>7</sup>

[27] Ms. [REDACTED] testified that from her location on the floor in the hallway she could hear three or four officers beating up Mr. [REDACTED], kicking and throwing him. She heard him “screaming for his life”, and thought the whole building could hear it.

[28] Ms. [REDACTED] was taken outside to the police wagon, where, she said, Constable [REDACTED] spoke with her only after she called her over to ask why she was under arrest. They talked for a short time, and she was released. She saw Mr. [REDACTED] being taken into an ambulance.

[29] Ms. [REDACTED] did not recall being told why she was under arrest or handcuffed. She denied saying or doing anything threatening to the officers, apart from filming them. She did that, she said, because she feared they would be excessive. Ms. [REDACTED] denied that she or anyone in the suite had sprayed pepper spray out the door at the officers, although when she returned to the suite she noticed it smelled like pepper spray. There was also blood on the floor and walls.

[30] In cross-examination by Ms. [REDACTED] Ms. [REDACTED] admitted to using drugs on the incident date, perhaps five hours earlier, but denied being affected by them at the time of the incident.<sup>8</sup> She agreed that she had heard the officers say they were police before she called 911,

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

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

<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. [REDACTED] did not believe that Mr. [REDACTED] 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. [REDACTED] confirmed that she knew a member of the [REDACTED] Hotel office staff named [REDACTED] 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?"<sup>9</sup>

[32] Ms. [REDACTED] 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."<sup>10</sup>

[33] Ms. [REDACTED] said it was after the battering ram had hit the door about 12 times that Mr. [REDACTED] 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. [REDACTED] 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

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<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. [REDACTED] 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. [REDACTED], Ms. [REDACTED] confirmed that she was the one who went to open the door and looked through the peephole when they heard the knock. Mr. [REDACTED] 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.

[37] Ms. [REDACTED] 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. [REDACTED] from being arrested. Her resistance to opening the door was due to mistrust. She was not trying to create a way for Mr. [REDACTED] to escape by calling 911; he could have gone out the window to the adjacent [REDACTED]. She agreed she had sworn during her testimony but maintained that she was not swearing at the police.

## 2. [REDACTED]

[38] [REDACTED] 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. [REDACTED] said the police were there and Mr. [REDACTED] told him he better open the door; it would be worse if he didn't. Mr. [REDACTED] told them to stop, and that he would open the door. Mr. [REDACTED] was still waking up, but heard a back and forth conversation between Mr. [REDACTED] and the police and then saw hands reach in, grab his arm and pull him out.

[39] Ms. [REDACTED] went to door and told the police they couldn't do this, that it was her house. An officer reached in and grabbed her out of the suite. Mr. [REDACTED] was wondering what was going on. He had both of his hands in his lap. An officer, which would have been Constable [REDACTED], came in toward him, he put his hands up, and the officer kicked him in the left shoulder. Mr. [REDACTED] went flying, and the officers started smashing him into furniture. A few more officers came in and stomped him while he was on the ground. He only saw one of the officers, Constable [REDACTED], because he was face down for the remainder of the altercation. He said one officer jumped on his neck and he thought he was going to be paralyzed. He denied fighting back. The officers were telling him to stop resisting arrest, and Mr. [REDACTED] was saying he wasn't resisting. He said he was unable to resist, and was lying in a pool of blood. With his face to the side, he could see the bottom of the officers' boots, and saw or felt their elbows and knuckles smashing his face over and over. He believed he was going to die.

[40] Mr. [REDACTED] 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. [REDACTED], Mr. [REDACTED] 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 [REDACTED] initially told him he was under arrest. He said he put his hands up and said he had nothing on him, and Constable [REDACTED] said nothing before knocking him off the chair. He denied that Mr. [REDACTED] sprayed pepper spray before opening the door, and denied that while in the ambulance he said, "Fucking [REDACTED] why did he do that?" as reported by Constables [REDACTED] and [REDACTED].<sup>11</sup>

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<sup>11</sup> September 14 Transcript, page 67, lines 19 – 27, and see paragraph 127, below.

### 3. [REDACTED]

[42] Mr. [REDACTED] testified that he heard people outside the door, and after a while he understood they were the police. That was about the time when he heard them say they were going to get a battering ram. He recalled that they had said they were "[REDACTED]" or something like that, and he knew there was no manager by that name or any male manager. He said that where they lived, you don't open the door for people, you can get in trouble by doing that, especially for someone covering the door and saying they were the manager.

[43] Mr. [REDACTED] knew he had a warrant outstanding from Surrey or Langley. He said an hour passed between their first arrival at the door and using the battering ram. They had been knocking throughout, but he only heard or understood that they were police just before they announced the battering ram. He recalled that Ms. [REDACTED] had called the police earlier.

[44] Mr. [REDACTED] said he was going to open the door, and then did so. He confirmed he was [REDACTED]. He was shocked to see four or five officers pointing tasers. He stepped out, and was taken right to the ground. His hands were up. The officers grabbed his hands and pulled him to the ground and handcuffed him behind his back. He saw Ms. [REDACTED] being escorted out, and the officers got physical with her, but he believed she had remained standing the whole time.

[45] Mr. [REDACTED] heard sounds from the apartment that he described as Mr. [REDACTED] "gargling," a sound he said he could not get out of his head, like someone getting beat up; a horrible sound. He could tell Mr. [REDACTED] was getting the worst of it. Mr. [REDACTED] was taken down the stairs and did not see Mr. [REDACTED] again until months later.

[46] Mr. [REDACTED] denied spraying bear spray under the door. He did not see if Mr. [REDACTED] or Ms. [REDACTED] did. He did not smell it and said if someone had sprayed it they would not have been able to breathe. He denied trying to avoid the warrant, saying he had opened the door as soon as he knew it was the police.

[47] In cross-examination by Ms. [REDACTED] Mr. [REDACTED] confirmed that he and Ms. [REDACTED] were interviewed together by the investigator and that he had talked to Ms. [REDACTED] and Mr. [REDACTED] about the incident, and after their testimony. He said they seemed a bit choked after testifying.

[48] He said that he had been using heroin before the incident, and the knock on the door had jolted him into awareness, but he denied being panicky. He said that Mr. [REDACTED] was “on the nod” from using drugs.

[49] Mr. [REDACTED] was not aware of any staff member being outside the door, other than that someone said they were the manager. He agreed that someone was jiggling the doorknob, but said neither he nor Ms. [REDACTED] had jammed the lock, that he was aware of.

[50] Mr. [REDACTED] agreed he kept a black and red can of bear spray in the apartment, in the cupboard in the bedroom. He denied spraying it under the door and said that the door had a rubber strip under it to keep bugs out. He denied that Mr. [REDACTED] was mad at him or had told him he believed that it was his fault the police had beaten him up. He said, “There was no bear spray sprayed, and I opened the door for them and said it's me, and they came in all on their own.”<sup>12</sup>

[51] In cross-examination by Mr. [REDACTED], Mr. [REDACTED] confirmed that he believed the front desk had told Ms. [REDACTED] that it was the police at the door, and she told him that, but since they had said they were the manager and covered the peephole, he was not sure. He said they put the drugs away at that point. He agreed his criminal record reflected two convictions for flight from a police officer. He said he was a lot younger then and that as soon as he was face to face with the officers on the incident date, he was cooperative. He never smelled pepper spray.

#### **4. Constable [REDACTED]**

[52] Constable [REDACTED] has been with the Vancouver Police Department for 14 years. She estimated that she has been to hundreds of domestic violence calls. She has prior experience as a social worker in [REDACTED] including working with people with mental health issues.

[53] On the incident date, she and Constable [REDACTED] responded to a request from Langley RCMP for assistance with outstanding warrants for Mr. [REDACTED] who was reported to be living at the suite address. Constable [REDACTED] recalled that the information they received from the

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<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. [REDACTED] 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 [REDACTED] stated:

-- Constable [REDACTED] 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 [REDACTED] 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 [REDACTED] reported in the General Occurrence [GO] Report written on the incident date that she and Constable [REDACTED] confirmed the warrants, viewed a 2016 photograph of Mr. [REDACTED], and were able to ascertain that the name of the victim on the files relating to the warrants was [REDACTED].<sup>14</sup>

[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 [REDACTED] and [REDACTED] 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 [REDACTED] who confirmed that he had seen Mr. [REDACTED] 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 [REDACTED] reported that Mr. [REDACTED] had told the officers

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<sup>13</sup> December 2 Transcript, page 9, lines 1 – 17.

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

<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. [REDACTED] rented the room and that Mr. [REDACTED] was staying or living with her there. Constable [REDACTED] 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. [REDACTED] was present. Constable [REDACTED] described their purpose at the time as assisting Langley by knocking to confirm an address for Mr. [REDACTED], and to see if he would cooperate and answer for his warrants.

[59] When they knocked on the door, Constable [REDACTED] clearly heard a female voice. She did not know it was Ms. [REDACTED] at the time. Constable [REDACTED] 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 [REDACTED] and she asked whether he was there.

[60] Constable [REDACTED] 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 [REDACTED] 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.<sup>18</sup>

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

<sup>17</sup> December 2 Transcript, page 12, lines 16 – 25.

<sup>18</sup> Page 12, lines 35 – 40.



[62] Constable [REDACTED] elaborated that in her experience with domestic violence on the downtown east side, it is secretive, and a female victim may be so beaten and broken that they do not feel worthy of justice or bother asking for help. While speaking with the female in this situation, Constable [REDACTED] was taking in the things that were going on. She said the woman became silent and she heard the sounds of furniture moving and the jarring of the deadbolt as if someone was trying to jam it. Constable [REDACTED] said she turned her mind to the idea that if the woman was the victim on the domestic violence file, there was a real problem given that they knew Mr. [REDACTED] did not obey orders, that domestic violence offenders often repeat the offence, and that if a victim asks for help it often results in violence.

[63] In the GO Report, Constable [REDACTED] related these events as follows:

PC [REDACTED] and PC [REDACTED] conducted a door knock to which a female responded. Male voices could be heard in the suite on initial knock. PC's identified themselves as police, and asked the female, later identified as [REDACTED] to open the door advising her they were there to speak with [REDACTED].

[REDACTED] refused to open the door, and stated that no one else was in the room. Several attempts to convince [REDACTED] to open the door failed and PC's could hear clicking and fidgeting with what they believed was the interior side of the lock on the door. [REDACTED] repeatedly said no one was inside with her, that police had no right to come in, that her name was [REDACTED], and then she would go completely quiet. During this interaction police could hear things being pushed towards the door (as though barricading it) in addition to what sounded like messing with the lock.<sup>19</sup>

[64] In her testimony, Constable [REDACTED] said that she spent the time at the door attempting to confirm whether the female was in danger. She did not recall if she communicated with her about what she was hearing inside the suite. Her priority was to try to maintain communication with her, and keep her talking, because the silence concerned her. The woman would talk, then Constable [REDACTED] would hear some whispering. When the woman stopped talking it was as if she was listening to something inside. Constable [REDACTED] noted that she had been to calls where a woman was hiding and would not present herself even if the perpetrator was in custody.

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

[65] Constable ██████ said that she and Constable ██████ tried every avenue to garner Ms. ██████'s trust and convince her that they were the police. Constable ██████ put his shoulder badge up to the peephole to show her. Constable ██████ was in uniform outside the peephole with her duty belt on, which she believed would have been visible to the woman. The staff member, Mr. ██████, came to the suite and tried the key but it would not work. He told the occupants that it was the police that were outside their door. Once she became concerned about the woman's safety, Constable ██████ told her she needed to see her. Although the woman had by then provided the name ██████, Constable ██████ told her she needed to confirm that by sight. She continued to ask her to open the door and step out to speak to her, but none of that happened.

[66] Constable ██████ said that in requiring the woman to open the door and show herself she was relying on the Attorney General's policy on Violence Against Women in Relationships, which she summarized as requiring that domestic violence situations be treated with the highest priority, whether the matter was a domestic "in progress" or a breach of conditions. She stated that such a matter required careful assessment and that the nature of the response is complicated because more often women victims were reluctant to cooperate or to reach out for help.

[67] In relation to the policy, Constable ██████ further stated:

... in my experience, and with the Attorney General's policy, part of our assessment in domestic violence is to look at the victim and see if there's any injuries. I've been to calls where a wife or a female would deny any injuries, and I can clearly see hand marks around her neck. I can see swelling and -- and discolouration starting in an eye, but she adamantly denies that anything happened. And what the policy does for me is it allows me to press the charges, and it's the police pressing charges or requesting charges, and it takes the onus off the victim. Because quite often if the victim participates or reaches out for help then the violence that comes afterwards is far worse. So it -- it puts the onus on the police to proceed without the victim's cooperation.<sup>20</sup>

[68] Constable ██████ said that fairly early in the events her concern shifted away from executing the warrants, although the nature of the warrants played into her concerns about the woman. Based on her experience, Constable ██████ said, the noises and the conversation she

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<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 [REDACTED] did not hear Ms. [REDACTED] 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. [REDACTED] that they were the police.

[70] Constable [REDACTED] further stated:

I believe I asked the dispatcher to tell her it was us, and then something -- either she -- I think Dispatch said she hung up, and she had asked if I wanted her to phone them back, and I said no, and I said no because I didn't want to bring in another element to try and deal with. For one, we only have our personal phones; and two, I was communicating with her directly through the door, and it would add another layer to have her try and communicate through the dispatch, through the phone to me in the hallway, it's just one more complication that we just -- I didn't feel was necessary. And again, in keeping her talking, in listening to what was going on in the apartment, I felt I was better equipped to analyze kind of what was going on and keep track of whether she was safe, if things escalated inside and things like that, so . . .<sup>21</sup>

[71] As previously noted, Constable [REDACTED] and [REDACTED] 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 [REDACTED] 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 [REDACTED] and the dispatcher:

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

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<sup>21</sup> December 2 Transcript, page 19, lines 5 – 23.

<sup>22</sup> FIR, page 62.

Dispatcher: That's what she's saying. Is it [REDACTED]? She was saying that someone is...

Constable [REDACTED]: That's the problem, is the gentleman inside is wanted on a domestic warrant and we can't confirm whether the female is in danger or not so we are waiting on the ram.

Dispatcher: 10-4. Do you want us to try calling her back?

Constable [REDACTED]: No, we're literally standing outside her door.

Dispatcher: Copy that.<sup>23</sup>

[73] Although Ms. [REDACTED] gave the name [REDACTED] to the dispatcher, Constable [REDACTED] testified that she was not content with identifying her through the door, because she needed to confirm whether she had injuries. Asked if she was surprised that Ms. [REDACTED] had called 911, Constable [REDACTED] stated:

...I was just kind of shocked, like we're trying to help you, and there's a simple resolution, and every -- I -- I have no issue speaking to people, I have no issue, I -- I like speaking to people, I like the district I work in, I understand the vulnerable population, I have -- I was just really surprised that it went to that extent, I guess, and it didn't -- it wasn't helpful, and -- and even -- it just -- it wasn't a -- it wasn't helpful.

... We -- we went through every avenue we could possibly think of, and even the dispatcher saying it's the police at your door, she just chose not to believe that. Like she didn't want -- I don't know if she looked through the peephole and saw [REDACTED]'s flasher, I don't know if she looked through the peephole and saw -- I took a step back for her to see full uniform. I don't know if she looked. I -- it was -- but then I don't know if she was allowed to look, I don't . . . so I'm -- I'm surprised, I feel like we tried to exhaust every avenue we could to try and make her realize that it was us, and that if she just stepped outside it would be done.<sup>24</sup>

[74] When interviewed by the investigator, Constable [REDACTED] was asked whether she asked the dispatcher to call Ms. [REDACTED] back or had done so herself. She answered:

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

<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>

[75] 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.

[77] Constable ██████ 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.

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<sup>25</sup> FIR, page 62.

[78] Constable [REDACTED] called Acting Sergeant [REDACTED] from the hallway and briefed him while Constable [REDACTED] was standing in front of the suite. She told Ms. [REDACTED] that they needed to get the ram, and that she should just open the door so they would not have to.

[79] Constable [REDACTED] did not recall specifically what information Constable [REDACTED] provided to Constable [REDACTED]. She believed it included what they had seen, the woman whispering, not cooperating, furniture moving, moments of silence, that they had tried with the staff and tried every avenue, and that they just needed to make sure she was safe.

[80] According to the CAD and video footage from the hallway, Constables [REDACTED] and [REDACTED] and Acting Sergeant [REDACTED] arrived at the suite at 9:53 a.m. Constable [REDACTED] recalled that announcements were made before the ram was used, which is supported by an entry in the CAD at 9:54 a.m. Constable [REDACTED] then used the ram to hit the door. As he did so, Constable [REDACTED] felt the effects of bear spray and began coughing and having trouble breathing. She looked at Constable [REDACTED] and saw that he had taken his jacket and pulled it over his face. She did not recall who said what at that point, but concluded they had all perceived they had just been bear sprayed. These events are confirmed by the video which shows Constable [REDACTED] coughing and pulling his jacket over his mouth at 9:55 a.m.

[81] While Constable [REDACTED] was hitting the door, Constable [REDACTED] stated, it did not open and was barely affected by the ram. At some point, she said, someone inside may have said they were going to open the door. Constable [REDACTED] heard a metal sound like a spoon dropping, heard the deadbolt unlatch, and the door opened. A male came out hunched over and passive, appearing cooperative, with his hands visible, moving toward the elevator area. He was taken into custody by one of the cover officers.

[82] Constable [REDACTED]'s description of what happened next is as follows:

From my perspective, then [REDACTED] comes out the door just full throttle, yelling, swearing, flailing, and just comes straight at me. And I take a hold of her and I'm telling her "get on the ground, get on the ground", just like -- but she's not registering anything. ...and I grabbed an arm, and I kind of tried to guide her to not be out of control in my face, and so I grab a hold of her clothing, and I believe it was her arm... At that time because of the

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 [REDACTED] described Ms. [REDACTED] as “flailing and yelling at police”.<sup>27</sup> She further described Ms. [REDACTED]’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>

[84] Constable [REDACTED] testified that after taking hold of her arm, Ms. [REDACTED] was still yelling, swearing, and not listening to verbal directions. Constable [REDACTED] did not tell Ms. [REDACTED] she was under arrest at that time, because the priority was safety, and Ms. [REDACTED] was not controlling herself: she was erratic and Constable [REDACTED] assessed her as actively resisting. She was physically trying to control her, giving her verbal direction, and she was resisting and was not rational, such that Constable [REDACTED] was unable to ask her what happened or assess her wellbeing. Constable [REDACTED] was focussed on observing her hands for weapons; and assessing whether she was bleeding or bruised, whether her clothes were torn, and whether she was running at her like a traumatized victim, but she was in a state where Constable [REDACTED] could not do a full assessment until she controlled the situation.

[85] In taking Ms. [REDACTED] into custody, Constable [REDACTED] used what she described as a “big C inside knee” to get her to the ground by achieving a mechanical advantage while maintaining her own safety. This entailed spinning her around, using herself as a lever while holding her arm, in a circle and down onto one knee. Constable [REDACTED] said this worked perfectly to take her down and move her to the ground with control, but not violently. Once on the ground,

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

<sup>27</sup> FIR, Attachment D Member Statement, Duty-Statement-Notes-Cst [REDACTED] page 3.

<sup>28</sup> Supra, page 63

Ms. [REDACTED] pushed herself back up and braced on one arm, still yelling. Constable [REDACTED] leg swept her arm with his foot to break her brace so they could handcuff her.

[86] As to whether she slammed Ms. [REDACTED] into a wall, Constable [REDACTED] said the hallway was very narrow and when she brought her around they were at the wall, so she couldn't do anything there with her and had to continue around in front of another apartment door. She agreed that she likely put her on the wall as they swung around, but was unable to control her so she used the big C maneuver and put her onto her stomach on the ground. Constable [REDACTED] denied that she had made any contact with her boot on Ms. [REDACTED]'s head or neck.

[87] Constable [REDACTED] placed her onto the ground and put her in handcuffs. Once Constable [REDACTED] had Ms. [REDACTED] in handcuffs and had the opportunity to talk to her, Ms. [REDACTED] calmed down. Constable [REDACTED] did a quick pat down, and found no weapons. She told Ms. [REDACTED] she was under arrest for obstruction and assault of a police officer. She saw no injuries, nor did Ms. [REDACTED] express that she had any.

[88] Constable [REDACTED] took Ms. [REDACTED] down the elevator and they spoke about what happened. She recalled an equivocal response to the right to counsel, and did not ask questions about the obstruction or assault police officer after that. As to what went on in the room and why she did not open the door, Ms. [REDACTED] denied any domestic issues. Constable [REDACTED] placed Ms. [REDACTED] into the side compartment of the wagon and continued the investigation.

[89] Another officer reported to Constable [REDACTED] that Ms. [REDACTED] had nothing to do with the bear spray, that it was one of the males. She explained to Ms. [REDACTED] why they were concerned about her and about the bear spray. Ms. [REDACTED] appeared upset upon learning that bear spray had been deployed in her apartment. Constable [REDACTED] released Ms. [REDACTED], gave her a card and a file number, and they parted on good terms.

[90] In cross-examination by Mr. [REDACTED], Constable [REDACTED] confirmed that she spent six months with the District 1 squad on a temporary posting. She was transferred shortly after the incident, although it was not the cause. She confirmed that she had training in use of force in the academy as well as legal studies, and was recertified in the use of force annually.



[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. ██████'s being taken into custody. She acknowledged that the initial concern was that Ms. ██████ was a victim, but 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."<sup>29</sup>

[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

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<sup>29</sup> December 2 Transcript, page 50, lines 15 - 17

<sup>30</sup> 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.

[96] Regarding the amount of force used in conducting the arrest, Constable [REDACTED] said that Ms. [REDACTED] 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.”<sup>31</sup> Constable [REDACTED] 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 [REDACTED] went back up to the room and saw Constables [REDACTED] and [REDACTED] with Mr. [REDACTED], 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 [REDACTED] had heard a commotion in the room while she was in the hall with Ms. [REDACTED].

[98] Mr. [REDACTED] was taken to the hospital. Constable [REDACTED] went with him in the ambulance and Constable [REDACTED] 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 [REDACTED] told Constable [REDACTED] that Mr. [REDACTED] had refused to show his hands and that Constable [REDACTED] was “concerned in the moment because Mr. [REDACTED] put up quite a fight with him.”<sup>32</sup>

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<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.<sup>33</sup>

## 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>

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<sup>33</sup> December 2, Transcript, page 59, lines 15 – 18.

<sup>34</sup> December 2 Transcript, page 72, lines 20 – 24.

<sup>35</sup> 73, 17 – 21

[105] Constable [REDACTED] said he did not regard this as a clear case, rather a case where there was a potential that there “might be” someone inside who was in “imminent risk of harm.” Constable [REDACTED] was familiar with situations where the victim on a domestic file had returned to the assailant. He noted that the woman was not identifying herself, that there was whispering behind the door, and he believed that someone inside might be preventing her from opening the door.

[106] Constable [REDACTED] was aware that he did not have authority to enter the suite to execute the warrant but believed this was different because it was a domestic violence situation. Given that the woman was refusing to identify herself, he was worried, and considered it “absolutely possible” that she was the victim of the domestic situation and was being prevented from opening the door.

[107] He and Constable [REDACTED] discussed the situation and agreed it was not safe for them to leave. He was aware of situations where domestic violence had escalated to greater harm. The situation was complicated so they decided to speak with their Acting Sergeant, Constable [REDACTED], to seek direction. Constable [REDACTED] spoke with him and Constable [REDACTED] in turn spoke with the duty inspector.

[108] In relation to the 911 call Ms. [REDACTED] made, Constable [REDACTED] testified that he believed the occupants had called 911 to report a break-in in order to avoid having to deal with the police or being arrested.<sup>36</sup> He had no doubt that they knew it was the police, and noted that the window facing [REDACTED] from the suite faced onto the police cars lined up in front. He believed that any reasonable person would have known it was police and that their state of mind was just to get the police to go away.

[109] Constable [REDACTED] indicated to Constable [REDACTED] that he was going to attend the suite after seeking direction. When he arrived, he advised that he had spoken with the inspector and that the plan was to use the ram, which Constable [REDACTED] had brought, to enter the suite to

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<sup>36</sup> December 2 Transcript, page 80, line 13 – 18.

ensure the safety of the female inside. Constable [REDACTED] understood that the inspector had approved the decision to enter the suite. Several other officers arrived at that time.

[110] Constable [REDACTED], who had experience with the ram, took it from Constable [REDACTED], and knocked and gave the occupants three warnings to open the door. They did not open the door, and Constable [REDACTED] hit the door 10 to 15 times with the ram. While he was doing this, he said, he suddenly began to cough, and perceived that someone was deploying pepper or bear spray under the door towards the officers. Constable [REDACTED] considered this to be an assault on the police officers. He also believed that the occupants were obstructing the police by refusing them entry, given that they had the supervisor's authorization to enter the suite.

[111] Constable [REDACTED] heard a female say she was going to open the door. Ms. [REDACTED] opened it, and was told to keep her hands up, which he said was common practice for officer safety and in light of the use of pepper spray. Ms. [REDACTED] and Mr. [REDACTED] came out of the suite, and Constable [REDACTED] took a step inside to ensure that no one else was present that might continue the use of the pepper spray. In his Duty Statement provided on October 18, 2018, Constable [REDACTED] stated that Mr. [REDACTED] and Ms. [REDACTED] complied with his commands to keep their hands up and exit the suite.<sup>37</sup>

[112] He had decided that in order to calm things down and mitigate the risk, anyone inside the suite would be taken into custody while the police investigated who had sprayed them. He said he had no opportunity to perform a legal analysis as to whether to detain or arrest the occupants, given the speed with which the events unfolded and the presence of the pepper spray, which is very difficult to deal with. His heart was racing and it was hard to breathe, and he had no chance to stop and think about his authority before proceeding in to clear the suite.

[113] As he went into the suite Constable [REDACTED] saw Mr. [REDACTED] sitting in a chair facing the window. The suite was very messy with a lot of junk, including needles and knives. Constable [REDACTED] believed it was odd that Mr. [REDACTED] was looking away from the door and that he did not

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<sup>37</sup> FIR, Attachment D, Member Statements, Duty-Statement\_Cst. [REDACTED] page 3.

turn or notice the police. They had been there over an hour, he had shown his shoulder patch through the peephole, and they could have seen the police vehicles out the window. He believed Mr. [REDACTED] must have known it was the police at the door. Constable [REDACTED] told Mr. [REDACTED] to show his hands, which he said were down so that he could not see them at all.

[114] Constable [REDACTED] had decided he was going to take Mr. [REDACTED] into custody and continue the investigation of the assault with pepper spray. He could not see what was in Mr. [REDACTED]'s hands; it could have been knives, needles or the pepper spray. He described it as a “basic, standard” officer safety principle that he would want to be able to see a suspect’s hands before cuffing him.

[115] Constable [REDACTED] testified that he did not remember whether he told Mr. [REDACTED] he was under arrest and he had no note of it, so he assumed he did not. He said that if he did not tell Mr. [REDACTED] that he was under arrest, it was because the first thing to do in connection with an arrest is ensure officer safety, and the suspect’s safety, by making sure there was nothing in his hands. He noted that later, in the ambulance, a concealed knife was found in Mr. [REDACTED]'s waistband, which is exactly why he would first demand to see his hands. Given the chaotic situation, and the fact that pepper spray had been deployed, he said he had a lot going on in relation to his state of mind. He was fearful he was going to get hurt, and primarily, he just wanted to get Mr. [REDACTED] to show his hands. Constable [REDACTED] said that if Mr. [REDACTED] had shown his hands, he would have told him he was under arrest; however, he did not comply with his commands.

[116] In his Duty Statement, Constable [REDACTED] stated as follows:

I informed [REDACTED] that he was under arrest, and for him to show me his hands. Everyone inside the suite was under arrest for obstruction, and ... we were also investigating the Assault caused by the bear spray. Our main purpose was to locate [REDACTED] for his outstanding domestic assault warrant; and then upon arrival ensure the safety of the unidentified female inside the suite.<sup>38</sup>

[117] Constable [REDACTED] testified that Mr. [REDACTED] told him to “fuck off” and that he was “not under arrest.” Mr. [REDACTED] pulled away as soon as Constable [REDACTED] tried to put his hand onto his

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<sup>38</sup> Supra, page 4.

shoulder to indicate he was being taken into custody. He yanked his shoulder forward, and Constable [REDACTED] placed him on the ground with a foot sweep. Mr. [REDACTED] landed on his back on the ground. Constable [REDACTED]'s goal then became putting him onto his stomach so that he could safely take him into custody.

[118] Constable [REDACTED] testified that Mr. [REDACTED] put his foot up toward Constable [REDACTED]'s body and face, trying to avoid being taken into custody. Constable [REDACTED] was able to get on top of him and get him onto his stomach. Mr. [REDACTED] then “turtled” with his hands together under his body, clenched in front of his chest. Constable [REDACTED] was still giving him commands to show his hands. He found out later that Mr. [REDACTED] had drugs under his armpit which he believed was why he wouldn't show his hands.

[119] Constable [REDACTED] was yelling, “stop resisting” after Mr. [REDACTED] had put his foot in the air in an “assaultive manner.” He perceived that Mr. [REDACTED] was in a position to kick him, and stop the arrest. In Constable [REDACTED]'s view Mr. [REDACTED] went from assaultive to being actively resistant.<sup>39</sup>

[120] Constable [REDACTED] was not able to get Mr. [REDACTED]'s hands out from under him to handcuff him. As a “distraction technique,” he punched him in the face 10 to 12 times in the hopes that he would react by giving up his arms so he could be handcuffed.

[121] Constable [REDACTED] fought with Mr. [REDACTED] for well over a minute but was unable to get him into custody. He believed he yelled out to the other officers for assistance. Constable [REDACTED] came to help him and they were able to get Mr. [REDACTED] into handcuffs. Constable [REDACTED] said he did not see what Constable [REDACTED] did, due to it being so chaotic. Constable [REDACTED] was just relieved when he came to assist, because he was concerned they were going to be injured based on the occupants' behaviour with the pepper spray and Mr. [REDACTED]'s putting his foot up and

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<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.

[122] In cross-examination by Mr. [REDACTED], Constable [REDACTED] indicated that the information they had from Langley included information that Mr. [REDACTED] was violent. He agreed they did not have confirmation that Mr. [REDACTED] was in the suite other than that he had been sighted in the building in a common area earlier and he lived in the suite. He believed they had been at the door for maybe half an hour before contacting Constable [REDACTED]. He agreed the woman inside never asked for help and it had been up to 45 minutes before the battering ram was used. The wait was because, although concerned for the woman's safety, he believed they required advice from someone with more experience. He agreed that they did not believe at first that they had to go in, but that if the woman had called for help there would have been more urgency.

[123] Constable [REDACTED] remembered seeing some needles on the ground when he first entered but it was hard to see how many, and he remembered seeing one or two cooking or kitchen knives. The suite was too cluttered to see more than that. He did not recall whether Mr. [REDACTED] had stood up or gotten off the chair before he used the foot sweep. He believed that he and Mr. [REDACTED] were about the same height but that he was heavier than Mr. [REDACTED].

[124] Constable [REDACTED] said that once the door was opened, he entered to see if there was anyone else, including a possible victim, in the suite. He did not have time to pause and reflect on his authority.

[125] Constable [REDACTED]'s concern about the woman's safety was based on the nature of the warrants and the fact that they believed Mr. [REDACTED] to be in the suite. After being bear sprayed he became concerned for his own safety. He agreed that he hit Mr. [REDACTED] 10 – 12 times in 20 to 30 seconds but said he constantly re-evaluated to see if he was getting compliance.

[126] As to his training with respect to the use of a closed versus an open hand, Constable [REDACTED] said he would have to go back and check exactly how they were taught to punch. He disagreed that a slap would be less likely to cause harm. He had agreed earlier in his evidence that Mr. [REDACTED] had bruises but he was not aware of which force may have caused them. He did not believe he used more force than was necessary.



[127] Constable [REDACTED] did not remember searching Mr. [REDACTED] and did not have a note of that. He had a note of giving him his Charter of Rights at 10:13 a.m., which was delayed because they were providing him with first aid. He recalled Constable [REDACTED] assisting with the search and advising that drugs had been found on him. Constable [REDACTED] gave Mr. [REDACTED] his Charter in relation to obstruction and possession of drugs. It was a paramedic in the ambulance that found the knife in his waistband.

[128] In his Duty Statement, Constable [REDACTED] stated that Constable [REDACTED] had conducted a quick pat-down search of Mr. [REDACTED] at the scene and found some drugs but did not complete the search due to Mr. [REDACTED]'s injuries. When the paramedic found the knife on Mr. [REDACTED] in the ambulance, Constable [REDACTED] asked Mr. [REDACTED] if he had anything else on him and he "did not mention any further items or weapons." He said he spotted the knife at virtually the same time as the paramedic did after the paramedic lifted Mr. [REDACTED]'s shirt, and that he was within arm's length of Mr. [REDACTED] at that time. Constable [REDACTED] said he conducted a further search of Mr. [REDACTED] at that point but was again limited due to the primary concern being first aid. While Mr. [REDACTED] was at the trauma bay in the hospital, staff called Constable [REDACTED] over and gave him a package of drugs that had dropped from under his armpit. Once Mr. [REDACTED] was stabilized at the hospital, Constable [REDACTED] conducted a further search and found the drugs in his sock.<sup>40</sup>

[129] Constable [REDACTED] also said in his Duty Statement that he believed Mr. [REDACTED]'s head injury was caused by one of his blows.

[130] In answer to questions by Mr. [REDACTED], Constable [REDACTED] testified that the officers searched the suite for pepper spray after everyone was handcuffed and Mr. [REDACTED]'s injuries were addressed. He noted that Mr. [REDACTED] told him it was Mr. [REDACTED] who sprayed the pepper spray. The suite was very messy and they did not find anything.

[131] In re-examination by Mr. [REDACTED], Constable [REDACTED] agreed that he had reported in his Duty Statement as follows:

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<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 ██████

[132] Constable ██████ had five and a half years with the Vancouver Police as of the hearing date. He was dispatched to the incident at 9:42 a.m. along with Constable ██████ as cover security. As such, he said, they did not get a full briefing. He was aware that Constables ██████ and ██████ were there to locate ██████ who had a domestic assault warrant and a history of violence, that there was a female involved inside and that they were concerned for her safety and wellbeing.

[133] Constables ██████ and ██████ were in the hallway when Constable ██████ and 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

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

behind commented about it. Constable [REDACTED] covered his face with his jacket. He could not see where it was coming from and assumed it was from under the door, and he vocalized that the occupants were trying to bear spray them.

[136] Constable [REDACTED] said that this changed the way they dealt with the occupants on their way out, given the concern that one may be in possession of bear spray. They grabbed them quickly as they came out to ensure police protection, but, he said, their primary aim was still to ensure the protection of the female occupant. It was about 30 - 45 seconds after the pepper spray that the door was opened and someone said they were coming out.

[137] Constable [REDACTED] and Constable [REDACTED] took Mr. [REDACTED] into custody. Constable [REDACTED] thought he was probably the person with the warrant. He believed they told him he was under arrest for the warrant, but he had the assault of the police officers in mind as well. He recalled Ms. [REDACTED] coming out in an agitated state while they were arresting Mr. [REDACTED].

[138] While they were handcuffing Mr. [REDACTED], Constable [REDACTED] heard crashing and banging inside the suite. It sounded like Constable [REDACTED] was in some kind of distress. He heard a lot of shouting, including Ms. [REDACTED] being extremely loud, and he recognized Constable [REDACTED]'s voice from the inside the suite. In his Duty Statement, Constable [REDACTED] stated that at this time, he observed Constables [REDACTED] and [REDACTED] "struggling with" Ms. [REDACTED]<sup>42</sup>

[139] In his testimony, Constable [REDACTED] said that Constable [REDACTED] had Mr. [REDACTED] under control, so he went into the suite to investigate. He saw Constable [REDACTED] involved in an altercation, trying to effect an arrest. He saw Mr. [REDACTED] on his back with his fists clenched and kicking up toward Constable [REDACTED]'s legs or knees. Constable [REDACTED] was trying to get him under control, standing awkwardly over him in the corner of the messy room. It looked like Constable [REDACTED] was trying to grab his arms to flip him over, while Mr. [REDACTED] was kicking him. In his Duty Statement, Constable [REDACTED] stated, "I observed that [REDACTED] was not complying with PC [REDACTED]'s verbal commands, had his fists clenched and was kicking PC [REDACTED]"

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<sup>42</sup> FIR, Attachment D, Member Statements, Duty\_Statement\_Cst\_[REDACTED] 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. ■■■■■'s 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. ■■■■■'s resistance, and the prior use of bear spray, which could be on Mr. ■■■■■'s person, 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 ■■■■■'s actions, 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

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<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.

[144] Constable [REDACTED] said he believed he used no more force than was necessary. He discontinued as soon as Mr. [REDACTED] was under control. His notes reflected that Constable [REDACTED] had arrested and chartered Mr. [REDACTED] he believed for obstruction, but he wasn't sure.

[145] Constable [REDACTED] did a preliminary pat down search while Mr. [REDACTED] was in the recovery position in the suite. He said the members were concerned about getting him medical assistance as he was bleeding a fair bit, and they did not want to move him. He searched the areas within immediate reach of his handcuffed hands: his pants, his waistband, his pockets. He found a little tea-type tin in his right pants pocket, with various drugs that appeared to be crack, meth, and heroin. He did not find any weapons on Mr. [REDACTED] at that time.

[146] Constable [REDACTED] acknowledged that he missed the knife in his pat down search. He believed this was because he had not wanted to roll Mr. [REDACTED] from one side to the other out of the recovery position, and he guessed he was lying on the side where the knife was in his waistband. He could not say why he missed it, otherwise. He had worked a couple of years at the jail where they stressed the importance of finding concealed weapons, and he said he did the best he could, but obviously missed that.

[147] He did not recall accompanying Mr. [REDACTED] to the ambulance; he believed that was Constable [REDACTED]; but indicated that if he had, he likely would have searched him again once he had him on his feet.

[148] Constable [REDACTED] asked Mr. [REDACTED] where the bear spray was, and he denied knowing. Constable [REDACTED] asked if he had seen it being used and he paused and said, "F'g [REDACTED] why did he do that", which Constable [REDACTED] took as indicating that it was Mr. [REDACTED] who had deployed it. He asked Mr. [REDACTED] to describe the canister and he said it was a red can with black electrical tape, or to that effect. Constable [REDACTED] searched the suite for it, to see if it was in

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. [REDACTED], Constable [REDACTED] said that when he arrested Mr. [REDACTED] he understood him to have been identified as the person with the warrants although he agreed that when he left the suite neither Constable [REDACTED] nor Constable [REDACTED] identified him as such, because “it was instantaneous”.<sup>45</sup> He came out with his hands up, as would a guilty party.

[151] Constable [REDACTED] was standing at Mr. [REDACTED]’s side when Constable [REDACTED] first entered the suite. He believed he saw him punch Mr. [REDACTED] once or twice in the face area, while Constable [REDACTED] was also striking him, from the opposite side. Constable [REDACTED] 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 [REDACTED] 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. [REDACTED]’s head 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 [REDACTED]’s Duty Statement he described his interaction with Mr. [REDACTED] as follows:

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

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

Over the next approximately 45 seconds [REDACTED] continued to fight and resist arrest. I subsequently delivered approximately 6-7 knee strikes, kicks and punches to [REDACTED]'s upper body and head while still holding on to one of his arms attempting to pull it loose.<sup>46</sup>

[153] Constable [REDACTED] testified that he and the other officers were concerned that Mr. [REDACTED] may have had a head or neck injury. He was bleeding heavily but he did not remember exactly where from. He ultimately saw that he had a large cut on his head. He believed Mr. [REDACTED] was injured by the blows he and Constable [REDACTED] delivered. He said he did not see Constable [REDACTED] deliver any blows.

[154] Constable [REDACTED] expressed the view that the injuries Mr. [REDACTED] received were a direct result of Mr. [REDACTED]'s own actions, which required actions from the police. Constable [REDACTED] believed that the force was reasonable in the circumstances. He believed that Mr. [REDACTED] had been given enough time between blows to comply and was not just reacting to protect himself by keeping his hands in that position. He agreed they had not stopped for 30 seconds between blows to explain that they did not want to hit him and ask him to comply, because 30 seconds would have been a lifetime in the middle of a fight that only lasted 40 seconds. He said his training permitted him to make a judgement call regarding use of force in the middle of a stressful situation.

## 7. Constable [REDACTED]

[155] Constable [REDACTED] was the on duty acting supervisor on the incident date. He had nine years experience with the VPD at that time. He was familiar with the departmental policy on domestic violence investigations, which he described as “complex” and “high priority”. He received a call from Constable [REDACTED], who explained the nature of their call to execute the warrant on Mr. [REDACTED]. Constable [REDACTED] told him they had made several knocks and announced that they were VPD and heard a female voice inside. Constable [REDACTED] said they were concerned

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<sup>46</sup> 46 FIR, Attachment D, Member Statements, Duty\_Statement\_Cst\_[REDACTED] page 2.

about the wellbeing of the female and were not sure if she was the victim from the Langley file. He and Constable [REDACTED] were looking for direction about entering the suite without a warrant.

[156] In relation to his authority, Constable [REDACTED] said that, as Acting Sergeant, he felt a little “stuck,” and essentially deferred to the judgement of Constables [REDACTED] and [REDACTED] given their level of experience, including the fact that Constable [REDACTED] was senior to him and had been a detective in the Domestic Violence and Criminal Harassment Unit.

[157] Constable [REDACTED] said:

...given their concerns with the female's safety, and their experience as officers, which, you know, I trust, and I respect as my colleagues, I knew I had a decision to make here, and it wasn't just a quick yes or no decision, there were other factors that I had to -- had to think about, and I had to honestly think about the female's safety, which was top priority for me as an acting supervisor.<sup>47</sup>

[158] Constable [REDACTED] got the “story” from Constable [REDACTED] and took it to his supervisor, Inspector [REDACTED]. In relation to his own frame of mind, Constable [REDACTED] stated:

Well, at the time I didn't think that entry, you know, was -- was necessary, there had been quite a time delay since the original incident in 2016, so we're -- you know, we're looking at -- I don't know what timeframe in 2016, but it could have been a year and a half, almost two years, right, so I didn't think that it was a -- you know, a green light, so to speak, right away. And that's when I took my -- you know, my -- my questions and, you know, advice from Inspector [REDACTED].<sup>48</sup>

[159] Constable [REDACTED] confirmed that he did not believe there were grounds to enter without a warrant at the point when Constable [REDACTED] called him. He related to Inspector [REDACTED] what he had been told by Constable [REDACTED] and described his response from Inspector [REDACTED]

...Inspector [REDACTED] seemed to believe that there was a bit more exigency behind this incident and that, you know, as police we have to maintain public safety, and ultimately preserve life. I know that may seem extreme, but he believed that authority to enter the

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

<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>

[160] Constable ██████ said that Inspector ██████ authorized the use of the ram if the occupants continued to ignore the officers and refuse to answer the door. Constable ██████ considered that to be a direction that he was required to follow. He believed the legal authority for that entry to be the common law authority to protect life.

[161] Constable ██████ was on another call at the time when these conversations occurred, and after he finished that, he went from there to the apartment, with the ram, which he had in his trunk. When he arrived he met with Constables ██████ and ██████ and advised them that they had authority to enter the suite to check the welfare of the female. He gave the ram to Constable ██████, who was the officer that had experience with it and was best qualified to use it.

[162] The officers knocked on the door, announced that they were the police, and requested that the occupants open the door. No one answered, so Constable ██████ began to hit the door with the ram. As he did that, Constable ██████ observed that he and the other members began to cough. Constable ██████ believed they were getting sprayed with bear mace or pepper spray under the door.

[163] The introduction of the bear spray threw the members off, Constable ██████ said, and his stress level rose, knowing that they were being assaulted, and that the individuals behind the door were violent. As he was coughing and trying to regain focus, the door opened, and a male and female were “pulled out of” the suite and dealt with by the assisting officers on scene.<sup>50</sup>

[164] Constable ██████ said the immediate priority was to get the two individuals into custody and out of the building, which was a confined space. The officers did not know which of

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

<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 [REDACTED] 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 [REDACTED] told Constable [REDACTED] 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.

[167] Constable [REDACTED] went in. Constable [REDACTED] heard a commotion, from which he knew Constable [REDACTED] had encountered someone inside the suite. He saw Constable [REDACTED] 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 [REDACTED] was in a struggle was concerning given his size, and the fact that Constable [REDACTED] knew he had been an [REDACTED] Constable [REDACTED] said his fight or flight response kicked in, and he entered the suite to encounter Constables [REDACTED] and [REDACTED] on the ground with Mr. [REDACTED] whom he described as a heavysset bald male.

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

[168] From what Constable [REDACTED] could see, both officers were essentially in trouble. Constable [REDACTED] is also a big man who also has experience fighting, and Constable [REDACTED] was concerned about their involvement with a violent subject in what he perceived to be a dark cluttered space they were not familiar with. He perceived Mr. [REDACTED] to be uncooperative and unresponsive to commands to give up his hands and be safely taken into custody. He was concerned that the two officers did not appear to be gaining control. He approached, and not seeing an opportunity to strike in any other location, he kicked Mr. [REDACTED] once in the head.

[169] On reflection since the incident, Constable [REDACTED] said he recognized that a kick to the head could be lethal and that his blow was excessive. His aim was to get Mr. [REDACTED] into custody and out of the suite, in all the circumstances including the level of stress from the prior assault and the state of the suite. If he had been less stressed and more objective he could have tried grabbing a limb or assisting in wrestling with him. He did not see a chance to strike him with his baton, and using pepper spray again in that space at that time was not a good option.

[170] In cross-examination by Mr. [REDACTED], Constable [REDACTED] confirmed that he knew the warrant for Mr. [REDACTED] was from 2016 and it was for a domestic violence incident, but that he did not know Mr. [REDACTED] was in the suite. He was aware that the female had not asked for help.

[171] He believed it was a matter of seconds from his entering the suite to kicking Mr. [REDACTED]. Mr. [REDACTED] was on the ground but he did not recall whether he was on his front or his back. He was not yet handcuffed. He did not recall what the other two officers were doing or any blows they struck. Shortly after the kick and perhaps as a result of it, Mr. [REDACTED] was taken into custody. Constable [REDACTED] noticed blood on the floor. He directed Constable [REDACTED] to apply pressure to Mr. [REDACTED]'s wound, and called for emergency health services.

## **8. Additional Evidence from Final Investigation Report and Attachments**

[172] Inspector [REDACTED] provided a Duty Statement in connection with the investigation. He stated:

I received a phone call from A/Sgt [REDACTED] who explained to me that Langley RCMP had requested the VPD attend [REDACTED] Street and attempt to locate and arrest an individual on an outstanding domestic violence warrant. A/Sgt [REDACTED] informed me when two of his members attended and knocked on the door, the occupants refused to answer. I

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 [REDACTED] 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 [REDACTED] 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 [REDACTED] 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, [REDACTED]. Mr. [REDACTED] confirmed that he attended the suite with the key to attempt to open the door but was not successful. He stated that Ms. [REDACTED] had told the police she was fine and said that Mr. [REDACTED] was not in the suite. He attempted to persuade Ms. [REDACTED] 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. [REDACTED] 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 [REDACTED] 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 [REDACTED] arrives at 9:53; Constables [REDACTED] and [REDACTED] at 9:54. Constable [REDACTED] appears to have a taser in his hand. Constable [REDACTED] 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

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<sup>52</sup> Fir, page 90.

outside the door. Constable [REDACTED] pulls his shirt over his face, and Constable [REDACTED] coughs. By 9:55, right after Mr. [REDACTED] and Ms. [REDACTED] leave the suite, Constable [REDACTED] enters it.

[175] The FIR indicates that Constable [REDACTED] was aware that someone from the suite had called 911 to report a break-in, but that he did not know it was Ms. [REDACTED] who had called. Constable [REDACTED] did not include the information about the 911 call in what he told Inspector [REDACTED]. He and Inspector [REDACTED] were both unaware that Ms. [REDACTED] had identified herself to the officers at the scene and the 911 operator. In addition, as previously indicated, the FIR reflects that the dispatch in relation to the 911 call occurred at 9:51 a.m. Constable [REDACTED]'s call with dispatch would have occurred after that, shortly prior to Constable [REDACTED]'s arrival.<sup>53</sup>

[176] In addition to the evidence of Constable [REDACTED] regarding his understanding that the woman inside the suite was unidentified and had gone silent, Constable [REDACTED] made the following statements to the investigator:

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. [REDACTED] and Cst [REDACTED] 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-

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

<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. [REDACTED] 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*.<sup>55</sup> 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. [REDACTED] and Mr. [REDACTED] were premised upon the assault of the police with bear spray, not in

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<sup>55</sup> *R. v. Godoy*, 1999 SCR

reliance on exigent circumstances or officer safety. He says the occupants were not all subject to arrest when it was unknown which of them may have committed the offence.

[181] Mr. [REDACTED] also submits that there are credibility issues in relation to the officers who were involved in the altercation with Mr. [REDACTED] because each of them stated they were unaware of what the others did. He points to Mr. [REDACTED]'s injuries, the number of officers involved, and submits that the force used was excessive because the officers did not regulate their actions to apply only the force needed to take Mr. [REDACTED] who was only resisting, into custody.

[182] Finally, Mr. [REDACTED] submits that if I accept Constable [REDACTED]'s version of the arrest of Ms. [REDACTED], it is open to me to find that the force used was not unnecessary.

[183] Counsel for the Members submit that the police did not enter the premises on the authority of *R. v. Godoy*, because their efforts were unsuccessful, such that the issue of whether those principles apply is not a factor in deciding the lawfulness of their actions. They submit that Mr. [REDACTED] and Ms. [REDACTED] came out voluntarily, and that the officers who entered the suite, Constables [REDACTED], [REDACTED] and [REDACTED], did so with authority to preserve officer safety. They further submit that the attempted entry with the ram was authorized by Inspector [REDACTED] after the occupants continued to refuse to open the door and that the officers present were entitled to rely on that authorization.

[184] Counsel for the Members further submit that Ms. [REDACTED] called 911 as a ruse to divert the police, and to prevent their entry to arrest Mr. [REDACTED]. They submit that the intervening event, the spraying of pepper or bear spray, changed the character of the investigation. They submit that Mr. [REDACTED] likely sprayed the bear spray, his judgement clouded by heroin use, and that was what caused the occupants to leave the suite very shortly after it was sprayed. They submit that the occupants were all subject to arrest for assault of the police with the bear spray and obstruction of the entry of the suite that had been authorized by Inspector [REDACTED].

[185] They submit that Constable [REDACTED]'s description of the arrest of Ms. [REDACTED] should be preferred over that of Ms. [REDACTED]. With respect to Mr. [REDACTED]'s arrest, Members' Counsel submit that Constable [REDACTED] had grounds to detain him for assault with the bear spray, and should not in the exigency of the circumstances be required to have assessed whether it was a

detention or an arrest. They submit that Mr. [REDACTED]'s failure to show his hands necessitated the use of force to place him under control and handcuff him, and that Mr. [REDACTED] resisted that because of the contraband that was later found on him. They submit that Constable [REDACTED] reasonably went to Constable [REDACTED]'s assistance and used necessary force to help get Mr. [REDACTED] into custody.

[186] Finally, Members' Counsel submit that the extent of Mr. [REDACTED]'s injuries interfered with the officers' ability to fully search him, and the fact that he was handcuffed removed the urgency of completing the search.

[187] In relation to the application of the law to the facts, Counsel for the Members submit that none of the officers were reckless regarding their authority given that the attempted entry with the battering ram was authorized by a superior officer; that their perception that they had been assaulted with pepper spray and obstructed in the execution of their duty to check on Ms.

[REDACTED] was reasonable; and that there were reasonable grounds to arrest all of the occupants for the assault. As to the use of force, they submit that taking Ms. [REDACTED] to the ground was not unnecessary in the circumstances; and that given Mr. [REDACTED]'s level of resistance and the surrounding circumstances, the force used on him was at least subjectively necessary, with the exception of the kick that Constable [REDACTED] admitted was excessive.

## **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



pepper spray experienced by the police themselves appear to have been short-lived and relatively minor, to the extent that Constable [REDACTED] did not even mention it in her notes.

[190] Ms. [REDACTED], although parts of her evidence were definitely troubled, was credible in her assertion that the ram was “getting a bit much”. She indicated it was the ram that caused her and Mr. [REDACTED] to realize it was really the police and to convince Mr. [REDACTED] to decide to surrender. Mr. [REDACTED]’s evidence is supportive of that.

[191] If the use of the ram had a role in providing the police with access to the suite and to the occupants, which I find it did, its justification must be considered in assessing the actions of the police within the appropriate context. *R. v. Godoy* requires that there be a reasonable basis for concluding that someone within the premises is in distress or risk of imminent harm. The circumstances must amount to exigency in order to justify interference with the occupants’ right of privacy. It is not enough to believe someone may possibly come to harm based on some past events. There must be an air of reality to the belief that harm is imminent.

[192] The use of *Godoy* to justify entry must be distinguished from a “wellbeing check”. According to the Attorney General’s policy referred to by Constable [REDACTED], from which the VPD domestic violence policy is derived, forcible entry is justified where there is a “reasonable certainty” that the “ongoing safety” of an occupant may be in jeopardy.<sup>56</sup> In the two decades since it was decided, *Godoy* has consistently been interpreted to apply only in cases of exigency, in the sense of “requiring immediate aid or action.”<sup>57</sup>

[193] The evidence and materials support a conclusion that Constables [REDACTED] and [REDACTED] were aware that the warrants for Mr. [REDACTED] were for domestic violence against an individual identified as [REDACTED] and that the underlying incident arose in 2016. It is not clear that the breach warrant was from a similar time frame; at least, there is not sufficient evidence to conclude that the officers were aware of that. Their perception, according to Constable [REDACTED], was that

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<sup>56</sup> <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. [REDACTED] 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. [REDACTED] was probably in the suite when they arrived at the door. Mr. [REDACTED] had advised them that he let him and Mr. [REDACTED] 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. [REDACTED] 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. Constables [REDACTED] and [REDACTED] 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, [REDACTED], 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. [REDACTED], attempt to unlock it. There was nothing in their observations up to that point to indicate the woman was in distress.

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

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 [REDACTED] stated only that there “might be” someone inside who was at risk, but he did not believe it was a clear cut case.

[198] Indeed, Constables [REDACTED] and [REDACTED] 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 [REDACTED] 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. [REDACTED] to use his key. It is clear that the members made the determination that they would be entering the suite before they called Constable [REDACTED]. Constable [REDACTED]’s initial assessment that 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 [REDACTED] and Inspector [REDACTED] 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 [REDACTED] 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 [REDACTED]’s evidence that the initial 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 [REDACTED] and [REDACTED]. 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 [REDACTED] to Constable [REDACTED]. 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. [REDACTED] 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 [REDACTED] and [REDACTED] testified to sufficient experience to make a reasonable assessment of the application of the principles to the situation. I do not take Constable [REDACTED]'s 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 [REDACTED].

[204] The second issue, then, is whether anything changed between the call to Constable [REDACTED] and the arrival of the ram. In my view, the circumstances can only be said to have de-escalated in terms of any possible conclusion that an exigent entry was required. Two of the concerns that had been articulated to Constable [REDACTED] 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. [REDACTED] clearly refutes both of those concerns.

[205] Constable [REDACTED] was made aware of the call shortly before Constable [REDACTED] arrived with the ram. As a result of her conversation with the dispatcher, she was aware that it was Ms. [REDACTED] 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.

[206] It is noteworthy in the circumstances that Constable [REDACTED] declined to have the dispatcher call Ms. [REDACTED] back. If she was genuinely concerned for her safety, and wanted to exhaust every avenue to convince her they were the police, calling her back would have provided an opportunity to communicate with her more effectively than was apparently occurring through the door up to that point. In her Duty Statement, Constable [REDACTED] pointed to other situations where exactly that had been done, and yet for some reason she declined the option in this case. The reason she gave, that she did not want to bring in another element or layer was, with respect, vague and unconvincing. In addition, while Constable [REDACTED] indicated that she believed the dispatcher would have told Ms. [REDACTED] it was the police outside the door, the nature of the dispatch, which was a break-in call, and Constable [REDACTED]'s conversation with the dispatcher both tend to refute that as a reasonable belief on her part.

[207] In my view, Constable [REDACTED]'s reaction to the 911 call was less consistent with her assertion that she was acting out of concern for Ms. [REDACTED]'s safety, and more consistent with annoyance at her refusal to accept that they were the police, and open the door. Her testimony that Ms. [REDACTED]'s actions in calling 911 were "unhelpful," is telling. In my view the 911 call and Constable [REDACTED]'s reaction to it negate any objective support for a belief that Ms. [REDACTED] remained at risk of imminent harm when Constable [REDACTED] arrived.

[208] As to the members' subjective belief, it is clear from the 911 recording that Constables [REDACTED] and [REDACTED] had already called for the ram when they learned of Ms. [REDACTED]'s call. Any conclusion they may have drawn regarding the risk of harm to the woman inside should have been reassessed in light of the new information that the woman clearly was Ms. [REDACTED] that she was apparently able to speak freely, and that she might be available by telephone to confirm the police presence and the reasons she was being asked to open the door.

[209] Clearly the information about the 911 call should have been provided to Constable [REDACTED] on his arrival, before the use of the ram was confirmed. The fact of the authorization by a superior officer or officers becomes irrelevant if the circumstances known to the attending members afford, and demand, a reassessment of that authorization. Even if the officers believed that they had authorization, it would have been incumbent on them to update their superiors regarding the new information that they had received.

[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.

[211] I have noted that both Constable [REDACTED] and Constable [REDACTED] acknowledged that they did not have authority to enter the suite to execute the warrants, in the absence of authority to enter for preservation of life. While I stop short of concluding that the suggestion that Ms. [REDACTED] was in peril was a conscious artifice on the part of the two officers, I have no hesitation in finding that they were reckless in failing to assess, and properly reassess, whether an exigent entry was justified. This mindset, which I find attributable to both Constable [REDACTED] and [REDACTED] who was also aware of the 911 call, supports a finding of misconduct against each of them in relation to the decision to enter unlawfully. In relation to Constable [REDACTED] as an officer experienced in the use of the ram, he had a primary responsibility to ensure that the entry was authorized, and to ensure that those he believed had endorsed it were in possession of all of the relevant facts, including the fact that the woman was clearly not the victim on the warrants.

[212] Constable [REDACTED] and Inspector [REDACTED] were both unaware that Ms. [REDACTED] had identified herself and made the call to 911, as were Constables [REDACTED] and [REDACTED]. Constable [REDACTED] apparently knew about the call but not who it had come from.

[213] While I am concerned that Inspector [REDACTED] 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 [REDACTED] arrived, he had what he understood to be Inspector [REDACTED]’s authorization essentially overriding his own assessment, as well as Constable [REDACTED]’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.<sup>58</sup> 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 ██████████**

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<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. [REDACTED] confirmed that she smelled it when she returned to the suite. According to both Constables [REDACTED] and [REDACTED] Mr. [REDACTED] said something consistent with being aware of it, after the incident, and described a canister similar to that later described by Mr. [REDACTED]. 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. [REDACTED], 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. [REDACTED] or Ms. [REDACTED]. 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

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<sup>59</sup> <https://canlii.ca/t/1nqxsx>.



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 [REDACTED] 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*.<sup>61</sup> Again, in my view, the distinction should be elementary, because so much flows from it. There was no basis for arrest of Ms. [REDACTED] as she exited the suite, although she could have been detained for investigation of the use of the bear spray.

[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.

[225] I note in this respect that, as pointed out by the Discipline Representative, Constable [REDACTED] did not seek to justify the arrest of Ms. [REDACTED] on officer safety grounds nor on the grounds of assault police officer, at the time when she took Ms. [REDACTED] 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. [REDACTED] into custody. Constable [REDACTED]'s primary focus, I find, based on all the circumstances, was a belief that Ms. [REDACTED] 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. [REDACTED] was in need of immediate aid. Moreover, her arrest for that purpose was inconsistent with the premise and more consistent with

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

<sup>61</sup> 2007 SCC 32

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

the officers' admitted frustration at Ms. [REDACTED]'s steadfast refusal to accept that the officers were the police, and to open the door. The arrest in those circumstances was made without grounds, and in my view, recklessly so.

[226] Constable [REDACTED] was not involved in the initial taking of Ms. [REDACTED] into custody. His involvement is limited to the use of force after she was taken to the ground and will be considered in the next section. I am aware of the fact that Constable [REDACTED] also drew the erroneous conclusion that the occupants were arrestable for assault of a peace officer. It is clear from the timeframe that any discussion of arrest on those grounds must have occurred after Ms. [REDACTED] was taken into custody, such that I am not satisfied Constable [REDACTED] had a role in the decision to place Ms. [REDACTED] into custody at the door. The evidence suggests that arrest for assault police officer was essentially an afterthought, rather than a considered decision based on the evidence available at the time when Ms. [REDACTED] was arrested.

[227] I find that Constable [REDACTED] arrested Ms. [REDACTED] without grounds to do so, in a situation where she was at best detainable. In my view that decision reflects Constable [REDACTED]'s mindset that Ms. [REDACTED] had obstructed her in the attempted unlawful entry of the street, a mindset that remained reckless in relation to Ms. [REDACTED]'s right to security of her person. What flows from what I find to be Constable [REDACTED]'s reckless failure to make the distinction between detention and arrest relates primarily to the use of force in effecting the arrest, which I now turn to consider.

### **3. Unnecessary Force in Arrest of [REDACTED]**

[228] At the outset I will say that I am not convinced that Ms. [REDACTED] came out of the suite in a physically aggressive manner. She may well have been vocally objecting to the presence of the police; she said as much. No doubt she was swearing. However, Constable [REDACTED]'s evidence was that she and Mr. [REDACTED] complied with his demands that they come out with their hands up. Constable [REDACTED] described the two as being "pulled out" which is consistent with Mr. [REDACTED]'s and Ms. [REDACTED]'s assertion that they were "yanked" out. Constable [REDACTED] described Ms. [REDACTED] only as "agitated" and "loud" and saw her struggling with Constables [REDACTED] and [REDACTED], clearly at a later point.

[229] Constable [REDACTED]'s portrayal in her testimony of Ms. [REDACTED] as coming out "full throttle, yelling, swearing, flailing, and ... straight at me," is somewhat enhanced from the descriptions she provided in her Duty Statement. With respect, that enhanced description seems designed to retroactively justify a decision made in the heat of the moment to take Ms.

[REDACTED] to the ground, perhaps because such a measure, in hindsight, felt heavy handed and incongruous with concerns for her safety. Constable [REDACTED] may have succumbed to an understandable desire, on reflection, to saddle Ms. [REDACTED] with more responsibility for the degree of force used in her arrest than she was due.

[230] Based on the evidence, Constable [REDACTED] appears to have overstated the level of Ms. [REDACTED]'s physical resistance and the threat she posed at the door of the suite. The question is whether, given what was known at that time, Constable [REDACTED] needed to take her to the ground and forcibly handcuff her.

[231] On any view of the facts at that point, including that of Constable [REDACTED], Ms. [REDACTED] had her hands in the air. I accept that given Constable [REDACTED]'s stature, she prefers not to go "toe to toe" with anyone, and she found herself in a crowded hallway with the lingering effects of pepper spray. However, arms flailing or not, they were clearly up, and Ms. [REDACTED] was not wielding a weapon or acting physically aggressive. As well, it must be remembered that the hallway was crowded because it was full of police officers, some of whom would be readily available to assist, as did Constable [REDACTED], if Ms. [REDACTED] refused to submit to being taken into custody.

[232] While Constable [REDACTED] says she was not responding to oral commands, the speed with which the arrest occurred, and Constable [REDACTED]'s admission that she did not provide Ms. [REDACTED] with the grounds for her arrest, effectively removed from Ms. [REDACTED] any opportunity she had to decide whether or not to submit to an arrest or detention. Constable [REDACTED] clearly made a decision to move directly to a physical takedown and forcible handcuffing, without giving Ms. [REDACTED] a reasonable chance to comply with verbal commands or a lesser application of force such as simply handcuffing her. The level of force may possibly have aligned with reasonable and probable grounds to believe Ms. [REDACTED] had assaulted a police officer or was in possession of a weapon, but in my view it was excessive

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

[233] I note here that the Discipline Representative does not take issue with that part of the arrest, if I accept the evidence of Constable [REDACTED]. However, I do not accept, based on Constable [REDACTED]'s own description of Ms. [REDACTED] coming out with her hands visible and being orally agitated, that the degree of force used in the arrest was objectively necessary.

[234] As to whether Constable [REDACTED] was reckless in her decision to use the amount of force she did, I find that she failed to direct her mind to whether verbal commands or handcuffing Ms. [REDACTED] while on her feet might be sufficient. The amount of force used would appear to be a direct expression of Constable [REDACTED]'s level of frustration with Ms. [REDACTED] which unfortunately overrode her concern for her safety. Viewed objectively from the standpoint of Constable [REDACTED] in the circumstances and given her level of experience, in my view, the officer was reckless as to the necessity of the force used, because she failed to consider her alternatives.

[235] On the other hand, I do not accept Ms. [REDACTED]'s portrayal of Constable [REDACTED]'s foot being placed on her head and/or neck "excessively" as a reliable report of the force by Constable [REDACTED]. In this respect, I note that Ms. [REDACTED] did not mention the foot being on her neck in her statement to the investigator, she admitted to using drugs on the incident date, she did not complain about excessive force at the scene or prior to her interview, and she displayed, and admitted, animus toward the police, when she testified. I also note the ongoing opportunity for collaboration with Mr. [REDACTED] and the fact they were together when they made their statements. Ms. [REDACTED]'s description of the force used against Mr. [REDACTED] in her testimony and her statement was almost identical to her description of the force used against her. If the only issue were whether Constable [REDACTED] unnecessarily placed her foot on Ms. [REDACTED]'s head, with respect, I would not be prepared to reject Constable [REDACTED]'s denial of that based solely on the evidence of Ms. [REDACTED].

[236] Based on Constable [REDACTED]'s evidence, Constable [REDACTED] used a foot sweep to assist Constable [REDACTED] in getting Ms. [REDACTED] handcuffed. I have found him not to be a party to the decision to arrest her or to use force in taking her to the ground. When Constable [REDACTED] intervened, Constable [REDACTED] was in the process of handcuffing Ms. [REDACTED]. Raising up on

one arm would objectively appear to be resistance, at that point, whatever preceded it. Constable [REDACTED] had already committed to her course of conduct, and Constable [REDACTED]'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 [REDACTED]'s part.

#### 4. Arrest of [REDACTED]

[237] Constable [REDACTED] entered the suite to check for other occupants and officer safety, having been directed to do so by Constable [REDACTED]. Ms. [REDACTED] had told the officers there was another person in the suite. Based on what Constable [REDACTED] 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. [REDACTED]'s arrest, I am of the view that Constable [REDACTED] did not have reasonable and probable grounds to arrest Mr. [REDACTED], 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 [REDACTED] encountered in Mr. [REDACTED] 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 [REDACTED] was entitled to assume that Mr. [REDACTED] was being deliberately unresponsive, and then, given his remarks, overtly resistant, to Constable [REDACTED]'s commands to show his hands. Constable [REDACTED] would have been entitled to reiterate to Mr. [REDACTED] (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 to being handcuffed.

[1] Unfortunately, that is not what Constable [REDACTED] did. Constable [REDACTED]'s evidence as to whether he arrested Mr. [REDACTED] 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

detention. In his testimony he denied having told Mr. [REDACTED] he was under arrest though he considered him arrestable, because his first focus was getting him to show his hands. Mr. [REDACTED] denies that he was told he was under arrest.

[2] Perhaps if Constable [REDACTED] had told Mr. [REDACTED] that he was under arrest or detention, and the reason, Mr. [REDACTED] would have had a chance to consider whether to comply by showing his hands. The fact that Constable [REDACTED] did not do so, in the circumstances, did not create grounds to arrest where none existed before that. I find that the arrest of Mr. [REDACTED], given the absence of grounds or articulation of them, lacked good and sufficient cause.

[3] The question in relation to the arrest is then whether Constable [REDACTED] was reckless as to the existence of cause to arrest, or in failing to turn his mind to whether he had grounds. While I recognize the need for emphasis on officer safety, again, in my view that cannot be used as a premise to create authority to arrest where there is none otherwise. An officer must be required to turn his mind to what his grounds are, and to verbalize them to the suspect, before forcing compliance to a command to show his hands. Constable [REDACTED]'s decision to physically arrest Mr. [REDACTED] in the face of what he perceived as resistance to his verbal commands appear to have been a heat of the moment reaction to a challenge to his authority, made in the face of an admitted failure to identify that authority. Arresting in those circumstances, and in the manner in which it was effected, was reckless.

[4] Constables [REDACTED] and [REDACTED] were not parties to the decision to arrest Mr. [REDACTED] and did not observe what may have precipitated it before he entered the suite. Their use of force in assisting in the arrest will be dealt with in the following section.

## **5. Unnecessary Force in Arrest of [REDACTED]**

[5] I have found that Constable [REDACTED] intervened physically without giving Mr. [REDACTED] an opportunity to submit without the use of force. Even if I were of the view that there were grounds to arrest Mr. [REDACTED] at that point, I am of the view that the force he used in doing so was excessive.

[6] Although the investigator reached the view that the mark on Mr. [REDACTED]'s shoulder was not consistent with the kick he said he received, in the absence of expert evidence to that effect,

it is in my view supportive of Mr. [REDACTED]'s description of how he was removed from the chair. In addition, that version is less problematic than Constable [REDACTED]'s description of a leg sweep while Mr. [REDACTED] was seated, or than his vagueness about whether Mr. [REDACTED] may have partially risen before the foot sweep was deployed. I find it to be more probable that, in the heat of the moment, and in reaction to Mr. [REDACTED]'s resistance of his authority, Constable [REDACTED] used the force described by Mr. [REDACTED] to take him to the floor.

[7] Even if I accept that, given the prior use of bear spray, Constable [REDACTED] was entitled to arrest and take Mr. [REDACTED] to the ground, the manner in which that was done and the force used thereafter were markedly excessive. The fact that Mr. [REDACTED] raised his leg while on his back on the floor, after being knocked to the ground, is consistent with a defensive maneuver, but, with respect, not with the description of “assaultive” applied by Constable [REDACTED]. Whether or not Mr. [REDACTED] was cooperative in showing his hands to the officer, his actions throughout, as described by Constable [REDACTED], appear to have been only defensive, and not actively resistant in the sense of striking out or using force against Constable [REDACTED], at any point. I note that Constable [REDACTED] also observed that Mr. [REDACTED] was kicking, but I agree with Mr. [REDACTED]'s observations that Mr. [REDACTED] appears to have been in a defensive posture, throughout.

[8] Constable [REDACTED]'s inability to overpower Mr. [REDACTED] sufficiently to handcuff him may have justified a distraction technique of some kind, but not, to my mind, the application of 10 to 12 blows to his head in rapid succession, with a closed fist. I draw this conclusion based on Constable [REDACTED]'s own description of the altercation, if it can be called that. As I have stated, I heard only about what appeared to be defensive or resistant actions, not aggression or attacks. From his position on his back on the floor, kicking or not, Mr. [REDACTED] would not appear to have posed a threat that justified a dozen punches to his head.

[9] I am mindful that the blows were apparently not effective in achieving compliance with Constable [REDACTED]'s attempts to handcuff Mr. [REDACTED] but again, Mr. [REDACTED] can only have been expected to defend himself against them rather than to yield submissively by putting his hands up for cuffing.

[10] I agree with Mr. [REDACTED]'s submission that the application of these admitted blows in rapid succession did not afford time for assessment of the need for continued force, nor would it

have allowed Mr. [REDACTED] any time to submit. Although Constable [REDACTED] said he reassessed as he proceeded, the timing is such that there cannot have been an opportunity for Mr. [REDACTED] to absorb or respond to the demands that were being made of him, before being subjected to a level of physical intervention that prevented him from doing so.

[11] Moreover, the command that Constable [REDACTED] gave him once he was on the ground, “stop resisting,” was not informative as to what Constable [REDACTED] expected of him. I recognize that verbal commands may have been less effective, and less achievable, in the heat of a struggle, but that does not mean Constable [REDACTED] was entitled to discontinue or refrain from any meaningful explanation of what he expected, as the events unfolded. In those circumstances the fact that Mr. [REDACTED] continued not to comply or submit does not justify the escalation of force beyond what is necessary to restrain him.

[12] The use of descriptors like assaultive and active resistance cannot elevate a suspect’s response beyond the threat level that it reasonably poses. Although he was hostile, Mr. [REDACTED] was not an aggressor. He did not make any motions consistent with going for a weapon or striking at Constable [REDACTED] in any meaningful way, before a flurry of punches was deemed appropriate.

[13] As to Constable [REDACTED]’s state of mind, I accept that he was rattled by the bear spray, and on heightened alert for threats to officer safety; however, his failure to turn his mind to whether he might employ a less excessive means of subduing Mr. [REDACTED] was reckless, in my view. In this respect, Constable [REDACTED]’s hindsight recognition that he could have grabbed an arm or a leg sets a reasonable standard for the type of force that might have been employed. Failing to slow down enough to assess whether more than one blow was required, let alone 10 to 12, is in my view a complete abdication of the officer’s duty to apply only the necessary force in the circumstances. I am concerned as well that it was Constable [REDACTED]’s decision to commit to the course of a physical takedown of Mr. [REDACTED] that underpinned his mindset that any force employed in that aim was justifiable. Any decision made in furtherance of that aim, where the aim itself was ill-considered, must be considered reckless.

[14] Turning to consider the subsequent use of force by Constables [REDACTED] and [REDACTED], neither of them observed the beginning of the altercation with Mr. [REDACTED]. As backup officers,



they entered to assist, and observed that Constable [REDACTED] was apparently having difficulty getting Mr. [REDACTED] into handcuffs and appeared to be in a struggle. They did not know what had precipitated the struggle; their duty at that point was purely to assist. They were not required to assess whether Constable [REDACTED]'s use of force was necessary, or whether, as I have indicated, the aim was ill-considered. Their duty required them to use the amount of force they deemed necessary to assist Constable [REDACTED] in achieving his aim, and to preserve officer safety.

[15] Within that context, Constable [REDACTED] admits to three to four punches to Mr. [REDACTED]'s head, and three to four knee strikes to Mr. [REDACTED]'s torso and shoulders. He did not perceive these blows to have much effect on Mr. [REDACTED]. It seems that Mr. [REDACTED] was not in fact successfully handcuffed until after Constable [REDACTED]'s kick. As I have indicated, the evidence does not support that Mr. [REDACTED] was doing more than strenuously resisting attempts to get his hands behind his back.

[16] I note, however, Constable [REDACTED]'s apparent willingness to join in with Constable [REDACTED] in striking blows, rather than employing some lesser means of assisting, like grabbing an arm or a leg as suggested by Constable [REDACTED]. I would have expected him to consider whether to employ a degree of force that was lower on the scale than the multiple overt, additional, blows to which he has admitted. There appears to have been a failure to consider what lesser options were available, before fully engaging by matching the force used by Constable [REDACTED]. I note that each of the officers, Constable [REDACTED] and Constable [REDACTED] believed that it was their blows that caused Mr. [REDACTED]'s significant head injury.

[17] I tend to agree with the Discipline Representative who suggests that there was no real contest here, given the stature of the officers. He notes as well that both officers testified that if Mr. [REDACTED] had simply been more passive or compliant he would have been struck fewer times, and suggests that the facts of this case amply demonstrate the danger of that reasoning. Constable [REDACTED]'s assessment that essentially Mr. [REDACTED] got what was coming to him is indicative of a mindset that escalation is justified as long as a subject continues to resist.

[18] Constable [REDACTED] has admitted the kick to Mr. [REDACTED]'s head was excessive. In so doing he sets a standard of assessment in the heat of the moment that I would prefer all of the

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.<sup>63</sup> 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.

[20] 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 [REDACTED], [REDACTED] and [REDACTED] that they each recklessly used unnecessary force against Mr. [REDACTED].

#### **Neglect of Duty in Search of [REDACTED]**

[21] As arresting officer, Constable [REDACTED] had the primary responsibility of searching Mr. [REDACTED]. Having come to his assistance and then participated in the pat-down search at the scene, Constable [REDACTED] 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

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

hospital. The fact that Mr. [REDACTED] was clearly seriously injured is one factor to be considered. It creates a heightened duty to safeguard his own safety to be sure; but it also creates a duty to ensure that those to whom he is to be entrusted for medical treatment are not placed at risk.

[22] The searches performed by both Constable [REDACTED] and Constable [REDACTED] were clearly inadequate. They missed a knife in his waistband. I understood both officers to assert that they had searched the areas where he could easily reach. Firstly, the supposition that he could do so is inconsistent with the assertion that his medical condition was such that a thorough search could not be performed. Secondly, as I understand it, he was handcuffed in front of his body. I may be wrong in that, but even if he wasn't, it is not enough in my view to simply search the areas within easy reach. Whether or not Mr. [REDACTED] was in need of medical assistance, he should have been searched adequately to protect himself and others who would need to deal with him.

[23] I note that Mr. [REDACTED] walked out of the room on his own, and Constable [REDACTED] indicates if he had had custody of him at that time, he would have searched him further. Constable [REDACTED] assumed custody of him, and I would expect that an adequate search would be essentially an automatic step in the arrest process. Constable [REDACTED] should have ensured that he was not armed or in possession of contraband. He hastened to note that he was within arms' reach when the knife was found, but I am sure that was small comfort to the paramedic who found it. Constable [REDACTED] said he asked Mr. [REDACTED] if he had any more items on him, at that time. Again, I would have expected the knife to be a cue to conduct a more thorough search incidental to arrest, for weapons or contraband. Two further items were easily found after that on Mr. [REDACTED]'s person, one of them, again, by medical personnel. Those items were contraband and not weapons, but whatever they were, they could clearly have posed a risk to others.

[24] It is unclear whether these oversights occurred because of the stress of the incident or because the responsibility for the arrest as between the two officers was not properly defined or articulated. The test in relation to neglect of duty is whether it occurred for "good and sufficient cause". I am prepared to apply a similar state of mind requirement to that which applies to other types of misconduct, that of recklessness; however, I cannot find other than that the failure by both Constables [REDACTED] and [REDACTED] to locate the items later found on Mr. [REDACTED] was clearly reckless and not reasonably excused by concerns for his safety.

[25] Constable [REDACTED], 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 [REDACTED] and Constable [REDACTED], not proven as against Constable [REDACTED] or Constable [REDACTED];
2. Arrest without Good and Sufficient Cause of [REDACTED] Proven as against Constable [REDACTED], not proven as against Constable [REDACTED] or [REDACTED]
3. Unnecessary Force in Arrest of [REDACTED]: proven as against Constables [REDACTED] and [REDACTED];
4. Neglect of Duty: proven as against Constables [REDACTED] and [REDACTED], not proven as against Constable [REDACTED].
5. Arrest without Good and Sufficient Cause of [REDACTED]: Proven as against Constable [REDACTED], not proven as against Constable [REDACTED];
6. Unnecessary Force in Arrest of [REDACTED] Proven as against Constable [REDACTED] not proven as against Constable [REDACTED]

Delivered at Sechelt, British Columbia, this 17<sup>th</sup> day of March, 2021.



Carol Baird Ellan  
Retired Provincial Court Judge  
Discipline Authority