

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

AND

IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT AGAINST
AN OFFICER OF THE NELSON POLICE DEPARTMENT

NOTICE OF ADJUDICATOR'S DECISION

TO: Mr. [REDACTED] (the "Complainant")

AND TO: Sgt. [REDACTED] (the "Member")
c/o Nelson Police Department
Professional Standards Section

AND TO: Chief Constable D. Fisher
c/o Nelson Police Department
Professional Standards Section ("Chief Constable Fisher")

AND TO: Sgt. [REDACTED], Investigator (the "Investigator")
Vancouver Police Department
Professional Standards Department

AND TO: Mr. C. Pecknold
Police Complaint Commissioner (the "Commissioner")

**DECISION PURSUANT TO SECTION 117(7) OF THE POLICE ACT, R.S.B.C. 1996,
c.367 AND AMENDMENTS THERETO**

AND NOTIFICATION OF NEXT STEPS

I- Decision Summary

1. This is a decision made pursuant to section 117(7) of the *Police Act* relating to certain complaints of misconduct concerning the Member alleged to have taken place June 10, 2021, involving the Complainant.
2. I have been appointed Adjudicator in connection with this matter as a result of the Commissioner's order of June 19, 2023 made in accordance with section 117(4) of the *Police Act*.
3. As set out below, in accordance with my appointment as Adjudicator, I have considered the evidence available in the Final Investigation Report dated May 10, 2023 (the "FIR), in relation to the following specific allegation of misconduct by the Member:

(i)That on June 10, 2021, the Member committed Abuse of Authority pursuant to section 77(3)(a)(ii)(A) of the Police Act by intentionally, or recklessly, using unnecessary force in the course of the arrest of the Complainant; ("the Misconduct Allegation")

4. As a result of my review of the Misconduct Allegation in the context of the FIR, and in accordance with section 117 of the *Police Act*, I have determined that the evidence considered appears sufficient to substantiate the alleged misconduct, potentially requiring consideration of disciplinary or corrective measures against the Member.
5. The next steps are set out below, but include the offer of a pre-hearing conference for the Member. Failing resolution through that process , a new disciplinary hearing on the Misconduct Allegation involving the Member will commence no later than August 31, 2023.

II History of Proceedings and details of the Complaint - Section 117(8)a

6. On June 10, 2021, an incident took place at a traffic stop in Nelson that resulted in the arrest of the Complainant, and ultimately, his hospitalization. The hospitalization of the Complainant was required to treat significant injuries apparently sustained during the arrest process involving the Member.
7. On June 6, 2022, counsel acting on behalf of the Complainant submitted a registered complaint (the "Complaint") to the Office of the Police Complaint Commissioner (the "OPCC") with respect to the circumstances of his arrest. The Complaint included a brief summary of allegations detailing injuries allegedly sustained by the Complaint during the course of his arrest by the Member and other officers.

8. Following a review by OPCC staff, the Complaint was accepted as admissible and forwarded to the Professional Standards Section of the Vancouver Police Department for investigation.
9. As noted in the Complaint, the misconduct alleged related to the Member's inappropriate use of force with respect to the Complainant during the course of his arrest. Specifically, allegations were made against the Member of abuse of authority in the use of force, including, among other issues, striking the Complainant with the Member's service pistol, thereby engaging consideration of section 77(3)(a)(ii)A of the *Police Act*.
10. The Investigator completed his investigation and submitted the Final Investigation Report (the "FIR") to the relevant discipline authority, Chief Constable Fisher, on May 10, 2023.
11. On May 24, 2023, Chief Constable Fisher, as Discipline Authority, issued his decision pursuant to section 112 of the *Police Act* concerning this matter. The Discipline Authority found that the Misconduct Allegation was not substantiated.
12. In an order made June 19, 2023, the Commissioner determined that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect.
13. Specifically, the Commissioner expressed the view that the Discipline Authority was incorrect in finding that the use of force by the Member during the arrest of the Complainant appeared to be justified in all of the circumstances thereby negating any conclusion of misconduct.
14. The Commissioner made the decision to refer the issue of the misconduct allegation involving the Member for review in accordance with section 117 of the *Police Act*. A decision to refer the file for review by a retired judge under section 117 is an exception to the normal prohibition of further review specifically set out in section 112(5) of the *Police Act*.
15. This review has focused on analysis of the Misconduct Allegation in the context of the FIR.

III Section 117

16. As noted, the statutory authority governing this review is found in section 117 of the *Police Act*.
17. Specifically, subsection 117(6) of the *Police Act* imposes a duty on the Commissioner to provide the Adjudicator with copies of all reports under section 98, 115 and 132 that may have been filed with the Commissioner prior to the Adjudicator's appointment in relation to the allegation of misconduct.

18. The central role of the Adjudicator as set out in subsections 117 (8) and 117(9) of the *Police Act* is to independently review the material delivered under subsection 117(6), and to determine whether or not the conduct of any of the Member appears sufficient to substantiate misconduct within the meaning of Part 11 of the *Police Act* requiring disciplinary or corrective action.
19. The law is clear that a review under section 117 is a paper based process of the record provided by the Commissioner. It takes place without live witnesses, additional evidence or submissions from any of the parties involved. The review is not an appeal of earlier decisions concerning misconduct nor is it a redetermination in any manner of other proceedings, including court proceedings, that may have a connection to the misconduct alleged. Nor is the Adjudicator's role to decide the facts concerning the matters in issue at this stage in the process. Rather, the adjudicative role in this part of the process is to determine whether or not the evidence appears to substantiate potential misconduct requiring some form of sanction or corrective measures.
20. The duty of an Adjudicator under subsection 117(1)b is to reach their own decision based on the materials submitted for review without submissions or further evidence adduced by way of a hearing.
21. The Supreme Court of British Columbia provided useful specific guidance on the role of Adjudicators serving under section 117 of the *Police Act*. In *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970, the Honourable Mr. Justice Affleck considered an earlier Adjudicator decision provided under section 117, noting as follows:

[27] *There are two troubling aspects to the approach to his task taken by the retired judge.*

[28] *The first is his implicit interpretation of s. 117(9) of the Act that it permitted him at an early stage of his inquiries to reach conclusions about the petitioner's conduct.*

[29] *In Florkow v. British Columbia (Police Complaint Commissioner), 2013 BCCA 92, Newbury J.A. observed that part XI of the Act, where s. 117 is found, "is not a model of clarity". Section 117(9) fits that description, but in my opinion it is clear that it authorized the retired judge to do no more than express a view that the petitioner's conduct on April 22, 2016 "appears" to have been misconduct. To have gone beyond an expression of a preliminary review by giving extensive reasons using conclusory language, such as asserting that the petitioner's "conduct was a marked and serious departure from the standard reasonably expected of a police officer" is not consistent with the scheme and object of the Act and the intention of the legislature (see Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 at para. 21.*

[30] *In my opinion the legislature did not intend the retired judge, whose ultimate role could include presiding over a disciplinary hearing involving the very person whose conduct he had already determined was improper, nevertheless could use language, before a hearing had taken place, that on any reasonable reading left no doubt in the*

mind of the petitioner that the retired judge had already made up his mind that the petitioner was guilty of the misconduct alleged.

[37] In my opinion, the retired judge improperly conflated the issue of whether the petitioner was in the course of his lawful duties when he entered the complainant's home and arrested her, with the other issue of whether the petitioner was guilty of misconduct by abusing his authority as defined in the [Police Act](#). That conflation is apparent from the retired judge's conclusion that:

It follows, therefore, that the question of whether A/S Scott abused his authority must be determined according respect for the factual findings of the trial judge. Respect for those findings of fact would result in the conclusion that A/S Scott had abused his authority. ...

[39] Section 117 of the [Police Act](#) is unfortunately worded in some respects. On one possible interpretation a retired judge appointed pursuant to the [Act](#) is directed to reach conclusions about the conduct of a member of a police force before a disciplinary hearing has been conducted by the retired judge in respect of that conduct. I do not accept the legislature intended such an approach to be taken. If that was the appropriate interpretation it would inevitably raise a serious issue of an apprehension of bias when the retired judge made preliminary findings adverse to the petitioner and was then required to conduct a disciplinary hearing. I conclude that the retired Judge adopted an interpretation which has now led to that unfortunate outcome.

22. This review has been undertaken in accordance with the foregoing principles and law.

IV Records submitted for review

23. In accordance with subsection 117(6) of the *Police Act*, the Commissioner has provided the FIR for my review which was prepared by the Investigator. Also included was a flash drive providing electronic copies of the FIR documents and videos detailing much of the encounter with between the Member, the Complainant and another attending police officer. The FIR comprises 62 pages of narrative, plus extensive related attachments. It details the evidence of all relevant parties concerning the Misconduct Allegation.

24. The Complaint submitted includes a number of pages of faxed photos which were sent as part of the initial submission in black and white. Regrettably, the quality of the photo copies makes it extremely difficult to make out any of the injuries alleged.

25. The FIR and related materials were delivered to me July 7, 2023. Section 117(9) of the *Police Act* confirms that my review must be completed within 10 business days with notice to the relevant parties of my decision and next steps.

V Misconduct and the Police Act- Allegations considered
– Section 117(8)c and 108 Police Act

26. The evidence set out in the Final Investigation Report outlines the perspectives of the Member and others concerning the unfolding events involving the Complainant. The report also includes important collateral materials on medical records, Nelson Police Department (“Nelson PD”) policies, case law and general principles associated with use of force training.
27. The FIR does not, however, contain material outlining the details of the Complainant’s perspective of events beyond the initial Complaint. The lack of this material is solely the responsibility of the Complainant. Counsel responsible for the initial complaint submission specifically asked that the OPCC follow up directly with the Complainant on any further inquiries.
28. The Investigator made multiple attempts to interview the Complainant . His purpose was to secure additional evidence on the Complainant’s perspective with respect to his arrest, and specifics of his injuries. Notwithstanding those efforts, the Complainant did not follow up on the requests for an interview and as such, no additional material was produced.
29. Fortunately, as noted above, video recordings arising from a camera system in Cst. [REDACTED] (“Cst. [REDACTED] police car have been made available and incorporated into the FIR. These recordings provide an important series of perspectives on the various interactions between the Complainant, the Member and other parties.
30. Turning to the specifics of possible misconduct under the Misconduct Allegation, section 77 of the *Police Act* provides, in part, as follows:

77(1) In this Part, "misconduct" means

(a) conduct that constitutes a public trust offence described in subsection (2), or

(b) conduct that constitutes

(i) an offence under section 86 [offence to harass, coerce or intimidate anyone questioning or reporting police conduct or making complaint] or 106 [offence to hinder, delay, obstruct or interfere with investigating officer], or

(ii) a disciplinary breach of public trust described in subsection (3) of this section.

(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

(a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,

(ii) in the performance, or purported performance, of duties, intentionally or recklessly

(A) using unnecessary force on any person,

31. An important overall limitation to the definitions of misconduct in section 77 of the *Police Act* is found in subsection 77(4) as follows:

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

32. Also, of apparent relevance to the Misconduct Allegation are the specific policies of the Nelson PD concerning the use of force, weapons used by members and the reporting of injuries arising from the use of force. These policies are set out in the FIR at Tab 8 along with other relevant Provincial Standards.
33. This review must independently assess the circumstances of the Member's interactions with Complainant, the actions of the various parties and the totality of the circumstances relating to the same as set out in the FIR. This includes consideration of the rapid escalation of the use of force by the Member, and the subjective and objective, rationale behind that use of force in the context of section 77 of the *Police Act*.
34. And again, it is important to confirm that this review is not a decision on proven facts, but rather an assessment of all relevant evidence in order to determine whether or not such evidence appears to substantiate the misconduct allegation in issue.

VI The Evidence arising from the Final Investigation Report

35. My review of the FIR and the evidence and records referenced in it discloses the following evidence, which if proven, may have relevance to the questions of misconduct raised in this review. I note, of course, that identifying the facts that appear to form the basis of evidence relevant to the allegations does not result in the conclusion that such facts will ultimately be proven.
36. The evidence in the FIR that I have considered relevant to the matters in issue appears to confirm the following general evolution of events:

The initial traffic stop of the Complainant

- (a) On June 10, 2021, just prior to 9:18 am, Cst. ■ appears to have noticed a rolling stop by a vehicle at Hall Mines and Stanley roads in Nelson, B.C. Cst. ■ appears to have

immediately moved to follow the subject vehicle in her police car. Emergency lights appear to have been engaged resulting in the successful and timely stop of the subject vehicle which moved to park at the right side of the road;

- (b) Cst. ■ appears to have then exited her vehicle and cautiously approached the driver's side window, which was apparently down;
- (c) Cst. ■ appears to have advised the driver, the Complainant, of the reason for the traffic stop. Cst. ■ appears to have immediately been met with hostility and verbal aggression from the Complainant;
- (d) A part of the exchange between the parties appears to have included statements from the Complainant that he suffered from "PTSD" which had been aggravated by the traffic stop;
- (e) There appears to be some inconsistency on how the Complainant responded to requests for driver's license and insurance documents made by Cst. ■. However, it does appear that ultimately Cst. ■ received the relevant materials;
- (f) Before moving to her vehicle to write a ticket, it appears that Cst. ■ made a radio call at approximately 9:18:12 requesting a backup unit to assist in dealing with what appears to have been a very irate driver;
- (g) It appears that Cst. ■ subsequently left the driver's side door and returned to her vehicle, which was parked immediately behind the Complainant's vehicle, to write up a ticket;

Arrival of the Member

- (h) The Member appears to have arrived on scene almost immediately after Cst. ■ call for assistance, just as Cst. ■ moved to return to her vehicle. The Member appears to have placed himself to the rear, and on the passenger side, of the Complainant's vehicle;
- (i) The Member appears to have maintained a watching presence behind the subject vehicle. During this time it appears that the Complainant continued to act angrily throwing material throughout the cabin of subject vehicle, talking to himself loudly, and in an apparent angry, animated manner;
- (j) The Member appears to have moved closer to the passenger side door briefly, then stepped back. It is unclear on the evidence in the FIR whether or not the passenger side window of the Complainant's vehicle was open partially or completely;
- (k) At some point during the Member's close observation of the Complainant, he appears to have heard, or seen, something involving the Complainant that significantly raised his level of concern. The FIR appears to indicate several possible comments that the Member may have overheard, although again, there does appear to be inconsistent evidence on that point;
- (l) Thereafter, the Member appears to have immediately moved his right hand to a holstered service pistol, removed the same and held the gun briefly in a low ready stance as he quickly moved towards the passenger side door;
- (m) At this same time, it appears that another member was arriving on scene in a vehicle from the area to the front of the Complainant with lights and siren operating;

- (n) It appears, however, that as the Member moved along the passenger side of the subject vehicle, the Complainant began to quickly exit from the driver's door;
- (o) In response, it appears that the Member turned, and then rushed around the back of the car with the pistol held almost waist level in his right hand;
- (p) As the Member came around the driver's side of the subject vehicle, it appears that the pistol was raised and pointed directly at the Complainant. The Complainant, at that point, appears to have fully exited the vehicle and closed the driver's door. It appears that the Member was substantially larger than the Complainant at the time of this encounter;
- (q) There does not appear to have been any weapon in the Complainant's hands as the Member held his pistol and issued some form of commands to the Complainant. It does not appear clear exactly what commands were being issued by the Member at the outset of the engagement with the Complainant. It does appear that the Member quickly closed the distance between himself and the Complainant within seconds to the point where the Member could easily reach the subject;
- (r) The Member next appears to have grabbed the Complainant with his left hand. It appears that the Complainant quickly moved to open the rear driver's side door, ultimately holding onto the door frame with what appears to have been both hands as the Member appears to have grappled with Complainant for control;
- (s) It appears that the Member struck the Complainant twice in the upper neck region commanding the Complainant repeatedly to get on the ground. The Complainant did not appear to comply and it appears that the struggle continued vigorously;
- (t) During the struggle, the Member's right hand holding the pistol appears to have been pointed horizontally across the Complainant's chest;
- (u) The Member next appears to have briefly grabbed the Complainant's collar and struck him on the right side of his chest, under his arm. Cst. ■ also appears to have joined the Member in attempting to subdue the Complainant during this part of the struggle;
- (v) At this point it appears that the Complainant was resistant to the efforts of the two officers to establish control and he continued to struggle. During this struggle, it appears that the Member moved his right hand and pistol aggressively hitting the Complainant attempting to gain control. Ultimately, the Member appears to have pushed the Complainant to the front of the driver's side rear door and forced the closure of the door;
- (w) As this was taking place, it appears that neither officer was having success in controlling the much smaller Complainant. It also appears that the Complainant had knocked off the Member's sunglasses and placed his hands on the Member's upper chest and around his neck. Cst. ■ appears to have continued to attempt to control the Complainant without apparent success;
- (x) It appears that what happened next was that the Member moved his right hand from the Complainant's back and swung it wide striking the Complainant with the pistol three times with considerable force. It appears that Cst. ■ was holding the Complainant as these strikes were made;

- (y) Ultimately it appears that the two officers were able to push the Complainant to the ground after the three pistol strikes. With assistance from other officers arriving on scene, the Complainant was ultimately subdued, arrested and handcuffed.
- (z) The elapsed time for this incident appears to have been approximately four to five minutes from initial stop to arrest;
- (aa) The Complainant was transported to Nelson PD cells and during that brief journey, appears to have continued his aggression by screaming and smashing his face into the silent patrolman barrier. It appears that the Complainant refused all medical assistance in cells;
- (bb) Ultimately it appears that the Complainant was transported to a local hospital and [REDACTED]; and
- (cc) The Complainant appears to claim that he attended hospital again, subsequent to his arrest for further assessment and treatment. The Complainant appears to claim three fractures of his face, a broken arm and a concussion arising from his arrest.

VIII Analysis of the Misconduct Allegation- Sections 117(8)(d) & (i) of the Police Act
Does the evidence appear sufficient to substantiate the Misconduct Allegations?

37. I now turn to an analysis of the evidence relating to the Misconduct Allegation.
38. At this stage I must consider whether or not the evidence adduced in the FIR that is summarized above appears sufficient to substantiate the Misconduct Allegation.
39. This stage of analysis under section 117 of the *Police Act* does not result in findings of fact on any alleged misconduct beyond analysis of whether or not the misconduct allegation appears substantiated against the Member based on analysis of the facts set out in the FIR.
40. As noted above, the evidence in the FIR describes a two stage encounter between the two key attending officers : Cst. [REDACTED] and the Member. The initial encounter appears to have been between Cst. [REDACTED] and the Complainant . The second stage of the encounter began with the arrival of the Member.
41. It appears that Cst. [REDACTED] did not use any force in dealing with the Complainant until she moved to assist the Member in his struggle.
42. Prior to the use of force by the Member, all engagement by Cst. [REDACTED] with the Complainant appeared to have been professional, focused and calm notwithstanding the apparent belligerence of the Complainant.
43. The Complainant appeared to have at least partially complied with directions from Cst. [REDACTED] during the course of their initial engagement. Specifically, the Complainant appears to have stopped his vehicle as directed and provided insurance and driver's license materials

as requested, although there are apparent inconsistencies in the FIR on the specific details of how that took place.

44. With the arrival of the Member and apparent arrival of a third police vehicle, it appears that the Complainant's state of agitation continued as he sat in his car.
45. In considering the lawfulness of the actions of the Member, I am mindful of the context. In *Berntt* [*Berntt v. Vancouver (City)*, 1999 BCCA 345] and *Anderson v. Smith*, 2000 BCSC 1194 the relevant law is summarized as follows at para 51:

[51] Consideration must be given to the circumstances as they existed at the time. Allowance must be made for the exigencies of the moment, keeping in mind that the police officer cannot be expected to measure the force with exactitude: Wackett v. Calder (1965), 51 D.L.R. (2d) 598 at 602 (B.C.C.A.); R. v. Botrell, supra at 218; Allrie v. Victoria (City), [1993] 1 W.W.R. 655 at para 20 (B.C.S.C.); Levesque v. Sudbury Regional Police Force, [1992] O.J. No.512 (QL) (Ont. Gen. Div); Breen v. Saunders (1986), 39 C.C.L.T. 273 at 277 (N.B.Q.B.); Berntt v. Vancouver (City), supra at 217. This may include the aura of potential and unpredictable danger: Schell v. Truba (1990), 89 Sask. R. 137 at 140 (Sask. C.A.) (in dissent). There is no requirement to use the least amount of force because this may expose the officer to unnecessary danger to himself: Levesque v. Sudbury Regional Police Force, supra.

46. Adjudicator Pitfield said the following about the relevance of exigencies at paragraph 37 of the *Dickhout* decision [*Re: Dickhout*, OPCC PH 2010-03]:

... The assessment of an officer's conduct must respect the fact that his or her job is a difficult one and, in the heat of the moment, frequently does not allow for detached reflection when deciding to act: R. v. Nasogaluak, [cited earlier, paragraph 35] and In the Matter of Constable Smith, Victoria, January 28, 2009, p. 21.

47. As Adjudicator, my review of a member's actions must:

- (a) Take account the exigencies and immediacy of the moment;
- (b) Consider the fact that members are often required to make decisions quickly in the course of an evolving incident, without the detached reflection that is available to those looking back on an incident; and
- (c) Consider that at law, there is no requirement that a member perfectly calibrate his or her actions to the perceived threat.

48. As it appears that the arrest or detention of the Complainant was at least one objective of the Member, section 25 of the Criminal Code also appears to have relevance to this review. Section 25 provides as follows:

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

(b) as a peace officer or public officer,

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.”

49. Section 25 must also be considered as part of the analysis of possible misconduct under section 77(3)(a)(i)(A) of the *Police Act*.

50. The specific issues arising with respect to the elements of proof required to be considered in a review of potential misconduct of the Member under section 77(3)(a)(ii)(A) are as follows:

(a) Was the Member acting in the performance or purported performance of his duties in dealing with the Complainant?

(b) Did the Member intentionally or recklessly use force on the Complainant?

(c) Did the Member use force on the Complainant without good and sufficient cause? Specifically, were the Member's actions in using force reasonable and proportionate in all of the circumstances?

(d) Was the conduct of the Member characterized by a serious blameworthy element, not simply a mistake of legal authority or an error forgivable because of a lack of training?

Issue (a) – Member acting in Performance of Duties

51. With respect to the first issue, it appears clear that the Member was engaged in the lawful execution of his duty in both serving as back up to Cst. ■ and attempting to control, detain and possibly and arrest the Complainant.

Issue (b) -Use of Force

52. With respect to the second issue, it appears that the Member used force of varying degrees in his dealings with the Complainant. This appears to have included significant physical strikes on the Complainant, including the use of the Member's service pistol as a tool in administering some of those strikes.
53. On the second issue, therefore, it appears that the Member used force in his attempts to achieve control over the Complainant and ultimately his arrest.
54. It appears from the evidence in the FIR that the apparent repeated application of significant force by the Member was intentional as a means of subduing and controlling the Complainant in the process of completing the roadside arrest.

Issue (c) - Good and Sufficient cause to use force

55. The third element to be considered is whether or not the Member had "good and sufficient cause" to use force in his dealings with the Complainant.
56. This issue requires consideration of the lawful justification for the use of force for the Member. In that regard it appears that all of the actions taken by the Member were intended to subdue, control and arrest the Complainant.
57. On the evidence set out in the FIR, the Member appears to maintain that his decision to draw his pistol and engage the Complainant was to protect Cst. ■. The Member appears to have reported overhearing a possible threat from the Complainant while seated in his car, possibly directed to Cst. ■. The Member appears to have specifically reported overhearing a threat to use a knife in an attack on Cst. ■.
58. Objectively, the following factors appear to have been relevant before the Member decided to engage the Complainant and draw his service pistol:
- (a) The Member, and Cst. ■ did not appear to have any knowledge of the Complainant's prior history;
 - (b) On arrival the Member did not appear to have witnessed any overt violence or threat to any person or property including Cst. ■.
 - (c) Although agitated, uncommunicative and apparently confused, it appears evident that the Complainant had been responding to some of the directions given by Cst. ■ and hence, complying with police directions, in part;
 - (d) It does not appear evident that the Complainant was subject to lawful arrest as a result of the roadside stop alone;
 - (e) The Member appears to have overheard something that raised concerns as to the increased risk posed by the Complainant. However, it also appears that exactly what the Member overheard is uncertain based on the evidence in the FIR;

- (f) The Member does not appear to have seen any weapon held by or in the control of the Complainant before withdrawing his service pistol and engaging the Complainant. Nor does the Member appear to have seen any such weapon at any point during the attempt to arrest and subdue the Complainant;
- (g) Cst. ■ appears to have been secured in her police vehicle completing documents at the time the Member drew his pistol and engaged the Complainant. As such, it appears that objectively any genuine risk to Cst. ■ was remote;
- (h) The Member appears to have known that when confronted, the Complainant appeared to be aggressively non-compliant;
- (i) At the time the Member engaged the Complainant, he had the support of Cst. ■ and the other attending officer;
- (j) The Member and Cst. ■ appear to have been aware that the Complainant was repeatedly communicating that he suffered from PTSD, a condition which he maintained was exacerbated by the actions of the two officers.

59. Subjectively, the following factors appear to have been relevant:

- (a) At the time the Member drew his service pistol and confronted the Complainant, the Member appears to have had a heightened concern as to the risk presented by the Complainant, particularly towards Cst. ■
- (b) The Member appears to have had training in use of force techniques and hence, was apparently informed of lawful use of force considerations;
- (c) Prior to the struggle with the two officers, the Complainant did not appear to have any weapon in his possession, there does not appear to have been any overt violence or property damage associated with the Complainant's actions, nor were there any serious threats to any party. Therefore, there does not appear to have been any urgent need to confront the Complainant with a drawn pistol, nor to subdue the Complainant; and
- (d) Finally, it appears evident that the Complainant was not behaving normally, possibly as the result of an underlying PTSD mental health issue.

60. It appears unlikely that a reasonable officer, properly considering the totality of the circumstances before the display, deployment and use of the Member's service pistol, including the Member's training and the National Use of Force Framework, would conclude that there was "a high likelihood of bodily harm" to any person necessitating such action.

61. It appears reasonable to conclude that the likelihood of bodily harm to any person would only arise if force was used on the Complainant. It also appears that the degree of force used by the Member did not appear to be immediately required. In terms of the possible threat to Cst. ■ it also appears that such risk was minimal once she had returned to her police car, and even lower when the complete absence of any weapon in the hands of the Complainant is considered.

62. In all of the circumstances, it appears that the force used by the Member in dealing with the Complainant was unreasonable and disproportionate to the actual risks that appear to have been presented by the Complainant.
63. It appears that considering the circumstances facing the Member, a reasonable officer would be unlikely to conclude that the immediate use of the force engaged by the Member was necessary in all of the circumstances. It further appears that there was no apparent urgency to forcibly subdue the Complainant, and specifically, no urgent need to subdue the Complainant using a service pistol in any manner.
64. Indeed, it appears that a reasonable officer fully apprised of the circumstances would readily conclude that de-escalation techniques were required to begin to deal with a nonviolent subject evidencing mental health issues, aggression and instability.

Issue D – Existence of serious blameworthy conduct, or mistake of legal authority, or error forgivable because of a lack of training

65. The last matter to be considered is whether or not the apparent misconduct of the Member evidences serious blameworthy misconduct, as opposed to a mistake of legal authority or lack of training.
66. In considering these matters, it is noteworthy that the Member's actions in drawing his pistol appears to have had the effect of contributing to an immediate violent confrontation with the Complainant. The struggle that ensued appears have seen several strikes to the Complainant's head and face with the Member's service pistol as well as other physical strikes to the Complainant's body.
67. It appears evident that as a result of the Complainant's violent arrest, he was forcibly withdrawn from the roadside in handcuffs and apparently taken to hospital, ultimately requiring care of the injuries incurred as a result of his arrest.
68. In all of the circumstances, it appears that the display and use of the Member's service pistol, and the use of force associated in the arrest of the Complainant, evidenced serious blameworthy conduct for the following reasons:
- (a) It does not appear that the Member's perspective that there was an imminent risk of bodily harm to anyone, particularly Cst. ■ was correct in all of the circumstances;
 - (b) It appears that by taking control of the dealings with the Complainant, the Member set in motion a chain of events that precipitated a violent use of force and subsequent arrest with high risk to the Complainant, the Member and other parties, including members of the public in the area that may have been avoidable;
 - (c) There does not appear to have been any urgent need to arrest and remove the Complainant from the area adjacent to his vehicle;

- (d) It appears that the Complainant suffered significant injuries from strikes, kicks and facial lacerations as a result of the arrest that took place when de-escalation efforts may have avoided such injuries; and
- (e) It appears that the force used by the Member was neither reasonable, nor proportionate to the risks at hand, in all of the circumstances.

69. It also appears that such misconduct did not arise as a result of a mistake of legal authority or lack of training. The FIR confirms that the Member had been trained in use of force principles and techniques.

70. It appears therefore that in all of the circumstances, the conduct of the Member does evidence serious blameworthy conduct that was not the result of a mistake of legal authority, or other error resulting from a lack of training.

IX Conclusion

71. There do appear to be some areas of uncertainty on the facts in the FIR concerning:

- (a) Exactly what took place between the Complainant and Cst. ■ concerning the provision of requested insurance and driver's license documents;
- (b) What precise comments of the Complainant motivated the Member to action;
- (c) The precise details of the Member's reasoning for forcefully engaging the Complainant;
- (d) The rationale for the Member's decision to draw, and ultimately use, his service pistol to engage with the Complainant;
- (e) What other use of force options were considered by the Member and the rationale for not engaging the same;
- (f) How the Member's use of force training and Nelson PD policy on use of force options, including firearms, may relate to the facts of this case; and
- (g) What de-escalation strategies were considered, if any. And if not, why not.

72. However, considering all of the material in the FIR, and applying the standard of review at this stage of the proceedings, pursuant to Section 117(9) and 117(8)(d)(i) of the *Police Act*, I have determined that there appears to be evidence set out in the FIR which, if proven, could substantiate the Misconduct Allegation with respect to the Member.

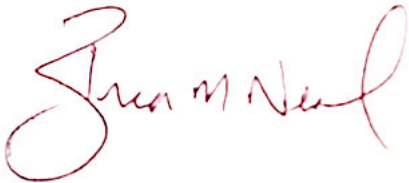
73. I have further determined that such a finding could potentially requiring the taking of disciplinary or corrective measures against the Member.

X Next Steps

74. I hereby notify the Member of the next steps in this proceeding, pursuant to subsections 117(7) and (8) of the *Police Act*.
75. Considering the factors in section 120 of the *Police Act*, and in particular section 120(3), I am willing to offer a prehearing conference to the Member with respect to the Misconduct Allegation.
76. I am directing the Member to advise the Registrar within 5 days once a decision has been made on whether or not to accept the offer of a prehearing conference.
77. The range of disciplinary and corrective measures set out in the *Police Act* which I might consider appropriate in the current case will, of course, be affected by the section 126 factors, most of which are not in evidence at this stage of review. However, based on the information in the FIR that is available, the range of disciplinary and corrective measures that may be considered appropriate includes:
- a. *requiring the Member to engage with retraining in use of force and de-escalation techniques, and,*
 - b. *the imposition of a moderate to significant suspension from service without pay.*
- pursuant to subsections **126(1)** of the *Police Act*.
78. Pursuant to s 113 of the *Police Act*, the Complainant has the right to make submissions:
- (a) at a discipline hearing (as *per* section 117(8)(b)) or,
 - (b) if the Member accepts a prehearing conference, to the authority convening that conference, pursuant to section 120(6) of the *Police Act*.
79. Pursuant to section 119, at a disciplinary hearing, the Member may request permission to question witnesses. Such a request must be made within 10 business days of this notification. Any such request will be directed to my attention through the Registrar.
80. Section 118(1) of the *Police Act* provides that a discipline hearing concerning the substantiated misconduct allegations must be convened within 40 business days of notice of this decision. That date is August 31, 2023.
81. A pre-discipline proceeding conference call will be convened by telephone August 3, 2023 at 9:00 am with the Member, and/or counsel on his behalf. At that time, dates will be canvassed that are convenient to commence the disciplinary hearing. The Registrar will advise the relevant parties as soon as possible of the conference call details.

82. In the event that date is unsuitable to the Member or his counsel, that party will advise the Registrar immediately and provide an indication of available dates and times for a conference call to be convened.

Dated at Victoria, B.C. July 20, 2023

A handwritten signature in red ink, appearing to read "Brian M. Neal". The signature is written in a cursive, flowing style.

Brian M. Neal KC (rt)