

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

AND

IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT AGAINST
CERTAIN OFFICERS OF THE VANCOUVER POLICE DEPARTMENT

NOTICE OF ADJUDICATOR'S DECISION

TO: Mr. [REDACTED] ("Complainant A")

AND TO: Ms. [REDACTED] ("Complainant B")

(Hereinafter collectively called the "Complainants")

AND TO: Constable [REDACTED] (Cst. [REDACTED])
Vancouver Police Department

AND TO: Constable [REDACTED] (Cst. [REDACTED])
Vancouver Police Department

(Hereinafter collectively called the "Members")

c/o Vancouver Police Department ("VPD")
Professional Standards Section

AND TO: Staff Sgt. [REDACTED] Investigator (the "Investigator")
Delta Police Department
Professional Standards Department

AND TO: Mr. Clayton Pecknold
Police Complaint Commissioner (the "Commissioner")

**DECISION
AND NOTIFICATION OF NEXT STEPS**

***PURSUANT TO SECTION 117(7)
OF THE POLICE ACT, R.S.B.C. 1996,
c.367 AND AMENDMENTS THERETO***

I- **Section 117(7) Police Act - Decision Summary**

1. This is a decision made pursuant to section 117(7) of the *Police Act* relating to certain complaints of misconduct concerning the Members alleged to have taken place December 20, 2019 at the Bank of Montreal (“BMO”) branch located at 595 Burrard Street, Vancouver, B.C.
2. I have been appointed Adjudicator in connection with this matter as a result of the Commissioner’s order of June 22, 2021 made in accordance with section 117(4) of the *Police Act*.
3. As set out below, in accordance with my appointment as Adjudicator, I have considered the evidence available in a comprehensive Final Investigation Report dated May 7, 2021 and supplements thereto (collectively, the “FIR”).
4. The Investigator conducted a detailed and comprehensive review of the facts, policy and law that he considered relevant to this case and ultimately concluded that no misconduct had been substantiated for either Member.
5. The Commissioner’s appointment letter, noted above, confirms that the FIR was subsequently reviewed by an appointed External Discipline Authority pursuant to section 112 of the *Police Act* resulting in a similar conclusion to that of the Investigator; specifically, a finding that no misconduct on the part of the Members had been substantiated.

6. My review of the FIR in accordance with section 117 of the *Police Act* has brought me to a different conclusion. Specifically, I have identified the following specific allegations of misconduct that appear to be applicable to the Members as disciplinary breaches of trust, namely that:

On December 20, 2019, the Members appear to have:

(i) Committed Abuse of Authority by oppressive conduct pursuant to sections 77(3)(a) and (a)(i) of the Police Act as a result of removing the Complainants from a bank to a public street without reasonable cause and recklessly arresting the Complainants without good and sufficient cause; (“Misconduct Allegation # 1”) and

*(ii) Abuse of Authority by oppressive conduct pursuant to section 77(3)(a)(ii)A of the Police Act by recklessly using unnecessary force on the Complainants through the application of handcuffs without good and sufficient cause.
 (“Misconduct Allegation #2”)*

7. With respect to Cst. ■ one further potential area of misconduct by way of an alleged disciplinary breach of trust, appears to arise on review of the FIR. It appears that Cst. ■ took photos of Complainant A and the ‘status cards’ of the Complainants during the course of his investigation. It also appears that Cst. ■ subsequently retained and ultimately shared the status card photos with counsel advising Cst. ■ such counsel not being an employee of the VPD or having any apparent role in any investigation of the Complainants.
8. As such, it appears that:

On December 20, 2019, the Cst. ■ appears to have committed misconduct pursuant to section 77 (3) (i) of the Police Act by recklessly disclosing photos of the Complainants’ status cards to an outside party without lawful authority to do so and contrary to the provisions of Part 3 of the Freedom of Information and Protection of Privacy Act.

(“Misconduct Allegation #3”)

9. Misconduct allegations # 1-3 are collectively referred to in this decision as the “Misconduct Allegations”.

10. My conclusions reached as a result of a review of the FIR are set out in detail below, but can be summarized as follows:
- (a) With respect to Misconduct Allegations # 1 and 2, the evidence considered appears sufficient to substantiate the alleged misconduct, potentially requiring consideration of disciplinary or corrective measures against both Csts. ■ and ■ and
 - (b) With respect to Misconduct Allegation # 3, the evidence appears sufficient to substantiate that additional allegation of misconduct with respect to Cst. ■ again potentially requiring consideration of disciplinary or corrective measures against Cst. ■
11. The next steps are set out below, and include the offer of a prehearing conference for both Csts ■ and ■ on the Misconduct Allegations.
12. In the event the prehearing conference offer is rejected, or does not result in an approved resolution of the Misconduct Allegations, a new disciplinary proceeding on the outstanding misconduct allegations that appear to have been substantiated will commence on August 19, 2021 at 9:00 by conference call.

II History of Proceedings and details of the Complaint - Section 117(8)a

13. On December 20, 2019, an incident took place at the main BMO branch in Vancouver that resulted in the arrest of the Complainants by the Members. Although the Complainants were ultimately released from custody without charge, they were apparently arrested, handcuffed, searched and contained on a busy public sidewalk by the Members for some time just outside the bank. The result appears to have been severe stress, angst and embarrassment for the Complainants.
14. On January 14, 2020 the Commissioner ordered an investigation into the conduct of Cst. ■ Delta Police Department was appointed the external investigative agency (“Delta PD”). An initial order was also made appointing an initial External Discipline Authority, ■, ■, West Vancouver Police Department (the “initial External Discipline Authority”).
15. On March 13, 2020, Counsel acting on behalf of the Complainants submitted a registered complainant to the Office of the Police Complaint Commissioner (the “OPCC”) with respect to the circumstances of their arrest and treatment by the Members (the “Complaint”).
16. The Complaint included a detailed summary of allegations made by the Complainants describing allegations of misconduct of the Members during the course of the arrests that took place and thereafter.

17. The Complaint specifically requested that it be combined and considered together with the investigation initiated by the Commissioner noted above. Following a review, the Complaint was determined to be admissible pursuant to Division 3 of the *Police Act*.
18. Following a review by OPCC staff, the Complaint was accepted as admissible and forwarded on for investigation.
19. On March 18, 2020, the Commissioner amended the initial investigation order to include the conduct of Cst. [REDACTED] Delta PD was advised of the expanded investigation mandate.
20. As noted in the Complaint, the misconduct alleged related to the Members' inappropriate arrest of, and use of force on, the Complainants during the course of their investigation of issues raised by BMO. Specifically, allegations were made against both Members of abuse of authority by detaining the Complainants and further by using force by applying handcuffs again without cause.
21. July 15, 2020 the Commissioner accepted the advice of the initial External Discipline Authority that he was unable to continue in that role. A new External Discipline Authority was appointed, Chief Constable D. Manak, Victoria Police Department (the "External Discipline Authority").
22. On July 31, 2020 the Investigator submitted the first version of the FIR to the External Discipline Authority and the OPCC.
23. On August 13, 2020 the Commissioner issued a Direction for Further Investigative Steps to be undertaken by the Investigator.
24. On December 2, 2020 the Investigator submitted a Supplemental Final Investigation Report to the OPCC and External Discipline Authority.
25. On December 16, 2020 a further Direction for Further Investigative Steps was issued to the Investigator by the Commissioner.
26. The Investigator completed his supplemental investigations and submitted an updated FIR to the External Discipline Authority and the OPCC on May 7, 2021.
27. On May 25, 2021 the External Discipline Authority issued his decision pursuant to section 112 of the *Police Act*. The decision confirmed that the allegation of abuse of authority under section 77(3)(a)(i) of the *Police Act* did not appear to be substantiated.
28. The Commissioner reviewed the decision of the External Discipline Authority June 22, 2021 and determined, pursuant to section 117 of the *Police Act*, that the decision was incorrect.

29. Specifically, the Commissioner expressed the view that the External Discipline Authority was incorrect in finding that the arrest and use of force through handcuffing of the Complainants by the Members appeared to be justified in all of the circumstances, negating any conclusion of misconduct.
30. The Commissioner also appears to have taken the position that the Cst. ■ should not have taken photos of Complainant A, or certain status cards of the Complainants, nor shared the same with counsel advising Cst. ■
31. This review has focused on analysis of the conduct of the Members in the context of the FIR.

III Section 117

32. The statutory authority governing this review is found in section 117 of the *Police Act*.
33. Specifically, subsection 117(6) of the *Police Act* imposes a duty on the Commissioner to provide the Adjudicator with copies of all reports under section 98, 115 and 132 that may have been filed with the Commissioner prior to the Adjudicator's appointment in relation to the allegations of misconduct.
34. The central role of the Adjudicator as set out in subsections 117 (8) and 117(9) of the *Police Act* is to independently review the material delivered under subsection 117(6), and to determine whether or not the conduct of any of the Members appears sufficient to substantiate misconduct within the meaning of Part 11 of the *Police Act* requiring disciplinary or corrective action.
35. The law is clear that a review under section 117 is a paper based process of the record provided by the Commissioner. It takes place without live witnesses, additional evidence or submissions from any of the parties involved. The review is not an appeal of earlier decisions concerning misconduct nor is it a redetermination in any manner of other proceedings, including court proceedings, that may have a connection to the misconduct alleged. Nor is the Adjudicator's role to decide the facts concerning the matters in issue at this stage in the process. Rather, the adjudicative role in this part of the process is to determine whether or not the evidence appears to substantiate potential misconduct requiring some form of sanction or corrective measures.
36. The duty of an Adjudicator under subsection 117(1)b is to reach their own conclusions based on the materials submitted for review without submissions or further evidence adduced by way of a hearing.

37. In *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970, the Honourable Mr. Justice Affleck considered an earlier Adjudicator decision provided under section 117, noting as follows:

[27] *There are two troubling aspects to the approach to his task taken by the retired judge.*

[28] *The first is his implicit interpretation of s. 117(9) of the Act that it permitted him at an early stage of his inquiries to reach conclusions about the petitioner's conduct.*

[29] *In Florkow v. British Columbia (Police Complaint Commissioner), 2013 BCCA 92, Newbury J.A. observed that part XI of the Act, where s. 117 is found, "is not a model of clarity". Section 117(9) fits that description, but in my opinion it is clear that it authorized the retired judge to do no more than express a view that the petitioner's conduct on April 22, 2016 "appears" to have been misconduct. To have gone beyond an expression of a preliminary review by giving extensive reasons using conclusory language, such as asserting that the petitioner's "conduct was a marked and serious departure from the standard reasonably expected of a police officer" is not consistent with the scheme and object of the Act and the intention of the legislature (see Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 at para. 21.*

[30] *In my opinion the legislature did not intend the retired judge, whose ultimate role could include presiding over a disciplinary hearing involving the very person whose conduct he had already determined was improper, nevertheless could use language, before a hearing had taken place, that on any reasonable reading left no doubt in the mind of the petitioner that the retired judge had already made up his mind that the petitioner was guilty of the misconduct alleged.*

[37] *In my opinion, the retired judge improperly conflated the issue of whether the petitioner was in the course of his lawful duties when he entered the complainant's home and arrested her, with the other issue of whether the petitioner was guilty of misconduct by abusing his authority as defined in the Police Act. That conflation is apparent from the retired judge's conclusion that:*

It follows, therefore, that the question of whether A/S Scott abused his authority must be determined according respect for the factual findings of the trial judge. Respect for those findings of fact would result in the conclusion that A/S Scott had abused his authority. ...

[39] *Section 117 of the Police Act is unfortunately worded in some respects. On one possible interpretation a retired judge appointed pursuant to the Act is directed to reach conclusions about the conduct of a member of a police force before a disciplinary hearing has been conducted by the retired judge in respect of that conduct. I do not accept the legislature intended such an approach to be taken. If that was the appropriate interpretation it would inevitably raise a serious issue of an apprehension of bias when the retired judge made preliminary findings adverse to the petitioner and was then required to conduct a disciplinary hearing. I conclude that the retired Judge adopted an interpretation which has now led to that unfortunate outcome.*

38. This review has been undertaken in accordance with the foregoing principles and law.

IV Records submitted for review

39. In accordance with subsection 117(6) of the *Police Act*, the Commissioner has provided the updated FIR for my review which was prepared by the Investigator. Also included was a flash drive providing electronic copies of the FIR documents and videos detailing much of the encounter with between the Members and the Complainants.

40. The comprehensive and detailed updated FIR, dated May 7, 2021, comprises more than 100 pages of narrative, plus extensive related attachments in four large binders. The report details the evidence of all relevant parties concerning the conduct of the Members on the date in question. The FIR also provides substantial background on relevant law, cases, policies and procedures.

41. The FIR and related materials were delivered to me June 25, 2021. Section 117(9) of the *Police Act* confirms that my review must be completed within 10 business days with notice thereafter to the relevant parties of my decision and next steps, if any.

V Misconduct and the Police Act- Allegations considered **– Section 117(8)c Police Act**

42. The evidence set out in the FIR outlines the perspectives of the Complainants, the Members, civilian witnesses and others concerning the unfolding events involving the Complainants and BMO. As noted, the report also includes extensive collateral materials on VPD policies, case law and general principles associated with use of force training, powers of arrest and training with respect to awareness on how policing actions may have unique and negative impacts on persons with indigenous heritage.

43. As noted above, a series of video recordings arising from an internal security system associated with the BMO Branch have been made available and incorporated into the FIR. These recordings provide an important series of perspectives of the various interactions between the Complainants, bank staff and the Members.

44. Turning to the specifics of possible misconduct that may be relevant to the actions of the Members, section 77 of the *Police Act* provides, in part, as follows:

77(1) In this Part, "misconduct" means

(a) conduct that constitutes a public trust offence described in subsection (2), or

(b) conduct that constitutes

(i) an offence under section 86 [offence to harass, coerce or intimidate anyone questioning or reporting police conduct or making complaint] or 106 [offence to hinder, delay, obstruct or interfere with investigating officer], or

(ii) a disciplinary breach of public trust described in subsection (3) of this section.

(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

(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, or

(B) detaining or searching any person without good and sufficient cause.

(i) "improper disclosure of information", which is intentionally or recklessly:

(i) disclosing, or attempting to disclose, information that is acquired by the member in the performance of duties as a member.

45. An important overall limitation to the definitions of misconduct in section 77 of the *Police Act* is found in subsection 77(4) as follows:

77(4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.

46. This review must independently assess the circumstances of each Member's interactions with Complainants, the actions of the various parties and the totality of the circumstances relating to the same as set out in the FIR. This includes consideration of the subjective and objective rationale behind the Members' arrest decisions and use of force by handcuffing the Complainants immediately on arrest.

VI The Evidence arising from the Final Investigation Report

47. My review of the FIR and the evidence and records referenced in it discloses the following evidence, which if proven, may have relevance to the questions of misconduct raised in this review.
48. I note, of course, that identifying the facts that appear to form the basis of evidence relevant to the allegations does not result in the conclusion that such facts will ultimately be proven.
49. The evidence in the FIR that I have considered relevant to the matters in issue appears to confirm the following general evolution of events:

The initial dealings at the BMO

- (a) It appears that Complainant A, a resident of [REDACTED] made an appointment to visit the BMO with his 12 year old granddaughter, Complainant B. The appointment was to take place during a trip to Vancouver before Christmas in December of 2019.
- (b) It appears that Complainant A had been a client of the bank for many years, banking remotely for the most part. The purpose of the appointment was to add Complainant A's granddaughter to his main account. Complainant A is apparently the legal guardian of Complainant B;
- (c) During the appointment with a representative of BMO, it appears that some issues arose with respect to Complainant A's identification. A valid debit card was produced along with a Certificate of Indian Status card ("status card A") with photo that for reasons unknown did not match the bank records. A further request was made for a driver's license, which Complainant A advised he had not had in a long time;
- (d) Ultimately Complainant A provided a valid birth certificate which appears to have satisfied bank concerns for identification. The representative next asked some basic security questions related to the account in question which ultimately left the agent comfortable with proceeding with Complainant A's request;
- (e) As such, although there were initial issues with identification, it appears that BMO representative was content with Complainant A's identification as a customer of the bank and confirmation of the account associated with that customer;
- (f) The BMO representative next asked for Complainant B's identification. Complainant A produced a laminated document, again titled Certificate of Indian Status with photo, that appears to have identified Complainant B ("status card B") This second card appeared to raise some concerns for the bank representative given its condition and quality;

- (g) The BMO representative then appears to have asked the Complainants for a residential address, as the bank records only showed a postal box. Neither complainant could immediately provide a street address, explaining that historically only postal codes were available in [REDACTED]. A discussion appears to have ensued on providing further clarity as to exactly where the parties lived;
- (h) The BMO representative appears to have had issues with Complainant B's identification. The representative appears to have believed that this second ID may have issues related to its legitimacy and hence, decided to consult her manager on that issue and the address matter. The issues with Complainant B's identification do not appear to have been canvassed with the Complainants while in the office of the BMO representative ;
- (i) The BMO representative then appears to have taken both status cards A and B (the "status cards") telling the parties that she was going to consult with her manager. The parties appear to have remained in the representative's office while this consultation took place;

Consultation with BMO management

- (j) The BMO manager appears to have reviewed the two status cards tendered by her subordinate. She appears to have noted concerns with both cards and her ability to ascertain exactly who Complainant A was;
- (k) The manager called a federal government number and asked for confirmation that both status cards were valid. It appears that Complainant A's status card was confirmed to be valid , however, the registration number of Complainant B's card was not;
- (l) It appears that advice was received from the federal official to retain both cards and call police. The manager reconfirmed that advice and then appears to have attempted to call the VPD non-emergency line, without success;
- (m) At some point it appears that a letter of refusal was prepared denying the application to add Complainant B to her grandfather's account. Complainant A appears to have asked for the return of the id's provided so he could take the matter up with his band. The representative appears to have told the parties that the manager had their id;
- (n) The Manager next appears to have called 911 and explained that she was from BMO and confirmed that she had "*fraudulent identification from one of the banks patrons*" and that she "*could not confirm the identity of another customer of ours*";
- (o) Identification information appears to have been provided including the date of birth of both complainants from the status cards;
- (p) Meanwhile, the BMO representative had brought both Complainants upstairs to wait seated in the large lobby outside the manager's office. The Complainants appear to have complied with that request and patiently waited for the results of discussions with the manager and return of their identification documents;

Arrival of Csts. ■ and ■ at the BMO

- (q) Csts. ■ and ■ appear to have been dispatched in response to the BMOs call at 11:43 am on December 20, 2019 to a “*possible fraud in progress*”. The Members appear to have been advised that the dispatch resulted from a call from BMO staff reporting “*two people trying to open accounts with fake identification that had been verified as such*”. They were apparently given general descriptions of the Complainants and advised that they were sitting down in the main floor lobby area waiting outside the management offices;
- (r) The Members appear to have arrived on scene at 11:58, parked in front of the BMO on Dunsmuir Street and entered the bank front doors at 11:59;
- (s) While in the bank, it appears that both Members were directed to the manager’s office noting the apparent subjects of the 911 call (the Complainants) seated outside;
- (t) Cst. ■ appears to have taken responsibility for watching the Complainants while Cst. ■ met and briefly talked to the manager. That discussion appears to have lasted approximately one minute. In that time, the manager appears to have confirmed that she called 911, and advised Cst. ■ of the following:
- (i) “*We had a customer of ours that we can’t identify based on the information in our systems;*
 - (ii) “*The other customer, [Complainant B’s] card looks to be altered; and*
 - (iii) “*Indigenous Services Canada has confirmed that the id was altered or fraudulent.*”
- (u) At some later point it appears that Cst. ■ was told of a large deposit recently made by Complainant A and a change in his cell phone number on the banks account records. The evidence of the manager appears to confirm that this additional information was provided to Cst. ■ after the arrest of the Complainants. Cst. ■ evidence appears to suggest he had the information before making the arrest;
- (v) It appears that at that time, no further information, including specific identification of the Complainants took place, although the manager did appear to pass over the two status cards to Cst. ■
- (w) There does not appear to be any specific evidence identifying the Complainants to either Member;
- (x) It further appears that immediately after that brief discussion, Cst. ■ left the manager’s office and briefly indicated that he wished to speak with the parties outside. Cst. ■ and Cst. ■ then appear to have escorted the Complainants from the lobby through the front doors of the bank with Complainant A leading the exit;

- (y) There does not appear to have been any further explanation of what was taking place or discussion of any nature with the Complainants until the parties exited the bank;
- (z) Slightly more than two minutes after walking through the bank front doors, at 12:01, the Members appear to have exited the bank escorting the Complainants through those same doors. The Complainants were thereafter immediately arrested and handcuffed on the sidewalk outside the bank;
- (aa) There appears to be conflicting evidence on the specific communication between Csts. ■ and ■ before the arrests took place. However, whatever actually took place, the transfer of information from Cst. ■ to Cst. ■ appears to have been minimal, if any at all;
- (bb) The Complainants appear to have reported that they were detained by the Members. However, the Members reported that both Complainants had in fact been arrested on suspicion of fraud after leaving the bank, read their rights under the Charter of Rights and Freedoms, and immediately handcuffed;
- (cc) The video record does not appear to show rough handling of the Complainants in the application of the handcuffs at the time of their arrest. What is evident is that the arrests took place immediately adjacent to the Members' police car. Several members of the public are seen to be passing the parties as the arrest and detention endured on the sidewalk in front of the bank. At all times it appeared that the Complainants were fully compliant with Member directions and responding to questions asked of them;
- (dd) The Members appear to have realized that they needed a female officer to search Complainant B and therefore requested assistance through dispatch;
- (ee) In the interim, Cst. ■ returned to the police vehicle for approximately five minutes until 12:06. During that time, Cst. ■ appears to have conducted basic investigation steps including a national query for police related files concerning the Complainants. Cst. ■ appears to have continued a dialogue with Complainant A and Complainant B as the searches took place.
- (ff) No negative responses were apparently received in connection with the police data search of the Complainants. Furthermore, it appears that both Complainants correctly answered identification questions posed by Cst. ■
- (gg) Two female VPD members attended the scene at 12:10:56. One of the members attending asked Complainant B to move to an adjacent quieter sidewalk area to do a pat down search;
- (hh) The search appears to have resulted in no items of concern, however, in talking to Complainant B, the female member learned that Complainant B was only 12 years old. The female member immediately passed that information on to Cst. ■
- (ii) At 12:13 Cst. ■ appears to have removed the handcuffs from Complainant B, although the handcuffs remained applied to Complainant A. It appears, however, that Complainant B remained detained at the scene even after the handcuffs were removed;
- (jj) At approximately 12:15, Cst. ■ returned to the BMO manager's office to further discuss matters involving the Complainants;

- (kk) Subsequent to the arrest and handcuffing of the Complainants, Cst. ■ conducted an investigation of the identification issues raised by the bank manager ultimately concluding that neither Complainant had attempted to defraud the bank;
- (ll) Cst. ■ removed the handcuffs from Complainant A at 12:36;
- (mm) Both Complainants then returned to the bank lobby where they were engaged by the bank manager;
- (nn) At 13:00 both Members met with the Complainants again and apologized for their actions explaining that the officers were simply “following procedure”;
- (oo) The total amount of time spent by the Members in dealing with the Complainants was approximately 61 minutes.

VIII Analysis of the Misconduct Allegations- Sections 117(8)(d) & (i) of the Police Act Does the evidence appear sufficient to substantiate the Misconduct Allegations?

- 50. I now turn to an analysis of the evidence considering each of the Misconduct Allegations in turn.
- 51. At this stage I must consider whether or not the evidence adduced in the FIR that is summarized above appears sufficient to substantiate some, or all, of the Misconduct Allegations.
- 52. This stage of analysis under section 117 of the *Police Act* does not result in findings of fact on any alleged misconduct beyond analysis of whether or not the misconduct allegations appear substantiated against any of the Members based on analysis of the facts set out in the FIR.

Misconduct Allegation (1)

- 53. The first misconduct allegation relates to the actions of both Members. Specifically, the allegation to be reviewed is as follows:

On December 20, 2019, the Members appear to have committed Abuse of Authority by oppressive conduct pursuant to section 77(3)(a)(i) of the Police Act by removing the Complainants from a bank to a public street without reasonable cause and recklessly arresting the parties without good and sufficient cause;

(“Misconduct Allegation # 1”)

54. Section 77(3)(a)(i) provides as follows:

77 (1) In this Part, "misconduct" means

(b) conduct that constitutes

(ii) a disciplinary breach of public trust described in subsection (3) of this section.

(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

(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,

55. Three issues appear to arise from this allegation of misconduct:

- (a) Did the Members act oppressively towards the Complainants by summarily removing them from BMO facilities to a public street?
- (b) Did either or both of the Members effect an arrest of the Complainants, and if so;
- (c) Were such arrests effected intentionally or recklessly without good and sufficient cause.

56. The Investigator takes the position in the FIR that:

- (a) The removal of the Complainants from the bank was reasonable in all of the circumstances and therefore not an oppressive act towards a member of the public;
- (b) the Complainants were in fact immediately arrested on leaving the BMO facilities; and
- (c) the arrest of the Complainants was made for "*good and sufficient cause*".

57. The Complainants appear to have reported that they were advised by the Members that they were being detained, not arrested.

58. The Investigator specifically opined that in all of the circumstances, the arrest of both Complainants was made on reasonable and probable grounds and as such, "*for good and sufficient cause*". Those grounds articulated in the FIR appear to have been described as:
- (a) The dispatch information;
 - (b) The details provided by the manager on scene described in paragraph 49 (t) above; and
 - (c) The additional details, that appear to be in dispute, on the account activity of Complainant A before the appointment at BMO, including a recent large deposit to his account.
59. The first issue appears to have arisen as a result of the Members decision to arrest the Complainants and remove them from the bank. The FIR appears to confirm that the Members took the view that moving the Complainants outside the bank to the sidewalk was necessary to minimize potential disruption to bank customers in conducting the arrests and completing the subsequent investigation of the Complainants.
60. It appears, however, that the movement of the Complainants foreclosed the option of conducting basic investigative inquiries with the parties either in the large bank lobby area or an adjacent office, areas of relative security and confidentiality. The video of the bank lobby appears to show a very large area with several office or meeting areas and relatively few customers present.
61. It is uncertain whether or not the Members would have been better served in questioning the Complainants in the bank rather than on the street, as there were clear physical barriers in existence where the Complainants were seated.
62. It appears that Cst. ■ had been monitoring the Complainants on his own outside the manager's office without issue while Cst. ■ conducted his limited verbal interview with that official. It also appears that the Complainants had posed no concerns to bank staff as they patiently waited to have their various issues resolved with branch management.
63. It appears from a consideration of the totality of the evidence in the FIR that the risks posed by the Complainants to the bank or its customers was virtually nonexistent. Furthermore, it appears evident based on the pre-police arrival conduct of the Complainants, that any prospects for the disruption of normal banking activity while interactions took place with the Complainants would have been minimal, if any at all. It appears that Complainant A had demonstrated patience and courtesy in his dealings with the bank's representative notwithstanding apparent frustrations arising from the identification issues.

64. It appears, therefore, that the movement of the Complainants outside the bank facility to a public and busy sidewalk created a less secure environment for the Members' investigation. This decision also appears to have increased the possible embarrassment and confusion felt by the Complainants. In such circumstances, it appears that the Members' action in moving the Complainants to the street as part of their planned arrest was itself a form of oppressive conduct towards members of the public which, it appears, was unjustified on any reasonable basis.
65. As well, at the time the arrest and removal decision was taken by the Members, it does not appear that either Cst. ■ or Cst. ■ had even talked to the Complainants to confirm their names. Furthermore, it appears that there had been no basic questions asked by the Members of either Complainant on the subject of the identification uncertainties. Rather it appears that the Members took the very basic and incomplete verbal information provided by the BMO manager as substantive proof of fraud, rather than undertaking the most basic investigation of the facts and identification of the parties. In the result, it appears evident the Complainants deferred completely to the bank manager on the alleged facts immediately moving to an arrest decision.
66. It also appears that the Members quickly assumed that the Complainants had attempted to commit fraud as a result of the very brief discussion with a bank manager who had never met the parties concerned. Cst. ■ in particular appears to have accepted the bank manager's report as credible and dispositive of the alleged fraud issue. He appears to have reached that conclusion without ever having talked to either Complainant or having conducted the most basic inquiries relevant to identification or credibility before proceeding with arrests. In the result, it appears that any presumption of innocence was ignored by Cst. ■ as he very rapidly moved to an arrest decision.
67. It also appears that there was no consideration by either Member of the apparent indigenous status of the Complainants and how their background as members of a small and remote coastal community might impact their dealings with a large urban bank and the Members.
68. The FIR comments extensively on the issue of the Members' apparent lack of indigenous cultural and safety awareness. It also notes that such may have been attributable to a lack of training for the Members.
69. Regardless of the cause, it appears that neither Member considered the Complainants' indigenous heritage or background and the possible harmful effects that a rapid arrest and handcuffing in a very public setting might have had on the parties.
70. As such, the conduct of the Members in this regard also appears to have relevance in assessing possible misconduct by way of oppressive acts against the Complainants when the totality of the circumstances are considered.

71. On the second issue, it appears that there is a conflict on the evidence as to whether or not the Complainants were in fact arrested or detained. That issue, is of course, unresolved at this stage of the proceedings. However, it appears that the actions of the Members were more consistent with an arrest of the Complainants as they left the bank building rather than a detention.
72. On the third issue of “good and sufficient cause”, the Investigator notes that the Members had been dispatched to investigate a possible fraud, likely arising under section 380 of the Criminal Code. The Investigator also notes that the Complainants appear to have been the subject of that investigation.
73. The Investigator outlines in the FIR a detailed analysis of sections 495(1) and (2) of the *Criminal Code* in support of the position that the arrest of the Complainants was made on reasonable and probable grounds.
74. It appears that there is no issue on the question of whether or not the Members acted on the authority of a warrant to arrest the Complainants. There does not appear to be any evidence of such a warrant.
75. Under section 495(1) of the *Criminal Code*, an arrest without warrant requires analysis of both subjective and objective criteria: *R. v Storrey* [1990 1 SCR 241]. Furthermore, in the BCCA decision of *R. v Henareh*, 2017 BCCA 7 confirms at paragraphs 38-42 as follows:

[38] *In R. v. Storrey*, [1990] 1 S.C.R. 241 at 250-251, the Court held that there is a subjective and objective element to the test for a lawful arrest under s. 495(1)(a):

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a prima facie case for conviction before making the arrest.

[39] *The reasonable grounds standard requires something more than mere suspicion, but something less than the standard applicable in civil matters of proof on the balance of probabilities: Mugesera v. Canada (Minister of Citizenship & Immigration), 2005 SCC 40 at para. 114. The appropriate standard is one of reasonable probability: R. v. Debot, [1989] 2 S.C.R. 1140 at 1166. Reasonable or credibly-based probability contemplates a practical, non-technical and common sense evaluation of the probability of the existence of facts and asserted inferences: R. v. Sanchez (1994), 93 C.C.C. (3d) 367 at 367 (Ont. Ct. (G.D.)).*

[40] Determining whether reasonable and probable grounds exist requires an assessment of the “totality of the circumstances”: *R. v. Debot* at 1168.

[41] A trial judge’s ruling on whether objectively reasonable grounds to arrest have been shown is a question of law subject to a correctness standard: *R. v. Shepherd*, 2009 SCC 31 at para. 20. Factual findings and inferences made in the course of the analysis are, however, entitled to deference and fall within the exclusive domain of the trial judge absent palpable and overriding error: *R. v. Mann*, 2004 SCC 52 at para. 49; *R. v. Cornell*, 2010 SCC 31 at para. 25; *R. v. Bush*, 2010 ONCA 554 at para. 48.

[42] Trial judges are obliged to assess the objective reasonableness of an arresting officer’s belief that he or she had reasonable grounds to arrest from the perspective of a reasonable person standing in the arresting officer’s shoes. The analysis takes account of the arresting officer’s knowledge and experience with respect to the matter under investigation: *R. v. Luong*, 2010 BCCA 158 at para. 24; *R. v. Wilson*, 2012 BCCA 517 at para. 26.

76. The Investigator concludes in the FIR that the Members had both subjective and objective reasonable and probable grounds to arrest the Complainants. Furthermore, the Investigator concludes that a reasonable person or police officer standing in the Members’ shoes would also conclude that subjective and objective reasonable and probable grounds existed for the arrests that appear to have taken place.
77. As a result of my review of the FIR, it does not appear that the Member had sufficient evidence to conclude that either of the Complainants had actually committed an indictable offence, thereby justifying a warrantless arrest under section 495(1) a of the Criminal Code.
78. At best, it appears that the Members had some evidence of a possible offence, but many outstanding questions on the facts. For example, it appears that BMO’s issue with Complainant A was refined to confirming he was actually the person shown in his identification. The identification that was apparently tendered for both Complainants appears to have included the status cards with id photos and other collateral documents.
79. In the absence of a warrant, it appears that an arrest of the Complainants could only take place under section 495(1)a of the *Criminal Code*. That section requires reasonable and probable grounds establishing that one, or both, of the Complainants had committed an indictable offence. Offences related to fraud under section 380 of the *Criminal Code* include indictable offences.

80. It appears evident that the test for reasonable and probable grounds arises immediately before an arrest takes place. It also appears evident that such grounds are not augmented or supplemented by evidence or information obtained subsequent to an arrest. In this case, the arrest of the Complainants took place on the basis of the very limited information conveyed by the BMO manager to 911 dispatch and in a one minute discussion with Cst. ■ noted above at paragraph 49 t.
81. It appears that the articulation of reasonable and probable grounds by Cst. ■ detailed in the FIR included information acquired after the arrest of the Complainants in further discussions with BMO staff. This appears to have included information on a large deposit made to his account by Complainant A and a recent change of cell phone number.
82. Even if both of those additional facts were known before the Complainant's were arrested, it does not appear that reasonable and probable grounds for arrest would have been established. It appears that this additional information had very limited real relevance to the issues in question.
83. It appears therefore, that the Members may not, in fact, have had either the subjective or objective reasonable and probable grounds to arrest either of the Complainants given the very limited information available to the Members before the two arrests.
84. It also appears that a reasonable person, or police officer, with the Members knowledge, training and experience considering such limited evidence, may well have concluded that a suspicion worthy of investigation had been raised.
85. However, it does not appear that such a person would conclude that the limited evidence available to the Members before the arrests took place would rise to reasonable and probable grounds for an arrest based on a practical, non-technical and common sense assessment of the totality of the circumstances.
86. In fact it appears evident that such a reasonable person would conclude that a practical, non-technical and common sense assessment of the initial facts would compel, at the minimum, a brief discussion with the Complainants, similar to that which took place outside the police car, before any arrest decision was taken.
87. Section 495(2) of the *Criminal Code*, limits the authority of an officer to complete an arrest. Having considered that subsection, the Investigator concludes that the Members had:
 - (a) A duty to confirm the identities of the Complainants;
 - (b) A duty to secure or preserve evidence relating to the possible fraud offence in issue; and
 - (d) Reasonable grounds to believe that it was, in fact, in the public interest to arrest the Complainants in order to discharge those duties.

88. It appears, however, that before the arrest of the Complainants took place, neither Member specifically considered the provisions and limitations of section 495(2) of the Criminal Code. Furthermore, neither Member appears to have considered, or commenced, the investigation of either Complainant to confirm their identities before proceeding with the arrests. Nor does it appear that the Members asked the Complainants for any further identification information that might have been relevant to the BMO issues before the arrests took place. It appears evident that both Complainants had been patient and fully cooperative with bank officials before the Members arrived and as such, it would be reasonable to presume that the Complainants would cooperate with any inquiries the Members may have made.
89. The issue that appears to arise is whether there were any possible reasonable grounds that would necessitate the arrest of the Complainants to confirm their identity or secure evidence given the facts of this case. It appears that no such reasonable grounds can be found in the FIR. Simple requests for information and an explanation of documents appear to have been readily available to the Members without resulting to the application of handcuffs in the context of an arrest.
90. It appears that a reasonable course of action in the circumstances of this case would have seen the Members engage in some basic communication with the Complainants on key issues before making an arrest. In that regard, it appears important to recall that:
- (a) The Complainants were known by the Members to have been patiently waiting at the BMO for at least 20 minutes before police arrived;
 - (b) The Members were aware that the Complainants had been dealing with bank officials for some time on the issue of adding Complainant B to Complainant A's account;
 - (c) The Complainants had dutifully moved from the initial banking representative's office to seating outside the manager's office without issue;
 - (d) There were no issues of violence or confrontation, nor any indication that the Complainants would leave the area of the BMO manager's office, or the bank; and
 - (e) Being aware of the Members arrival on scene, neither Complainant made any effort to leave.
91. In such circumstances, it does not appear evident that there were any grounds, nor any reasonable grounds, to conclude that there was a public interest in arresting the Complainants to establish the identities of the Complainants or to secure evidence potentially relevant to the BMO 911 call. Specifically it appears evident that the Complainants were not planning to leave and were quite capable of voluntarily engaging in discussion on the matters in issue without rancor or danger to any party.

92. In summary of all of the foregoing, therefore, it appears that the Members each:

- (i) Acted in an oppressive manner by summarily removing the Complainants from the bank without undertaking the most basic investigative steps;
- (ii) Did not have reasonable and probable grounds to arrest the Complainants to discharge the duties noted by the Investigator; and
- (iii) Lacked “*good and sufficient cause*” to arrest either Complainant.

93. It appears that the actions of the Members evidenced serious blameworthy conduct as a result of the cumulative effect of their actions leading up to the arrest of the Complainants. As well, it appears evident that the arrests, and the manner in which they took place, had a profound negative effect on both Complainants which appears to further bolster the evidence of serious blameworthy conduct.

94. In the result, it appears, considering the totality of the circumstances relevant to the Complainants, that the evidence referenced in the FIR appears sufficient to substantiate Misconduct Allegation # 1 with respect to both Members, potentially requiring the taking of disciplinary or corrective measures.

Misconduct Allegation # 2

95. As noted above, the second misconduct allegation is as follows:

*On December 20, 2019, the Members appear to have committed Abuse of Authority by oppressive conduct contrary to section 77(3)(a)(ii)A of the Police Act by recklessly using unnecessary force on the Complainants through the application of handcuffs without good and sufficient cause.
 (“Misconduct Allegation #2”)*

96. The Investigator identified the essential elements of Misconduct Allegation # 2 to be as follows:

- (a) Force was used;
- (b) The Members were in the performance of their duties;
- (c) The force was unnecessary; and
- (d) The Members intended to use unnecessary force, or were reckless about it.

97. I would add that it appears evident that any analysis of the use of force appears to require consideration of whether or not the use of force was justifiable for good and sufficient cause.

98. It appears that section 25 of the Criminal Code also appears to have relevance to this review. Section 25 provides as follows:

“25 (1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law

(b) as a peace officer or public officer,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.”

99. The Investigator also notes the apparent relevance of the Supreme Court of Canada decision concerning the use of force, *R. v Nasogalauk* reported at [2010] 1 S.C.R. 206 at paragraphs 32, 34 AND 35 as follows:

[32] The Crown emphasized the issue of excessive force in its submissions to this Court, arguing strenuously that the police officers had not abused their authority or inflicted unnecessary injuries on Mr. Nasogaluak. But police officers do not have an unlimited power to inflict harm on a person in the course of their duties. While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.

[34] Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended or likely to cause death or grievous bodily harm, unless he or she believes that it is necessary to protect him- or herself, or another person under his or her protection, from death or grievous bodily harm. The officer’s belief must be objectively reasonable. This means that the use of force under s. 25(3) is to be judged on a subjective-objective basis (Chartier v. Greaves, [2001] O.J. No. 634 (QL) (S.C.J.), at para. 59). If force of that degree is used to prevent a suspect from fleeing to avoid a lawful arrest, then it is justified under s. 25(4), subject to the limitations described above and to the requirement that the flight could not reasonably have been prevented in a less violent manner.

[35] Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in R. v. Bottrell (1981), 60 C.C.C. (2d) 211 (B.C.C.A.):

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218]

100. In considering the lawfulness of the actions of the Members, I am mindful of the context. In *Berntt* [*Berntt v. Vancouver (City)*, 1999 BCCA 345] and *Anderson v. Smith*, 2000 BCSC 1194 the relevant law is summarized as follows at para 51:

[51] Consideration must be given to the circumstances as they existed at the time. Allowance must be made for the exigencies of the moment, keeping in mind that the police officer cannot be expected to measure the force with exactitude: Wackett v. Calder (1965), 51 D.L.R. (2d) 598 at 602 (B.C.C.A.); R. v. Botrell, supra at 218; Allrie v. Victoria (City), [1993] 1 W.W.R. 655 at para 20 (B.C.S.C.); Levesque v. Sudbury Regional Police Force, [1992] O.J. No.512 (QL) (Ont. Gen. Div); Breen v. Saunders (1986), 39 C.C.L.T. 273 at 277 (N.B.Q.B.); Berntt v. Vancouver (City), supra at 217. This may include the aura of potential and unpredictable danger: Schell v. Truba (1990), 89 Sask. R. 137 at 140 (Sask. C.A.) (in dissent). There is no requirement to use the least amount of force because this may expose the officer to unnecessary danger to himself: Levesque v. Sudbury Regional Police Force, supra.

101. Adjudicator Pitfield said the following about the relevance of exigencies at paragraph 37 of the *Dickhout* decision [*Re: Dickhout*, OPCC PH 2010-03]:

... The assessment of an officer's conduct must respect the fact that his or her job is a difficult one and, in the heat of the moment, frequently does not allow for detached reflection when deciding to act: R. v. Nasogaluak, [cited earlier, paragraph 35] and In the Matter of Constable Smith, Victoria, January 28, 2009, p. 21.

102. The Investigator also set out details of the *National Use of Force Framework* relevant to handcuff decisions, including training modules on the same subject from the Justice Institute of BC made available to both Members as part of their training.

103. As Adjudicator, my review of a member's actions must:

- (a) Take account the exigencies and immediacy of the moment;
- (b) Consider the fact that Members are often required to make decisions quickly in the course of an evolving incident, without the detached reflection that is available to those looking back on an incident; and

- (c) Consider that at law, there is no requirement that a member perfectly calibrate his or her actions to the perceived threat.

104. It appears from a review of the FIR that there is no issue that both Members were engaged in the lawful execution of their duties. There also appears to be no dispute that both Members used force on the Complainants as they applied handcuffs to the parties while completing arrests.
105. The remaining issues, therefore, appear to be:
- (a) Did the Members subjectively believe that the force used, handcuffing, was necessary? and
 - (b) Would a reasonable person placed in the position of the Members objectively conclude that there were reasonable grounds to handcuff the Complainants?
106. As noted, the Investigator concluded that the Members each subjectively believed that the handcuffing of the Complainants was necessary and further that such action was objectively reasonable in all of the circumstances.
107. With respect to the first issue, it is difficult to know exactly what the Members' subjective beliefs were before applying handcuffs onto the wrists of the Complainants. After the fact, the Members both articulated an intention to remove the Complainants from the bank and out to the sidewalk. It appears evident that at least Cst. ■ had a plan to arrest and handcuff the Complainants once they had been removed from the bank. Cst. ■ appears to have followed the lead of his partner without discussion or specifically articulating the legal grounds for what followed.
108. Cst. ■ does not appear to have had any discussion with Cst. ■ on the specific plans, but rather confirmed an implicit "understanding" of Cst. ■ presumed course of conduct as a result of some time spent working together. In any event, it appears that Cst. ■ followed Cst. ■ lead both in removing the Complainants from the bank building and completing the arrest and handcuffing of the parties.
109. It appears that Cst. ■ led off by handcuffing Complainant B, while Cst. ■ handcuffed Complainant A at approximately the same time on the sidewalk out the BMO bank doors. As noted, there does not appear to have been any communication between the two members on the issue of arrest of the Complainants. Handcuffing of the parties appears to have been presumed to be required as a matter of course. The legal grounds for such action appears to have been left unexpressed.

110. Taking the information in the FIR, it appears that subjectively the Members believed that the use of force in handcuffing the Complainants was necessary. However, the specific evidence on those matters appears to have arisen long after questions arose as to how and why the Complainants were arrested. It appears that rather than going through a considered formulation of subjective grounds to proceed with the use of force, the fact of the handcuffing of the Complainants was almost automatic once an arrest decision had been taken.
111. On the next issue, it appears that the Investigator concluded that the handcuffing of both Complainants was both necessary and appropriate. The Investigator came to that conclusion by acknowledging Cst. [REDACTED] report that with respect to Complainant B:
- (a) The Members and the Complainants were outside the bank on sidewalk next to a busy roadway. Cst. [REDACTED] had related a concern with the prevention of an escape in justifying the handcuffing of the parties;
 - (b) The Members had not, at that point, confirmed the identity of either Complainant;
 - (c) Cst. [REDACTED] knew he needed a female officer to search Complainant B;
 - (d) Cst. [REDACTED] explained that it is common practice to place persons under arrest in handcuffs once they are under arrest; and
 - (e) Cst. [REDACTED] knew that he would have to return inside the bank to make further inquiries and wanted to be safe with Cst. [REDACTED] having to watch two people.
112. With respect to Cst. [REDACTED] it appears that that member simply followed Cst. [REDACTED] lead in handcuffing Complainant A. It appears that Cst. [REDACTED] shared Cst. [REDACTED] unexpressed concern of being left to monitor two individuals at roadside if Cst. [REDACTED] returned to the bank.
113. On the next issue, as noted above, the Investigator concludes that a reasonable person, or police officer, with the same training, experience, knowledge and skills of the Members would agree with the Members and handcuff the Complainants.
114. It appears, however, that such a conclusion fits more comfortably with the assertion made by Cst. [REDACTED] that "it is common practice to handcuff persons under arrest" rather than a position considering the apparent facts.
115. It does not appear to be the law that all persons under arrest must be handcuffed. Police officers have the power to do so, however, they are also provided ample discretion in deciding to use force, such as the application of handcuffs. As well, it appears that the VPD policy on the use of restraint devices such as handcuffs requires that officers must "consider their lawful authority for applying any restraint" and "to articulate in each circumstance the reasons why they applied a particular restraint device".

116. As noted above, the Supreme Court of Canada outlined the limits of force that may be used by police at paragraph 32 of the decision in *R. v Nasogalauk supra*:

[32] While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.

117. On the facts as set out in the FIR, it appears that both Cst. ■ and Cst. ■ were dealing with the following circumstances:

- (a) Both members were aware that they were dealing with parties who had been engaged with bank officials for some time attempting to resolve account issues;
- (b) Bank staff had reported no issues of violence, threats or disruptive behaviour on the part of either Complainant;
- (c) Neither Member appeared to have any concerns about potential weapons being held by the Complainants;
- (d) Both Members appear to have been aware of the birthdates of both Complainants, including Complainant B who was then 12 years old, as a result of the status cards;
- (e) Both Members were aware that the Complainants were patiently waiting in the bank for a manager to return their status cards and confirm that their request to add Complainant B to Complainant A's account would in fact be denied; and
- (f) Both Complainants had readily agreed to follow the direction of Cst. ■ to leave the bank and in fact, Complainant A led the party out of the bank doors, a development that appears unlikely if the risk of flight genuinely existed for the Members;

118. In terms of risk assessment, it appears difficult to see that either Complainant posed any risk to the Members, or any other person. Both Complainants appear to have been fully cooperating with the bank to resolve the account issues. Complainant A appears to have provided identification information to bank officials and answered security questions on his account.

119. It appears therefore, that before leaving the bank lobby, any reasonable person or police officer with the experience and training of the Members would conclude that the risk posed by the Complainants was extremely low. Such a person would also appear to have recognized that one of the parties in question was in fact 12 years old, not exhibiting any risk creating behaviour and complying with bank and police directions.

120. At this stage, therefore, there does not appear to have been any risk of flight or destruction of evidence. Rather it appears that the Complainants were comfortable remaining in the bank to resolve their account issues and had provided evidence and documents in support of that resolution rather than destroying such evidence.
121. As the Members moved the Complainants outside the bank to the sidewalk, the videos in the FIR appear to show that the parties were fully, and calmly, complying with police directions. Indeed, with respect to flight risk, as noted above, it appears to be significant that the Members allowed Complainant A to lead the parties out of the bank to the street. If flight was a genuine risk, it appears evident that the Members would not have allowed that to occur.
122. The sidewalk outside the bank appears to have had many other pedestrians passing the Members and Complainants, and normal traffic passed on the adjacent street. It appears that a reasonable person or police officer with the attributes noted above would acknowledge that the sidewalk was less secure than a confined lobby or office in the bank. However, it also appears that there had been no change in the risks posed by either Complainant.
123. It appears that a reasonable person or police officer considering the totality of the circumstances would see no prospect of flight or escape from the Complainants, and certainly no destruction of evidence or exigent circumstances requiring increased vigilance.
124. As well, notwithstanding the views of Cst. ■ it does not appear that a safety search of Complainant B required anything more than a request to cooperate by a female member. The Complainants appear to have been engaged in a calm dialogue with the Members subsequent to their arrest and handcuffing, fully complying with movement directions and raising no reasonable concerns of any nature. As well, it appears that the backup female members arrived on scene minutes after the dispatch request was made for assistance.
125. It appears, therefore, that a reasonable person or police officer considering the totality of the circumstances would not conclude that handcuffing either Complainant, and in particular Complainant B, was either reasonable or necessary. It would also appear evident that handcuffing the Complainants in such circumstances was significantly disproportionate to the risks actually posed by the parties.
126. It appears, therefore, that the Members recklessly used unnecessary force on the Complainants through the routine application of handcuffs following their arrest without reasonable grounds to do so and therefore without good or sufficient cause.

127. In the result, it appears, considering the totality of the circumstances relevant to the Complainants, that the evidence referenced in the FIR appears sufficient to substantiate Misconduct Allegation # 2 in relation to both Members, potentially requiring the taking of disciplinary or corrective measures.

Misconduct Allegation # 3

128. The third allegation of misconduct relates only to Cst. [REDACTED] and as noted above is defined as follows:

*On December 20, 2019, the Cst. [REDACTED] appears to have committed misconduct pursuant to section 77 (3) (i) of the Police Act by recklessly disclosing photos of the Complainants' status cards to an outside party without lawful authority to do so and contrary to the provisions of Part 3 of the Freedom of Information and Protection of Privacy Act.
("Misconduct Allegation #3")*

129. The FIR indicates that Cst. [REDACTED] took photos of Complainant A and the two status cards provided to bank officials. It appears that these photos were taken by Cst. [REDACTED] with a personal cell phone rather than a VPD camera. As such, the information was apparently retained in Cst. [REDACTED] personal data records.

130. The FIR appears to confirm that Cst. [REDACTED] took the photo of Complainant A because he was not certain of his identity. It is noteworthy, however, that the status cards provided to Cst. [REDACTED] by the bank manager appear to have already contained Complainant A's photo. The status cards appear to contain personal information, and photos, of both Complainants.

131. The FIR further indicates that Cst. [REDACTED] "forgot" about the photos subsequent to his dealings with the Complainants. At some later unspecified point it appears that Cst. [REDACTED] deleted the photo of Complainant A. The status cards, however, appear to have been forwarded to Cst. [REDACTED] counsel at his request.

132. The issue arising is whether or not Cst. [REDACTED] may have breached the provisions of sections 30.4, 33.2 and 34 of the *Freedom of Information and Protection of Privacy Act* ("FOIPPA") and acted contrary to section 77(3)(i) of the *Police Act*. Section 77(3)(i) provides as follows:

(3)Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

(i)"improper disclosure of information", which is intentionally or recklessly

(i)disclosing, or attempting to disclose, information that is acquired by the member in the performance of duties as a member,

133. Nothing in the FIR appears to indicate that the disclosure of the status cards was made as part of the investigation into the Complainants, nor to a person with a need to have that personal information. As well, it appears that Cst. ■ signed a confidentiality statement on commencing his employment with VPD confirming his agreement that he would not disclose “designated and classified” information to persons without a legitimate need to know the information.
134. The Investigator submits that counsel advising Cst. ■ had a legitimate “need to know” the information relating to the Complainant’s status cards.
135. The FIR notes that the practice of sharing information to personal lawyers advising a Member on an investigation is common with police officers. The Investigator notes an opinion shared by counsel advising Delta PD the disclosures in question might well have breached several provisions of FOIPPA as there was no necessity for Cst. ■ to provide any disclosure to his counsel outside of the processes already established under the *Police Act*.
136. At page 98 of the FIR the Investigator appears to reject that advice noted that:
- “Taking Mr. [H]’s analysis and opinion on the matter, one could conclude a historical breach of FOIPPA is present in every case involving disclosure to a lawyer for a member facing a Police Act investigation.”*
137. It appears evident that the entire purpose of the FOIPPA is to control and protect the acquisition and distribution of personal information. That, of course, would appear to regulate the common practice described by the Investigator.
138. However, a plain reading of the FOIPPA appears to confirm that the legislation is not intended to eliminate the disclosure of essential information when necessary. Rather it appears evident that the legislation sets out a simple process to ensure that any such disclosure is appropriate and necessary.
139. The disclosure of the status cards to counsel appears to have been more than a sharing of officer notes and a verbal recollection of events in the context of a *Police Act* complaint. Rather it appears that the facts of this case involve the sharing of actual investigation evidence with highly personal information. In such circumstances it appears that such a disclosure would be governed, at a minimum, by the provisions of FOIPPA.
140. Considering the totality of the evidence in the FIR, it appears that the Cst. ■ failed to consider his undertaking to VPD on the retention and handling of investigation documents and the provisions of FOIPPA in making the disclosures he did to counsel.

141. As such, Cst. ■ appears to have acted recklessly in disclosing the two Complainant status cards to his counsel contrary to section 77(3) (i) of the *Police Act*.
142. It appears that Cst. ■ actions in retaining and disclosing the Complainants' personal information as described in the FIR evidences reckless decision making and serious blameworthy conduct.
143. In the result, it appears, considering the totality of the circumstances relevant to the Complainants, that the evidence referenced in the FIR appears sufficient to substantiate Misconduct Allegation # 3 in relation to Cst. ■ potentially requiring the taking of disciplinary or corrective measures.

IX Conclusion

144. Applying the standard of review at this stage of the proceedings, pursuant to Section 117(9) and 117(8)(d)(i) of the *Police Act*, I find that there appears to be evidence set out in the FIR which, if proven, could substantiate Misconduct Allegations # 1 and # 2 with respect to both Members, and potentially require the taking of disciplinary or corrective measures.
145. I further find that applying the same test, pursuant to Section 117(9) and 117(8)(d)(i) of the *Police Act*, that there appears to be evidence set out in the FIR which, if proven, could substantiate Misconduct Allegation # 3 with respect to Cst. ■ and potentially require the taking of disciplinary or corrective measures.

X Next Steps

146. I hereby notify the Members of the next steps in this proceeding, pursuant to subsections 117(7) and (8) of the *Police Act*.
147. Considering the factors in section 120 of the *Police Act*, and in particular section 120(3), I am willing to offer a prehearing conference to the Members with respect to the Misconduct Allegations.
148. I am directing Csts. ■ and ■ to advise the Registrar within 5 days once a decision has been made on whether or not to accept the offer of a prehearing conference.

149. The range of disciplinary and corrective measures set out in the *Police Act* which I would consider appropriate in the current case includes:

- a. a suspension from service without pay for both Members for a duration to be determined on consideration of section 126(2) *Police Act* factors (Section 126(1)(c);
- b. requiring the Members to engage in and complete training, or retraining, in de-escalation techniques, indigenous cultural awareness and risk assessment skills (Section 126(1)(f); and
- c. requiring the Members to provide the Complainants with a written apology in a form satisfactory to myself as Adjudicator (Section 126(1)(h).

pursuant to subsections **126(1)** of the *Police Act*.

150. Pursuant to s 113 of the *Police Act*, the Complainants have the right to make submissions:

- (a) at a discipline proceeding (as *per* section 117(8)(b)) or,
- (b) if the Members accept a prehearing conference, pursuant section 120(6) of the *Police Act*, oral or written submissions.

151. The Complainants are advised that pursuant to section 113(1) of the *Police Act*, submissions in relation to a discipline proceeding must be made not less than 10 business days before the commencement of such proceeding. In the case of a pre hearing conference, submissions must be made not more than 10 days after receiving notification of this decision.

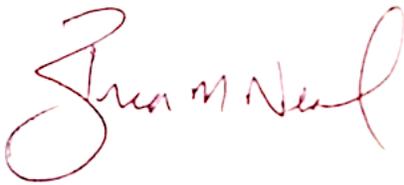
152. Pursuant to section 119, at a Disciplinary Proceeding, the Members may request permission to question witnesses. Such a request must be made within 10 business days of this notification. Any such request will be directed to my attention through the Registrar.

153. Section 118(1) of the *Police Act* provides that a Discipline Proceeding concerning the substantiated misconduct allegations must be convened within 40 business days of notice of this decision. That date is September 3, 2021. In the event that a resolution of the Misconduct Allegations relating to both Members is achieved in the pre-hearing conference process, and approved by the Commissioner, a Discipline Proceeding will not be required.

154. However, if the offer of a prehearing conference is not accepted by either of the Members, or if a resolution accepted at a Prehearing Conference is rejected by the Commissioner, a Discipline Proceeding will then take place.

155. Subject to earlier advice that the Misconduct Allegations have been fully resolved, or that the offer of a pre hearing conference has been rejected by one or both of the Members, the technical start to the Discipline Proceeding will be convened by telephone **August 19, 2021 at 9:00 am** with the Members, or counsel on their behalf. At that time, dates will be canvassed that are convenient to commence the full Disciplinary Proceeding.

156. The Registrar will advise the relevant parties as soon as possible of the conference call details.
157. In the event the August 19, 2021 date is unsuitable to either Member or their designated counsel, such party will advise the Registrar immediately and provide an indication of available dates and times for a conference call to be convened before September 3, 2021.



Brian M. Neal, Q.C.(rt)
Discipline Authority
Retired Judge
July 8, 2021
Victoria, B.C.
