

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

AND

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

NOTICE OF ADJUDICATOR'S DECISION
PURSUANT TO SECTION 117(7) POLICE ACT

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

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

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

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

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

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

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

1. This is a decision made pursuant to section 117(7) of the *Police Act* relating to certain complaints of misconduct concerning the Members. The misconduct is alleged to have taken place August 29, 2021, into the early hours of August 30th, 2021, at a supportive housing complex located at [REDACTED] Vancouver, B.C (the “Residential Facility”).
2. I have been appointed Adjudicator in connection with this matter as a result of the Commissioner’s order of July 8, 2022 made in accordance with section 117(4) of the *Police Act*.
3. As set out below, in accordance with my appointment as Adjudicator, I have reviewed the evidence available in a comprehensive Final Investigation Report dated May 26, 2022 and attachments thereto (collectively, the “FIR”).
4. The Investigator conducted a detailed and comprehensive review of the facts, policy and law considered relevant to this case, and ultimately concluded that no misconduct had been substantiated for either Member.
5. The Commissioner’s appointment letter, noted above, confirms that the FIR was subsequently reviewed by Inspector [REDACTED], VPD, serving as Discipline Authority, (the “Discipline Authority”) pursuant to section 112 of the *Police Act*. The Discipline Authority’s review resulted in a similar conclusion to that of the Investigator; specifically, a finding that no misconduct on the part of the Members had been substantiated.
6. My review of the FIR in accordance with section 117 of the *Police Act* has brought me to a similar conclusion. Specifically, I have I concluded that no allegation of professional misconduct appears to be substantiated on the part of either Member based on the facts set out in the FIR.

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

7. On August 29, 2021 into the early hours of August 30th 2021, an incident allegedly took place at the Residential Facility in Vancouver that resulted in a call from staff on scene to VPD. The call sought police assistance in the removal of a person from the Residential Facility in the context of reporting a series of alleged assaults by that person on a resident of the facility.
8. The Members and other VPD officers attended the scene and arrested the subject in question (█).
9. On September 8, 2021 the Complainant submitted a written complaint (the "Complaint") concerning █ arrest which was received by the Office of the Police Complaint Commissioner (the "OPCC") .
10. The Complainant reported that although not present during the arrest of █ there had been consultation with facility staff present for the incident, and a review of available video of the police interaction with █. In the Complainant's view, and apparently in the view of several staff, the use of force by the Members was excessive and improper.
11. On November 2, 2021 the OPCC issued a "Notice of Admissibility" relevant to the Complaint. Based on a review of the allegations in the Complaint, the OPCC determined that the alleged professional misconduct of the Members could potentially be characterized as abuses of authority pursuant to section 77(3)(a)(ii)A of the *Police Act*.
12. The Investigator was assigned responsibility for reviewing the circumstances relevant to the Complaint. As noted, the FIR was completed by the Investigator May 26, 2022. The report concluded that the evidence available did not substantiate any allegation of professional misconduct relating to the Members from the facts arising in the Complaint.
13. On June 9, 2022, the Discipline Authority reviewed the FIR. The Discipline Authority's decision confirmed that the allegation of abuse of authority under section 77(3)(a)(ii)A of the *Police Act* was not substantiated with respect to either Member.
14. In a decision released July 8, 2022, the Commissioner reviewed the decision of the Discipline Authority and determined, pursuant to section 117 of the *Police Act*, that the decision was incorrect.
15. Specifically, the Commissioner expressed the view that the Discipline Authority was incorrect in finding that the use of force by the Members in arresting █ appeared to be justified in all of the circumstances, negating any conclusion of misconduct.

16. This review has focused on analysis of the conduct of the Members in the context of the FIR.

III Section 117

17. The statutory authority governing this review is found in section 117 of the *Police Act*.
18. Specifically, subsection 117(6) of the *Police Act* imposes a duty on the Commissioner to provide the Adjudicator with copies of all reports under section 98, 115 and 132 that may have been filed with the Commissioner prior to the Adjudicator's appointment in relation to the allegations of misconduct.
19. The central role of the Adjudicator as set out in subsections 117 (8) and 117(9) of the *Police Act* is to independently review the material delivered under subsection 117(6), and to determine whether or not the conduct of any of the Members appears sufficient to substantiate misconduct within the meaning of Part 11 of the *Police Act* requiring disciplinary or corrective action.
20. The law is clear that a review under section 117 is a paper based process of the record provided by the Commissioner. It takes place without live witnesses, additional evidence or submissions from any of the parties involved. The review is not an appeal of earlier decisions concerning misconduct nor is it a redetermination in any manner of other proceedings, including court proceedings, that may have a connection to the misconduct alleged. Nor is the Adjudicator's role to decide the facts concerning the matters in issue at this stage in the process. Rather, the adjudicative role in this part of the process is to determine whether or not the evidence appears to substantiate potential misconduct requiring some form of sanction or corrective measures.
21. The duty of an Adjudicator under subsection 117(1)b is to reach their own conclusions based on the materials submitted for review without submissions or further evidence adduced by way of a hearing.
22. In *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970, the Honourable Mr. Justice Affleck considered an earlier Adjudicator decision provided under section 117, noting as follows:

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

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

[29] *In Florkow v. British Columbia (Police Complaint Commissioner), 2013 BCCA 92, Newbury J.A. observed that part XI of the Act, where s. 117 is found, "is not a model of clarity". Section 117(9) fits that description, but in my opinion it is clear that it authorized*

*the retired judge to do no more than express a view that the petitioner's conduct on April 22, 2016 "appears" to have been misconduct. To have gone beyond an expression of a preliminary review by giving extensive reasons using conclusory language, such as asserting that the petitioner's "conduct was a marked and serious departure from the standard reasonably expected of a police officer" is not consistent with the scheme and object of the [Act](#) and the intention of the legislature (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.*

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

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

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

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

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

IV Records submitted for review

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

25. The comprehensive and detailed FIR, dated May 26, 2022, comprises more than 100 pages of narrative, plus extensive related attachments. The report details the evidence of all relevant parties concerning the conduct of the Members on the date in question. The FIR also provides substantial background on relevant law, cases, policies and procedures.
26. It is significant to note that notwithstanding extensive efforts by the Investigator, no interview with ■ was ever completed. ■ mother did provide a brief report to officers on scene immediately after the arrest, however, the Investigator was unable to secure a more detailed interview. As such, important perspectives on the unfolding of events preceding the call for police assistance, and interactions with the Members was not available.
27. The FIR and related materials were delivered to me July 14, 2022. Section 117(9) of the *Police Act* confirms that my review must be completed within 10 business days with notice thereafter to the relevant parties of my decision and next steps, if any.

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

28. The evidence set out in the FIR outlines the perspectives of the Complainant, the Members, civilian witnesses and others concerning the unfolding events involving the arrest of ■. As noted, the report also includes extensive collateral materials on VPD policies, case law and general principles associated with use of force.
29. As noted above, a series of video recordings arising from an internal security system associated with the Residential Facility have been made available and incorporated into the FIR. These recordings provide an important series of perspectives of the various interactions between the ■ the Members and others.
30. Turning to the specifics of possible misconduct that may be relevant to the actions of the Members, section 77 of the *Police Act* provides, in part, as follows:

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

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

(b) conduct that constitutes

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

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

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

(a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,

(ii) in the performance, or purported performance, of duties, intentionally or recklessly

(A) using unnecessary force on any person,

31. 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.

32. This review must independently assess the circumstances of each Member's interactions with ■ the actions of the various parties and the totality of the circumstances relating to the same as set out in the FIR. This includes consideration of the subjective and objective rationale behind the Members' arrest decisions and use of force in completing the arrest of ■

VI The Evidence arising from the Final Investigation Report

(i) The Complainant

33. The FIR sets out in detail the circumstances surrounding the Complaint and the Complainant's perspective on those issues.

34. It appears that the Complainant was not on site when the arrest of ■ was completed. As such, it appears that the circumstances of the Complaint were set out based on the Complainant's post incident conversations with staff, and a review of available video records.

35. The foundation of the Complaint appears to rest on the position that ■ was asked to leave the property of the Residential Facility and having refused, police were called to escort her out.

36. As will be noted below, it appears that on site staff actually dealing with [REDACTED] and her mother had reported the alleged assaults by [REDACTED] to police, not simply asked for assistance in securing [REDACTED] removal from the property. The Complainant acknowledges that he was not aware of those details.
37. The Complainant appears to have expressed the view that [REDACTED] was laying on her stomach and not posing a risk to anyone while being repeatedly struck the Members.
38. It appears from a review of the video evidence that the Complainant's report did not accurately capture the details of [REDACTED] resistance to her arrest and the difficulty the Members' were having achieving compliance.

(ii) Other Civilian Witnesses

39. Witness "G" appears to have reported hearing screaming and a loud argument arising from [REDACTED] mother's room.
40. "G" appears to have acknowledged not seeing what had taken place in the bedroom and reports being approximately 15' from the site of the arrest of [REDACTED]
41. "G" also reported very rough handling and unnecessary force used by the Members on [REDACTED]. The witness also appears to have reported that [REDACTED] was not in fact resisting arrest. Again, this appears to be in conflict with the video recording.
42. Witness "C" appears to have witnessed [REDACTED] "beating up" her mother. "C" also reported [REDACTED] fighting with the police outside the facility and the use of elbow strikes on [REDACTED] while handcuffed.
43. Again, this timeline does not appear to coincide with the video evidence. The video appears to show attempts to handcuff [REDACTED] and elbow strikes before that, however, it does not appear to show such strikes after the handcuff process was complete.
44. Witness "B" reported seeing the attempted arrest from "10 to 20 meters" away. The witness appears to have acknowledged [REDACTED] resistance to police arrest attempts, but characterized it as "mild" resistance. Witness "B"'s details on the unfolding of events appears to have been limited by his vantage point and again do not appear to be supported by the video evidence.
45. Witness "Bx" reported initially looking out a window noticing a struggle going on near the gazebo area. The witness appears to have reported that during that initial look, there was a woman on the ground screaming for help and yelling that she couldn't breathe.

46. Witness Bx confirmed that he had reviewed the videos and provided his observations including the view that ■ was “simply pulling away” from the Members, not actively resisting them.
47. The witness also appears to have believed that ■ was “subdued” when on the ground with Cst. ■ on her back such that there was no need for the elbow strikes in the back, neck and shoulder areas.
48. Again, it appears that the video records demonstrate that ■ was not in fact handcuffed or under control when the strikes took place. The video also appears to clearly show the active resistance of ■ in the struggle with the Members.
49. The final civilian witness was “T” who actually responded to the initial incident in ■ mother’s room. Witness “T” confirmed that ■ was hitting her mother, punching her in the face and kicking her in the legs.
50. “T” provided the assault details and information on identification to police dispatch.
51. However, it does not appear that witness “T” observed the initial confrontation with police and ■ in the courtyard.

(iii) The Members evidence

52. The evidence of the Members appears to be generally consistent, both in terms of the General Occurrence Reports filed and interviews with the Investigator.
53. In summary, the Members each appear to report receiving a dispatch to the Residential Facility to deal with a person ■ alleged to have assaulted her mother several times.
54. Each Member further appears to report that on arrival they were directed to the gazebo area and quickly identified the person they were dispatched to deal with, ■
55. Cst. ■ also appears to report that he requested that ■ come towards the officers, which she did. He further appears to report that he advised ■ she was under arrest and was immediately met with active resistance from ■
56. Both Members appear to report a struggle with ■ that immediately saw Cst. ■ collar grabbed and held, along with a series of punches thrown at Cst. ■ head by ■
57. Cst. ■ appears to confirm that the efforts of both officers were unsuccessful in controlling ■ on her feet. However, quickly all the parties appear to have fallen to the ground where the struggle continued.

58. Both Members appear to confirm that elbow strikes were administered to ■ while on the ground as they continued their attempts to secure ■ with handcuffs and have her release the hold on Cst. ■
59. Both Members also report that during that process, they each stopped to order ■ to end her resistance and submit to arrest without further violence. Regrettably it appears that those orders was also unsuccessful in achieving compliance from ■
60. Ultimately, both Members confirm that ■ was finally subdued with a last elbow strike from Cst. ■ and the application of a shot of pepper spray to ■ face. At that point it appears that ■ released Cst. ■ and was finally handcuffed. However, it appeared that although handcuffed, ■ continued to struggle aggressively by kicking with her legs. A leg hobble was apparently ultimately secured to ■ legs with the assistance of cover officers, ending that struggle.
61. The Members each appear to deny any unnecessary use of force in connection with the arrest of ■

(iv) The Video Evidence

62. The video evidence arises from two cameras that appear to be located at the Residential Facility. Both appear to be fixed positions.
63. Cameras ■ and ■ each appear to point to the courtyard area outside the Residential Facility capturing the green gazebo from opposing angles. Neither camera appears to have had audio recording.
64. The video cameras each appear to be approximately 30' from the gazebo area. As such unlike body cameras, the perspective recorded is broad based and appears to have captured a comprehensive overview of the details of the struggle between the Members and ■
65. It appears that the video evidence generally corresponds to the narratives provided by the Members.

(v) Evidence arising from review of the FIR

66. My review of the FIR discloses the following evidence, which if proven, may have relevance to the questions of misconduct raised in this review.

67. I note, of course, that identifying the facts that appear to form the basis of evidence relevant to the allegations does not result in the conclusion that such facts have been, or may ultimately be proven. It is entirely possible that the hearing of witnesses and further review of relevant records may result in evidence which differs from the outlines provided in the FIR.
68. However, having reviewed all of the evidence and video records in the FIR, I am satisfied that the evidence in the FIR that I have considered relevant to the matters in issue appears to confirm the following general evolution of events:

I The initial incident at the Residential Facility

- (a) It appears that prior to the police incident in question ■■■ had been visiting her mother at the Residential Facility August 29th 2021 continuing into the early hours of August 30th. It also appears that both had been consuming alcohol;
- (b) The specifics of what took place between mother and daughter before a cry for help arose does not appear to be available;
- (c) However, it does appear that shortly after midnight on August 29th, staff at the Residential Facility could hear screaming coming from ■■■ mother's room;
- (d) Attending at the room, it appears that staff could see ■■■ repeatedly kicking her mother in the leg and punching her in the face;
- (e) ■■■ mother was able to ask that staff call the police, which was done. However, before Police arrived, ■■■ appears to have left the facility waiting outside in the courtyard area with other people;
- (f) Staff noted that both the mother and ■■■ appeared to be intoxicated at the time the alleged assaults took place. As well ■■■ mother had a black eye after the assault;

II Call to Police and Dispatch

- (g) To comply with ■■■ mother's request, staff radioed for police to be called to the facility;
- (h) During the call, police were apparently given the names of both mother and daughter, including a description of ■■■ and confirmation of the repeated assaults that had taken place by ■■■
- (i) The Members were tasked by Dispatch at 00:04:52 August 30th to attend to the Residential Facility. The dispatch was a priority 1 call, "domestic in progress", later clarified to be an assault by a daughter on her mother;
- (j) En-route, the Members were apparently provided with a first name for ■■■ as well as a general description, including a heavy build, brown jacket, blue t shirt;
- (k) The Members appear to have been specifically told that ■■■ had repeatedly kicked her mother and punched her in the head, but had left the facility and was waiting in the gazebo area;

- (l) Members also appear to have been advised that the presence of weapons were unknown, as was the status of the parties to the incident, and whether or not an ambulance was required;

III Arrival of the Members and decision to arrest

- (m) At 00:06:02 the Members appear to have arrived on scene at the Residential Facility;
- (n) The Members' police car can be seen parked outside the facility in a large, open parking area. Approximately 40' away, a small open gazebo provided a seating area for a small group of people. ■ appears to have been part of that group;
- (o) It appears that on arrival, the Members received a further dispatch noting that ■ was a young indigenous woman. As well, it appears that at the same time staff members of the facility pointed to the courtyard and identified ■ noting that she was a person wearing a blue top;
- (p) Cst. ■ appears to have called out "■■■■■" to the small group in the gazebo, and immediately ■ turned to look at the officer and move towards him. Ultimately, it appears that ■ moved to within 6 feet of the Members, just in front of the Gazebo area;
- (q) Cst. ■ was then standing next to Cst. ■ Both appear to have been putting gloves on in preparation for dealings with unfolding events;
- (r) At this point, both Members appear to have formed the opinion that ■ was subject to arrest for an assault on her mother in the Residential Facility;
- (s) Cst. ■ next appears to have identified himself as a VPD member and advised ■ that she was under arrest for assault;
- (t) ■ immediate response to being advised that she was under arrest appears to have been to respond "no, I'm not", and turned as if to move away from the Members;
- (u) The area behind ■ at that point did not appear contained or limited in any significant way;

IV Altercation with

- (v) As ■ turned to move away from the Members, it appears that Cst. ■ moved forward in an attempt to grab her shoulders before she could leave;
- (w) Cst. ■ also moved forward and appears to have attempted to grab ■ on her left side;
- (x) ■ appears to have immediately begun active, strong resistance to the attempts of both Members to complete her arrest. This appears to have begun with raising her arms attempting to block Cst. ■ hands, as well as punching and clawing at Cst. ■ face;
- (y) Cst. ■ appears to have managed to secure ■ left hand. However, at the same time, ■ appears to have grabbed and held Cst. ■ collar with that same hand, while also continuing to attempt punches to the Member's face with her right hand;

- (z) Cst. ■ appears to have deflected most of the impact of the punches resulting in only grazing hits to his face;
- (aa) As this was taking place, it appears that Cst. ■ moved behind ■ attempting to grab her arms and perform a leg sweep to bring ■ to the ground. Those efforts appear to have been unsuccessful;
- (bb) Cst. ■ appears to have had no success either as he wrestled with the heavy set ■. He appears to have next decided to attempt to get control of ■ head by grabbing her hair at the back of her head which was in a tight bun. Again, it appears that this move was intended to force ■ to the ground and achieve control in the arrest process;
- (cc) Cst. ■ also appears to have attempted a vascular restraint, but could not get her arm around ■ neck. As such the vascular restraint attempt was abandoned;
- (dd) As both members struggled with ■ it appears that she continued to be both assaultive and actively resistant to any attempts to complete the arrest;
- (ee) Ultimately at this point in the struggle, it appears that all three persons fell to the ground with Cst. ■ on top of ■. ■ appears to have maintained her grip on Cst. ■ collar after the fall continuing her active resistance to arrest with both feet and arms ;
- (ff) While this was taking place, it appears that Cst. ■ was attempting to notify dispatch that they were involved in a fight with the suspect and required backup;
- (gg) Once on the ground, Cst. ■ appears to have continued his efforts to gain control of ■ by delivering an elbow strike to ■ left shoulder. The strike does not appear to have affected ■ resistance.
- (hh) In an attempt at de-escalation, Cst. ■ again repeated that she was under arrest and to let go of his shirt immediately. ■ did not appear to respond to or comply with Cst. ■ commands;
- (ii) In an attempt to force ■ to release her hold on his collar, Cst. ■ appears to have then delivered 3-4 more elbow strikes to her shoulder and back area;
- (jj) As Cst. ■ was wrestling with ■ Cst. ■ appears to have also been attempting, without success, to put ■ right arm behind her back to gain control;
- (kk) Cst. ■ also appears to have yelled at ■ demanding she stop fighting immediately and that she was under arrest. Again, it does not appear that ■ complied with Cst. ■ command, resulting in an elbow strike to the back of ■ neck;
- (ll) Cst. ■ final elbow strike appears to have ultimately succeeded in breaking ■ grip on his collar. However, ■ was still not in handcuffs and Cst. ■ appears to have believed that his partner was in continued danger as the active struggle with ■ continued with arms and legs;
- (mm) Cst. ■ appears to have decided to engage OC spray in ■ face to finally subdue her. The spray succeeded allowing the members to place ■ in handcuffs;
- (nn) Even while in handcuffs on the ground, ■ appears to have continued to assault the members by kicks until she was placed in a hobble with the assistance of other officers who had then arrived on scene; and

(oo) The video records do not appear to confirm any further hard elbow strikes after the handcuffs were finally applied to [REDACTED]

VII Analysis of the Misconduct Allegation- Sections 117(8)(d) of the Police Act: Does the evidence appear sufficient to substantiate an allegation of professional misconduct?

69. I now turn to an analysis of the evidence considering possible misconduct on the part of the Members.

70. At this stage I must consider whether or not the evidence adduced in the FIR that is summarized above appears sufficient to substantiate an allegation of professional misconduct under the *Police Act* with respect to either Member.

71. This stage of analysis under section 117 of the *Police Act* does not result in findings of fact on any alleged misconduct beyond analysis of whether or not any misconduct allegations appear substantiated against either of the Members based on analysis of the facts set out in the FIR.

VIII Misconduct Allegations

72. It does not appear that any allegation of professional misconduct beyond that noted by the Commissioner in his decision of July 8, 2022 warrants further consideration.

73. It appears evident that the Members had well established reasonable and probable grounds to arrest [REDACTED] immediately in relation to the alleged assault of [REDACTED] mother, a vulnerable person, in relation to a crime of domestic violence.

74. The misconduct allegation raised by the Commissioner for review can be summarized as follows:

*On August 30, 2021, the Members appear to have committed Abuse of Authority by oppressive conduct contrary to section 77(3)(a)(ii)A of the Police Act by recklessly using unnecessary force on the [REDACTED] in the course of her arrest without good and sufficient cause.
("the **Misconduct Allegation**")*

75. The essential elements of the Misconduct Allegation under section 77(3)(a)(ii)A appear to be as follows, namely that:

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

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

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

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

(b) as a peace officer or public officer,

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

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

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

[34] Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended or likely to cause death or grievous bodily harm, unless he or she believes that it is necessary to protect him- or herself, or another person under his or her protection, from death or grievous bodily harm. The officer’s belief must be objectively reasonable. This means that the use of force under s. 25(3) is to be judged on a subjective-

objective basis (Chartier v. Greaves, [2001] O.J. No. 634 (QL) (S.C.J.), at para. 59). If force of that degree is used to prevent a suspect from fleeing to avoid a lawful arrest, then it is justified under s. 25(4), subject to the limitations described above and to the requirement that the flight could not reasonably have been prevented in a less violent manner.

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

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

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

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

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

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

81. The Investigator also sets out in the FIR details of the *National Use of Force Framework* relevant to use of force decisions, including VPD policies and training records relevant to the Members.
82. As Adjudicator, my review of a member's actions must:
- (a) Take account the exigencies and immediacy of the moment;
 - (b) Consider the fact that Members are often required to make decisions quickly in the course of an evolving incident, without the detached reflection that is available to those looking back on an incident; and
 - (c) Consider that at law, there is no requirement that a member perfectly calibrate his or her actions to the perceived threat.
83. It appears from a review of the FIR that there is no issue that both Members were engaged in the lawful execution of their duties. There also appears to be no dispute that both Members intentionally used alternate and increasing levels of force on ■ as they attempted to apply handcuffs to her while completing the arrest.
84. The remaining issues, therefore, appear to be:
- (a) Did the Members subjectively believe that the increasing levels force used was necessary? and
 - (b) Would a reasonable officer placed in the position of the Members objectively conclude that there were reasonable grounds to use such force on ■
85. With respect to the first issue, it appears from a review of the FIR that subjectively, the Members both believed that the use of force engaged in completing the arrest of ■ was necessary. Both apparently knew that ■ was alleged to have committed an series of assaults on her mother. Both knew that ■ would be subject to immediate arrest. The Members also appear to have realized very quickly that ■ was not going to comply with directions to facilitate a co-operative arrest. And finally, both appear to have realized that increasing levels of force were required to gain ultimate control of ■ and complete the arrest.
86. Subjectively, therefore, it appears evident that both Members believed that increasing force was required to ultimately complete the arrest of ■

87. On the issue of the objective reasonableness of the Member's beliefs, it appears that:

- (a) The Members knew prior to their arrival that the subject of the investigation, ■■■ was alleged to have seriously assaulted her mother minutes before the 911 dispatch;
- (b) ■■■ had waited outside the Residential Facility after the incident, and without further assaults;
- (c) On being told of her arrest, however, ■■■ immediately resisted members attempt to take her into custody by both force and attempts to leave the area. Members would also have been aware that ■■■ was not constrained from leaving by the physical surroundings;
- (d) Members would have quickly realized that the two officers in uniform and exiting a marked police car were unable to control ■■■ and complete an arrest by presence, communication and soft control measures;
- (e) Members would also appear to be aware that ■■■ was physically assaulting both officers during their attempts to complete the arrest; and
- (f) Even when taken to ground, both Members would appear to have realized that further use of force control measures were needed to complete the arrest of ■■■ This appeared to include attempts at de-escalation by interrupting the Member's use of force and ordering ■■■ to submit to arrest, which ultimately did not succeed.

88. It appears evident, therefore, that a reasonable police officer, with the same training, experience, knowledge and skills of the Members would agree with the Members' use of force, and de-escalation efforts, in attempting to secure the arrest of ■■■

89. Although the process of using force in dealing with ■■■ appeared imprecise, and to a degree uncoordinated, it appears that a reasonable officer would recognize that the two Members were involved in a physical struggle with a difficult and combative subject, leaving no meaningful time for precision or planning to complete the arrest.

90. I also have reviewed the Members' actions in the context of considering cultural safety issues that may have been relevant to ■■■ a young indigenous woman. Specifically, I have considered whether or not a reasonable officer would respond differently to ■■■ taking such matters into account. My conclusion, based on the available evidence, is that it would appear that they would not because:

- (a) ■■■ appears to have been identified as an indigenous person only in a dispatch coinciding with the Member's arrival on scene. As such, it appears that neither Member had more than a minute to reflect on possible cultural safety needs that might be relevant to ■■■
- (b) It appears that ■■■ had been accused of multiple assaults on her mother in the minutes before the Members arrived on scene. Although she appears to have left the Residential Facility and her mother's room, it is apparent that the Members would have been focused on the continuing risk that ■■■ might still pose to those in the area, and the Members themselves;

- (c) It appears that ■ was not constrained by her physical surroundings. As such, the risk of flight given the arrival of police would appear to have been a legitimate concern for the Members heightening the need for a quick arrest; and
- (d) Although ■ initially responded to Cst. ■ request to come forward, it appears evident that her co-operation immediately ended once the arrest plan became known. As such, the prospects for further immediate de-escalation and full consideration of possible cultural safety issues relevant to ■ would appear to have been extremely limited.

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

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

92. On the facts as set out in the FIR, it appears that both Members were dealing with circumstances that reasonably required increasing levels of force. It also appears that the use of force by the Members was proportionate to the risks presented by the increasing aggression of ■ and her complete unwillingness to allow Members to effect an arrest.
93. In terms of risk assessment, it appears evident that although ■ was initially compliant in responding to Cst. ■ request for her to come forward, thereafter her resistance to all police commands and directions simply increased.
94. It appears therefore, that any reasonable police officer with the experience and training of the Members, and being aware of the assault allegations immediately preceding the attendance by police, would conclude that the potential risk posed by ■ was high, with the realistic prospect of a risk of flight had the arrest not been concluded.
95. It appears that a reasonable police officer considering the totality of the circumstances would identify several exigent circumstances in the attempted arrest of ■ requiring increased vigilance and the need for increased use of force options.
96. It appears, therefore, that a reasonable police officer considering the totality of the circumstances would conclude that the increased use of force undertaken by the Members was in all of the circumstances reasonable and necessary. It would also appear evident that such a use of force was not disproportionate to the risks actually posed by ■

97. It appears, therefore, that neither Member recklessly used unnecessary force on the [REDACTED] through the increasing use of force without reasonable grounds to do so and without good or sufficient cause. Nor does it appear that either Member used force in relation to [REDACTED] contrary to their training, VPD policies or the National Use of Force guidelines.

98. In the result, it appears, considering the totality of the circumstances relevant to the Members and [REDACTED] that the evidence referenced in the FIR appears does not appear sufficient to substantiate the Misconduct Allegation in relation to either Member, potentially requiring the taking of disciplinary or corrective measures.

IX Conclusion

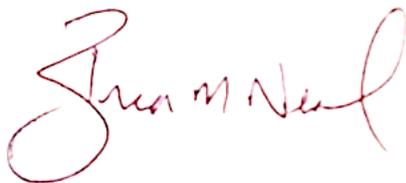
99. Applying the standard of review at this stage of the proceedings, pursuant to Section 117(9) and 117(8)(d)(i) of the *Police Act*, I find that there does not appear to be evidence set out in the FIR which, if proven, could substantiate the Misconduct Allegation, or any other misconduct allegation, with respect to the Members, potentially require the taking of disciplinary or corrective measures.

X Effect of Section 117(11) Police Act

100. As required by section 117(8)e of the *Police Act*, I hereby notify those affected by this decision of the provisions of section 117(11) of that Act.

101. Section 117(11) provides that having concluded that the evidence available does not appear sufficient to substantiate any allegations of misconduct relating to the Members, such a conclusion is:

- (a) not open to question or review by a court on any ground, and
- (b) final and conclusive.



Brian M. Neal, Q.C.(rt)
Adjudicator
Retired Judge
July 26, 2022
Victoria, B.C.
