



Office of the
Police Complaint Commissioner

British Columbia, Canada

NOTICE OF APPOINTMENT OF RETIRED JUDGE

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

OPCC File 2021-20310

July 8, 2022

To: Mr. [REDACTED] (Complainant)

And to: Constable [REDACTED] (Members)
Constable [REDACTED]
c/o Vancouver Police Department
Professional Standards Section

And to: Inspector [REDACTED]
c/o Vancouver Police Department
Professional Standards Section

And to: The Honourable Judge Brian Neal, Q.C. (ret'd) (Retired Judge)
Retired Judge of the Provincial Court of British Columbia

And to: His Worship Mayor Kennedy Stewart
Chair, c/o Vancouver Police Board

On September 8, 2021, our office received a complaint from Mr. [REDACTED] describing his concerns with members of the Vancouver Police Department (VPD). The OPCC determined Mr. [REDACTED] complaint to be admissible pursuant to Division 3 of the *Police Act* and directed Vancouver Police Department to conduct an investigation.

On May 26, 2022, Sergeant [REDACTED] completed his investigation and submitted the Final Investigation Report to the Discipline Authority.

On June 9, 2022, Inspector [REDACTED] issued her decision pursuant to section 112 in this matter. Specifically, Inspector [REDACTED] identified one allegation of misconduct against Constables [REDACTED] and [REDACTED]. She determined that the allegation of *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* against Constables [REDACTED] and [REDACTED] did not appear to be substantiated.

Clayton Pecknold
Police Complaint Commissioner

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

Background

The Complainant, who is the [REDACTED] for a module-housing complex, reported that on August 29, 2021, the VPD attended a call made for a resident of one of their programs located at [REDACTED] in Vancouver.

According to the complaint, the VPD were asked to escort the affected person, a [REDACTED] Indigenous female off of the property due to a dispute with her mother, a facility resident. The Complainant stated when VPD officers arrived they apprehended the affected person by wrestling her to the ground and struck her with several elbow blows to the back of the head while her arms were held behind her back. The Complainant was not present during the arrest but subsequently viewed video footage and reported the incident as excessive force used by the VPD, on behalf of staff members.

Police reports of the incident document that the officers were responding to an allegation that the affected person had assaulted her mother and force was used to take her into custody, including multiple elbow strikes, an attempted Vascular Neck Restraint, and Oleoresin Capsicum spray (OC spray).

DA Decision

The Discipline Authority determined that police were responding to a 9-1-1 call from a staff member reporting that the affected person had kicked and punched her mother and that upon arrival, police had determined they were initiating an assault investigation and that the affected person was arrestable for assault.

When police arrived, the alleged assault was over, and both parties were in separate locations with the affected person gathered with a group of persons outside of the complex. Police put on gloves and called out to the affected person who responded. Police informed her she was under arrest. In taking the affected person into custody, the Discipline Authority determined that the affected person resisted the officers' attempts to handcuff her, and that the affected person grabbed ahold of the member's shirt and started to punch the other officer. The Discipline Authority concluded that force was required in order to gain control.

The Discipline Authority determined that the affected person was aggressive and actively resisting throughout her interaction with police. The Discipline Authority concluded that both members' actions were in keeping with their training, that she could not identify any clear conscious wrong doings on the part of the members, and that neither officer intentionally or recklessly used unnecessary force in taking the affected person into custody.

OPCC Decision, Section 117 of the *Police Act*

Based on a review of the evidence contained in the Final Investigation Report, I am of the view that the Discipline Authority was incorrect in determining that the affected person was

aggressive and actively resisting throughout the whole interaction with police. The evidentiary record contains considerable undisputed video and other evidence as to the overall response in officers apprehending the affected person and the substantial degree of force used.

The video demonstrates that when police arrive on scene and call over the affected person, the affected person willingly walks towards police. Within approximately ten seconds, police can be seen to move forward to grab her which results in the affected person taking a few steps back and taking what appears to be a defensive posture. Following this, significant force is used to place the affected person in custody, including five elbow strikes to her shoulder area by one member and one strike by the other member.

In my view, the evidence demonstrates that the initial approach by officers to immediately use force without attempting further dialogue, particularly as the affected person did not display any pre-assaultive cues and did not run from police, was not objectively reasonable. Additionally, the evidence does not support that exigent circumstances existed at the point of time when police engaged the affected person; the assault was not in progress, they had identified the person who was alleged to have committed an assault, and it was open to police to engage in further dialogue or investigation with the affected person or others before resorting to force. Furthermore, I have concerns with the proportionality of the force used by police in these circumstances.

The entirety of the interaction with the affected person needs to be assessed in the context of their training, VPD and provincial policy, as well as the legal justification supporting the arrest and use of force employed at various points in the interaction.

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

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

The Office of the Police Complaint Commissioner will provide any existing service records of discipline to the Discipline Authority to assist her in proposing an appropriate range of disciplinary or corrective measures should a pre-hearing conference be offered or a disciplinary proceeding convened. If the retired judge determines that the conduct in question does not constitute misconduct, they must provide reasons and the decision is final and conclusive.

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



Clayton Pecknold
Police Complaint Commissioner

cc: [REDACTED], Registrar