

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

AND

IN THE MATTER OF A DISCIPLINE PROCEEDING CONCERNING ALLEGATIONS
OF MISCONDUCT AGAINST CONSTABLES [REDACTED] AND [REDACTED]
OF THE VANCOUVER POLICE DEPARTMENT

REASONS FOR DECISION: DISCIPLINE PROCEEDING

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

AND TO: Constable [REDACTED] (Cst. [REDACTED])
Vancouver Police Department
(Hereinafter collectively called the "Members")

c/o [REDACTED], Counsel ("Counsel for the Members")

AND TO: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section

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

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

I Executive Summary of Decision

In the fall of 2019, Mr. [REDACTED] was a resident of the small, coastal community of [REDACTED]. Mr. [REDACTED] served as guardian for his granddaughter, [REDACTED], then a 12 year old child. As members of the [REDACTED], both Mr. [REDACTED] and his granddaughter were supported by a strong indigenous culture centered on family, and a rich shared history.

On December 19, 2019, Mr. [REDACTED] and his granddaughter made the long trip to Vancouver. The contrast between the two communities could not be more profound. While [REDACTED] residents enjoyed the simplicity of homes without formal addresses, Vancouver residents and visitors navigated a complex, modern city with a full range of services, including financial institutions.

One of Mr. [REDACTED] goals for his trip was make an appointment at the main branch of the Bank of Montreal. Mr. [REDACTED] intention was to add his granddaughter to a long standing account that he had maintained at the Bank.

On arrival in Vancouver on December 19th, Mr. [REDACTED] made an appointment to complete his banking arrangements. The appointment was set for the morning of December 20, 2019. Both Mr. [REDACTED] and his granddaughter arrived early for their appointment, waiting patiently until called into the office of the designated Bank representative.

What followed thereafter was a disturbing and profoundly disrespectful series of events affecting both Mr. [REDACTED] and his granddaughter. In the result, shortly after noon that day, both Mr. [REDACTED] and his granddaughter found themselves escorted out of the Bank without explanation by two Vancouver Police Officers, Cst. [REDACTED] and Cst. [REDACTED]. On exiting the Bank to the busy sidewalk and December weather, both parties were immediately arrested and handcuffed by the two officers.

Mr. [REDACTED] and his 12 year old granddaughter were at all times fully cooperative with police directions. However, there can be no doubt that both parties were clearly confused, upset and fearful as a result of the summary arrest experience so far from home.

Less than an hour after Mr. [REDACTED] and his granddaughter had been arrested, both were released with apologies from the two officers. The allegations of possible fraud which were the basis of the arrests, had been determined to be completely without merit.

A written complaint concerning the conduct of the two officers was submitted on behalf of Mr. [REDACTED] and his granddaughter. A comprehensive investigative report was prepared by a senior officer in the Delta Police Department, independent of VPD staff.

A Discipline Proceeding was commenced with respect to the actions of the two officers. Written submissions were invited from Mr. [REDACTED] and his granddaughter. Evidence was heard from

the two officers and the complaint Investigator. Finally, oral submissions were also heard from Counsel representing the two police officers.

Having considered all of the circumstances set out in the investigation report, the evidence of witnesses and submissions advanced, I have found that both Cst. [REDACTED] and Cst. [REDACTED] acted oppressively in their dealings with Mr. [REDACTED] and his granddaughter. Specifically, I have found that the officers' actions in arresting and handcuffing the parties was undertaken without reasonable and probable grounds. I have found that no reasonable police officer standing in the shoes of the two officers could support such actions based on suspicion alone. Furthermore, I have found that such actions demonstrated serious, blameworthy conduct contrary to section 77 of the Police Act.

As such I have substantiated two allegations of misconduct against both officers;

- (i) Recklessly arresting Mr. [REDACTED] and his granddaughter without good and sufficient cause; and
- (ii) Recklessly using unnecessary force on Mr. [REDACTED] and his granddaughter by applying handcuffs to the parties on arrest without good and sufficient cause.

A third allegation of misconduct was also reviewed concerning additional actions by Cst. [REDACTED]. The alleged misconduct related to Cst. [REDACTED] decision to share photographs of certain personal identification relating to Mr. [REDACTED] and his granddaughter with legal counsel.

Having reviewed the facts relating to that disclosure, I have concluded that Cst. [REDACTED] actions in sharing the photographs was unauthorized by both policy and law. However, considering all of the circumstances, I have not concluded that Cst. [REDACTED] actions in that regard evidenced serious blameworthy conduct. Hence, I have found that this third allegation of misconduct has not been substantiated.

The circumstances of this case have brought into sharp focus the risk of precipitous action by police in summarily ending the liberty of persons under investigation by arrest.

This decision has also found that the cultural safety needs of Mr. [REDACTED] and his granddaughter, indigenous persons who found themselves under scrutiny by police, were simply not considered by the officers in question. In the result, two vulnerable persons of indigenous heritage were exposed to unnecessary trauma and fear, and left with a serious perception of unfairness in their treatment at the hands of police.

Finally, this case has also highlighted the very real danger to children, such as Ms. [REDACTED] who have come into contact with the police. The circumstances relating to Ms. [REDACTED] clearly demonstrate the high risk of policing decisions that result in the almost automatic application of handcuffs following any arrest without due consideration of the apparent age of the subject in question, or the lawful basis for such a use of force.

II Introduction and Overview

- (1) This is a Discipline Proceeding convened pursuant to sections 123-125 of the *Police Act*.
- (2) These proceedings relate to a complaint filed March 13, 2020 (the “Complaint”) on behalf to Mr. [REDACTED] (Complainant “A”), and his twelve year old granddaughter, [REDACTED], (“Complainant “B”). The Complaint focuses on the Complainants’ dealings at the main branch of the Bank of Montreal in Vancouver (“BMO”), and the Members’ interactions with the Complainants.
- (3) As detailed below, Complainants A and B were met with a number of unexpected issues when they attended at the Bank by appointment. The issues arose in discussions with BMO staff over apparent conflicts between Bank records and the identification provided by the two Complainants.
- (4) Two disciplinary breaches of trust have been alleged involving the Members, namely that:

On December 20, 2019, the Members each:

(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) Committed 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”)

- (5) With respect to Cst. [REDACTED] one further alleged disciplinary breach of trust, has also been considered. Specifically, it is alleged that:

On December 20, 2019, Cst. [REDACTED] 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”)

- (6) The issues arising in this case are complex, and have required consideration of the extensive evidence set out in the Final Investigation Report and Supplement (the “Supplement”) delivered November 4, 2021 (collectively, the “FIR”) as well as the oral evidence of the Members and the Investigator.
- (7) I have also carefully considered submissions from Counsel on behalf of the Complainants, and Counsel for the Members.

III History of Proceedings

- (8) The background to this Discipline Proceeding was set out in the earlier decision rendered under section 117 of the *Police Act*, July 8th, 2021 (the “Section 117 Decision”).
- (9) The Section 117 Decision concluded that the three misconduct allegations noted above appeared to be substantiated. As part of that decision, a pre-hearing conference was offered to the Members in accordance with section 120(3) of the *Police Act*.
- (10) The offer of pre-hearing conference process was initially accepted by the Members, however, before that process commenced, initial counsel for the Members (“Initial Counsel”) advised that the pre hearing conference would not proceed. Matters were then focused on setting dates for a Discipline Proceeding to take place.
- (11) Before dates were set for the commencement of this Discipline Proceeding, Initial Counsel for the Members withdrew. Shortly thereafter, Counsel for the Members appeared on their behalf setting new dates for the hearing of evidence from witnesses, including interim dates for administrative appearances.
- (12) On October 15, 2021 Counsel for Cst. ■ made an application pursuant to section 132 of the *Police Act* for a further limited investigation of circumstances surrounding Misconduct Allegation # 3. That application was approved and the Investigator was directed to undertake a further limited set of inquiries. Ultimately a final additional supplement to the FIR was completed by the Investigator November 4, 2021.
- (13) An evidentiary hearing in this Discipline Proceeding ultimately commenced November 29, 2021. During that hearing testimony was received from the Investigator and both Members.
- (14) The Discipline Proceeding continued December 13, 2021 with initial submissions from Counsel for the Members. Matters were subsequently adjourned to January 12, 2022, and thereafter, to January 24th for final submissions.

IV Misconduct and the Police Act

- (15) Section 77 of the *Police Act* sets out the definition of “misconduct” relevant to the allegation concerning the Members. Specifically, subsection 77 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 delay, obstruct or interfere with investigating officer], or
(ii) a disciplinary breach of public trust described in subsection (3) of this section.

(2) A public trust offence is an offence under an enactment of Canada, or of any province or territory in Canada, a conviction in respect of which does, or would likely

(a) render a member unfit to perform her or his duties as a member, or

(b) discredit the reputation of the municipal police department with which the member is employed.

(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,

(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.

(16) 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.*

(17) These proceedings are not an adjudication of claims or defences raised in other matters, or an appeal of other decisions under the *Police Act*. Rather, this decision reflects an examination of all of the evidence submitted in these proceedings related to the allegations of misconduct defined by subsection 77 of the *Police Act*, as qualified by subsection 77(4).

V Governing Legal Principles

(18) I am grateful for the authorities provided by the Investigator and Counsel for the Members. The materials submitted augment a number of other authorities widely known in consideration of *Police Act* misconduct allegations.

(19) I also acknowledge, and am grateful for, the comprehensive written submissions and authorities provided by Counsel for the Complainants. I have reviewed all of these authorities and summarized some of the materials below in my analysis.

(20) All authorities are set out in the FIR or submissions which have been marked as exhibits in these proceedings.

(21) In summary, the authorities confirm that as Discipline Authority, my assessment of a Member's arrest and use of force actions, must:

- (a) Consider whether or not each Member had subjectively determined that there were reasonable and probable grounds to arrest and handcuff the Complainants ;
- (b) Consider whether or not each Member had subjectively determined that the use of force, by immediately removing and handcuffing the Complainants, was not an unnecessary use of force;
- (c) Determine whether or not each Member's beliefs were objectively reasonable taking into consideration such member's training, experience and the circumstances at hand viewed through the perspective of a reasonable officer;
- (d) Take account the exigencies and immediacy of the moment facing each Member before action was taken;
- (e) 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;
- (f) Not evaluate the actions of a Member with the benefit of hindsight, but rather through the perspective that might reasonably be taken by an officer with equivalent training and experience facing similar circumstances, in a practical, non-technical common sense manner;
- (g) Consider that at law, there is no requirement that a Member perfectly calibrate their use of force to a perceived threat; and
- (h) Consider whether or not in taking the action in question, there was a "serious blameworthy" aspect to the conduct in question in that the Member concerned either acted knowing that there was no legal authority to do so, or reckless as to whether or not such authority existed.

(22) Two additional comments are relevant with respect to the applicability of the foregoing legal principles:

- (a) Having regard to the *Lowe* decision in particular, I have found that the facts of this case are in no sense complex enough that independent expert evidence is required to assist in considering whether or not misconduct has taken place. I am quite satisfied that the application of "common sense" to the facts as found is more than

- adequate to ascertain whether or not misconduct has taken place intentionally, or recklessly and in circumstances where there is serious blameworthy conduct; and
- (b) Although the Investigator has undertaken a detailed review of the evidence in the FIR, and reached conclusions that generally support the view that neither Member has committed misconduct, I am, with respect, not guided by the wisdom of those conclusions in discharging my duty. As will be noted below, in completing a comprehensive review of the credibility of the various parties providing statements and evidence, I have reached different conclusions than those set out in the FIR on the facts relating to the arrest and handcuffing of the Complainants. As a result, I am not satisfied that relying on the Investigator's professional assessment of the actions taken by the Members is appropriate in such circumstances. Rather, I am satisfied that there are material differences in the facts between those reached by the Investigator, and those set out below which have taken into consideration credibility issues.

VI Records submitted for review

(23) The following records were entered as exhibits in this proceeding:

- (a) The FIR dated May 7, 2021 with video links and related procedural documents;
- (b) The Supplement to the FIR. (This report included the application by Counsel for the Member and my decision in relation to the same);
- (c) Submissions from Counsel for the Complainants on the initial FIR and Supplement; and
- (d) Further submissions of Counsel for the Members.

(24) As noted above, the three witnesses testifying in these proceedings were the Investigator and the two Members.

(25) These materials, and the testimony of the witnesses, collectively comprise the record with respect to these proceedings (the "Record").

VII Position of Counsel for the Members

(26) The position of Counsel for the Members was set out in considerable detail in written submissions subsequently augmented by oral submissions during the course of this Discipline Proceeding.

(27) With respect to the facts surrounding the Misconduct Allegations, Counsel for the Members submission can be summarized as follows:

- (a) The lack of indigenous cultural awareness and training on such matters provided to the relatively inexperienced Members was a major factor in their approach to dealing with the Complainants. This included the Members lack of awareness of possible indigenous perspectives with respect to safety and policing issues;
- (b) At the Discipline Proceeding, both Members testified that with the benefit of time, further reviewing the FIR and considering the importance of the insights of Mr. [REDACTED] Director of the [REDACTED] set out therein, they have each come to a much deeper understanding of how they could have handled the issues relating to the Complainants differently;
- (c) Specifically, the Members acknowledge that focusing the needs of the Complainants, rather than those of the Bank, and being more alive to the unique cultural and historical factors that impact Indigenous people and their interactions with colonial institutions and police would, in hindsight, have led to different outcomes;
- (d) On the evidence in the Record, it is submitted that the facts do not establish misconduct on any of the Misconduct Allegations;
- (e) Specifically, it is submitted that the arrest of both Complainants was made on reasonable and probable grounds, justified both subjectively and objectively;
- (f) Furthermore, the handcuffing of both Complainants was a lawful use of force immediately following arrest by both Members;
- (g) Finally, the retention and disclosure of photos of Complainant documents by Cst. [REDACTED] to counsel acting on his behalf in relation to the Complaint did not contravene any provision of the Police Act or constitute misconduct.

(28) Counsel for the Members submits that police officers do not have to be perfect in the application of force, they must only be reasonable: *R. v. Nasogaluak*, 2010 SCC 6; *Anderson v. Smith*, 2000 BCSC 1194.

(29) Counsel further submits that:

"..Section 25 of the Criminal Code authorizes to use force in carrying out lawful duties, but only as much force as is necessary to carry out said duties Officers are not required to use only the absolute least amount of force that will achieve a desired objective, nor is the use of force that an officer employs to be assessed to a nicety.."

(30) Counsel further notes that an adjudicator:

"..must not assess conduct with the benefit of hindsight and must not substitute his or her judgment as to what could or should have been done in the circumstances for that of the officer. The question is whether any belief the officer had with respect to the need for force and the amount of force required was reasonable and is not to be answered by reference to what others might have done in similar circumstances" (PH 2010-3, Part 1, p. 13, Pitfield, Ret.J).."

(31) I will address the further specific submissions of Counsel for the Members on each of the three Misconduct Allegations as I consider each of those matters below.

VIII Submissions of the Complainants

(32) Both Complainants were interviewed by the Investigator as part of the process of completing the FIR.

(33) As well, Counsel for the Complainants provided extensive written submissions. The submissions addressed:

- (a) The adequacy of the investigation undertaken concerning the Complaint;
- (b) The Misconduct Allegations; and
- (c) Appropriate disciplinary or corrective measures.

(34) With respect to the adequacy of the investigations undertaken, Counsel for the Complainants submits that:

"..investigations concerning police conduct towards Indigenous Peoples should address any discriminatory stereotypes and views of Indigenous People that may play a role in events." Complaints Submissions September 30, 2021 P. 1

(35) Specifically, the Complainants submit that any investigations concerning police conduct towards indigenous peoples should address any discriminatory stereotypes and views of Indigenous peoples that may play a role in events.

(36) Counsel notes the importance and relevance of sections 2 and 3 of the *Declaration on the Rights of Indigenous Peoples Act* SBC 2019 . Counsel also references *Campbell v Vancouver Police Board (No. 4)* 2019 BCHRT 275 on the issues of racial profiling, discrimination and stereotypical views of Indigenous peoples which, it is alleged, are pervasive issues in the history of police dealings with Indigenous peoples.

(37) Reference is also made to submissions advanced in connection with a BC Human Rights Tribunal decision, *Campbell v Vancouver Police Board (No.4)* reported at 2019 BCHRT 275. Counsel for the Complainants submits that the submissions can be included as

evidence in relation to historic and present factors impacting the relationship between police and indigenous persons.

(38) As Counsel correctly notes, I cannot consider the noted submission as evidence in this proceeding (section 124(3) Police Act). I have, however, taken the materials submitted as submissions of Counsel on the points noted, rather than evidence.

(39) One of the key submissions relating to the *Campbell* case adopted by Counsel for the Complainants was found at paragraph 114:

“The evidence showed that officers mostly believed that as long as they treated everyone the same and with “respect”, this was sufficient. This formal equality approach fundamentally prevents officers from understanding the ways in which they must respond differently to Indigenous persons whose interactions with police are the product of a colonial history of genocide, intergenerational trauma and personal trauma.”

(40) With respect to the Misconduct Allegations, Counsel for the Complainants submits that:

- (a) The Complainants were told that they were not “under arrest”, but rather detained by the Members;
- (b) There were no grounds to arrest either Complainant. Specifically, while Counsel acknowledges that Cst. ■ may have believed that he had subjective grounds to complete the arrest of the Complainants, it is submitted that there was in fact no objective evidence supporting authority for the arrests. Counsel maintains that further investigative steps were necessary before the Members could have formed any reasonable belief that the Complainants had committed a crime;
- (c) The Members committed abuse of authority in handcuffing Complainant B, a young person. Counsel notes that the Members had seen Complainant B’s birthdate on her status card very early in their interaction with her, however, simply did not “do the math” to determine her age;
- (d) Counsel notes that the Supreme Court of Canada has addressed the particular vulnerability of young persons of indigenous heritage, such as Complainant B, as follows:

“...the vulnerability experienced by young people in general is amplified for those young people who are indigenous or members of racial minorities. The unfortunate reality, as this Court recently pointed out in R. v. Le, 2019 SCC 34, is that ‘being frequently targeted, stopped, and subjected to pointed and familiar questions’ by police is a ‘common and shared experience’ for racialized youth (para. 97). These young people disproportionately interact with the criminal justice system for a complex variety of reasons, which include both direct and systemic racial discrimination with the system....” R v C.P. 2021 SCC 19;

- (e) Counsel submits that the evidence does not reasonably establish that the Members needed to deploy handcuffs in their dealings with the Complainants, and in particular, Complainant B. As such, it is submitted that the Members:

"..recklessly used unnecessary force on the Complainants through the routine application of handcuffs following their arrest without reasonable and probable grounds to do so and therefore without good and sufficient cause.." Complainant submissions page 6

- (41) The majority of the remainder of Counsel's submissions are incorporated under a heading titled "disciplinary and corrective measures" which are not the focus of this stage of the proceedings. Having said that, there are elements of those submissions that clearly touch on the substantive issues arising from the Misconduct Allegations. The key submissions that appear relevant to the analysis I must undertake at this stage of the Discipline Proceeding appear to be as follows:

- (a) The submission is made that the actions of the Members were not merely a lapse of judgment that led to oppressive conduct. Rather, it is submitted that the Members:

"..used unnecessary force recklessly, without good and sufficient cause, because the Complainants were people of colour- specifically Indigenous in appearance as well as in fact- and therefore likely guilty." Complainant submissions page 7

- (b) Counsel further submits that this decision:

"..should not merely conclude that the Members engaged in oppressive conduct, but further infer that would not have engaged in such oppressive conduct with white Bank customers. In other words, the conduct of the Members was more likely than not tainted by stereotyped and discriminatory assumptions.. " Complainant submissions page 7

- (42) On the issues raised in the Supplement, Counsel submits that the Members' Initial Counsel misunderstood the nature of Certificates of Indian Status. As such, it is submitted that Cst. ■ allegedly provided the photographic materials in issue to address an irrelevant point, a question concerning a Certificate number of Complainant B's status card. In doing so, it is submitted that Cst. ■ disclosed elements of Complainant B's personal information unlawfully.

- (43) Counsel submits that such a misunderstanding further demonstrates a concern with respect to Cst. ■ lack of knowledge and understanding of Indigenous legal identification.

- (44) The remainder of the Complainant's submissions touch on matters that may have relevance in any consideration of Disciplinary and Corrective measures.

IX Evidence not in dispute with respect to Misconduct Allegations # 1 & # 2

(45) The Record does not suggest any dispute with respect to the following facts relating to Misconduct Allegations #1 or #2, namely that:

- (a) At all material times the Members served as a patrol Officers with the VPD. Cst. ■ had served as an officer for 4 years, Cst. ■ 3 years, at the time the incident in question took place;
- (b) Both Members were at all times acting in the normal course of their duties as police officers;
- (c) Prior to becoming a police officer, Cst. ■ had approximately one year of experience working at a Bank in the Downtown Eastside area of Vancouver;
- (d) Both Members had received approximately 20 weeks of training at the Justice Institute before graduating as police officers;
- (e) Of the approximately 800 hours of instruction at the Justice Institute, only three were specifically dedicated to indigenous culture. Awareness of Indigenous cultural safety issues was not specifically part of any training received by either Member;
- (f) However, both Members acknowledge that consideration of an Indigenous perspective on issues did permeate much of their general training. As well, both Members had had prior experience dealing with Indigenous persons as part of their normal duties;
- (g) On the day in question, Cst. ■ had lead responsibility for investigations while Cst. ■ served as driver and cover officer;
- (h) Both Complainant A and Complainant B were ordinarily resident in ■ a very small, remote community on the coast of BC;
- (i) Before the incident in question, Complainant A had been a long term customer of BMO at its main branch in Vancouver;
- (j) On December 19, 2019, Complainant A made an appointment with the Bank to obtain a Bank card for both himself and his granddaughter, Complainant B;
- (k) On December 20, 2019, both Complainants returned to the Bank arriving early for their appointment. On engaging with Bank staff, Complainant A informed them of his wish to secure a Bank card for both himself and his twelve year old granddaughter;
- (l) As outlined in detail below, there is no issue that both Complainants were arrested and handcuffed by the Members slightly more than two minutes after their arrival on scene at the BMO. Complainant B was 12 years old when arrested and handcuffed; and
- (m) There is also no issue that approximately 13 minutes after being arrested and handcuffed, Complainant B was released. Complainant A was unhandcuffed 35 minutes after his arrest when Cst ■ concluded that no crime had in fact been committed by either Complainant.

(46) What followed thereafter is at least to some extent in dispute. There are minor, but important, differences in the evidence of the various parties on several key issues.

X Credibility assessments with respect to evidence in dispute

(47) In reviewing the facts in dispute, it is evident that there are differences in the unfolding events as described by the various participants. The evidentiary issues arise with respect to three key areas:

- (a) The precise information made known to the Members before removing the Complainants from the BMO branch outside to Dunsmuir Street to be arrested;
- (b) The precise circumstances confronting the Members immediately before the Complainants were arrested and handcuffed; and
- (c) The actions taken by the Members and the Complainants subsequent to arrest.

(48) In order to make findings of fact on these next stages of the interaction between the Members and the Complainants, I have considered the evidence of all parties with respect these developments as set out in the Record. I have specifically considered the conflicts arising from the various reports, materials and statements set out in the Record. I have also considered the video and audio recordings in the FIR and, of course, the testimony of the participants as reflected in the FIR and supplement. Finally, I have considered and reviewed the testimony of the Investigator and the Members provided during the Discipline Proceeding.

(49) I am aware, of course, that my ability to assess the credibility of the various witnesses is limited to a review of the Record. I have not had the ability to personally observe or, indeed, raise questions of any of the witnesses, other than the testimony of the Members and the Investigating Officer.

(50) With those limitations taken into consideration, I have reviewed the evidence provided in the Record.

(i) The Investigator

(51) I have no credibility concerns with respect to the evidence of the Investigating Officer. The Investigator, both in the FIR and in testimony during this proceeding, was in all respects, credible, reliable and trustworthy.

(ii) Complainant A

(52) Complainant A was forthright in his evidence to the Investigator on the key issues. He demonstrated the ability to observe, recollect and report what had taken place on key issues both with the Bank and the Members.

(53) Although there were acknowledged gaps in Complainant A's recollection of some details of the arrest and handcuffing process, I am satisfied that the statement given to the Investigator was provided truthfully and as completely as possible given the undoubted shock and confusion of a summary arrest. Clearly the circumstances of the arrests and handcuffing was extremely upsetting to Complainant A, however, he provided his evidence with objectivity and patience.

(54) I have no hesitation in finding that Complainant A was a trustworthy, credible and reliable witness in these proceedings.

(III) Complainant B

(55) Complainant B is now approximately 14 years old, 12 at the time of her arrest and handcuffing. The interview with the Investigator took place in the company of her Grandfather and counsel representing the Complainants.

(56) Complainant B was unable to recall details of much of what took place with Bank officials and the Members. Her evidence confirms that she had a general understanding of what was taking place. However, on many occasions she responded to questions on details with an honest acknowledgment that she either did not know or could not recall given the fear and confusion experienced during the arrest process.

(57) The statement given by Complainant B makes plain her discomfort in providing a formal answer to the Investigator's questions. Clearly Complainant B was attempting to be truthful in her responses to the Investigator. However, her inability to recollect and report on many details of the interaction with the various parties raises concerns as to the reliability of her evidence.

(IV) Other Witnesses

(58) Having reviewed the statements of the Cst, [REDACTED], [REDACTED], [REDACTED] and [REDACTED] (the "Branch Manager") given to the Investigator as set out in the FIR Volume 1, I have no material credibility concerns with respect to the evidence of those parties.

(59) I am not satisfied that the evidence of [REDACTED] (the "Branch Representative") was reliable. At many points in her statement to the Investigator the Branch Representative reported that she was either unclear, or could not recall material details of events involving the Complainants. Although apparently present during part of the brief initial meeting with Cst. [REDACTED] her recollection of that event is vague and provides little material detail.

(60) The Branch Representative's one clear recollection is that she had no communication with the Members at all before or immediately after the arrest of the Complainants.

(61) The Branch Representative's credibility as a witness is compromised by the general vagueness and unreliability of her recollection of events relating to the Complainants.

(V) Cst. ■

(62) With respect to Cst. ■ concerns arise with respect to his ability to reliably observe, recollect and report on matters relating to the decisions made and actions taken involving the Complainants.

(63) The key issue relates to the reliability of the Members evidence, particularly in the areas of grounds for arrest and handcuffing of the Complainants. Let me explain.

(64) Cst. ■ provided written reports on his dealings with the Complainants contained within the Record, including PRIME and General Occurrence reports filed after the incident in question. Cst. ■ was interviewed by the Investigator twice. The Member also testified during the Discipline Proceedings. There are, I find material inconsistencies between those various records and statements.

(65) A careful review of the first interview that took place June 5, 2020 revealed that the Member had extremely limited notes of the interactions that took place with the Complainants. The Member's evidence was imprecise and at times vague. One early example is a question posed by the Investigator at page 5, line 100 of the interview. Cst. ■ is asked:

Q- "...did you conduct any queries or make any phone calls for further information prior to arriving on scene at all..?"

A- "Uh, not prior to arriving.." line 102

(66) However, shortly thereafter, the Member continues as follows:

"Um so, going there, I had a couple of possible names. I queried them and there was nothing, um they didn't have uh, uh, Lower Mainland police involvement that I could recall.." lines 106-107

(67) A review of the VPD detailed called summary for this dispatch (Volume 3, Tab 15 E of the FIR) discloses what appears to be a significant number of police data base queries made by Cst. ■ before arriving on scene at the BMO. The queries begin at 11:49:23 and continue 12:08:58, an elapsed time of approximately 18 minutes. The VPD logs confirm that the Members arrived on scene at 12:35:59.

(68) Although not a significant contradiction, Cst. ■ casual approach to this evidence, which is in contrast to other elements of the Record and his initial statement on queries, raises a concern as to the accuracy of his recollections. It is a pattern reflected elsewhere in his evidence on multiple occasions evidencing a lack of precision with details.

(69) The transcript of this first interview raises other examples of equivocation and inconsistencies of a similar nature which has raised material reliability concerns as to the Member's evidence.

(70) For example, on the crucial issue of grounds for arrest, Cst. ■ reported to the Investigator that he was unsure which information had been conveyed to him by the Branch Manager before the arrest of the Complainants, and which after. (Volume 3, Tab 15 E lines 157-178) Again, there were no notes taken on this critical issue.

(71) The Investigator asked at line 154

"what information specifically did the Bank Manager uh, give you um in terms of verbally and also any types of documents or any information she provided?"

(72) The Member's response was as follows:

"So it was uh, verbal and I just, kind of uh, uh, um, before I continue I...I spoke with (him) for initial verbal statement and later on during investigation which I'm sure was discussed later. I went back and, and got a little bit more uh, uh details from them, But initially, uh, uh they just verified the initial dispatch information that uh they had confirmed uh, on their own policies and procedures that uh these two parties had uh produced a fraudulent document and are trying to open a Bank account.." Volume 3, Tab 15, section L lines 157-164"

(73) For her part, the Branch Manager's report of what was told to Cst. ■ is markedly different than that reported by the Member. The manager described her very brief initial conversation with Cst. ■ as follows:

"I explained the situation that we had um, and a customer of ours that we couldn't identify based on the information we have on our systems. Um and that the other customer (Complainant B's) card looks to be altered and I had confirmed with um Indigenous Services Canada and that they had confirmed that the ID was altered or fraudulent"

(74) As is noted above, I found no reason to question the reliability or credibility of the Branch Manager.

- (75) The message conveyed by the Branch Manager to the Member was not that the two Complainants had produced fraudulent documents trying to open a Bank account, based on their own policies and procedures. Rather, it was that the Bank had a customer, an existing customer, that they could not identify. The manager further advised that Complainant B's ID appeared to be altered and that Indigenous Services Canada had confirmed it was either altered or fraudulent.
- (76) There was, however, in the Branch Manager's limited communication to Cst. [REDACTED] no direct accusation of fraud against either party based on the Bank's internal policies and procedures, and particularly, none specifically made against Mr. [REDACTED]. At best Cst. [REDACTED] limited direct communication with the Branch Manager confirmed three things:
- (a) The Bank had an existing customer it was unable to identify based on their internal procedures; and
 - (b) Identification had been produced relating to Complainant B that appeared to be altered or fraudulent; and
 - (c) Indigenous Affairs Canada had advised that the id in question appeared to be either altered or fraudulent and suggested that authorities be contacted concerning the same.
- (77) Clearly the 911 call details were to some extent different. However, Cst. [REDACTED] evidence on what he had been told by the Branch Manager was materially inconsistent with her report of the same encounter. That inconsistency raises a concern as to the reliability of Cst. [REDACTED] recollection of events. Careful notes of the Branch Manager's report may have assisted her, but such do not appear to exist.
- (78) Perhaps the most significant issue with the reliability of Cst. [REDACTED] evidence lays in his use of the phrase "I don't recall". The term, or some version of that term, appears on almost every page of the first statement given to the Investigator.
- (79) In the second statement dated October 5, 2020 Cst. [REDACTED] was questioned on the video of his interaction with the Complainants and in particular, his dealings with Complainant B. Again, there are multiple references to Cst. [REDACTED] inability to recall matters or provide amplification on crucial issues.
- (80) One example concerns the dealings with Complainant B when she was given her Charter rights. Cst. [REDACTED] was asked by the Investigator if the Member had asked Complainant B about her status card. The card, of course, was the focal point of the Branch Manager's concerns leading to the 911 call. Cst. [REDACTED] response at Volume 1 Tab 4 M line 563 of the FIR was:

"No, I don't. I don't recall. I don't think so. Okay"

- (81) The lack of precision in that, and further, responses raises a concern as to the reliability of Cst. ■ recollections.
- (82) A further issue with Cst. ■ evidence raises concerns as to the accuracy of his reporting. It is clear that Cst. ■ had expressed concern over the need to protect the Charter rights of the Complainants, hence moving quickly to arrest them and provide Charter warnings.
- (83) However, Cst. ■ acknowledges that notwithstanding the warnings and cautions, his investigative queries of both Complainants continued after their arrest. The expressed concern over protecting the rights of the Complainants seems to have disappeared as Cst. ■ investigated the uncertainty arising from the Complainants' dealings with the Bank.
- (84) Again, this manifest contradiction between what Cst. ■ explained as his reason to move quickly to arrest, and the reality of what took place thereafter raises concerns as to the accuracy of his evidence.
- (85) In oral testimony November 29, 2021, Cst. ■ was led through many of the same issues canvassed by the Investigator in earlier statements. At page 55 of the Transcript, line 24, Cst. ■ confirms that he knew about a large cash deposit relevant to this case before the arrests were made. This conclusion does not appear to be borne out by a review of the CAD records, nor is it consistent with the Branch Manager's evidence.
- (86) Cst. ■ PRIME report sets out four grounds for arrest which Cst. ■ claims were provided in further discussions with the Branch Manager:
- (a) Recent large deposit;
 - (b) Complainant A only changed his phone number on the account with the Bank the day before;
 - (c) Complainant A's status card did not match the Bank database; and
 - (d) Complainant B had presented a status card which BMO had deemed fraudulent since it was under a different name than listed on the public inquiries data base.
- (87) With respect to these articulated grounds, the Branch Manager's recollection was that the information about a large deposit having been made to Complainant A's account took place during a second discussion with the Member, after the arrests had been made. As well, the Branch Manager did not report having advised Cst. ■ of any change in phone number by Complainant A or that the Bank itself had deemed Complainant B's status card fraudulent. Rather the manager had reported that Indigenous Services Canada had advised that Complainant B's status card was "likely altered or fraudulent".
- (88) These material inconsistencies on a crucial issue raise serious concerns as to the reliability of Cst. ■ evidence as a whole.

- (89) Cst. ■ confirms as well that he cannot recall the details of his discussion with Cst. ■ concerning Complainant B's age. Given the significance of this issue, that statement at best reflects continued concern over the reliability of Cst. ■ evidence. At worst, it may not have the ring of truth.
- (90) In summary, there are numerous issues with Cst. ■ evidence that do not appear to be accurate such as:
- (a) his explanation for handcuffing and then releasing Complainant B;
 - (b) his explanation for arresting the two Complainants to protect their Charter rights ;
 - (c) his explanation of the grounds he believed were provided by the 911 call and the Branch Manager and the manifest conflict between the articulated reasonable and probable grounds for arrest detailed in Cst. ■ PRIME report, and the evidence given at this hearing.
- (91) As noted above, on all these points, other evidence which I have accepted differs in materials ways with Cst. ■ version of events. This raises a serious concern as to the reliability, accuracy and completeness of Cst. ■ evidence.
- (92) As a policing professional, Cst. ■ would have been aware of the importance of accuracy and detail. However, Cst. ■ evidence was compromised by his poor recollection of important details, his casual, inconsistent and fluid description of material events, and his vague and at times uncertain reporting of other facts and details.
- (93) Considering all of the foregoing, I find that Cst. ■ evidence was not reliable. I therefore reject Cst. ■ evidence where it conflicts with that of other witnesses.

(VI) Cst. ■

- (94) Cst. ■ would also have been aware of the importance of accuracy and detail in police decision making. He provided an initial statement to the Investigator June 6, 2020 marked as an attachment to the FIR at Volume 1, tab 4 I. As with Cst. ■ I have a number of concerns as to the reliability of Cst. ■ evidence.
- (95) Reliability issues arise early in Cst. ■ statement as he describes his dispatch to the BMO, initial contact with the Complainants and the movement out of the Bank as directed by Cst. ■
- (96) Cst. ■ was able to generally describe what took place, but specifics as to grounds for arrest, the rationale for moving the Complainants outside the Bank and the handcuffing of the Complainants were lacking precision and detail. In many cases, Cst. ■ appeared to be relying on supposition and general practice to justify decisions taken involving the Complainants.

(97) As an example, at lines 119 to 159 of the June statement, Cst. [REDACTED] was asked by the Investigator several questions about the events following Cst. [REDACTED] brief meeting with the Branch Manager :

[REDACTED] *Okay. And, did you have a conversation with Cst. [REDACTED] after he spoke uh, to the Bank manager?*

[REDACTED] *Uh, I, I think it would've, he, he spoke to them and I would've, cause I kept an eye on the two parties that were seated.*

[REDACTED] *Okay*

[REDACTED] *Uh, he went to speak to them and then he came back and said , if I remember was just like okay, we're just gonna ask them to go outside.*

[REDACTED] *Kay. Okay. And then did he say anything to you about, in what, what, what he was gonna do or what his intentions were once you went outside?*

[REDACTED] *I can't recall that exactly.*

[REDACTED] *Kay. Um, did you ask Cst. [REDACTED] about any questions, um, uh, just with regards to the conversation that the had with the Bank manager?*

[REDACTED] *I can't recall that.*

[REDACTED] *Kay. Um, so just tell me a little bit about the, I guess when you first met [the Complainants] in the lobby, um what was the conversation that you had with them?*

[REDACTED] *Um, I didn't have a conversation with them at all, until uh, once they were outside and after I had chartered it.*

[REDACTED] *Okay. Um, were you aware that you were going to arrest him once you got outside?*

[REDACTED] *Yeah. I was uh, just given the information already from the call and then, uh, if I can't remember exactly, but, I think I knew, like we can just read off each other like its, you know in a partnership usually if someone's gonna do something.*

[REDACTED] *Right*

[REDACTED] *And then , sometimes you can read it and in this case I think I could read that, you know, uh, we were likely going to.*

[REDACTED] *Okay. Uh, did Cst. [REDACTED] direct you to detain, arrest or handcuff anyone?
I can't remember exactly.*

(98) Those uncertain and equivocal responses on such important matters and in the absence of notes raise a serious issue as to the reliability of Cst. [REDACTED] evidence and recollections.

(99) On the important issue of the grounds to proceed with arrests, the following exchange is recorded in the statement at lines 156-159:

[REDACTED] *Right. Okay. Was there any discussion with Cst. [REDACTED] about reasonable grounds to believe an offence had been committed prior to making the arrest?*

[REDACTED] *Uh, n... I don't think I would, we went into that detail*

[REDACTED] *Okay*

[REDACTED] *'Cause I mean, like I said, the Bank is a reliable source.*

[REDACTED] *Yeah*

[REDACTED] *and, and we, we had reasonable grounds to believe at that point. Like..*

Okay
 ...coming from the Bank. Right?
 Yeah
 information is is credible
 Ok, so can you uh explain your reasonable and probable grounds then that led to the detention handcuffing of Mr. [REDACTED]
 Uh, so the, the Bank uh, tells us, you know, this fraud had happened and um, um basically and once we get him outside uh, the arrest, when we arrested them, uh, I was thinking like there's two parties here. And, you know, I don't want, I don't want them to leave.
 Mmm
 And so. I knew that there would be more to it. It wouldn't just be a one sided story where the Bank tells us something, just, you know, they give us a little tidbit of information and then we just, okay, you're under arrest.

(100) The casual and inaccurate explanation of reasonable and probable grounds by Cst. [REDACTED] reflects the fact that he acted to arrest Complainant A with the most minimal facts. His last comment is perhaps the most accurate, acknowledging that simply having a "tidbit" of information from the Bank leading to an arrest would not be realistic.

(101) Cst. [REDACTED] appears to acknowledge that he knew that there would be more to the facts than the limited information he access to. In the above noted passage, it is evident that Cst. [REDACTED] has an incomplete and unreliable recollection or understanding of the material facts relevant to the arrest decisions made.

(102) Cst. [REDACTED] was similarly vague in reporting whether or not Complainant A had requested access to a lawyer (*lines 246-249*). Neither could he recall if Complainant A asked why he and his granddaughter were being handcuffed (*lines 294-300*).

(103) Further uncertainty as to Cst. [REDACTED] recollection arose when asked about the basis for the arrest decision between lines 354 to 367. The summary of Cst. [REDACTED] evidence of this point appears to have been:

[REDACTED] *I think just um, uh seeing him and I can't remember exactly if we had an exchange or anything, but if anything it might have been like, yeah, they're under arrest. And it was very brief.*

[REDACTED] *Kay
 So, um I think once, I once I got that confirmation whether it was verbal or just a nod or something then I knew." (*lines 362-367*)*

(104) Cst. [REDACTED] lack of a precise recollection on such an important issue raises a further serious concern as to the reliability of his evidence.

- (105) As with Cst. ■ the June statement of Cst. ■ reflects a number of occasions where the Investigator posed a specific question only to receive a “ I don’t recall” response from the member. Such responses further raise concerns as to the reliability of Cst. ■ recollection of events.
- (106) With respect to a second statement given to the Investigator October 5, 2020, similar concerns arise.
- (107) With respect to Cst. ■ oral evidence November 29, 2021, the Member continued to be unable to recall a number of specific details. These included questions to whether or not he and Cst. ■ had a conversation prior to the arrests, or whether he had eye contact with the Complainants while waiting in the lobby.
- (108) As well, Cst. ■ could not specifically recall the results of the search undertaken of Complainant A post arrest. He also confirmed that in reality, his practice is to always handcuff suspects on arrest. *(page 114 Transcript of November 29, 2021, line 4)* As such it appears that issues of genuine concern for officer safety, flight and the need to search for further documents were not seriously considered by Cst. ■ before the arrests took place. Cst. ■ explanations on these issues simply does not appear to have accurately reflected the reality facing the Members.
- (109) Finally as with Cst. ■ there are also concerns as to the sincerity of Cst. ■ belief that the arrest and handcuffing of the Complainant’s was required to stop them from fleeing. I am not satisfied that Cst. ■ had any such serious concerns. In fact I am not convinced that Cst. ■ gave any genuine thought to that issue at all before removing the Complainants from the Bank. Had he done so, it is difficult to understand how he could allow both Complainants to precede him out of the Bank onto the busy sidewalk. Such assertions appear to be, at a minimum, inaccurate, given the apparent lack of serious consideration given to those matters by Cst. ■ and the behaviour of the Complainants observed by the Member.
- (110) On balance, considering the two statements and oral testimony of Cst. ■ I find that at several points his evidence was vague and lacked precision. Cst. ■ ability to observe and recall material details was not aided by substantive notes. At many points in his evidence Cst. ■ relied on supposition and general practice. Cst. ■ evidence also was equivocal on multiple occasions when answers provided did not appear to be accurate in the context of other evidence.

- (g) The Branch 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 status card raised some concerns for the Bank Representative given its condition and quality;
- (h) The Branch Representative next 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] given its status as a very small coastal village. A discussion appears to have ensued on providing further clarity as to exactly where the parties lived;
- (i) The Branch Representative was ultimately left with uncertainty as to Complainant B's identification documents. The representative appears to have believed that Status Card B may have had issues related to its legitimacy and hence, decided to consult her Branch Manager on that issue;
- (j) The issues with Complainant B's identification do not appear to have been canvassed in detail with the Complainants while in the office of the Branch Representative ; and
- (k) The Branch Representative then took both Status Cards A and B telling the Complainants that she was going to consult with her Branch Manager. The parties initially remained in the representative's office while this consultation took place.

II Consultation with BMO management

- (l) The Branch Manager reviewed the two status cards tendered by her subordinate. She did not meet with or see either Complainant;
- (m) The Branch Manager appears to have noted concerns with both cards. The manager was uncertain as to her ability to identify whether or not Complainant A was in fact the Bank's customer and the holder of the account in question. The manager also was uncertain as to the validity of the identification for Complainant B;
- (n) The Branch Manager called Indigenous Services Canada and asked for confirmation that both status cards were valid. Complainant A's status card was confirmed to be valid , however, the registration number of Complainant B's card was not;
- (o) Advice was received from the federal official to retain both cards and call police. The manager reconfirmed that advice and then attempted to call the VPD non-emergency line, without success;
- (p) During this process the Branch Representative was instructed to prepare a letter of refusal directed to Complainant A denying the request to add his granddaughter to his account. This letter, denying the application to open a joint account, was prepared by the Branch Representative and delivered to the Complainants while seated in the representative's office;
- (q) Complainant A was unhappy with that result and asked for the return of the id's provided so he could take the matter up with his Band;

- (r) The Branch Representative told the Complainants that the Branch Manager had their id;
- (s) The Branch Manager next 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"*;
- (t) Identification information was provided to the dispatch operator including the date of birth of both Complainants from the status cards;
- (u) Meanwhile, the Branch Representative had brought both Complainants upstairs to wait seated in the large lobby outside the manager's office. The Complainants patiently waited for the results of discussions with the manager and return of their identification documents; and
- (v) BMO management anticipating a possible issue, made a call to Bentall Towers security. Building security officers attended to serve as a safety backup, but did not contact the Complainants in any manner. The officers simply monitored the Complainants seated in the lobby.

III Dispatch and Arrival of Csts. ■ and ■ at the BMO

- (w) Csts. ■ and ■ were dispatched in response to the Branch Manager's call at 11:43 am on December 20, 2019. The dispatch was to a *"possible fraud in progress"*;
- (x) The Members had 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"*;
- (y) The Members were given names and general descriptions of the Complainants. Complainant A was described as a 50 year old male sitting in the main lobby area, approximately 6' tall, heavy with a grey hoodie, jeans and backpack. Complainant B was described as a female teenager, 16 years old, approximately 5' tall;
- (z) En-route to the BMO, Cst. ■ was driving, serving as cover officer. Cst. ■ was responsible for investigations and conducted several searches relevant to the Complainants on the police computer, with negative results;
- (aa) The Members arrived on scene at 11:58, parking in front of the BMO on Dunsmuir Street . They entered the Bank front doors at 11:59;
- (bb) Prior to entering the Bank both Members had made the decision to arrest the Complainants based on the Bank's 911 call. Each of the Members had subjectively formed the belief that arrests were warranted for both Complainants on the basis of the limited information conveyed to them by dispatch;
- (cc) In forming that view, I find that both Members relied very heavily on the fact that the *"possible fraud"* issue outlined in the 911 call was conveyed by senior staff at a large Bank and would, in all likelihood, be determinative of an offence having taken place;
- (dd) After entering the Bank, both Members passed two people were seated in the upper lobby area. The Members were *"pretty convinced"* that these individuals were the suspects (statement of Cst. ■ page 6);

- (ee) The Members were directed to the Branch Manager's office. They noted that the apparent subjects of the 911 call (the Complainants) seated outside the office in the spacious lobby area;
- (ff) Cst. ■ took responsibility for standing by and watching the Complainants seated in the lobby. There is no evidence that anyone, including BMO staff, identified the persons seated in the lobby as the subjects of the Branch Manager's 911 call;
- (gg) Cst. ■ did not engage in discussion with the Complainants or identify either of the parties at this point;
- (hh) Cst. ■ met and very briefly talked to the Branch Manager in her office. That discussion lasted less than one minute. In that time, the manager confirmed to Cst. ■ 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 . That office also recommended that the id be held and turned over to authorities (police)"*
- (ii) At that time, no further information was provided to the Members, although the Branch Manager did to pass over two status cards and birth certificates to Cst. ■
- (jj) There was, at this point, no other information provided concerning Complainant A's accounts, deposit amounts or anything else relevant to the relationship with the Bank; and
- (kk) Immediately after the brief discussion with the Branch Manager, Cst. ■ left the Branch Manager's office. As noted above, Cst. ■ had subjectively decided to defer to what he believed would have been the Bank's expertise on the issue of fraudulent documents and to proceed as planned with the immediate arrest of the two persons seated in the Bank lobby area.

IV The Arrest of the Complainants

- (ll) On exiting the Branch Manager's office, Cst. ■ briefly indicated to the Complainants that he wished to speak with them outside. Cst. ■ directed the parties towards an exit. There was no communication with Cst. ■ who nonetheless complied with Cst. ■ direction and immediately followed the Complainants out the Bank's main door and onto the sidewalk;
- (mm) Again, with respect to identification of the suspects, Cst. ■ had nothing other than a general reference in the dispatch call noting that the two subjects of the complaint were seated in the expansive Bank lobby area, and a basic description of an older man and teenage female. No Bank personnel had identified the Complainants to the Members. The Branch Manager had, in fact, never met either Complainant;

(nn) There was no further explanation of what was taking place or discussion of any nature with the Complainants, or indeed between the Members themselves, until the parties exited the Bank;

(oo) At the time to Members directed the Complainants to leave the Bank:

(i) There were no “exigencies of the moment” confronting either Member;

(ii) There were no risks evident to either Member, any Bank staff or members of the public in the Bank. Cst. ■ had completed CAD checks of possible existing police records relating to the Complainants during the drive to the Bank. There were no records found relating to the Complainants;

(iii) There was no evidence that the Bank staff had been dealing with either Complainants as belligerent, aggressive or confrontational customers. In fact, the Complainants had at all times been patient, cooperative and calm in their dealings with Bank officials. In short, they posed absolutely no risk to anyone, and were being quietly monitored by two security staff from Bentall Towers and Cst. ■

(iv) No sudden emergency or dangerous situation existed at the time the Cst. ■ asked the Complainants to leave the Bank. Indeed, neither Member had asked Bank staff any questions concerning the risks that might be posed by the Complainants, or indeed, any information that might have been relevant to a risk assessment;

(v) There was no evident need to separate the Complainants from Bank staff or customers given the large expanse of lobby, two security personnel on stand-by and the complete absence of any conflict, real or perceived.

(vi) As well, the Complainants demonstrated no risk of flight. They had patiently waited for more than an hour as the Bank attempted to resolve its concerns over identification issues. The Members had known that the Complainants were patiently waiting in the lobby since the initial dispatch call. Again, neither Member had asked any questions of

Bank staff on the possible risk of flight associated with the Complainants;

(vii) There was a much higher likelihood of complications in dealing with the Complainants on a busy main street sidewalk outside the Bank in Downtown Vancouver. As is evident from the video, multiple members of the public walked in and around the area of arrest and adjacent parked police car. There is no evidence in the videos of such possible complications in the large Bank upper lobby area; and

(viii) There was, in fact, no risk assessment made by either Member, in even the most basic form, before moving the Complainants outside the Bank to the sidewalk and proceeding with the arrests.

- (pp) At 12:01 pm, slightly more than two minutes after entering through the Bank front doors, the Members had exited the Bank following the Complainants through those same doors;
- (qq) The Complainants were thereafter immediately arrested and handcuffed on the sidewalk outside the Bank. Cst. ■ led with his move to arrest Complainant B immediately followed by Cst. ■ arresting Complainant A. Both Complainants were immediately handcuffed by the Members;
- (rr) There was no verbal communication whatsoever between Cst. ■ and Cst. ■ after exiting the Bank Manager's office before the arrests were made;
- (ss) The Complainants believed that they were detained by the Members. However, both Complainants had in fact been arrested on suspicion of fraud after leaving the Bank. They were read their rights under the *Charter of Rights and Freedoms*;
- (tt) It is unclear what Complainant B understood of her rights at that point. In particular it is not clear that she understood that she had been told of her right to consult counsel or the right to refrain from answering any questions. Complainant B was confused and crying as the arrest process was completed;
- (uu) Complainant A did understand his rights and clearly wanted to speak to a lawyer. That request was never acted upon by either Member. Notwithstanding the request to consult counsel, Cst. ■ continued his investigation by questioning the parties, and in particular Complainant A, subsequent to the arrests;
- (vv) Although the application of handcuffs by the Members did not constitute rough handling of the Complainants, unquestionably the experience was uncomfortable, demeaning and stressful for both individuals taking place, as it did, on a busy public sidewalk. Several members of the public were passing the parties as the arrest and detention continued on the sidewalk in front of the Bank on Dunsmuir Street. Throughout this process the Complainants were fully compliant with Member directions and responding to questions asked of them;
- (ww) Subsequent to the arrests, the Members realized that they needed a female officer to search Complainant B and therefore immediately requested assistance through dispatch;
- (xx) In the interim, Cst. ■ returned to the police vehicle for approximately five minutes until 12:06. During that time, Cst. ■ conducted basic investigative steps including a national query for police related files concerning the Complainants. Cst. ■ also continued his dialogue with Complainant A and Complainant B as the searches took place;
- (yy) No negative responses were received in connection with the police data search of the Complainants. Furthermore, both Complainants correctly answered identification questions posed by Cst. ■
- (zz) 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;
- (aaa) The search resulted in no items of concern, however, in talking to Complainant B, the female member immediately learned that she was only 12 years old. The officer immediately passed that information on to Cst. ■

- (bbb) At 12:13 Cst. ■ removed the handcuffs from Complainant B, although the handcuffs remained applied to Complainant A. Complainant B remained detained at the scene even after the handcuffs were removed;
- (ccc) At approximately 12:15, Cst. ■ returned to the Branch Manager's office to further discuss matters involving the Complainants;
- (ddd) Subsequent to the arrest and handcuffing of the Complainants, Cst. ■ conducted an investigation of the identification issues raised by the manager ultimately concluding that neither Complainant had attempted to defraud the Bank;
- (eee) Cst. ■ removed the handcuffs from Complainant A at 12:36;
- (fff) Both Complainants then returned to the Bank lobby where they were engaged by the Bank Manager;
- (ggg) At 13:00 both Members met with the Complainants again and apologized for their actions explaining that the officers were simply "following procedure"; and
- (hhh) The total amount of time spent by the Members in dealing with the Complainants was approximately 61 minutes.

XII Misconduct Allegation # 1- Oppressive Conduct & Making an Arrest without good and sufficient cause - Sections 77(3)(a) and (a)(i) of the Police Act

(114) Misconduct Allegation # 1 combines two elements of abuse of authority alleged against the Members involving the Complainants :

- (a) Oppressive conduct towards a member of the public; and
- (b) The Intentional, or reckless arrest of the Complainants

Both without good and sufficient cause.

(115) It is clear that considering, in hindsight, what an officer might have done better or differently is not the correct test for reviewing possible misconduct. My analysis has considered the actions on the Members measured against what might reasonably have been expected of officers with similar training and experience, facing similar circumstances.

(116) The evidence relevant to consideration of possible oppressive conduct and arrest issues involving the Members, includes:

- (a) First the apparent failure of either Member to recognize, and reasonably accommodate, the Complainants as Indigenous persons facing a policing intervention;
- (b) Second, the summary removal of the Complainants from the BMO to a busy outside sidewalk;
- (c) Third, the failure of either Member to recognize the actual age of Complainant B and to accommodate her as a child in the investigation process until long after the arrest and handcuffing process had been completed; and
- (d) Fourth, the immediate arrest of the Complainants on exiting the Bank.

I Recognition of the Indigenous status of the Complainants

- (117) With respect to the first issue, it is clear that the dispatch information provided to the Members indicated that they were dealing with Indigenous customers of the BMO. Notwithstanding this information, in their evidence, both Members expressed some initial uncertainty as to the identity of the Complainants as they sat in the lobby area.
- (118) Nothing in the actions of the Members reflected any awareness of possible cultural safety issues that might be relevant to the Complainants as Indigenous persons. Nor did the Members' actions reflect the need to approach the investigation of the BMO allegations before arrest with an awareness of the possible impact of past trauma with respect to policing issues which may have been relevant to the Complainants.
- (119) Counsel for the Member properly addressed this as the first issue in submissions:

"11. At the DP, both officers testified that with the benefit of time, and reviewing the FIR and Mr. [REDACTED] insights therein, they have come to a much deeper understanding of how they could have handled this call differently, centering the needs of the Complainants rather than BMO's, and being more alive to the unique cultural and historical factors that impact Indigenous people and their interactions with colonial institutions and police." (submissions of Members, para 5-11)

- (120) Notwithstanding that acknowledgment, Counsel for the Members argues that the lack of appropriate, practical training on issues of Indigenous cultural safety provided to the Members is highly relevant. Specifically, it is submitted that this gap left the Members unprepared to recognize the likely fear and sensitivity that the Complainants might have had when confronted with a policing intervention.
- (121) With respect to Counsel's submission, I cannot agree. Even the rudimentary training provided to the two Members as set out in the FIR made clear that Indigenous persons have suffered historic, generational trauma relating to many issues involving dealings with those exercising legal authority. These issues have included those arising with respect to colonization, residential schools and extreme levels of incarceration in the justice system. All of these issues have been broadly reported in many forms of media for several years. This is not a situation where the Members had never been exposed to the issues.
- (122) The question is how a reasonable officer with equivalent training and experience to that of the Members would approach policing with persons of Indigenous heritage in similar circumstances. I find that such an officer could reasonably be expected to exercise policing authority demonstrating a basic degree of awareness and understanding of Indigenous cultural issues in discharging the policing duties. This is particularly true where, as in this case, the investigation appears to involve a child with indigenous heritage and circumstances that clearly showed the complete absence of risk to any person.

- (123) Such an officer would, in my view, approach a policing issue potentially involving Indigenous persons with greater care, recognizing that not to do so could have the effect of ignoring potentially significant impacts on such persons facing an encounter with law enforcement, that may not have been experienced by others.
- (124) I further find that such an officer, standing in the shoes of the Members, would know that simply treating Indigenous persons the same as anyone else in such circumstances would not be an appropriate, common sense, or reasonable, exercise of policing authority.
- (125) The Members lack of more extensive training on issues of Indigenous culture, history and safety issues did not provide “good and sufficient cause” to treat the Complainants as they did. Even the basic training and awareness that the Members had received was sufficient to alert them of the need to approach the Complainants with greater care and respect as they conducted their investigation.
- (126) The Members arrival at the Bank, and immediate forceful dealings with the Complainants, without consideration of their Indigenous status, could, in all of the circumstances, reasonably be characterized as oppressive in the eyes of an officer standing in the shoes of the Members.

II Removal of the Complainants from the Lobby

- (127) On the second issue, Counsel for the Members submits that the decision to summarily remove the Complainants from the Bank property was required for two reasons:
- (a) To separate the Complainants, as suspects, from Bank staff, as witnesses; and
 - (b) To avoid creating a scene in a “sensitive area” (*para 26 Members submissions*)
- (128) An outline of each Member’s thought process in taking the Complainants outside the Bank is summarized starting at page 86 of the FIR:

Cst. ██████ stated that he arrested Mr. ██████ and Ms. ██████ outside the Bank because he felt the Bank's interior was a sensitive area where people want to feel safe. In his second interview, he stated that he did not want to “create a scene” inside the Bank, where people deal with sensitive matters. He said he felt taking them outside was appropriate at the time.

Cst. ██████ stated the Bank was the complainant on the matter, and when you have a witness (in this case, Bank employees) and a suspect, you do not typically keep them together. He also wanted to avoid a scene whereby there could be some yelling if the suspects objected to the Bank involving police.

Cst. █████ asked Mr. █████ and Ms. █████ to step outside the Bank. Cst. █████ and Cst. █████ did not use force when they escorted Mr. █████ and Ms. █████ out of the Bank, where they were ultimately arrested.

(129) At the Discipline Proceeding, Cst. █████ expanded on this decision:

'Q Did you yourself turn your mind to dealing with these parties inside the Bank as opposed to taking them outside?

A I didn't at first, like looking back at it now I guess, but at that time our training, we were always sort of taught to separate the witnesses from the subjects of complaint or arrested. So there's no, you know, contamination of evidence or in this case I felt that they may become angered or there may be some back and forth if they felt that the Bank had reported them and that's why we showed up. So I wanted to separate, just going off that I just wanted to separate them and then we could sort of deal with it separately.

Q Okay, any other considerations in your mind about taking them outside versus not?

A Yeah, I just thought to remove them from -- like, I just saw the Bank as the Bank is the complainant and then, you know, we have them and just to separate the Bank from them. Obviously looking back at it now with information that we have, I would not have done that. I probably, you know, looking at the FIR and seeing what █████ has said it's sort of given me new perspective on it."

(130) It is relevant that the Complainants were removed before they had been specifically identified as the parties under suspicion by any Bank staff. Clearly the Members had had the benefit a description from dispatch, however, there was no specific identification of the suspects by Bank staff.

(131) It is also significant that Complainant A had already received a letter from the Bank Representative denying his application for a change to his Banking arrangements before he was moved to the upstairs lobby area with his granddaughter. Although Complainant A was unhappy with the Bank's decision, there had been no scene or difficulty in continuing to talk to Bank staff about the issue that was reported to the Members. In fact, of course, neither Member inquired about the attitude of the Complainants or potential risks they might pose.

(132) On requesting a return of his id documents, Complainant A was told by the Bank Representative that the Branch Manager had the material. Both Complainants dutifully waited while the manager undertook her duties.

- (133) In no sense was there any reasonable prospect of a scene or disturbance involving the Complainants. The issue was initially a civil matter involving a conflict between Bank policies and identification questions. Both Complainants, and in particular Complainant A, had responded appropriately to the Bank's requests for information. As well, both appeared to show great patience in waiting for the Bank to complete its processes.
- (134) The Complainants had been moved to the large upper lobby from the Bank Representative's basement office to await the completion of the Branch Manager's review. Bentall Security were monitoring the Complainants while they waited without incident. The lobby itself had ample space to separate the Complainants from all Bank staff and any customers. It also had the additional benefit of providing a secure, contained area to resolve any conceivable flight issues that might have arisen for the Members.
- (135) As Cst. ■ acknowledged in his evidence, at the time the direction to move the Complainants from the lobby took place, he had not turned his mind to dealing with the parties inside the Bank. In fact, Cst. ■ asked no questions about the risks posed by the Complainants in his very brief discussion with the Branch Manager. There was, in reality, no risk assessment or considered reflection undertaken by Cst. ■ He simply ordered the parties to move outside the Bank. Another officer of equivalent training and experience standing in the shoes of Cst. ■ would reasonably be expected to have undertaken this task.
- (136) For his part, Cst. ■ justifications for the move were limited to articulating factors arising after the decision to move had been made by Cst. ■ Cst. ■ simply followed Cst. ■ lead without any consideration of his training and experience on the need to move the parties from the Bank lobby. Cst. ■ followed Cst. ■ and did not seriously consider any on the removal issues or risk assessment until later in his dealings with the parties. Again, an officer with training and experience equivalent to Cst. ■ standing in his shoes would reasonably be expected to at least consider the need for removal, or seek clarification of Cst. ■ intentions, even in a role as cover officer.
- (137) In short, I find that there was, in reality no reasonable necessity to remove the Complainants from the Bank lobby area. There was, in fact, no real risk of confrontation with Bank witnesses, no prospect of a scene that would affect Bank customers, and no risk of flight whatsoever.
- (138) I find that a reasonable officer with equivalent training and experience to that of the Members standing in their shoes would not have immediately removed the Complainants from the Bank lobby to a busy public sidewalk.
- (139) Considering the totality of the circumstances facing the Members, I find that there was in fact no good and sufficient cause to summarily remove the Complainants from the Bank lobby to the busy outside public sidewalk. As such, the removal that took place was an oppressive act.

III The age of Complainant B

- (140) On the third issue, the initial dispatch to the Members had identified one of the suspects as “a 16 year old female teenager”. The identification turned over to Cst. ■ by the Branch Manager for Complainant B showed a birthdate of 2007. A simple reflection on that fact would have confirmed that at least one part of the identification documents showed Cst. ■ that he was dealing with a 12 year old child.
- (141) Cst. ■ was frank in acknowledging that he had not turned his mind to the significance of that date on the status card which, if accurate, would have confirmed Complainant B to be 12 years of age. In fact, neither Member took any time or steps to determine the age of Complainant B before the arrest and handcuffing took place. Simply put, neither Member turned their mind to the issue despite obvious conflicting information from initial reports and documents.
- (142) It was not until Cst. ■ arrived on scene to deal with Complainant B that doubts were raised as to the suspect’s actual age. Cst. ■ had immediately asked Complainant B to confirm her age and was told in response that she was indeed only 12 years old. Cst. ■ immediately advised her partner, Cst. ■ of this development. Cst. ■ then raised the issue with Cst. ■ Shortly thereafter the handcuffs were removed from Complainant B by Cst. ■
- (143) Both Members testified that they believed Complainant B to be in her “mid-teens” and dealt with her as such, largely relying on the dispatch information.
- (144) Neither Member directed their mind to clarifying Complainant B’s actual age before proceeding to arrest and handcuffing. Indeed, Cst. ■ had ignored identification that, if considered, would have at least raised a question as to the conflict between the information provided by dispatch, and that apparently reflected in the tendered identification documents. Cst. ■ had taken no steps to question Cst. ■ actions on this point.
- (145) A reasonable officer with training and experience equivalent to the Members standing in their shoes would have at least questioned the apparent difference in age between dispatch details and the birthdate shown on Complainant B’s status card.
- (146) Such an officer would also have at least asked Complainant B her age before undertaking an arrest and handcuffing.
- (147) I find that there was no good and sufficient cause to ignore prima facie evidence of Complainant B’s actual age, or the apparent conflict between dispatch reports and the relevant status card. There was also no good and sufficient reason to fail to ask Complainant B, clearly a young person, her actual age.

(148) Moving quickly to arrest and handcuff Complainant B without at least inquiring into her actual age was, in all of the circumstances, oppressive towards that complainant by the Members.

(149) Complainant B's indigenous status was also ignored by both Members. As a result, the arrest process proceeded precipitously ignoring both possible issues with Complainant B's age and the need to consider the cultural safety issues that would, in all likelihood, be relevant to her heritage.

IV Summary - Issues 1-3

(150) Considering the totality of issues 1 -3, I find that the Members each acted oppressively in dealing with the Complainants before their arrest and handcuffing.

(151) I find that the Members had shown no consideration as to how their intervention might have been perceived by two Indigenous customers of a large Bank in confusing and uncertain circumstances.

(152) I further find that there was no compelling reason to remove the Complainants from the Bank lobby area, even if an arrest was contemplated. The lobby area provided a secure and expansive area to deal with the Complainants. There was, I find, no risk to anyone and no prospect of any conflict with Bank staff nor any realistic scenario that could lead to an interference of other Bank customers.

(153) Finally, the Members acted oppressively with respect to Complainant B by failing to take any steps to clarify her age before proceeding to arrest and handcuffing.

(154) Considered objectively, and through the lens of a reasonable officer standing in the shoes of the Members, I find that the cumulative actions of the Members prior to the arrest of the Complainants were oppressive within the meaning of section 77(3) (a) of the Police Act.

V The arrest of the Complainants

(155) After having received the initial dispatch information, the Members each assumed that the Complainants were under investigation for fraud, under section 380 of the *Criminal Code*. The *Criminal Code* offence of fraud is a dual, or hybrid, offence, thus meeting the threshold for an arrest without warrant under section 495(1) of the *Criminal Code*, which states, in part:

451(1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

(b) a person whom he finds committing a criminal offence;

- (156) It is not disputed that the issue here is whether each Members had reasonable and probable grounds to believe that the Complainants had committed, or were about to commit, fraud.
- (157) With respect to the decision to arrest the Complainants, I am satisfied that both Cst. ■ and Cst. ■ had subjectively concluded that they had such reasonable and probable grounds simply as a result of the dispatch information.
- (158) As noted above, I have found that the information provided to the Members by dispatch prior to their arrival at the Bank was actually limited to the following facts:
- (a) The BMO main branch staff had called advising of a *possible* fraud in progress;
 - (b) Two people were reported to be trying to open accounts with fake id. The Bank was stalling the two who were sitting in the lobby on the main floor and had been able to verify that the ID was fake;
 - (c) The two subjects were “10/10” – no outstanding criminal charges/convictions;
 - (d) BMO staff had contacted the Canadian government and were advised to confiscate the ID and contact authorities; and
 - (e) Descriptions of two subjects were given by CAD.
- (159) No additional information was provided to the Members during the drive to the Bank either by dispatch or as a result of CAD searches undertaken by Cst. ■ I am satisfied that both Members believed subjectively that the information they had received provided reasonable grounds to arrest the described suspects seated in the Bank lobby.
- (160) Again as noted above, the Members entered the Bank and Cst. ■ met for less than a minute with the Branch Manager. The additional information provided to Cst. ■ at that time by the Branch Manager was limited to the following:
- (a) *“We had a customer of ours (Complainant A) that we can’t identify based on the information in our systems;*
 - (b) *“The other customer, [Complainant B’s] card looks to be altered; and*
 - (c) *“Indigenous Services Canada has confirmed that the id was altered or fraudulent . That office also recommended that the id be held and turned over to authorities (police)”*
- (161) Cst. ■ left the Branch Manager’s office and, without meaningful communication to Cst. ■ directed the Complainants to move outside the Bank. Cst. ■ followed that lead without question or clarification as to the proposed plan of action.
- (162) Once outside the Bank, the Complainants were immediately arrested. Cst. ■ arrested Complainant B while Cst. ■ arrested Complainant A. If there was any investigative detention, it only arose in the very brief move from the Bank lobby to the sidewalk during which time no questions were put to either Complainant.

(163) As Counsel for the Members noted in submissions at paragraphs 35 and 36:

“35. The officers have consistently set out their grounds as follows:

- a. CAD call information;
- b. Objective credibility of the Bank as a large financial institution;
- c. Cst. ■ knowledge of the extensive training staff receive on fraud;
- d. Indigenous Services Canada confirming the cards were fraudulent and should be seized (and instructing the Bank to call the police).

36. Cst. ■ testified that he was following the lead of Cst. ■ who was the contact, or lead investigator. However, he agreed with Cst. ■ RPGs:

“I already knew sort of the direction, based on the CAD call and the remarks that came in. Sort of had that -- I felt we had the reasonable grounds... large institution – believed they would have taken all the steps to verify these documents before calling us. And so based off that I formed my grounds that a fraud had occurred, and we’d have to investigate it (DP Tr. p. 97)”

(164) However, in his PRIME report narrative, Cst. ■ reported that there were four reasons that led him to form reasonable grounds to arrest without warrant under section 495 of the *Criminal Code*. Those grounds were expressed to be as follows:

1. The Bank reported there had been a large money deposit into the account;
2. (Complainant A) had changed his cell number the day before;
3. (Complainant A’s) status card number did not match the number the Bank had on their database; and
4. (Complainant “B”) presented a status card, which the Bank deemed fraudulent, as it did not match the public enquiries database.

(165) The findings of fact noted above conclude that Cst. ■ was, in fact, not aware of items 1-3 until after the arrest of the Complainants. As well, with respect to item 4, there is no evidence that the Bank itself had deemed the status card of Complainant B to be fraudulent, rather it was relying on Indigenous Services Canada to confirm that the card was “altered or fraudulent”.

- (166) As the Investigator has correctly noted at page 52 of the FIR, and Counsel for the Member at paragraphs 44 and 45 of submissions, the test for establishing “reasonable grounds” to conduct an arrest is well established. The leading case on what constitutes “reasonable grounds to believe” continues to be the Supreme Court of Canada decision in *R. v Storrey*, recently considered by the BC Court of Appeal in *R. v. Henareh*, 2017 BCCA 7:
- (167) The terms “reasonable and probable grounds” and “reasonable grounds” are synonymous. *R. v Loewen*, 2011 SCC 21. The two-pronged test of reasonable and probable grounds requires that the arresting officer:
- (a) subjectively believe there are reasonable and probable grounds to arrest, and
 - (b) that those grounds are objectively reasonable.
- (168) When applied to the actions of a police officer, the second part of the test for reasonable grounds has often been called a “*modified objective test*” because it is not based on a generic reasonable person, but rather on a “reasonable police officer standing in the shoes of” the member. Under this “modified objective test”, the analysis considers the position that would be taken by a reasonable police officer with the following qualities:
- (a) An officer who has the benefit of the same training, experience, knowledge and skills as the police officer in question; and
 - (b) An officer who has the same vantage point, with the benefit of the same observations and information as that police officer had at the time.
 - (c) The actions of each officer facing misconduct allegations must be evaluated separately based on his, or her, own lens. *Cluett v The Queen*, [1985] 2 S.C.R. 216;
- (169) The BC Court of Appeal in *R. v. Ballendine* 2011 BCCA 221 further confirmed at page 227 that: “*as has been oft stated, a reasonable-grounds determination is based on a practical, non-technical, and common-sense assessment of the totality of the circumstances.*”
- (170) As noted above, I am satisfied that both Members subjectively believed that they had reasonable and probable grounds to arrest the Complainants.
- (171) I am, however, not satisfied that a reasonable officer, with equivalent training and experience facing the circumstances encountered by the Members would conclude that the required grounds for arrest of either Complainant had been made out. A common sense assessment of the totality of the circumstances known to the Members immediately before arresting the Complainants neither objectively, nor reasonably, supported the arrest decisions. Let me explain.

- (a) Both Members were made aware of a “possible fraud” in progress. The information provided by the Bank to dispatch and conveyed to the Members did not report that a fraud had conclusively taken place, but rather that it was possible;
- (b) Cst. ■■■ reliance on his prior Banking experience purported to confirm complete reliance on Bank expertise for considering fraud issues. Cst. ■■■ expressed his complete faith in information provided by a large financial institution on a fraud issue. However, as noted, the information conveyed to the Members was only of a “possible” fraud. In no sense had the Bank itself confirmed the facts of a fraud for either Complainant;
- (c) The Members were aware that the identification information for one of the Complainants, Complainant B was in issue. The id card appeared to be altered. The brief discussion with the Branch Manager confirmed to Cst. ■■■ that with respect to Complainant A, his identification documents were not alleged to be fraudulent. Rather, the manager expressly told Cst. ■■■ that Complainant A “*was a customer of ours we can’t identify based on our systems*”. The logical conclusion of such a report was that an existing Bank customer was dealing with the Bank, and that for unknown reasons, there were problems confirming the identity of that customer. Under no reasonable circumstances does such an assertion arise to the level of a fraud accusation. At best, it raises a suspicion of fraud;
- (d) The information provided by the Branch Manager to Cst. ■■■ confirmed that Indigenous Services Canada had advised that the id for Complainant B was “altered or fraudulent”. Again, there was no concise or unequivocal conclusion by the Bank itself that the document was fraudulent. The Branch Manager simply told Cst. ■■■ that Complainant B’s status card “looks to be altered”.
- (e) The Members were aware that the Complainants were patiently waiting in the Bank after having encountered issues with their tendered identification. This was not a circumstance where the parties had attempted a fraud and attempted to leave;
- (f) The Members were also aware that neither Complainant had any PRIME or criminal record history which might have raised suspicions as to their actions in the Bank; and
- (g) No formal identification of the Complainants as the subjects of the Bank’s 911 call had been made to the Members at any point.

I Cst. ■■■

(172) Considering the totality of the circumstances, as Cst. ■■■ left the Branch Manager’s office, a reasonable police officer, with equivalent training and experience to that of the Member facing the same circumstances would have known that:

- (a) The focus of the Banks’s complaint was an issue with identification documents, particularly the Complainants’ status cards. The question raised was whether or not such documents were valid. Notwithstanding that fact, Cst. ■■■ gave two status cards such a cursory review that he didn’t notice that age issue arising from Complainant B’s identification and the conflict with information received from dispatch. A

- reasonable officer standing in Cst. ■ shoes would have at least reviewed the cards in question and considered their content before arresting the Complainants;
- (b) There was a discrepancy between the dispatch information and the advice from the Branch Manager with respect to Complainant A. The manager had confirmed that Complainant A was an existing customer that they were unable to identify based on their systems. In fact, Complainant A's identification documents were considered valid. It was the reconciliation of those documents with Bank records and link to the actual person at the Bank, Complainant A, that was in issue. Hence, there was an uncertain link to fraudulent activity on the part of Complainant A, other than a suspicion linked to the tender of Complainant B's id. Again, a reasonable officer standing in the shoes of Cst. ■ would have noted the uncertainty concerning the fraud issues relating to Complainant A and not moved to arrest on the basis of the limited, conflicting and uncertain information on hand;
 - (c) The dispatch information was for a "possible fraud", not a confirmed fraud, on the part of the two Complainants, by the Bank. A reasonable officer with equivalent experience, including Banking experience, would recognize that the BMO had not in fact reached the conclusions on fraud assumed by the two Members. Such an officer would recognize that there were suspicions to address concerning the status cards, however, would not summarily move to arrest based on the information then available;
 - (d) There was no obvious or compelling need to act urgently to secure evidence or prevent the Complainants from fleeing the Bank. As well, there was no obvious need to protect anyone from the Complainants waiting patiently in the lobby area. Complainant B's card was reported to be either "altered or fraudulent". As such, its status was certainly suspicious, but uncertain from the Bank's perspective. The issue at hand was in fact uncertainty between a Bank and its customers on the issue of identification documents, one of which appeared to be suspicious; and
 - (e) That an arrest was not reasonably required to confirm identities, secure evidence or prevent flight during an investigation. On the same basis, such an officer would not conclude that reasonable and probable grounds for arrest had been established at that point in the investigative process.
- (173) Considering all of the foregoing, when Cst. ■ left the Branch Manager's office and moved to arrest the Complainants, he had nothing more than a suspicion of fraudulent activity. Cst. ■ had not taken the time to consider the actual facts before him or measure those facts against the law authorizing an arrest before acting. In short, a reasonable officer standing in Cst. ■ 's shoes would conclude that the Member had failed to exercise judgment in considering the actual facts and law then known before proceeding with the arrests. Rather, I am satisfied that such officer would conclude that Cst. ■ had acted precipitously on suspicion alone.

(174) In fact, I find that objectively there were no reasonable and probable grounds justifying an arrest of either Complainant at that time. Instead, considering the totality of the evidence, I find that a reasonable officer, standing in the shoes of Cst. ■ would conclude that there existed a suspicious set of facts and assumptions concerning the interaction between the Bank and the Complainants with respect to an existing customers account, and certain identification documents. Objectively, therefore such an officer could not conclude that such suspicions rose to the level of reasonable and probable grounds to arrest either Complainant.

II Cst. ■

(175) From Cst. ■ perspective, the chain of evidence supporting reasonable and probable grounds is even weaker. Cst. ■ relied exclusively on the dispatch information, which was limited and uncertain. Beyond that limited information, he simply followed the lead of Cst. ■ and proceeded to arrest Complainant B.

(176) A reasonable officer standing in the shoes of Cst. ■ could not reasonably conclude that grounds for the arrest of either of the Complainants had been made out.

(177) Such an officer would conclude that there were issues arising from the Complainants' identification that required further investigation.

(178) Such an officer would also find that the dispatch information and other circumstances known to Cst. ■ prior to arrest were simply matters raising a suspicion, and did not ever objectively rise to the standard of reasonable and probable grounds for arrest.

III Reckless Arrests in the absence of good and sufficient cause

(179) Considering all of the evidence, I find that the arrests made by the Members were made precipitously, recklessly and without good and sufficient cause. The Members each acted recklessly:

- (a) In failing to consider the conflicts between the dispatch information and the details provided by the Branch Manager;
- (b) In failing to review the details of the status cards;
- (c) In failing to obtain information from Bank personnel on the risks, if any posed by the Complainants before moving to arrests;
- (d) In arresting Complainant A when Cst. ■ was aware the key issue arising from the Bank was simply confirming that Complainant A, a long term Bank customer, was in fact the person then at the Bank;
- (e) In arresting Complainant B without giving any consideration to her actual age and the appropriateness of arresting a twelve year old child on a public street;

- (f) In assuming facts relating to a possible fraud on the part of the Complainants that had not been part of the information made known to the Members before arrest;
- (g) In moving the Complainants to a busy sidewalk to complete the arrests; and
- (h) In failing to consider the Indigenous heritage of the Complainants and the likely profound negative effect of a precipitous arrest decision on such persons.

(180) I find that the Members acted without good and sufficient cause in arresting the Complainants because:

- (a) No reasonable and probable grounds for arrest had been established, and key conflicts in information which might have raised the fraud allegation beyond a suspicion had not been considered by either Member;
- (b) The Complainants presented no risk whatsoever to any party, or the Members. As well, there was no reasonable “*aura of potential and unpredictable danger*” confronting the Members: *Schell v. Truba (1990) 89 Sask.R. 137 at 140 (Sask.C.A.)*;
- (c) There was no urgent need to arrest the Complainants to confirm their identity, preserve evidence or secure the suspects from flight risks. The Complainants showed no risk of flight, had been fully compliant with inquiries and cooperative with the Bank staff and had already provided identification; and
- (d) The investigation of the issues raised by the Bank could very easily have been completed, and the uncertainty over the status cards resolved, without the arrest of either Complainant.

IV Serious Blameworthy Conduct

(181) Misconduct under section 77 of the *Police Act* is not established without determining that the actions of each Member demonstrate “*serious blameworthy conduct*”. In considering that issue, I have noted the training and experience of each Member and the circumstances that each were facing immediately prior to the arrest of the Complainants.

(182) Without doubt, the power of arrest is a critical element of policing powers. As the FIR sets out, extensive training is provided to officers on the law and practice surrounding arrest decisions. In the course of discharging normal policing duties, arrest processes are routinely exercised by officers conducting criminal investigations.

(183) An arrest, however, is not, and should never be, a perfunctory action taken by police. The essence of an arrest is the deprivation of a citizen’s freedom by force. Clearly it is easier for police to deal with anyone suspected of a crime if under arrest and handcuffed. However, it is not the law that any suspicion of criminal activity provides officers with the authority to summarily end a person’s freedom through an arrest. The arrest process should never be routine or take place by rote to accommodate an evolving investigation. As noted above, officers are required to assess the totality of the circumstances that they encounter, assess those circumstances having regard to

their training, and only move to an arrest if articulable reasonable and probable grounds for arrest have been established.

- (184) Regrettably, in the circumstances of this case, I have found that the arrest decisions of both Members were not made in exigent circumstances or supported by the requisite reasonable and probable grounds. The arrest decisions on the part of both Members were perfunctory, and not made due to an error of judgment or lack of training. The Members simply decided, on insufficient grounds, that removing the Complainants to a busy sidewalk outside the Bank and arresting the parties was the next step in their investigation.
- (185) The summary deprivation of the Complainants' liberty by arrest was aggravated by the fact that no consideration whatsoever was made of cultural safety issues that might have been relevant to the Indigenous status of the parties. All police interventions are serious matters, however, the Members each failed to consider how seriously a precipitous arrest decision might impact two Indigenous Bank customers, one a child, both from a very small coastal village. As the FIR confirms, the impacts on the Complainants, particularly Complainant B, were profound and significant.
- (186) The arrest decisions were further aggravated by the fact that there was no genuine consideration given by either Member of the need to arrest either Complainant to prevent them from fleeing investigation, to secure evidence, to confirm identities or to contain possible risks of conflict arising from the investigation. Proceeding to arrest without giving due consideration to these issues was an abrogation of the Members' duties and an inappropriate exercise of their policing authority.
- (187) In the result, a twelve year old indigenous child and her grandfather from a small north community were deprived of their liberty on busy public street in what can only be objectively described as humiliating circumstances. The submission of Counsel for the Complainants has described the profound negative effect of these arrests on the Complainants, and indeed the members of their community.
- (188) As well, with respect to Complainant A, the FIR and Complainant submissions confirm that the arrest "*brought back memories of the forcible removal of Heiltsuk children to residential schools*". (Complainant submissions, page 9) As a person with self-reported mental health issues, the effect of an unlawful arrest on Complainant A was clearly significant.
- (189) It is acknowledged, of course, that arrests made without lawful authority can arise from an inappropriate exercise of judgment or simple mistake of law.
- (190) However, where arrests take place as a matter of routine, without due consideration of the totality of the circumstances known to an officer, and without the exercise of judgment and discretion, the risk of diminished public approval for all policing action increases.

- (191) In establishing the first policing authority in the United Kingdom, Sir Robert Peel made clear that the ability of police to perform their duties is dependent upon public approval of police actions. In the circumstances of this case, I find that the arrest of the Complainants by the Members without lawful authority has significant potential to diminish public respect for policing actions. Hence, such actions have relevance in considering the seriousness of blameworthy conduct.
- (192) Considering the totality of the foregoing, I find that the actions of the Members in removing and arresting the Complainants demonstrated serious blameworthy conduct.
- (193) Misconduct allegation #1 is therefore made out on a balance of probabilities.
- (194) One final matter requires consideration with respect to this issue. Counsel for the Complainants has made the submission noted above that as Discipline Authority in this process, I:
- “..should not merely conclude that the Members engaged in oppressive conduct, but further infer that they would not have engaged in such oppressive conduct with white Bank customers. In other words, the conduct of the Members was more likely than not tainted by stereotyped and discriminatory assumptions.. ” Complainant submissions p. 7”*
- (195) The submission advanced is a serious matter that would require an inference that can only be drawn from the Record. I have no authority to consider evidence that is not set out in the Record.
- (196) Having considered the totality of the circumstances set out in the Record, I find that the evidence does not provide the basis for me to draw the inferences suggested.
- (197) There is no doubt that the Members each demonstrated indifference to the Indigenous heritage of the Complainants and failed to consider the potential cultural safety issues that might be relevant in their dealings with the two parties.
- (198) There is also no doubt that, in hindsight, the Members themselves have both recognized those critical shortcomings in their treatment of the Complainants.
- (199) However, considering all of the evidence available, I find that the haste with which the Members approached the arrest and handcuffing of the Complainants was more consistent with a failure to exercise judgment, than overt stereotyping and discriminatory assumptions.
- (200) To accede to the submissions of Counsel for the Complainants on this point would require conclusions based on suspicion alone.

XIII Misconduct Allegation # 2 -Unnecessary use of force – Handcuffing
S. 77(3)(a)(ii)A of the Police Act

(201) The second allegation of misconduct relates to the unnecessary use of force by the Members in handcuffing the two Complainants immediately upon their arrest. The specific allegation is that the Members:

(ii)Committed 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”)

(202) Having found that the arrest of the Complainants was unlawful, there was, it would appear, no prima facie authority for the Members to handcuff or use force on the parties. My detailed analysis of that issue follows.

I Authorities and submissions of Counsel for the Members

(203) The authorities and principles governing police use of force misconduct allegations referenced above apply equally to consideration of this allegation.

(204) The specific submissions of Counsel for the Members on this issue are set out below:

65.The decision to handcuff in this case was derived by the officers’ belief they had the authority to do so pursuant to the lawful arrest.

66.The VPD policy in existence at the time regarding the application of handcuffs provided:

When an officer arrests or detains a person, or when a person is restrained for officer safety and is transported by police wagon, police vehicle or on foot, the officer must consider their lawful authority for applying any restraint device(s), e.g. handcuffs, to the prisoner. The safety of the prisoner and the safety of the officer are two lawful reasons why restraint devices may be applied; however, an officer must articulate in each circumstance the reasons why they applied a particular restraint device(s) to the prisoner. (FIR pdf 1958)

67.In his second statement, Cst. ██████ explained his own reasons for handcuffing:

...at face value, it was the grounds for, for arrest had been met and, and it was, the suspects were still there. So I walked them out uh, into a, into a, a busy street, so both to prevent, uh, escape, and also because it is a fraud investigation, I don't know who these two people were. Um, I have

yet to establish identity. So, uh, until that, uh, until I'm able to sort that out, I uh, put them in handcuffs (p. 5, ll. 85-90)

68.Cst. █████ testified at the DP as follows:

"...this is kind of how we're trained as soon as you say they're under arrest that's where the fight or flight risk may occur because they realize oh I might be going to jail. So that's -- putting handcuffs on is one way to mitigate that risk."

69.Cst. █████ in his statement explained that he was concerned about safety due to the "unpredictability" of the situation (Stmt 2, p. 22, l. 495). In this regard, Cst. █████ also relayed experience with a past Fraud file where he did not handcuff. When they searched the person, they located drugs. They then started to handcuff him. The man started fighting and the situation went from "0 to 100." He doesn't recall specific scenarios in the JIBC as to when they handcuff or when they don't. If there is a personal safety concern he has, then he will handcuff.

70.At the DP, Cst. █████ testified about this decision to handcuff Mr. █████ as follows:
Q Okay. I want to ask you about your decision to handcuff Mr. █████ Was that something you considered not doing in this (inaudible)? A Looking back at it now I wouldn't have. Q No, but at that time. A At that time, at that time, given I knew that Cst. █████ would have to investigate, I would have to watch two people and my concern was that if I'm dealing with two people, if one of them takes off then I can't be in two places at once. Q Okay. A And so the handcuff just sort of prevented them from doing that. They could still do it but, you know, it makes it harder.

71.Cst. █████ did not consider Indigenous Cultural Safety or historical trauma when he decided to arrest and handcuff, stating: "it did not cross my mind" (Stmt 2, p. 22, l. 488).

72.Cst. █████ made similar comments when S/Sgt. █████ asked him if he considered the fact that the complainants were Indigenous: ...race was not, it was not a negative impact in this, in this file. Yes, I knew they were indigenous, but uh, that wasn't the reason I arrested them. That wasn't even remotely a factor in my mind. I typically am pretty nice to most people, especially they are being uh, cooperative. So, um, no, I, I, I took them out to a public area, actually uh, I thought I'd be giving them more dignity in, in that sense, for the fact that, 'kay, they're, they're inside the Bank, lots of sensitive information. Okay. I arrest them, if for whatever reason they go back in, all of a sudden now everyone's looking at them and.....okay, oh, you just got arrested. So, um, maybe, you know, maybe because it is downtown and, and we're very used to arresting people outside and, and, and, uh, maybe that, that was a factor, but no, in terms of indigenous side, that was not, not a negative impact on them. (see in whole, Tr. p. 20, l. 495 – p. 21, l. 21, l. 467)

(205) Counsel also relies on the decision of Adjudicator Pitfield in the *Dickhout* decision [OPCC PH 2010-03] at para. 37:

“...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”

(206) Counsel further submits as follows:

89. In our respectful submission, both officers reasonably exercised their discretion to apply handcuffs in keeping with their training and VPD policy, as well as their experiences in the field. Throughout the investigation and proceedings, both officers have consistently articulated their lawful authority to arrest and apply handcuffs.

90. In applying handcuffs, both officers used the least amount of force necessary to effect their purposes. Cst. ██████ appreciates that the very fact of being handcuffed was upsetting to Ms. ██████ and he apologized on scene, and continues to regret that she was so upset. However, the handcuffs were not applied roughly, and were taken off as soon as Cst. ██████ realized she had remained cooperative, was no threat, and was in fact just 12 years old.

91. If the Adjudicator finds that the decision to handcuff in this case went beyond an error in judgement to an abuse of authority, then we respectfully submit that Lobell and Huong must apply. There is no clear, compelling or cogent evidence to support a finding that these officers acted recklessly or without due consideration of their lawful authority.

II Analysis - Handcuffing

(207) As noted above, there is no dispute that the Members were at all times engaged in the lawful execution of their duty and that the handcuffing of the Complainants was a use of force on members of the public.

(208) In order to consider the use of force allegations of misconduct concerning each Member arising under section 77(3)(a)(ii) (A) of the *Police Act*, I have considered the following factors:

- (a) Did the Members each subjectively believe that the use of force on the Complainants by handcuffing was necessary?*
- (b) Did the Members each subjectively believe the use of force was not excessive?*
- (c) Objectively, were each Members’ beliefs about their use of force reasonable?*
- (d) Were the actions of the Members in handcuffing the Complainants undertaken recklessly using unnecessary force? and*
- (e) Did the actions of the Member reflect serious blameworthy conduct?*

(a) Did the Member subjectively believe that the use of force by handcuffing was necessary?

(209) The first issue is a subjective consideration of each Members' belief that the use of force was necessary by handcuffing was necessary in the circumstances of this case.

(210) The evidence of each Member is that he believed that the use of force by handcuffing the Complainants immediately upon their arrest was a virtually automatic process.

(211) I am not satisfied that either Member actually turned their mind to consider, subjectively, whether or not an arrest should be followed by the application of handcuffs. I am satisfied, however, that as a matter of general practice, the Members each had adopted the habit of handcuffing virtually all persons arrested, regardless of the circumstances.

(212) Subjectively, therefore, although not a considered decision, both Members had decided that the use of force by handcuffing was necessary and appropriate in the circumstances.

(b) Did the Members subjectively believe the use of force by handcuffing was not excessive?

(213) The next issue relates to a further analysis of the Member's subjective beliefs with respect to the amount and nature of force used to control the Complainants by handcuffing the parties.

(214) My concerns with respect to the credibility of each of the Members' subjective beliefs and actions remain as noted above.

(215) I have concerns as to the objective reality of risks facing each Member. I cannot find that either Member seriously considered the actual risks posed by the Complainants and the need to apply handcuffs before doing so.

(216) Subjectively, I find that both Members simply assumed that handcuffing was the appropriate use of force for persons who had been arrested and was, therefore, not excessive.

(217) I am not satisfied that either Member took the time to consider if the use of force was, in all of the circumstances required, or excessive. Rather, I find that each Member subjectively considered the handcuffing process to be a routine part of their duties and at the time of arrest, and acted without reflection of any kind as to the actual lawfulness of their decisions to use force.

(218) Having considered all of the foregoing, I have concluded that subjectively each Member believed, without analysis, that deployment of handcuffs was a reasonable use of force tool in all of the circumstances and not an excessive use of force in the circumstances.

(c) Were the Members' beliefs about their use of force reasonable?

(219) With respect to this issue, I must consider whether or not in all of the circumstances, the Members' beliefs were each reasonable in that the use of force by handcuffing the Complainants on arrest was necessary and reasonable.

(220) This is not simply an assessment of what I might consider reasonable, but rather the reasonableness of each Member's beliefs about his use of force that must be measured against the standard of acceptable behaviour from the perspective of a reasonable police officer with the same level of training and experience, confronted by similar circumstances.

(221) I have, of course, considered that *R. v. Asante-Mensah*, 2003 SCC 38, confirms at para. 73 that:

"a certain amount of latitude is permitted to police Officers who are under a duty to act and must often react in difficult and exigent circumstances".

(222) As noted earlier in this decision, it is clear that the law recognizes that officers are not required to measure the force they use with precision.

(223) I have also considered the training of both members and the provisions of the National Use of Force Framework. However, simply because such training and framework indicates that a use of force option may be applicable, it may not always be appropriate in the discharge of an officer's lawful duties.

(224) Officers are required to consider the facts and law before using force on a member of the public through the appropriate exercise of judgment. Clearly there will be circumstances where such decisions are made very quickly, as with possible violence or risks to the officers or other persons. As noted above, however, there were no exigent or emergency circumstances facing either Member as they encountered the Complainants.

(d) Cst. ■

(225) Considering all of the evidence in the Record and specifically Cst. ■ training history, his policing experience and the National Use of Force Framework, I find that a reasonable officer of similar training and experience, confronting the circumstances apparent to Cst. ■ would recognize that:

- (a) No information had been received by the Member of any potential risks posed by the Complainants;
- (b) There were no reported overt acts of resistance, violence or property destruction associated with the Complainants. As such, there was no urgency to handcuff and remove Complainant B. Time was available to assess the full risks that might be present;
- (c) Cst. ■ had been monitoring what he believed to be the two seated suspects, in fact the Complainants, patiently seated in the large Bank lobby area. The lobby area itself was large, contained and quiet;
- (d) Cst. ■ had not been advised of any issues of concern with respect to these two individuals notwithstanding the very obvious presence of two uniformed police officers;
- (e) The Bank Manager had provided the Member with identification documents and advised that they were having difficulty confirming that Complainant A was, in fact, the Bank's client. Cst. ■ also had the full dispatch details on identification provided by the Bank for both individuals, including descriptions of the parties. This was not a situation where the police were dealing with unknown persons, both Complainants had been named by the Bank and identification details provided;
- (f) Cst. ■ had conducted several computer checks on the Complainants using the provided identification during the trip to the Bank. No reports arose of any police related activity or concern;
- (g) The area in which the Complainants had been seated was essentially secure, effectively containing them from further moves beyond the control of the Members;
- (h) There were two officers and two security guards on scene to deal with the Complainants, neither of which present any immediate risk of harm;
- (i) The Complainants had dutifully complied with Cst. ■ direction to move to the street outside the Bank. Although Cst. ■ had not provided the Complainants with a reason for moving the parties outside, however, the parties had fully complied;
- (j) Neither Member was concerned enough with the issue of flight to prevent the Complainants from leading the way outside to the sidewalk. Had there been any genuine concern for possible flight, an escorted exit would have been chosen by such reasonable officer;
- (k) There was no genuine air of "*unpredictability*" confronting the Members as they exited the Bank. There were no overt risks evident, the Members had basic identification concerning both Complainants and no genuine concerns as to flight for either suspect;

- (l) There was no evident risk to officer safety or indeed the safety of any other party, including the Complainants;
- (m) The move of the Complainants to the sidewalk increased the risk of a loss of control over the parties and would have increased their embarrassment at being arrested in a very public and active setting;
- (n) On being informed of her arrest, Complainant B showed no resistance or negative reaction. She willingly complied with the directions of members evidencing complete cooperation with the arrest process; and
- (o) As noted above, reasonable and probable grounds for the arrest of the Complainants had not been established as the parties left the Bank.

(226) Considering all of the foregoing, I find that a reasonable officer of similar experience and training to that of Cst. ■ confronting similar circumstances, would conclude that handcuffing Complainant B was unnecessary, excessive and an unreasonable use of force.

(227) Following the decision to arrest, Cst. ■ acted automatically to handcuff Complainant B. There was, in fact, no compliance with VPD policies to take the time to consider and articulate whether or not in all evident circumstances, any use of force, or handcuffing, was required to allow the Members to complete their investigations. Justification for the handcuffing decisions by Cst. ■ arose after the fact, and was not supported by the objective facts then in existence.

(228) Considering all of the foregoing, I find that there is in fact clear, compelling and cogent evidence to support a finding that Cst. ■ acted unreasonably, recklessly and without due consideration of his lawful authority in applying excessive force by applying handcuffs to Complainant B.

(e) Cst. ■

(229) Considering all of the evidence in the Record and specifically the Cst. ■ training history, his policing experience and the National Use of Force Framework, I find that a reasonable officer of similar training and experience, confronting the circumstances apparent to Cst. ■ would recognize that:

- (a) No reasonable and probable grounds existed justifying the arrest of Complainant A;
- (b) No information had been received by the Member of any potential risks posed by Complainant A;
- (c) There were no reported overt acts of resistance, violence or property destruction associated with the Complainants. As such, there was no urgency to handcuff and remove Complainant A. Time was available to assess the full risks that might be present, if any;
- (d) Cst. ■ had been monitoring what he believed to be the two seated suspects, in fact the Complainants, patiently seated in the large Bank lobby area. The lobby area itself was large, contained and quiet;

- (e) Cst. ■ had not been advised of any issues of concern with respect to these two individuals notwithstanding the very obvious presence of two uniformed police officers;
- (f) Cst. ■ also was aware of much of the dispatch information on identification provided by the Bank for both Complainants, including descriptions of the parties. This was not a situation where the Members were dealing with unknown persons. Both Complainants had been named by the Bank and identification details provided before the members had arrived on scene both by dispatch and through CAD transmissions monitored by Cst. ■
- (g) Cst. ■ had conducted several computer checks on the Complainants using the provided identification during the trip to the Bank. No reports arose of any police related activity or concern communicated to Cst. ■
- (h) The area in which the Complainants had been seated was essentially secure, effectively containing them from further moves beyond the control of the Members;
- (i) There were two officers and two security guards on scene to deal with the Complainants, neither of which present any immediate risk of harm to any person;
- (j) The Complainants had dutifully complied with Cst. ■ direction to move to the street outside the Bank. Although Cst. ■ had not provided the Complainants with a reason for moving the parties outside, the Complainants had fully complied. A reasonable officer standing in the shoes of Cst. ■ as cover officer would have at least inquired as to the results of the discussion with the Bank Manager and sought clarification of Cst. ■ planned next steps in the investigation. No reasonable explanation for failing to make those basic inquiries was proffered by Cst. ■ A reasonable officer standing in Cst. ■ shoes would have made such inquiries before moving the Complainants, and proceeding with the arrest and handcuffing of the Complainants ;
- (k) Neither Member was concerned enough with the issue of flight to prevent the Complainants from leading the way outside to the sidewalk. Had there been any genuine concern for possible flight, a reasonable officer standing in the shoes of the Members would have escorted the suspects out the exit to the street under close control;
- (l) There was no genuine air of “*unpredictability*” confronting the Members as they exited the Bank. There were no overt risks evident, the Members had basic identification information concerning both Complainants and no genuine concerns as to flight for either suspect. A reasonable officer standing in the shoes of Cst. ■ would be aware that what had developed was, in essence, a civil dispute between the Bank and two customers;
- (m) There was no evident risk to officer safety ,or indeed the safety of any other party, including the Complainants;
- (n) The move of the Complainants to the sidewalk increased the risk of a loss of control over the parties and would have increased their embarrassment at being arrested in a very public and active setting;

- (o) On being informed of his arrest by Cst. ■ Complainant A showed no resistance or negative reaction. He willingly complied with the directions of Cst. ■ evidencing complete cooperation with the arrest process;
- (p) Although managing two suspects on a busy sidewalk could potentially present possible challenges absent handcuffs, Cst. ■ had accepted the decision to move to that less secure location without question.;
- (q) A reasonable officer standing in the shoes of Cst. ■ would not consider that arrests on the street, as opposed to within the Bank lobby area, would provide the Complainants with greater “dignity” in an arrest and handcuffing of Complainant A;
- (r) Almost immediately after completing the arrests, two backup officers had been requested to assist with searching Complainant B. Therefore, any potential risk of managing the Complainants on the sidewalk after arrest was significantly reduced;
- (s) As well, notwithstanding those circumstances, both Complainants had shown absolutely no resistance to police directions and posed no meaningful risk in any form; and
- (t) Cst. ■ prior negative experience with an earlier fraud investigation lacked detail as to relevant circumstances and information then known to Cst. ■ As such, although the delayed application of handcuffs may have resulted in resistance by the subject in that case, the facts and experience have not been proven to be directly applicable to the circumstances relating to Complainant A beyond a balance of probabilities.

(230) Considering all of the foregoing, I find that a reasonable officer of similar experience and training to that of Cst. ■ confronting similar circumstances, would conclude that handcuffing Complainant A was unnecessary, excessive and an unreasonable use of force by the Member.

(231) Following the decision to arrest, Cst. ■ acted automatically to handcuff Complainant A. There was, in fact, no compliance with VPD policies by Cst. ■ to take the time to consider and articulate whether or not in all evident circumstances, any use of force, or handcuffing, was required to allow the Members to complete their investigations. The justification for the handcuffing decisions by Cst. ■ arose after the fact, and was not supported by a considered pre arrest decision, or the objective facts then in existence.

(232) Considering all of the foregoing, I find that there is, in fact, clear, compelling and cogent evidence to support a finding that Cst. ■ acted unreasonably, excessively, recklessly and without due consideration of his lawful authority in handcuffing Complainant A.

(f) Serious Blameworthy Conduct

(233) As noted above, the concept of “*serious blameworthy conduct*” implies deliberate or intentional action to act improperly or, alternatively, action that is reckless in the same manner.

(234) Implicit in an assessment of such conduct is the exercise of judgment in decision making. As noted above, mere errors of judgment do not rise to misconduct as serious blameworthy conduct. Police officers are expected to use their training and experience to assess the situation they are facing and exercise judgment in taking appropriate action, often in challenging circumstances.

(235) However, the exercise of judgment by an officer requires due consideration of the facts and law relevant to the circumstances. It is not an appropriate exercise of judgment to ignore facts or information that may be relevant to decision making. This is particularly important where law or policy mandates consideration of such matters before acting to use of force against a member of the public. Such is the case with the use of handcuffs and VPD policy on the use of force. Nowhere in the law or directions provided by VPD policy to all officers is a general principle established that handcuffs will always be applied on undertaking an arrest. Rather, the law and policy requires a considered decision, genuinely undertaken with the exercise of appropriate judgment, to establish lawful grounds for the use force on a member of the public.

(236) I will now consider the actions of both members and determine whether or not their acts of misconduct evidence serious blameworthy conduct.

I Cst. ■

(237) As noted above, in the circumstances of this case, the actions of Cst. ■ in handcuffing Complainant B were reckless. I also find that such actions evidenced serious blameworthy conduct.

(238) I am satisfied that one of the most significant factors evidencing serious blameworthy conduct by Cst. ■ is found in his failure to consider cultural safety issues relevant to Complainant B as a young indigenous child subjected to a forceful police intervention. In the result, Complainant B endured the humiliation of handcuffing on a busy public street and significant enduring negative trauma.

(239) As noted above, Counsel for the Complainants commented in submissions concerning the impact of policing interventions that:

“the vulnerability experienced by young people in general is amplified for those young people who are indigenous or members of racial minorities”

(240) Cst. ■ failure to consider this critical vulnerability for Complainant B is perhaps the most significant factor in considering whether or not his conduct evidenced serious blameworthy conduct.

(241) Additional factors that are relevant concerning the seriousness of the Member's actions before handcuffing Complainant B were his :

- (a) Failure to establish reasonable and probable grounds for her arrest;
- (b) Failure to make any genuine effort to ascertain Complainant B's age before applying handcuffs on a busy public street;
- (c) Failure to take any meaningful assessment of the Complainant, her status and possible risks to the Members, the public or herself; and
- (d) Failure to exercise considered judgment in his dealings with the Complainant and instead proceeding in haste, without application of judgment, to complete both the arrest and handcuffing processes in connection with Complainant B.

(242) In the result, the Member did not take the time to exercise discretion and judgment in making his arrest and handcuffing decisions. Instead, Cst. ■ was acting on limited and conflicting information that he had not stopped to seriously consider as he moved to arrest Complainant B. As a result, a twelve year old indigenous child found herself handcuffed on a busy downtown Vancouver street completely uncertain as to how that had come to be. Such decision making was not an error in judgment by the Member, but rather a rush to action in circumstances where there was not real urgency to act immediately, and no meaningful exercise of judgment by the Member.

(243) The Member had not established any lawful reason to use force on the Complainant, specifically, no need to prevent flight, secure evidence, confirm identity or ensure officer safety. The handcuffing process, instead, was completed as a matter of course, without the exercise of judgment or discretion in the application of facts to law.

(244) Considering all of the foregoing, Cst. ■ actions in handcuffing Complainant B evidenced serious blameworthy conduct.

II Cst. ■

(245) As noted above, in the circumstances of this case, the actions of Cst. ■ in handcuffing Complainant A were also reckless. I also find that such actions evidenced serious blameworthy conduct because the Member had, before handcuffing Complainant A:

- (a) Failed to establish reasonable and probable grounds for his arrest. Cst. ■ grounds for arrest were, in fact, limited to the very basic and uncertain information provided by dispatch in response to the 911 call of the Bank Manager, his experience in an earlier fraud investigation and faith in the ability of large financial institutions to identify fraud. As noted above, I have determined that Cst. ■ had, at best, a suspicion concerning possible fraud against the Bank, but nothing more. Proceeding to an arrest and immediate handcuffing of Complainant A was a precipitous act not supported by the facts or law;

- (b) Failed to take any meaningful assessment of Complainant A, his status and and possible risks to the Members, the public or himself;
- (c) Failed to consider cultural safety issues relevant to Complainant A, an Indigenous person, who was subjected to a forceful police intervention. In the result, Complainant A endured the humiliation of handcuffing on a busy public street and significant enduring negative trauma; and
- (d) Failed to exercise considered judgment in his dealings with Complainant A and instead proceeded, in haste, without application of judgment, to complete both the arrest and handcuffing processes in connection with Complainant A.

(246) In the result, the Member did not take the time to exercise discretion and judgment in making his arrest and handcuffing decisions. Instead, Cst. ■ was acting on even more limited and conflicting information than Cst. ■. Such decision making was not an error in judgment by the Member, but rather a rush to action in the absence of a genuine exercise of judgment.

(247) The handcuffing of Complainant A was completed in circumstances where there was not real urgency to act immediately. In the result, Complainant A was left in an embarrassing situation on a public street with his similarly handcuffed twelve year old granddaughter.

(248) It is acknowledged that Cst. ■ was at all times serving as cover officer supporting Cst. ■ as lead investigator. However, as cover officer it was still incumbent on Cst. ■ to act lawfully. As noted above, I have found that Cst. ■ did not have lawful reasonable and probable grounds to arrest either Complainant on the limited and uncertain information provided by dispatch. At a minimum, it would have been reasonable to expect that Cst. ■ would make basic inquiries of Cst. ■ as to the state of his investigation before moving to complete an arrest and handcuffing of Complainant A. Proceeding without communication with his partner evidenced recklessness given the very limited and conflicting information on a possible offence that was then known to Cst. ■ from dispatch.

(249) The Member had not established any lawful reason to use force on Complainant A, specifically, no need to prevent flight, secure evidence, confirm identity or ensure officer safety. The handcuffing process, instead, was completed as a matter of course, without the exercise of judgment or discretion in the application of facts to law.

(250) Considering all of the foregoing, Cst. ■ actions in handcuffing Complainant A evidenced serious blameworthy conduct.

(G) Conclusion – Misconduct Allegation # 2

(251) As a result of the foregoing analysis, I have determined that Misconduct Allegation # 2 is substantiated with respect to both Cst. ■ and Cst. ■.

XIV Misconduct Allegation # 3

(252) The third allegation of misconduct relates only to Cst. ■ and alleges that:

on December 20, 2019, 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”)

(253) The Supplement has provided important new information on the timing of the alleged misconduct with respect to disclosure of the photos held by Cst. ■ We now know that the disclosure took place not on December 20, 2019, but rather several months later on or about May 14, 2020. I have therefore considered Misconduct Allegation # 3 in the context of this new information, as has Counsel for Member in submissions.

(254) With respect to Misconduct Allegation # 3, the Supplement also confirms that there is dispute that:

- (a) Cst. ■ on commencing his employment with VPD signed an agreement referenced in the FIR confirming that he would not disclose “designated and classified” information to persons without a legitimate need to know the information;
- (b) Cst. ■ took photos of Complainant A and the two status cards provided to Bank officials on December 20, 2019. These photos were taken by Cst. ■ with a personal cell phone rather than a VPD camera. As such, the information was retained in Cst. ■ personal data records and not incorporated into the VPD file with respect to the Complainants;
- (c) Cst. ■ 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. ■ by the Bank manager already contained Complainant A’s photo.) The status cards contained personal information, and photos, of both Complainants;
- (d) Cst. ■ “forgot” about the photos subsequent to his dealings with the Complainants. At some later unspecified point it appears that Cst. ■ deleted the photo of Complainant A. The status cards, however, remained in Cst. ■ phone records and became relevant when Cst. ■ began to deal with the Complainant with the advice of Initial Counsel;
- (e) Even though Cst. ■ took the photos on his private phone, he did so as an employee of VPD and in the course of his investigative duties. As such, the photos in question are deemed to be in the custody and control of VPD under FOIPPA ; and
- (f) In order to assist with an understanding of the background to Misconduct Allegation #3, Cst. ■ agreed to waive solicitor client privilege and permit the Investigator to review the relevant circumstances. It is important to note that Cst. ■ had no obligation whatsoever to waive privilege and permit the Investigator to complete the required work on this issue.

(255) As the Supplement further confirms, after the Complaint was filed, Cst. ■ noticed an apparent difference between televised copies of the Complainants' status cards, and his recollection of the documents he had seen.

(256) During an initial meeting May 14, 2020, Cst. ■ advised Initial Counsel of this apparent conflict. Cst. ■ also confirmed to Counsel that he had copies of the status cards in question on his personal cell phone. Counsel requested that the records be provided to him in the context of providing legal advice to the Member in connection with the Complaint and related processes. Cst. ■ forwarded the photos to counsel by email for review.

(257) The issue arising is whether or not Cst. ■ may have breached the provisions 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) on or about May 14, 2020.

(258) The relevant provisions of FOIPPA in effect during the material dates were as follows:

30.4 An employee, officer or director of a public body or an employee or associate of a service provider who has access, whether authorized or unauthorized, to personal information in the custody or control of a public body, must not disclose that information except as authorized under this Act.

33.2 A public body may disclose personal information referred to in section 33 inside Canada as follows:

(a) for the purpose for which it was obtained or compiled or for a use consistent with that purpose

34 For the purposes of section 33.2(a), a use of personal information is consistent with the purpose for which the information was obtained or compiled if the use:

(a) has a reasonable and direct connection to that purpose, and

(b) is necessary for performing the statutory duties of, or for the operating of a program or activity of, the public body that uses or discloses that information.

(259) VPD policies also have relevance to this issue. Specifically, the policy set out in the VPD Policies and Procedures Manual ("VPD Policies"), sections 2.9.1(i) which provides as follows:

POLICY

Members shall only use or disclose police or personal information in the custody or care of the Department if it is for a legitimate investigative or administrative purpose and authorized by law.

This includes any personal information that the Department has a record of either in the form of a report, information written in a member's notebook, any file system kept in a Department section and any information a member has obtained orally. "Personal information" means information about an identifiable individual, including their name, address, telephone number, race, age, sex or other personal identifiers, including their photograph or driver's licence number, and any information about their criminal history or about a matter for which the individual was investigated. Members shall refer to the Administrative Legal Advisor, if uncertain as to the authorization for release of personal information to other agencies, groups or individuals.

Restrictions for Disclosure

1. Members shall:

- a. Only access, use or disclose information in the Department's records when it is necessary to perform their duties. Members may supply information as requested by Crown Counsel or other police agencies in the normal course of official business;*
- b. Complete an Information Query Form (VPD 64) stating their reason for requesting a copy of a report from the Information Section. Examples are for court purposes or for an ongoing investigation; and*
- c. Refer any requests by victims or witnesses, for either copies of statements or reports to the Manager i/c Information Management Section.*

2. Members shall not:

- a. Testify or produce records in civil suits unless legally subpoenaed. In the event members are subpoenaed to produce a record or copy thereof, or excerpts from their personal notebooks, the Manager i/c of the Information Management Section must be consulted so as to ensure departmental policy and guidelines currently established by the City Law Department are adhered to;*
- b. Provide names, addresses or telephone numbers of witnesses, victims or others, unless consent has been obtained or unless legally subpoenaed;*

(260) Section 2.9.4 of the VPD Policies also appears to have relevance to these proceedings:

- 1. Case file originals will not be removed from Information Management without the permission of the Director i/c of the Information Management Section. Copies of these case files shall be obtained from Information Management. Copies will be issued according to Information Management Section procedures.*
- 2. Copies of case files will not be released to non-members of the Department unless the authority of the Director i/c of the Information Management Section has first been obtained. This authority can be requested by filling out a VPD 64 Request for Information Log.*

(261) Finally, also of relevance, is the document signed by Cst. ■ when he joined the VPD. Specifically, the acknowledgment on the “*Handling of Designated and Classified Information*” signed by Cst. ■ and found at Tab 15 E of Volume 3 of the FIR makes clear that several important restrictions are imposed on any officer as follows:

“I may only access Designated and Classified Information in a manner authorized and for a purpose required for the performance of the duties of my employment”

“I will only release Designated and Classified Information, including by way of verbal, written or any other form of disclosure, to an individual who has a legitimate need-to-know and possesses a security or reliability status commensurate with the sensitivity of the information being released or read. I understand that need-to-know is the need for an individual to access and know information in order to perform his or her duties.”

(262) With respect to the facts, Counsel for the Member submits as follows on this matter:

93. At the DP in this matter, Cst. ■ testified that he followed the direction of his legal counsel who he knew was experienced and assigned by his union. Even so, Cst. ■ had regard for his duty to safeguard confidential information:

Q Is it your recollection that Mr. ■ asked you to send those photos?

A Yes.

Q Okay, and you did that by email?

A Yes.

Q At the time you sent those, before you hit the send do -- does the Freedom of Information and Protection of Privacy Act enter your mind?

A It's -- I mean it's always something in the back of your mind as a police officer, release of information, everything is confidential. In this case he's my assigned lawyer as provided by the Union, so just layman's understanding of client/attorney privilege I didn't think it would be an issue (Tr. p. 65)

94. In his interview with (the Investigator), Mr. ■ confirmed that he asked Cst. ■ to send the photographs via email and that Cst. ■ “never spontaneously sent these items.” (Stmt. p. 4, l. 64-66)

95. Mr. ■ set out the relevance of the Photos and why he felt was necessary for him to review them in advance of Cst. ■ interview:

...given the obvious centrality of the issue about the actual content and the actual cards that were used, I therefore directed and advised Constable ■ to send me um, the pictures of the cards, uh, and the link to the CBC article and he did that (p. 4, ll. 59-62).

**** (Complainant A) disclosed the cards to the entire world by posing for a photograph with the CBC...And he put at issue the informational content of the photograph because in the CBC interview he claimed um, that the uh, only issue between the card that he was showing, um, and the card*

that was actually used was like the card that was used at the Bank, um, had two digits on the card, card reversed (p. 6, ll. 128-134).

**** And so, when the suggestion is being made on the CBC website, you know, and just look at that cards, you can see that everything is in, is in order. Um, then um, and, and the specific claims made that the only difference between the card at the Bank and the card being showed as two digits which were reversed, seemed to me self-evidently obvious that, um, it was at least relevant that that, that was not correct. And it confirms to me that...the issue about what card was used at the Bank and whether that was the card is also relevant (p. 8)*

(263) Counsel further submits at page 30 of the written submissions that:

101. There are two separate statutes which apply to Cst. [REDACTED] provision of the Photos to Mr. [REDACTED]

- 1. the FOIPPA; and*
- 2. the Police Act.*

In our respectful submission, consideration of the FOIPPA and its necessity requirement under s. 34 should simply be subsumed in the analysis under ss. 77(3)(i) and (4) of the Act since Cst. [REDACTED] is only facing an allegation under the Act, not under s. 74 of FOIPPA.

102. With the benefit of Mr. [REDACTED] evidence explaining why he sought the Photos, we submit it is now clear how and why they are relevant or potentially relevant to Cst. [REDACTED] RPGs and the credibility of witnesses (see above).

103. We respectfully submit that Cst. [REDACTED] provision of the Photos to Mr. [REDACTED] was in fact necessary. The VPD did not themselves, as an organization, possess the Photos. This is critical because, at least according to Mr. [REDACTED] the sole reason the provision was not necessary is because Mr. [REDACTED] could have obtained the same Photos directly from the VPD.

(264) In the Supplement, and initial FIR, the Investigator submits that Initial Counsel advising Cst. [REDACTED] had a legitimate “need to know” the information relating to the Complainants’ status cards.

(265) The FIR notes that the sharing of investigative information concerning a complaint to lawyers advising on that complaint is common practice with police officers.

(266) The Investigator notes, however, an opinion shared by counsel advising Delta PD that notwithstanding the established common practice on sharing investigative information, the disclosure in question arising under Misconduct Allegation # 3 may well have breached several provisions of FOIPPA as there was no “necessity” for Cst. [REDACTED] to provide any disclosure to his counsel.

(267) At page 98 of the FIR the Investigator appears to reject that advice noted that:

“Taking Mr. █████ 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.”

(268) Counsel for the Complainants provided submissions on this issue as well. Counsel argues that the Supplement confirms that Initial Counsel and Cst. █████ misunderstood the nature of the status cards, and numbering of those cards. Counsel further submits that Cst. █████ provided photos of the status cards to Initial Counsel to address an irrelevant point. Counsel maintains that the disclosure demonstrates an important lack of knowledge on the part of Cst. █████ on the issue of Indigenous legal identification.

I The Issues

(269) I agree with the submission of Counsel for the Member that the analysis in these proceedings must be focused on the misconduct allegation potentially arising under sections 77(3) (i) and 77(4) of the Police Act. The issues arising from those section are as follows:

- (a) Were the images of status cards retained on Cst. █████ phone information that was acquired by the Member in the performance of his duties?;
- (b) Did Cst. █████ disclose the status cards to Initial Counsel as part of necessary action in the proper performance of authorized police work? and
- (c) If the data was disclosed to a third party that was not necessary for the proper performance of authorized police work, was such a disclosure intentional or reckless such that it constituted serious blameworthy conduct?

(i) Status of the phone images

(270) On the first issue, I am satisfied that the status cards were properly characterized as information directly acquired by Cst. █████ in the course of his investigation of the Complainants. Under normal circumstances following VPD policy, such data would be recorded on a VPD camera and form part of the relevant file. Counsel for Cst. █████ acknowledges such is the case.

(271) However, in this case, the data did not reach the file, and was retained personally by Cst. █████ Notwithstanding that fact, the principles of the FOIPPA deem such information to be data in the possession and control of VPD, Cst. █████ employer. As such, I am satisfied that Cst. █████ was engaged in the performance of his duties when the data in question was acquired. Again, Counsel for Cst. █████ acknowledges this legal principle.

(ii) Was disclosure necessary?

- (272) On the second issue, there is no dispute that Cst. ■ disclosed the photos of the status cards to Initial Counsel. As noted above, Cst. ■ forwarded the material at counsel's request during the course of a review of the Complaint and advice to the Member on discipline proceedings.
- (273) The question is whether or not such disclosure was "*necessary for the proper performance of authorized police work*"?
- (274) Counsel for the Member's argument on necessity is that a review of the status card data held by Cst. ■ was "necessary" for Initial Counsel to provide advice to the Member, particularly on credibility issues.
- (275) Furthermore, as the Member was engaged in the process of preparing for an anticipated *Police Act* Discipline Proceeding, Counsel maintains that any actions taken by the Member relating to that statutory process was "necessary for the proper performance of authorized police work".
- (276) It is submitted that the "police work" in question is found in Cst. ■ duty to participate in the processes set out in Part 11 of the *Police Act* in response to the filing of the Complaint.
- (277) A further submission is made by Counsel for Cst. ■ that reviewing all of the available information would be appropriate to allow the Member to obtain any necessary legal advice, and part of the performance of necessary police work.
- (278) I agree with Counsel that preparing an officer to deal with a complaint proceeding under the *Police Act* would be the "proper performance of authorized police work" within the meaning of section 77(4) of the *Police Act*. Clearly the statutory processes established under the *Police Act* for dealing with complaints sets in motion administrative duties imposed on the member concerned by law. And without doubt, members in such circumstances are entitled to the full benefit of independent, confidential, legal advice.
- (279) The pivotal question is whether or not it was "necessary" was for Cst. ■ to disclose the photos to Initial Counsel as part of the Part 11 processes, including securing legal advice.
- (280) The process for disclosure of information with respect to a discipline investigation is set out in the *Police Act*. Members are entitled to receive notification of an admissible complaint and thereafter, a copy of the investigation report once complete under section 112.

(281) If on review of that report a member considers that a further investigation is required, application can be made to the relevant discipline authority for additional material to be examined by the investigator pursuant to section 114.

(282) Nowhere in the policy or law relating to discipline proceedings is a general authority created for members dealing with an admissible complaint to generally access police department records outside the framework of the Police Act. Disclosure on the facts in issue is provided to members through the process of the Final Investigation Report. The report is prepared by an Independent Investigator and forms the key evidentiary basis for a Discipline Proceeding.

(283) Although the photos in question may well have been relevant to Cst. [REDACTED] response to the Complaint, the photos were VPD property. Both the Member and VPD had a duty to protect confidential information contained in those records under sections 30.4, 33.2 and 34 of FOIPPA as well as section 2.9.1 of the VPD Policies.

(284) As noted, the data in question was lawfully under the control of VPD notwithstanding the fact that it remained in Cst. [REDACTED] personal possession after the relevant investigation had been completed. Furthermore, there is no issue that the status cards contained "Designated", or personal, information.

(285) The legislative purpose of the FOIPPA is to protect and control the acquisition and distribution of personal information. As noted above, duties in that regard are imposed on VPD through FOIPPA, and on Members through the VPD policies.

(286) Counsel for Cst. [REDACTED] submits that in connection with the VPD policies and the acknowledgment signed by the Member, disclosure of the photos was authorized as it was:

- (a) for a purpose required for the performance of the Member's duties", such duties being preparing a response to the Complaint in the Discipline Proceeding process; and
- (b) released to a Initial Counsel, a secure and reliable person with a legitimate need to know the information.

(287) There is no issue that Initial Counsel clearly meets the test of an individual with security and reliability status commensurate with the sensitivity of the information in question.

(288) I am not satisfied, however, that Cst. [REDACTED] access to the photos and sharing the same with Initial Counsel met the test of "necessary" action for the performance of the Member's authorized duties.

- (289) It was not “necessary” because at the point of access and disclosure, Cst. ■ had not yet received the Final Investigation Report. The Member’s duties under the *Police Act* were limited to attending for an interview with the Investigator and participating in the discipline process.
- (290) In the processes that followed submission of the Complaint, Cst. ■ had no professional role in securing evidence for the discipline process, or preparation of the Investigation report. His duty was not to access and survey VPD records concerning the Complaint. That role is assigned by law to the Investigator under the Police Act.
- (291) Cst. ■ would ultimately have received a copy of the investigative report into the Complaint, including relevant exhibits and documents. This would be provided as a necessary disclosure, specifically authorized by the provisions of the Police Act.
- (292) The Police Act further confirms that any Member dealing with a discipline process is entitled to be represented by counsel throughout the proceeding. Disclosure of the relevant investigation report and exhibits to such counsel, or representative, would be necessary to ensure fairness for the member concerned.
- (293) Beyond the statutory processes, however, a member facing a complaint has no general right of access to police investigative files, nor disclosure of investigative records related to a complaint outside the framework of a Final Investigation Report. Rather it is the Investigator who has the duty under section 100 of the Police Act to interview parties, review documents and assemble information relating to the Complaint.
- (294) As is evident in section 88 (1) of the *Police Act*, a Chief Constable, on learning of an admissible complaint concerning a member must:
- “take every reasonable step to ensure that all members ... take any lawful measures that appear to them to be necessary or expedient for the purposes of obtaining and preserving evidence “*
- (295) Subsection (b) of 88(1) also provides that a Chief Constable, on learning of an admissible complaint *“may postpone notifying the member or former member whose conduct is the subject of the complaint or report until those measures are taken”*.
- (296) Such a duty is inconsistent with any notion of general access to investigative records by a member who is the subject of a complaint. Clearly, once a complaint has been lodged, the member concerned no longer has an investigative role, but rather is limited to duties imposed under the Police Act, such as those set out in section 101. Such duties do not extend to accessing files or records, nor do they contemplate sharing such records outside the framework of an approval under the VPD policies.

(297) Access to records required to secure legal advice in connection with the Complaint, and sharing those records with Initial Counsel was therefore not a necessary function of Cst. ■■■ duties when the transmittal took place.

(298) Had Cst. ■■■ and Initial Counsel wished to review the photos on Cst. ■■■ phone:

- (a) applications could have been made under the VPD policies for disclosure to Initial Counsel;
- (b) the photos could have been forwarded for inclusion in the relevant VPD file to be accessed by the Investigator preparing the investigation report, or
- (c) a supplemental investigation request made to the Discipline Authority after the production of the investigation report.

(299) The plain reading of *FOIPPA* confirms that the legislation is not intended to eliminate the disclosure of essential information when necessary. Rather, the legislation sets out a simple process to ensure that any such disclosure is appropriate and necessary.

(300) VPD Policies provide the administrative procedures to ensure that appropriate controls are placed on the disclosure of personal information, such as photos of the status cards of the Complainants. The processes under those policies, *FOIPPA* and the *Police Act* are designed to ensure the safe and secure handling of personal information acquired by a public body such as VPD, particularly in the context of an admissible complaint.

(301) I find that Cst. ■■■ was required to comply with such processes, even when exercising his right to consult counsel. Clearly any discussions with legal counsel are subject to solicitor client privilege. However, the provision of information, such as the status card photos to legal counsel is not. The photos in question were VPD property and subject to its control, even though the material was in the possession of Cst. ■■■

(302) In the circumstances of this case, I find that Cst. ■■■ did not have the right to provide Initial Counsel with the status card photos, whether in the possession of VPD or Cst. ■■■ absent compliance with the VPD Policies, *FOIPPA* and the provisions of the *Police Act*.

(303) I also find that the direct disclosure of the status card photos to Initial Counsel by Cst. ■■■ was not necessary. The statutory investigative process into the Complaint was underway, and ultimately both the Member and Initial Counsel could have had access to the relevant documents as authorized by the *Police Act*, or alternatives to secure the same.

(304) In the result, on the second issue, I find that the intentional disclosure of the status card photos by Cst. ■■■ to Initial Counsel was not "*necessary action in the proper performance of authorized police work*".

(iii) Serious blameworthy conduct

- (305) The last issue requires a consideration of possible “serious blameworthy conduct” arising in connection with Cst. [REDACTED] disclosure to Initial Counsel.
- (306) Having considered the circumstances of the disclosure, I am not satisfied that Cst. [REDACTED] actions evidence serious blameworthy conduct. To reach that conclusion would, in all of the circumstances, be unfair to the Member.
- (307) Cst. [REDACTED] an officer with limited policing experience, had consulted with Initial Counsel on the issues arising from the Complaint. The Member has acknowledged limited understanding of the operational effects of FOIPPA. He has also advised that it was his belief that solicitor client privilege protected the information on the status card photos. VPD Policies on these matters were also not well known or understood by the Member.
- (308) In all of the circumstances, the disclosure was inappropriate, but not reckless. Cst. [REDACTED] simply misunderstood his duties at the time of disclosure in, what is acknowledged to be, a complex intersection of law and policy. Cst. [REDACTED] action in this regard, therefore, did not rise to the level of misconduct worthy of sanction as there was no serious blameworthy conduct.
- (309) Considering all of the foregoing, I find that Misconduct Allegation # 3 has not been substantiated.

XV Next Steps

- (310) Pursuant to section 125(1)(d), the Members may each make submissions regarding disciplinary or corrective measures. Pursuant to section 125(2), those submissions must be submitted in writing within 10 days business days of each Member receiving a copy of the Form 3 in this matter. I understand that Counsel for the Members will acknowledge such service on behalf of the Members.
- (311) As noted above, both Members testified in these proceedings. The Members each independently acknowledged new insights into Indigenous cultural safety issues, in large measure arising from the wisdom imparted by Mr. [REDACTED] of the [REDACTED] in discussions with the Investigator.
- (312) The Members expressed regret for the fear and trauma experienced by the Complainants, and in particular, the fear and trauma experienced by Complainant B, an Indigenous child, then 12 years old.
- (313) With those insights in mind, I will be inviting specific submissions from Counsel for the Members on the appropriateness of more fulsome and specific apologies, in addition to other section 126 outcomes.

(314) As noted above, Counsel for the Complainants has made submissions on disciplinary and corrective measures. Specific submissions made have addressed the need for further educational training on Indigenous cultural perspectives, issues of privilege and stereotyping. Counsel has also submitted that face to face training on such matters is critical.

(315) Included in submissions of Counsel for the Complainants is a suggestion that such education might take place as part a [REDACTED] community gathering to address healing, and the impacts of the specific conduct of the Members on both the Complainants and their broader community.

(316) Clearly, with the advent of current COVID restrictions, certain courses of action may be challenging for some time. However, my goal in the next stage of these proceedings is to emphasize the need for disciplinary and corrective measures that address, and if possible restore, trust and confidence in policing for both Complainants, while ensuring that the Members' misconduct is appropriately addressed.

(317) I would expect that such action would take place through measures that emphasize priority for the correction and education of the Members.

(318) I look forward to receiving Counsel's further submissions.

Brian M. Neal

Brian M. Neal, Q.C.(rt)
Discipline Authority
January 28, 2022
Victoria, B.C.
