

June 7, 2021

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

AND

IN THE MATTER OF A REVIEW OF AN ALLEGATION OF MISCONDUCT AGAINST
CONSTABLE [REDACTED] OF THE VANCOUVER POLICE DEPARTMENT

NOTICE OF ADJUDICATOR'S DECISION

TO: Constable [REDACTED] Member

AND TO: Corporal [REDACTED] Investigating officer
c/o Royal Canadian Mounted Police
Professional Standards Section

AND TO: Mr. Clayton Pecknold Police Complaint Commissioner

Introduction

1. On September 14, 2020 the Office of the Police Complaint Commissioner received information from the Vancouver Police Department (VPD) pursuant to section 89 of the Police Act in relation to an incident that occurred on September 12, 2020. The VPD reported that a suspected car thief had been bitten and injured by a Police Service Dog. The dog's handler, Constable [REDACTED] the member, and other VPD constables located a stolen vehicle in the Downtown Eastside of Vancouver on September 12, 2020 around 09:00. The officers used their patrol cars to

surround the suspect who was seated in the driver's seat of a stolen BMW. Constable [REDACTED] exited his police vehicle and approached the passenger side of the stolen vehicle. The passenger side window was partially down. He drew his firearm and identified himself as a police officer. He advised the suspect, later identified as [REDACTED] he was under arrest and ordered him to get out of the vehicle. Mr. [REDACTED] would not get out despite the member repeatedly ordering him to do so. Mr. [REDACTED] shook his head and appeared to be acting erratically. Constable [REDACTED] then let his police dog out of the police vehicle and went to the passenger side window of the BMW. He again advised Mr. [REDACTED] he was under arrest and warned him he would release the police dog if Mr. [REDACTED] did not "give up". Constable [REDACTED] reached in through the open window, unlocked the passenger door and ordered the dog to apprehend Mr. [REDACTED]. Mr. [REDACTED] was bitten once on his upper right arm before he opened the driver's door and exited the vehicle. The dog jumped through the vehicle and bit Mr. [REDACTED] left leg. Constable [REDACTED] moved around the front of the BMW and took control of the police dog. Mr. [REDACTED] was handcuffed and taken into custody by other officers. Mr. [REDACTED] suffered cuts and puncture wounds to his arm and left leg. He was transported to hospital where he was treated for his injuries before being taken to jail.

2. The information provided to the Office of the Police Complaint Commissioner included a video of the incident taken by a civilian. The Commissioner reviewed the information and concluded, "the apparent immediate deployment of force by a Police Service Dog without the opportunity for the affected person to surrender is concerning and worthy of investigation." The Commissioner was of the opinion that the conduct alleged against Constable [REDACTED] if substantiated, would constitute misconduct and could potentially be defined as intentionally or recklessly

using unnecessary force on any person contrary to section 77(3)(a)(ii)(A) of the Police Act.

3. On October 6, 2020 the Commissioner ordered that the alleged misconduct be investigated by an external police force, pursuant to section 93(1)(a) and section 93(1)(b)(ii) of the Police Act. The RCMP conducted the investigation and RCMP Corporal [REDACTED] was assigned to investigate. The Commissioner also issued a Notice of Designation of External Discipline Authority pursuant to section 135(1) of the Police Act. [REDACTED] [REDACTED] of the Port Moody Police Department became the Discipline Authority.
4. On March 31, 2021, Corporal [REDACTED] submitted his Final Investigation Report to the Discipline Authority. Corporal [REDACTED] concluded that the evidence did not prove on a balance of probabilities that Constable [REDACTED] committed the alleged misconduct.
5. On April 19, 2021, [REDACTED], as the Discipline Authority, issued her decision pursuant to section 112 of the Police Act. [REDACTED] determined that the evidence in the Final Investigation Report did not appear to substantiate the allegation pursuant to section 77(3)(a)(ii)(A) of the Police Act.
6. The Police Complaint Commissioner reviewed the allegation and the alleged conduct and considered that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect.
7. On May 17, 2021 the Police Complaint Commissioner appointed me to review the investigating officer's report, the evidence and the records pursuant to section 117 of the Police Act.

Section 117

8. The statutory authority governing this review is set out in Section 117 of the Police Act. If, on review of a discipline authority's decision under section 112(4) or 116(4) that conduct of a member or former member does not constitute misconduct, the Police Complaint Commissioner considers that there is a reasonable basis to believe that the decision is incorrect, the Police Complaint Commissioner may appoint a retired judge recommended under subsection (4) of this section to do the following:
 - (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.

Section 117(6) The Police Complaint Commissioner must provide the appointed retired judge with copies of all reports under sections 98, 115 and 132 that may have been filed with the Police Complaint Commissioner before the appointment.

Section 117(7) Within 10 business days after receiving the reports under subsection (6), the retired judge appointed must conduct the review described in subsection (1)(a) and notify the complainant, if any, the member or former member, the police complaint commissioner and the investigating officer of the next applicable steps to be taken in accordance with this section.

Section 117(8) Notification under subsection (7) must include:

- (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,
- (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 requires 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, and
- (e) if subsection (10) applies, a statement that includes the effect of subsection (11).

Section 117(9) If, on review of the investigating officer's report and the evidence and records referenced in them, the appointed retired judge considers that the conduct of the member or former member appears to constitute misconduct, the retired judge becomes the discipline authority in respect of the matter and must convene a discipline proceeding, unless section 120 (16) applies.

Section 117(10) If, on review of the report and the evidence and records referenced in it, the retired judge decides that the conduct of the

member or former member does not constitute misconduct, the retired judge must include that decision, with reasons, in the notification under subsection (7).

9. A review of the Section 117 case law and the case cited as 2016 BCSC 1970 defines my role as the adjudicator. I must review the material delivered under subsection 117(6) and determine whether or not the conduct of the member appears to constitute misconduct. The law is clear that, because the adjudicator may become the discipline authority in relation to discipline proceedings, my job is not to reach conclusions about the conduct of the member; rather, it is to assess only whether it appears to constitute misconduct.
10. The review is a paper-based process of the record provided by the Commissioner. There are no witnesses or submissions. Section 117(1)(b) directs the adjudicator to make “her or his own decision on the matter.”

Reports and Material Considered

11. Pursuant to sec. 117 (6) the Commissioner provided the following materials for my review.
 - (a) Final Investigation Report of Corporal [REDACTED] and attachments described as: progress reports, OPCC notices, civilian statement, police officers’ statements, supporting documents, video and legislation/police policy/case law.
 - (b) Additionally, I have considered the Notice of Appointment of Retired Judge dated May 17, 2021, and the relevant case law and statutory authority.

Section 117(8)(a) Description of the Complaint and Conduct of Concern

12. The conduct of concern relating to Constable [REDACTED] arose out of the arrest of [REDACTED] on September 12, 2020. The member was one of several VPD constables who were dispatched to investigate a recently stolen motor vehicle. Constable [REDACTED] saw the vehicle, followed it and with the assistance of other officers “boxed and pinned” the stolen car. Mr. [REDACTED] was in the driver’s seat and refused Constable [REDACTED] commands to surrender and get out of the car. Constable [REDACTED] who is a VPD dog handler, released his police dog [REDACTED] into the vehicle. Mr. [REDACTED] was bitten on his arm and leg during the arrest. The conduct of concern here is whether Constable [REDACTED] intentionally or recklessly used unnecessary force against Mr. [REDACTED] when he deployed his police dog.

Section 117(8)(c) - Allegation of Misconduct Considered

13. Having reviewed the evidence referenced in the Final Investigation Report, I identify the following allegation of misconduct against Constable [REDACTED] that could appear to be substantiated:
 1. Abuse of authority by intentionally or recklessly using unnecessary force on Mr. [REDACTED] contrary to section 77(3)(a)(ii)(A) of the Police Act.
14. I am mindful of the limitation to the definitions of misconduct in Section 77 found in Section 77(4):

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

Section 117(8)(d)(i) Whether the Evidence Appears Sufficient to Substantiate the Allegation

15. Corporal [REDACTED] as part of his investigation, reviewed the Order for External Investigation from the Office of the Police Complaint Commissioner. He interviewed Constables [REDACTED] [REDACTED] [REDACTED] and [REDACTED]. He also interviewed [REDACTED] and he viewed the video of the arrest of Mr. [REDACTED]. This material is referred to in his Final Investigation Report and forms part of the record forwarded to me by the Commissioner.
16. Having reviewed the Record I agree with Corporal [REDACTED] that, for the most part, the circumstances leading up to the arrest of Mr. [REDACTED] are not in dispute. In his Final Investigation Report at paragraph 60-74 he writes:
 - a) Most of the details of the events that transpired on September 12, 2020, were largely not disputed. All parties, including [REDACTED] agreed that he was driving a freshly stolen BMW X4. In the previous two days, [REDACTED] had been on a spree stealing vehicles and keys from dealerships, which police were investigating when they were told of the fresh theft of a BMW X4. The member investigating was told of a fresh theft of a BMW X4 and immediately broadcast the GPS location and description the stolen BMW X4.
 - b) Constable [REDACTED] was aware that a suspect was involved in a few recent thefts of vehicles from dealerships. Constable [REDACTED] was near the area of the GPS location broadcast by the investigating member and fairly quickly found the stolen BMW X4 that matched the description provided over the police radio. He

observed that the stolen vehicle had a mismatched license plate attached for a white Jaguar and not the black BMW X4 it was attached to.

- c) Based on the dealership's accurate GPS location of the vehicle, the rare style of a BMW X4 and the fact that it had a mismatched Jaguar license plate for a white vehicle and not the black one, Constable [REDACTED] quickly and correctly identified that he had located the freshly stolen BMW X4 parked roadside on Abbott Street, between Pender and Keefer.
- d) Constable [REDACTED] initial plan was to covertly watch the stolen vehicle while resources were gathered to box and pin the stolen vehicle where he located it. This initial plan was thwarted because as he was getting in position, the stolen vehicle started driving northbound on Abbott Street.
- e) Constable [REDACTED] followed the stolen vehicle and broadcast the vehicle's current location and description to other members on the police radio. Sergeant [REDACTED] gave the approval to "take down" the vehicle at Hastings Street. The stolen vehicle however continued a short distance further and turned into an open air parking lot off of Abbott Street just north of Hastings Street. This parking lot was less than two full blocks from where Constable [REDACTED] first located the vehicle and as such, there was not a lot of time to gather more resources.

- f) The stolen vehicle drove around the open air parking lot and Constable [REDACTED] took a position to box the vehicle in from the front, while Constable [REDACTED] boxed the vehicle in from the rear.
- g) Constable [REDACTED] exited his vehicle after turning on his emergency lights and drew his firearm pointed it at the driver because of the danger posed by a driver in a stolen vehicle to the police and public. Constable [REDACTED] said he gave commands to the driver for 15 to 20 seconds while he had him at gun point, before lowering his use of force and transitioning to his police dog.
- h) While Constable [REDACTED] had the driver at gun point, he was focussed on him and said the driver was in some sort of emotional crisis, flailing his arms, shaking his head, yelling and screaming. Constable [REDACTED] said [REDACTED] was not compliant because he did not exit the vehicle with his hands up as commanded while he had him at gun point. The [REDACTED] video does not capture this portion of the incident, as the recording started as Constable [REDACTED] had transitioned to retrieving PSD [REDACTED] and was putting his firearm away. As such the recording did not capture the portion of the incident he had his firearm drawn.
- i) [REDACTED] said in his statement that he thought the "cops gave him the BMW," and said "Yeah I was kind of screwed up" when asked to clarify why police would give him a stolen BMW, and following this he said "I don't know."
- j) As the driver of the stolen vehicle did not exit the vehicle, Constable [REDACTED] left other police officers with their guns drawn, while he retrieved his Police Service Dog, [REDACTED] from the back of his vehicle.

Constable's [REDACTED] and his passenger Constable [REDACTED] exited the rear box police vehicle and approached the stolen vehicle along with Constable [REDACTED]. Constable [REDACTED] had her firearm drawn and took up a position on the passenger side of the vehicle and covered Constable [REDACTED] from behind him while Constable [REDACTED] went to the driver side of the stolen vehicle.

- k) Constable [REDACTED] said he gave further commands to driver of the stolen vehicle through the open passenger window and did not receive compliance from him, so he opened the passenger door and PSD [REDACTED] entered the vehicle. In Constable [REDACTED] statement he said that he could not hear what the exact commands that Constable [REDACTED] gave, but described the commands saying "it was a loud tone.....calm and loud.....not frantic.... it felt like it was in the right kind of cadence, length as police, you're under arrest.....show me your hands or get out the door. It felt like it was nice, short, short and simple.....there was pauses in between every time [REDACTED] (Constable [REDACTED] spoke. So it sounded like he was saying something, giving a couple pregnant pauses, waiting for a response, and then saying something else."
- l) Constable [REDACTED] reached into the vehicle and unlocked the passenger door and let PSD [REDACTED] enter the vehicle while holding [REDACTED] leash. [REDACTED] reached and grabbed a cup of water and moved it to his left hand. PSD [REDACTED] entered the vehicle through the opened passenger door. PSD [REDACTED] lunged towards [REDACTED] and Constable [REDACTED] tugged on the leash for several seconds. The video is not conclusive, however Corporal [REDACTED] believed that at about the 21 second mark, water is thrown towards the passenger side where PSD

█ was. Less than one second later █ exits the vehicle from the driver side, having been bitten on his right arm.

- m) From the video exactly when █ was bit on his right arm can not be conclusively determined. Constable █ said that he gave the command to bite and then █ threw the cup of water towards PSD █. In his statement █ did not remember being bit while in the vehicle and thought that Constable █ let PSD █ bite him on the arm after he exited surrendered and laid on the ground. From █ single four stitch wound to his right upper arm, Corporal █ concluded that he was likely bitten once while in the vehicle, which caused him to exit the vehicle to get away from the Police Dog after that initial bite. Corporal █ believes the most likely scenario was that █ threw the water towards PSD █ with his left hand in reaction to being bit on his right arm. Corporal █ would expect the injuries to █ upper right arm to be more severe, like he received to his lower left leg, had PSD █ bit him more than once, when he was still in the vehicle.
- n) █ quickly exited the driver's door and almost as soon as his feet hit the pavement, PSD █ bit him again, this time on the lower left leg. █ hopped south and then turned back toward the vehicle and laid face down on the ground. PSD █ maintained █ bite on his leg the entire time.
- o) Constable █ transitioned around the vehicle and gained control of PSD █ while the other VPD members moved in and handcuffed █. An ambulance was immediately called for █ and he received treatment for his injuries in the hospital.

17. There are a few disputes and disagreements regarding some of the circumstances surrounding the arrest. The observations and recollections of Constable [REDACTED] differ from those of Mr. [REDACTED]. They disagree on whether Mr. [REDACTED] surrendered before police dog [REDACTED] was deployed and what, if anything, Constable [REDACTED] said to Mr. [REDACTED]. As well, they disagree on whether Mr. [REDACTED] threw water at the police dog, where Mr. [REDACTED] was when he was bitten on the arm and whether he was fleeing the police or simply trying to get away from the dog.
18. In a Dog Application Report dated September 17, 2020 and in a subsequent interview with Corporal [REDACTED] Constable [REDACTED] stated that he approached the BMW, initially with his firearm drawn, and commanded Mr. [REDACTED] to surrender. He said that when Mr. [REDACTED] did not respond he retrieved his police dog, opened the passenger door and warned Mr. [REDACTED] to give up. Instead, Mr. [REDACTED] moved his hand towards the console. Constable [REDACTED] stated he feared Mr. [REDACTED] may be reaching for a weapon or may attempt to drive away and he released [REDACTED] into the BMW.
19. Constable [REDACTED] in his report, wrote;

I then exited my police vehicle, drew my firearm, and pointed it at the driver of the Vehicle. I gave loud and lawful verbal commands that I was the police and that he was under arrest and to show me his hands. I stepped back to the rear of my police vehicle and then transitioned by holstering my firearm and retrieving PSD [REDACTED] from the back of my police vehicle.

ARREST OF ACCUSED

PSD [REDACTED] already had her 20 foot tracking line attached to [REDACTED] body harness from a previous incident and I began to move up toward the Vehicle. I again gave the driver lawful commands, telling him he was under arrest, to show me his hands, and to step out of the car. He refused to obey my lawful commands. I moved closer to the Vehicle and saw that it appeared to be in park and/or secured in the box and pin. I reached in through the partially open passenger side window and hit the door unlock button.

Based on my experience, I know that the occupants of stolen vehicles will often carry weapons such as knives and firearms to use in the commission of secondary offences. In addition, I know that drivers of stolen vehicles will frequently attempt to evade police apprehension by driving in an erratic and dangerous manner and that such actions would jeopardize the safety of dozens of pedestrians in the parking lot and at the adjacent busy intersection of W Hastings St and Abbott St. I was also aware that the driver of the Vehicle was arrestable for possession of stolen property over \$5000 and that he had been given multiple opportunities to surrender to police and comply with my lawful commands and those of other officers to exit with his hands up.

I opened the passenger side door and saw the driver, later known to me as [REDACTED] [REDACTED]. As I did, I saw that [REDACTED] in an erratic, unexpected, and potentially dangerous move, immediately reached toward the center console of the car. I did not know what he was reaching for and feared it may be a weapon or other item to aide in escape. I immediately gave PSD [REDACTED] the command to apprehend [REDACTED]

***PSD [REDACTED] CONTACT WITH [REDACTED]

PSD [REDACTED] entered the Vehicle through the open passenger side door and bit [REDACTED] upper right arm.

[REDACTED] immediately reached again for the center console, grabbed a full cup of ice water, and threw it on PSD [REDACTED] face, causing [REDACTED] to release [REDACTED] bite.

[REDACTED] then opened the driver's door and began to flee southbound, away from the Vehicle.

I again gave PSD [REDACTED] the command to apprehend [REDACTED] and [REDACTED] climbed over the center console, out the open driver's side door, and caught up to [REDACTED] approximately 5-10 feet from the Vehicle. PSD [REDACTED] bit [REDACTED] in his left calf, causing him to fall to the ground. I moved around the Vehicle and grabbed hold of PSD [REDACTED] collar while asking patrol to take control of [REDACTED] hands and place him in handcuffs. Once members grabbed hold of [REDACTED] hands and began placing him in custody, I removed PSD [REDACTED] from the bite and placed [REDACTED] back in my police vehicle.

20. On December 8, 2020, Corporal [REDACTED] interviewed Constable [REDACTED]. Constable [REDACTED] was asked to describe the circumstances surrounding the arrest. The member stated:

Uh, he's just non-compliant. Uh, I don't really uh, and I don't know if it was as a result of um, just not wanting it to end, like just not wanting to be arrested. I don't know if it was uh, a mix of various things. He did seem to be in some way um, drugged uh, drug

affected at the time. That's what it kinda seemed to me, like he was so erratic. Um, but just non-compliant. Uh, resisting uh, police commands to get out of the car, the simple commands just to open his door with his hands up. And given how long, that was another thing that stood out to me is people resist in that like first one second, two second, three second, but this went on for like fifteen to twenty seconds. And for him to continually decide no, I'm just gonna stay here in this car, it's an extremely rare thing for someone to be resistant um, for that long. It's not something I, I've seen very commonly.

Q: When you're referring to that fifteen to twenty seconds, is that kinda the, the point you had him at gunpoint when he was not complying before you transitioned to your dog?

A: Correct. Sorry, yes. That was the, my initial getting out of the car and assessing that this was um, yeah, something that I needed to uh, code five him at, and it wasn't so much a dog um, uh, it wasn't so much something that my first instinct was to re-, retrieve my dog. It was that first twenty seconds of dealing with him with my gun out.

Q: And when you, when that didn't gain compliance, is that uh, the point you, you decided to transition to the dog?

A: Yeah. When I saw that communication, my presence um, the, the uh, presentation of lethal force, when I saw all these things weren't working uh, that's when I decided yes, to transition 'cause I have seen in my limited experience um, significant compliance with the

dog when it's appropriate. I see generally will, will give up and uh, safely be taken into custody when presented with the dog.

Q: Right. And at, at any point did he give you an, any indication that he was uh, complying or giving up based on -

A: Oh, no.

Q: - his behaviour with his hands, putting his hands up, verbally saying anything?

A: No. No, if anything like the only uh, and I also think I mentioned it earlier, the only thing I ever saw with him, other than his erraticness [SIC], like at one point uh, he like kinda shook his head as if like he was, he heard me and he was saying like no, no, no like he's not going to come out. Um, so no, he never gave me any indication that okay, okay, I just need a second to get out. There was nothing like that. It was, it was just completely erratic. Or the times when he did focus on me, it was obviously ignoring my commands or shaking his head no like he wasn't going to comply with my commands.

Q: Right. Um, and then when you did transition to uh, your dog uh, I think you've mentioned it, but just to reiterate it, you, you did give him further commands before uh, giving your dog the command to bite him.

A: Yeah. So I, I opened the door and uh, I started giving commands to him again from the passenger side. Um, and to me, these things are, they're quite patterned. You kinda get into a rhythm. You give

these commands, so if you give these uh, uh, announcements so many times you know, Vancouver Police, this building is gonna be searched by a police dog yadda yadda yadda or it's Vancouver Police, you're under arrest, get on the ground now and you won't be hurt or else I'll send the dog. All these sorts of things, they start to get very patterned in your head um, always saying you know, or else I'll send the dog, or else I'll send the dog. Vancouver Police, you're under arrest. In this case, when I had given him that twenty seconds of giving him commands as well as telling him at, at the end of those commands that I was gonna be sending the dog in if he didn't comply, when I brought the dog back and opened the door uh, I was giving the commands again and that was the point when he reached for the centre console in the middle of my commands. I can't, I can't recall uh, what I said, but also when I was reaching into the car when I was like pressing the unlock button um, I, I want to say I said like uh, oh man, I can't remember. It was something, something to the effect of like um, you don't uh, don't uh, you don't want my dog coming in. Just give up, buddy. Or something like that. I was telling him too through, as I was trying to unlock the door. The exact words I can't remember, but it wasn't like your official police command. And then when I opened the door, that was when I was thinking for sure, okay, here we go, now he's gonna give up. I started saying Vancouver Police, you're under arrest or whatever I was saying, and he reached for the centre console, interrupted me and I couldn't let that happen so that's when I deployed my dog.

Q: Okay. And you describe this cup as, as kind of a tall clear water type cup.

A: Yeah.

Q: Okay. Um, and at the point when you opened the door to give him more commands uh, did you feel it was impractical to hold off for longer?

A: Y-, sorry, like when I -

Q: Like to...

A: - opened the door and I was giving him commands, did I feel it was impractical to...

Q: To hold off longer before deploying the dog. Was there um...

A: In uh, in, in that moment...

Q: Any, any tactical reason...

A: So like I said, the, the, the thing that gave me impetus to deploy my dog in addition to the totality of circumstances, the, the main trigger was that he reached toward the, the gear shifter um, and or the centre console. So to me to try and negotiate or to try and give further commands would've meant that yes, the car very well could've went mobile and uh, and killed or maimed myself, my dog, other people, other officers. So yeah uh, to try and stay there and give further commands or, or get into more of a negotiation sort of scenario, I felt as though um, was not practical after he did that.

21. Later in the same interview with Corporal [REDACTED] Constable [REDACTED] explained why he felt it necessary to deploy the police dog. Constable [REDACTED] said:

A: [REDACTED] kinda goes from outside the car to wanting to get into the car, and you can see [REDACTED] hit the line tension that I have on [REDACTED]. So that was when I was trying to now tell him like okay, this is done, buddy. Like it's the Vancouver Police, you're under arrest, get out of the car or else you're gonna get bit by my dog. Um, and I stopped [REDACTED] up from going in because I wanted to give him that one last chance to actually surrender and to understand the reality of what's going on. Sometimes maybe in a drug-induced state he wouldn't completely understand until the dog is presented right to him so I wanted to ensure that he had every uh, possible chance to surrender. So at the seventeen-second mark when you see my dog lunge and then kinda get punched back from the line tension, that's when I'm issuing my, another police challenge.

Q: Right. And then um, if I let it play a few seconds further uh, is that when the, kinda that eighteen, nineteen, twenty, twenty-one seconds, is that when [REDACTED] uh, bites him in the right arm?

A: Yeah. So eighteen second, I think you see me pointing to um, Constable [REDACTED] um, like right as [REDACTED] enters the car [REDACTED] engages on his right arm. I immediately tell Constable [REDACTED] to go around um, to get to the driver door and to assist in taking him into custody. Um, so around the, I think you see me almost kinda pull back sharply around the twenty-second mark.

Q: Yeah.

A: Uh, if you kinda let it play real time um, somewhere around there is when he grabs the water and throws it on [REDACTED] So maybe around, or kinda keep going back and forth, yeah, maybe around the nineteen to twenty-one-second mark is the point at which he throws water um, and begins to try and flee.

Q: Okay. And then um, he's kinda out of the vehicle at about the twenty-two-second mark. Uh, and he's the one who opened the driver's door for, from what you saw?

A: Yeah. It seemed to me like uh, um, Constable [REDACTED] was going to go and do it, and right as he got there he was kinda surprised the door flung open. Uh, and yeah, the, the uh, uh, Mr. [REDACTED] was the one who reached through the door and popped it open and tried to take off.

Q: Right. Um, and then in your report you had said he uh, like your dog had released the bite and then uh, reengaged with him a short distance away.

A: Yes.

Q: Um, and like I was saying, when I watched the [REDACTED] video it appeared that it was all that he was um, uh, the bite was still on his left leg, but when I watched my, the enhanced version, there was a split-second gap at about the twenty-two-second mark where uh, your dog did not have contact and then reengaged when he was just outside of the driver's side.

A: Yeah, exactly. So, and I mean, even just the simple mechanics of where he was bit on the leg um, I mean you can't really bite someone on the bottom of their left leg when they're seated in the driver's seat from the passenger side. So yeah, ■■■ bit him on the arm. ■■■ got the water thrown on and then you can kinda see he, just as he steps out of the car, just as both feet are kinda hitting the ground and he's trying to run away, that's when ■■■ manages to, to get him again -

Q: Right.

A: - right around the twenty-three or so second mark.

Q: Right. And did you think he was trying to escape custody? Escape from the dog? What was your, your perception or your belief at that point?

A: Yeah, my subjective believe based on the fact that he had, he had accessed the water, thrown it on ■■■ and had that brief moment in time where he was actually free of the dog bite, my belief was that he was trying to now run away from the car. Um, that maybe he didn't quite in that moment understand that there was other police there, that maybe it was just me, and he was thinking okay, I'm gonna run outta here uh, and get away. And if he did, and I were to have to try and re-arrest him, then at that point now he's out into Abbott and Hastings, I have my dog, I'm not able to arrest him because I can't deploy my dog into traffic like that. It wouldn't be safe. It wouldn't be safe for the public. So my belief was that he was trying to run away, and I knew that it was imminently important

that we get him into custody at that moment before he's able to get away.

Q: Right. And, and the reason you couldn't deploy your dog is because of the other pedestrian traffic? Would, would it be a danger to other pedestrians that your dog might bite one of them mistakenly?

A: Yeah. So at the point when he's at his kinda apex, his furthest point away from the car, if my dog were still to be in the car and he were to be in full sprint um, running towards Abbott and Hastings, my concerns would be that he would uh, that my dog would in fact catch up to him, but that he would then fall in traffic and then he could be injured, my dog could be injured. My concerns would be that my dog would uh, he would get across the street and my dog would get hit, or that uh, in the process of deploying [REDACTED] [REDACTED] could um, for whatever reason, any number of circumstances could happen where [REDACTED] could perhaps engage on another police officer or engage on another pedestrian in the area. Um, so yeah, that was kinda what was going through my head.

Q: Right. And um, so once he kind of falls to the ground um, if I let the video play say through the, all the way to the thirty-five-second mark after [REDACTED] has kinda maintained control and he's gone to ground, you've come around to take control of [REDACTED] at that point?

A. Yes.

22. On December 15, 2020, Corporal [REDACTED] interviewed Mr. [REDACTED] Mr [REDACTED] recalled, without having viewed the video, the circumstances of his

arrest. He told the investigator he did not hear the dog handler issue any commands or warnings before the police dog entered the car. He said that he got out of the vehicle to avoid being bitten, that the officer pulled the dog out of the car, came around the car and let the dog attack and bite him as he lay on the ground. Mr. [REDACTED] said he knew the police were there, that he was boxed in and that he had surrendered. He stated:

Q: So from your uh, your perspective, what did you do to surrender?

A: I was on the ground. Like...

Q: Before that. In the car, so I just, I (INDECIPHERABLE)...

A: In the car I would've been like this. In the car, in the car when the cop had me blocked in he didn't even have to have the dog. Like if he would've put his car in park and opened his door and opened the BMW door and been like, you know what I mean? I would've been like alright, fuck. You know what I mean? I was already surrendered. The car was in park. I was surrendered.

Q: So you would've put your hands up, but um...

A: I would've put my hands up if the dog wasn't (INDECIPHERABLE) wasn't there to bite it off.

Q: But you didn't put your hands up. Like did you give a different indication to him that you were (INDECIPHERABLE)?

A: If I would've gone like this the dog would've bit me in the hand.

Q: Okay. Fair enough. No, no.

A: Yeah.

Q: But did you have any other way to communicate to the police that you were surrendering?

A: Yeah, the fact that I didn't run away in the BMW. Like I put it in park. Like I was surrendered. I put the car in park. I was surrendered.

Q: Right.

A: Like the fact that he was able to come over to the door and open the door and let the dog in would've let him know that I was surrendered. Like I didn't open the door and start running.

Q: Right.

A: You know what I mean?

Q: Right. So the fact that you weren't fleeing was -

A: Right.

Q: - your indication to him that you had surrendered.

A: Right.

23. During the interview Corporal [REDACTED] played the video for Mr. [REDACTED]. After watching the video which shows the police dog pursuing Mr. [REDACTED] out the driver's door and biting his left leg, Mr. [REDACTED] said he got out of the car because the dog was after him. He stated:

Q: So after that point, so the dog had been presented in the passenger side and then came through the driver's side.

A: Oh, is that what he did?

Q: So you can...

A: Oh, I thought he went around.

Q: I'll let it play there.

A: Oh, that's what he did.

Q: So you went -

A: I didn't know that.

Q: - a little bit out onto -

A: Yeah. That's -

Q: - the, the sidewalk.

A: - that's, that's why I didn't surrender. That's why I didn't put my hand up because the dog was right there. That's what he

did. I thought he went from around and fuckin' he let the dog go on me.

Q: So I know, I know in your memory, and I'm, I'm not saying that -

A: Yeah.

Q: - that you like, I understand memory -

A: Yeah, he didn't say anything.

Q: - is the way it is, but you didn't spill out the door and just lay on the ground.

A: Yeah.

Q: You came out and, and -

A: Oh, that's what happened.

Q: - made your way a bit out of there.

A: Yeah.

Q: So what were you thinking when you got out of the car door?

A: That the dog's fuckin' after me. F-...

Q: Why, why were you kind of running away here?

A: 'Cause the dog was after me, man.

24. In the Final Investigation Report, the investigator carefully analyzed the issue of whether the member used unnecessary force against Mr. ██████████. Corporal ██████████ watched the video and summarized his impressions and provided a time line of the events as they unfolded on the video. He considered the case law, the relevant Vancouver Police Department Use of Police Service Dog policy and the British Columbia Provincial Police Standards, and the National Use of Force Model. He reviewed the member's conduct having regard to section 25(1) of the Criminal Code. Corporal ██████████ concluded that Constable ██████████ was acting in the lawful execution of his duty, that he acted on reasonable grounds to believe force was necessary and that he used no more force than was necessary.
25. In OPCC File No. 2016-11867 Adjudicator Carol Baird Ellan reviews the test to be considered under section 25. At paragraph 32 she states:

"The investigating officer considered the member's actions from the point of view of whether the arrest complied with Section 25(1) of the Criminal Code. In the recent case of *Akintoye v White*, 2017 BCSC 1094 Fleming J. considered the test under Section 25. She stated:

[97] Section 25(1) is not a source of extra police powers. Instead it operates to justify the use of force when a police officer's conduct is permitted pursuant to a separate statutory or common law power.

[98] The defendants accept that under s. 25, they bear the onus of proving on a balance of probabilities, three requirements

described in *Chartier v. Graves*. [2001] O.J. No. 634 at para. 54(S.C.), as follows:

1. the officer's conduct was required or authorized by law in administering or enforcing the law;
2. he or she acted on reasonable grounds in using force: and
3. he or she did not use unnecessary force.

[99] The third requirement focuses on the level or degree of force used.

[100] In *R v. Nasogaluak*, 2010 SCC 6 (CanLII), the Supreme Court of Canada specified the degree of "allowable" force is constrained by the principles of proportionality, necessity and reasonableness, cautioning: "courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences" (at para. 32).

[101] A subjective-objective or modified objective test is applied to assess the reasonableness of a police officer's belief that the force used was necessary: he or she must subjectively believe the force used was necessary and that belief must be objectively reasonable in all the circumstances.

[102] Recognizing police officers often engage in dangerous and demanding work that requires them to react quickly, they are not expected to measure the level of force used "with exactitude". Put another way, they are not required to use the least amount of force necessary to achieve a valid law enforcement objective. Although entitled to be wrong in judging the degree of force required, an

officer must act reasonably (Crampton v. Walton, 2005 ABCA 81 (CanLII) at para.22). The common law accepts that a range of use of force responses may be reasonable in a given set of circumstances (Bencsetler v. Vancouver (City), 2015 BCSC 1422 (CanLII) at para. 153). The reasonableness, proportionality and necessity of the police conduct are assessed in light of those circumstances, not based on hindsight.”

26. Section 117(1)(a) and (b) of the Police Act requires me to consider Corporal [REDACTED] report and the evidence and records and then make my own decision on the matter. I agree with the comments of the Adjudicator Baird Ellan in OPCC 2016-11867 where she said:

“While my task is not to review his decision, rather to consider the issues and reach my own conclusion, I find it instructive to consider the matter from the perspective of a trained officer, particularly in assessing the reasonableness of the member’s response from a policing perspective. In doing so I nonetheless bear in mind that the test has an objective component”.

27. The evidence and the records would appear to support the member’s subjective belief that he needed to prevent Mr. [REDACTED] from fleeing in the stolen vehicle. Constable [REDACTED] said Mr. [REDACTED] was acting erratically, would not respond to commands and was reaching down towards the console as though he might be reaching for a weapon or attempting to put the stolen car in motion. Constable [REDACTED] said that his best option was to use intermediate force, in this case, deploying his police dog to apprehend Mr. [REDACTED]. Constable [REDACTED] stated that using his police dog was reasonable and necessary and complied with the policies of the VPD and the British Columbia Police Standards.

28. The member's subjective belief regarding his use of force is not however determinative of the matter. Corporal [REDACTED] stated in the Final Investigation Report that a central issue to be considered was "whether Mr. [REDACTED] was given an opportunity to surrender before Constable [REDACTED] deployed the Police Service Dog." Constable [REDACTED] stated that Mr. [REDACTED] had multiple opportunities to surrender but did not. Mr. [REDACTED] told Corporal [REDACTED] he surrendered as soon as the police arrived. It is important to consider that the apprehension of Mr. [REDACTED] occurred very quickly. Approximately 90 seconds elapsed from the time Constable [REDACTED] got out of his vehicle with his firearm pointed at Mr. [REDACTED] to Mr. [REDACTED] being handcuffed. Constable [REDACTED] and the other police officers described the situation as "highly dynamic and dangerous". Guns were drawn, several members of the public were nearby, and Mr. [REDACTED] was injured. I accept that the incident would have been emotionally upsetting for everyone involved. It is not surprising then that the member's and Mr. [REDACTED] subjective impressions of what occurred are different. Those perceptions may eventually be resolved following an assessment of the credibility and reliability of their testimony.
29. While the subjective beliefs of the member must be considered, this allegation of misconduct must be assessed objectively to determine whether what the member believed and did was reasonable. In OPCC File No. 2016-11505 the Adjudicator discussed the meaning of recklessness in the context of the Police Act. He said:

I would add that the use in the Police Act of the word "reckless" (in both of the s. 77 subsections at issue here) is consistent with the fact the Police Act disciplinary matters involve an objective component. That is to say, the assessment of a misconduct allegation is not

dictated by the individual officer's personal intention of "good faith", rather it also involves an objective question as to the reasonableness of what the officer believed and did. While an officer's subjective belief will always be relevant, and may mitigate a misconduct allegation, the analysis does not start and end with the subjective component. It is necessary to assess objectively whether what the officer believed and did was reasonable.

30. After a consideration of the evidence, it appears there are questions as to whether it was objectively reasonable for Constable [REDACTED] to conclude that Mr. [REDACTED] was not surrendering and continued to pose a serious enough risk to justify the force used upon Mr. [REDACTED]. As well, it appears there are questions whether Constable [REDACTED] use of force complied with the policies and standards regarding the use of police service dogs and whether that use was reasonable and necessary. The evidence objectively considered raises questions as to whether the member recklessly used unnecessary force in apprehending Mr. [REDACTED].
31. The issue to be determined at this stage is whether the evidence appears sufficient to substantiate misconduct. Based on the materials and evidence, I find the evidence appears sufficient to substantiate the allegation that Constable [REDACTED] recklessly used unnecessary force.

Conclusion and Next Steps

32. After reviewing the Final Investigation Report and the evidence and records I am satisfied that the conduct of the member appears to constitute misconduct.
33. I hereby notify the relevant parties of the next steps pursuant to sections

117(7) and (8) of the Police Act.

- a) Considering the factors in section 120 of the Police Act, I am willing to offer the member a prehearing conference.

 - b) I have determined that the range of disciplinary or corrective measures being considered for Constable [REDACTED] includes:
 - i. Suspend the member without pay for not more than 30 scheduled working days.
 - ii. Require the member to undertake specified training or retraining.
 - iii. Give the member advice as to his conduct
34. The member may, pursuant to section 119(1) file with the discipline authority a request to call and examine or cross-examine one or more witnesses listed in the Final Investigation Report. Such a request must be made within 10 business days of this notification.

Dated at Victoria British Columbia

June 7, 2021

David Pendleton

David Pendleton
Adjudicator