Office of the
Police Complaint Commissioner

British Columbia, Canada

CONCLUSION OF PROCEEDINGS
Pursuant to section 133(6) of the *Police Act*, RSBC 1996 c.367

OPCC File 2020-18524
March 13, 2023

To: Constable [redacted] (Member)
c/o Vancouver Police Department
Professional Standards Section

And to: Mr. David Pendleton (Discipline Authority)

And to: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section

The Office of the Police Complaint Commissioner (OPCC) completed its review of the decision issued by the Discipline Authority pursuant to section 133 of the *Police Act* ("Act") in this matter.

1. *Abuse of Authority*, pursuant to section 77(3)(a)(ii)(A) of the *Police Act;* specifically, unnecessary force relating to the deployment of his police dog that bit and injured a suspected car thief on September 12, 2020.

   Discipline Proposed – Written Reprimand

After careful review of the discipline proceeding and a written request for a Review on the Record received from [redacted] on behalf of the member on February 9, 2023, I have determined that there is not a reasonable basis to believe the decision of the Discipline Authority is incorrect and that a Public Hearing or Review on the Record is not necessary in the public interest.

The member submits that the retired judge did not refer, or give proper notice to, five principles from *R. v Kempton* 2022 BCPC 21. With regard to that submission, I note that *Kempton* essentially re-states the principles cited by the Discipline Authority at paragraph 18 of his s. 125 reasons ("Decision"). I am satisfied that the Discipline Authority took account of those principles in that he stated at paragraph 25 that his finding does not demand perfection from the member.

Clayton Pecknold
Police Complaint Commissioner

5th Floor, 947 Fort Street
PO Box 9895 Stn Prov Govt
Victoria, British Columbia V8W 9T8
Tel: (250) 356-7458 Fax: (250) 356-6503

Toll Free 1 877-999-8707 ⌗ Website: www.opcc.bc.ca

The member's submission also raised three interrelated concerns regarding the appearance of a reasonable apprehension of bias. First, the member observes that the retired judge appointed under s. 117 to conduct a review became the discipline authority who presided over his discipline hearing. In support of this, the member cites the Supreme Court of Canada's decision in *2747-3174 Quebec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 ("*Régie*"). Following from this position as I understand it, the member submits that Retired Judge Pendleton's decision is arbitrary, as it is distinct from a decision made earlier in the disciplinary process. Finally, the member submits that, because I issued the s. 117 decision appointing Retired Judge Pendleton, a denial of his request for a Review on the Record would also raise a reasonable apprehension of bias.

We have carefully reviewed the submissions, the provisions of the *Police Act* and the materials gathered in the discipline proceeding. I am not satisfied the issues raised regarding the appearance of a reasonable apprehension of bias establish a reasonable basis to believe Retired Judge Pendleton's findings are incorrect nor do I consider those arguments to establish the need for a Review on the Record in the public interest. The reasonable apprehension of bias that is said to arise stems from the language of the *Police Act* itself. That is, the steps taken by Retired Judge Pendleton are specifically contemplated by the Act. Section 117(9) of the *Police Act* requires the s. 117 retired judge to become the discipline authority if, on review of the materials, they consider the conduct of the member appears to constitute misconduct:

> 117(9) If, on review of the investigating officer's reports and the evidence and records referenced in them, the retired judge appointed 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) *[prehearing conference]* applies.

In my opinion, the fact that this procedure is explicitly contemplated by the Act is dispositive of the issues raised by the member regarding reasonable apprehension of bias. That is because the Legislature is permitted to abrogate from the common law rules of procedural fairness (of which bias is one). As stated in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, "absent constitutional constraints, it is always open to the Legislature to authorize an overlapping of functions that would otherwise contravene the rule against bias" (see, paras. 42-43). I observe that the Supreme Court of Canada cited *Régie* in its reasoning in *Ocean Port*. By virtue of s. 117(9) of the Act, Retired Judge Pendleton was required to consider the materials and render a decision. He then was required to preside over the discipline proceeding as the discipline authority. Any observations he made during the s. 117 process are not sufficient, in my opinion, to raise a reasonable apprehension of bias in the mind of an informed person, viewing the matter realistically and practically and having thought the matter through.

In my view this reasoning also applies to the concern regarding a reasonable apprehension of bias arising from my s. 117 appointment decision and role in considering whether a Review on the Record should be convened.

In that respect the Act specifically contemplates that the Commissioner is involved in each of those stages of the disciplinary process. To accept the member's submission would result in a fettering of my decision-making authority under s. 138 of the Act.

The remaining concern raised is that Retired Judge Pendleton's decision is arbitrary. In this respect as well, the *Police Act* contemplates that various decision-makers at different stages of the process may reach different conclusions on a matter that comes before them. This does not indicate that any one decision is arbitrary; rather, as observed by the Supreme Court of Canada in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 "a lack of unanimity [within a tribunal] is the price to pay for the decision-making freedom and independence given to the members of these tribunal". I do not consider the fact that two decision-makers reached different conclusions in this matter to result in a finding that one of those decisions is arbitrary.

For all of the above reasons, in my opinion, there are insufficient grounds to arrange a Review on the Record in the circumstances. The decision to conclude this matter is final and this office will take no further action.

In relation to the substantiated allegation, the disciplinary or corrective measure imposed is approved. Our file with respect to this matter will be concluded upon receipt of confirmation that in accordance with *Police Act*, any disciplinary or corrective measure imposed in relation to, or agreed to by, a member or former member, has been completed, and that their service record of discipline has been updated.

Clayton Pecknold, Police Complaint Commissioner

cc: [redacted] VPU
Mr. [redacted] (Discipline Representative)