

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

AND

IN THE MATTER OF A REVIEW UNDER SECTION 117

AND

IN THE MATTER OF ALLEGATIONS OF MISCONDUCT

AGAINST

CONSTABLE [REDACTED]

OF THE VANCOUVER POLICE DEPARTMENT

NOTIFICATION OF MISCONDUCT PURSUANT TO SECTION 117(7)

TO: Mr. [REDACTED] (Complainant)

AND TO: Constable [REDACTED] (Member)
c/o Vancouver Police Department
Professional Standards Section

AND TO: Mr. Clayton Pecknold (Commissioner)

AND TO: Sergeant [REDACTED] (Investigator)
c/o Vancouver Police Department
Professional Standards Section

Overview and Timeline

[1] This Notification arises out of a review under Section 117(1)(a) of a complaint against Constable [REDACTED] a member of the Vancouver Police Department.

[2] Constable [REDACTED] is a dog handler. The complaint pertains to a February 13, 2021 arrest of a [REDACTED] Indigenous youth during which the youth was bitten several times by the officer's police service dog.

[3] The youth's father filed a complaint with the Office of the Police Complaint Commissioner and an investigation ensued. The investigating officer, Sergeant [REDACTED] filed his final investigation report on November 3, 2022. He considered an allegation of excessive force under Section 77(3)(a)(ii)(A) of the Police Act, and recommended a finding that misconduct was not substantiated. That recommendation was accepted by a VPD discipline authority acting under Section 112 on November 18, 2022. On December 2, 2022, the complainant requested a review under Section 117.

[4] By a Notice of Appointment of Retired Judge dated December 16, 2022, the Police Complaint Commissioner appointed me to conduct the review. A review under Section 117 requires a fresh consideration of the final investigation report and the evidence and records referenced in it to ascertain whether the evidence "appears sufficient to substantiate misconduct and to require the taking of disciplinary or corrective measures." I am to identify the potential allegations of misconduct that arise under Section 77 of the *Police Act* and arrive at my own conclusions. I am not bound by the nature of the misconduct identified by the investigator. The review must be completed within 10 business days of my receipt of the materials on December 28, 2022; hence, by January 12, 2023.

[5] The allegations of misconduct I have identified and considered are set out in Part 3. For the reasons that follow I have determined that the evidence meets the Section 117 threshold of appearing sufficient to substantiate the first of those allegations and not the second. Section 117(8) requires certain information to be included in this Notification. Those requirements are addressed below under the applicable headings.

[6] This Notification is not for publication and will be redacted as appropriate to address privacy concerns. For that reason, I will at times refer to Constable [REDACTED] as “the member” and to other individuals in descriptive terms rather than by name.

1. The Complaint and Conduct of Concern [Section 117(8)(a)]

[7] The complainant stated his complaint in the following terms¹:

[REDACTED] is Indigenous. [REDACTED] and [REDACTED] friend [Name] were walking up [REDACTED] to [REDACTED] after being at [REDACTED]. Without warning, a police dog was released onto [REDACTED] which bit [REDACTED]. Both [REDACTED] and [Name] did not try to run away from police. [Name] was on the ground while [REDACTED] was bit by the dog on [REDACTED] left leg. The dog handler punched [REDACTED] in the head and got on [REDACTED] back with his knee before handcuffing [REDACTED].

[8] I will refer to [REDACTED] as “the youth”. [REDACTED] was [REDACTED] at the time of the incident and [REDACTED] companion was also a young person.

[9] After the incident, the member filed a Dog Handler Report² as part of the General Occurrence Report (“GO”) and a separate Dog Application Report³. He reported that he and his police dog, “[REDACTED]” responded to a report of a break-in at a corner store at [REDACTED] and [REDACTED] in Vancouver at about 3:27 a.m. on February 13, 2021. The caller provided a description of two [REDACTED] that matched the description of the youth and [REDACTED] companion. The member learned through police radio dispatches that plain clothes officers had observed the two leaving the area of the corner store and then breaking windows at [REDACTED], nearby. After that, the

¹ All materials that accompanied the Final Investigation Report are referred to by the title assigned to them by the investigator: 19727 2021 05 20 Registered Complaint_Redacted

² GO_21-25794, p. 56, “Dog Handler Report”

³ 20210216_Dog Report_[REDACTED]: this is the same verbatim as the report in the GO.

member learned that the youth had thrown a rock through the rear window of an [REDACTED] parked in the [REDACTED], and the pair were seen fleeing east on [REDACTED] across [REDACTED].

[10] The member related that at about 4:25 a.m., “plain clothes officers set up a takedown plan at the corner of [REDACTED],” for the two suspects to be challenged by the member and [REDACTED] [REDACTED] was on a twenty-foot tracking line. The member concealed himself nearby, aware that the suspects were arrestable for mischief. He saw them walk east on [REDACTED] to [REDACTED]. He challenged them with the police dog, and stated, “in a loud clear voice,” “Police, you are under arrest, get on the ground or you will be bit!”

[11] The member reported that the two [REDACTED] immediately began to walk backwards away from him, and the youth said, “What, what?” The member “repeated his lawful police commands two more times,” while he continued to challenge the two with the dog, stating, “Police, you are under arrest, get on the ground or you will be bit!” As reported by the member, the two “disobeyed multiple lawful police commands and continued to walk backwards looking in all directions in an obvious attempt to flee on foot.”

[12] The member then directed [REDACTED] to apprehend the youth, as the “primary accused who had smashed multiple windows”. The member observed [REDACTED] close the distance, make contact with the youth’s left lower leg and pull [REDACTED] to the ground. The member stated in a loud and clear voice, “Show me your hands, do not fight the dog!” He told the youth’s friend to “get on the ground!” and [REDACTED] complied. At this point, additional police members moved in and gained control of the youth, and the member commanded the dog to release [REDACTED].

[13] The youth received lacerations and puncture wounds to [REDACTED] upper and lower left leg from dog bites. [REDACTED] upper left arm had bruising.⁴ [REDACTED] was treated at [REDACTED] Hospital and released. As noted earlier, the youth's father filed a complaint which resulted in a finding of no misconduct by a VPD discipline authority, and the complainant requested this review.

[14] In the Notice of Appointment of Retired Judge, the Commissioner provides the following basis for his decision to order the review (referring to the youth as "the affected person"):

... I am of the view that the Discipline Authority was incorrect in determining that the affected person was preparing to flee and that the release of the PSD [Police Service Dog] was consistent with BC Provincial Policing Standards. There is evidence to support that the affected person and [REDACTED] friend may have been complying with the request of the respondent member to get on the ground when the PSD was released.

Further, I have concerns with the proportionality of the force used which resulted in dog bite punctures to the affected person. Evidence supports that the level of risk posed to the respondent member, the affected person and the public was not proportional to the use of the PSD and was contrary to VPD policy.

Additionally, the evidence does not support that exigent circumstances existed at the point in time when the respondent member engaged the affected person. The two youths were under surveillance by multiple members for almost an hour prior to arrest. The respondent member deployed the PSD despite other members in the area and within seconds of being on scene.

[15] The issues that arise from the member's account of the events, the results of the dog encounter, the complaint, and the terms of the Notice of Appointment, is whether the arrest of the youth and the deployment of the dog were appropriately conducted, in the circumstances. In particular, the question that arises is whether it was necessary to

⁴ Medical Report – [REDACTED] Injuries Diagram

challenge the two youths with the dog at the time when that first occurred, whether it was subsequently necessary to use the dog to arrest the youth by biting, and whether the dog was removed from the youth as soon as reasonably possible. These issues engage the potential allegations of misconduct under Section 77 of the *Police Act* that I have set out in the next part.

2. Allegations Considered [Section 117(8)(c)]

[16] I have identified and considered the following allegations that potentially arise in connection with the incident.

(1) That on February 13, 2021, Constable [REDACTED] committed abuse of authority pursuant to section 77(3)(a)(ii)(A) of the *Police Act*, by intentionally or recklessly using unnecessary force when he deployed a police service dog to arrest a person; and

(2) That on February 13, 2021, Constable [REDACTED] committed abuse of authority pursuant to section 77(3)(a)(ii)(A) of the *Police Act*, by intentionally or recklessly using unnecessary force during the arrest of a person when he failed to ensure that the police dog released the person as soon as reasonably possible.

3. Does the Evidence Appear Sufficient to Substantiate the Allegations? [Section 117(8)(d)(i)]

A. Review of the Evidence and Materials

i. The Member

[17] In addition to his statement in the GO, the member filed a Subject Behaviour – Officer Response [SBOR] report in relation to the dog bite⁵. He does not indicate in the SBOR how many other officers were present for the incident. He specifies (by checking

⁵ 220408-SBOR-[REDACTED]

boxes) that: the subject was actively resistant, non-compliant, and pulled away or attempted to flee; the struggle was officer-initiated; he used verbal police challenges three times; and the dog bit the subject on the lower left leg.

[18] The member was interviewed by the investigator in connection with the complaint. In relation to the decision to deploy the police dog, he added the following details. He was aware that the two individuals had fled twice, once after breaking the window at the school and again after breaking the window of the [REDACTED]. It was dark and snowing with about 2 inches of fresh snow on the ground. The youth was over 6 feet tall and dressed in black, and the member was not aware [REDACTED] was a minor or Indigenous.

[19] The investigating officer summarized the member's explanation of his decision to engage the dog as follows⁶:

Due to the multiple criminal offences committed and the suspects fleeing from both crimes I believed challenging the suspects with my K-9 was the appropriate level of force.

From my experience as a police handler, many suspects have surrendered to the presence of my police dog and my police uniform with this tactic.

My intentions were for the suspects to listen to my police commands and get down on the ground and no further force would have been used.

As the suspects approached the intersection, I stepped out of my place of concealment and yelled out my police commands, "Police you are under arrest, get on the ground or you will be bit."

[The youth and [REDACTED] friend] immediately began to walk backwards away from me out in the middle of the street.

[The youth] stated, "what what".

Given [the youth] made these statements I wanted to make clear to [REDACTED] that [REDACTED] was under arrest and repeated my police commands two more times while they continued to walk backwards, "Police get on the ground or you will be bit."

⁶ Interview Summary – Cst. [REDACTED]. Some corrections have been made for clarity.

It was clear to me that both suspects heard my police commands and were choosing to disobey my lawful police commands to surrender to police and continued to walk backwards.

Both suspects were looking in all directions but I focused on [the youth].

In my opinion [the youth] was actively resisting as ■ was walking backwards, looking in all directions and in my opinion ■ was looking for an avenue of escape to flee on foot as ■ had done twice already.

Given these circumstances I gave PSD ■ the command to apprehend [the youth] as ■ was the primary accused suspect.

I then observed PSD ■ pull [the youth] to the ground with the assistance of myself holding the 20-foot line and I stated further commands for [the youth] to show me your hands and to not fight the police dog.

While this was occurring, I split my attention on my police dog and [the youth] as well as the second suspect [Name] who was also in close proximity in the middle of the street.

At this point in the arrest, I was outnumbered with two suspects and I was not clear on their intentions given they chose not to get on the ground, they were not compliant and they were actively resistant.

I directed my attention to [Name] and yelled for ■ to get on the ground which ■ complied after the second command and appeared to be listening.

At that point, several plainclothes officers arrived and assisted in taking both suspects into custody.

Once the officers had control of [the youth's] arms, I gave the command for PSD ■ to release his hold on [the youth] which PSD ■ complied.

[20] The investigator asked the member about his understanding of when it was appropriate to deploy a police dog in response to a subject's behaviour. The investigator summarized the member's response as follows:

From my experience as well as what we are bounded by the BC Provincial standards a police service dog is a less lethal use of force and when I made my decision to release my police service dog in which case I did in this incident, there was no lesser means of force available to me that would have been

appropriate to take custody of [the youth]. Again it is a less lethal tool in the use of force framework, a police service dog is, and given this situation there is two suspects, I'm outnumbered, I'm by myself with my police service dog. Other means of use of force whether it be physical control by grabbing onto them was not practical as I was 20-30 feet away. They were backing away from me and they were looking around for avenues of escape in my opinion from what I observed. It would not have been safe or practical for me to run after them given their behaviour and given the fact that I had my police service dog. Not safe for me to do or make that decision given the fact that there are two suspects. I remember [the youth] to be well over 6 feet and also [Name] is there as well and I'm not going to go hands on with these suspects given that I'm outnumbered and also [the youth] was using rocks to commit [redacted] criminal offences. I don't know if [redacted] has any other weapons on [redacted] other rocks which would cause injury to my police service dog or myself. After the fact, which is common in other incidents I've been involved in a weapon was found on [the youth] in the form of bear spray which was readily accessible in [redacted] front pocket. So again no lesser means of force were appropriate in my opinion in this situation and I determined that the safest way to take custody of [the youth] and to ensure that [redacted] could be taken into custody as quickly and safely as possible for not only myself but as well for [the youth] was to use my police service dog. I was in the opinion that [redacted] was in need of immediate apprehension as they had fled twice from multiple criminal offences and I believe they had every intent to flee once again and my police service dog prevented that from happening. Again it was my safest option given I was outnumbered as I was able to use my police service dog as a distance weapon, which I have done over the years as a police handler, to take suspects into custody in a safe manner from distance from a long police line to keep myself safe.

[21] The investigator then asked the member why he released the dog before the youth started to run. He summarized the member's response as follows:

The rationale for that is they had three opportunities, three lawful police commands were given by myself I stated, "you are under arrest get on the ground or you will be bit." They made the decision to walk backwards and be actively resistant. [The youth] stated, "what what" and [redacted] was clearly not complying with my lawful police commands and [redacted] was not intending on

surrender. Their actions, particularly [the youth's], who my police dog made contact with, made the decision to back up in the middle of the street. In my opinion [they] had every intention to flee and in that intersection [REDACTED] [REDACTED] is a major intersection, there is a lot of snow on the ground, snow is falling I also have to consider taking [REDACTED] into custody safely with the use of force that I believe to be appropriate but if [REDACTED] took off running [REDACTED] could have been hit by a passing vehicle on a major street like [REDACTED] is or could have continued to commit other criminal offences. So in my opinion [REDACTED] was actively fleeing already with [REDACTED] decision to back away. Someone does not have to be running to meet the definition of actively fleeing.

[22] In the remainder of the interview, the member denied having made any physical contact with the youth and stated that the youth appeared to be under the influence of alcohol or drugs, but he was not sure which. He said the youth's words were unclear, and [REDACTED] was argumentative and actively resistant.

[23] In a follow-up question by email, the member was asked to relate his understanding of the release of a police dog in the context of the National Use of Force Framework [NUFF]. He stated⁷:

With respect to the National Use of Force model, a police service dog is classified as an intermediate weapon. In this incident, I went through the NUFF by displaying officer presence i/c of my police service dog, I used communication by giving lawful police commands to the suspect(s), and I determined that the use of open-hand or soft control tactics was not appropriate. The suspect(s) were aware of my presence, heard my lawful police commands, and disobeyed them by backing away into the street off of the sidewalk and looked around for avenues of either escape or to fight. The use of open-hand or soft control tactics was not appropriate as I was outnumbered, I would have had to close the distance towards the suspect(s) which would not have been safe as they were active resistant/fleeing and therefore, I determined that the safest option was to use an intermediate weapon (police service dog) to take one suspect into custody from distance while giving commands to the second suspect from

⁷ Follow-up question-response-[REDACTED]

distance. As a result, the first suspect [the youth] was taken into custody by my police service dog and the second suspect immediately obeyed my lawful police commands and laid on the ground. With regards to the BC Provincial Policing Standards, the threshold and circumstances of using a police dog where a bite may occur, the suspects were arrestable for multiple criminal offences, their identity was unknown, they had fled on foot three times from the school, the first vehicle, and finally the second vehicle, and when challenged by myself i/c of my police service dog with lawful police commands they backed away/fled looking around for avenues of escape/or to fight. I was of the mindset that the suspect(s) were fleeing and were in need of immediate apprehension by a police dog given the circumstances listed above.

ii. Officers Who Were Present During the Arrest

[24] There were four other officers involved in the surveillance of the youth and [REDACTED] friend before the pair were challenged with the dog, and who later assisted with the arrests. They each provided reports in connection with the arrests and were subsequently interviewed by the investigator. Their evidence is summarized here.

a. Constable [REDACTED]

[25] Constable [REDACTED] (whom I will refer to as Constable [REDACTED] or PC [REDACTED] provided the following synopsis in the GO⁸ of his involvement and observations:

On February 13, 2021 at approximately 0327 hours complainant [Name] called police when two [REDACTED] suspects were observed kicking doors into businesses in the south lane of [REDACTED] at [REDACTED] [REDACTED] Covert observations conducted and observed both suspects – [Name] and [the youth] - shatter windows at [REDACTED] [REDACTED] and later to a parked car on the street (BC Plate [Number]). Both suspects challenged by K9 and [the youth] began to reach for bear spray that [REDACTED] had in [REDACTED] possession. Both parties taken into custody.

⁸ GO 21-25794, page 16, some corrections have been made for clarity.

[26] In the narrative portion of the GO, Constable [REDACTED] stated⁹:

PC [REDACTED] observed [the youth] and [Name] approach a vehicle in the [REDACTED] St. The vehicle was a [REDACTED] - ... - it was parked and unoccupied. PC [REDACTED] observed [the youth] pick up an object and throw it into the rear windshield of the vehicle, completely shattering it. Both parties immediately ran away together eastbound. Police challenged both parties at [REDACTED] [REDACTED] with the police dog. Both parties were not complying with police commands. The police dog handler took [the youth] into custody with assistance from the police dog. Both parties then went to the ground. Several members attended the scene and ... arrested both parties.

Search incident to arrest and police located bear spray in the front hoody pocket of [the youth]. ...

PC [REDACTED] arrived at the arrest location and chartered [Name] for [REDACTED] and [REDACTED].

[27] The investigator provided this summary of Constable [REDACTED] statement in his interview¹⁰:

[Once] police had the resources to conduct an arrest ... the K-9 unit set up the take down at [REDACTED]. ...Once the suspects reached [REDACTED] that is when an arrest was conducted with the K-9 and other police members. ...One suspect was apprehended by the K-9. ...I was approximately a block and a half out, it was a dark night and it was snowing. ...The visibility was limited. ...Once I arrived on scene both suspects were in custody.

[28] The investigator then asked, "Could you at all hear any of the commands by any of the officers?" Constable [REDACTED] responded, "At the exact time of the arrest it was hard due to the visible barriers, weather and time of night. It was hard to see the exact arrest in detail. I do recall hearing a lot of yelling from everyone involved and hearing, "Police police", and the police members were yelling that they were police. I do recall that but I

⁹ GO, supra, page 17

¹⁰ Interview Summary – Cst. [REDACTED] Some corrections have been made for clarity.

can't remember what exactly was said between the two parties I was too far away." The inspector asked if he would be able to say if they were resisting arrest or tried to flee, and Constable [REDACTED] said, "I couldn't tell from my distance."¹¹

b. Constable [REDACTED]

[29] Constable [REDACTED] (whom I will refer to as Constable [REDACTED]) provided this narrative of his observations and involvement, pertinent to the arrest¹²:

I observed [the youth] and [Name] run across to the north side of [REDACTED] and east. Cst [REDACTED] took over observations and observed them begin walking east on the south side of the [REDACTED]. Cst [REDACTED] and Cst [REDACTED] observed [the youth] throw an object through the rear window of a parked [REDACTED] BCLP: [Licence No.] causing it to shatter. Both [the youth] and [Name] ran east across [REDACTED] and began walking east on the south sidewalk once they crossed.

[The youth] and [Name] were challenged and arrested by [the member] (K9) on the southwest corner of [REDACTED]. [The youth] did not comply with commands and was bit by the police dog on the left arm. [The youth] continued fighting to get free from the police dog and was reaching under [REDACTED] body to [REDACTED] waistline with [REDACTED] right hand. I ran toward [the member] to assist with gaining control of [the youth]. I stated Vancouver Police You're Under Arrest give me your hand. [The youth] ignored my commands and continued reaching for something under [REDACTED] body. I feared that [the youth] was trying to access a weapon that [REDACTED] could use to get free from the grasp of the police dog and police custody. I delivered a knee strike to the upper right shoulder area of [the youth] in an effort to create a temporary motor dysfunction and gain control of [the youth's] right hand. This was not effective and [the youth] continued grasping for something at [REDACTED] waistline area. I delivered two closed fist punches to the upper right side of [the youth's] face that were effective and allowed me to gain control of [REDACTED] right hand. I held [the youth]'s right hand and

¹¹ 20220530-Interview-[REDACTED]. This is transcribed in the interview summary as, "I could tell from my distance," but the audio reflects that Constable [REDACTED] said, "couldn't."

¹² GO, page 37. Some corrections have been made for clarity.

¹³ Referred to below.

Cst [REDACTED] secured [the youth] into handcuffs. [The youth] had a can of bear spray in [REDACTED] hoodie pocket in the area that [REDACTED] was reaching for during the arrest.

I assessed [the youth]'s injuries that included a minor dog bite to [REDACTED] left forearm that didn't appear to break skin and a few cuts to [REDACTED] lower left leg from a dog bite that did break skin. At 0428 hrs I called for EHS to attend the scene to assess and treat [the youth] medically.

At 0538 hrs EHS arrived on scene. Police members repeatedly called for updates from EHS and called to speak with an EHS supervisor about the extended wait. PC's allowed [the youth] to sit in the police transport wagon which was heated as it was cold and snowing outside. EHS transported [the youth] to [REDACTED] Hospital for treatment of [REDACTED] dog bite. [The youth's] mother was reached and attended taking custody of [REDACTED] from police at 0550 hrs.

[30] The investigator summarized Constable [REDACTED] evidence in his interview as follows¹⁴:

Knowing my statutory authorities under the Criminal Code I believed I had the authorities to arrest these [REDACTED] for the criminal offences that had been committed.

I also believed that if they were allowed to continue without being apprehended they would commit additional criminal offences.

This was now the third sequence of events they tried to commit offences.

I was also aware I had a common law duty to prevent crime, protect property and apprehend offenders.

K-9 [the member] was monitoring the situation and a quick arrest plan was formed for [the member] to challenge the [REDACTED] as they approached the southwest corner of [REDACTED].

This plan was made on the go and these suspects were committing criminal offences and had been running from the locations where crime was committed.

Police had limited resources and the conditions made things challenging.

Due to these challenges, often observations were made from a block away.

¹⁴ Interview Summary – Constable [REDACTED] Some corrections have been made for clarity.

Highly likely these suspects would try to flee if challenged by police.

I believe it was the safest and most appropriate plan considering the circumstances.

I was approximately a block to the south and east when [the member] challenged these two [REDACTED] at [REDACTED].

I could hear him providing commands and I began running to the arrest location.

The suspects were not complying and I arrived on location with [the member] and the K-9 was holding [the youth] by the left arm.

[31] Constable [REDACTED] restated in the interview that he perceived that the youth was trying to reach for something at [REDACTED] waistband and, fearing for his safety and believing that the youth would try to escape, he administered a knee strike to [REDACTED] upper right shoulder, which was not effective, and two closed fist strikes to the youth's face, which allowed him to gain control over [REDACTED] right hand.

[32] This conduct on Constable [REDACTED] part is not the subject of this review, which pertains only to the conduct of the member. However, it is clear from the member's and Constable [REDACTED] evidence that the member is not the officer who administered the strikes that the complainant attributed to him.

[33] Constable [REDACTED] was not asked in his interview what observations he made before the dog made contact with the youth.

[34] Constable [REDACTED] prepared an SBOR report¹⁵ in which he described this incident as a high-risk response, "Code 5." He stated that there were two officers on scene at the incident, and that he used a stun/strike in response to non-compliant behaviour when he believed the suspect was reaching for a weapon.

c. Constable [REDACTED]

¹⁵ 20220408-SBOR-[REDACTED]

[35] Constable [REDACTED] (whom I will call Constable [REDACTED]) took up his observations as the two entered a housing development near the initial call. He wrote the following narrative about the events surrounding the youth's arrest¹⁶:

[The youth] and [Name] walked slowly through the complex, and eventually sat on a concrete barrier. [The youth] and [Name] sat for about 5 minutes, before walking away east toward [REDACTED]. [Constable [REDACTED]] lost visual of [the youth] and [Name] for a short time. [The youth] and [Name] then walked over the pedestrian overpass toward [REDACTED].

[Constable [REDACTED]] then crossed the pedestrian bridge and took a position to the south of the [REDACTED]. [REDACTED] [Constable [REDACTED]] could hear the sounds of doors being kicked as other members dispatched that [the youth] and [Name] were kicking doors. From the position to the south, [Constable [REDACTED]] could see [the youth] and [Name] throwing items at the second floor of the school. [Constable [REDACTED]] repositioned to the southwest.

Over the radio [Constable [REDACTED]] could hear another PC broadcast that [the youth] had thrown a rock through the window and caused a mischief. [The youth] and [Name] ran north and then east.

[Constable [REDACTED]] paralleled [the youth] and [Name] from the north. [Constable [REDACTED]] heard on the radio that [the youth] had thrown a rock through the rear window of a parked car. [The youth] and [Name] ran east.

As the pair walked east on [REDACTED], toward [REDACTED], [Constable [REDACTED]] heard that the K9 handler was to challenge and arrest [the youth] and [Name] at [REDACTED]. [Constable [REDACTED]] could see and hear the K9 handler give loud commands "Police, you're under arrest, get on the ground!!". [Constable [REDACTED]] could see that both parties did not comply. [The youth] and [Name] both slightly bent at the knees and started to look around, as if to look for a direction to flee. [Constable [REDACTED]] thought that both parties were about to flee, so [Constable [REDACTED]] ran and arrested [Name]. [Name] was still slightly bent and on one knee. [Constable [REDACTED]] yelled "Police!!! You're under arrest!!!" and pushed [Name] to the ground. [Name] resisted by not placing [REDACTED] hands behind his back. [Constable [REDACTED]] had to

¹⁶ GO, page 41. Some corrections have been made for clarity.

force the hands of [Name] into handcuffs. [Constable █ verbally Chartered [Name] for █

EHS was called for [the youth]. While [the youth] was signing █ PTA, █ started to fight with [Constable █ [Constable █ had to force the left arm of [the youth] behind █ back and re-handcuff █ [The youth] seemed to be in a drug or alcohol induced "state".

[Constable █ assisted on scene during the rest of the incident.

[36] Constable █ statement in his interview was summarized by the investigator as follows¹⁷:

After breaking the car window, [the youth] was arrestable for mischief.

When the window initially broke they ran for a short time and then continued to walk east on █.

A takedown plan was set for the K-9 handler ... to initiate an arrest at █ and █

There was a radio broadcast that the K-9 was challenging the suspect and I could see from the north the K-9 challenging the two █ suspects.

I ran to assist and could hear the K-9 handler yelling out commands, "Police you are under arrest...get on the ground."

Neither suspect got on the ground and in fact both suspects hunched down almost in a sprinter's stance and I took that as they were trying to weigh their options.

... As I ran up, I could see the shorter suspect get lower but still in a sprinter's stance and to me it looked like they were both about to start running.

When I got closer, I then pushed over the shorter █ [Name] and I tried to take █ into custody.

When I did, I yelled, "Police, you are under arrest".

[37] In questioning by the investigator, Constable █ responded as follows:

¹⁷ Interview Summary – Cst █ Some corrections have been made for clarity.

4. You said the arrest happened at the intersection of [REDACTED] and [REDACTED] [REDACTED], where exactly in the intersection did that happen?

"I believe it was the southwest corner is where [the youth] was arrested and [Name] had taken a few quick steps so he was more so at the mouth of [REDACTED] where it reaches [REDACTED] So [REDACTED] was trying to make [REDACTED] way north when I was able to grab [REDACTED]"

5. I know your focus was on [Name] during your arrest but did you make any observations of [the youth]?

"The only observation I can recall is that I could hear officers yelling direction at [REDACTED] Again I can't say specifically what the direction was, but it was along the lines of 'police you are under arrest get on the ground'."

6. Was [REDACTED] complying with police commands?

"I would not be able to answer that definitively but for the length of time that the officers were yelling my assumption would be that they were having difficulty getting and maintaining control."

d. Constable [REDACTED]

[38] Constable [REDACTED] ("Constable [REDACTED] made observations of the two [REDACTED] at [REDACTED] and [REDACTED]. He provided the following narrative¹⁸:

[Constable [REDACTED] observed the dark outline of [REDACTED] 1 and [REDACTED] 2 throwing rocks or hard objects at the windows on the northeast corner of [REDACTED] at [REDACTED]. [Constable [REDACTED] could see the form of the [REDACTED] throwing something and could hear the sound of an object hitting windows. [Constable [REDACTED] broadcasted this information. Minutes later [Constable [REDACTED] heard sounds as though a door was being kicked. [Constable [REDACTED] then heard glass break and broadcasts that [REDACTED] 1 and [REDACTED] 2 were running.

At this time [Constable [REDACTED] was at [REDACTED] and [REDACTED]

[Constable [REDACTED] moved north on [REDACTED], and observed [REDACTED] 1 and [REDACTED] 2, as per description, location and time walking east on [REDACTED], and then zig zagged east on [REDACTED]

[Constable [REDACTED] observed [REDACTED] 1 and [REDACTED] 2 approach a parked car on the east side of [REDACTED] approximately mid block in the [REDACTED]. This vehicle was an older model red sedan. [REDACTED] 2 was observed pulling on the passenger side door handle. [REDACTED] 1 was observed at the trunk. At first [Constable [REDACTED] thought that [REDACTED] 1 was attempting to breach the trunk, however, [Constable [REDACTED] later confirmed [REDACTED] 1 drew a penis in the snow on the rear windshield.

[REDACTED] 1 and [REDACTED] 2 remained in the area of the parked vehicles. [REDACTED] 2 then went out of view to [Constable [REDACTED] to the south - off the sidewalk. [REDACTED] 2 then returned and appeared to "shot put" a large object into the rear windshield of a parked vehicle. A large smash / sound of breaking glass was heard. [REDACTED] 1 and [REDACTED] 2 then started running east on the sidewalk.

[REDACTED] 1 and [REDACTED] 2 continued east on foot and remained on view to [Constable [REDACTED] until such time that [REDACTED] 1 and [REDACTED] 2 were challenged by police and arrested at [REDACTED], and [REDACTED].

¹⁸ GO, pp. 43-44

[39] Constable [REDACTED] prepared an SBOR report¹⁹ in relation to an interaction he had with the youth later in the ambulance, but it does not pertain to the deployment of the dog. He reported that there were 5 officers on scene when he interacted with the youth, and that he used a stun/strike in response to assaultive behaviour on the youth's part in the belief that [REDACTED] was in possession of a weapon.

[40] Constable [REDACTED] statement in his interview was summarized by the investigator as follows²⁰:

Police set up a takedown at [REDACTED] and [REDACTED].

The suspects were challenged by the K-9 and other officers and I quickly ran up to assist.

I arrived on scene and chartered [the youth] for [REDACTED] verbatim and [REDACTED] refused to identify [REDACTED] to me.

[41] The investigator asked Constable [REDACTED] "Could you go into more detail of any of the commands [the member] yelled out and the behaviour of the suspects at the time? Were you in a position to see what happened there when you were moving up?" Constable [REDACTED] responded:

Actually no....specifically to this incident I could not speak in detail but knowing we call takedown I remember running as fast as I can to support the other officers. From my vantage point, I couldn't speak to the specific commands or the response from [the youth].

iii. The Youth

[42] The investigator summarized the youth's evidence in his interview relating to the incident as follows²¹:

¹⁹ 20220408-SBOR-[REDACTED]

²⁰ Interview Summary – Cst [REDACTED] Some corrections have been made for clarity.

²¹ Interview Summary for [REDACTED] Some corrections have been made for clarity.

I was walking and it was dark outside and I heard, “get on the ground.”

Before I could get on the ground, the K-9 started attacking my arm but could not get through my jacket and then it started attacking my leg.

When I was on the ground, the officers were trying to get the K-9 off of me but it was still biting me.

The ambulance came after that.

My parents arrived on scene as well.

I went to the hospital and was injected with Ativan and I went to sleep.

I think I got hit when I was on the ground.

[43] The youth added that ■ would have gotten on the ground if ■ had time, “but then the K-9 was trying to bite my arm.” ■ denied trying to flee, stepping back, or resisting arrest.

[44] At the end of the interview, the investigator asked, “Is there anything else that you would like to add or say regarding your arrest with the Vancouver police that day? The youth responded, “I can think of one thing that the officer said to me. When I didn’t want to give my name or anything because I just got bit in the leg, I wasn’t too happy and I didn’t want to give them my name. He said, ‘If you don’t give me your name I’m going to put you in the back of the van with the K-9.’ I knew they were not going to do that, but they still said that.”

[45] The investigator interviewed the youth a second time, and summarized the relevant portion of the interview as follows²²:

You told me before the interview that you wanted to speak more on the incident with the arrest with [the member] and the K-9 that you may have missed on our first interview. Please go ahead and talk about anything that you may have missed in our first interview?

²² Re-interview Summary for ■ Some corrections have been made for clarity.

"At [REDACTED] and [REDACTED] I heard, 'get on the ground' and before I could react I started getting bit on my arm and the dog could not get through my jacket so it started going for my legs.

"My whole legs have scars now.

"When I was on the ground, I got kneed on the head and then knee on the shoulder to keep me down.

"I got up then they did not call the ambulance or my parents until I gave them my name and I guess that makes sense.

"I gave them my name and they called the ambulance and went to my parents and that's when the rest happened in the ambulance."

Follow up questions:

1. At what point did you see the K-9 officer?

"I didn't even see him I just heard get on the ground and I saw him once the K-9 started biting me."

2. What other commands did he say to you? How many times did he yell them?

"He said get on the ground and when the K-9 was biting me I went like this (gesturing [REDACTED] grabbed the K-9's mouth) he then stated, 'don't hurt my dog' and then the K-9 went to my legs. The only thing the officer said to me was to get on the ground and to not hurt his dog."

3. The officer yelled, "get on the ground". Did he yell that once or twice? Could you tell?

"I don't really remember but it wasn't more than three times or twice I don't know."

4. When he yelled to get down on the ground, can you describe how you felt at that moment? What exactly you did?

"When he yelled get down on the ground I didn't even have time to think before the K-9 started biting my jacket."

5. Did you walk backwards? Where on the street were you? Can you paint the picture? Were you on the sidewalk or the street?

"Do you know [REDACTED] [REDACTED]...I was on the sidewalk right at the corner of the street."

6. When you got arrested and bitten by the dog, where were you?

"At the corner on the sidewalk. On the side of [REDACTED] yes, north side."

7. Did you step back or attempt to run from the police?

"No no I didn't attempt to run."

8. Do you remember what your friend [Name] was doing at the time?

"No I don't know what [REDACTED] was doing. [REDACTED] said [REDACTED] got put on the ground."

9. You got arrested that day for [REDACTED] but do you remember that night? You got accused of breaking a window at a school and a vehicle.

"Yeah I remember the whole night."

10. After the windows were broken from the school and vehicle did you run from the scene?

"Nope.....maybe the car but not the school."

11. What was the reason for running? Was there an alarm going off?

"Yeah, there must have been an alarm."

12. Did you know police were following you at the time?

"No I had no clue."

13. Was it a surprise when the K-9 unit came out?

"Yeah."

14. When the police challenged you were you surprised then?

"Yeah I did not know the police were around."

15. Did you know it was a police officer?

"When he said get on the ground and the K-9 starting biting me I knew he was a police officer."

16. Did you strike the officer or the K-9 during the arrest?

"No no."

17. Did you resist arrest?

"I was resisting getting bitten but not arrest I would have gotten right on the ground but I wasn't trying to let the K-9 attack me so I tried to stop the K-9."

18. What did you do to try and stop the K-9?

"I only held it like this (gesturing grabbing the K-9's mouth area) but I didn't hurt the K-9. Like I held the mouth so it wouldn't bite me and the officer said don't hurt my dog."

19. Anything else you would like to add or say regarding your interaction with police that night?

"I remember everything happening but I'm not too good at talking about it. Not really no."

20. What was your state of mind that night? Even before when you were out with [Name]? In the ambulance?

"Before I got arrested my state of mind was good, I was happy with [Name] my best friend. Once I got arrested as soon as the dog bit me I was not happy anymore it ruined my night. I was yelling a lot it ruined my night. So my state of mind before it was good and then after it was not good."

21. You were not under the influence of alcohol or drugs that night? Medication?

"No. No. After that happened at the hospital they shot Ativan into my leg but not during my arrest I was not on anything."

iv. The Youth's Companion

[46] The young person who accompanied the youth on the incident date was interviewed by the investigator. [REDACTED] evidence was summarized by the investigator as follows²³:

We were out during the night at a school messing around.

After that we were walking down the street around [REDACTED] and we smashed a window.

²³ PSS Interview Summary – Witness [REDACTED] Some corrections have been made for clarity.

5 to 10 minutes later, we were walking and there was a person standing there and all of a sudden, he yelled, “get down on the ground.”

We didn’t even have time to get down on the ground and all of a sudden he let go of the dog and [the youth] got bit.

[The youth] then fell to the ground or ■ got tackled by another cop.

I then got arrested.

I’m pretty sure the cop was threatening [the youth] because ■ wasn’t giving him ■ name.

I think they said, “If you don’t give me your name I’m going to put you in the car with the K-9.”

I just kept [telling] [the youth] to give police ■ name.

v. Provincial Policing Standards

[47] The BC Provincial Policing Standards (“BCPPS”), Subsection 1.4, “Police Service Dogs”²⁴ included in the materials contains the following relevant entries under the heading, “Principles for Standards for Police Service Dogs”:

- **Police dogs are ... intermediate weapons; police dogs bite.** One of the tasks of police dogs is to apprehend suspects by biting... The potential for a dog bite is inherent in every deployment...
- **A police dog bite can cause injury.** Sometimes the injury can be substantial and serious.
- **The use of a dog, as with all other force options, must be proportional to the level of risk posed to the officer, the suspect, and the community as a**

²⁴ Provincial Policing Standards Police Service Dogs, (BCPPS) 1.4, page 1(Emphasis in original).

whole. The need to locate or apprehend someone must always be balanced with the potential for a police dog bite and its likely resulting injury.

- **Police dog bites must be minimized as much as reasonably possible and must be proportional to the risk posed to the handler and to others.**

Minimizing bites can take the form of deciding not to deploy a dog at all if the circumstances are not serious enough (e.g. shoplifting, by-law offences), to adjusting handling techniques to limit the possibility of a bite (e.g. shortening leash; keeping visual contact; and recalling the dog) and removing the dog off a bite as soon as possible.

[48] Under “Permitted uses of police dog,”²⁵ the use of a police dog is “authorized” for certain purposes, which include “(b) Apprehending persons by police dog bite or display”.

[49] “Responsibilities of the dog handler”²⁶ include the requirement that the handler “take reasonable steps to ensure that the police dog does not bite when it would be reasonable to ... arrest or apprehend a person without a bite”.

[50] Under “Threshold and circumstances of using a police dog where a bite may occur,”²⁷ the standards prohibit a handler from permitting a dog to bite or continue to be deployed ... unless: (a) The person is causing bodily harm to an officer, a third party, or the police dog; (b) The police dog handler is satisfied, on reasonable grounds, that the person’s behaviour will imminently cause harm to an officer, a third party, or the police dog; or (c) The person is fleeing or hiding and there are reasonable grounds for their immediate apprehension by a dog bite.

²⁵ BCPPS Section 1.4.1, paragraph (1)

²⁶ Supra, paragraph (4)

²⁷ Supra, Section 1.4.2, paragraph (1)

[51] In addition to the above criteria, handlers are required to consider the following prior to and during each deployment²⁸:

- (a) Whether there is lawful authority to arrest;
- (b) That no lesser use of force would be appropriate or effective; and
- (c) The totality of the circumstances, including, but not limited to:
 - (i) the seriousness of the offence...;
 - (ii) The potential risk to any person, including the person being apprehended;
 - (iii) The identity of the person being apprehended, if known;
 - (iv) Whether the person could be apprehended at a later time;
 - (v) The age of the person being apprehended, in particular whether the person is reasonably believed to be a young person, or elderly;
 - (vi) Whether there is a weapon involved;
 - (vii) Whether the person being apprehended has a history of violence or has demonstrated violence or threatened violence; and
 - (viii) Any injury likely to result from a police dog bite.

[52] Under the heading, “Warning prior to a bite”, the handler is required to give “a loud verbal warning” before permitting a dog to bite, unless impractical, identifying themselves as a police dog handler with a police dog, and informing the suspect that they may be bitten if they do not comply with police instructions²⁹.

[53] Finally, under “Removing the dog from a bite,” dog handlers are required to remove a dog from a bite as soon as reasonably possible, and in determining when it is reasonable to remove a dog from a bite, to consider:

- (a) That a person may struggle from pain or fear in response to a dog bite;

²⁸ Supra, paragraph (4)

²⁹ BCPPS, Section 1.4.2, paragraphs (3) and (4).

- (b) That a person may not be able to remain completely passive, or may not be able to completely comply with police officer directions while being bitten; and
- (c) That these behaviours, of struggling due to pain or fear, on their own, are insufficient reasons to not have the police dog release the bite.

[54] In addition to the standards relating to deployment of a police service dog, the Provincial Policing Standards contain detailed requirements relating to qualification and annual testing of handlers and dogs.³⁰

vi. Vancouver Police Regulations and Procedures Manual

[55] The materials also include excerpts from the VPD Regulations and Procedures Manual (“RPM”), on Use of Police Service Dogs³¹, and Use of Force - Justification³².

[56] In addition to a requirement that police dog handlers comply with the Provincial Standards, the relevant section of the RPM includes the following specific guidelines, with respect to permitting a dog to bite a person:

Warnings prior to a bite

8. Police dog handlers must give a loud verbal warning prior to permitting their police service dog to bite, unless such a warning would be impractical or place anyone, including the police handler-dog team, at risk of bodily harm.

9. The purpose of this warning is to identify the police dog handler as a police officer with a police service dog, and advise the person they may be bitten if they do not comply with police instructions.

[57] In the general section on use of force, Section 1.2.1 of the RPM, states as follows in relation to the use of intermediate weapons:

Use of Intermediate Weapons

³⁰ Supra, Section 1.4.4.

³¹ Use of Police Service Dogs VPD Policy, VPD RPM Part 1.13.1

³² Use of Force Policy, VPD RPM Part 1.2.1

12. The Vancouver Police Department supports the use of intermediate weapons by members who are qualified and/or certified to use them when lower levels of force (including other specific intermediate weapons) have been ineffective and/or inappropriate, and the use of higher levels of force (including other specific intermediate weapons) may not be justified and/or appropriate.

B. Analysis

i. Unnecessary Force by Deployment of a Police Service Dog

[58] To reiterate, the question under Section 117(8)(d)(i) is whether the evidence “appears sufficient to substantiate the allegation(s) and require the taking of disciplinary or corrective measures.” As in every Section 117 review, I remind myself that the threshold is lower than *proof* of misconduct, which is required at the next stage, a discipline proceeding, if misconduct is found here to be apparently substantiated. Because Section 117(9) designates the Section 117 reviewer as the discipline authority for the purposes of the discipline proceeding, at the Section 117 stage I must instruct myself not to draw premature conclusions that misconduct has been proven.³³

[59] I will proceed to assess the evidence as summarized above with the applicable standard in mind.

[60] Section 77(3)(a) defines abuse of authority as “oppressive conduct,” including, in paragraph 77(3)(a)(ii)(A), intentionally or recklessly using unnecessary force on any person, in the performance of duties.

[61] In order to constitute misconduct under Section 77(3)(a)(ii)(A), the force used must be either recklessly or intentionally unnecessary, measured against the yardstick of what is objectively reasonable, viewed from the officer’s perspective. This is referred

³³ Scott v. British Columbia (The Police Complaint Commissioner), 2016 BCSC 1970, <https://canlii.ca/t/gvcbr>, paragraph 39.

to as a “subjective-objective” test³⁴. It is adopted in the BC Provincial Policing Standards, Section 1.4.2 in the definition of “reasonable grounds”³⁵.

[62] At the Section 117 level the question for these purposes is whether the evidence appears sufficient to substantiate a reckless or intentional application of the police dog in circumstances, known to the officer, that objectively support a conclusion that the application was unnecessary. This is different from whether the member had reasonable grounds to arrest the youth; the issue framed by the policing standards and the *Police Act* is whether the evidence appears sufficient to substantiate that it was unreasonable for the member to believe it was necessary to arrest the youth by deploying the police service dog. The standards provide an objective yardstick against which to measure the reasonableness of the actions of the member. The second part of the analysis is what does the evidence appear to substantiate about the member’s subjective mindset when he deployed the dog.

[63] In considering the objective aspect, the standards establish, firstly, that a bite is to be reasonably anticipated when a dog is deployed to effect an arrest. In fact, it is often the intended consequence of using a dog to arrest a suspect. That explains the requirements in the standards that a handler consider available alternatives and potential consequences, before making the decision to arrest in that fashion. In this respect, the standards contemplate a need for some reflection on the part of an officer before a command is given.

[64] Objectively, in arresting a subject, the member is to consider the factors set out as the threshold for deployment when a bite “may” occur, and he is required to reassess the situation as it unfolds, considering throughout whether the dog should be permitted

³⁴ R. v. Pompeo, 2014 BCCA 317, <https://canlii.ca/t/g8ht6>; Akintoye v White, 2017 BCSC 1094, <https://canlii.ca/t/h4l0w>

³⁵ BCPPS, 1.4.2, p. 1.

to bite or continue to bite. The standards explicitly prohibit permitting the dog to bite unless: the subject is causing or appears likely to cause bodily harm, or the subject is “fleeing... and there are reasonable grounds for their immediate apprehension by a police dog bite.”

[65] In addition, a handler must have regard to the factors set out in part 1.4.2(2), including the nature of the offence, the risk to persons including the subject, whether the subject could be apprehended at a later time, the subject’s age, the presence of a weapon, the subject’s history, and the likely injury arising from a bite. Finally, prior to deployment the handler must provide a warning that conveys to the subject that he will be bitten if he does not comply.

[66] A leisurely review of these requirements might easily yield a finding of unreasonableness when considering the nature of the actions ascribed to the youths, their ages, whether there was a need for immediate apprehension, and the fact that they had not yet started to actively flee; however, the analysis in relation to misconduct requires that the member’s decision be considered from his subjective mindset as it was at the time of the incident, and not as it may appear in fully informed hindsight. It is clear, for instance, in this matter, that the member did not know the suspects were young persons.

[67] The question is, did the member have an opportunity to consider the factors set out in the standards as the incident unfolded, and if so, does the evidence apparently substantiate that he recklessly overlooked any of them? The standards provide a framework for considering the member’s assessment of the circumstances at successive stages of the deployment, bearing in mind the applicable test, and remaining mindful of the fact that the member was acting in the heat of the moment, without the benefit of sober reflection or hindsight.

a. The Decision to Challenge with the Dog

[68] The first question that arises on the evidence is the nature of the takedown plan, and how it came about that the member was alone at the time when he challenged the youths with the dog.

[69] The evidence establishes that the member had radio information about the direction in which the youths were headed, and that a prior decision had been made for him to challenge them with the dog at a set location. The member's statements indicate that he expected the two would surrender in response to being challenged, as most subjects do. What is less clear on the available evidence is why the member felt it necessary to challenge the suspects with the dog before the arrival of other members.

[70] The evidence appears to substantiate that the member was aware there were several other officers nearby who had been conducting surveillance of the two suspects for almost an hour. The officers described a planned takedown; an apparently concerted decision to confront the suspects with the dog, and to conduct an arrest.

[71] The other officers' characterizations of the plan were: "a quick arrest plan" that was made "on the go," as described by Constable [REDACTED] and a "takedown plan" for the member to "initiate" an arrest, by Constable [REDACTED]. Constable [REDACTED] said, "Police set up a takedown at [REDACTED] and [REDACTED] ... The suspects were challenged by the K-9 and other officers." He added that he quickly ran to assist. Constable [REDACTED] said that "[once] police had the resources to conduct an arrest ... the K-9 unit set up the take down at [REDACTED]" He added that "an arrest was conducted with the K-9 and other police members." From those descriptions, the plan appears to have been for the youths to be challenged by the dog, and arrested by the officers.

[72] As described by the member, however, the challenge was initiated before the other officers arrived. His evidence does not explain why he believed it was necessary for him to do that.

[73] Often contemporaneous police radio broadcasts will assist in providing context and the apparent understanding of officers as an event unfolds. One might look to those to ascertain the nature of the plan to take down the suspects, and in some cases, an officer involved in an altercation will open their radio so that others can hear what is transpiring. In other cases, recordings from emergency transmissions activated by a member have been provided as evidence to provide a “real time” record of what was said during the incident.³⁶

[74] I am unaware as to the protocol pertaining to that practice and cannot say whether it was advisable in these circumstances, but it would have been helpful as support for the member’s assertion that he was acting in accordance with a plan in which other officers were participating, at the time when he first deployed the dog to confront the suspects. If such a channel was activated in this matter, it is not part of the record on this review.

[75] The approximately 500 audio excerpts that accompany the file are devoid of any communication among these 5 officers between the surveillance at about 3:30 a.m. until after the arrests. Notably, at least one officer in addition to the member, Constable ■ indicated that he heard broadcasts about the takedown plan and the plan to have the dog handler challenge the suspects. The investigator indicates in his report that an audio recording at 03:36³⁷ indicates that the broadcasts were “switched” to “an OPS channel,” but what that means is not explained in the materials. If there were any recorded communications at the scene, they are not included in the materials, until the report at 04:27 of “two in custody” and “requesting EHS for a dog bite”.

³⁶ <https://opcc.bc.ca/wp-content/uploads/2019/11/12210-2020-02-18-Ludeman-Logan-PH-19-01-Decision.pdf>

³⁷ Audio 2005657, FIR p. 10.

[76] It is therefore not possible to weigh the credibility of the member's evidence against audio of the surrounding communications at the time when the member decided to confront the suspects alone, or (later) to make the arrest command.

[77] Based on the state of the evidence, therefore, it is somewhat unclear what the plan was in terms of the timing. The evidence of the officers other than the member appears to substantiate that they expected to be present for the challenge with the dog. The question is whether given the information apparently available to the member, his decision to challenge the suspects before the other officers arrived amounted to recklessness.

[78] In this respect, the evidence appears to substantiate, firstly, that it was not objectively necessary for the member to act alone when he did, given the proximity of the other officers. The surrounding facts do not appear to objectively support the need for an immediate challenge. There is no suggestion of exigency. While the youths had arrived at the planned location, they were apparently not fleeing as they did so. There is no suggestion that the appearance of the suspects was fleeting or unexpected, or that if it was, it raised exigencies requiring the immediate deployment of the dog without waiting for other officers to attend. They had been under surveillance for almost an hour; they were neither freshly fleeing a crime, nor eluding police detection.

[79] One of the factors that a dog handler is directed by the standards to consider is whether the person could be apprehended at a later time. Given the apparent proximity of the other officers, there is objective support for a conclusion that the initial challenge of the subjects could have waited. It appears substantiated that the member was aware that the other officers were nearby and intended to be involved in the takedown.

[80] As stated, the member's evidence in the report does not address the reasoning behind the decision to challenge the youths as soon as he did, although he does address the decision to use the dog to effect an arrest. As noted, the radio broadcasts do not

assist, nor does the evidence of the other officers. In the absence of apparent objective justification for the initial challenge without backup, the evidence appears to substantiate that the member's belief that it was necessary to use the dog to challenge the pair at the time when he did was unreasonable. Had he waited until the arrival of the other officers at the scene before challenging them, the matter may have been resolved with police presence, and unfolded very differently.

[81] Accordingly, at this stage, my finding is that the evidence appears to substantiate either that (a) the member did not hold a subjective belief that challenging the youths with the service dog could not be conducted at a later time; or (b) if he did believe that, his belief was unreasonable. The initial decision to challenge the suspects at the time that it was made, in all the circumstances as disclosed at this point, would appear to have been recklessly made.

b. Adequacy of the Warning

[82] Whether or not the initial challenge was necessary, the bites experienced by the youth were the result of the member's subsequent command for the dog to apprehend [REDACTED]. The first question in relation to that command is whether the member provided sufficient warning to the suspects, and a sufficient opportunity to comply with his direction. The question under Section 117 in relation to this point is whether the evidence appears sufficient to substantiate that the member recklessly failed to convey a sufficient warning, before commanding the dog to arrest the youth.

[83] The standards set the requirement that the handler provide a loud, clear command, with a warning of the possible consequence of being bitten, before letting the dog conduct an arrest. The obvious intention is that a suspect is to be given a reasonable opportunity to submit to arrest voluntarily to avoid injury.

[84] The member's evidence is that he provided three warnings, and that he perceived the suspects were not complying. In this respect, the evidence of the two

youths and that of the member differs. The difference is to some extent one of timing, but it raises questions of credibility.

[85] As noted above, it appears substantiated that none of the other officers were present when the member initially confronted the suspects. Their evidence in each case was essentially that they did not hear exactly what transpired before their arrival. Constable ■ was a block and a half out and told the interviewer he could not see or hear what occurred when the member challenged the suspects. Constable ■ was a block away and heard commands but arrived when the dog had already bit the youth. Constable ■ told the interviewer he could not “speak to the specific commands or the response from [the youth]”.

[86] The evidence that is perhaps the most supportive of the member’s, that of Constable ■ is that he heard the member yelling “commands,” but he did not say how many. He indicated that he could see the member challenging the suspects, yelling, “Police you are under arrest...get on the ground,” and that neither of them got on the ground. He described them as hunching in a sprinter’s stance as if preparing to flee.

[87] In his interview, Constable ■ admitted he was not close enough to hear what was said and only assumed from the length of time that “officers” were yelling, that the youth was not complying. The impression from that statement is that more than one officer was yelling as Constable ■ was approaching the scene, which appears to indicate he was hearing a later part of the interaction.

[88] Constable ■ also stated that when he arrived, he pushed the companion to the ground. This evidence is inconsistent with the member’s evidence that the companion complied with his command to get to the ground after the dog was already on the youth, and before other officers arrived.

[89] The evidence of the other officers on this point appear not to provide support for the member's evidence regarding the number of commands he provided before he deployed the dog to conduct the arrest. The youth and [REDACTED] companion admit there may have been more than one, but both state that they did not have time to comply.

[90] Additionally, looking at the circumstances from an objective point of view, if, as asserted by the member, he called out loudly three times, it would appear reasonable that the youths would have had time to comply, or if they intended to flee, to actually do so. The member's evidence is that the companion complied after the dog was deployed, and before other officers arrived, indicating willing compliance on his part, albeit after the dog had accosted the youth and perhaps once the point was brought home. The companion could equally have fled at that point, however, if indeed that was [REDACTED] intention, and if in fact the member was "outnumbered," as he said.

[91] Again, there is no audio evidence surrounding this part of the incident, so no real time support for the member's assertion that he provided ample warning to the youths. Both youths have a different recollection of the sequence of events; one which, apart from the timing between the warning, or warnings, and the deployment of the dog, largely accords with that of the member, including the fact that no other officers were present until after the youth was taken down by the dog.

[92] The standards require assessment and reassessment of the need for intervention by the dog; an intermediate weapon likely to cause injury. It appears reasonable to expect that this reassessment would apply while a member is considering whether his warnings have been sufficient for the subjects to understand what was being asked of them.

[93] Considering the surrounding circumstances and the member's own description of the interaction, I find his evidence that he provided the suspects with an adequate opportunity to comply with his command to be problematic, at this stage of the matter.

While it is difficult to assess credibility fully at this stage of the proceedings, the evidence appears to substantiate that the timing is more likely that perceived and described by the youths, and would appear to tip toward an inference that they were not given a sufficient opportunity to submit to arrest before the dog was deployed.

b. Decision to Apprehend with the Dog

[94] Even if the member gave sufficient warnings to the suspects, and they behaved as he described, there is an additional question as to whether the subsequent decision to carry out the apprehension with the dog was reasonable. Put another way, does the evidence appear to substantiate that it was unreasonable, and reckless, for the member to not either wait for the arrival of other officers, or wait long enough to see if the suspects actually carried out what he perceived as an intention to flee?

[95] The decision to deploy the dog to conduct an arrest in these circumstances engages the standards pertaining to the “Threshold and circumstances of using a police dog where a bite may occur.”³⁸ The situations where a dog may be deployed are restricted to those listed, and in fact, deployment where a bite is likely is prohibited unless one of three situations exists. The first two of those pertain to a risk of bodily harm, and do not appear to apply. The third is that the person “is fleeing” and “there are reasonable grounds for their immediate apprehension by a dog bite.”

[96] The question of the need for immediate apprehension is wrapped up to some extent in the initial question of whether the member took advantage of other reasonably available lesser force options before challenging the suspects, in particular, police presence. It would appear that his initial decision to proceed alone gave rise to a

³⁸ BCPPS, 1.4.2 (1)

situation in which, as he stated, he was outnumbered, and, in the moment, unable to conduct an arrest by any other reasonable means.

[97] The question that flows from that sequence of events and the principles set out in the standards is whether it was necessary for the member to arrest the suspects at that moment, before they actually fled. One reason dogs are used in this context is presumably that they are generally faster than people.

[98] Notably, the investigator asked the member why he didn't wait until the suspects actually started running, and he responded that the two had failed to comply with his commands, displayed active resistance by backing up and failing to comply, and that he was concerned they might endanger themselves by running into traffic. He added that a suspect "does not have to be running to meet the definition of actively fleeing".

[99] The member was asked about how his use of the dog for the arrest fit into the National Use of Force Framework. He related that he had "displayed officer presence with the dog", "used communication by giving lawful police commands", and "determined that the use of open-hand or soft control tactics was not appropriate". He perceived that the suspects were aware of his presence and heard his commands, and that they "disobeyed them by backing away into the street off of the sidewalk and looking around for avenues of either escape or to fight (sic)". He believed the use of open-hand or soft control tactics was not appropriate at that time, "as he was outnumbered, and would have had to close the distance towards the suspects, which would not have been safe as they were active resistant/fleeing". Therefore, he said, he "determined that the safest option was to use an intermediate weapon (police service dog) to take one suspect into custody from distance while giving commands to the second suspect from distance."

[100] This assessment performed by the member does not directly address the question of why he considered it necessary to detain the youths by force prior to the arrival of the other officers. The description of them as “active resistant/fleeing” could objectively place them into a category where both an intermediate weapon and deployment of a police dog may be justified; however, it does not appear to be supportable on the evidence available at this stage of the proceedings, including that of the member.

[101] In support of the conclusion that the two were about to flee, as noted, Constable ■ described the suspects as crouching in a sprinter’s stance, as if they were preparing to run. None of the officers, however, including the member, suggested that either of them actually started to run. The member said only that they were backing up. This would appear to have been a natural reaction to being confronted by the dog, perhaps while not completely comprehending the command that was being provided, to get to the ground. As noted earlier, had the other officers been present at that point, it seems unlikely the two would have executed what the member perceived was their plan to flee.

[102] The standards include clear terms about how to interpret the potential reactions of people who are actually accosted by service dogs, and the need to evaluate the need for intervention, or continued intervention, by a dog bite. While the dog was not yet biting the youths, at the time the initial decision to deploy for arrest was made, based on the terms related to biting, it would appear reasonable for an officer to consider whether the reaction he was observing was related to resistance, a lack of comprehension, or having been challenged unexpectedly by the dog.

[103] Moreover, falling to the pavement, on a snowy night, may not be a natural reaction to being confronted by a police service dog. It would appear to be reasonable for a suspect to take some time to process ■ options, and equally reasonable for a

handler to ensure that the suspect understood them, at least as long as the suspect remained in a stance that could yet become compliant. The advantage of having the dog at the ready is that if the suspect nonetheless makes the rash decision to actively flee, the dog can then be deployed to apprehend [REDACTED] after [REDACTED] does so. While I am mindful of the member's expressed concern that the youths were backing into the intersection and could flee into traffic, the evidence appears to substantiate that the youths had been travelling east to arrive at the intersection and would not likely have been backing toward [REDACTED], although not a lot turns on that.

[104] Considering the surrounding evidence of the various officers about the actions of the youths, despite describing varying degrees of apparent defiance, none of them support a conclusion of actual flight. While the other officers also characterize the youth as actively resistant, it appears, based on the available evidence, including that of the officers, that this may have been an overstatement, at least until after the dog had made contact with [REDACTED]. In any event, the evidence at this stage appears to substantiate that, objectively, it had not yet come to actual flight at the time when the member commanded the dog to engage the youth, with the inevitable result of [REDACTED] being bitten.

[105] Considering the member's subjective justification for concluding that the youths were about to flee, it is based in part on their having run from the sites where they had broken the fence and the two windows. Notably, however, the evidence available to the member appears to suggest the youths were not aware of police presence until they saw the dog, and then the member. Considering this evidence with the described actions of the youths, a conclusion that they were attempting to escape apprehension, or actively resisting, at the time the dog was deployed to arrest them by biting, does not seem supportable. It appears based on the evidence that the worst that the member could have concluded was that they may have made the decision to flee, but hadn't yet.

[106] The evidence at this stage appears to substantiate that the member's expressed conclusion that the first part of the test under the third category of permitted uses in Section 1.4.2 (1), that the subjects were "fleeing," was neither objectively supported nor was it reasonable for the member to hold a belief that they were. Given the cautions around deploying the dog as an intermediate use of force, the premature conclusion that the youth met one of the tests for apprehension by biting would appear to have been reckless.

c. Reasonable Grounds for Immediate Apprehension

[107] Even if flight was a reasonable conclusion, the second aspect of the required assessment under Section 1.4.2 (1) is whether there are reasonable grounds for *immediate* apprehension. For Section 117 purposes, again, the question here is whether the evidence appears to substantiate that the decision to proceed with an *arrest* at the time it was made was unreasonable and reckless, even if the pair could have been said to be fleeing. In making that decision, the member is directed to have regard to the factors enumerated in Section 1.4.2 (2)³⁹.

[108] It is clear that the two youths were arrestable. In terms of the seriousness of the offences, the evidence substantiates that a gate and two windows were broken, but the radio dispatches indicate that no premises or vehicles had been actually entered. There is an early suggestion in the radio dispatches that the youths wore masks, but that is not substantiated by the officers who dealt with them at the scene. Although one officer concluded there had been an attempted break-in, the consensus, and mindset of the member, appear to be that the offences were mischief. The member stated that he understood the two were arrestable "for mischief". The lengthy surveillance suggests the suspects were not aware of the police presence or evading detection, nor actively engaged in an offence when they were challenged. They were walking when

³⁹BCPPS, Section 1.4.2 (2)(c), set out at paragraph 50.

approached by the member. Accordingly, while there was clear support for the suspects being arrestable, it would appear to have been for relatively less serious offences and in less than exigent circumstances.

[109] Considering the potential for harm or the presence of weapons, there was support for a belief that the two may have been in possession of rocks or items that could be used to smash windows. As for identity and age, they had not yet been identified, and the member was not aware that they were youths. In addition, the policy standards do not prohibit the use of dogs on minors unless they are less than 12.

[110] Accordingly, none of the factors prescribed in Section 1.4.2 (2) (a) or (c)(i), (ii), (iii), (v) or (vi) detract from the reasonableness of the decision to arrest, or, if necessary, to deploy the dog in doing so.

[111] Paragraphs 1.4.2 (2)(b) and (c)(iv) and (viii) of Section 1.4.2 however also require evaluation “prior to and during each deployment of a police dog” of whether lesser force is available, whether the person could be apprehended at a later time, and the likelihood of injury from a bite.⁴⁰

[112] As discussed earlier, if the member made an initial decision to challenge the two with the dog, without backup, the reasoning behind that is not apparent from the materials. The question that arises from that initial decision is whether, given the continued absence of the other officers, and the surrounding circumstances, immediate apprehension by a dog bite became necessary, or could reasonably have been deferred until either the suspects ran, or backup arrived. Objectively considered, the evidence would appear to substantiate a conclusion that apprehension by a police dog bite was

⁴⁰ BCPPS, 1.4 (2)(c).

not necessary at the time when the dog was deployed, given the proximity of the four other officers.

[113] In relation to the member's subjective mindset, he appears not to have considered available and reasonable alternatives to the use of this intermediate weapon with its consequent likelihood of injury; particularly where there were two individuals involved and the member was aware of the presence nearby of several other police officers who were participating in the investigation, and in the plan to arrest the suspects. While he said he was outnumbered and did not have the option of physically arresting them, again his evidence in that respect does not address the reasoning behind the timing of the arrest, given the imminent arrival of the other officers.

[114] In all of the available circumstances at this stage, the evidence would seem to substantiate that it was not reasonable for the member to conclude that he needed to deploy the dog to effect immediate apprehension by a bite, and that in failing to address his mind to that question, he was reckless.

[115] Considering all of the circumstances and how the incident unfolded, as disclosed by the evidence at this stage, and applying the test prescribed under Section 117, the evidence appears to substantiate that the use of the dog to apprehend the youth by biting [REDACTED] was unnecessary, and the member was reckless in the use of the force that he applied.

ii. Unnecessary Force by Failing to Remove the Dog

[116] This allegation pertains to the continued deployment of the police dog after the initial decision to deploy him. It arises from the fact that the youth was bit more than once, and from the youth's evidence that the officers were trying to get the dog off [REDACTED] without success. The standards require a handler to withdraw the dog as soon as reasonably possible after he has bitten a suspect. They also specifically require handlers

to consider that failing to comply or struggling due to fear or pain are insufficient reasons to not have the dog release the bite.⁴¹

[117] The evidence on this aspect supports a view that the youth was in fact actively resisting once the dog had been commanded to apprehend [REDACTED] first by attempting to hold the dog's mouth away from [REDACTED] arm, and later, while on the ground, when the dog was biting [REDACTED] leg. By that point, other officers were present, and more than one of them perceived that the youth was trying to reach for a weapon. In fact [REDACTED] was found ultimately found to be in possession of bear spray, and [REDACTED] admits to having it on [REDACTED] at the time of the arrest. Added to that is the understanding of the officers that the offences had been committed through the use of rocks, which the youth could have retained on [REDACTED] at the time of the arrest.

[118] Those perceptions of the officers were astute, and it appears it was not unreasonable for them to conclude that the youth needed to be brought under control at that point, and prevented from reaching whatever [REDACTED] appeared to be reaching for. Two officers describe being physically engaged with the youth before [REDACTED] was successfully taken into custody. Whether the force they used was excessive is not the subject of this review. The member says he called the dog off once he perceived that the youth was under control. While some of the youth's actions were consistent with resistance to the dog bites, the perception that [REDACTED] was reaching for something in [REDACTED] pocket provided an objective basis to conclude [REDACTED] needed to be brought under control.

[119] The youth said in [REDACTED] statement that the officers were trying to get the dog off [REDACTED] while the dog continued to bite [REDACTED]. This is concerning but not sufficient to show that the member failed to act reasonably in the circumstances as described by him and the other officers at the time of the incident.

⁴¹ BCPPS, 1.4 (5) & (6), set out at paragraph 52.

[120] In all of the circumstances disclosed by the materials, the evidence does not appear to substantiate a conclusion that the member failed to have the dog release the bite as soon as reasonably possible, despite the fact that the youth received more than one bite to ■ leg during the arrest.

4. Next Steps [Sections 117(7), (8)(e), (9) and (10)]

[121] In relation to the first allegation of abuse of authority by unnecessary force under Section 77(3)(a)(iii)(A), pursuant to Section 117(9), I have determined that the evidence at this stage appears sufficient to substantiate the allegation and to require the taking of disciplinary or corrective measures.

[122] Assuming the member has no related service record of discipline, the range of measures I am considering includes:

- (1) pursuant to Section 126(1)(f), require the member to take additional training in BC Provincial Policing Standards relating to the use of police service dogs; and
- (2) pursuant to Section 126(1)(i), a written reprimand;
- (3) pursuant to Section 126(1)(j), a verbal reprimand; or
- (3) pursuant to Section 126(1)(k), advice as to conduct.

[123] Within 10 business days of receipt of this Notification Constable ■ may file a request under Section 119 to call witnesses at a discipline proceeding. Depending on the date of receipt, the deadline will be approximately January 25, 2023. I ask the Professional Standards Section to confirm that date of receipt through the registrar. A request for extension of the time limit for requesting witnesses will only be considered if it is received by the registrar before the 10-day time period elapses.

[124] Constable [REDACTED] will be offered a prehearing conference under Section 120. If he declines a prehearing conference, a discipline proceeding must be convened within 40 business days from the date of this Notification, or by March 9, 2023.

[125] I ask that I be advised through the registrar whether Constable [REDACTED] will accept the offer of a prehearing conference, within 5 business days of the later of:

- (a) the expiry of the time for making a request for witnesses under Section 119(1), if no such request is made; or
- (b) if such a request is made, the date of a decision pursuant to Section 119(3)(a) rejecting a request to call witnesses.

[126] If Constable [REDACTED] does not accept the offer of a prehearing conference within the time set out in the paragraph above, the offer is withdrawn and a discipline proceeding will be convened on March 9, 2023.

[127] In relation to the second allegation identified above, pursuant to Section 117(10), for the reasons expressed, I have determined that the evidence does not appear to substantiate misconduct. Pursuant to Section 117(11), this decision is final and conclusive and not open to question or review by a court on any ground.

5. Complainant's Right to Make Submissions [Section 117(8)(b)]

[128] The complainant will receive a copy of this Notification. This section is directed toward notifying him of the next steps and his right to make submissions.

[129] Sections 113 and 120 of the *Police Act* together provide that:

- (1) At any time after receiving a copy of the final investigation report in this matter but at least 10 business days before the date of any discipline proceeding, or, if a prehearing conference is to be held, within 10 business days after receiving notice under Section 120(6), the complainant may make written

or oral submissions, or both, to the discipline authority or the prehearing conference authority, as the case may be, in relation to one or more of the following matters:

- (a) the complaint;
- (b) the adequacy of the investigation;
- (c) the disciplinary or corrective measures that would be appropriate.

[130] For the complainant's information, the matter will either be resolved at a prehearing conference, or it will proceed to a discipline proceeding. The interrelation of Sections 113 and 120 in this matter means that the complainant may make submissions any time between his receipt of the final investigation report (which he should already have received) and the later of the deadline provided for by the prehearing conference authority under Section 120(6) and 10 business days prior to March 9, 2023, or February 23, 2023.

DATED at Sechelt, British Columbia, this 11th day of January, 2023.



Carol Baird Ellan
Retired Provincial Court Judge
Discipline Authority