



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 2022-21993
June 19, 2023

To: Mr. [REDACTED] (Complainant)

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

And to: Chief Constable Donovan Fisher (Discipline Authority)
c/o Nelson Police Department
Professional Standards Section

And to: The Honourable Judge Brian Neal, KC (Retired Judge)
Retired Judge of the Provincial Court of British Columbia

And to: Her Worship Mayor Janice Morrison
Chair, c/o Nelson Police Board

On June 6, 2022, our office received a complaint from Mr. [REDACTED] (“the Complainant”) describing his concerns with members of the Nelson Police Department (NPD). The OPCC determined the complaint to be admissible pursuant to Division 3 of the *Police Act* and directed Vancouver Police Department (VPD) to conduct an investigation.

On May 10, 2023, Sergeant [REDACTED] completed his investigation and submitted the Final Investigation Report (FIR) to the Discipline Authority, Chief Constable Donovan Fisher.

On May 24, 2023, the Discipline Authority issued his decision pursuant to section 112 in this matter. Specifically, the Discipline Authority identified one allegation of misconduct against Sergeant [REDACTED] (“the Member”). The Discipline Authority determined that the allegation of *Abuse of Authority* (unnecessary force) pursuant to section 77(3)(a)(ii)(A) of the *Police Act* against the Member did not appear to be substantiated.

Pursuant to section 117(1) of the *Police Act*, having reviewed the allegation 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.

Clayton Pecknold
Police Complaint Commissioner

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Background

On June 10, 2021, the Complainant was pulled over by Constable ██████████ of NPD for an alleged traffic violation. Much of the ensuing incident was captured on the dashboard camera of Constable ██████████ police vehicle. Constable ██████████ radioed for backup on the basis that the Complainant was "irate." The Member arrived on the scene a short while later and observed the Complainant from a position behind the Complainant's vehicle. The Member drew his service pistol at approximately the time that the Complainant exited his vehicle. The Member then engaged the Complainant physically and the Member delivered strikes to the Complainant, including three strikes to his head using the butt end of his pistol. Following this, the Member can be heard on the video accusing the Complainant of saying that he (the Complainant) was going to get a knife and stab somebody. In reply, the Complainant indicated that he had made a statement about cutting his own wrists.

Discipline Authority's Decision

The Discipline Authority determined that the Complainant reacted "aggressively" to Constable ██████████ and that the Complainant can be seen moving around and reaching for items in his vehicle, before "aggressively" exiting the driver's door "at approximately the same Sergeant ██████████ can be seen drawing his pistol." The Discipline Authority found the Member's evidence to be credible in relation to having heard the Complainant make a statement about a knife, which the Member believed to be a threat to Constable ██████████. The Discipline Authority also found the Member's evidence that he believed the Complainant had a knife in his vehicle to be credible.

The Discipline Authority determined that the Member's "split second decision" to intercept the Complainant after he left his vehicle, thereby preventing him from gaining access to the back seat, was "the proverbial fork in the road." He found that it would have been difficult for the Member to "go back" from that point, because disengagement carried a risk that the Complainant would retrieve a knife from the vehicle.

The Discipline Authority determined that the Member acted reasonably, lawfully and used the required amount of force under the circumstances, and the allegation of *Abuse of Authority* (unnecessary force) was not substantiated.

OPCC Decision, Section 117 of the *Police Act*

Based upon my review of all the available evidence, I have a reasonable basis to believe that the decision of the Discipline Authority is incorrect with respect to the *Abuse of Authority* allegation relating to the use of force.

I agree with the Discipline Authority that the Member's evidence is credible in relation to hearing the Complainant say something about a knife, and his belief that the Complainant had a knife in his vehicle. I also accept that the matter was dynamic and a decision to intercept the Complainant, with a view to preventing him from retrieving a knife, is not on its face unreasonable.

However, I consider that the Discipline Authority erred by failing to consider whether the force used by the Member was reasonable and proportionate in light of the circumstances including the risk and potentially grave consequences of an accidental discharge of the Member's pistol resulting from striking the Complainant with it and the video evidence of where the muzzle of the weapon was pointed during the strikes.

Additionally, the Discipline Authority's decision did not sufficiently consider that the video demonstrates that the Member delivered the blows to the Complainant's head using his pistol, at the time when Constable [REDACTED] had joined the struggle and was in contact with the Complainant, that the Complainant's hands were visible and there was no evidence of a weapon being present or accessible

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 The Honourable Judge Brian Neal KC, 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
Sgt. [REDACTED], Vancouver Police Department

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