



Office of the  
Police Complaint Commissioner

British Columbia, Canada

**NOTICE OF APPOINTMENT OF RETIRED JUDGE**

Pursuant to section 117(4) of the *Police Act*

OPCC File 2022-21665

January 11, 2023

To: Dr. [REDACTED] (Complainant)

And to: Sergeant [REDACTED] (Member)  
c/o Victoria Police Department  
Professional Standards Section

And to: Chief Constable Del Manak  
c/o Victoria Police Department  
Professional Standards Section

And to: The Honourable Judge James Threlfall, (ret'd) (Retired Judge)  
Retired Judge of the Provincial Court of British Columbia

And to: Her Worship Mayor Marianne Alto  
Her Worship Mayor Barbara Desjardins  
c/o Victoria & Esquimalt Police Board

On April 19, 2022, our office received a complaint from Dr. [REDACTED] (Complainant) describing his concerns with members of the Victoria Police Department (VicPD). The OPCC determined Dr. [REDACTED] complaint to be admissible pursuant to Division 3 of the *Police Act* (Act) and directed the VicPD to conduct an investigation.

On December 7, 2022, Sergeant [REDACTED] completed his investigation and submitted the Final Investigation Report to the Discipline Authority.

On December 12, 2022, Inspector [REDACTED], as Discipline Authority, issued his decision pursuant to section 112 in this matter. Specifically, Inspector [REDACTED] identified one allegation of *Abuse of Authority* pursuant to section 77(3)(a)(i) of the Act against Constable [REDACTED]. Additionally, Inspector [REDACTED] identified one allegation of *Neglect of Duty* pursuant to section 77(3)(m)(ii) of the Act against Sergeant [REDACTED]. He determined that neither of these allegations appeared to be substantiated.

Clayton Pecknold  
Police Complaint Commissioner

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OPCC ID 1301-20191113

Pursuant to section 117(1) of the *Police Act*, having reviewed the allegations and the alleged conduct in its entirety, I consider that there is a reasonable basis to believe that the decision of the Discipline Authority is incorrect with respect to the unsubstantiated allegation of misconduct against Sergeant [REDACTED]

I do not consider that the decision of the Discipline Authority is incorrect with respect to the conduct of Constable [REDACTED]

### **Background**

The complaint concerns an incident with members of the VicPD on April 16, 2022, during which the Complainant was arrested for a state of public intoxication. After being arrested, the complainant was transported to VicPD cells where he was held for a period of more than three hours until his release.

The Complainant alleged that, during his time in custody, he asked multiple times to exercise his *Charter* right to consult with counsel. This request was denied and he was not permitted to exercise his right to counsel.

### **Discipline Authority's Decision**

The Discipline Authority found that the arrest occurred as a result of the Complainant being intoxicated by alcohol and, despite being asked to leave the scene, repeatedly interfering with Constable [REDACTED] as he attempted to aid and assess another intoxicated individual. The Discipline Authority found that the member was justified in arresting the Complainant for state of intoxication in a public place under the *Liquor Control and Licensing Act* and, based upon a review of the circumstances, the Discipline Authority found that it did not appear that the arrest was oppressive, intentionally unjustified, or reckless.

The Discipline Authority advised that, once brought to cells, the Complainant was observed to exhibit indicia of intoxication, was argumentative and belligerent with jail staff, and was becoming aggressive. The Discipline Authority analyzed the decision to suspend the Complainant's access to counsel by reference to caselaw and VicPD policy, which permits the right to counsel to be suspended if the prisoner is violent or if there is a reasonable concern for safety. Based on the entirety of the information provided, the Discipline Authority found that it appeared that Sergeant [REDACTED] was justified in suspending the Complainant's access to counsel based on the belief that there was a safety concern.

### **Request for Appointment of a Retired Judge**

On January 2, 2023, I received a request from the Complainant that I appoint a retired judge to review the FIR pursuant to section 117 of the Act and make his or her own decision in the matter. Section 117 gives me authority to make such an appointment if I consider that there is a reasonable basis to believe the Discipline Authority's decision is incorrect. A number of reasons were offered in support of their request that can be summarized as follows:

1. The Complainant's right to counsel is a constitutional right guaranteed by section 10 of the *Charter* that should have been provided without delay or immediately unless there were extraordinary circumstances.
2. The Complainant noted that he was incorrectly suggested to be "uncooperative" and/or "violent". Instead, he stated he was compliant with police direction, exhibited no violent behaviour, and did nothing to suggest that he could become violent.
3. The delay for more than a couple hours in providing the Complainant his right for access to counsel was unjustified.

### OPCC Decision, Section 117 of the *Police Act*

After review of the Discipline Authority's decision, I consider that the Discipline Authority erred in finding that Sergeant [REDACTED] was justified in suspending the Complainant's right of access to counsel during his stay in cells. The Discipline Authority cited caselaw and VicPD policy which permits this right to be suspended if the prisoner is violent or if there is a reasonable concern for safety. However, in my view, the objective evidence, which includes video footage and witness member statements, does not support the suspension of the Complainant's rights on that basis.

Therefore, pursuant to section 117(4) of the *Police Act* and based on a recommendation from the Associate Chief Justice of the Supreme Court of British Columbia, I am appointing James Threlfall, retired Provincial Court Judge, to review this matter and arrive at his own decision based on the evidence.

Pursuant to section 117(9), if the appointed retired judge considers that the conduct of the member appears to constitute misconduct, the retired judge assumes the powers and performs the duties of the discipline authority in respect of the matter and must convene a discipline proceeding, unless a prehearing conference is arranged. The allegations of misconduct set out in this notice reflect the allegations listed and/or described by the Discipline Authority in their decision pursuant to section 112 of the *Police Act*. It is the responsibility of the retired judge to list and/or describe each allegation of misconduct considered in their decision of the matter pursuant to section 117(8)(c) of the Act. As such, the retired judge is not constrained by the list and/or description of the allegation as articulated by the Discipline Authority.

The Office of the Police Complaint Commissioner will provide any existing service records of discipline to the Discipline Authority to assist him or her in proposing an appropriate range of disciplinary or corrective measures should a pre-hearing conference be offered or a disciplinary proceeding convened. If the retired judge determines that the conduct in question does not constitute misconduct, they must provide reasons and the decision is final and conclusive.

Finally, the *Police Act* requires that a retired judge arrive at a decision **within 10 business days after receipt of the materials** for review from our office. This is a relatively short timeline, so our office will not forward any materials to the retired judge until they are prepared to receive the materials.



Clayton Pecknold  
Police Complaint Commissioner

cc: [REDACTED], Registrar  
Inspector [REDACTED], Victoria Police Department  
Sergeant [REDACTED], Victoria Police Department