

OPCC File 2021-19261

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

AND

IN THE MATTER OF A REVIEW PURSUANT TO SECTION 117

AND

IN THE MATTER OF ALLEGATIONS OF MISCONDUCT AGAINST

CONSTABLE [REDACTED]

VANCOUVER POLICE DEPARTMENT

NOTICE OF ADJUDICATOR'S DECISION UPON REVIEW

TO: Ms. [REDACTED] Complainant
c/o [REDACTED]
[REDACTED]

AND TO: Constable [REDACTED] Member
c/o Vancouver Police Department
Professional Standards Section

AND TO: Inspector [REDACTED] Discipline Authority
c/o Vancouver Police Department
Professional Standards Section

AND TO: Sergeant [REDACTED] Investigator
c/o Vancouver Police Department
Professional Standards Section

AND TO: Mr. Clayton Pecknold Commissioner
c/o Office of the Police Complaint Commissioner

AND TO: His Worship Mayor Kennedy Stewart
c/o Vancouver Police Board

Chair

ADJUDICATOR'S DECISION

Introduction

1. Ms. [REDACTED] [the Complainant], made a complaint to the Office of the Police Complaint Commissioner regarding the treatment she received from Cst. [REDACTED] [the Member] of the Vancouver Police Department [VPD] when she was stopped by police while walking on a street. She was then detained as a potential suspect in an alleged break and enter of a garage in the early hours of May 8, 2020 [the Incident].
2. The Complainant shared two general descriptors as to clothing with the description of the suspect provided by a resident in the area. However, the description of the suspect referred to a male with a backpack and a bicycle.
3. At the outset of the police stop the Complainant was asked to provide proof of her identity by the Member, who was on duty and in uniform, accompanied by a police officer in training, Cst. [REDACTED]. She produced a BC Identification Card with her picture on it and a credit card, which is what she had with her at the time. When the Complainant's identification linked her to a male person of a different name on police databases, the Member became concerned that the Complainant was attempting to obstruct him in the investigation of identity of the perpetrator of the alleged break and enter. As time passed without the Member being satisfied that the Complainant had correctly identified herself, she continued to be detained and was handcuffed, even after a male suspect had been apprehended by other police officers.
4. The Complainant alleges that the Member accused her of being a liar and yelled at her. The Complainant also stated that she felt very intimidated and vulnerable during

the time she was stopped by the Member and his partner, and more so when her transgender status was known.

5. A male person found in the same area and arrested by police, was determined to be the correct suspect. He was released at the scene as there was apparently insufficient evidence to link him to the property where the alleged break and enter had occurred. The police officers involved in his arrest then attended at the location where the Complainant, the Member and Cst. ██████████ were. These officers advised that the correct suspect had been arrested and then released.
6. Considering the Member's ongoing difficulty in verifying the Complainant's identity, one of the officers who arrived, Cst. ██████████ a self-identified member of the LGBTQ community, asked the Complainant if she was a trans person. The Complainant indicated to him that she was, and she said that the male person who had turned up on police databases when the Member was searching her identity was her "dead name", ie. the name of her former self when she was a male. She had earlier told the Member that the name belonged to her dead twin.
7. The Member then stopped pursuing a possible charge of obstruction of a police officer against the Complainant for refusing to properly identify herself and the handcuffs were removed. Cst. ██████████ and his partner drove the Complainant a short distance to her residence.
8. The Complainant's complaint alleging police misconduct by the Member relates to her prolonged detention, being handcuffed despite being cooperative, not being advised of her *Charter* rights regarding her detention and her right to counsel, and the degrading comments allegedly made by the Member about her appearance, gender presentation and transgender status with the other officers present.
9. The matter was investigated and ultimately a review was sought of aspects of the Disciplinary Authority's decision.

10. These reasons represent a review of this complaint by me as a retired judge appointed by the Police Complaint Commissioner pursuant to s. 117 of the *Police Act*, R.S.B.C. Ch.367 [*Police Act*].

Procedural Background

11. The Complainant's complaint regarding the Incident of May 8, 2020, was received by the Office of the Police Complaint Commissioner [OPCC] on February 11, 2021. The OPCC determined that it was an admissible complaint and directed the VPD to investigate it.

12. On October 15, 2021, Sgt. [REDACTED] an investigator in the VPD Professional Standards Section completed his investigation. He submitted the Final Investigation Report [FIR] to Inspector [REDACTED] the Discipline Authority, and he also submitted it to the OPCC.

13. On October 27, 2021, the Police Complaint Commissioner, Clayton Pecknold [the Commissioner], rejected the FIR and directed further investigative steps be taken. On December 1, 2021, after receiving the re-submitted FIR, the Discipline Authority rejected the FIR and directed the investigator to carry out further investigative steps, which Sgt. [REDACTED] did.

14. On March 29, 2022, the Discipline Authority issued his decision pursuant to s. 112 regarding the Incident. The Discipline Authority identified three allegations of misconduct regarding the Member's conduct, and one allegation of misconduct in relation to the conduct of Cst. [REDACTED]

15. The Discipline Authority determined that one allegation of Neglect of Duty, pursuant to ss. 77(3)(m)(ii) of the *Police Act*, did appear to be substantiated against the Member. That subsection specifies Neglect of Duty as, a form of "a disciplinary

breach of public trust”, “which is neglecting, without good or sufficient cause, to [...] promptly and diligently do anything that it is one’s duty as a member to do”.

16. The Discipline Authority determined that the remaining allegations of Abuse of Authority and Discourtesy, pursuant to ss. 77(3)(a) and ss. 77(3)(g) of the *Police Act* respectively, did not appear to be substantiated against the Member.
17. Upon reviewing the matter, the Commissioner considered there was a reasonable basis to conclude that the Discipline Authority’s conclusion was incorrect regarding the unsubstantiated allegations of misconduct by the Member. Therefore, pursuant to s. 117(1) of the *Police Act*, the Commissioner appointed me as a retired judge to review the matter.

The Disciplinary Authority’s Decision

18. In the Notice of Appointment of Retired Judge, dated April 27, 2022, the Commissioner summarized the decision of the Disciplinary Authority rendered on March 29, 2022.
19. The Disciplinary Authority concluded upon a review of the evidence that the Abuse of Authority allegation against the Member did not appear to be substantiated. Specifically, the Disciplinary Authority found that the Member lawfully detained the Complainant in relation to the Break and Enter investigation, noting the Complainant “generally” matched the reported description of the suspect and was in the area around the time that the alleged Break and Enter was to have occurred. The Discipline Authority also concluded that it was reasonable for the Member to have placed the Complainant under arrest for Obstruction of Justice.
20. Regarding handcuffing the Complainant, the Discipline Authority found that the Complainant was handcuffed for officer safety as part of the investigative detention. The Discipline Authority agreed with the analysis of the investigator, who submitted that the Member had complied with the VPD policy regarding handcuffing, insofar as

it was necessary to handcuff the Complainant to protect the police and to prevent escape.

21. Regarding the allegation of Discourtesy towards the Complainant by the Member, the Discipline Authority found that the Member was not intentionally discourteous when questioning the Complainant in relation to her associated “dead name”, and that there was a divergence in the evidence of the Complainant and the police officers present about whether the Member had aggressively questioned the Complainant and made inappropriate comments about her appearance.
22. The Disciplinary Authority did find that the alleged misconduct of Neglect of Duty by the Member appeared to be substantiated as he failed to advise the Complainant of her s. 10(b) *Charter* right to counsel upon detaining her in relation to the alleged Break and Enter investigation.

Complainant’s Request for Appointment of Retired Judge

23. The Commissioner received a request from the Complainant’s legal representative that he appoint a retired judge under s. 117 to make their own decision in this matter. The Commissioner summarized the reasons advanced on behalf of the Complainant as follows:
 1. That the Complainant did not sufficiently match the description of the suspect provided to police (a Caucasian male, in his mid-20s, medium build, wearing a red jacket, and a baseball cap), as she was a woman wearing workout pants, ankle weights, and a brown-orange cardigan.
 2. Handcuffs were applied to restrain the Complainant despite there being no risk to the safety of anyone or of the Complainant fleeing. She was incorrectly classified as “passive resistant”. She complied with the officers’ requests by providing the identification she had and was not struggling or trying to flee.
 3. The Complainant was held by the Member even after the actual male suspect was located, questioned, and released, which was relayed to the Member over the police radio.

The Commissioner's Position

24. The Commissioner's view is that the Discipline Authority appears to have erred by not adequately and independently assessing all the available evidence as to whether the Member appears to have committed the misconduct of Abuse of Authority in detaining, arresting, and handcuffing the Complainant.
25. In relation to the initial detention of the Complainant, the Commissioner's view is that the Discipline Authority did not sufficiently consider whether the Member had objective reasonable grounds to suspect that the Complainant was associated with the investigation of the break and enter, particularly given that the Complainant did not match several of the reported descriptors of the suspect, including the suspect's gender and age. Additionally, the Discipline Authority did not assess the validity of the Complainant's continued detention once the Member was notified via radio broadcasts that other officers had located a male considered to be the correct suspect.
26. The last point raised by the Commissioner in support of his decision to appoint a retired judge for a s. 117 review, is that the Discipline Authority does not appear to have sufficiently analyzed whether the Member had reasonable grounds to believe the Complainant was arrestable for the criminal offence of Obstruction of Justice, when the grounds are assessed objectively. The evidentiary record indicates that the Complainant provided the Member with a piece of identification (a BC Services Card) bearing her correct legal name and gender identity. She answered the Member's questions to confirm her identity although she acknowledged she was not comfortable speaking about the origin of her "deadname" that the Member located in the police database.

Statutory and Legal Requirements Applicable to a s. 117 Review

27. The *Police Act* under which this review takes place has been the subject of amendment and judicial review by the courts. Its goal is to integrate the interests of

police officers, individual civilians, and in certain instances broader community interests, into a fair and just police complaint procedure.

28. Turning to the Act and the present review, s. 117(1) gives the Commissioner the authority to appoint a retired judge to review the decision of a disciplinary authority when the Commissioner considers that there is a reasonable basis that the disciplinary authority's decision is incorrect in terms of a finding that the member or former members conduct did not constitute misconduct.

29. Section 117(1) also sets out the task for the reviewing retired judge, which is to:

- (a) review the investigating officer's report referred to in section 112 or 116, as the case may be, and the evidence and records referenced in that report;
- (b) make her or his own decision on the matter;
- (c) if subsection (9) of this section applies, exercise the powers and perform the duties of discipline authority in respect of the matter for the purposes of this Division. [Emphasis added.]

30. Section 117(9), referred to immediately above, is engaged if, on review, the retired judge considers the police conduct at issue “appears to constitute misconduct”. If this occurs:

- [...] the retired judge becomes the discipline authority in respect of the matter and must convene a discipline proceeding, unless s. 120(16) [a prehearing conference] applies. [Emphasis added.]

31. On the other hand, if the retired judge upon review decides that the conduct of the member or former member does not constitute misconduct (s.117(10)), the retired judge must include that decision, with reasons, in the notification required under s. 117(7) to the listed individuals.

32. Section 117(8) mainly deals with what the notification referred to in s. 117(7) must contain. First, it specifies the required ingredients of notice for any s. 117 review carried out by a retired judge must contain:

- (a) a description of the complaint, if any, and any conduct of concern,

- (b) a statement of a complainant's right to make submissions under section 113,
- (c) a list or description of each allegation of misconduct considered by the retired judge...

33. Further, if the retired judge does not make a finding different from the discipline authority's finding of no misconduct, then pursuant to s. 117(11) the decision of the retired judge "(a) is not open to question or review by a court on any ground, and (b) is final and conclusive." Section 117(8)(e) requires the retired judge to include such a finding in the notification.

34. On the other hand, if the retired judge decides that they are unable to agree with the discipline authority's finding of no misconduct, and considers the police conduct at issue to constitute apparent misconduct, s. 117(8)(d) contains the test to be applied in reaching such a determination. It requires the retired judge to include in the notification their determination as to the following:

- (d) if subsection (9) applies, the retired judge's determination as to the following:
 - (i) whether or not, in relation to each allegation of misconduct considered by the retired judge, the evidence referenced in the report appears sufficient to substantiate the allegation and require the taking of disciplinary or corrective measures;
 - (ii) whether or not a prehearing conference will be offered to the member or former member under section 120;
 - (iii) the range of disciplinary or corrective measures being considered by the retired judge in the case...[Emphasis added.]

35. Thus, as specified in s. 117(8), the test to be applied by the retired judge to the evidence is whether it "appears sufficient to substantiate the allegation of misconduct and require[s] the taking of disciplinary or corrective measures". The making of such a finding places the retired judge in the role of disciplinary authority.

36. This articulation, when contrasted to the task for the retired judge on review that he or she make their "own decision" on the matter (s. 117(1)(b)), has caused some confusion.

37. In *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970, [Scott], Mr. Justice Affleck addressed this issue (at para. 30), stating:

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.

38. In *Scott*, the woman who had complained about the conduct of the police officer, had been tried and acquitted of two criminal charges arising from the police removing her granddaughter from her home. Included in the reasons of the retired judge conducting a s. 117 review was consideration of the risk of inconsistent results flowing from the provincial court trial of the complainant and the police complaint process, which focused on the conduct of the arresting police officer. The retired judge found the police officer's conduct to be "a marked and serious departure from the standard reasonably to be expected of a police officer"; and he engaged in an analysis of whether the police officer had acted in good faith and found good faith to be lacking (from the retired judge's decision as quoted by Affleck J. in *Scott*, at para. 23).

39. Mr. Justice Affleck commented (at para. 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.

40. Thus, Affleck J. concluded (at para. 41) that the retired judge was disqualified from serving as the disciplinary authority pursuant to the Act, finding that the apprehension of bias was so apparent that the petitioner could not "reasonably have any confidence he [would] receive a fair hearing."

41. Therefore, it is important to note that while s. 117(1)(b) directs a retired judge to come to their own decision, it is incorrect for the judge's reasons to stray into a conclusive analysis of the evidence. This is because in the case of apparent police misconduct the s. 117 review may well be preliminary to a later hearing regarding apparently substantiated allegations of misconduct in which the retired judge becomes the discipline authority, whereas apparently unsubstantiated allegations of misconduct do not proceed past the review.
42. If the allegations of police misconduct do proceed to hearing, the police officer whose conduct is at issue, individuals recognized as complainants, other affected parties, and members of the public must have confidence that the presiding retired judge is free from bias and has maintained an open mind regarding the evidence to be heard and conclusions to be reached.

Materials Considered

43. In conducting this review, I have reviewed all the materials provided by the OPCC. These materials include but are not limited to the following:
- The written statement of complaint filed on behalf of the Complainant that includes her detailed account of what she alleges occurred, and additional written answers provided through her counsel to questions posed by the investigator;
 - Summaries of the evidence provided to the investigator by the Member and Cst. [REDACTED], including the notes each made in their notebooks and the follow-up questions;
 - Summaries of the evidence provided to the investigator by two witness officers: Cst. [REDACTED] and Cst. [REDACTED];
 - A summary of the Computer Aided Dispatch [CAD] report from May 8, 2020, in relation to the call of a suspected break and enter;
 - The synopsis of the General Occurrence Report written by Cst. [REDACTED] in relation to the investigation of the same alleged break and enter;
 - The synopsis for another General Occurrence Report in relation to an incident on October 19, 2016, involving the Complainant's former male identity (pulled

- up from the police database by the Member while checking the identification provided by the Complainant);
- A Google map that shows the location of the Complainant when stopped by the Member and Cst. [REDACTED] in relation to the location of the suspected break and enter to be half a block;
 - Another Google map that estimates the time and distance from the location where the Complainant was stopped and detained by the Member and Cst. [REDACTED] to her residence where she was later driven by Cst. [REDACTED] and Cst. [REDACTED]. It shows the distance to be 1 km. or 1.2 km. depending on the route taken, with an estimated time to travel by vehicle of three or four minutes, respectively;
 - Sgt. [REDACTED] summaries of the Radio Broadcasts and the CAD Report information;
 - Portions of the VPD Regulations and Procedure Manual pertaining to Initial Contact with Transgender People (1.14.4), Obstruction of a Police Officer (1.6.5(ii)), Police Warnings (1.4.1), Use of Force - Restraint Devices (1.2.3), and the National Use of Force Model;
 - Information about the Member's training, which confirmed that he had completed VPD Cycle 2 training regarding LGBTQ2S persons and also the VPD Cycle 4 training – an arrest and detention legal update in 2017; and
 - the relevant statutory provisions of the *Police Act*, s. 129 of the *Criminal Code* – Obstruction of a Police Officer, s. 9 and 10 of the *Charter*, and the relevant caselaw.

The Evidence

The Complainant's Evidence

44. The Complainant's evidence comes from her registered complaint as submitted on her behalf by Ms. [REDACTED] from the [REDACTED]. The Complainant declined to be interviewed by Sgt. [REDACTED] and through her counsel asked that her complaint be taken from the Registered Complaint Form. She did

answer some follow up questions that were sent to her counsel which were asked and answered in written form.

45. The following is copied directly from the Complainant's complaint with some format changes, her name deleted, and deletions as indicated:

[...], the complainant, is a transgender woman. At the end of 2016, [she] completed legal name changes and corrections to her BC Services Card to reflect her true gender identity. An important feature of her updated identification is that it no longer features her previous legal name, [male first and middle name, with the same last name as she has currently]. [She] understands her previous legal name to be her "deadname". Use of her deadname and interactions that fail to recognize her true gender identity are harmful to [her] mental wellbeing and dignity. [Her] updated BC Services Card was acquired to prevent being misgendered and referred to by her deadname whenever possible, facilitating interactions with the public that are safer for her and protect and uphold her dignity.

On or around the night of May 7, 2020, the complainant was walking in the area of Kaslo Street and 7th Avenue in Vancouver. Around midnight, while on this walk, [she] walked past a police vehicle that was stopped on the side of the road in this area. Almost immediately after this, the complainant noticed that the police vehicle turned around and approached her. Two officers were in the vehicle. The principal officer in this interaction is the key actor in this case (██████████; officer number ██████████). While still in the police vehicle, the principal officer asked the complainant to stop walking and provide two pieces of her identification to him. After this, the police vehicle parked and both officers emerged. To this, the complainant complied and provided the officer her BC Services Card and a credit card that had her name on it; this was all that she had on her at the time. After receiving her identification, the principal officer took it into the vehicle where it was presumably run through some database that he had access to. After this was completed, the principal officer informed the complainant that another name with a different gender marker was associated with her identification; this name was [her] deadname and previous gender marker. The complainant informed the officer that that person was not her, to which the principal officer was not satisfied and began accusing her of having a warrant.

The principal officer quickly began to question the complainant in an aggressive tone, to which she felt intimidated. Early in this interaction [she] eventually informed the principal officer that the name he had found was of her "dead twin brother", in an attempt to inform him that this was no longer her in the best way she could articulate at the time given the unsafe atmosphere the officer created. [She] continuously informed the principal officer that the important thing was that the identification she presented to him was true and accurate, reflecting who she is now. To this, the officer then accused her of lying and began asking her for additional information, including her address, phone number, and her social media. This included the officer asking [her] for her Facebook information so that he could "look her up". The complainant continued to redirect the officer to the identification she had presented him to begin with.

During this questioning, the accompanying officer stood with the complainant and did not ask questions. The accompanying officer did at some point identify to ██████████ that there had been a burglary in the area, and this may be why she had been stopped. The principal officer became more agitated and aggressive towards the complainant during this time and

did not stop questioning the complainant about her name and identity. At no time was she asked any other questions (e.g., where she had been walking, where she was going etc.). During this questioning, the complainant provided the principal officer with her mother's telephone number and informed him that she could validate the accuracy of the identification provided. The principal officer took the number, dialed it in front of [her], and then immediately pressed "end call" and then said, "nice try," and told the complainant that the phone number she provided was fake, even though [she] knew it to be correct. This all continued, and after some period of time that was less than an hour, the principal officer told the complainant that she was "obstructing justice" and put her in handcuffs while standing outside the vehicle and began yelling at her "you're a liar".

The complainant was indeed intimidated and fearful; she felt that she had given the principal officer exactly what he had asked her for, but she continued to be detained. It was the complainant's intention to resolve the issue as quickly as possible, as she had never had an encounter like this with the police before, had no prior criminal record, and was concerned about being in such close presence to the officers without gloves or masks given the COVID-19 outbreak active at the time. [She] felt degraded and trapped in a situation that was unnecessarily aggressive and traumatizing, as she continued to be questioned about her deadname and identity.

After approximately two hours of detention, two new officers arrived at the scene. On being briefed on the situation, one of the new arriving officers, [REDACTED], approached her and asked her if she was transgender. [She] confirmed that she was transgender. In response, the principal officer stated to her "oh, you barely notice, you're doing a good job" and that "he couldn't tell". The officers present then began to discuss her trans identity in front of her for several minutes while she remained in handcuffs. [REDACTED] felt degraded that she had been outed in front of a group of strangers and, furthermore, by the fact that her identity then became a discussion topic and comments about her appearance were made (i.e., comments from the principal officer). It was only after [she] asked to be taken out of handcuffs that she was. She was then let go without any further questioning.

[REDACTED] drove [her] home and provided her a business card with his name and contact information. When [she] finally arrived at her home it was sometime around 3:00AM. The following day, [she] and her mother met [REDACTED] in a public park. [She] and her mother asked why she was detained for so long despite having no criminal record and giving the officers what they asked for. [REDACTED] articulated that she had crossed an "invisible boundary" and made reference to the nearby burglary. During this meeting, [REDACTED] also informed her that her deadname was linked to her updated identification. During this interaction, [REDACTED] provided [her] and her mother with the principal officer's name and badge number.

46. The submissions made on behalf of the Complainant referred to aspects of what the Complainant said occurred, the various forms that the misconduct of Abuse of Authority may take under the *Police Act* in the context of what she alleges occurred, the VPD policy Initial Contact with Transgender People (1.14.4), and the nature of the Complainant's detention and interrogation by the Member. She submits that "All indications are that this detention was a consequence of [her] current identification

not matching the name and gender marker to a previous version that was on file; in the entirety of the detention the only questions asked of [her] related to her name and identification.” She further submits that during this detention and interrogation the principal officer handcuffed her, yelled, and continuously questioned her name and gender marker present on her updated identification. In addition, the principal officer continued to invoke her deadname, despite a clear indication from her that it was inaccurate. The Complainant said that during her interaction with the principal officer she became “increasingly intimidated and fearful” and answered all the questions she was asked and truthfully presented her identification.

47. According to the Complainant, the comments that the principal officer made to her once he knew she was transgender that she was “doing a good job” and that he “could barely notice” that she was transgender were one of the most harmful aspects of her interaction with the police. She said she remained in handcuffs while the officers discussed her transgender identity in front of her. She felt that she was trapped and on display and this reinforced her belief that her detention was because of her gender identity.
48. In further submissions the Complainant stressed that transgender persons are more likely than the mainstream population to have previous identification information of the VPD’s database with different names and gender markers than their current identification, and that there ought to be a protocol for police officers to follow to resolve discrepancies while maintaining the dignity of the person with whom they are interacting. For the police to resort to hostile questioning that continuously invokes a transgender person’s deadname and previous gender marker can quickly elicit fear, emotional distress, and dissociation, as she experienced on this occasion.

Summary of Events

49. The following is my summary of the relevant evidence drawn from the CAD Report and the police radio broadcasts. (I have omitted reference to the seconds stated with certain times where not necessary.)
50. On May 8, 2020, at 01:48 hours 911 received a phone call from a Mr. [REDACTED] indicating that a male suspect (later identified as Mr. [REDACTED]) was scoping out residences. The

call lasted nine minutes and 43 seconds, during which Mr. [REDACTED] passed on to the 911 operator various observations. Mr. [REDACTED] believed that the male had broken into his mother's house two weeks earlier. He observed the suspect in his neighbour's garage and believed the suspect had possibly stolen something. Mr. [REDACTED] provided his address [in the [REDACTED] block of] E. 6th Avenue, near [REDACTED] Street. Mr. [REDACTED] provided a description of the suspect as a Caucasian male, mid 20s, medium build, wearing a black baseball hat, a red bomber jacket, black jeans, and riding a bicycle. He last saw the suspect travelling westbound on E. 7th Avenue towards Nanaimo Street.

51. At 01:52 Central Dispatch broadcasted the call to units in District 2, indicating that there was a suspicious person in the [REDACTED] block of E. 6th. Using call sign Echo-21, Constables [REDACTED] and [REDACTED] indicated they were on their way.
52. At 01:53 Special Municipal Constable [REDACTED] using call sign Romeo-32, attended on scene at the [REDACTED] Block E 6th Avenue. At 01:57 Cst. [REDACTED] provided an update that he "had a strong possible on the male", who was at Nanaimo Street and E 7th Avenue. At 01:57 Cst. [REDACTED] (with Cst. [REDACTED] using call sign Echo-14, provided an update that the suspect was south of E. 7th Avenue on the west side of Nanaimo Street. The suspect was seated behind a bus stop. At 01:58 Cst. [REDACTED] asked if the Romeo unit could just keep an eye on the suspect, who was sitting on the ground next to his bicycle at 01:58.
53. At 01:59 the 911 call taker ended the call with Mr. [REDACTED]
54. At 02:00 Cst. [REDACTED] provided an update that the suspect was walking eastbound across Nanaimo Street, and then seconds later advised that he could no longer observe the suspect, who he had last seen eastbound on E 7th Avenue.
55. At 02:02 Cst. [REDACTED] using call sign Echo-14, provided an update that he could observe a person in the east lane of Nanaimo Street and asked if the suspect was still in possession of his bike.
56. At 02:04 the Member and Constable [REDACTED] utilizing call sign Echo-90, were enroute to the call.

57. Between 02:02 and 02:06 communications between Echo-14 (Cst. [REDACTED] and Echo-21 (Csts. [REDACTED] and [REDACTED] indicated that they no longer could see the suspect, and at 02:06 the Member asked the others if they wished to set up points (for containment).
58. Between 02:06 and 02:38 the police units on scene were joined by Constables [REDACTED] and [REDACTED] call sign D-21, and discussions ensued as to where their suspect might be, and whether he had managed to get past the police. His bike was reported to still be on Nanaimo.
59. The police become interested in a pickup truck that “blew a stop sign” in the area and Cst. [REDACTED] Echo-14, went off to see if he could catch up with the truck. The officers using call sign Echo-21 (Csts. [REDACTED] and [REDACTED] asked the Member if he had any thoughts on where the suspect might be, to which the Member responded at 02:42:14, “We have seen movement. So my thought is he is in the area heated up and laying low.”
60. At 02:43:06 the Member (Echo-90) said, “We got a female that walked past us and took off a red sweater. She is going to be eastbound on 5th.” At 02:43:20 the Member said, “She didn’t want to stop to talk to us.”
61. At 02:43:33 the Member said, “We are going to stop and chat with her at Penticton and 5th.”
62. Next, Cst. [REDACTED] broadcast that the truck was going to check out [i.e. was not the suspect].
63. At 02:44:55 the Member said “Sorry guys, just out of the vehicle with (indiscernable). It’s probably her.” Then a second later he asked, “Can anybody confirm if it was a male before?”, to which Echo-21 (Csts. [REDACTED] and [REDACTED] responded, “No that was just the description from the complainant. Male, red jacket, dark pants.”
64. At 02:45:19 the Member responded, “Alright. Standby. I’m going to run her name. She is a piece of work”, and at 02:45:51 he said, “She’s sweating, out of breathe, and carrying a basket that she so happened to find on the ground.”

65. The officers at D-21 (Csts. [REDACTED] and [REDACTED] responded that they would see if they could “shoot up to Penticton from Kamloops”, and at 02:46 the same officer said, “[REDACTED] if you can hold onto her for a few. I’m just huffing it up the hill here.”
66. At 02:48 Echo-21 broadcast, “I got eyes on our male here. He is on the east corner of E. 7th.” This was then corrected to the corner of the east lane east of Nanaimo and E. 7th.
67. At 02:49:40 Delta-21 said, “I’m here with the female but if you guys think the other guy is the right target then I will give up what I have”, to which Echo-21 responded, “I just did a walk by and I think the guy in the east lane here is our guy. White male, red shirt, black pants, and a backpack. He is walking south in the lane.”
68. At 02:50:38 the Member said, “Sorry 90. I missed it. Is there someone else we are looking at?”, to which Echo-14 responded, “Yeah [REDACTED] We got a red shirt. Heading south, east lane of Nanaimo. Has a backpack.”
69. To this the Member said, “Ok, copy” at 02:50:53.
70. Echo-21 continued to follow the male suspect back to the bus stop and the bicycle, and then broadcast that he was checking him at Nanaimo and Broadway, reporting that [REDACTED] is with him, referring to Cst. [REDACTED]
71. At 02:54:19 hours Echo-21 broadcast that the male was in custody.
72. The CAD Report showed that Cst. [REDACTED] performed a person query of the Complainant’s name at 02:46:19, another person query of the Complainant’s name, including her middle name at 02:47:34, and at 02:56:19 query of a different first name and the same last name, quickly followed by a location query for an address in the [REDACTED] block of E. 2nd Avenue.
73. At 02:56:55 Cst. [REDACTED] performed a person query for the male name associated with the male suspect.
74. At 03:14:07 Cst. [REDACTED] queried a female name with the same last name as the Complainant with a birthdate.

75. At 03:30:53 Cst. [REDACTED] added call remarks that indicated he gave the Complainant a ride home from Penticton and E. 5th Ave. to [REDACTED] and [REDACTED]

The General Occurrence [GO] Report regarding The Break and Enter Allegation

76. Included in the FIR is the synopsis for the GO Report for the VPD file related to the alleged break and enter, written by Cst. [REDACTED]. It sets out the details of Mr. [REDACTED] call to 911 about an unknown male, later identified as Mr. [REDACTED] scoping out backyards in the block. Mr. [REDACTED] stated he observed Mr. [REDACTED] ditch his bike and go inside his neighbor's garage. Mr. [REDACTED] was surveilled by police and was observed entering and exiting numerous lanes. Police lost visual continuity of Mr. [REDACTED] at the south lane of E. 7th Avenue, and it was unknown if he had entered any yards during this time. Mr. [REDACTED] eventually emerged back onto Nanaimo Street and returned to his bike. Mr. [REDACTED] was carrying a tan backpack and it was unknown if it was stolen property. He was subsequently stopped by police and arrested for possession of stolen property. Mr. [REDACTED] backpack contained 6-8 spools of wire. It was unknown if it belonged to the original garage in which he was observed. Cst. [REDACTED] followed up with Mr. [REDACTED] and determined the residential garage at an address on E. 5th Avenue was associated to an abandoned home, as the homeowner recently passed away, and the new homeowners were in the process of doing a demolition of the property. Mr. [REDACTED] advised that the garage door had been propped open for the past month and does not believe any valuables were left inside. Police noted miscellaneous property inside the garage and determined that the break and enter had not occurred on this date.

77. In the GO Report Mr. [REDACTED] was described as a Caucasian male, 6' 1", 174 lbs, medium build, wearing a black baseball cap, red zip track style sweater with logo "World Senior Games" on the front and a matching larger logo on the back, black pants, all black running shoes with black laces, with a tan backpack with single zipper and small zipper on the front, a medium sized boom box, turquoise blanket and a black/white framed bicycle.

The Member's Statement

78. Sgt. [REDACTED] conducted an audio-recorded phone interview with the Member on August 6, 2021, with a union representative also on the phone line.

79. In the interview the Member stated on May 8th, 2020, he was on duty in District 2, dressed in full police uniform, driving a marked police vehicle, working in the company of Cst. [REDACTED] and utilizing the call sign VA2E90 ("Echo-90").
80. At approximately 01:48 the police received a call from Mr. [REDACTED] from [an address in the [REDACTED] block of E. 6th Ave]. Mr. [REDACTED] had witnessed a break and enter to a neighbour's garage and believed the suspect had stolen property. Mr. [REDACTED] described the suspect as a Caucasian male, in his 20's, medium build, wearing a baseball hat, red bomber jacket, and black jeans. The Member stated plainclothes members attended the area in an attempt to locate the suspect. Additional police members attended and established containment due to the nature of the call involving a break and enter. The Member stated containment was necessary to locate and identify the suspect, and that he was responsible to assist with containment.
81. The Member stated at approximately 02:06 he was at E. 5th Avenue and Kamloops Street holding a containment spot. He was able to observe E. 5th Avenue from Penticton Street to Nanaimo Street.
82. At approximately 02:43 the Member observed a female enter the area of Penticton Street and E. 5th Avenue and walk past their marked police vehicle. Her location was a block north of the break and enter incident. The Member stated the female was wearing a red sweater and was in the process of removing it. She was wearing black jeans and carrying a bag. He described her as Caucasian in her 20's.
83. The Member stated in his policing experience, suspects often change and discard their clothing after committing a crime to attempt to disguise themselves to evade arrest. The Member stated he believed that Mr. [REDACTED] may or may not have seen the gender of the suspect, and that the person he was observing may have discarded the bike. The Member stated he was acting on his common law authority when he asked the Complainant to stop as he wanted to speak to her. He stated that the Complainant did not stop, and she asked why.
84. The Member said that at approximately 02:44 he broadcasted on the police radio that he was checking the female. He stated that she was confrontational and difficult. He also stated that the Complainant was sweating and out of breath. He said she appeared to be nervous and to be scanning the area.

85. The Member stated he had reasonable grounds to believe that the female may have been involved in the break and enter. He considered that she had a similar description to the one provided by Mr. [REDACTED] and she was in the containment area in the immediate vicinity of the original call. The Member stated that he explained to the female the reason why he had stopped her, which was to investigate a break and enter in the vicinity. He needed to confirm if she was involved. The Member stated that when he asked the Complainant for her name, initially, she was not cooperative and challenged his legal authority.
86. The Member spoke to the female for a “couple minutes” before he obtained her name and conducted a CPIC/PRIME query. The query produced an alias associated with the Complainant. The Member said this alias also “tweaked his interest” as to whether or not this person was involved with the break and enter.
87. The Member stated he believed the female was involved but was waiting for the other police members to follow up with Mr. [REDACTED] to confirm the description and to confirm if a crime had occurred. He also stated he had asked on the police radio if the suspect was confirmed to be a male. He wanted to verify the information as the Complainant was a female; however, she matched the suspect description. The Member stated he checked on PRIME and there was previous information that the Complainant had provided identification in another name. He documented in his notebook the associated file number VPD 16-208878.
88. I digress at this moment to provide information from the GO Report in relation to this 2016 file. The report referenced the Complainant’s prior name and former male gender. It indicated [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] and no suggestion that on May 8, 2020, the date the Member stopped the Complainant, that the Complainant had a criminal record.

89. Returning to the Member's statement, the Member stated he asked for additional identification and observed another card within her wallet. He stated the PRIME/CPIC information did not produce any addresses or phone numbers related to the Complainant. He stated the Complainant did not answer any questions regarding her identity.
90. The Member stated, "at the time, I had no clue she was transgender and I still didn't understand why she had two names." He needed to question her about the different names, and he believed it upset her that he had asked. He said his further questioning was not hostile or aggressive. He explained that he asked for the Complainant's social media platforms and her mother's name as a possible method to confirm her identity. When he ran the Complainant's mother's name it also produced the alias at the same address, that he believed could have been a maiden name. He stated he has relied on phone numbers provided by suspects to assist with confirming the identity, explaining that this practice is situational and done on a case-by-case basis.
91. The Member stated he believed he had phoned the number the Complainant had provided; however, the number was no longer in service. He stated he did not call, immediately hang up, and state, "nice try."
92. The Member said he informed the Complainant that she was under arrest for obstruction. He also stated he did not remember her being in handcuffs but said, "To me, it would make sense if she was chartered and cautioned for obstruction, she would have been placed in handcuffs at that time."
93. The Member stated the reason for handcuffing would be the fact she was under arrest and to protect the police. Handcuffs were applied to assist with control and to prevent escape. Then the Member stated he did not recall who placed the Complainant in handcuffs. He said he believed that Constable [REDACTED] had provided the Complainant with the *Charter* and caution warning.
94. The Member said that Cst. [REDACTED] and Cst. [REDACTED] attended his location, and Cst. [REDACTED] advised him that they had located a male matching the description of the suspect in the area. The Member was not aware that the other male suspect was located. He said the Complainant was free to go at this point of the investigation.

95. The Member stated he did not recall when the handcuffs were removed from the Complainant. He believed it would have been around the time she was no longer being detained or arrested. He stated he still did not understand why the Complainant was lying about her name. He said Cst. [REDACTED] asked her about her gender identity and confirmed she was transgender.
96. The Member said, "The entire time I'm dealing with her, at no time did I ever think that she was anything other than female. It wasn't known to me until after that she was transgender." He said that the Complainant had referred to the name she had previously given as her deadname or her twin brother's name.
97. The Member said that at approximately 03:30 Cst. [REDACTED] and Cst. [REDACTED] transported the Complainant to her residence. He stated that from the time he had stopped the Complainant to her being transported home was 44 minutes in duration. He stated it took 44 minutes to verify her identity, verify the call, and determine if the call was criminal in nature. He said the Complainant "was not being straightforward with her answers. She was almost being evasive."
98. The Member indicated he was reading and processing the information that he received on PRIME, and he believed it was a fault in the system that there was a related alias associated with her deadname.
99. The Member stated he is sensitive to the LGBTQ community and has many friends that are gay, including Cst. [REDACTED]. He said, "He did not treat her any differently, knowing before or after that she was transgender." He denied yelling at the Complainant and calling her a liar. He said, "I wasn't there to play games. That is kind of the way the complaint is making it sound."
100. The Member denied saying "You barely notice, you are doing a good job, or you couldn't tell", and he also denied that the police members discussed the Complainant's gender identity in front of her. He stated it was "absolutely not" his intention to cause harm to the Complainant's mental well-being and dignity by not recognizing her true gender identity, and that he would have asked her if he had thought she was transgender.

101. In relation to questions posed by the OPCC investigator, Sgt. [REDACTED] received an email from the Member answering the OPCC investigator analyst's questions.
102. My summary of the key points follows:
- Regarding how busy in terms of foot traffic was the containment area during the Incident, the Member responded that the area was a quiet residential neighbourhood, and the Complainant was the only pedestrian he recalled seeing.
 - Whether the Member ever asked the Complainant what she was doing in the area or learned what her purpose for being in the area was before she was released, the Member responded that the Complainant was asked what she was doing in the area and initially refused to answer the questions. Later he believed she said she was out for a walk to get some exercise.
 - Asked what questions regarding her identity the Complainant refused to answer, the Member responded that she wouldn't repeat her name on her ID to verify, and wouldn't explain the alias name. She also wouldn't state if she had previously been charged or had scars, marks or tattoos or had ever gone by any other names. She said she didn't have any identification.
 - Asked whether the Member had any concerns with the validity/genuineness of the photo-identification card the Complainant provided to him, the Member responded, "Yes, that's why I asked questions. There was an alias listed in PRIME. She would not explain why she had an alias which caused me to suspect that her identification could be fraudulent. Based on my experience as a police officer, people with false identifications/names have a criminal history of fraud and obstructing the police. Also, according to PRIME she previously had identification in someone else's name."
 - Asked whether the Complainant ever asked or indicated that she not be referred to by her "deadname" aka [REDACTED] the Member responded "no".
 - Asked whether the Member knew what piece of information or circumstance caused Cst. [REDACTED] to believe that the Complainant was transgender, the Member responded that he was not sure.
 - Asked how long the Complainant remained under arrest after the Member learned that the male suspect had been located, and whether the Complainant was advised she was no longer under arrest, the Member

responded as follows. From what he recalled, Cst. ██████ attended as the Member was in his police vehicle doing computer checks. He came and sat in the vehicle with the Member, and they had a brief conversation regarding the call. Cst. ██████ said that he believed they had located the break and enter suspect. The Member believed he was explaining to Cst. ██████ his stop with the Complainant, and the reason he for arresting her for obstruction. At some point Cst. ██████ asked him if the Complainant was transgender, or if the Member had asked her. The Member said he had not considered that conclusion.

- The Member indicated that Cst. ██████ exited the vehicle and spoke with the Complainant. The Member said that he was not present for that conversation, but Cst. ██████ determined that the Complainant was transgender, and the alias name was her "deadname". The Complainant was then un-arrested by removing the handcuffs, although the ██████ did not recall who removed the handcuffs or what time it was.
- Asked what particular behaviour of the Complainant caused officer/subject safety concerns that would have required her handcuffing, the ██████ responded that: the call came in as a break and enter; the Complainant was arrested; there was poor lighting; she walked away upon initial contact, she was taking off her sweater; she appeared nervous; she was evasive; she had not been searched; she was not known to him; and he believed that she was a suspect in the break and enter. The Member indicated handcuffs are used for everyone's safety and security, the Complainant was sweating, out of breath, scanning the area and she stated that she didn't have identification when she did. His partner at the time was a recruit with limited experience.
- In a further audio interview conducted by Sgt. ██████ the Member was asked what his mindset was when he heard the radio broadcast by Cst. ██████ indicating that they were making observations of a suspect wearing a red shirt, in relation to the Member's radio response made at 02:50:38, when the Member broadcasted, "Sorry, 90, is there somebody else we are looking at." And then at 02:50:52 the Member broadcasted, "Ok, copy." The Member said he was not aware if there was a response to the question, he asked on the radio, stating that he had no idea. The Member responded: "I have no idea. I can't really answer that. I don't know what my mindset at all was. If somebody else was being stopped, I don't remember that." The Member also responded "but what I can tell you, that if somebody else is being stopped, it

doesn't mean that I would necessarily jump to the conclusion that I was dealing with the wrong person. I was dealing with a person that [sic] I said at the beginning when they were stopped, and believed was the correct person, and I listed my reasons as to why."

- Asked why the Member continued the detention of the Complainant, he stated, "unless somebody came over and said they had the right person here, unless it was an absolute that they had the right person, like I said, its due diligence."
- When the Member was referred to his radio broadcast at 02:44:55 where he broadcasted, "It's probably her", the Member stated, "on the factors that were in front of me, I believed I had the right person. Somebody else might have thought they had the right person, but we are still acting in good faith and doing our job."
- When the Member was asked what steps he took when the Complainant was detained to determine if she was involved in the break and enter the police were investigating, he stated "I was looking at who she was. At one point I asked over the radio if someone was able to determine or asked if it was a male before", and that "I was dealing with [the Complainant], who to me presented as female. I know the original call came in as a male. I was looking at that to be looked at."
- The Member was asked if he recalled if he or Cst. ██████ provided the Complainant with her section 10 (a) and (b) *Charter* rights upon the detention for the break and enter investigation, to which he stated "I don't have it written down and I don't know if she [Cst. ██████] does. I can say it's my common practice as an 18 year police officer who's actually done not just 100's but thousands of arrests. It's my common practice to give people their 10 (a) and 10 (b)."
- After outlining his common practice, the Member stated, "if my partner didn't do it, I can pretty much guarantee that she [the Complainant] would have been advised of that information at some point in time." He also stated "just because I don't have it written down in my notes, doesn't mean it didn't happen. There is a lot of things that are happening, and I won't have my notebook out all the time when initially dealing with somebody."
- The Member stated he did not recall if he had provided the Complainant with her 10 (a) and 10 (b) *Charter*, nor did he recall if Cst. ██████ had done so.

- Asked if there was a reason why the Member would not have provided the Complainant with her *Charter*, he stated “I don’t really remember it. I’m just saying it’s my common practice to do that. No, it’s my common practice. I would never just stop somebody and arrest somebody and continue to detain somebody without actually telling them that. It would never happen. There’s no reason. People have to understand what’s going on, especially when it’s leading to where she was arrested for obstruction, it would have been made clear to that person.”
- Asked if he could explain his reasons for the continued detention and what grounds he believed he had to arrest the Complainant for obstruction, the Member stated, “there were several reasons that I believed that she was the person that was involved in the break and enter. It was the proximity of where she was stopped, the time and late hours which is a common thing when there is break and enters. There is crime that is committed throughout the night. She was stopped in the containment bubble where police were looking for somebody because they believed they were within this area. She was stopped shortly after the call came in, I don’t know the exact time. Maybe 15 minutes. When she stopped she was wearing a red sweater, the same description, a red jacket or sweater that the original male that the complainant said. Black pants, same thing. Caucasian, medium build. Also, when she was stopped she was sweating and out of breath. I remember she was carrying a basket that she told me she just so happened to find on the ground.” The Member continued, “there were a number of things to me that just led me to believe that this was the right person. She didn’t want to stop for me when I had asked her to stop. She continued to be evasive or just wanted to get away from the police rather than stop and explain what she was doing that would make logical sense and police would move on to say this isn’t the correct person.” The Member said it was “my subjective belief that I was dealing with the right person. I’m trying to explain the objective portion of it. It would make sense to any other person that it was a reasonable stop. All I can say, the information that was presented to me, everything that was in front of me, my experience, I believed I was dealing with the right person, and I actually said it on the radio that I believed it was her.”
- The Member stated “to me it wouldn’t just make sense to think that I had the right person and then tell them they are free to go. I wouldn’t really be doing

due diligence of my job. That's why there was a continued detention. That's why the questioning because I believed I was dealing with the correct person."

- Asked what information led him to believe the Complainant was not being forthcoming or honest about her name, the Member stated on his first page of his police notes, he documented the name [male first and middle names and same last name as the Complainant and a birthdate] and description. He also documented the name/alias [the Complainant's current name] and date of birth. He said he was trying to figure out how a male name came up, and the Complainant told him it was her brother's dead name. He said he had never encountered a situation where he had stopped a transgender person with a "deadname".
- Asked if he recalled whether he or Cst. ██████ provided the Complainant with the obstruction warning prior to arresting her, the Member stated "as I stated before, I would always explain that stuff to somebody. I don't have it written down. I don't even remember these conversations or this part of it."
- When asked if there was anything else he would like to add, the Member said he had reviewed his previous recorded interview, and he wanted to clarify a question he had answered regarding who had placed the Complainant in handcuffs and at what point. He stated, "I don't remember her ever being placed in handcuffs. I don't know if it is something that's being looked at as something I should or should not have done. I don't think she was placed in handcuffs. I don't remember placing her in handcuffs. If she was placed in handcuffs, I would in my own head articulated or written it down. I don't always place people in handcuffs that are under arrest unless I really feel that it is the proper thing to do."

Constable ██████ Statement

103. The following is a summary of an audio interview with Cst. ██████ conducted by Sgt. ██████ with a union representative present. Cst. ██████ was a police recruit in Block 2 of her training and the Member was her field trainer on the shift.

104. Cst. ██████ described the same details in relation to the break and enter investigation. She described the containment of the area the police were conducting. She recalled that the suspect had been described as wearing red, and said, "Anybody that's in the containment, we try to identify because, at that time of night, I

didn't see anyone else around at that time of night, especially someone wearing red, like the suspect was wearing."

105. Cst. ██████ stated at approximately 02:00 they observed a female wearing a red jacket or sweater who had ankle exercise weights on. She was carrying a basket, and she appeared to be sweating. She was the only person that Cst. ██████ saw walking within the established containment area during the early morning hours.
106. Cst. ██████ stated she and the Member drove up to the female and asked her to stop walking. Cst. ██████ stated she believed the female was potentially associated with the break and enter.
107. Cst. ██████ said that the woman had headphones on, and she was unable to determine if the woman did not hear the police commands, or if she was intentionally ignoring the demands. They exited their police vehicle and spoke with the female.
108. Cst. ██████ could not recall if they identified themselves as police, but she stated she and the Member were in full police uniform and driving a marked police vehicle.
109. Cst. ██████ stated they did not specifically tell the female she was being detained but they told her they were investigating a suspicious circumstance in the area. The female was informed that the suspect was also wearing red clothing and they asked her questions regarding her reasons for being out at that time of night, what she was doing. They also asked for her name.
110. Cst. ██████ stated that the female provided a piece of identification with the name "██████" and the Member took the identification and conducted a CPIC/PRIME query in the police vehicle, while she remained with the Complainant.
111. Cst. ██████ stated, "I was actually kind of happy that ██████ went into the car to run her. I stayed with her because I like speaking with other women when I'm doing policing. I think it sometimes makes them calmer just to have another woman there. She was kind of similar to my age so we were just having a conversation. I was trying to be friendly to her. She was being very calm, so I was being calm as well."

112. Cst. ██████ stated that the Complainant explained she enjoyed working out at night as she did not like being sweaty and having people observe her during the day. They spoke about Mother's Day. The Complainant explained that she had found the basket of flowers she was carrying and planned to clean it and give it to her mother as a gift.
113. Cst. ██████ stated that the Member exited the vehicle and told her that he couldn't find anything on the police system for the name the Complainant provided. He asked if she went by another name or if she was lying as he was attempting to confirm her identity.
114. Cst. ██████ said that the Complainant was adamant that her name was "██████" and stated it multiple times. The Member asked the Complainant if she knew someone by the name of ██████. Cst. ██████ was not sure of the reason or meaning of the question as she had not seen the information on the police computer.
115. Cst. ██████ said that the Complainant became very quiet and said her dead twin brother was named ██████. She offered her condolences to the Complainant over the loss of her twin brother, and it appeared that the Complainant did not want to talk about the topic any further. The Member returned to the police vehicle to conduct further computer queries.
116. Cst. ██████ stated the Complainant provided the Member with her mother's phone number to assist with verifying her identity. Cst. ██████ said she was unsure if the Member called the Complainant's mother.
117. Cst. ██████ stated the Member exited the police vehicle and told her to charter the Complainant for Obstruction as he was unable to identify her, and he did not want to release her from custody in case she was indeed the suspect from the break and enter.
118. Cst. ██████ stated she retrieved her Charter card and documented that the time was 03:14 in her notebook. She began to charter the Complainant for Obstruction.

119. Cst. ██████ stated the Complainant was in handcuffs when she started to provide the obstruction warning. She could not recall if the Complainant was placed in handcuffs when they had stopped her or just before she provided her the obstruction warning.
120. Cst. ██████ stated that Cst. ██████ and his recruit, Cst. ██████ attended the location and Cst. ██████ spoke to the Member. She stated that Cst. ██████ interrupted her as she read from the charter card and asked the Complainant if she was transgender, to which she replied that she was.
121. Cst. ██████ stated “At that point, I was actually really surprised. I had no idea that she was transgender. It all started kind of making sense in my mind about, maybe the name was her previous name.” She said that the Member and Cst. ██████ told her that she could remove the handcuffs from the Complainant as her identity was confirmed, which she immediately did.
122. Cst. ██████ stated she apologized to the Complainant because “I know that it was probably uncomfortable topic to bring up that she was transgender. That is probably why she didn’t want to give us her name which I completely understand now.”
123. Cst. ██████ said that the Complainant was upset about her interactions with the police. Cst. ██████ offered to drive the Complainant home.
124. Cst. ██████ estimated that their entire interaction with the Complainant was approximately 30 to 45 minutes before she was transported home by Constable ██████
125. Asked about the Member’s tone and behaviour in relation to the Complainant, Cst. ██████ described them as calm and collected. She said that the Member “wasn’t overly stern with her or anything like that, but I wouldn’t say he was super friendly to her either.” She said she would not describe the Member’s behaviour as aggressive. Constable ██████ also stated, “The entire situation was calm until we brought up if [she was] are transgender. I can’t remember if she cried but she seemed to get almost emotional.”

126. Cst. ██████ stated she did not hear the Member yell and call the Complainant a liar; and she said that he did not raise his voice throughout the entire interaction. She also stated that she did not hear the Member say to the Complainant, "You barely notice, you are doing a good job" or that "he couldn't tell" in relation to her being transgender.
127. Cst. ██████ stated she and the other police members did not discuss the Complainant's gender identity in front of her. She acknowledged that the police do need to ask difficult questions that may offend people, stated in relation to the Complainant, "I would say we weren't trying to label her. We were just trying to identify who she was to determine if she was the suspect or not. I do understand she might have been offended by that, but our job can also be uncomfortable sometimes."
128. Cst. ██████ stated she believed the Complainant was a female during the police interaction, but she now realized that the Complainant was referring to her (male) "deadname", whereas at the time of the Incident, she did not know the meaning of a dead name.
129. In a follow-up audio-recorded interview conducted by Sgt. ██████ Cst. ██████ was asked what her mindset was when she heard the radio broadcast by Cst. ██████ indicating that they were making observations of a suspect wearing a red shirt. She stated "I actually don't recall knowing there was actually another suspect. I think I was so engaged in conversation with [the Complainant]. That at that point I was very new and my radio skills weren't very good. I don't even know if I was aware of another suspect, or if they were following another suspect or one was in custody."
130. When asked if she recalled whether she or the Member provided the Complainant with her s. 10 (a) and (b) *Charter* rights upon being stopped, Cst. ██████ stated "I don't think I did. At that point, I was quite new and I definitely followed directions from my field trainer at that time. Especially in kind of situations like this where there are a lot of moving parts and it felt a little bit overwhelming if someone is really new and what steps to take. I definitely followed directions from my field trainer that we needed to establish her identity first. It was later on when he directed me to charter her. That's when in my notebook, you can see I wrote the

time, and I was about to do s. 10(a) when we were interrupted by Cst. [REDACTED] speaking to her.”

131. Asked if she could explain her reasons for the continued detention of the Complainant and what grounds she believed she had to arrest the Complainant for obstruction, Cst. [REDACTED] stated, “Like I said, I was definitely following directions from [the Member] and he was the one that had her identification in the car, running her on the MDT. I don’t recall ever being in the car looking at the MDT or any of the information. Based on what he said, I didn’t know what other information he had on the computer, he wasn’t satisfied with her identification and thought she could be lying about who she was. He told me to charter her for obstruction and read the obstruction warning to try and establish who she was.”

132. Asked if she read the Complainant the obstruction warning and the Charter, Cst. [REDACTED] stated “I believe I was starting the charter. I can’t recall in my mind but based on her[sic] notebook entry because I wrote 10 (a), I believe I was going to go and charter her first.”

133. In relation to what she recalled the Member doing in this regard, Cst. [REDACTED] stated “I do recall [the Member] saying it. I don’t think he, I don’t want to speak on behalf of him, but I don’t think he had his charter card with him but explaining that. I was new, again, I wasn’t used to that wording, but I remember him saying, we are in the lawful execution of our duties as police officers, and we need to find out who you are in layman’s terms.”

Cst. [REDACTED] Statement

134. Cst. [REDACTED] was also interviewed in relation to this matter. He and Cst. [REDACTED] another trainee, were dispatched to investigate the same alleged break and enter.

135. Cst. [REDACTED] explained the purpose of the containment of the area was to identify suspects and stated that if a person matches the description of the suspect, the police have the lawful authority to detain a person under investigative detention to identify and verify if they are associated with the police call. He also indicated that in

his police experience, suspects often hide their mode of transportation when actively doing crime. On this occasion, he said it was later determined that Mr. [REDACTED] had hidden his bike and walked around the neighbourhood before returning to his bike.

136. Cst. [REDACTED] stated it was late at night and only the Complainant and Mr. [REDACTED] were observed within the containment area. He stated that the Member and Cst. [REDACTED] stopped the Complainant, the Member broadcasted that he had stopped a female as she matched the description of the suspect.
137. Cst. [REDACTED] stated the Complainant was wearing red clothing, but he did not recall a detailed description.
138. Cst. [REDACTED] stated patrol members located Mr. [REDACTED] in the immediate area and conducted surveillance on him. Cst. [REDACTED] stopped Mr. [REDACTED] and determined that he was the suspect involved in the dispatched call. Mr. [REDACTED] was not arrested but released.
139. He did not recall the length of time they conducted surveillance on Mr. [REDACTED] before he attended the location where the Member and Cst. [REDACTED] were. Cst. [REDACTED] stated that immediately upon releasing Mr. [REDACTED] he drove to the Member's location at E. 5th Avenue and [REDACTED] Street.
140. When he arrived, Cst. [REDACTED] stated the Member was seated in the police vehicle and was not interacting with the Complainant. Cst. [REDACTED] was standing with her. He did not recall if the Complainant was in handcuffs when he arrived on scene.
141. Cst. [REDACTED] stated he had a brief conversation with the Member about the Complainant's identity. Cst. [REDACTED] and the Complainant were not conversing. Constable [REDACTED] observed the Complainant's identification and the CPIC/PRIME results on the police computer.
142. Cst. [REDACTED] believed the information was the Complainant's deadname. Cst. [REDACTED] stated he is part of the LGBTQ community and was able to recognize the

Complainant's deadname. Cst. ██████ said to her, "Sorry I have to ask, but the police records seem to be possibly a deadname. Are you trans?", and the Complainant confirmed she was. Cst. ██████ stated he and the Member discussed her gender identity because her identification did not match the PRIME/CPIC query results. This was fact-finding and not derogatory.

143. Cst. ██████ stated there was a discussion with the Complainant regarding the length of the police interaction. Cst. ██████ was empathetic and offered to drive her home. He received approval from his sergeant to do this and he transported the Complainant to her residence.
144. Cst. ██████ described the length of time from when he arrived on scene to transporting the Complainant home as, "real quick."
145. Cst. ██████ said the Complainant had contacted him after the incident, and he met with her and her mother at Victoria Park. Cst. ██████ stated that the Complainant believed the only reason she was released from police custody was because Cst. ██████ had attended the scene and was part of the LGBTQ community, and he explained that this was not the reason. Cst. ██████ stated he explained the circumstances of the call and that the police had recently identified the correct suspect related to the suspicious circumstances. Cst. ██████ explained police containment to the Complainant, and that if a person is observed within the area, they could be stopped to identify themselves and for police to determine if they were related to the call. Cst. ██████ stated during the meeting with the Complainant and her mother, the Complainant was frustrated as she believed the stop was a result of being transgender.
146. Cst. ██████ stated he did not observe the Member interact with the Complainant upon his arrival. He did not hear the Member yell or call the Complainant a liar.
147. Cst. ██████ stated he did not hear the Member say, "You barely notice, you're doing a good job, he couldn't tell" or "anything to the effects of that."

148. Cst. [REDACTED] described the atmosphere with the Complainant as calm, and her behaviour as “cooperative but agitated.”

Cst. [REDACTED] Statement

149. Cst. [REDACTED] was interviewed by Sgt. [REDACTED] in relation to the Incident. He was on duty, dressed in full police uniform, driving a marked police vehicle, and working with Cst. [REDACTED]. They were using the call sign VA2E14 (Echo-14). Cst. [REDACTED] was a trainee.

150. Cst. [REDACTED] stated plainclothes and uniformed police members responded to the call, and he and Cst. [REDACTED] took a position of containment in the immediate area, while the plainclothes units attempted to locate the suspect. The primary police units made observations and eventually lost visual continuity of the suspect.

151. Cst. [REDACTED] stated the suspect’s description included a red hoodie or a red jacket.

152. Cst. [REDACTED] stated he stopped assisting with containment and began driving within the area. He said the Member broadcasted that he was with a possible suspect (the Complainant), located in the containment area, who was wearing red clothing.

153. Cst. [REDACTED] stated he and Cst. [REDACTED] attended the Member’s location to assist. The Member was speaking with the Complainant on the sidewalk.

154. Cst. [REDACTED] stated he did not recall if the Complainant was in handcuffs. The Member informed them that he thought the Complainant was playing the name game. Cst. [REDACTED] stated Cst. [REDACTED] had a private discussion with the Complainant and determined she was transgender.

155. Cst. [REDACTED] stated Cst. [REDACTED] informed him that he had asked if the alias was her dead name. He stated he now understands that a dead name is used to describe a previous name.

156. Cst. ██████ stated they determined that the Complainant was not the suspect involved in the break and enter.
157. Cst. ██████ stated at approximately 03:00 a.m., he and Cst. ██████ offered the Complainant a ride home. They received authorization from their sergeant and transported her home.
158. Cst. ██████ stated he did not hear the Member yell or call the Complainant a liar. Cst. ██████ described the Member's behaviour as stern, but not unprofessional.
159. Cst. ██████ did hear the Member say, "You barely notice, you are doing a good job, or he couldn't tell." Cst. ██████ also stated the Complainant's gender identity was not discussed amongst the officers in her presence.

Applicable Sections of the *Police Act*

160. "Misconduct" is defined by s.77 of the Act and covers a broad range of conduct.
161. Section 77(1)(b)(ii) establishes the category of "a disciplinary breach of public trust" as described in ss. (3)(a)(ii)(B) that includes a member intentionally or recklessly detaining any person without good and sufficient cause: (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, or
 - (B) detaining or searching any person without good and sufficient cause,
[...]

(g) “discourtesy”, which is failing to behave with courtesy due in the circumstances towards a member of the public in the performance of duties as a member;

[...]

(m) “neglect of duty”, which is neglecting, without good or sufficient cause, to do any of the following:

[...]

(ii) promptly and diligently do anything that it is one’s duty as a member to do;

[...]

162. The *Police Act* also contains the following provision:

(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.

163. Furthermore, the disjunctive phrase “intentionally or recklessly” suggests that mere negligence is not a sufficient basis upon which to find misconduct. Regarding this element the Supreme Court of Canada decision in *Peracomo v. Telus Communications Co.*, 2014 SCC 29 [*Peracomo*] appears to be the leading case on the meaning of “wilful misconduct” and “recklessness”. The Court stated the following:

[57] In other contexts, “wilful misconduct” has been defined as “doing something which is wrong knowing it to be wrong or with reckless indifference”; “recklessness” in this context means “an awareness of the duty to act or a subjective recklessness as to the existence of the duty”: *R. v. Boulanger*, 2006 SCC 32, [2006] 2 S.C.R. 49, at para. 27, citing *Attorney General’s Reference (No. 3 of 2003)*, [2004] EWCA Crim 868, [2005] Q.B. 73. Similarly, in an insightful article, Peter Cane states that “[a] person is reckless in relation to a particular consequence of their conduct if they realize that their conduct may have that consequence, but go ahead anyway. The risk must have been an unreasonable one to take”: “*Mens Rea in Tort Law*” (2000), 20 *Oxford J. Legal Stud.* 533, at p. 535.

[58] These formulations capture the essence of wilful misconduct as including not only intentional wrongdoing but also conduct exhibiting reckless indifference in the face of a duty to know. This view is supported by two of the key authorities relied on by the appellants and they are, as I see it, sufficient to deal with the issue raised on this appeal. [Emphasis added.]

Alleged Member Misconduct

164. Having reviewed the evidence relating to this complaint I find that I am obliged to consider whether the evidence I have considered appears sufficient to substantiate any, some, or all of the following allegations of misconduct made against the Member under the *Police Act*:

1. Abuse of Authority by detaining the Complainant without good and sufficient cause – s. 77(3)(a)(ii)(B);
2. Neglect of Duty by failing to promptly and diligently advise the Complainant of her s. 10(a) and (b) Charter rights upon her detention – s. 77(3)(m)(ii);
3. Abuse of Authority by using unnecessary force on the Complainant by handcuffing or directing Cst. ██████████ to handcuff her without good and sufficient cause – s.77(3)(a)(ii)(A); and
4. Discourtesy by shouting and disrespectful comments made to the Complainant - s. 77(3)(g).

Analysis and Findings

165. The Complainant was out walking when she was detained and handcuffed by the police. In Canada, people are free to go about their business, day or night, without interference with the police unless the police have a specific legal authority interfere with that freedom through arrest or detention.

166. The legal framework for determining whether detention, with or without handcuffs is lawful is found in the *Criminal Code*, the common law and the *Canadian Charter of Rights and Freedoms* (the “*Charter*”).

167. The sections of the Charter relevant to my analysis are:

9. Everyone has the right not to be arbitrarily detained or imprisoned.
10. Everyone has the right on arrest or detention
 - (a) to be informed promptly of the reasons therefor;
 - (b) to retain and instruct counsel without delay and to be informed of that right;

168. Arrests without warrant are governed by s.495(1) of the Criminal Code. A police officer may lawfully arrest a person, without a warrant, when there are reasonable grounds for believing the person has committed or is about to commit an indictable offence or, where the person is committing a criminal offence.

169. The Complainant was not arrested, and there would have been no grounds upon which to do so.

170. In the leading case of *R. v. Storrey*, 1990 CanLII 125 (SCC), the Supreme Court of Canada considered the authority to arrest and held that the reasonable and probable grounds necessary for a lawful arrest must exist both subjectively and objectively. Further, and importantly, the Court held that the objective component acts as an “additional safeguard against arbitrary arrest”:

It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest. See *R. v. Brown* (1987), 1987 CanLII 136 (NS CA), 33 C.C.C. (3d) 54 (N.S.C.A.), at p. 66; *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.), at p. 228.

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

than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

171. Where there are no grounds to arrest, an officer may in some circumstances be permitted to conduct an investigative detention. This authority is found in the common law.

172. The authority to conduct an investigative detention was thoroughly canvassed by the Supreme Court of Canada in *R. v. Mann*, 2004 SCC 52 [*Mann*].

173. In *Mann*, the majority cautioned that investigative detentions are subject to *Charter* scrutiny:

A detention for investigative purposes is, like any other detention, subject to *Charter* scrutiny. Section 9 of the *Charter*, for example, provides that everyone has the right “not to be arbitrarily detained”. It is well recognized that a lawful detention is not “arbitrary” within the meaning of that provision. Consequently, an investigative detention that is carried out in accordance with the common law power recognized in this case will not infringe the detainee’s rights under s. 9 of the *Charter*. (at para. 20)

174. In determining whether an investigative detention is lawful, a court or, in this instance, a discipline authority, must consider “whether an invasion of individual rights is necessary in order for the peace officers to perform their duty, and whether such invasion is reasonable in light of the public purposes served by effective control of criminal acts on the one hand and on the other respect for the liberty and fundamental dignity of individuals.” (*Mann*, at para. 26)

175. Like the power to arrest, the power to conduct an investigative detention rests upon the existence of reasonable grounds, which have both a subjective and objective component. These principles are set out in *Mann*:

34 The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the *Waterfield* test, along with the *Simpson* articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an

objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test.

35 Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest.

176. In *Mann*, and in *R. v. Greaves*, 2004 BCCA 484 [*Greaves*], courts have held that investigative detentions will generally be brief:

[37] With respect to the second question, *Mann* establishes that reasonable grounds to detain alone are insufficient to justify an investigative detention. The detention must also be reasonably necessary in all the circumstances. Iacobucci J. indicated that, generally, this means an investigative detention will be "of brief duration" (at para. 22) and cannot become a "*de facto* arrest" (at para. 35). In *Simpson*, at 503, Doherty J.A. provided examples of situations in which an investigative detention would and would not be justified:

... [A] reasonably based suspicion that a person committed some property-related offence at a distant point in the past, while an articulable cause, would not, standing alone, justify the detention of that person on a public street to question him or her about that offence. On the other hand, a reasonable suspicion that a person had just committed a violent crime and was in flight from the scene of that crime could well justify some detention of that individual in an effort to quickly confirm or refute that suspicion. Similarly, the existence of an articulable cause that justified a brief detention, perhaps to ask the person detained for identification, would not necessarily justify a more intrusive detention complete with physical restraint and a more extensive interrogation.

177. Detention may be achieved through words, such as a command or through physical restraint such as handcuffs.
178. The use of physical restraint through the use of handcuffs must be justified both subjectively and objectively. Handcuffs are not minimally intrusive, nor is the use of handcuffs justified or justifiable through reference to general practice or general reference to safety.
179. The law recognizes that a detention which is lawful at the outset, may become arbitrary and unlawful when the original purpose justifying the detention no longer exists. This was recognized by the Court of Appeal in *Greaves*. Evidence in relation to changes in circumstances, or new information which becomes available to the police, will be relevant to this determination.
180. In summary, where the common law is relied upon as the justification for an investigative detention, I must consider:
- a. What was the purpose for the detention.
 - b. Subjectively, what beliefs did the officer hold which might justify detention for that purpose?
 - c. Objectively, what basis existed for the detention?
 - d. Where the detention is ongoing rather than brief, as it was in the present case, and assuming that there were subjective and objective grounds to justify the initial detention, did those grounds continue to exist?
 - e. Where physical restraint, such as handcuffs are used as they were in the present case, were there both subjective and objective grounds that justified that use of physical force or restraint in the circumstances of the case?
181. Here, the purpose of the Complainant's detention was to determine her identity and to identify or eliminate her as a suspect in the nearby break and enter.

182. The Member's subjective reasonable grounds arise from his evidence about the nature and location of the alleged break and enter, the description of the suspect provided, the early hour when he observed the Complainant was walking through the otherwise quiet police containment of a residential area, and that fact she seemed reluctant to engage with the police. According to the Member she was not willing initially to speak to the police and appeared to be sweating and scanning the area. She appeared Caucasian and in her mid-20s, and she was wearing a red sweater and black or dark pants. Her gender was female, not male as was reported to 9-1-1. However, I note the Member explained his experience in terms of suspects changing their appearances to avoid detection by the police. Those reasons also appear to be objectively reasonable.

183. However, once it had been generally broadcast that other police officers had located and arrested a male suspect close by who more closely matched the original description provided (ie. was male, wearing a red jacket and black pants, and had a backpack and a bicycle), the evidence appears sufficient to render the Member's detention of the Complainant became objectively unreasonable.

184. My reasons in this regard are based on the fact that other police officers in the containment area were following a male suspect with a bicycle as early as 01:57, when the initial call went out on police radio to the units in District 2 at 1:52. After the Complainant was stopped and detained by the Member at 02:43, another police unit (Echo-21) broadcast at 02:48 they "had eyes on our male here" at a different location. This broadcast was followed up by a further broadcast at 02:49 between Echo-21 and Delta-21 that referred to the male and described how he matched the description provided (white male, red shirt, black pants, and a backpack walking south in the east lane of Nanaimo). Then the Member came on the radio at 02:50 and said he was sorry, that he'd missed it, to which Echo-14 responded that they had a "red shirt. Heading south, east lane of Nanaimo. Has a backpack", to which the Member responded, "Ok, copy." Radio broadcasts at 02:54:08 indicated that Cst.

██████ was with the male suspect and at 02:54:19 it was broadcast that the male suspect was in police custody. Had the Member known this he might have continued to detain the Complainant a few minutes longer to confirm it, and then released her without continuing to pursue the problem of trying to identify her.

185. Given these radio broadcasts, including the one where the Member responds in a manner that indicated he knew of the other suspect, the Member knew or ought to have appreciated from 02:50 on that other police officers were following a male suspect, who matched the more detailed description provided, in an area close to site of the alleged break and enter. From 02:54 he ought to have been aware that that male was in custody. Instead, the Member continued to detain the Complainant until approximately 03:15, or a minute or two later, until Cst. ██████ resolved the problem of identifying the Complainant, and she was released. Shortly thereafter and by 03:30 she was driven home by Csts. ██████ and ██████

186. In his evidence the Member could not explain how it was that he had failed to appreciate that the police were following and then apprehended a male person whom they considered to be the right suspect, while he continued to detain the Complainant.

187. Therefore, after the reason for the Complainant's initial detention was no longer viable, her continued detention by the Member for approximately 15 to 20 minutes appears to have become objectively unreasonable, and no longer reasonably necessary in terms of the public purpose it was originally considered to serve. Therefore, in my view a correct analysis results in a finding that the detention of the Complainant became unlawful for the last 15 to 20 minutes, and therefore may be regarded as a violation of s. 9 of the *Charter*.

188. However, in this instance a *Charter* violation of s. 9 must not be conflated with the question of whether there has been an abuse of authority in the sense that, as a matter of law, a *Charter* violation will not necessarily and in all circumstances constitute an abuse of authority.

189. For this apparent oversight or lack of attention to amount to the misconduct of Abuse of Authority pursuant to s.77(3)(a)(ii)(B) the officer in performance of their duties be found to have “engaged in oppressive conduct”, to have acted “intentionally or recklessly”, and without “good and sufficient cause.”

190. In this instance I will deal first with the element of “intentionally or recklessly.”

191. In *Scott*, at para. 36, Mr. Justice Affleck held:

The petitioner does not seek to challenge in subsequent administrative proceedings the acquittal of the complainant. The question before Rounthwaite P.C.J. was whether the complainant was guilty beyond a reasonable doubt of assaulting a police constable in the execution of his duty and of resisting arrest. The issue of the complainant's guilt or innocence is not the same as the issue of whether the petitioner was guilty of misconduct by abusing his authority. Provincial Court Judge Rounthwaite decided the petitioner did not have authority to enter the house of the complainant and arrest her, but made no decision that the petitioner had abused his authority within the meaning of s. 77(3) of the *Police Act*, which is reproduced at para. 7 of these reasons. “Abuse of authority” is defined for the purpose of the complaint against the petitioner as the intentional or reckless arrest of the complainant without good and sufficient cause. I do not read the phrase “without limitation”, as the retired judge apparently did, to mean that intention or recklessness can be ignored when considering the petitioner’s conduct. In my view, the section should be read to apply to conduct which has a serious blameworthy element and not simply a mistake of legal authority alone. (Emphasis added.)

192. The following passages from Lowe v. Diebolt, 2013 BCSC 1092 (CanLII), are also of assistance:

[32] The ultimate question that the Adjudicator had to answer was whether, paraphrasing s. 77(3)(a)(ii)(B) and 117 (9) and (10) of the *Act*, it appears that Cst. Burrige negligently or recklessly searched Ms. Gowland without good and sufficient cause (ss. 9) or whether she did not (ss. 10).

[...]

[46] I do not agree with this position. The question of misconduct is different from whether a *Charter* breach occurred, and also from whether evidence obtained from an illegal search should be excluded. That is clear from the definition of the charged misconduct, which requires recklessness or intent. The “intent” cannot refer to the physical act of the search, because it is virtually

impossible to conduct a physical search non-intentionally. It must refer to the mens rea, or state of mind of the officer. Recklessness must be interpreted in the same manner. The fact that an officer is ignorant of the law related to searches does not, by itself, indicate intent or recklessness. It is more in line with negligence, or, for that matter, poor training. (I address actual knowledge below at para. 52.)

[...]

[52] In this case, the difficulties with the Adjudicator's approach to the validity of the search were apparent, and therefore not a "treasure hunt". However, as I have stated, that is only the starting point. On several occasions, I invited the petitioner's counsel to point me to anything in the record indicating either intentional or reckless misconduct by Cst. Burrige other than the search itself. He could not do so other than to point out her acknowledgment that she did not have grounds to arrest. But that factor merely circles back to the validity of the search. There was nothing in the evidence to show that Cst. Burrige knew that the lack of grounds for arrest meant she could not do the search, something which might amount to intention. While there might be cases in which the misconduct bespeaks intention or recklessness, this is not one of them. (Emphasis added.)

193. On the evidence here I do not find any element of intention or reckless in the conduct of the Member regarding his continued unlawful detention of the Complainant subsequent to an initial lawful detention. Whether through inadvertence or lack of attention to the police radio broadcasts regarding the following and apprehension of the male suspect, the fact he was working with a trainee constable who was not particularly adept at monitoring the police radio, or he was absorbed in the task of trying to sort out the identity of the person he had stopped, none of his conduct rises to a deliberate or reckless continued detention of the Complainant.
194. Based on this view, further consideration of whether in the context of detention the Member's "engaged in oppressive conduct" or "acted without good and sufficient cause, is unnecessary.
195. I turn now to the allegation of the Member's apparent failure to provide the Complainant with her s. 10(b) *Charter* rights. While the Complainant was likely told of the reason why the police had stopped her and sought to determine her identity – Cst. ██████ referred to speaking to the Complainant about a burglary nearby – my

view of the evidence is that the Member, or Cst. ██████ under his supervision, apparently failed to advise the Complainant of her s. 10(b) right to counsel.

196. My view of the evidence is that it is not sufficient to substantiate this allegation of neglect of duty contrary to s. 77(3)(m) of the *Police Act*, which defines this misconduct as “neglecting, without good or sufficient cause, to [...] (ii) promptly and diligently do anything that it is ones’ duty as a member to do”, which in the context of present Canadian law requires a police officer to promptly upon detention inform the person of their s. 10(b) rights to retain and instruct counsel without delay.

197. The Complainant was clearly detained insofar as she was not free to leave until her identity had been determined to the satisfaction of the Member, who was doing his duty. That being so, she was entitled to be advised of her s. 10(b) right to counsel promptly upon detention.

198. The law is clear based on *R. v. Suberu*, 2009 SCC 33, that the police duty to inform an individual of their s. 10(b) *Charter* right to retain and instruct counsel without delay, is triggered at the outset of an investigation. In this case there can be no doubt that the outset of the investigation was at the point the Member, with Cst. ██████ stopped the Complainant.

199. The evidence here falls short of establishing that the Member (or Cst. ██████ under his supervision) provided her with that advice. Indeed, it is more likely on the evidence that Cst. ██████ was just commencing to provide the Complainant with her *Charter* rights, including s. 10(b) right in addition to the obstruction warning, at 03:13 hours, which was about the approximate time Cst. ██████ arrived. By that time the Complainant had been detained by police since she had been stopped by the Member shortly after his radio broadcast at 02:43, a period of approximately 29 minutes.

200. I note that the Member indicated, based on his years of experience and standard practice, that it is likely that the Complainant was advised of her s. 10(a) and (b) *Charter* rights. While the evidence may support an explanation of the reason for her

detention being given earlier (s. 10(a)), either by the Member or Cst. [REDACTED] it appears, absent a reliance on the Member's evidence about his standard practice regarding s. 10(b) and considering the evidence of Cst. [REDACTED] and her notes, that the Complainant had not been informed of her s. 10(b) rights to retain and instruct counsel promptly on her detention.

201. In relation to this alleged misconduct, which requires that the Member neglect "without good or sufficient cause to ... (ii) promptly and diligently do anything that it is one's duty as a member to do", I am obliged to consider whether, as it is apparently the case that the Member failed to ensure that the Complainant had been properly and promptly advised of her s. 10(b) rights, this amounted to the misconduct of neglect of duty.

202. In this case it appears that the Member was continuously occupied from the time the Complainant was first detained by trying to elicit information from her as to her identity and how he might confirm it, given his suspicions. While his apparent failure to ensure that the Complainant was provided with advice as to her s. 10(b) rights to counsel without delay upon her detention, is unfortunate and might well have consequences resulting in the exclusion of evidence at a criminal trial, I accept that his trying to ascertain her identity was, in these rather unique circumstances, sufficient cause for this failure and I decline to find it amounted to apparent misconduct.

203. Next, I turn to the issue of the Complainant being handcuffed during this detention, which forms the basis for the allegation of Abuse of Authority by using unnecessary force without good and sufficient cause, pursuant to s. 77(3)(a)(ii)(A) of the *Police Act*.

204. The elements of this misconduct are: 1) the Member engaged in oppressive conduct towards a member of the public; 2) in the performance of their duties; 3) intentionally or recklessly; 4) using unnecessary force; 5) on another person.

205. In this instance it seems self-evident that being handcuffed while detained may amount to oppressive conduct. This is so in this case, considering the situation the Complainant found herself in: being stopped and detained by police just because she was in a particular area at night; being obliged to answer repeated questions about her identity identifying as a transgender person with identification that reflected her correct name with a photograph; and facing what appeared to be an ongoing detention because of the information in the police databases that apparently equated her deadname with an alias; and knowing that she was not the correct suspect.

206. While the evidence is not clear as to who or when the Complainant was handcuffed, she clearly was, either by the Member or Cst. [REDACTED] acting under his supervision. Being hand-cuffed was an intentional act that required the Member to turn his mind to the circumstances.

207. The VPD Regulations and Procedures Manual at 1.2.3 Use of Force – Restraint Devices states:

When an officer arrests or detains a person ... 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.

208. In his evidence the Member initially stated that the Complainant was handcuffed because she was under arrest for obstruction, and it was to protect the police. He stated that handcuffs were applied to assist in control and to prevent escape. The Member said when asked about his specific safety concerns regarding the Complainant that the call came in as a break and enter, there was poor lighting, she walked away upon initial contact, she was taking off her sweater, she appeared nervous, she was evasive, she had not been searched, she was not known to him, and he believed her to be a suspect in the break and enter. He stressed that handcuffs are for everyone's safety, the Complainant was sweating, out of breath,

scanning the area, and stated initially that she did not have identification when she did. The fact that he was working with a recruit with limited experience was also a factor.

209. I am alive to fact that police officers may encounter situations which are difficult and volatile. This was addressed by the Supreme Court of Canada in the very recent decision of *R. v. Stairs*, 2022 SCC 11, where the Court considered the issue of the authority to search pursuant to arrest as follows:

[74] When assessing police conduct, the reviewing judge must be alive to the volatility and uncertainty that police officers face — the police must expect the unexpected. This reality is inherent in the police’s exercise of their common law powers, as well as their statutory duties, including “the preservation of the peace, the prevention of crime, and the protection of life and property” (*R. v. Godoy*, 1999 CanLII 709 (SCC), [1999] 1 S.C.R. 311, at para. 15 (emphasis deleted), citing *Dedman v. The Queen*, 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2, at pp. 11-12; *Police Services Act*, R.S.O. 1990, c. P.15, s. 42). Given their mandate, “police officers must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing” (*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 16). A reasonable suspicion standard ensures that the police may carry out these duties, while also balancing the enhanced privacy in a person’s home.

210. At the same time, not every encounter between a police officer and a person under arrest or detention is dangerous. The facts of each case must be closely scrutinized.

211. I have carefully considered whether this evidence establishes a basis for the application of handcuffs to the Complainant or amounts to unnecessary force. This is a difficult decision because I do not doubt that the Complainant felt particularly vulnerable in all the other circumstances of her detention.

212. However, I have concluded that in the circumstances and for the reasons stated by the Member, the use of handcuffs in this instance did not amount to the use of unnecessary force. For these reasons I find this allegation to be unsubstantiated.

213. Finally, I turn to the allegation against the Member of Discourtesy by shouting and disrespectful comments he is alleged to have made to the Complainant, a misconduct pursuant to s. 77(3)(g) of the Police Act.
214. I have concluded that the evidence available in relation to this allegation appears insufficient to substantiate it. While it is understandable that the Complainant was upset by the circumstances of the Incident, particularly as she seems to view her detention by police to have been related to her transgender status (which indirectly it was), there is an insufficient evidentiary basis on which to conclude that the Member shouted at her, called her a liar, and referred to her transgender status in an unprofessional way. The Member was obviously surprised that the name he thought was an alias was her “deadname”. He seemed to genuinely believe that the Complainant was playing the “name game”, which is how he referred to what was transpiring. The difficulties the Member had in trying to identify her on the police databases, his repeated questioning of her as to her identity, and his references to her “deadname” undoubtedly caused her considerable distress. This distress has perhaps coloured her perceptions of how she was treated by the Member. However, the fact that he was stern and trying to deal with the situation does not amount to the misconduct of discourtesy.
215. Important to this determination is the evidence of the other police present; in particular, Cst. [REDACTED] and Cst. [REDACTED]. Cst. [REDACTED] evidence about the Incident is clear and reasonable concise. She noted relevant details and paid attention to the demeanor of the Complainant. Cst. [REDACTED] a self-identifying member of the LGBTQ community, who attended and solved the identity problem, was unlikely to behave in a disrespectful manner towards the Complainant and her transgender status. While the officers, including the Member, may have referred to it briefly within the Complainant’s hearing, there is insufficient evidence to support the complaint against him of discourtesy by shouting and making disrespectful comments to the Complainant.

Conclusion

216. On reviewing all the evidence in this matter, pursuant to s. 117(8)(d) of the *Police Act*, I am satisfied of the following regarding each allegation of misconduct alleged in relation to the Member:

1. Abuse of Authority - detaining the Complainant without good and sufficient cause – as specified in s. 77(3)(a)(ii)(B) is **not** substantiated;
2. Neglect of Duty - by failing to promptly and diligently advise the Complainant of her s. 10(a) and (b) Charter rights upon her detention – as specified in s. 77(3)(m)(ii) is **not** substantiated.
3. Abuse of Authority - by using unnecessary force on the Complainant by handcuffing or directing Cst. ██████████ to handcuff her without good and sufficient cause – as specified in s.77(3)(a)(ii)(A) is **not** substantiated; and
4. Discourtesy by shouting and disrespectful comments made to the Complainant – as specified in s. 77(3)(g) is **not** substantiated.

217. It follows that the taking of disciplinary or corrective measures are not required to be taken.

218. Having found, based on my review of the evidence and material before me, that none of the misconduct contained in the allegations is substantiated insofar as the evidence appears insufficient, pursuant to s. 117(11)(a) of the Act this decision “is not open to question or review by a court on any ground,” and (b) “is final and conclusive.”

Dated the 21st day of July, 2022.

The Hon. Elizabeth A. Arnold-Bailey

The Honourable Elizabeth A. Arnold-Bailey

Retired Justice of the British Columbia Supreme Court

