

**IN THE MATTER OF THE
PUBLIC HEARING INTO THE COMPLAINT AGAINST
SERGEANT RON KIRKWOOD
A MEMBER
OF THE VICTORIA POLICE DEPARTMENT**

Public Hearing Counsel -	Bradley Hickford
Agent for Sergeant Kirkwood -	Kevin Woodall
Commission Counsel -	Christopher Considine, K.C
Counsel for Adjudicator -	Patrick McGowan, K.C.
Dates of Hearing -	April 15, 16, 17, 18, 29, 30, May 1, 2, 3, 8, July 9, 10, September 9, 10, 11, 12, 2024
Date of Decision -	May 23, 2025

Reasons for Decision on Public Hearing

INTRODUCTION

1. On the evening of December 25, 2019, Sgt. Kirkwood of the Victoria Police Department ("VicPD") was involved in an incident where he deployed three rounds from an Anti-Riot Weapon ENfield ("ARWEN"), an intermediate weapon which discharges plastic projectiles. The target of the deployment, Ms. Lisa Rauch, was struck in the head with one or more of the projectiles and ultimately died from her injuries. Following the incident, other than a very brief will-say acknowledging that he was the officer who discharged the weapon, Sgt. Kirkwood did not complete notes or reports detailing his involvement in the incident.

2. Sgt. Kirkwood is alleged to have abused his authority and neglected his duty pursuant to section 77 of the *Police Act* (the “Act”).
3. The first allegation deals with Sgt. Kirkwood’s use of the ARWEN, which caused the death of Lisa Rauch. The second allegation deals with the failure of Sgt. Kirkwood to make notes of the incident.
4. The specifics of the allegations, as set out in the Notice of Public Hearing, are as follows:
 - i) Constable Kirkwood committed Abuse of Authority pursuant to section 77(3)(a)(ii)(A) of the Police Act which is oppressive conduct towards a member of the public, including, without limitation, in the performance, or purported performance of duties, intentionally or recklessly using unnecessary force on any person. Specifically, the discharge by the member of the ARWEN rounds that struck Ms. Rauch.
 - ii) Constable Kirkwood committed Neglect of Duty pursuant to section 77(3)(m)(ii) of the Police Act, 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. Specifically, by failing to complete the documentation required by the VicPD for incidents where the member uses force on a person resulting in serious bodily harm or death.
5. A public hearing was held pursuant to s. 138 of the *Act*.

PROCEDURAL HISTORY

6. The Independent Investigations Office (“IIO”), the provincial organization tasked with investigating officers who are involved in incidents which result in death or serious injury, was notified of the ARWEN deployment on December 25, 2019, and commenced an investigation.

7. On December 26, pursuant to s. 89 of the *Act*, the VicPD reported the incident to the Office of the Police Complaint Commissioner (“OPCC”).

8. On January 16, 2020, the OPCC ordered a mandatory external investigation pursuant to s. 89 of the *Act*, which requires an investigation when an officer is involved in an incident resulting in death or serious bodily harm. The Vancouver Police Department (“VPD”) was appointed to investigate the matter. Insp. Mike Kim of the Vancouver Police Department was appointed as the Discipline Authority pursuant to s. 135 of the *Act*.

9. In April 2020, the OPCC process was suspended pending the outcome of the IIO investigation. The IIO concluded its investigation and issued a public report on October 8, 2020, concluding that the matter would not be referred to Crown counsel for consideration of whether charges would be approved.

10. Following the issuance of the IIO report, the OPCC lifted the suspension of its process, and the *Police Act* investigation resumed.

11. In November 2020, the OPCC received a formal complaint regarding the use of force in the death of Ms. Lisa Rauch and other matters from Audry and Ron Rauch, Lisa’s parents. The OPCC also received complaints from Kelly Rauch, Lisa’s Sister, and Cheryl Peterson, Lisa’s daughter. The Rauch family members were formally recognized by the OPCC as complainants to the investigation.

12. The *Police Act* investigation conducted by the VPD assessed the alleged Abuse of Authority in relation to the use of force by the member and the alleged Neglect of Duty in relation to the failure to make notes. On February 14, 2022, Sgt. Andrea Anderson of the VPD submitted the Final Investigation Report (the “FIR”) to the Discipline Authority. On March 1, 2022, the Discipline Authority, Mike Kim, determined that in his view, the two allegations of misconduct were unsubstantiated.

13. On March 24, 2022, the Police Complaint Commissioner (“PCC”) concluded that there was a reasonable basis to believe the decision of the Discipline Authority was incorrect and, pursuant to s. 117 of the *Act*, appointed a retired Judge, the Honourable

Elizabeth Arnold-Bailey, to review the matter and make her own determination regarding the alleged misconduct.

14. On June 6, 2022, retired Judge Arnold-Bailey issued a decision setting out her findings that the allegation of Abuse of Authority did not appear to be substantiated and that the allegation of Neglect of Duty appeared to be substantiated. Pursuant to section 117(9) of the *Act*, the retired Judge assumed the role of Discipline Authority, and a discipline proceeding was convened.

15. On July 26, 2023, following the discipline proceeding, the Discipline Authority determined that the Neglect of Duty allegation was unsubstantiated.

16. On August 21, 2023, the Rauch family, in their capacity as complainants, requested that a Public Hearing be held regarding the death of Lisa Rauch. On October 24, 2023, pursuant to section 138 of the *Act*, the PCC issued a Notice of Public Hearing directing that a public hearing be held in respect of the allegations of Abuse of Authority and Neglect of Duty. Pursuant to that Notice of Public Hearing and section 142(2) of the *Act*, I was appointed to preside as the Adjudicator in this proceeding.

PUBLIC HEARING

17. The Public Hearing commenced on April 15, 2024, in Victoria, British Columbia. Evidence and argument consumed 16 days of hearing in several blocks, concluding on September 12, 2024. A total of 20 witnesses were called to testify.

Participants

18. Public Hearing Counsel was appointed and had responsibility for calling the evidence required for me to decide the issues raised in the Notice of Hearing.

19. The OPCC and Sgt. Kirkwood were also represented and participated throughout the hearing.

20. Prior to and during the hearing, several parties applied for standing to make final submissions on the issue of the duty of an officer who is the subject of an IIO investigation to make notes. I allowed the following parties to make submissions on this issue: the IIO, the British Columbia Police Association ("BCPA"), and the National Police Federation ("FPF").

21. I also granted the VicPD standing to make submissions about proposed recommendations which may affect them.

22. As complainants, the Rauch family had standing to make and did make submissions on the matters at issue in this hearing.

Witnesses

23. The following witnesses were called by Public Hearing Counsel:

- Staff Sergeant Michael Darling - the VicPD Watch Commander on December 25, 2019;
- Sergeant Dale Sleighthome - the dayshift Road Sergeant on December 25, 2019;
- Inspector Keith Lidner - the Critical Incident Commander in charge of the Greater Victoria Emergency Response Team ("GVERT") on December 25, 2019;
- Sylvia Dick - the occupant of unit 311 - 749 Pandora Street;
- Constable Robert Taylor - a Detective involved in securing the scene after the incident occurred;
- Constable Cam Stephen – an on-duty member of GVERT;
- Constable Casey Jones – an on-duty member of GVERT;

- Captain Richard Sulsbury - a fire Captain who was dispatched to 749 Pandora and who attended unit 311;
- Firefighter Thomas Falkiner - a firefighter who was dispatched to 749 Pandora and who attended unit 311;
- Constable Steven Reichert - a member of GVERT who attended 749 Pandora;
- Constable Kyle Roy - a member of GVERT who attended 749 Pandora;
- Sergeant Louise Neil - the night shift Road Sergeant who took over command of the scene from Sergeant Sleighthome on the evening of December 25, 2019;
- Constable Robert Horne - a Detective involved in securing the scene after the incident occurred;
- Staff Sergeant John Mussico – a member of GVERT who attended 749 Pandora and who, after the incident, was tasked with transporting Sergeant Kirkwood from 749 Pandora Street back to the police station;
- Sgt. Sean Plater - a Union Representative who provided advice to Sergeant Kirkwood and arranged legal counsel for him;
- Inspector Drew Robertson - the Team Leader for GVERT on December 25, 2019; and
- Michael Massine - an expert witness who provided opinion evidence regarding the use of force.

24. The following witnesses were called on behalf of Sgt. Kirkwood by his agent, Mr. Woodall:

- Sgt Kirkwood;
- Inspector Brown – a VicPD inspector who gave evidence regarding note-taking policies and members' obligations to provide documentation; and

- Inspector Kevin Cyr – an expert witness who provided opinion evidence regarding the use of force.

25. Evidence from David Butcher, K.C., the lawyer who provided advice to Sgt. Kirkwood, following the incident, was filed in the form of an affidavit.

EVIDENCE

Events of the afternoon of December 25, 2019

26. At the time of this incident, Lisa Rauch was 43 years old. She had an unfortunate life. She was a member of a marginalized community that was well known to police. It is not in dispute that she was addicted to narcotics.

27. On the afternoon December 25, 2019, Lisa Rauch attended at 749 Pandora St. in Victoria and was visiting with her friend, Sylvia Dick, in Ms. Dick's unit - #311. The two consumed alcohol and crystal meth. Ms. Dick testified that after consuming the drugs Ms. Rauch was "on edge" and was "getting louder". Ms. Dick asked Ms. Rauch to be quieter as Ms. Dick's daughter had recently moved in with her and she was concerned her daughter would come home. Ms. Rauch's state of intoxication progressed to the point where it appeared to Ms. Dick that Ms. Rauch "wasn't herself" and was in a drug induced psychosis. The psychosis was escalating, so Ms. Dick decided to leave her apartment.

28. Eventually, Ms. Dick returned to her apartment and knocked on the door. Ms. Rauch opened the door and had a knife in her hand. Ms. Rauch asked for drugs and threatened to kill Ms. Dick, though Ms. Dick stated that she did not believe Ms. Rauch really meant the threat. Ms. Rauch then slammed the door and when Ms. Dick tried to open the door to her unit, it was locked. Ms. Dick heard banging inside the unit. Ms. Dick then reported the incident to building staff who called the police. The staff member

reported what Ms. Dick had told him and also told the 911 operator that Ms. Rauch had been involved in a similar incident the day before.

29. Certain aspects of Ms. Dick's evidence were corroborated by CCTV footage, which showed some of the events described by Ms. Dick, including the arrival of Ms. Rauch and the departure of Ms. Dick.

Police attendance at 749 Pandora

30. Sgt. Sleighthome was the Downtown Patrol Supervisor for the VicPD day shift on December 25, 2019. At 1642, he received a report of a female who was threatening others with a knife and smashing up an apartment at 749 Pandora Avenue. Sgt. Sleighthome was familiar with that housing complex, having been there many times. He testified that the building was a challenging environment because many of the individuals housed there struggled with mental health and addiction issues.

31. Sgt. Sleighthome considered this to be a high-risk call. The police officers involved defined the situation as a criminal barricade as they believed a criminal offence had been committed, and that Ms. Rauch had locked herself inside the unit. Sgt. Sleighthome contacted S/Sgt. Darling, the on-duty watch commander, and requested that GVERT be activated. S/Sgt. Darling then contacted the GVERT team lead, Sgt. Drew Robertson, to activate the team. S/Sgt. Darling also messaged two crisis negotiators as part of the activation. S/Sgt. Darling remained at the command post in his role as watch commander. With him at the command post was Insp. Lindor, the Critical Incident Commander for GVERT.

32. Insp. Lindor explained that he viewed the situation as a criminal barricade where police had the advantage of time. The belief of the police at the time was that Ms. Rauch was alone in a contained unit, so there was no threat to anyone else. The plan was a "contain and call out". Insp. Lindor dispatched crisis negotiators Cst. Lord and Cst. O'Connor to the scene.

33. A call regarding the incident had gone out over the police radio, and a number of officers responded.

34. A number of the officers who attended testified about the steps taken by police prior to their eventual entry into unit 311. Their evidence was amplified by CCTV footage from the building, which showed various areas, including the third-floor hallway.

35. Sgt Stephen, an on-duty GVERT member, heard the initial broadcast of the call at 16:44. He immediately headed to 749 Pandora and contacted the other on-duty GVERT member, Cst. Jones, who also attended. Upon his arrival, Cst. Stephen attended the third floor with an ARWEN and his "go-bag", which contained other tools such as door ties, a door wedge and flashbangs. He liaised with Sgt. Sleighthome to confirm that evacuations had been commenced, and that containment had been established

36. Police first arrived on the third floor and 1647, taking up positions outside the door to 311.

37. Sgt. Stephen testified that upon his arrival on the third floor, he heard yelling and the sound of things being thrown inside unit 311. He could not make out any words. The yelling sounded like nonsensical ramblings.

38. Sgt. Sleighthome, together with a GVERT member already on scene, decided that the door to unit 311 should be tied off to prevent an uncontrolled and potentially risky exit by Ms. Rauch.

39. The officers proceeded to tie off the door by securing a length of rope to the door handle and anchoring it so the door could not be opened. After the door was tied off, officers proceeded to evacuate the third floor. While this was occurring, Sgt. Sleighthome heard Ms. Rauch swearing.

40. With the unit secured, Sgt. Sleighthome's plan was to await the arrival of the remainder of GVERT and the crisis negotiators. Sgt. Sleighthome remained in charge of the scene until he was relieved by Sgt. Louise Neil, the night shift patrol supervisor, at

approximately 1740. As it was a shift change, some day shift members were relieved by night shift members. Officers continued to hold the scene as they awaited the arrival of GVERT.

41. Sgt. Neil testified that she had an encounter with Ms. Rauch the previous day. On December 24, 2019, Sgt. Neil had been dispatched to 717 Pandora Ave, a nearby building. Ms. Rauch was reported to have entered a unit and was subsequently reported to have been causing a disturbance in a common area. Sgt. Neil testified that police tried to de-escalate the situation, but Ms. Rauch was not cooperative and seemed intoxicated. To Sgt. Neil's observation during the December 24 incident, Ms. Rauch was agitated and aggressive towards police. Ms. Neil stated that Ms. Rauch had threatened to slit an officer's throat if they tried to take her out, though it does not appear that Ms. Rauch had a knife on that occasion. Ms. Rauch was eventually arrested on December 24, for causing a disturbance, and struggled with police as they carried her out of the building. Ms. Rauch spent the night in custody and was released at 6:30 am on Christmas morning.

42. When Sgt. Neil took over command at 749 Pandora on December 25, she determined that she had time on her side and should maintain containment of unit 311 and await the arrival of trained crisis negotiators.

43. Sgt. Neil testified that at 1744, the fire alarm in unit 311 went off. She, in conjunction with other officers, made the decision to call the fire department. Around this same time, Ms. Rauch was observed looking out the unit's exterior window and uttering the words "oh shit".

44. As they continued to await the arrival of GVERT, the police evacuated the third floor and secured and monitored the entrance to unit 311.

45. At 1808, GVERT having assembled at the building, Sgt. Neil handed the scene over to GVERT. She briefed Sgt. Robertson, the GVERT team leader and Sgt. Bruce.

GVERTs actions

46. With GVERT in place and patrol members controlling the perimeter of the building, GVERT initially maintained a position some distance from the door to await the arrival of the crisis negotiators.

47. Cst. Jones, one of the GVERT members, announced through the door to unit 311 the presence of the police and stated that Ms. Rauch was under arrest for assault and mischief. He advised Ms. Rauch to exit into the hallway. He was 20 to 30 feet from the door when he made these statements. Cst. Jones did not hear any response to his commands. He only heard what he described as “muffled mumblings, mutterings.”

48. In his earlier conversations with building staff, Cst. Jones had been briefed on the layout of the unit and had been provided a key to unit 311.

49. At 1814, the building fire alarm started ringing. This was a different alarm from the unit’s smoke detector that had been heard earlier. Shortly after the building alarm started to sound, smoke was seen coming from the window of unit 311. This observation was broadcast to GVERT members on the third floor.

50. A number of GVERT members gave evidence of what transpired from this point to the point officers entered unit 311 a short time later. Their evidence was largely consistent and was corroborated by CCTV footage that was placed in evidence.

51. With the building alarm sounding and smoke having been seen exiting the window of unit 311, GVERT abandoned its plan of waiting for crisis negotiators as the fire created an urgent need to act. Only the third floor had been evacuated, and the police were understandably concerned that if the fire spread, it could put others in the building at risk.

52. GVERT, in a “stack” formation (a line of officers possessing various force options, usually behind a shield), approached the door to unit 311, cut the tie and moved back.

53. At this stage, Sgt. Robertson sought and was given authorization to breach the door to unit 311. GVERT members then again approached the door in a stack

formation. The door was keyed open and was propped open with a door stop. GVERT members then faded back.

54. When the door was keyed open, Cst. Stephen was the member in the stack with the ARWEN. He testified that when they opened the door, he could only see one or two feet into the suite due to the thick black smoke. He saw flames. He could not see past the bathroom, which was right adjacent to the entrance to the unit. Cst. Stephen tried to use the ARWEN mounted light, but that just created a white wall, obscuring his view. The fire alarm was very loud. Cst. Stephen recalls an announcement being made telling Ms. Rauch to come to the door with nothing in her hands. The only response from inside was more yelling.

55. Cst. Jones, who was on the shield at the front of the stack, described the visibility in the suite as limited to about three feet. The smoke was moving, and at times, visibility was limited to one foot. He saw flames, which appeared to be on a couch approximately ten feet away. He could hear Ms. Rauch yelling in a manic fashion.

56. Following this breach, GVERT retreated to a staging position in hopes that Ms. Rauch would present herself at the door. Voice commands were made. It is uncertain if Ms. Rauch heard them. She did not exit the unit.

57. There was some variance in the evidence about whether and the extent to which smoke was coming out of the unit into the hallway. From my review of the CCTV video, it appears that, at most, a modest amount of smoke was coming out of the unit door into the hallway, and it did not materially obstruct visibility in the hallway.

58. A decision was then made to have the stack move to a "breach and hold" position at the threshold of the doorway. At this point, Cst. Stephen was still the ARWEN operator in the stack. GVERT members who had not been in the stack were putting on their gas masks and trading positions with officers in the stack so they could obtain their gas masks. Cst. Stephen handed the ARWEN to Sgt. Kirkwood, who took his position in the stack.

59. With GVERT in a stack formation at the threshold, a decision was made to place firefighters in the stack with the police. I was told this was a very unusual occurrence. Two firefighters, Capt. Sulsbury and Mr. Falkiner were added to the stack with the aim of using a firehose to douse the flames.

60. The alarm continued to sound, and the sprinklers in unit 311 were deploying water. It was loud in the hallway due to the alarm, and communication was challenging. The firefighters were not on the same radio frequency, and communication with them was limited to signals and pushing and pulling. Even though police had radio connectivity with each other, meaningful communication over the radio was next to impossible due to the alarm.

61. Several witnesses described the layout of the unit to me. As one enters the unit, there is a short corridor with a bathroom on the right. Past the bathroom door, also on the right, there was a set of stairs leading to a loft. Past the stairs is the living area. The loft overlooked the living area.

62. Insp. Robertson told me that as they were at the threshold, he heard incoherent yelling coming from inside the unit. He and other officers feared that Ms. Rauch might be in the loft, which presented the risk of Ms. Rauch dropping something on police or coming down the stairs very near the entrance, possibly with a knife.

63. Because he believed that Ms. Rauch might come down the stairs, which would put her only a few feet from the officers, Insp. Robertson told Sgt. Kirkwood words to the effect of "I want you to target her with the ARWEN as soon as you see her", a communication which Sgt. Kirkwood acknowledged. Both Insp. Robertson and Sgt. Kirkwood explained that despite this communication, the decision about whether and when to deploy the ARWEN rested solely with the ARWEN operator, Sgt. Kirkwood.

64. Due to the risk posed by the fire, GVERT made the decision to enter the unit in a slow and deliberate fashion. By this point, Cst. Roy was in the shield position at the front of the stack. He described the smoke as fairly dense and dark. He could see partway down the entry corridor where the bathroom was, after which it was quite dark.

He testified that from his position at the front of the stack, visibility fluctuated between five and eight feet. At the time that the stack entered the unit, Cst. Roy did not hear anyone verbalize a sighting of Ms. Rauch before the ARWEN deployment. He heard the sound of three ARWEN rounds being deployed. Cst. Reichert, who was also present, rated the visibility to the living area of the apartment to be low – 2 or 3 out of 10.

65. Two firefighters, Cpt. Salsbury and firefighter Tom Falkiner were in the stack with a firehose as the stack entered past the threshold of unit 311.

66. Both firefighters who were in the stack testified. Cpt. Salsbury, a firefighter with 24 years of experience, testified that there were two alarms that sounded. The first was for unit 311, and the second was for the whole building. He and his fellow firefighter, Tom Falkiner, were placed in the stack. Mr. Faulkner was the “nozzleman”. Cst. Salsbury described the fire as not a serious one. He testified that from the stack, they sprayed water on the fire for approximately 30 seconds. Cpt. Salsbury confirmed that he and his fellow firefighter believed they had put the fire out, and after Ms. Rauch was taken out, Cpt. Salsbury re-entered the suite and confirmed the fire was out.

67. Mr. Falkiner was manning the nozzle of the firehose. He was responsible for directing water from the firehose. He said the smoke was thick, and he couldn't see anything past it. He was initially spraying water in an arc, hitting window height. He received some communication from a GVERT member that there were still flames, so he peered around the shield and observed what he described as a small fire. He adjusted the nozzle to spray directly on the flames, and that put the fire out immediately. After putting the fire out, he began backing out of the suite, as those were the instructions previously given. As he was backing out, he heard three shots.

68. While the firefighters were quite clear that they had extinguished the fire, several police officers, including Sgt. Kirkwood, testified that they believed the fire had not been fully extinguished. Cst. Reichert, a GVERT member who was at the back of the stack fulfilling the role of lethal overwatch, testified that when firefighters backed out, he believed he could still see flames in the suite.

69. Insp. Robertson told me that when the water from the firehose contacted the flames, it caused the smoke and steam to increase quite substantially for a short time. Insp. Robertson testified that once inside the unit, while scanning the room, he saw movement. He believed Ms. Rauch was standing on the other side of a couch about 15 feet away. He told me he saw a light spot through the smoke that he thought was Ms. Rauch's abdomen. He believed he could not see her legs as they were behind the couch. He didn't see her face. He couldn't see what was below the light spot as it was behind a couch. What was above the light spot was obscured by smoke. He believed he could not see Ms. Rauch's head or face.

70. Upon seeing what he believed to be Ms. Rauch's abdomen, Sgt. Robertson shouted "contact". A second or less after shouting "contact", Insp. Robertson heard the first ARWEN deployment. After one or two ARWEN rounds, Insp. Robertson saw Ms. Rauch "fold forward" away from him and he realized she had been sitting on the couch with the back of her head facing towards police. Insp. Robertson yelled "that is her head." He did not hear any ARWEN rounds after that. At the time, Insp. Robertson believed only two ARWEN rounds had been discharged.

71. Ms. Rauch had been seated on the couch with her back to the officers, not standing facing them. One or more of the ARWEN rounds deployed by Sgt. Kirkwood struck Ms. Rauch in the back of her head, causing significant trauma.

72. After Insp. Robertson identified that Ms. Rauch had been seated and was injured, police responded immediately, removing her from the building to an outside courtyard. Lifesaving efforts were commenced by officers and firefighters. Ms. Rauch was transferred to the hospital. Unfortunately, lifesaving efforts were unsuccessful, and Ms. Rauch died as a result of the head injuries she sustained from the ARWEN deployment

73. From the CCTV footage, it is apparent that the time from when GVERT and the firefighters entered the threshold of unit 311 in the stack until GVERT members exited the unit carrying Ms. Rauch was 46 seconds.

Evidence of Sgt. Kirkwood regarding he his attendance at 749 Pandora

74. Sgt. Kirkwood had been a member of the VicPD for ten years and a member of GVERT for four years at the time of the incident. He was on annual leave, spending time with his family on Christmas Day, when GVERT was activated. He decided to respond to the call in order to assist the team as it was Christmas, and he thought they might be shorthanded.

75. Sgt. Kirkwood was briefed by Sgt. Neil on his arrival at 749 Pandora, who advised Sgt. Kirkwood that Ms. Rauch was arrestable. Sgt. Kirkwood was familiar with Ms. Rauch from prior dealings with her, primarily in the context of domestic violence calls where Ms. Rauch had been the primary aggressor.

76. Sgt. Kirkwood described the actions of GVERT prior to its entry into the unit in a manner consistent with his fellow GVERT members. He testified that, initially, with 360-degree containment in place, the plan was to “contain and call out”. Sgt. Kirkwood explained that the plan changed once the second fire alarm went off. Sgt. Kirkwood testified that he believed Ms. Rauch had started the fire.

77. When Sgt. Kirkwood first approached the threshold of the suite, he was in the stack with a Conducted Energy Weapon. He testified that he saw two fires (which is at odds with most other witnesses who reported only one fire).

78. Sgt. Kirkwood testified that he had concerns that Ms. Rauch was in the loft and might pour an accelerant on police. There was also a concern that she could come down from the loft and attack the officers in the narrow hallway. He described the scene as chaotic. Sgt. Kirkwood explained that he was concerned that the fire might spread and that floors 1, 2, and 4 had not been evacuated. In Sgt. Kirkwood’s mind, definitive action was required.

79. Sgt. Kirkwood described the process of team members donning gas masks and replacing members in the stack so they could don their masks. Sgt. Kirkwood replaced Cst. Stephen in the stack as the ARWEN operator.

80. Sgt. Kirkwood testified that he saw firefighters in the stack putting water into the suite. His evidence was that he saw the flames go out and then spring back up. He believed the hose had been turned off. He said the firefighters then turned their hose back on.

81. Sgt. Kirkwood testified that Insp. Roberson had communicated to him that he should deploy the ARWEN at the earliest opportunity. He said he agreed with Insp. Robertson, as he believed the situation was out of control, and the police needed to incapacitate Ms. Rauch quickly.

81. Sgt Kirkwood described the visibility in the unit as follows:

So what would happen is you would have no visibility and then you would have visibility for seconds. Then it would shift again and there would be no visibility and then a different portion of the room would open up with a sightline and that continued in that smoke movement while that application of the water was happening with Fire.

82. Sgt. Kirkwood testified that during the second deployment of water by the firefighters, he first saw Ms. Rauch and yelled, "contact right". He did not deploy the ARWEN on his initial sighting of what he believed to be Ms. Rauch, as the smoke moved and obscured his sight line. Sgt. Kirkwood testified that seconds later, he saw what he believed to be Ms. Rauch's abdomen. He testified that he could not see her head, which he believed to be completely obscured by smoke and could not see her legs, which he believed to be behind the couch. He could not see her hands. He believed she was standing on the opposite side of the couch, facing him. She was approximately 15 feet away.

83. He could not see her hands and did not see a knife. Sgt. Kirkwood could not determine whether or not she still had the knife, but was operating on the belief that she still had it in her possession. Sgt. Kirkwood explained that, from his perspective at that moment, the knife was not the concern:

[The knife] is not the concern at that point. The concern for me is the fire and that she set it and she's refusing to come out ... The urgency here and the imminent risk is around the fire.

84. Sgt. Kirkwood testified that he targeted what he believed to be Ms. Rauch's stomach. He knew this to be a higher risk area, but believed that the urgent need to incapacitate her justified that risk.

85. Sgt. Kirkwood described firing the first round and nothing happening . He expected to see body movement but did not. He fired a second round, and again, nothing happened. He then decided to elevate his tactical aimpoint to what he believed to be her chest area and fired again, at which point he heard Insp. Robertson shout "watch her head". When he heard Robertson shout, he lowered the ARWEN, engaged the safety and observed other members enter the unit and extract Ms. Rauch. As they were removing her, he observed what looked like an ARWEN impact wound on the left side of Ms. Rauch's head.

86. Sgt. Kirkwood told me that if he knew he was aiming at her head, he would not have fired the ARWEN.

87. Sgt. Kirkwood described the officers having some difficulty locating Ms. Rauch after the ARWEN deployment because of the thickness of the smoke.

Events following the Removal of Ms. Rauch

88. Cst. Horne was partnered with Cst. Taylor to maintain scene security and to continue the investigation after it was handed over to IIO. He was later advised by Sgt. Mussico that Sgt. Kirkwood would not be providing a statement, and he was provided a will-say authored by Sgt. Kirkwood, which did not contain any details. He understood that Sgt. Kirkwood had not created a Subject Behaviour Officer Response report ("SBOR"), so a month later, on behalf of Sgt. Kirkwood, Cst. Horne completed that document. He testified that part of the reason he completed the SBOR form was to document the use of the ARWEN for statistical purposes.

89. Insp. Robertson turned Sgt. Kirkwood over to Sgt. Mussico to transport Sgt. Kirkwood and the ARWEN back to VicPD, as he understood the IIO would be involved.

90. Insp. Robertson, who was the GVERT team leader and Sgt. Kirkwood's superior officer that evening, testified that his understanding at the time was that every police officer had a legal duty to make notes, but with the involvement of the IIO, he was uncertain of the appropriate course.

91. Insp. Robertson testified that he did not direct Sgt. Kirkwood to make notes because he had not had clear guidance about a situation like this. Instead, he deferred to S/Sgt. Mussico, who had experience in a similar situation. Sgt. Robertson understood S/Sgt. Mussico's advice was for Sgt. Kirkwood to get a union agent to obtain legal counsel for Sgt. Kirkwood and for Sgt. Kirkwood to not make any notes or statements.

92. S/Sgt. Mussico was second in command to Insp. Robertson that night. He arrived after Ms. Rauch had been removed from the unit. He was tasked by Insp. Robertson to take Sgt. Kirkwood back to the detachment. Sgt. Mussico had been investigated by the IIO in 2014 for a fatal shooting. It appears this was the reason, at least in part, that he was assigned to accompany Sgt. Kirkwood back to the detachment. Drawing on this experience, S/Sgt. Mussico advised Sgt. Kirkwood to not do anything until he had been put in touch with a police agent and a lawyer to provide him advice. He provided this direction to Sgt. Kirkwood, as this was the advice his supervisor had given him when he was involved in the fatality in 2014. He told Sgt. Kirkwood that they needed to document his role and what he did that night. Sgt. Kirkwood dictated a will-say that S/Sgt. Mussico typed verbatim. The brief will-say noted only that Sgt. Kirkwood was working that day as an officer with GVERT, attended 749 Pandora and deployed three ARWEN rounds. It contained no other pertinent details. S/Sgt. Mussico's understanding at the time was that the VicPD did not expect an officer who anticipated being designated as a subject officer by the IIO to complete statements or notes. Sgt. Mussico also explained that there were systems in place

within the VicPD to monitor officers and follow up if they had not created required notes or statements.

93. I pause here to note that a subject officer is an officer whose conduct has made them the subject of an investigation by the IIO.

94. Sgt. Plater, a very experienced officer and VicPD union representative, told me that he spoke with Sgt. Kirkwood on the evening of the incident. Sgt. Plater told Sgt. Kirkwood to not do anything until he received legal advice. Sgt. Plater told me that while, at the time, VicPD had a policy requiring officers to complete notes, this did not apply to a subject officer being investigated by the IIO.

95. Several days after the incident, Sgt. Kirkwood received advice from a very experienced lawyer who advised him that, because he was the subject of a criminal investigation, he should not complete any notes.

96. Public Hearing Counsel placed in evidence, as exhibit 14(b), the VicPD policy in place at the time regarding an officer's duty to make notes. It provided:

Operational police officers will maintain a current notebook within which a written record of daily activities, events and information will be kept

...

An entry will be made for each day of duty and will include:

- (a) Date, day of week, shift, duty assignment, vehicle and equipment assigned, and weather; and
- (b) A chronological record of activities throughout the shift, including complaints attended, persons arrested or interviewed and details of any incident or event that is deemed important.

97. Consistent with this policy, a number of officers testified to their general understanding that an officer is obliged to make timely and comprehensive notes of their

involvement in significant incidents. A number of officers also testified that the general understanding within the force at the time was that this general policy did not apply to an officer who had been designated a "subject officer" and was being investigated by the IIO.

98. Inspector Brown was called as a witness by Sgt. Kirkwood's agent. He has been with the VicPD for 26 years and is a lawyer and member of the Law Society of British Columbia. At the time of the incident, Insp. Brown was the inspector in charge of the VicPD's executive services division, which included responsibility for professional standards. He continues to occupy that position. He testified that he was authorized to speak on behalf of the VicPD.

99. Insp. Brown testified that, in 2019, the feeling within the force was that officers who were the subject of investigation by the IIO should speak with a lawyer first before making any notes. He told me that this was the practice at the time. He indicated that there had been other officers subject to IIO investigation, and typically, no notes would be made.

100. Insp. Brown testified that the VicPD policy regarding the making of notes, exhibit 14(b), was a general policy for an investigating officer, but was "not meant to apply to a subject officer who is involved in a lethal force encounter". Insp. Brown testified that the practice of subject officers not making notes was not a culture of not following a policy in certain circumstances, but, rightly or wrongly, was the force's understanding of the law at the time:

A I wouldn't describe it so much as a culture, is that was our understanding of the law, right or wrong. Our understanding of the law is that if you were a subject officer involved in a lethal force encounter where you were going to be a criminal suspect and subject to a criminal investigation, that you didn't have to make notes, you had *Charter* rights under section 7, section 10, and section 11, and you should be discussing the matter with counsel. That was our understanding.

101. Insp. Brown was cross-examined about a 2014 training document created by Mr. Mike Massine, which, apparently in reference to the Supreme Court of Canada's decision in *Wood v. Schaeffer*, 2013 SCC 71 ("*Wood v. Schaeffer*"), instructed officers involved in a use of force incident to make notes immediately and prior to consulting counsel. Insp. Brown testified that he was not familiar with the document and that it did not reflect VicPD policy at the time. Public Hearing Counsel questioned the veracity of Insp. Brown's evidence in this regard. On this point, I found Insp. Brown to be credible and accept his evidence.

102. Insp. Brown explained that the VicPD now has in place a process where subject officers involved in the use of force resulting in death or serious bodily harm are required to make timely, detailed and comprehensive notes but in a way that protects these materials from being used against the officer in the criminal investigation. The materials are entered into PRIME (a police database) and privatized. This new process has been formalized in a written policy that was entered as Exhibit 29.

Sgt. Kirkwood's evidence regarding activities after the ARWEN deployment

103. Sgt. Kirkwood described that after the incident, he met with Sgt. Mussico, who told him he would be designated a subject officer. Sgt. Kirkwood testified that he was aware of the VicPD written policy that required officers to complete notes of events they were involved in. He told me his general understanding was that subject officers would not provide notes and would be put in touch with counsel.

104. Sgt. Kirkwood testified about the advice he received regarding the completion of notes in a manner that is generally consistent with the evidence of other officers. Sgt. Kirkwood testified that he relied on the advice of Sgt. Mussico, who had experience being designated a subject officer in a similar situation. Sgt. Mussico asked him to dictate a will-say for the purpose of identifying him as the officer who deployed the ARWEN (and thus the subject officer).

105. Sgt. Kirkwood explained that he next spoke with Sgt. Plater, a union agent, who advised him not to do anything until he had spoken to counsel. About three days later, he was contacted by a senior lawyer who advised him of his rights and to not make any notes or provide any statements.

106. Sgt. Kirkwood testified that he understood that, as a police officer, he had a general duty to account, but that he understood his situation to be different as he was a subject officer.

107. None of his superiors ever asked Sgt. Kirkwood to expand on his will-say or complete any other notes or statements.

108. Sgt. Kirkwood was cross examined by Public Hearing Counsel about a 2014 training pamphlet created by Mike Massine (a use of force trainer) which instructed, in apparent response to the decision of the Supreme Court of Canada in *Wood v. Schaeffer*, “Recently the Supreme Court of Canada ruled that police officer’s notes are to be written immediately after the incident and without discussion with any lawyer”. It was suggested that Sgt. Kirkwood attended a training with Mr. Massine in April 2014, where Mr. Massine presented on the subject. While not denying that he may have been at the training and presented with the document, Sgt. Kirkwood testified that he did not recall that training or the document. Given the passage of time and the fact that the document did not seem to reflect the position of senior management with the force at the time, I accept Sgt. Kirkwood’s evidence that if he received training on this document in 2014, he did not recall it in 2019 or when he testified in 2024.

Expert Evidence

109. I heard evidence from two use of force experts, Mr. Mike Massine and Insp. Kevin Cyr.

110. Mr. Mike Massine was called by Public Hearing Counsel. Mr. Massine is a policing and public safety consultant who had previously worked as a police officer,

including on emergency response teams, and taught at the justice institute as the use of force co-ordinator.

111. Mr. Massine explained in some detail, the National Use of Force Framework and the B.C. Crisis Intervention De-Escalation model.

112. Mr. Massine explained that the ARWEN is classified as a less lethal option when targeting areas below the clavicle. ARWEN operators are trained to first target the large muscle groups in the legs, as this can gain pain compliance and take away the subject's mobility. The abdomen and chest are permissible higher risk targets. Operators are trained that the weapon can only be used to target the neck or head when lethal force is justified in accordance with s. 25 of the *Criminal Code* and there is no other option to prevent death or grievous bodily harm. Members are trained that in selecting an appropriate target, they should balance the urgency of the incapacitation with the potential for injury to the subject.

113. Mr. Massine was supportive of the steps taken by the patrol members who initially attended the scene and the approach taken by GVERT with respect to their control and monitoring of the unit and the ultimate decision to enter the unit. In his opinion, the ARWEN was the appropriate less lethal option to employ in the circumstances.

114. Mr. Massine testified that in his opinion Sgt. Kirkwood followed the GVERT Rules of Engagement and that his deployment of the ARWEN was in alignment with the VicPD use of force policy, including its requirement that "members must make due consideration in selecting an appropriate target..."

115. With respect to this requirement and with reference to the universal firearms rule "be sure of your target and your surroundings", Mr. Massine commented that Sgt. Kirkwood "believed he could see Ms. Rauch from the neck down".

116. Ultimately, Mr. Massine concluded in his report that "in relation to the National Use of Force Framework, it is my opinion that Cst. Kirkwood intervened with an

appropriate amount of force in response to the behaviours of Ms. Rauch and situational factors he faced at the time.”

117. Mr. Massine further concluded in his report “...I believe Cst. Kirkwood’s shot placement which was intended for what he perceived to be the stomach and chest of Ms. Rauch but ultimately resulted in impacts to the back of her head were in line with the principles of the National Use of Force Framework.”

118. Mr. Massine elaborated in his testimony that in his opinion, if the use of the ARWEN was justified and other target areas were not available, and if the officer felt in good faith that directly targeting the stomach area could help resolve the situation safely, then targeting the stomach could be appropriate.

119. Mr. Massine testified that the identification of target areas, that is, the intended point of impact, is crucial with any weapon system, including less lethal force options. He agreed that, with the ARWEN, “tactical aim point” is important and the concept implies that the operator “need[s] to know what you’re shooting at”.

120. Mr. Massine agreed, in cross examination, that, with the possibility that the fire was out, one option would have been to “step back and contain and let the smoke dissipate before going in”.

121. Mr. Massine was questioned about the wisdom of firing into a smoky atmosphere and the risk of not being able to see the target posed:

Q Yes. And one of -- one of those reasons that would be in your mind if you were in that situation would have been, that if I deploy the ARWEN into a smoky atmosphere, I may not see that target properly and I could hurt them, give them serious bodily harm or death, isn't that correct?

A It would be, but in this case the, the actions were articulated in what the officer, Cst. Kirkwood, believe he was seeing at the time. So, without anything to the contrary, if I put myself in his shoes I find that reasonable, I find his approach very reasonable operationally. I find his consideration of targets and

elimination of targets for various reasons, very reasonable from an operational standpoint. And I also find his escalation of force being from targeting what he believed to be the stomach, which is a higher risk target, to then chest. I still find that to be reasonable as well.

122. Mr. Massine again addressed the issue of the obscured visibility in the following exchange:

THE ADJUDICATOR: But if there is smoke that impedes the visibility, you say that he still should have shot?

A Well, if it's completely obscured, no. But in this case, it wasn't. He had, he had what he believed to be the torso as the target area.

123. Mr. Massine was cross examined about alternatives which were available to Sgt. Kirkwood if the evidence of the firefighters is correct and the fire had been extinguished:

Q So, if they had -- when they got into the apartment and the fire was out, assuming that to be the situation as they went into the apartment, over the threshold, there was an opportunity, surely, to assess and withdraw and they had a number of options. I'll put the options to you that they could have considered. And I'll list down and then you can tell me if you disagree with any of them, unless it's easier for me to go one by one. They could have withdrawn, consulted with the fire department to see how long it would take for the smoke to dissipate, isn't that an option they could have had?

A I suppose it could be, yes.

Q They could also have withdrawn, consult with the fire department and then wait for the negotiators who we understand were either on scene or on their way, isn't that correct?

A That's a potential option, sure.

Q They could have called out further to Ms. Rauch to surrender if they'd

wished to do so because the deployment of water now occurred, and the sprinklers were going.

A Sure.

Q And they could have also decided to use other less non-lethal weapons.

A There is no non-lethal weapons, they're less lethal.

Q Less lethal, thank you very much for that. So, there were a number of options they could have used should they have chosen to have done a further reassessment once they crossed over that threshold, isn't that correct?

A Well, I preface it again with the benefit, the benefit of hindsight. Yes, there is.

124. Insp. Cyr was called as a witness by Sgt. Kirkwood's agent. Insp. Cyr is the commanding officer of the Lower Mainland Emergency Response Team. He holds an LL.M. in criminal law. He teaches the critical incident manager course at the Canadian Police College. He, too, provided an opinion on the use of force.

125. Insp. Cyr was not retained or instructed by Sgt. Kirkwood, but was engaged to provide an opinion by the VPD, who had been appointed to investigate the matter pursuant to the *Police Act*.

126. Insp. Cyr was supportive of the approach taken by the patrol officers and GVERT prior to the fire being started.

127. Insp. Cyr explained that if there is time and no ballistics threat, negotiation is the preferred outcome because every tactical intervention creates risk.

128. Insp. Cyr concluded that the tactics employed by GVERT were consistent with current ERT practices in the Canadian policing context. With respect to Sgt. Kirkwood's deployment of the ARWEN, Insp. Cyr concluded in his report: "The author struggles to think of any other viable courses of action that would have provided additional mitigation against the risks presented at the call".

129. In his report, he expanded on his reasons for reaching his conclusions:

ERT members believed they saw the subject's abdomen and deployed an extended range impact weapon.

...

...faced with a circumstance where the fire could not be fought by the fire department while the subject was still armed and in the apartment and where the subject in the apartment could not be dealt with while the fire spread, police were left with rapidly narrowing options and scant time to take action.

...

the fire department began deploying water on the fire but was unable to access all of it from their position...With rapidly spreading flames that put the subject and other building occupants at risk, ERT had to take more assertive action"

...

ERT had a plan to immediately take the subject into custody by using the ARWEN at the first available opportunity. This is a reasonable plan since the fire presented an immediate and growing risk....,

...

The reduced visibility, ability to communicate, lack of distance from the armed subject, and lack of time due to the growing fire created a confluence of circumstances that rendered this event incredibly difficult. The combination of the armed subject in crisis and a growing fire presented additional difficulties...

130. In his testimony, Insp. Cyr explained that sometimes there is no perfect option, and police are often faced with having to make the "least bad decision"

131. Insp. Cyr was questioned about the fact Sgt. Kirkwood deployed three shots from the ARWEN:

I don't have any concerns about there being three shots rather than one shot. The reason being, again, just relying on the sense of urgency, there's a need to have that quick compliance. And assuming that, you know, if you believe that you are shooting an abdomen, three shots does not dramatically increase risk over one shot. So you're not dramatically increasing the risk of injury, you think you're shooting at an abdomen, three quick follow-on shots is what you need to get compliance and get control of that situation so you can keep everyone safe.

So, yeah, the difference between one and three in this case is there's not a lot of difference in terms of risk. Assuming once you believe you're shooting at a non -- at an acceptable target area.

132. Insp. Cyr agreed that, because of the potential lethal nature of the ARWEN if certain areas of the body are targeted or contacted, in normal circumstances, the operator is supposed to have a clear line of sight before deployment of the ARWEN. Insp. Cyr was questioned about the advisability of deploying into a room where visibility is substantially obscured:

Q I think we would all agree that if there was zero visibility the police had no idea what was in the room, it would be irresponsible to deploy an ARWEN into a space where you have no idea what's in there or where the suspect is.

A Correct.

133. Insp. Cyr went on to explain his understanding of the visibility at the time of deployment:

It's not perfect visibility, it's not zero visibility; it's somewhere, it's somewhere in between here.

134. And his related conclusion that:

In my view the best choice was to continue with the plan and attempt to use the ARWEN based on the -- based on the assessment of the operator that they saw what they thought they saw, being an appropriate target zone.

135. In examination-in-chief, Insp. Cyr was questioned about his heavy reliance in his report on the fact the fire was spreading as a factor supporting his opinion and about how his opinion might change if he were to assume that the fire “appeared to be out but no determination had been made that it was actually out”. He responded as follows:

A I don't see that as a determinative factor here. I think the determinative factor that requires the plan to be continued with is that there has been a -- from the time the police -- so ERT opened the door and pulled back and waited ten minutes. Then they approached with fire to extinguish the flame. It is that approach with police and fire to the threshold of the door that in my view is what necessitates the continuing of the plan. This is, you know, a very small room, we have a subject inside who is armed with an edged weapon and now you have police and Fire right at the doorway. What has happened is there's been a compression of time and distance.

136. Insp. Cyr was later cross examined by Public Hearing Counsel about the importance of the fire spreading to his conclusion that the deployment of the ARWEN in the circumstances was justified and appears, despite his evidence in chief, to accept that it was a central factor in his analysis.

Q And I appreciate that sitting here asking questions of you and talking about this, it doesn't bring into the picture how dynamic this situation is and that there's -- you know, things are happening very quickly but it would seem to me that in your report the fire and the fire spreading was something that caused you to come the conclusion that you did.

A I think it was a major contributing factor, yes.

137. Public Hearing Counsel again questioned Insp. Cyr about the importance of the fact the fire was spreading to the conclusions he reached:

Q ...So it would seem that you accepted as important the fact that this fire was spreading and spreading rapidly as to concluding why actions had to be taken the way they were?

A Yes.

138. Insp. Cyr again returned to the spreading nature of the fire when questioned about the possibility of further dialogue with Ms. Rauch once located:

And in my opinion, like once the fire gets started and my understanding is spreading or, you know, presenting an imminent threat, the window of opportunity for patience and dialogue has unfortunately been closed to a large extent.

139. Insp. Cyr was then questioned about the potential impact of the police appreciating that the fire was out:

Q Okay, I'm not suggesting for a moment that it wasn't reasonable for the GVERT members who were there to think that the fire was not out. The question is, if they could have been provided information that would have told them the fire was out, that might have changed things.

A It might have, yeah. If someone, you know, were to say, "The fire is completely out." And if you had time to hear that information, comprehend the information and then apply the information, and then, you know, if I knew the fire's out, we'd probably revert back to some sort of containment position. Depending, depending on, I mean, how much is that smoke going to -- are we going to lose our containment because of the smoke? Are we going to lose some other advantage or position we need because of the water that's being sprayed? Or is there some other thing that has now happened that is going to preclude us from moving back to a position of cover or time and distance? I think those would be the considerations in my mind.

Q Certainly. But what I said was that that knowledge would have provided at least a thought process to consider other options.

A It very well may have.

140. As noted above, GVERT's plan to deploy the ARWEN as soon as Ms. Rauch was located was premised, at least in part, on the officers' belief that she was in the loft, and if she came down the stairs, she would be immediately upon them. Commission counsel questioned Insp. Cyr about whether the initial sighting of Ms. Rauch in a location different than expected, some 16 feet away behind a couch, might have provided an opportunity for a re-assessment:

Q So would it be fair to say the operator would have a moment for reassessment then as to whether or not he should use the ARWEN at that point in time when he first -- that first visual sighting of her?

A Yes. And any use force, the person is going to reassess and make sure it's still appropriate.

141. When Insp. Cyr was questioned about the specific risk Ms. Rauch posed, the following exchange took place:

THE ADJUDICATOR: Okay. You're obviously well versed in the circumstances of what took place on that date. And you're an expert in this area. In your opinion did she pose a risk?

A Yes.

THE ADJUDICATOR: In what way?

A Well, the risk -- well, I think she posed a risk to herself. She was armed with a knife, I would be concerned about self-harm. I think that's a background risk that I've just sort of always in the back of my mind. But in my view, you know, lighting a fire, that's a risk of self-harm. Who would light a fire in a place that they're in but someone who is looking to self-harm or does not understand the consequences of their actions?

THE ADJUDICATOR: Yeah, okay.

A So it tells me that there's someone who's in an irrational headspace. They've

already threatened someone with a knife. It's -- you know, once that door gets opened, there's not a lot separating her from the police and the fire. There's a, there's a definite risk to the building, to the police, the fire department and to her. I think there was definite risks, that the police have to intervene.

THE ADJUDICATOR: What if you are told that while there was a knife in the room, that she did not have it in her possession? These are different alternatives and --.

A Yeah. I mean that certainly reduces the immediate risk.

Use of Force Policy and Training Materials

142. At the time of the incident, the VicPD had in place a use of force policy that provided as follows:

- (1) Members shall only use force within the course of their duties that is proportionate, necessary and reasonable within the meaning of the law based on the totality of the circumstances.

143. That policy defined "Reasonable Grounds" as follows:

Reasonable Grounds: grounds based upon both a subjective and objective component. To fulfill the subjective component a member must have a *bona fide* belief, based on the surrounding circumstances, that a course of action is reasonably necessary. To fulfill the objective component, a fully informed and objective third person, acting reasonably, must be satisfied that the member's action was reasonable in the circumstances.

144. The VicPD use of force policy specifically addressed the use of Extended Range Impact Weapons, of which the ARWEN is one:

Members must make due consideration in selecting an appropriate target based on balancing the urgency of incapacitation with the potential for injury; and

If control of the subject is not obtained with an ERIW due to the fact the impact projectile missed or was ineffective, the member must consider that the effect of the kinetic energy delivered by the impact projectile intensifies as more projectiles are delivered.

145. The GVERT ARWEN training materials identify the following as permissible target areas:

1. Legs below knee
2. Thigh (front) or hamstring (back)
3. Buttocks
4. Arms below elbow
5. Arms above elbow (be aware of proximity to chest and neck etc)
6. Abdomen
7. Chest / Thorax ** high potential for serious injury**

146. These same training materials also establish that the head, neck, spine, throat, groin and clavicle are prohibited target areas unless lethal force is intended and justified. The justification for this distinction is that if one of the prohibited areas is contacted, the weapon can be lethal.

147. These training materials are consistent with evidence of the expert witnesses who testified that the ARWEN is classified as a less lethal intermediate weapon when used to target the extremities, abdomen or chest, but can only be used to target the prohibited target areas only if lethal force is justified.

ANALYSIS

Standard of Proof

148. As Retired Judge Baird Ellan observed in *Ludeman and Logan*, PH 19-01, the standard of proof is on a balance of probabilities. The outcome of this hearing will be determined on the basis of the evidence led during this hearing.

149. I have carefully reviewed and considered all of the evidence led at this public hearing and the extensive written and oral submissions by the Public Hearing Counsel, Commission Counsel, Sgt. Kirkwood and the Rauch family.

Neglect of Duty

150. Sgt Kirkwood is alleged to have neglected his duty by “failing to complete the documentation required by the VicPD for incidents where the member uses force on a person resulting in serious bodily harm or death.”

151. Following the incident at 749 Pandora, Sgt. Kirkwood completed no notes or reports other than a very brief will-say that identified him as the ARWEN operator.

152. It was immediately obvious to Sgt. Kirkwood and to his superiors that the IIO would be investigating the incident, and that Sgt. Kirkwood would be designated as a subject officer. Consistent with this expectation, shortly after the incident, Sgt. Kirkwood was designated as a subject officer by the IIO.

153. The first issue that arises is whether Sgt. Kirkwood, as a subject officer, had a duty to account, which required him to document the events of that evening and his involvement in them.

154. I am satisfied that all investigating officers in British Columbia have a duty to make timely, comprehensive and detailed notes. I am also satisfied that this duty applies to investigating officers, regardless of whether they are involved in an incident

during their shift which causes them to be designated a subject officer or to anticipate such a designation.

155. The Supreme Court of Canada addressed an officer's duty to account in *Wood v. Schaeffer*. At issue in that case was Ontario legislation regarding the province's Special Investigation Unit (SIU), a force analogous to the IIO in British Columbia, and whether officers under investigation were entitled to obtain legal advice prior to making notes.

156. Unlike British Columbia, where each force has been left to navigate this landscape without legislative guidance, in Ontario, legislation requires that a subject officer "complete in full notes on the incident in accordance with his or her duty". The Ontario legislation also incorporates protections against self-incrimination by directing that "no member of the police force shall provide copies of the notes [of a subject officer] at the request of the SIU".

157. In *Wood v. Schaeffer*, the court concludes that, separate from any obligation in the Ontario legislation, there is a duty on police officers to prepare accurate, detailed and comprehensive notes as soon as practicable after an investigation:

[62] Sections 9(1) and 9(3) of the regulation require witness and subject officers to "complete in full the notes on the incident in accordance with [their] duty". The regulation does not define the duty to make notes. Nor does the Act, which provides a non-exhaustive list of the "duties of a police officer" in s. 42, including, for example, preserving the peace, laying charges and participating in prosecutions, and performing the lawful duties that the chief of police assigns.

[63] Although it is common ground among the parties that the duties of a police officer include a duty to make notes on the events that transpire during the officer's tour of duty, I recognize that neither side points to a definitive statement of this Court holding as much.[3]

[64] However, reports by experienced jurists have concluded that such a duty exists. For example, in their 1993 report to the Attorney General of Ontario on charge screening, disclosure, and resolution discussions, a committee made up of

experienced counsel and police officers and led by the Honourable G. A. Martin, observed that:

. . . the duty to make careful notes pertaining to an investigation is an important part of the investigator's broader duty to ensure that those who commit crimes are held accountable for them.

. . .

. . . inadequate note-taking, while it can hamper the conduct of the defence, also risks hampering an investigation and/or a prosecution. In short, inadequate note-taking does a disservice to both an accused and the community, [which] is entitled to expect that innocent people will be acquitted and guilty people properly convicted. [Emphasis added.]

(Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (1993) ("Martin Committee"), at pp. 151 and 153)

[65] In another instance, the Honourable R. E. Salhany considered the significance of police notes in the course of a public inquiry into a death caused by an off-duty officer. He explained the importance of notes in this way:

[Note-making] is not a burdensome task that police officers must reluctantly undertake because they were taught to do so at their police college. It is an integral part of a successful investigation and prosecution of an accused. It is as important as obtaining an incriminating statement, discovering incriminating exhibits or locating helpful witnesses. The preparation of accurate, detailed and comprehensive notes as soon as possible after an event has been investigated is the duty and responsibility of a competent investigator. [Emphasis added.]

(Report of the Taman Inquiry (2008), at p. 133)

[66] These conclusions, in my view, stand on firm ground. The importance of police notes to the criminal justice system is obvious. As Mr. Martin observed of properly-made notes:

The notes of an investigator are often the most immediate source of the evidence relevant to the commission of a crime. The notes may be closest to what the witness actually saw or experienced. As the earliest record created, they may be the most accurate. [p. 152]

[67] Against that background, I have little difficulty concluding that police officers do have a duty to prepare accurate, detailed, and comprehensive notes as soon as practicable after an investigation. Drawing on the remarks of Mr. Martin, such a duty to prepare notes is, at a minimum, implicit in an officer's duty to assist in the laying of charges and in prosecutions — a duty that is explicitly recognized in s. 42(1)(e) of the Act.

158. The court, in defining this duty, does not distinguish between witness and subject officers.

159. That the court accepted that the duty applied equally to subject officers is apparent when they reference the duty in the context of analyzing whether subject officers should be able to consult counsel prior to making notes:

[77] Without imputing any ill will on the part of officers who seek legal advice or the lawyers who provide it, it would only be natural for officers to listen to the good advice of counsel, and it would not be surprising for the notes they prepare *after* this consultation to reflect that advice. But this creates a real risk that the focus of an officer's notes will shift — perhaps overtly, perhaps more subtly — away from the rather mechanical recitation of *what* occurred (which is required by their duty) toward a more sophisticated explanation for *why* the incident occurred (which detracts from that duty).

160. A consistent conclusion was recently arrived at by the Quebec Court of Appeal, which was considering the constitutionality of a provision requiring officers being

investigated by the Quebec equivalent of the IIO to submit notes to that investigative body:

[122] There is no doubt that police officers must draw up an account of an occurrence, even if the police officer is involved within the meaning of the *Regulation*. As Moldaver J. noted in *Wood v. Schaeffer*, “such a duty to prepare notes is, at a minimum, implicit in an officer’s duty to assist in the laying of charges and in prosecutions” (*Procureur général du Québec c. Fédération des policiers et policières municipaux du Québec*, 2024 QCCA 537).

161. The importance of police notes was again commented on by the Supreme Court of Canada in *R. v. Beaver*, 2022 SCC 54:

[172] It is well recognized that police notes are crucial to the court’s ability to meaningfully review the exercise of police power without prior judicial authorization, including the arrest power (*R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 82; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at para. 70; see also *Wood v. Schaeffer*, 2013 SCC 71, [2013] 3 S.C.R. 1053, at paras. 63-66).

162. The duty of police officers to make notes was also recently recognized by Devlin J in *R. v. Hayer*, 2023 BCSC 15, where, relying on *Wood v. Schaeffer* and *R. v. Vu* 2013 SCC 60, she stated:

[174] The officers involved in this case must understand that the duty of police officers to produce accurate, comprehensive, and contemporaneous notes is essential to the proper administration of justice.

163. I have been directed by counsel for Sgt. Kirkwood and others to *R. v. Lofty*, 2017 BCCA 418. I do not read this case as detracting from the conclusion that police officers in British Columbia have a common-law duty to complete contemporaneous notes. Noting that the issue was not fully argued before him, Frankel J.A., in *Lofty*, simply stated that he was not in a position to determine, one way or the other, whether the duty that existed in Ontario was the same as in British Columbia. After citing *Wood v.*

Schaeffer, Frankel J.A. made it clear that he accepted that “police officers have an obligation to make notes”.

164. I am satisfied that there exists a general duty to account which requires all officers, including subject officers, such as Sgt. Kirkwood, to create timely, detailed and comprehensive notes. Sgt. Kirkwood failed to fulfill this duty on December 25, 2019.

165. However, that is not the end of the analysis, as the Notice of Public Hearing does not allege that Sgt. Kirkwood failed to comply with his common-law duty, but that he failed to “complete the documentation required by the VicPD”.

166. Following the incident, the GVERT team leader, Insp. Robertson, unsure of what to do, handed the handling of Sgt. Kirkwood over to his second-in-command, S/Sgt. Mussico. His reason for doing so was, at least in part, that S/Sgt. Mussico had experience as a subject officer previously. I am satisfied that Insp. Robertson’s intention and expectation, which would have been clear to Sgt. Kirkwood, was to have Sgt. Kirkwood take and follow S/Sgt. Mussico’s direction and advice.

167. S/Sgt. Mussico advised Sgt. Kirkwood that, other than creating a brief will-say, documenting his role, he should do nothing until he received advice from legal counsel.

168. Sgt. Kirkwood also received advice on the evening of the incident from Sgt. Plater, a very experienced officer and a VicPD union representative. Sgt. Plater, relying on an unwritten VicPD policy that subject officers were not required to make notes, told Sgt. Kirkwood to not do anything until he received legal advice.

169. Sgt. Plater put Sgt. Kirkwood in touch with experienced legal counsel who advised Sgt. Kirkwood that he should not make any notes.

170. The VicPD had workflow systems where officers monitored ongoing files and could send reminders to police officers where further information, such as the officer’s statement, is required. No reminder was sent to Officer Kirkwood by any supervisor seeking further information or prompting him to complete his notes or police statements.

171. A number of the VicPD officers who testified acknowledged their understanding regarding the general duty of officers to complete notes. Those who were asked each expressed that it was their understanding in 2019 that the VicPD did not require subject officers to comply with the general force policy regarding the completion of notes and that it was their understanding that subject officers were not required by their force to do so.

172. Insp. Brown, a senior VicPD officer and the inspector in charge of the VicPD's executive services division, which included responsibility for professional standards, confirmed that in 2019 the position of the VicPD was that subject officers should speak with a lawyer before making any notes and that typically subject officers did not make notes. He made it clear that Sgt. Kirkwood's failure to make any notes was consistent with what was required of him by the VicPD at the time.

173. Insp. Brown's uncontradicted evidence was that he was authorized to speak to this point on behalf of the VicPD. Counsel for the VicPD confirmed as much in her submissions on behalf of the force.

174. Based on the foregoing, I am satisfied that Sgt. Kirkwood did not fail to complete the documentation required by the VicPD, and as such did not neglect his duty as alleged in the Notice of Public Hearing.

175. Were I of the view that the force had, at the time, intended its general policy requiring officers to complete timely notes to apply to subject officers, such as Sgt. Kirkwood, I would have, given the consistent direction of senior officers and the advice of counsel to not complete notes, nevertheless found that Sgt. Kirkwood had good and sufficient cause for his failure to complete the required notes.

176. The Neglect of Duty allegation is unsubstantiated.

Abuse of Authority

177. Sgt. Kirkwood is alleged to have abused his authority by intentionally or recklessly using unnecessary force in discharging the ARWEN rounds that struck Ms. Rauch.

178. Section 25 of the *Criminal Code* sets parameters for the use of force by police officers.

Protection of persons acting under authority

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

- **(a)** as a private person,
- **(b)** as a peace officer or public officer,
- **(c)** in aid of a peace officer or public officer, or
- **(d)** by virtue of his office,

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

...

When not protected

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

When protected

(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if

- **(a)** the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;
- **(b)** the offence for which the person is to be arrested is one for which that person may be arrested without warrant;
- **(c)** the person to be arrested takes flight to avoid arrest;
- **(d)** the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and
- **(e)** the flight cannot be prevented by reasonable means in a less violent manner.

...

179. In *R. v. Nasogaluak*, 2010 SCC 6, the Supreme Court of Canada confirmed that the assessment of an officer's use of force must be judged on a "subjective-objective" standard.

[34] Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended or likely to cause death or grievous bodily harm, unless he or she believes that it is

necessary to protect him- or herself, or another person under his or her protection, from death or grievous bodily harm. The officer's belief must be objectively reasonable. This means that the use of force under s. 25(3) is to be judged on a subjective-objective basis (*Chartier v. Greaves*, [2001] O.J. No. 634 (QL) (S.C.J.), at para. 59). If force of that degree is used to prevent a suspect from fleeing to avoid a lawful arrest, then it is justified under s. 25(4), subject to the limitations described above and to the requirement that the flight could not reasonably have been prevented in a less violent manner.

180. As Retired Judge Baird Ellan observe in *Tiwana* P.H. 2014-01, the assessment of the officer's use of force cannot be purely objective:

The test with respect to an officer's use of force cannot be a purely objective standard, of course, because a person not familiar with police training and tactics may not be able to put herself into the shoes of the officer or of the reasonable officer with the same level of training.

...

Clearly the officer's own view regarding the necessity of force is not determinative; the reasonableness of that view must be assessed against the yardstick of acceptable behaviour from the perspective of an officer with the same level of training and experience. But the doppelganger analysis prescribed by the cases requires that the adjudicator be equipped to understand the perspective of a reasonable officer in the shoes of the respondent.

181. In *R. v. Kempton*, 2022 BCPC 21, the court summarized several important principles applicable to the assessment of the use of force by a police officer:

[38] In considering this issue, I bear in mind the following principles: police actions are not to be judged against a standard of perfection; some allowance must be made for an officer facing a dynamic situation and misjudging the degree of force necessary to restrain a prisoner; there is no obligation on an

officer to impose the least amount of force which might achieve their objective; it is often necessary for police officers to take control of a situation as quickly as possible to prevent an escalation; and finally, an officer cannot be held to a standard of conduct which one sitting in the calmness of a courtroom later might determine was the best course.

182. I heard much evidence of what transpired in the hours that preceded the ultimate entry by police into unit 311. While the evidence of the actions of the patrol officers, GVERT and senior officers overseeing the event, up to the point of entry into the unit provides important context, it is important to remember that the actions of the patrol officers and GVERT prior to the entry into unit 311 are not the subject of this hearing. That being the case, I will observe that, for the most part, it appears to me that the conduct of the patrol officers and GVERT up to the point of entry into the unit was measured and appropriate. They made a concerted effort to resolve the situation without resort to violence. That said, I do think that a more urgent effort to have crisis negotiators attend in person would have been preferable. Further, given that it was known to police that Ms. Rauch was suffering from mental health issues and may have been suffering a drug induced psychosis, I believe that prior to the start of the fire, in conjunction with the police commands that were shouted loudly through the door, an a more concerted effort could have been made to develop a dialogue and attempt a verbal de-escalation.

183. There is no doubt that the fire in the unit dramatically changed the situation. When GVERT first identified smoke coming from the unity, they quite reasonably concluded that the risk presented by the fire took away the benefit of time that GVERT had previously been operating with. The presence of flames and smoke, the sounding of the alarm and the sprinkler system created a chaotic situation that was no doubt very challenging and stressful for the officers.

184. When the police, with the firefighters in the stack, proceeded across the threshold into unit 311, the police believed Ms. Rauch to be in the loft which presented a

risk of her coming down the stairs from the loft which would have placed her immediately upon the police in the narrow hallway near the entrance to the unit.

185. As the stack entered unit 311, the firefighters deployed water onto the fire. While Sgt. Kirkwood testified that he recalls two fires, the evidence from most other witnesses was that there was one. Given that Sgt. Kirkwood made no substantive notes and did not provide an account for months after the incident and given the preponderance of evidence from other witnesses, including the firefighters, that there was one fire, I am satisfied that there was only one set of flames and that it was a relatively small fire, as described by firefighter Falkiner.

186. While the fire inside the unit created a risk, I am satisfied that the fire was of such a size that the decision to insert two firefighters into the stack with a firehose significantly mitigated the risk posed by the fire.

187. The evidence of the firefighters strongly suggests the second application of water from the firehose had quickly extinguished the fire. I appreciate that some officers testified that the fire was not fully extinguished as the firefighters backed out. However, on balance, I prefer the evidence of the firefighters on this point. Their primary focus was the fire, while the officers were also focussing on locating Ms. Rauch and identifying any threat she may present. The firefighters were directed to back out once the fire was doused. Mr. Falkiner testified they were in the process of doing so when the ARWEN was deployed. I also note that Capt. Sulsbury confirmed the fire was out after Ms. Rauch was taken out of the unit. Given that no further efforts were required to extinguish the fire, it makes sense that Mr. Falkiner's evidence that he had extinguished the fire prior to backing out was correct.

188. Sgt. Kirkwood recalled that he discharged the ARWEN as the second spray of water was being applied to the flames. The evidence of firefighter Falkiner was that he had doused the fire and was in the process of backing out when he heard the shots. I am satisfied that firefighter Falkiner, who was manning the hose and was focussed on the deployment of water, was correct when he concluded that the fire was out prior to

the deployment of the ARWEN. That said, it had likely been out for only a few seconds at most, and I accept that this may not have been appreciated by Sgt. Kirkwood.

189. As set out in the VicPD use of force policy, members shall only use force within the course of their duties that is proportionate, necessary and reasonable, and in using force, members are required to balance the urgency of incapacitation with the potential for injury.

190. As Sgt. Kirkwood proceeded into unit 311, as the ARWEN operator, he was required to balance the urgency of incapacitating Ms. Rauch with the potential for injury to her. He was required to constantly reassess this balance as circumstances changed or developed.

191. It was such a reassessment that led police to move from a “contain and call-out” to a decision to breach the door when smoke was observed.

192. The primary sources of danger to Ms. Rauch, the officers and potentially others were the fire and the possible presence of a knife.

193. I took Sgt. Kirkwood’s evidence to be that as he began entry into unit 311, in his mind, it was the fire that was the primary factor requiring the urgent incapacitation of Ms. Rauch.

194. The plan to discharge the ARWEN as soon as Ms. Rauch was seen was also based on the belief on the part of the police that Ms. Rauch was in the loft and if she came down the stairs, she would have been immediately upon the police, potentially with a knife.

195. As police proceeded into the unit, several developments occurred which served to materially impact the risk, and thus the urgency of incapacitation and the risk of injury to Ms. Rauch presented by any deployment of the ARWEN.

196. First, police had succeeded in moving firefighters, who had been placed in the stack, to the point where they could deploy water onto the fire. The size of the fire and the fact that a firehose was being deployed at the flames significantly decreased the risk

that the fire would imminently overtake the police or Ms. Rauch or that it would spread through the building. Regardless of whether the fire had been fully extinguished, Officer Kirkwood should have appreciated that this development significantly decreased the urgency, as it was probable that the fire would quickly be addressed, as in fact it was.

197. Second, when Sgt. Kirkwood caught sight of what he believed to be Ms. Rauch, she was not, as police had feared, coming down the staircase and immediately upon them in the narrow entry hallway, but was approximately 15 feet in front of Sgt. Kirkwood, in the living area, behind a couch, not advancing on police. No knife was observed. When juxtaposed with the feared scenario that she would be upon police in the narrow hallway with a knife, her observed location presented a materially less risky and less urgent scenario.

198. It was incumbent on Sgt. Kirkwood to assess these developments and balance them with the risk of injury to Ms. Rauch that was presented by the degree to which smoke and steam were obscuring visibility and thus impacting the ability of Sgt. Kirkwood to reliably identify a target.

199. As the police and firefighters approached and entered the unit, they made observations of the degree to which the smoke and steam were obscuring visibility.

200. Several officers described the visibility in the unit:

- Cst. Roy - "Very poor, a couple feet at times" ... "basically it's just a wall of black smoke"
- Cst. Jones – "... the interior of the suite is smoke-filled with visibility limited to about three feet. So, if I put my hand out in front of me, I can barely see my hand."
- Cst. Reichert – "very low" "2 or 3 [out of 10]"

201. Inspector Robertson observed that when the water deployed by the firefighters hit the fire, the smoke and the steam increased quite substantially for a short period.

202. Firefighter Falkiner gave the following evidence regarding visibility:

Q What was the visibility like when you looked through that three-inch crack into the suite?

A Zero.

Q Zero visibility?

A For me, yes. I could see maybe a couple of feet in front of me and that was -- it was just dark.

203. While some officers, including Sgt. Kirkwood, described swirling smoke or the movement of smoke that provided pockets of marginally improved visibility, based on the totality of the evidence, I am satisfied that the moving quality of the smoke did nothing to materially improve the ability of police to make reliable observations further into the unit, and did not provide a reliable view into the living area.

204. I am satisfied that as police entered the unit, and in the moments immediately preceding Sgt. Kirkwood's deployment of the ARWEN, visibility into the unit, and specifically into the living area, was almost entirely obscured, such that no meaningful or reliable observation could be made and such that it was impossible to identify a target or target area with any degree of reliability.

205. This conclusion is supported by the fact that Sgt. Kirkwood's visibility into the unit was so obscured that he mistook the back of the head of Ms. Rauch, who was seated on a couch facing away from police for an abdomen of a person standing facing police. Sgt. Kirkwood placed insufficient weight on the impact the smoke and steam had on his visibility into the unit and the degree to which that obscured visibility increased the risk of injury to Ms. Rauch.

206. I wish to stress that I accept that Sgt. Kirkwood did not intend to target Ms. Rauch's head. I accept that he subjectively believed he had seen her abdomen. However, he came to that subjective understanding by relying on observations that were not reasonably capable of supporting his subjective belief. The visibility was so

obscured that it was impossible to draw any reliable conclusion about Ms. Rauch's body position or about available targets. His conclusion in this regard was objectively unreasonable. He should have appreciated that a reliable target identification in the circumstances was not possible.

207. The expert evidence, on its face, appears to support the actions of Sgt. Kirkwood as justified. I make several observations about that evidence. First, both expert witnesses place a heavy reliance on the fire, and appear to assume that the risk it presented was greater than I have found, given its size and the presence of the firefighters in the stack who were attending to it. Further, both experts assessed Sgt. Kirkwood's conduct almost entirely based on his subjective perception, specifically on his subjective perception that he was observing and targeting Ms. Rauch's abdomen. Neither addressed whether his conclusion that he had sufficient visibility into the unit to reliably identify a target was objectively reasonable. This may be because the materials provided to the experts did not identify, to the extent the evidence before me did, the extent to which the smoke and steam almost completely obscured visibility into the unit, especially into the living area of the unit where Ms. Rauch was.

208. Both experts acknowledged that if visibility into the unit was completely obscured, as I have found it essentially was, deploying the ARWEN would not have been justified.

209. The following exchange occurred with Mr. Massine:

THE ADJUDICATOR: But if there is smoke impedes the visibility, you say that he still should have shot?

A Well, if it's completely obscured, no. But in this case, it wasn't. He had, he had what he believed to be the torso as the target area.

210. Insp. Cyr testified as follows:

It's not perfect visibility, it's not zero visibility; it's somewhere, it's somewhere in between here.

...

In my view the best choice was to continue with the plan and attempt to use the ARWEN based on the -- based on the assessment of the operator that they saw what they thought they saw, being an appropriate target zone.

211. The actions of Sgt. Kirkwood must be assessed not only on his subject assessment but also on whether that subjective assessment was objectively reasonable, bearing in mind what was known to him, the dynamic and challenging nature of the call and his circumstances.

212. Given the size of the fire, which was being addressed by firefighters with a fire hose, the location of Ms. Rauch, the fact no weapon was observed and that she was not advancing on police, at the moment the ARWEN was deployed, while there was an ongoing need to take Ms. Rauch into custody, there was not an imminent risk of death or grievous bodily harm to the police or anyone else that would have justified lethal force.

213. Give that the ARWEN is a less-lethal weapon when targeting some areas of the body, but considered a lethal force option with others, and given that visibility into the unit was so obscured that a target area could not be reliably identified, discharging the ARWEN, in the circumstances, presented a substantial risk of serious injury or death to Ms. Rauch.

214. I recognize that this call was unusual and presented unique challenges. Some allowance must be made for stress and confusion of the call and the need to make a quick decision, in the moment. That said, Sgt. Kirkwood is a highly trained member of GVERT and was wielding a weapon capable of causing death. The circumstances were not such, when he identified what he believed to be Ms. Rauch 15 feet away, that he was deprived of a meaningful opportunity to reflect and reassess.

215. Given the circumstances and the risk, Sgt. Kirkwood should have recognized that the deployment of three ARWEN rounds presented an unnecessary and unjustified risk. Given the circumstances, Sgt. Kirkwood's assessment that the urgency of incapacitation justified the risk of firing into a room where visibility was substantially obscured was

objectively unreasonable. His deployment of the ARWEN three times in the circumstances was reckless and unnecessary.

216. The allegation of Abuse of Authority is substantiated.

CONCLUSION

217. The death of Ms. Rauch was a tragedy. I wish to express my deepest sympathy to the Rauch family for their loss.

218. I accept that this was the last outcome Sgt. Kirkwood wanted. I accept that his expression of regret about the outcome of this call is sincere.

219. Sgt. Kirkwood's decision to make no notes, while contrary to his common law duty, was in line with what was expected of him by his force at the time, and accorded with the directions of his superior officers. The allegation of Neglect of Duty has not been proven.

220. His decision to deploy the ARWEN was not justified given the circumstances, the obscured visibility and the potential lethal capability of the device. On the evidence, the allegation of Abuse of Authority is proven.

221. Section 143(9)(c) of the *Police Act* directs that, in addition to adjudicating the allegations set out in the Notice of Hearing, I recommend, to the chief constable or the board of the municipal police department, any changes in policy or practice that I consider advisable. I will address my recommendations in subsequent reasons.

Reasons Delivered at Victoria, British Columbia, this 23rd day of May, 2025.



The Honourable Wally Oppal K.C. – Adjudicator