



Office of the
Police Complaint Commissioner

British Columbia, Canada

NOTICE OF APPOINTMENT OF RETIRED JUDGE

Pursuant to section 117(4) of the *Police Act*

OPCC File 2020-17317

June 22, 2021

- To: Mr. [REDACTED] (Complainant)
- And to: Constable [REDACTED] (Members)
Constable [REDACTED]
c/o Vancouver Police Department
Professional Standards Section
- And to: Chief Constable Del Manak (External Discipline Authority)
c/o Victoria Police Department
Professional Standards Section
- And to: The Honourable Judge Mr. Brian Neal, Q.C. (ret'd) (Retired Judge)
Retired Judge of the Provincial Court of British Columbia
- And to: His Worship Mayor Kennedy Stewart
Chair, c/o Vancouver Police Board
- And to: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section

On January 14, 2020, I ordered an investigation into the conduct of Constable [REDACTED] of the Vancouver Police Department (VPD). The Delta Police Department was appointed as the external investigative agency and conducted an investigation into this matter. On March 18, 2020, I amended the ordered investigation to include the conduct of Constable [REDACTED] of the VPD.

On March 13, 2020, our office also received a complaint from Mr. [REDACTED] describing his concerns with members of the VPD. On March 24, 2020, the OPCC determined Mr. [REDACTED] complaint to be admissible pursuant to Division 3 of the *Police Act*.

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Police Complaint Commissioner

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On May 7, 2021, Staff Sergeant [REDACTED] (“Investigator”) completed his investigation and submitted the Final Investigation Report to the Discipline Authority.

On May 25, 2021, Chief Constable Del Manak (“Discipline Authority”) issued his decision pursuant to section 112 in this matter. Chief Manak determined that one allegation of *Abuse of Authority* pursuant to section 77(3)(a)(i) of the *Police Act* against both members did not appear to be substantiated.

Pursuant to section 117(1) of the *Police Act*, having reviewed the allegation and the alleged conduct in its entirety, I consider that there is a reasonable basis to believe that the decision of the Discipline Authority is incorrect.

Background

On December 20, 2019, Mr. [REDACTED] and his 12-year-old granddaughter attended a Bank of Montreal in Vancouver to open an account for her. A bank employee formed the opinion that they had presented fraudulent “*Status*” cards and called 911. Two Vancouver Police Department (VPD) members attended and, after speaking with bank staff for approximately one minute, immediately took Mr. [REDACTED] and his granddaughter from where they were seated within the bank lobby to a location on the street outside of the building. Both persons were placed in handcuffs once outside.

The two members remained outside with the affected persons until two female VPD members arrived in order to conduct a search of the granddaughter. She was subsequently released from handcuffs after approximately 13 minutes. Mr. [REDACTED] remained handcuffed for approximately 34 minutes. It was eventually determined that there was no criminal activity and both persons were released within approximately one hour. During the interaction, Constable [REDACTED] had taken a photograph of Mr. [REDACTED] with his personal cell phone and later deleted it. Constable [REDACTED] had also taken photographs of the identity documents that were provided to him and he later forwarded those photographs to his own legal counsel.

DA Decision

In his decision, the Discipline Authority advised that he is satisfied that the members arrested Mr. [REDACTED] and his granddaughter after forming reasonable grounds based on information from the bank staff. The Discipline Authority decided that Constable [REDACTED] subjectively had reasonable and probable grounds and those grounds were objectively justifiable. The Discipline Authority concluded that, although it seemed the members had “limited knowledge” of section 495(2) of the *Criminal Code of Canada*, the members did not “breach” that section.

In addition, the Discipline Authority considered that the members’ decision to walk Mr. [REDACTED] and his granddaughter outside to the street was reasonable and the manner it was done was “reasonable and respectful.” The Discipline Authority found that the handcuffing was reasonable and justified in the circumstances and he further found that the members did not use unnecessary or excessive force during the handcuffing. In relation to the specific handcuffing of the granddaughter, the Discipline Authority found it “highly concerning” that a

non-violent, 12-year-old female was placed in handcuffs; however, based on the circumstances, he was satisfied that the arrest and handcuffing did not constitute misconduct.

Overall, the Discipline Authority found that the members “could have done a better job in assessing the situation and being better informed by *Indigenous Cultural Safety/Awareness* and the impacts of trauma which both officers admitted they didn’t have.” However, the Discipline Authority determined he, “cannot fault the officers for a lack of training that is outside their immediate control.” The Discipline Authority noted that, in totality, he did not find evidence of misconduct by the members, including Constable ██████ taking a photograph of Mr. ██████ with his personal cell phone nor Constable ██████ sharing Mr. ██████ personal information with Constable ██████ lawyer. The Discipline Authority also supported the policy recommendations made by the Investigator related to improving Indigenous Cultural Safety training.

Request for Appointment of a Retired Judge

On June 9, 2021, I received a request from Mr. ██████ via his counsel, pursuant to section 117 of the *Police Act*, that I appoint a retired judge to review the Final Investigation Report (FIR) and make his or her own decision on the matter.

The request outlined a number of concerns that the Discipline Authority failed to analyze and address key factual issues. These concerns included that the Discipline Authority failed to properly conduct a credibility analysis with respect to conflicting evidence. Specifically, Mr. ██████ and his granddaughter stated that during the incident members told them that they were “not under arrest” but “detained.” Mr. ██████ disagrees with the members’ evidence that they were told they were under arrest. The request notes that the FIR “failed to properly conduct a credibility analysis in light of this conflicting evidence” and further, that the Discipline Authority failed to complete an independent and sufficient analysis.

Mr. ██████ request further noted that the Discipline Authority decision failed “to consider key facts in assessing whether it was an abuse of authority to handcuff and leave [his ██████] in handcuffs beyond when they reasonably should have known her age.” Mr. ██████ points out that information on his granddaughter’s age was available to the members very early in the interaction through her *Status* card as well as her own cooperative acknowledgement of her date of birth at the scene. However, the members “simply didn’t do the math” and “chose to accept without question speculative evidence from the bank and dispatch based on assumptions.”

In addition, Mr. ██████ questioned whether the use of handcuffs was necessary as “the need for handcuffs is not reasonably established on the evidence.” Mr. ██████ and his granddaughter “waited patiently for the police to arrive” and the members knew that “back up female police constables would have to be called and could provide safety or escape support.” Mr. ██████ stated that the members “created the situation” then “used that situation to justify handcuffs on very weak safety grounds.” Mr. ██████ further stated that the members’ evidence was that “they had no concerns about weapons.”

Finally, Mr. ██████ disagrees with the members reliance on the information from the bank staff as grounds for arrest and noted that the Discipline Authority did not analyze and consider the nature of the bank staff's suspicion or the source of the information. Mr. ██████ stated that while it may be reasonable to consider the bank staff as a credible source of information, the bank was not relaying first hand observational evidence, rather "a collection of information, some second hand, some confused through the interpretation of the 911 call into dispatch notes, and opinion that the *Status* card was fraudulent and the interaction suspicious." Constable ██████ "objective component of the test was not met" and the "information relied upon was either hearsay, uncertain or mere suspicion, not reasonable grounds to arrest." Mr. ██████ stated that "further investigative steps were necessary in order to form a reasonable belief that a crime had been committed."

OPCC Decision, Section 117 of the *Police Act*

After review of the Discipline Authority's decision, I consider that there is a reasonable basis to believe that the decision is incorrect.

The Discipline Authority assessed the members' overall conduct in totality and found that Constable ██████ and Constable ██████ "could have done a better job in assessing the situation and being better informed by *Indigenous Cultural Safety/Awareness* and the impacts of trauma which both officers admitted they didn't have." However, the Discipline Authority determined he "cannot fault the officers for a lack of training that is outside their immediate control." The Discipline Authority further stated that the Indigenous background of Mr. ██████ and his granddaughter should have factored into the members overall assessment and determination of next steps and noted that this "highlights the lack of *Indigenous Cultural Safety/Awareness* the officers possessed at the time."

In my respectful view, this assessment is incorrect, considering *Abuse of Authority* is defined as "oppressive conduct towards a member of the public, without limitation" (emphasis added). The members stated in their evidence that they did nothing different in the call due to the Indigenous status of the individuals and it did not factor into their actions and response. Constable ██████ was presented with "Certificate of *Indian Status*" cards by the bank, the members would have known at the material times they were interacting with Indigenous persons. I am of the view that totality of evidence can reasonably support the conclusion that these officers committed misconduct and that their apparent lack of training, while potentially mitigating, does not provide an excuse from culpability.

The Discipline Authority's decision is also incorrect in determining that the members formed the required grounds to arrest Mr. ██████ and his granddaughter during this incident and that handcuffing of them was "reasonable and justified" in the circumstances.

The evidence supports that within approximately two minutes and 30 seconds of arriving on scene, the members had spoken with the bank staff, escorted the two affected persons outside to the street, and placed them both in handcuffs. Constable ██████ stated in his evidence that he "deferred" to the bank's expertise. The evidence supports that Constable ██████ collected a one-minute verbal statement with bank staff and then formed reasonable grounds that a fraud had

been committed. The evidence obtained supports that the collection of information provided to Constable [REDACTED] was based on assumptions and speculation of the granddaughter's age by the bank staff and dispatch. The evidence also supports that the members failed to consider, or even ask about, relevant information in the bank's possession that may have assisted them in confirming Mr. [REDACTED] identification; such as Mr. [REDACTED] *Status* card being validated by Indigenous Affairs, his production of secondary identification, and Mr. [REDACTED] answering his phone as the bank staff called him while present.

Furthermore, in my view, in light of the lack of objective safety or flight risk concerns, the decision to handcuff as well as the length of time the handcuffs were applied can reasonably be seen to be oppressive based upon the evidence in the FIR. The members stated that they had no concerns with weapons or violence and there were no attempts to flee by either party. Constable [REDACTED] agreed both affected persons were calm and cooperative from the start and Constable [REDACTED] agreed that he was surprised that they were still there at the scene upon arrival. This is supported by Constable [REDACTED] evidence that "we typically don't try and handcuff youth anyways unless they're being violent."

During the interaction Constable [REDACTED] took a photograph of Mr. [REDACTED] as well as the *Status* cards. In his evidence, Constable [REDACTED] stated that he used his personal phone to do so.

The Discipline Authority found that Constable [REDACTED] "did not breach VPD policy by using his personal cell phone to take a photograph of Mr. [REDACTED]. However, the analysis does not sufficiently weigh the available evidence against the specific requirements of VPD policy. In addition, Constable [REDACTED] shared the photographs he took with a non-VPD employee and the decision does not sufficiently consider the impact of this within the overall conduct of the officers towards these persons and the legal authorities under which they acted.

Therefore, pursuant to section 117(4) of the *Police Act* and based on a recommendation from the Associate Chief Justice of the Supreme Court of British Columbia, I am appointing Mr. Brian Neal, Q.C., retired Provincial Court Judge, to review this matter and arrive at his own decision based on the evidence.

Pursuant to section 117(9), if the appointed retired judge considers that the conduct of the member appears to constitute misconduct, the retired judge assumes the powers and performs the duties of the discipline authority in respect of the matter and must convene a discipline proceeding, unless a prehearing conference is arranged. The allegations of misconduct set out in this notice reflect the allegations listed and/or described by the Discipline Authority in their decision pursuant to section 112 of the *Police Act*. It is the responsibility of the retired judge to list and/or describe each allegation of misconduct considered in their decision of the matter pursuant to section 117(8)(c) of the Act. As such, the retired judge is not constrained by the list and/or description of the allegation as articulated by the Discipline Authority.

The Office of the Police Complaint Commissioner will provide any existing service records of discipline to the Discipline Authority to assist him or her in proposing an appropriate range of disciplinary or corrective measures should a pre-hearing conference be offered or a disciplinary

proceeding convened. If the retired judge determines that the conduct in question does not constitute misconduct, they must provide reasons and the decision is final and conclusive.

Finally, the *Police Act* requires that a retired judge arrive at a decision **within 10 business days after receipt of the materials** for review from our office. This is a relatively short timeline, so our office will not forward any materials to the retired judge until they are prepared to receive the materials. I anticipate this will be within the next 10 business days.

Take Notice: That on April 8, 2020, the Minister of Public Safety and Solicitor General issued Ministerial Order No. MO98, the Limitation Periods (COVID-19) Order, pursuant to section 10(1) of the *Emergency Programs Act*. That Order is in effect from the date of the Order until the end of the state of emergency the Provincial Government of British Columbia declared on March 18, 2020, in response to the COVID-19 pandemic. Should the appointed Retired Judge require further time to issue his decision, we refer him to section 3 of the Limitation Periods (COVID-19) Order.



Clayton Pecknold
Police Complaint Commissioner

cc: [REDACTED], Acting Registrar
Staff Sergeant [REDACTED] Delta Police Department