

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

AND

IN THE MATTER OF A DISCIPLINE PROCEEDING UNDER SECTION 125

AND

IN THE MATTER OF ALLEGATIONS OF MISCONDUCT

AGAINST

CONSTABLE [REDACTED]

OF THE VANCOUVER POLICE DEPARTMENT

DISCIPLINE AUTHORITY'S REASONS UNDER SECTION 125(1)(b)

(Supplement to Form 3)

TO:	Constable [REDACTED] c/o Vancouver Police Department Professional Standards Section	(Member)
AND TO:	Mr. Kevin Westell	(Member's Counsel)
AND TO:	Mr. Clayton Pecknold	(Commissioner)

1. EXECUTIVE SUMMARY

[1] These are my reasons following a discipline proceeding pertaining to an allegation of unnecessary force in connection with the member's decision to use a police service dog to arrest a young person in the early morning hours on February 13, 2021. The youth, who was [REDACTED] at the time, received several bite wounds to a leg and

bruising to an arm in the arrest. [REDACTED] father filed a complaint with the Office of the Police Complaint Commissioner.

[2] A subsequent departmental investigation under the *Police Act* recommended a finding of no misconduct. The father requested a review and the Police Complaint Commissioner appointed me under Section 117 of the *Police Act*. This discipline proceeding arises out of that review.

[3] The issue on a discipline proceeding is whether the alleged misconduct has been proven by the evidence presented at the hearing. The evidence filed in this matter consisted of the following:

- a. The final departmental investigation report and evidence and records referenced in it;
- b. A further investigation report prepared under Section 132 in relation to an expert opinion, and the evidence and materials referenced in it, including the expert opinion; and
- c. Transcripts of the witness interviews conducted in the departmental investigation.

[4] No witnesses testified at the proceeding aside from the departmental investigator, who was not cross-examined. Counsel for the member filed written submissions on November 8, 2023.

[5] For the reasons that follow, I have decided that misconduct has been proven.

2. ALLEGATION AND RELATED LEGAL ISSUES

[6] The following is the allegation against the member:

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.

[7] The question raised by this allegation is whether the member wrongly concluded that it was necessary for him to deploy the dog to challenge the youth and/or to effect an arrest. If the use of the dog was not objectively reasonable, there is an additional question of whether the member held a reasonable subjective belief that it was. I will say more about the applicable legal tests in the Analysis in Part 9.

[8] The application of the legal principles as they pertain to the use of a police service dog is wrapped up in the question of whether the member acted consistently with relevant provincial and departmental policies and standards. I will outline those policies and standards in the next two sections, before turning to the evidence.

3. BC PROVINCIAL POLICING STANDARDS

[9] The BC Provincial Policing Standards (“BCPPS”), Subsection 1.4, “Police Service Dogs,”¹ include the following general principles.

Principles for Standards for Police Service Dogs

The goal of the Provincial Standards for police service dogs is to have effective and accountable police service dog units, which minimize bites and injuries, without hindering the appropriate use of police service dogs to further public safety.

- **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 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.

[10] The following terms are found in Part 1.4.1, “General Requirements,” under the heading “Standards.” This section is prefaced by the wording, “The chief constable, chief officer, or commissioner may,” which suggests that these standards are intended as

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

permissive but not mandatory guidelines for the implementation of policy at the departmental level.

Permitted uses of police dog²

(1) Authorize the use of police dogs for the following purposes:

...

(b) Apprehending persons by police dog bite or display.

Responsibilities of the dog handler³

(4) Require that police dog handlers take reasonable steps to ensure that the police dog does not bite when it would be reasonable to search for, locate, arrest or apprehend a person without a bite, including but not limited to:

(a) Shortening the length of the leash;

(b) Maintaining visual contact with their police dog; and

(c) Recalling the police dog.

[11] Part 1.4.2, entitled, “Threshold and Circumstances of Police Dog Use,”⁴ includes the following definitions:

“Exigent circumstances” – circumstances where a delay in taking action would result in danger to human life or safety or where action is necessary to prevent the continuation of an offence which threatens human life or safety.

...

“Reasonable grounds” – includes both a subjective and an objective component, and means that the officer must personally believe that the decision or action is necessary, and in addition, the decision or action must be able to stand the test of whether an objective third person, who is acting reasonably—and is informed of the officer's training, experience and the factual circumstances known at the time—would also reach the same conclusion.

[12] The definition section is followed by a section entitled, “Standards,” which is prefaced by the following statement: “The chief constable, chief officer, or

² BCPPS Section 1.4.1, paragraph (1)

³ Supra, paragraph (4)

⁴ Supra, Section 1.4.2

commissioner *must*.⁵ There follows a list of mandatory terms for inclusion in departmental standards, which include the following.

Threshold and circumstances of using a police dog where a bite may occur⁶

(1) Prohibit police dog handlers from permitting a police dog to bite a person, and prohibit dog handlers from permitting a police dog to continue to be deployed if it would reasonably be expected that the police dog would bite a person, 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.

(2) In addition to Standard (1) above, require that police dog handlers consider the following prior to and during each deployment of a police dog, and conclude, on reasonable grounds, that the risk of a bite is justified:

- (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

⁵ Supra, Section 1.4.2 (1) [emphasis added]

⁶ Supra, Section 1.4.2, paragraph (1)

(viii) Any injury likely to result from a police dog bite.

Warning prior to a bite⁷

(3) Require that police dog handlers give a loud verbal warning prior to permitting their dog to bite, unless such a warning would be impractical or place any one, including the police handler-dog team, at risk of bodily harm.

(4) Require that the warning described in Standard (3) above identifies the handler as a police officer with a police dog, and advises that the person may be bitten if they do not comply with police instructions.

[13] Appendix A of the BCPPS contains mandatory testing requirements including those for criminal apprehension, testing in part for the ability of the dog to take a suspect's arm and immediately release it when commanded to do so.

4. VANCOUVER POLICE REGULATIONS AND PROCEDURES MANUAL

[14] The Vancouver Police Department Regulations and Procedures Manual ("VPD RPM") section on Use of Police Service Dogs⁸ incorporates the Provincial Standards in several of its sections. The first of these is at the beginning of this section of the manual, which largely tracks the permissive part of the BCPPS set out at paragraph [10] above.

POLICY

Police service dogs are an important policing tool that can be used for a variety of tasks. Police service dogs are also considered intermediate weapons in the context of use of force and, as such, dog handlers are responsible and accountable for deploying police service dogs in a manner, which facilitates the effective execution of police duties while reasonably safeguarding the public and police members.

The use of a police service dog must be proportional to the level of risk posed to the officer, the suspect, and the public. Ultimately the use of a police service dog as a means of force lies with the dog handler. The dog handler makes decisions within the framework of law, training and policies of the Vancouver Police Department, and the requirements of the B.C. Provincial Policing Standards.

Provincial Standards for Police Service Dogs

Service Dogs may be deployed in the exercise of all regular police duties including:

⁷ BCPPS, Section 1.4.2, paragraphs (3) and (4)

⁸ VPD RPM Part 1.13.1, Use of Police Service Dogs VPD Policy

- a. Tracking or searching for persons who may have committed, or be about to commit, an offence;
- b. Apprehending persons by police dog bite or display;
- c. Tracking or searching for missing or lost persons;
- ...

[15] This part of the VPD RPM, still under the heading, “Provincial Standards for Police Service Dogs,” imports the definition of exigent circumstances included in the BCPPS, set out in paragraph [11] above, and then sets out applicable principles, under the heading, “Procedure,” which include the following.

General

- 1. Unless assigned a specific duty, members of the Canine Unit will support patrol units and attend calls where there is a request for their services or where it is apparent that their services may be of assistance.
- 2. Members assigned to the Canine Unit shall comply with the **B.C. Provincial Policing Standards** for Police Service Dogs.

Searches and Apprehension

- 3. Where a police service dog is to be applied in a search, the dog should be the first to cover the area. To facilitate this, **attending members** should contain the area or building and await the arrival of the dog handler and dog.
- 4. When a member believes on reasonable grounds that a suspect may be in possession of a weapon, the dog handler shall be immediately informed.
- 5. Police dog handlers are prohibited from deploying their police service dog to search for or apprehend a person, if the person is reasonably believed to be 12-years-old or younger, unless:
 - a. The police dog handler has reasonable grounds to believe that the child poses an imminent risk of grievous bodily harm or death to any person, including themselves; or
 - b. The child is a missing or lost person.

Warnings prior to search

- 6. Before releasing a police service dog from physical control into a building or confined space to locate a suspect, the police dog handler shall first call a loud verbal warning that the police are present, that the building will be searched by a police service dog, and that anyone present should identify themselves immediately and comply with police

instructions or they may be bitten. The police dog handler will then give persons in the building a reasonable opportunity to exit the building before releasing the police service dog. The warning should be repeated as often as reasonably necessary to alert persons who may be on the premises.

7. A loud verbal warning may be omitted when there are exigent circumstances.

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.

[16] The VPD RPM also deals with the use of force generally, in Part 1.2, which includes the following sections on levels of force and justification.

Use of Force - Justification⁹

POLICY

Members of the Vancouver Police Department (VPD) may be required to use force in the execution of their duties. Members must endeavour to use a reasonable level of force, in consideration of all the circumstances they are presented with.

When using force in the course of their duties, members shall comply with the provisions of the Criminal Code of Canada (CCC) and the BC Provincial Policing Standards (BCPPS). Members shall also be guided by the National Use of Force Framework (NUFF) which provides the following force options:

- a. Officer presence;
- b. Communication, supplemented to include crisis intervention and de-escalation techniques;
- c. Physical control;
- d. Intermediate weapons; and
- e. Lethal Force.

⁹ VPD RPM Part 1.2 Use of Force, 1.2.1 Use of Force - Justification

[17] The manual goes on to describe these various levels of force. In relation to use of intermediate weapons, it provides as follows.

Use of Intermediate Weapons

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.

[18] In addition to the above sections of the RPM, the materials filed on the discipline proceeding include a VPD document entitled, "Canine Unit Operational Practices, 2016." It contains a section entitled, "8.0 Radio Room," which states as follows:

Canine Unit portable radios and mics are assigned to each member. A list will be kept and posted in the radio room. The list will indicate the radio number, the microphone number and to whom each is assigned.

[19] This document also contains a section entitled, "16.1 Canine Unit Validation Standards," which describes the requirements for a dog team to qualify at Levels I, II and III in relation to various skills, including, at each level, similarly to Appendix A of the BCPPS, "Criminal Apprehension." For each level, in relation to apprehension, the qualifications specify that the dog is to take the suspect's arm, then be taken off the arm at the "out" command, remain three metres away from the suspect while the handler searches the suspect, following which the dog and the handler escort the suspect away.

5. SUMMARY OF WITNESSES' STATEMENTS TO THE INVESTIGATOR

[20] These reasons will be redacted as appropriate to address the witnesses' privacy concerns under this part of the Act. In order to reduce the number of redactions I will refer to individuals in descriptive terms rather than by name.

[21] While I have reviewed the materials filed on the discipline proceeding in depth, what follows here is a general summary of the witnesses' evidence that is relevant to the issues.

i. Complainant

[22] In his complaint, the father of the youth noted that his [REDACTED] was Indigenous. He was not present for the incident. He reported that the youth and a friend, also a young person, were walking up [REDACTED] to [REDACTED] in [REDACTED] Vancouver, coming

from [REDACTED] Without warning, the father said, a police dog was released onto the youth, biting [REDACTED] and pulling [REDACTED] to the ground. The father reported that neither of the two had tried to run from police.

ii. The Member

[23] The member filed several reports following the incident, including a Dog Handler Report¹⁰ as part of the General Occurrence Report (“GO”) and a separate Dog Application Report¹¹. He reported that he and his police service dog had responded to a report of a break-in at a corner store at [REDACTED] and [REDACTED] Street involving two [REDACTED] at about 3:27 a.m. The evidence establishes that these were 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. Some time after that, the 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]

[24] At about 4:25 a.m., the member stated, “plain clothes officers set up a takedown plan at the corner of [REDACTED] and [REDACTED]” for the two suspects to be challenged by the member and the police service dog. The dog was on a twenty-foot tracking line. The member concealed himself nearby, aware that the suspects were arrestable for two counts of mischief. He saw them walk east on [REDACTED] to [REDACTED] He challenged them with the police dog, stating in a loud and clear voice:

Police, you are under arrest, get on the ground or you will be bit!

[25] The member reported that the two [REDACTED] immediately began to walk backwards away from him, and the youth said, “What, what?” In response, 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!” The member stated that the two “disobeyed multiple lawful police commands and continued to walk backwards looking in all directions in an obvious attempt to flee on foot.”

[26] The member directed the dog to apprehend the youth, as the one who smashed the windows. The dog closed the distance, made contact with the youth’s left lower leg,

¹⁰ GO_21-25794, p. 57, “Dog Handler Report”

¹¹ 20210216_Dog Report_ [REDACTED] this is the same verbatim as the report in the GO.

and pulled [REDACTED] to the ground. The member stated in a loud and clear voice, "Show me your hands, do not fight the dog!"

[27] The member told the youth's friend to, "Get on the ground!" and said [REDACTED] "immediately laid on the ground and complied with the lawful police commands." At this point, the member stated, "Additional police members moved in and gained control" of the youth's arms. Once they had control, the member commanded the dog to release the youth.

[28] The youth received lacerations and puncture wounds to [REDACTED] upper and lower left leg from dog bites. [REDACTED] upper left arm had bruising.¹² [REDACTED] was treated at [REDACTED] Hospital and released.

[29] In addition to his statement in the GO, the member filed a Subject Behaviour – Officer Response [SBOR] report in relation to the dog bite¹³. It specified that the youth was actively resistant, non-compliant, and pulled away or attempted to flee; the struggle was officer-initiated; and the member used verbal police challenges three times.

[30] In his interview by the departmental investigator, the member added the following details¹⁴. He understood 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 two 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. He believed challenging the suspects with the dog was the appropriate level of force, which, in his experience, generally resulted in surrender. He expected the suspects to listen to his commands and get down on the ground.

[31] The member repeated the information in his original statement, that he had stepped out his place of concealment as the suspects approached the intersection, and yelled, "Police you are under arrest, get on the ground or you will be bit." The two immediately began to walk backwards away from him. He added, "out in the middle of the street." [The youth] stated, "What, what?" In response, the member said he "wanted to make clear to [REDACTED] that [REDACTED] was under arrest" and repeated two more times, while they continued to walk backwards, "Police, get on the ground or you will be bit."

¹² Medical Report – [REDACTED] Hospital, Injuries Diagram

¹³ 220408-SBOR [REDACTED]

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

[32] The member believed that both suspects heard his commands and were choosing to disobey. They were looking in all directions. He focused on the youth, who, in his opinion, “was actively resisting as [REDACTED] was walking backwards, looking in all directions ... looking for an avenue of escape to flee on foot as [REDACTED] had done twice already.” He gave the command to the dog, in response.

[33] The member said that while this was occurring, he split his attention between the police dog and the youth on the one hand, and the second suspect, on the other, who was still nearby, in the middle of the street. He was “outnumbered with two suspects and ... not clear on their intentions given they chose not to get on the ground, they were not compliant and they were actively resistant.”

[34] The member yelled for the second suspect to get on the ground and, “after the second command,” [REDACTED] complied and appeared to be listening. At that point, several plainclothes officers arrived and assisted in taking both suspects into custody.

[35] In questioning by the investigator about how the decision related to his training, the member’s response may be summarized as follows. A police service dog is a “less lethal” use of force and there was no lesser means of force available to take custody of the youth. He was outnumbered, alone with the police dog. Grabbing onto them was not practical as they were too far away, nor would it have been safe or practical to run after them. He was aware they had been using rocks and was not aware of whether they had any weapons. He noted that the youth was later found to have bear spray in [REDACTED] front pocket.

[36] The member believed the youth needed immediate apprehension, as they had fled twice from multiple criminal offences and he believed they had every intent to flee once again. The dog prevented that from happening. He was able to use the police dog as a distance weapon to apprehend the suspect and keep himself safe.

[37] The member noted that the youths “had three opportunities, three lawful police commands,” in which he stated, “you are under arrest get on the ground or you will be bit.” The youth was clearly not complying or intending to surrender. He noted that the intersection [REDACTED] is a major intersection, there was a lot of snow on the ground, and if they took off running they could have been hit by a passing vehicle or continued to commit other criminal offences. He considered that the youth was “actively fleeing already with [REDACTED] decision to back away,” adding, “Someone does not have to be running to meet the definition of actively fleeing.” He concluded that the

youth appeared to be under the influence of alcohol or drugs, because [REDACTED] words were unclear and [REDACTED] was argumentative and actively resistant.

[38] The member acknowledged that a police service dog is an intermediate weapon under the National Use of Force Framework (NUFF). He said he went through the NUFF steps by displaying officer presence with the dog, using communication by giving lawful police commands, and determined that open-hand or soft control tactics were not appropriate. As the suspects were actively “resistant/fleeing,” the safest option was to use the dog, an intermediate weapon, to take one suspect into custody while giving commands to the second suspect, observing that “the second suspect immediately obeyed” and laid on the ground.

[39] With regards to the application of the BCPPS “Threshold” provisions, the member observed that “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 (sic), and finally the second vehicle. When challenged with the police service dog and lawful police commands, “they backed away/fled looking around for avenues of escape/or to fight.”

iii. The Other Officers

[40] Four other officers were involved in the incident to one degree or another. Their observations may be summarized as follows, based on their statements and the related radio broadcasts. One or more of these officers observed the actions of the suspects at the [REDACTED] and [REDACTED] incident. A later broadcast by one of them indicated it involved a “fence door and not a business one.”¹⁵

[41] One of the officers observed and reported that the youth threw a rock and broke a window at the school, the two ran north and east, and then the youth threw a rock through the rear window of the parked car in the [REDACTED]. They ran east on [REDACTED] and were then seen walking east on the south side of [REDACTED] as they approached [REDACTED]. This officer stated that “once police had the resources to conduct an arrest,” the “dog unit” set up a take down at [REDACTED] and [REDACTED] (sic). He reported that when the suspects reached the intersection, an arrest was conducted with the dog unit “and other police members;” however he did not see the arrest as he was approximately a block and a half away when it occurred. He arrived after both

¹⁵ See Part 6, below, “Audio Records”.

suspects were in custody. He said he had heard officers yelling “police” but could not say exactly what was said or whether the suspects were trying to flee.

[42] A second officer stated that he believed the suspects were arrestable for the three incidents that had been observed and they would likely commit additional criminal offences if allowed to continue. He reported that a “quick arrest plan” was formed for the dog unit to challenge them as they approached the southwest corner of [REDACTED] and [REDACTED]. The plan was made on the go, police had limited resources, and the conditions made things challenging. Due to these challenges, often observations were made from a block away. This officer was a block to the south and east when the dog handler challenged the suspects. He could hear him “providing commands” and he began running to the arrest location. When he arrived, he reported, “the suspects were not complying” and the dog was holding the youth by the left arm. He assisted in the arrest of the youth. A large part of his statement was focused on later events involving his response to resistance by the youth. He was not asked in his interview what observations he made prior to the apprehension of the youth by the dog, although it appears he was not in a position to see what was occurring, only to hear “commands,” which he did not describe beyond that.

[43] A third officer had the youths under surveillance during the first two incidents. He heard a radio broadcast that the dog unit was to challenge the suspects at [REDACTED] and [REDACTED]. He could see them from the north, and he reported that he heard the dog handler yelling commands to the effect of, “Police you are under arrest...get on the ground.” He later admitted he could not say specifically what the commands were. He reported that the suspects were not complying, and said he observed that neither suspect got on the ground. Instead, he said, both “hunched down almost in a sprinter’s stance,” which he interpreted as if they were “trying to weigh their options. Do they run or do they comply with police commands.”

[44] As he ran up, the shorter suspect got lower, “still in a sprinter’s stance” and to him it looked like “they were both about to start running.” He “pushed over the shorter [REDACTED] and ...tried to take him into custody,” yelling, “Police, you are under arrest”.

[45] In further questioning by the investigator, this officer said he believed the youth was arrested at the southwest corner of the intersection, and the other suspect was arrested slightly into the mouth of [REDACTED] “trying to make [REDACTED] way north” as the officer was able to grab [REDACTED].

[46] The investigator asked the following further questions:

I know your focus was on [the other suspect] 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'."

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."

[47] A fourth officer stated that he kept the pair in view as they left the parked car, until they were challenged by "the K-9 and other officers" and arrested at [REDACTED] and [REDACTED]. He was unable to provide details of the challenge, but stated, "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."

iv. The Youth

[48] The youth's statement, made with numerous interjections by [REDACTED] father, may be summarized as follows.¹⁶ [REDACTED] was walking, it was dark, and [REDACTED] heard, "Get on the ground." Before [REDACTED] could get on the ground, the dog started attacking [REDACTED] arm. It could not get through [REDACTED] jacket, and then it started attacking [REDACTED] leg. [REDACTED] did not see the canine officer until the dog started biting [REDACTED]. The officer said get on the ground. The dog continued biting [REDACTED] when [REDACTED] was on the ground. The youth tried to hold the dog's mouth and the officer said, "Don't hurt my dog," and the dog moved to [REDACTED] legs.

[49] [REDACTED] would have gotten on the ground if [REDACTED] had time, "but then the dog was trying to bite my arm." [REDACTED] denied trying to flee, stepping back, or resisting arrest. [REDACTED] was uncertain as to whether the officer may have said "get on the ground" more than once, but it was not more than three times. [REDACTED] didn't have time to think before the dog started biting [REDACTED] jacket. [REDACTED] was on the sidewalk at the corner of the intersection, near [REDACTED]. [REDACTED] did not attempt to run. [REDACTED] denied running from the school, but admitted running from the car. [REDACTED] thought there may have been an alarm. [REDACTED] was unaware that police were following [REDACTED]. [REDACTED] was surprised when the police dog

¹⁶ Interview Summary for [REDACTED]. Some corrections have been made for clarity.

challenged [REDACTED] When the officer said get on the ground and the dog started biting [REDACTED] [REDACTED] realized it was the police.

[50] The youth said [REDACTED] was resisting getting bitten but not resisting arrest, and would have gotten right on the ground except [REDACTED] was trying not to let the dog attack [REDACTED] so [REDACTED] tried to stop it. [REDACTED] grabbed its mouth area but didn't hurt it. [REDACTED] held the mouth so it wouldn't bite [REDACTED] and the officer said, "Don't hurt my dog."

[51] The youth said [REDACTED] had been in a good mood that night, but "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." [REDACTED] denied being under the influence of alcohol or drugs.

[52] The youth reported that [REDACTED] legs were scarred as a result of the incident. [REDACTED] added, "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, an officer 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."

[53] [REDACTED] gave them [REDACTED] name and they called the ambulance and [REDACTED] parents. The youth included in [REDACTED] statement descriptions of strikes by two other officers in the course of [REDACTED] arrest. These are not the subject of this proceeding, so I will not include them here. The youth's father provided photographs of [REDACTED] injuries to the investigator.

v. The Companion

[54] The youth's companion provided the following information. They smashed a window, and 5 to 10 minutes later, they were walking, and, "there was a person standing there and all of a sudden, he yelled, 'get down on the ground.'" They didn't have time to get down on the ground. "All of a sudden he let go of the dog," and it bit the youth. He thought the police said to the youth, "If you don't give me your name I'm going to put you in the car with the K-9." He just kept telling the youth to give the police [REDACTED] name.

6. AUDIO RECORDS

[55] The final investigation report contains a summary of the radio broadcasts among the police officers, including the confirmation that the initial break-in report was an outside gate. One officer comments that he could see the door wide open but apparently the youths never went inside. There are various brief reports from each of the officers surveilling the two youths, who were described by an officer at one point as

moving, “pretty casual ... like nowhere to go.” He added, “Might be good to foot ‘em for a bit.”¹⁷

[56] The officers followed the movements of the youths east through [REDACTED] for the next few minutes. One officer called for a dog unit but there is no discussion in these transmissions of a planned take down. One officer indicated he was going to take a position to the south and another was on foot moving to the east. One officer queried whether they should “switch to an OPS channel,” which was resisted by another officer¹⁸. Then, at 3:36 a.m. an officer states, “Let’s just switch to an OPS channel.”

[57] The officers were then not on the recorded audio channel for about an hour, resuming at about 4:27 a.m., after the youths were in custody, when an officer called for an ambulance for a dog bite.

7. CANINE EXPERT

[58] Sergeant [REDACTED] of the Vancouver Police Department [“the expert”] provided a report pertaining to the departmental and provincial standards and how they relate to the application of a police service dog in circumstances such as the case at hand. He candidly discloses his potential conflict, not only in being a member of the same department, but in having been the member’s instructor and having worked with him in the K-9 unit, albeit on opposite shifts, for 3 years. He expressed awareness of his duty of impartiality in relation to providing expert evidence, and while he appeared genuine in his intention to adhere to this, there are areas in the report where he strayed into providing evidence, and expressing views on the issues to be decided. I recognize that the difference between providing examples of reasonable police conduct related to the field of Police Service Dogs may be hard to distinguish from providing views on whether a member’s conduct aligned with those examples. In summarizing the expert’s report I will nonetheless attempt to refrain from including any areas in which he either provides evidence or expresses a direct opinion on the question at the heart of the discipline proceeding.¹⁹

[59] The expert stated that in training, dog teams are presented with scenarios that become increasingly more difficult and often require decision-making skills. These scenarios include challenging a suspect who is non-compliant and begins to flee;

¹⁷ Radio Transmissions, Audio_2005619

¹⁸ Radio Transmissions, Audio_2005641

¹⁹ R. v. Pompeo, 2014 BCCA 317, <https://canlii.ca/t/g8ht6>

challenging a passive, non-compliant suspect; and challenging multiple suspects with one or both fleeing from the police.

[60] The expert pointed out that dog handlers are taught to make quick decisions whether to deploy their canine as a compliance tool through presence; as a locating tool by tracking; or as an apprehension tool by engaging and biting a suspect. He added that, depending on the situation and actions of the suspect, the use of a police canine in one of these ways may be the safest, most effective, and efficient means to gain compliance, perhaps preventing matters from becoming more dangerous and putting the public, police, and suspect at increased risk.

[61] The expert provided a view that the availability of police resources is a constant strain in all areas of policing, in particular on frontline patrol. In this respect it was not clear if he was referring to departmental challenges or industry wide ones. He noted that dog handlers serve as support for patrol officers when not specifically assigned (a point that is included in the departmental standards), and at times to help fill the resource void on patrol. He specified that this includes assisting “in running a plain clothes surveillance call on a separate ‘operations channel’ so as to free up either the Sergeant or another member so they can be utilized more effectively.”

[62] To some extent, in the latter aspect of his opinion, the expert appears to be providing evidence pertaining to the VPD’s resources and surveillance practices. While there is some evidence on the record about resource limitations, and perhaps some available inferences about the surveillance plan, in my view it is not appropriate for the expert to supplement the record with additional facts with the apparent aim of addressing a question not otherwise answered by the evidence (which I will discuss in due course): why other officers may not have been present at the time of the apprehension.

[63] The expert further advised that the VPD has set aside operations [OPS] channels for front line police to use during planned operations and/or specific calls, which channels are not recorded. The purpose behind this, he said, is to protect any surveillance techniques or police procedures from being disclosed, and to allow officers to speak more freely, creating efficiency and effectiveness for ongoing operations (presumably covert ones in particular). Again, I am mindful that the expert’s role is not to supplement the record by providing evidence pertaining to the plan that was being followed by the plain clothes officers or the member, in this case. The issue of the member’s subjective understanding of the plan is part of the analysis that I am required

to make in connection with the issue of misconduct. If there are gaps in the evidence relating to that, it is not the role of the expert to fill them.

[64] In relation to operational practice surrounding apprehension, the expert advised that the common practice is to have a police canine present “or to act as lead” when challenging a suspect. He added that whether or not an officer is able to join the dog handler during the arrest attempt will depend on the availability of resources and the situation. He explained that a dog team may be utilized because suspect compliance is more likely to occur when a uniformed officer challenges a suspect, rather than a plain clothes officer. Dog handlers are often a supplementary resource to a call, and therefore able to freely move into a position to effect an arrest, whereas other officers may be actively engaged in a containment position, on foot in their respective surveillance spots, or tied up in an investigative role.

[65] The expert observed that, considering the time of the investigation, availability of resources, and the nature of the call, a dog handler may be the only one in a position to challenge and arrest a suspect, adding, “without giving up tactical advantage and/or a vital position on the call such as a containment point or surveillance spot.” Again, if this evidence is intended to address the absence of other officers at the time of the incident, it is not in my view open to the expert to fill any existing gaps in the evidence pertaining to the understanding and actions of the member.

[66] The expert explained that dog handlers have access to a wider range of tools under the NUFF guidelines; i.e., an intermediate weapon. The dog handler will be able to apprehend a suspect who chooses to resist or flee more quickly, effectively, and safely than through officer presence and verbal commands. The handler can challenge from a safe distance and, if necessary, deploy the dog from safety to apprehend.

[67] The expert commented that the member on this call responded to assist plain clothes officers surveilling the two suspects, because it is “one of the mandates” of the VPD, and because the member had “the skills, experience, knowledge, training, and tools needed to help ensure the safest, most effective, and efficient arrest of the suspects.” He also commented that during the surveillance, two offences of mischief were observed, with the suspects “fleeing” from both. He observed that the offences took place at a time of night when police resources are at the absolute minimum or below minimum. He noted that despite this, four plain clothes officers were able to respond to the initial citizen report of an attempted commercial break and enter. He explained that the member provided an opportunity for a fifth officer to be involved,

allowing the four plain clothes officers to focus on their surveillance and attempts to maintain a proper surveillance “box”.

[68] He added:

Without giving up any trade secrets, a surveillance box refers to the containment of the suspect(s) within a box, while either static or mobile (foot or vehicle) containment is conducted. From my experience, this box is often difficult to maintain given the weather conditions (eg. snow, heavy rain), area in which it is being conducted (eg. downtown vs rural vs urban neighborhood, low lighting), the actions of the suspects (eg. running/fleeing from crimes, multiple suspects, separating), and the number of officers assisting. [The member] and the [other] officers followed standard VPD procedure and switched to an “operations” channel so they could communicate more efficiently and effectively, all the while freeing up the dispatch channel for normal operations. A take-down plan was coordinated between the covert officers and the member in order to [effect] a safe arrest of both [suspects].

[69] Again, to the extent that the expert is here providing evidence as to what occurred on the incident date that is not otherwise available on the record, in my view that is not open to him, and this part of his report is not admissible. General explanations of a “surveillance box” may assist, but one of the crucial questions will be whether or not there were tactical decisions of which the member was aware that he believed constrained him to act alone in conducting the apprehension of the two suspects. That is evidence that would need to come from him, and cannot be filled in under the guise of an expert opinion.

[70] The expert indicated he was familiar with the location where the takedown was to take place, and that it would provide clean entry and exit points for a dog team, areas for the dog team to remain covert, unobstructed lines of sight, and a fairly large geographical area within which to challenge the suspects, all of which was in line with departmental training. He added that the decision to conduct an arrest at a specific location can often depend on a quick analysis of things like opportunity, including the suspect’s direction of travel and the area they are walking in. He observed that suspects who “commit random crimes, run, then walk, then repeat this behavior are hard to predict and therefore a take-down plan can be difficult to reliably orchestrate. For example, it would be prudent to [effect] an arrest attempt while the suspects are walking casually in a straight line and seemingly out of ‘crime mode’. ...it is often the behavior of the suspect(s) and the location they are walking that triggers the decision to [effect] an arrest, as long as the resources are in place.”

[71] These comments may be helpful in support of the member's decisions on the incident date, to the extent that those decisions are articulated by him, but again cannot serve to fill in gaps in his evidence regarding his perceptions and motivation.

[72] I will here relate a portion of the expert report that in my view, in some respects, clearly oversteps the line by providing and interpreting evidence, filling in the mindset of the member, and commenting on the heart of the issues to be decided on the discipline proceeding. While it is summarized here, as I will explain below starting at paragraph [79], I believe it necessary to significantly limit the extent to which these aspects of the report may be considered.

[73] The expert expressed the opinion that maintaining the surveillance box with four covert officers was a reasonable, correct and efficient use of police resources, in line with current police practices; if the plain clothes officers had left their positions it would have created an opportunity for the suspects to flee; the collapse of the box will be dynamic and fluid, depending on how the challenge of the suspects goes; once the decision to [effect] an arrest attempt by the member and the dog was made, proper resources were put in place (containment) and a safe, effective arrest location was chosen by the member; the member and the dog engaged in officer presence when they left their place of concealment and presented themselves to [the suspects]; the member progressed from officer presence to communication, specifically, identifying himself as police and yelling three commands to "get on the ground, you're under arrest;" neither suspect complied with the initial command to get on the ground and the member was then faced with two suspects who were not complying; rather than comply with the commands to get on the ground, both suspects replied with, "What? What?" while walking backwards and looking around in all directions; there is not a police officer or dog handler in Canada that would not interpret and believe this response to be a delay tactic and active resistance by the suspects; and this delay tactic allowed [the suspects] time to think and weigh their options of surrender, flight, or fight.

[74] He added:

It was the intent of [the member] and the other officers, as attested to in their statements, to have option 1 chosen by the suspects. The moment that [the suspects] engaged in active resistance and the delay tactic of backing up and questioning [the member], it immediately raises the level of concern for [the member]. It also communicates to [the member] that they are not surrendering. This also significantly raises the level of risk to the public, police, and suspects due to the fact that neither fleeing, arming themselves, nor fighting officers are desirable options for the police.

[75] The expert concluded that because the member chose to give further commands, it was apparent he did not wish to deploy his dog unless he absolutely had to. He noted that dog handlers are trained to assess whether or not “no commands, one command, or multiple commands” are necessary and justified, and taught that a suspect requiring multiple commands increases officer safety concerns significantly due to the fact that they may be deciding on whether or not to arm themselves, assault the officer, or attempt to flee.

[76] The expert went on to express the opinion that it was not unreasonable for the member to believe the suspects were fleeing, noting that both had committed multiple criminal offences and fled afterward, both backed away from the member and the dog, both were looking around as if for an avenue of escape, and both assumed a “sprinter’s stance.” The expert said he would have concluded that these actions were preparatory to flight or active resistance, and that conclusion would be consistent with the member’s training and experience and the practice of other dog handlers.

[77] The expert stated that it would have been imprudent for the member to wait for the suspects to run from police before deploying the dog, given that they had already demonstrated their willingness to flee and ignore commands, and that, “Past behavior is often the best predictor of future behavior.” Allowing them to flee would have permitted the continuation of offences, and endangered the public and the other officers. The longer the member took to transition from officer presence and communication to that of deploying his police service dog, the more dangerous the situation would become for all involved.

[78] Finally, the expert observed that, in his experience, officers who are faced with noncompliant, actively resistant suspects often do not have the “luxury” of time or the ability to determine why the suspects are not complying. “It is not prudent, nor safe, to stand there and conduct a forensic investigation into why the suspects are not complying. Dog handlers must interpret the information they are receiving via the suspect’s body language, verbal communication, and factors already known to them, and make an appropriate decision on what to do next. Often this decision may be made in a matter of seconds. In some situations, the officer or dog handler may choose to wait longer to see if suspect compliance is about to occur or slow to occur. This would likely be in scenarios where the suspect has to come down from a deck or balcony, come out from under a car, or put down items in their hands. That was not the case with [these suspects]. They chose to look around for avenues of escape, question [the member] in

an attempt to gain time to decide on their course of action, and backed away from him and his police dog.”

[79] The foregoing opinions offered by the expert in relation to the specific actions of the member go beyond the scope of an appropriate expert opinion, providing facts not in evidence, relying in some cases on disputed facts, and encroaching on the very issue to be decided, the subjective mindset of the member. The latter question must be resolved based on the member’s own statements and that of others who were present. Once the factual questions are resolved, however, I accept that it can be helpful to refer to an expert opinion in support of the reasonableness of that mindset. Hence, I have outlined the opinions provided by the expert in this section with a view to considering the extent to which they may support the reasonableness of the member’s evidence regarding his subjective mindset at each decision-making stage.

8. SUBMISSIONS

[80] Counsel for the member, Mr. Westell’s written submissions may be summarized as follows. It is uncontroversial that the member deployed the dog, and that before the first bite, at least one verbal command was issued to the youth. It is also uncontroversial that the youth did not submit to arrest, although [REDACTED] claims [REDACTED] had no reasonable opportunity to do so. The suspects were not obviously young persons; in particular, the youth was unusually tall for a [REDACTED]. There was also no available information as to their race or heritage at the time of the incident.

[81] [REDACTED]

[82] A plan was developed between the plain clothes officers and the member that the member would position himself and the police dog at the agreed upon location and wait for the suspects to arrive from the west. The member was not operating in a surveillance capacity. His only role was to bring the youth into physical custody.

[83] The four other officers were fulfilling a very different role, to surveil and contain the suspects until such time that they could be safely brought into police custody. Inherent in their role was the necessity of maintaining a sufficient distance from the suspects to avoid drawing attention to themselves and incentivizing them to flee. At the same time they were attempting to stay close enough to avoid collectively losing visual

continuity. The use of a surveillance box and its challenges is outlined in the report of the expert.

[84] The plan of the attending members was never for the plain clothes officers to catch up and surround the suspects, to incentivize compliance and surrender by officer presence or the threat of physical intervention. As the expert explained, that approach could prompt a prolonged foot pursuit involving risk-taking or criminal behavior on the part of the suspects to evade arrest.

[85] There is no basis to suggest the member or other officers failed to draw on their training and experience to effect arrest in the way that they did. Instead, it appears they proceeded to use the dog in accordance with approved training and policy standards and were not only successful in bringing into custody an offender who was physically large in stature, armed with a dangerous weapon, and incentivized to flee on foot due to possession of illegal drugs. They were also successful in doing so without causing serious bodily harm to the suspects, the dog, or the other officers.

[86] In his statement the member explained that he provided three warnings and that he perceived the suspects were not complying. While other officers were not present at the time of deployment, one confirmed hearing commands from a block and a half away. Another heard commands being yelled as well, and reported that he could see that the suspects were not complying but instead hunching in a sprinters stance as if ready to flee.

[87] The decision to have the member challenge the suspects at the time and in the circumstances does not reflect an impulsive or rash decision to unleash an intermediate weapon recklessly. Counsel relied on the expert's statement to the effect that dog handlers are taught that a suspect requiring multiple commands increases the officer safety (concerns), as they may be deciding whether to arm themselves, assault the officer or attempt to flee. In addition, counsel noted, the youth was found to be armed during arrest.

[88] Counsel submitted that there are compelling reasons not to accept the youth's evidence. It was the member's assessment that appeared intoxicated at the time, which is supported by the fact that a controlled substance was found on person upon arrest. Additionally, he submitted that the youth's evidence did not hold up as a matter of logic. It is difficult to understand why the member would have issued commands at all if he hadn't intended to afford the suspects an opportunity to comply and avoid the unpleasantness of a dog bite. The fact that he gave commands supports

the notion that he had fully intended them to be followed and that he provided them the time necessary to comply. That he may have failed in that regard is as consistent with an honest and reasonable mistaken misjudgment of time and space as it is with a reckless or malfeasant intention to apply inappropriate force.

[89] Counsel further submitted that it was unnecessary for the member to wait for the suspects to start fleeing before deploying the dog. The member offered three commands before doing so rather than just one. The time it took to issue three commands (as opposed to just one) would have provided ample time for the suspects to consider the threat they were facing and surrender immediately. They did not surrender and instead were seen to take a stance consistent with an intention to flee on foot.

[90] The plain clothes officers had observed a behavioural pattern in the suspects' earlier conduct. Each time they committed a crime, they fled the scene by running away. At the time of the dog's deployment, the member was aware of this pattern. It was fair and appropriate for him to consider the suspects' recently observed past behaviour in determining their likely response to being challenged with the dog. As stated by the expert, it would have been imprudent for the member to wait for the suspects to actually flee, nor did the member have the luxury of time to determine their reasons for not immediately complying. The suspects were on a property crime spree at the time of the arrest and neither VPD policy nor any other legal standard directs that officers allow for the ongoing commission of property crime because of the risk of superficial injury stemming from the use of a properly deployed police service dog.

[91] The officers chose to keep an eye on the suspects until they could augment their box technique formation with a dog handler capable of safely effecting an arrest. It would not have been a legitimate decision to decline to put a stop to the ongoing property crime after such time that the VPD officers assigned to the case had reached the conclusion that there were sufficient grounds and resources to effect an arrest.

9. ANALYSIS

i. The Applicable Test

[92] Section 77(3)(a)(ii)(A) of the *Police Act* defines the misconduct of abuse of authority, through intentionally or recklessly using unnecessary force on any person, in the performance of duties. In order to constitute this type of misconduct, 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 to as the "subjective-objective" test²⁰.

[93] The subjective-objective test is adopted in the definition of "reasonable grounds" contained in the BC Provincial Policing Standards, Section 1.4.2,²¹ set out above at paragraph [11]. That definition requires that "the officer must personally believe that the decision or action is necessary, and in addition, the decision or action must be able to stand the test of whether an objective third person, who is acting reasonably—and is informed of the officer's training, experience and the factual circumstances known at the time—would also reach the same conclusion."

[94] The issue as framed by the policing standards and the *Police Act* is therefore whether it was unreasonable for the member to believe it was necessary to arrest the youth by applying the police service dog. The standards provide a yardstick against which to measure the objective reasonableness of the actions of the member. The second part of the analysis is the member's subjective mindset as supported by the circumstances in which he found himself. The assessment must be made based on the facts surrounding the decision to use force, as perceived by the officer, and weighed against a test of whether, given those facts, another officer with similar experience "would also reach the same conclusion."

[95] Interestingly, the test in the case law, sometimes referred to as the "doppelganger" test, does not go as far as that:

[41] Where a judge chooses to adopt the role of a "doppelganger," it is essential that the judge recognize that the ultimate issue is not what a doppelganger *would or should* have done, but rather the reasonableness (on a subjective-objective basis) of the police officer's belief that the force used was necessary.²² (Emphasis added.)

[96] The question for these purposes is, did the member reasonably consider the factors set out in the standards as the incident unfolded, and if so, does the evidence establish that he recklessly overlooked any of them, at any point in the process? The standards provide a convenient framework for considering the member's assessment of the circumstances at successive stages of the deployment, bearing in mind the

²⁰ R. v. Pompeo, 2014 BCCA 317, *supra*, at paragraph 40; Akintoye v White, 2017 BCSC 1094, <https://canlii.ca/t/h4l0w>

²¹ BCPPS, 1.4.2, p. 1.

²² R. v. Pompeo, *supra*, at paragraph 41.

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. I therefore find it convenient to assess the evidence as it relates to three different “stages” of the member’s actions, as listed below.

ii. The Decision to Challenge with the Dog

[97] In my view, the first question that arises on a review of the evidence is how it came about that the member was alone at the time when he challenged the two youths with the dog, and whether his decision that it was necessary to proceed without the presence of other officers was reasonable from an objective or subjective viewpoint.

[98] The various officers’ statements confirm the development of a takedown plan, at a set location, through the use of the police service dog. The suspects were known to be travelling east toward that location, and the member had set himself up in a covert location nearby. The four plain clothes officers were acting in a surveillance capacity, in vehicles, and at least occasionally on foot. None of the plain clothes officers had identified themselves to the suspects or confronted them in any fashion.

[99] 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 how it came about that the member challenged the suspects before the arrival of other members. The radio transmissions support a conclusion that these officers were clearly nearby and engaged in the investigation, and had been for almost an hour. All of the officers described a planned takedown, which involved an apparently concerted and coordinated decision to have the dog team and other members confront the suspects and apprehend them.

[100] The descriptions of the plan provided by the plain clothes officers in their statements were as follows:

A “quick arrest plan” that was made “on the go;”

A “takedown plan” for the member to “initiate” an arrest;

“Police set up a takedown at [REDACTED] and [REDACTED];”

“The suspects were challenged by the K-9 and other officers;”

“[Once] police had the resources to conduct an arrest ... the K-9 unit set up the take down at [REDACTED]” and

“An arrest was conducted with the K-9 and other police members.”

[101] From those descriptions, it would appear that the plan entailed not only that the youths would be challenged by the dog team, but that the other officers would be involved in the arrest. In fact, the four other officers all arrived at the arrest location very shortly after the member challenged the suspects. Some were close enough to hear the member giving commands, and one at least indicated that he saw the suspects before the dog was deployed.

[102] As described by the member, however, the challenge was initiated before any other officers arrived or, apparently, confirmed their arrival. The evidence does not disclose the extent of the member’s access at that point to radio confirmation of the others’ locations, nor does he provide any comment about that. He also does not explain why he believed it was necessary for him to initiate the confrontation in the absence of confirmation that one or more of the plain clothes officers, or others, would be present to assist. In other reported cases involving suspect apprehension by a police service dog, other officers have been present and involved in the arrest²³.

[103] The initial question here is therefore whether it was objectively reasonable for the member to confront the suspects with the dog, in the absence of confirmation that the surveillance officers would participate in the arrest.

[104] 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 walking, not actively 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.

[105] The youths had been under surveillance for almost an hour; they were neither freshly fleeing a crime, nor eluding police detection. The suggestions that they had “fled” two or three other scenes were overstatements, with the exception of the [REDACTED] and there was no indication that the two were aware they were being observed by police. Indeed, as I will discuss further in due course, it may have been better if they had been made aware that they were under close observation, before the dog was

²³ e.g. [18524-2022-12-06-Findings-of-Discipline-Authority - Pendleton re Police Dog.pdf](https://canlii.ca/t/jt6gv); R. v. Tsonos, <https://canlii.ca/t/jt6gv>; Fennell v. Victoria, <https://canlii.ca/t/1wrs3>; Carpenter v. Vancouver, <https://canlii.ca/t/1drxk>

deployed. Finally, 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.

[106] In considering the subjective mindset of the member, I will observe that he does not specifically say in his statement that he believed the plain clothes officers would be present, or needed to be. However, his reference to a plan having been devised by “plain clothes members,” and the evidence and proximity of those other officers, support a conclusion that the plan was one in which quite reasonably the confrontation would be accompanied by officer presence, as a first step in the NUFF approach.

[107] The member was not asked why or whether he considered it necessary to challenge the suspects alone with the dog, and so his understanding of the plan needs to be derived from the evidence available on the record.

[108] While the expert suggests that departmental policy was consistent with a decision of that nature and that officer presence by a canine member and his dog is more effective than that of one or more uniformed officers, I did not understand him to be suggesting that it is departmental policy to have one member and a dog confront two suspects, in the face of the proximate availability of four other officers, albeit plain clothed.

[109] The expert also pointed to the need to keep the surveillance box covert, and a lack of departmental resources. The latter provides no explanation in light of the speed with which all four plain clothes officers arrived after the dog had bit the youth. If the tactical secrecy of the surveillance box is intended to suggest that additional presence would be contrary to or inconsistent with departmental policy, in a scenario where there are two suspects and just one dog, in my view that inference strains credulity. As the member himself stated, that would set him up to be “outnumbered.” If that is in fact departmental policy, or the member’s understanding of it, in my view more direct evidence on that point is required.

[110] Equally, I cannot conclude that it would be reasonable for the member to engage in the confrontation of two suspects alone in the expectation or hope that both would comply, as opposed to the “free” one following a natural instinct to flee, particularly having no knowledge that other officers were standing by ready to arrest him. Again, if this is departmental policy, I would be very surprised. Far from preventing the flight of the second suspect by maintaining the covert “surveillance box,” as suggested by the expert, it would seem to me that failing to confirm or advise the suspects that other officers were present and able to participate in the arrest would invite a flight response

by the one of the two who was fortunate enough not to have been bitten by the dog. Far from reasonable, such a plan, to keep the additional officers “covert” at the time of the confrontation, would to my mind be devoid of reason.

[111] In addition, that is not the evidence provided by the member in relation to his decision to confront the suspects, or perhaps more accurately, he has not provided evidence to explain his decision to do that, particularly given his immediately subsequent conclusion that he had to deploy the dog because he was “outnumbered”. With the apparent proximity of the four other officers, seconds away, my observation, setting aside what I am urged to accept was departmental policy, is that it made no sense to proceed with the challenge before confirming that the other officers or at least one other officer would be present to assist in the apprehension. Additionally, a confrontation coupled with visual or vocal confirmation, to the suspects, that several officers were present, would seem a far more effective method of safely apprehending them both.

[112] Therefore, if the member seeks to rely on a belief that it was necessary for him proceed with the challenge based on departmental policy to the effect that a single dog and handler should be deployed to an arrest of two suspects who may reasonably be expected to flee, with respect, to my mind, more evidence is required. There is nothing in the record to support the member’s belief in or understanding of such a policy and how it may have played into the decision to set into motion the ensuing sequence of events.

[113] I note that paragraph (2) of the BCPPS Threshold provisions²⁴ set out at paragraph [12] above, which apply “prior to and during each deployment of a police dog” in circumstances where a bite may occur, require a dog handler to conclude on reasonable grounds, among other things, that no lesser use of force would be appropriate or effective; and to consider, as part of the circumstances, whether the person could be apprehended at a later time. While it is not entirely clear that this part of the standards applies to a decision to challenge suspects, as opposed to the decision to apprehend by biting, these provisions at least highlight the question, at this stage of the analysis, of whether the member considered if the challenge could reasonably have been postponed for whatever brief period may have been necessary to confirm the

²⁴ BCPPS 1.4.2 (2)

presence of other officers. These provisions will be considered in more depth in the section below dealing with the decision to apprehend the youth.

[114] Considered from a subjective viewpoint, therefore, the evidence in my view does not support a conclusion that the member reasonably believed, at the time of the decision to challenge the two suspects with the police service dog, that this level of force was necessary at the time when he elected to apply it.

[115] On the question of the member's decision to use the dog to challenge the suspects, in my view the evidence on the discipline proceeding establishes both that it was not objectively necessary for the member to act alone and that the member has not either articulated or explained a reasonable belief that it was. I am left with the unshakeable conclusion that, had he waited the very short time until the arrival of the other officers involved in the investigation, the matter may have been resolved with police presence and communication, and unfolded very differently. I find that the use of the dog as an intermediate level of force at the time of the confrontation was unnecessary and reckless.

iii. Adequacy of the Warning

[116] Even if the initial challenge was an unnecessary use of force at the time when it was made, there is an additional question as to whether the member provided a sufficient opportunity for the youths to submit to apprehension before applying the dog to effect the arrest by biting. On this aspect there is a difference between the evidence of the member and that of the youth and [REDACTED] companion. The difference is to some extent one of timing, but it raises questions of credibility which are difficult to resolve in the absence of viva voce testimony and cross-examination.

[117] The provincial and departmental standards as set out above contain a 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. In particular, the Provincial standards, which are in the mandatory section of the policy, permit an officer not to provide a warning if it is impractical or dangerous to do so, and require that the warning "identifies the handler as a police officer with a police dog, and advises that the person may be bitten if they do not comply with police instructions."

[118] The VPD standards, set out at paragraph [15] above, provide for warnings in the event of a search or before a dog is permitted to bite, unless impractical. The provision pertaining to the bite warning states, "The purpose of this warning is to identify the

police dog handler as a police officer with a police dog, and advise the person they may be bitten if they do not comply with police instructions.”

[119] Of note is the fact that the VPD provision does not suggest that the specific wording of the warning is mandatory. The VPD Canine Policy Operational Practices document contains the BCPPS and VPD RPM sections in entirety but notably, does not outline specific training in relation to warnings, beyond those in relation to a search.

[120] The first part of the member’s interview with the investigator appeared to consist of him reading a prepared statement regarding the incident. In relation to the warnings that he provided to the youth, he said that he moved out of his place of concealment and stated loudly a “lawful police command,” as he has given several times over his career. He stated that the words he used were, “Police, you are under arrest, get on the ground or you will be bit.” I note here that the wording he provided in the GO report in relation to his command was the exactly the same.

[121] The member stated to the investigator that the youths “immediately began to walk backwards away” from him, “out into the middle of the street,” with the youth stating several times, “What, what.” The fact that they had backed into the street was not included in his written report.

[122] In the interview, the member stated, “Given that [REDACTED] had made these statements I wanted to make clear to [REDACTED] that [REDACTED] was under arrest and [REDACTED] was being ordered to the ground, or [REDACTED] would be bit by my police dog, so I then repeated my lawful police commands an additional two more times, while I observed both of them walking backwards away from me.” He reiterated that the wording of his commands was, “Police, you are under arrest, get on the ground or you will be bit.”

[123] The member said it was clear to him that “they heard my lawful police commands and they both were choosing to disobey... my lawful police commands” and “they disobeyed these commands ... multiple times and continued to walk backwards.” At this point, the member stated, he observed “both of them looking in all directions.” His attention was focused mainly on the youth. He said he “observed [REDACTED] behaviour to be ... actively resistant, ... walking backwards, looking in all directions.” The member expressed the opinion that the youth was “looking for an avenue of ... escape to flee on foot as... [they] had done twice already... in the previous... criminal... offences... that they had committed.”

[124] Given all of that, the member stated, he “made the decision to command [the dog] to apprehend [the youth].” He released the dog from his physical control but kept hold of the 20 foot lead. The dog ran “after” the youth and made contact with [REDACTED] left lower leg, and pulled [REDACTED] to the ground, with the assistance of the member holding the lead. The member stated, “in a loud, clear voice,” further “commands” to “show me your hands and don’t fight the dog.” At this point, the member said, the companion was in the middle of the street, and the member was outnumbered with two suspects, aware that other plain clothes officers were in the area, but no one was with him at that time and he was unaware of the suspects’ intentions given that they had been actively resistant. He gave the companion “lawful police commands” to get on the ground. He stated, “After saying that second command to get on the ground,” [REDACTED] got onto [REDACTED] knees and appeared to be complying with the “lawful police command.” At that point several plain clothes members moved in to take custody of the two and once the youth was under control, the dog was removed from [REDACTED]

[125] I note that the member stated that the companion complied with his command, either immediately, or after the second command. Based on the description of the interaction provided by the member, it appears that this was after the dog was deployed, and before other officers arrived.

[126] The difference, or change, in the member’s description of the companion either “immediately” complying or doing so after the second command, suggests that the member was attempting to demonstrate the clarity of his commands, and, alternatively to confirm that he had provided at least two commands by that point. However, it is not clear from his evidence whether these one or two commands were in addition to the three he says he made before the dog was deployed, and this sequence of events does not assist in supporting the member’s assertion that he provided three commands to both youths before deploying the dog.

[127] Turning to the surrounding evidence, the other officers spoke of hearing “commands”, but were unable to provide or confirm the details of the wording. None of them was in a position to confirm the timing of the warnings in relation to the deployment of the dog. The first plain clothes officer, as outlined above, was a block and a half away, and told the interviewer he could not see or hear what occurred when the member challenged the suspects. The second was a block away and heard commands, but arrived when the dog had already bitten the youth.

[128] The evidence that is perhaps the most supportive of the member’s is that of the third officer. He stated that he heard the member yelling “commands,” but he did not

say how many. He could see the member challenging the suspects, and said that he could see that neither of them got on the ground, rather hunched down “in a sprinter’s stance,” as if preparing to flee.

[129] In his interview this officer 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 youths were not complying. His statement suggests that more than one officer was yelling as this officer was approaching the scene and therefore that he may have been hearing a later part of the interaction. His statement to the investigator may be contrasted with his report, in which he stated that the youths were “not complying,” suggesting a willingness to provide conclusory statements in support of the member.

[130] In addition, this officer 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 any other officers arrived. The description of the “sprinter’s stance” of both youths is also inconsistent with the member’s evidence to the effect that both suspects were on the ground before other officers arrived. I will say more about this in relation to the apprehension analysis, but this evidence confirms that the third officer did not observe the initial part of the interaction or hear what the member said before deploying the dog.

[131] There is therefore an unfortunate absence of surrounding evidence supporting the member’s statement regarding the number of commands he provided before he deployed the dog to conduct the arrest.

[132] It is unfortunate that there was not some kind of record with respect to this part of the interaction. While the expert has offered information regarding the practice of VPD officers conducting surveillance, of moving to an OPS channel so as to communicate more directly and efficiently about an investigation that is actively unfolding, to my mind that does not fully explain the absence of supportive evidence pertaining to either the investigation plan, or the interaction prior to deployment of the dog, in the records or the statements.

[133] In my experience, sometimes contemporaneous police radio broadcasts will assist in providing context and support for the perceptions of officers as an event unfolds. In some cases, an officer involved in an altercation or confrontation will open

their radio so that others can hear what is transpiring, and recordings from those transmissions can provide a “real time” record of what was said during the incident.²⁵

[134] I note that the VPD manual specifies that dog handlers are assigned a radio and mic.²⁶ One might assume that a high risk scenario in which a dog may well be deployed could benefit from live broadcast, or at least a record of some kind, given the likelihood of injury and just this kind of complaint. Unfortunately we do not have the advantage of any supporting evidence from the audio record in this case. It is therefore not possible to weigh the credibility of the member’s evidence against audio of either the surrounding communications or the confrontation with the suspects.

[135] I am aware that at the time of this investigation, the VPD did not have body cameras in use, and they have only recently been implemented as a pilot project²⁷. It strikes me that the deployment of a police service dog is precisely the kind of situation that could clearly benefit from some kind of live recording of what is said; both for the benefit of the member himself as well as that of the complainant, and in the public interest. Given that there is now a pilot project that can presumably address this concern, I will leave the topic here, with that observation.

[136] Turning to the evidence of the youth and [REDACTED] companion, as pointed out by the member’s counsel, they agree that the member told them to get on the ground at least once, before or as the dog approached. The youth agreed that [REDACTED] may have said this more than once, but was firm in [REDACTED] assertion that [REDACTED] did not have time to get on the ground before the dog started biting [REDACTED]. The companion said that it was only once, and there was not sufficient time to respond.

[137] The companion said [REDACTED] first saw the person with the dog when the dog was about 6 feet in front of them. The officer yelled once to get down on the ground and they did not have time to respond before the dog bit the youth. The companion said [REDACTED] was surprised to see the officer there, shocked and scared, and that the youth kind of froze. [REDACTED] said they both stood still, did not move or step back. They were on the sidewalk facing [REDACTED] and remained there, side by side, two feet apart, until they were arrested. The dog was biting the youth, and the member told the companion

²⁵ <https://opcc.bc.ca/wp-content/uploads/2019/11/12210-2020-02-18-Ludeman-Logan-PH-19-01-Decision.pdf>

²⁶ Vancouver Police, Canine Unit Operational Practices, 2016, included in Exhibit 1 on Discipline Proceeding

²⁷ <https://vpd.ca/body-worn-cameras/>

to get down on the ground, which [REDACTED] did. [REDACTED] believed there were 6 officers present for the arrests.

[138] The youth said [REDACTED] was walking and heard “get on the ground” and before [REDACTED] could get on the ground the dog started biting [REDACTED] jacket. It could not get through [REDACTED] jacket, and started attacking [REDACTED] leg. [REDACTED] was not under the influence of alcohol or drugs at the time of the incident. [REDACTED] believed there were 3 officers present for the arrests. [REDACTED] did nothing before [REDACTED] was bitten. [REDACTED] did not have a chance to do anything. [REDACTED] did not step back or resist. [REDACTED] was not surprised that the police appeared, given that they had smashed a car window. [REDACTED] held the dog’s snout to try to avoid getting bitten, and the officer said, “Don’t hurt my dog.” The youth denied resisting the officer’s command to get on the ground in any way before being bitten by the dog.

[139] Notably, the companion and the youth were not asked if they had discussed the events of the incident or their evidence before providing their statements to the investigator.

[140] Looking at the different versions from an objective standpoint, one question that arises is why, if the situation with the dog and the handler was clear to the youths, they would hesitate to the point of appearing resistant. The surrender of the companion after the dog bit the youth somewhat refutes a prior intention on [REDACTED] part to flee. It also supports an inference that the length of the interaction was not long enough to permit a conclusion that the youths were openly defying repeated commands.

[141] The one remark ascribed to the youth, “What, what?” indicates bewilderment, not defiance. It was not repeated or uttered by both suspects as suggested by one of the officers. In addition, having listened to the youth’s voice on the recording of the interview, there may also have been an available inference that [REDACTED] was not an adult. While that recording was made more than a year after the incident, there is no record of how [REDACTED] sounded on the incident date and it seems unlikely [REDACTED] would have sounded older. At very least, however, the suspects’ focus on a school as part of their window-breaking spree, and the nature of their actions, could arguably have raised a question about their ages, and therefore, their capability of understanding the gravity of the situation.

[142] Looking at the interaction from an objective point of view, if, as asserted by the member, he took the time required to call out the commands he says he provided, loudly three times, it would be reasonable to conclude that the youths either had time to comply, or if they intended to flee, to actually do so. However, by all accounts they

did neither at any point before the dog was deployed. One available inference, as pointed out by the expert, was that they were considering their options. Another perhaps more reasonable inference was that they did not understand what was happening. Both youths indicated that they did not see the member or realize that there was an officer present until after the dog was released, essentially simultaneously with hearing a command to “get on the ground”.

[143] 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 three ample “lawful police commands” 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 appeared to be present until after the youth was taken down by the dog. As already noted, there is little or no support in the surrounding evidence for the member’s version of how he stated his commands, and how many he gave.

[144] In the absence of viva voce testimony, the available finding in relation to credibility is that the unprepared statements of the youths, both of whom deny being in an altered state and appear to remember the events relatively clearly, have the ring of truth to them. The evidence points toward a conclusion that the youths did not move after the first command, and that this command was made almost simultaneously with the release of the dog. Notably at least one of the other officers confirmed that the arrest of the youth occurred on the sidewalk.

[145] I note at this point, as well, that the wording described by the member does not quite accord with the mandatory requirements of the BCPPS, which require that the member identify himself as a police officer with a police service dog, and advise that the person may be bitten if they do not comply with police instructions. It may not be sufficient to repeat, verbatim, the words that the member says he used. The response, “What, what?” clearly conveyed a lack of comprehension.

[146] I have noted that the VPD RPM section pertaining to warnings speaks of the intent of the warning as opposed to prescribing its components, which might create some room for a belief on the part of an officer that they had complied with the intent, if not the precise wording. However, there is no evidence suggesting such a belief in these proceedings, and the only issue is whether the officer adequately complied with the mandatory provisions of the BCPPS.

[147] Notably, the officer does not appear to have explained that he was a dog handler or that the dog was a police dog. If he said police, it appears to have been part of a rapid-fire, run-on sentence. Given the evidence of the youths, it does not appear to have been made sufficiently clear to them that the member was a police officer, either verbally or by the manner in which he appeared to them from his covert location.

[148] As a final point, I note the use of the word “bit” by the officer as opposed to the prescribed wording, “bitten.” While the matter cannot reasonably boil down to a question of semantics, in terms of what might be easier to hear and comprehend, the mention of a police service dog, coupled with the perhaps more easily heard word, “bitten,” might have been more effective to convey the full circumstances to the youths.

[149] In addition, I am not convinced based on the evidence that the member actually did state those commands, verbatim, three times. If he had time to do that, he would have had time to elicit a response beyond the single, “What, what?” In addition, even the few seconds it may have taken to repeat those commands (and provide a reasonable time between them for comprehension and compliance) should have afforded time for the plain clothes officers to arrive on the scene.

[150] Looking at all the evidence from an objective standpoint, therefore, it seems probable that the youths were not provided with a sufficient opportunity to hear or comprehend what was being asked of them, before the member made the decision to use the dog to apprehend the youth.

[151] Turning to the question from a subjective viewpoint, it is whether the member reasonably believed he had provided a sufficient warning. As I have noted, the applicable police standards as set out above require assessment and reassessment of the need for intervention by a police service dog; an intermediate weapon likely to cause injury. Although I will say more about this in the next part of the analysis, it appears reasonable to expect that this ongoing assessment would apply while a member is considering whether his warnings have been sufficient for the suspects to understand what was being asked of them.

[152] The expert speaks of the “luxury” of time to consider why a suspect is not complying; however, one available option might be to ask that question; i.e. to inquire as to whether the suspect is understanding what he is being asked to do. To respond essentially by rote each time with a rapid-fire “lawful police command,” as the member states he did, might be less responsive to the initial “What, what,” than, for instance, a rewording of the command to invite a response, such as, “I am a police officer with a

police service dog, and you are under arrest for mischief [or breaking a car window], do you understand? I need you to get onto the ground NOW, or I will have to release the dog, and you will be bitten.”

[153] While I recognize the expert’s issue with imposing an obligation on a dog handler to “process and comprehend” the level of resistance being exhibited by a suspect or suspects who are not complying, that appears to be the standard required by the policy materials, which recommend continual assessment and reassessment. Moreover, if the member’s version of events is to be accepted, it is the standard to which he would have held the suspects; a quick comprehension of what was being asked of them, without elaboration, followed by immediate compliance.

[154] Considering the surrounding circumstances and the member’s own description of the interaction, therefore, I find his evidence that he believed he provided the suspects with adequate commands to be problematic, as compared with that of the youths, who both say they had no time to respond. Having listened to their statements, which did not have the ring of preparation or collusion, and that of the member, which appeared prepared and self-serving and at some points, malleable, in my view the scales tip in favour of the youths’ version, and detract from reasonable support for a belief on the part of the member that he did enough.

[155] In particular, the youths’ separate assertions that they did not have time to respond, their descriptions of the location of the arrests, having been on the sidewalk, and the companion’s description of the distances involved all support their version of the events, and contradict that of the member. In addition, I am mindful that it was dark, neither youth appeared to recognize the member as a police officer until the dog was essentially upon them, the fact that if they were “backing up” at that point, they would have been moving away from the street, all of which tends to support the youths’ evidence over that of the member, in terms of the timing of the events.

[156] While it is difficult to fully assess credibility based on the materials presented, the evidence points to a conclusion that the timing is more likely that perceived and described by the youths, and in my view, on balance, toward a finding that the member could not reasonably have believed he provided the youth with a sufficient opportunity to submit to arrest before the dog was deployed.

[157] In considering the application of the conclusions in this part to the duties of the member under the policing standards, and Section 77(3)(a)(ii)(A), I find that objectively the member failed to provide an adequate warning to the youth, and subjectively, he

was reckless as to whether the youth understood what was being asked of him. The result is that the force used was unnecessary and the officer was reckless in applying it.

iv. Decision to Apprehend with the Dog

[158] 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 an immediate apprehension with the dog was reasonably necessary. Put another way, does the evidence prove that even in the face of the resistance the member describes, it would have been more reasonable from an objective standpoint for the member to wait for the arrival of other officers, or at least until the suspects started to flee? The associated question about the officer's subjective mindset is whether he was reckless in deciding that, despite the youths' failure to comply with his commands, the force used was necessary at the time that it was used.

[159] Notably, the introductory section of the BCPPS Principles²⁸ requires that bites be minimized "as much as reasonably possible" and must be "proportional to the risk posed to the handler and to others," and suggests that "Minimizing bites can take the form of determining not to deploy a dog at all if the circumstances are not serious enough (e.g. shoplifting, by-law offences) ..."

[160] The decision to deploy the dog to conduct an arrest in these circumstances squarely engages the standards pertaining to the "Threshold and circumstances of using a police dog where a bite may occur."²⁹ 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 apply here. The third is that the person "is fleeing" and "there are reasonable grounds for their immediate apprehension by a dog bite."

[161] In addition, the mandatory Threshold provisions of BCPPS 1.4.2 (2), require that dog handlers consider "prior to and during each deployment," whether a bite is justified in all of the circumstances, having regard to the listed factors.

[162] The first question engaged by these standards is whether the member reasonably concluded that the suspects were "fleeing." Notably, the member does not describe a "sprinter's stance," as does another officer who apparently was not present

²⁸ BCPPS, 1.4

²⁹ BCPPS, 1.4.2 (1)

at the time the dog was released. The member states that the pair were “backing up” into the intersection, and looking around themselves. This description of backing is inconsistent with the suggestion they had assumed a sprinter’s stance (as if to run forward), and inconsistent with the companion’s evidence regarding where the arrest took place. And as I have previously noted, the member only added in his interview that the youths backed into the street.

[163] The two youths themselves deny having moved after realizing there was a dog present. Both firmly deny backing into the street, and as I have noted, other evidence supports a conclusion that the arrest happened on the sidewalk. From the member’s description of the interaction, the youths were walking east when the member approached them. The evidence does not suggest he approached them from behind. Had they backed away from the dog, they would logically have backed up to the west. Notably, at least one of the other officers was west of the location.

[164] In light of those facts, the member’s description of the youths as “active resistant/fleeing,” similarly to the use of that term in relation to the “three” prior criminal offences, is a plain overstatement and appears to be an artifice designed to justify a precipitous decision to use an intermediate weapon, on the use of force framework. In addition, it is not a reasonable inference from the actions the member says he observed, despite his assertion that a suspect “does not have to be running to meet the definition of actively fleeing”.

[165] If indeed the youths were backing up as described by the member, that would appear to have been more consistent with a natural reaction to being confronted by a dog coming at them, while not completely comprehending the command that was being provided. Repeating by rote the sequence of events and emphasizing the lawfulness of the commands does not assist to refute this available inference as to the nature of their actions. A simple assertion that a person does not have to be running to be actively fleeing also does not assist.

[166] Moreover, falling to the pavement, on a snowy night, may not be a natural immediate reaction to being confronted by a police service dog. To my mind it would be reasonable for a suspect to take some time to process or comprehend his options, particularly in those circumstances, and equally reasonable for a handler to consider whether initial non-compliance represented natural hesitation or comprehension issues, as opposed to “flight,” particularly while the suspect remained in a stance that could yet become compliant.

[167] The BCPPS include clear terms³⁰ about how to interpret the potential reactions of people who are actually accosted by service dogs, and the need to evaluate whether the person's reaction is resistance or a reaction to the dog. While the dog here was not yet biting the youths, in my view it would have been reasonable for the member to consider whether the reactions he was observing were related to a lack of comprehension, or having been surprised by the dog, as opposed to active resistance.

[168] In addition, an inference that the youths were attempting to escape apprehension, or actively resisting, at the time when they were initially challenged with the dog was not available to the member. His decision to arrest the youth by biting must have been based on the actions he observed after he challenged them with the dog. The worst conclusion that the member could have drawn, based on his own evidence, in my view, was that the suspects may have been in the process of deciding whether to flee.

[169] The expert's opinion that it was reasonable for the member to conclude that the youths were actively resistant or about to flee is unhelpful. It does not address the present tense wording of the standards, and it relies on facts, such as flight between crimes, statements by "both" suspects, and the "sprinter's stance," which are not established on the evidence.

[170] The evidence on balance supports a conclusion that the member did not believe, nor was it reasonable for him to believe, that the suspects were actually fleeing. In the absence of support for that belief, one of the prerequisites for the deployment of the dog to apprehend by biting was not met, and it flows that the consequent use of force was unnecessary and recklessly applied.

[171] The second requirement set out in paragraph (1)(c) of the Threshold standards, is that even for a fleeing suspect, the member must conclude there are reasonable grounds for the suspect's *immediate apprehension* by a police dog bite.

[172] I will observe firstly here that given the absence of other officers at the time of the deployment, a decision to use the dog to apprehend can only have been reliably effective in relation to one of the suspects. There was a clear risk that the other would not surrender, particularly if they both met the definition of "fleeing". The question that flows from the events here, therefore, is whether it was reasonably necessary for the

³⁰ BCPPS 1.4.2 (6)

member to immediately arrest one of the suspects at that moment and thereby increase the risk that the other would indeed flee.

[173] Notably, the investigator asked the member why he didn't wait until the suspects actually started running, and he responded by reiterating that the two had failed to comply with his lawful commands, displayed active resistance by backing up, and that he was concerned they might continue their crimes or endanger themselves by running into traffic.

[174] The member and the expert both emphasized the need to end the suspects' crime spree and minimize the risk to the public, the officers, and the suspects themselves. However, the question is not whether they were arrestable; they clearly were. The question under the standards is whether it was necessary to arrest them, or one of them, by a police dog bite, immediately.

[175] The advantage of keeping the dog at the ready would be that if the suspects, or one of them, thereafter made the rash decision to actually flee, a justifiable decision could then be made to deploy the dog to apprehend [REDACTED]. In addition, it could have bought some time to enable the other officers to arrive, and possibly conclude the arrests with officer presence or further communication.

[176] I find the evidence on balance does not support an assertion on the member's part that he subjectively believed that it was necessary to deploy the dog to bite the youth at the time when he made that decision. It appears that his decision arose directly from a premature conclusion of non-compliance, and he did not address his mind to whether immediate apprehension was justified, or he recklessly concluded that it was. Given the wording of Section 1.4.2 (1), which prohibits the use of a dog as an intermediate weapon unless those conditions are met, I find that the member's application of the dog for apprehension by biting without regard to those conditions was a reckless use of unnecessary force.

[177] Finally, in his evidence, the member did not address the factors set out in paragraph (2) of the Threshold standards. This section requires that he conclude, based on reasonable grounds, that the risk of a bite was justified in light of certain enumerated factors. These include, firstly, the availability of lesser force options.

[178] While the member was asked by the investigator about how his use of the dog for the arrest fit into the NUFF guidelines, in response he reiterated that he had "displayed officer presence with the dog", "used communication by giving lawful police

commands”, “determined that the use of open-hand or soft control tactics was not appropriate,” and “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.”

[179] This rote response is unresponsive to the heart of the question, which is whether the officer could have used a verbal approach by explaining his commands instead of repeating them verbatim, and whether he could have waited long enough to permit a greater police presence. I have discussed these options above in relation to the adequacy of the warning, and will simply observe that the member’s evidence does not in my view establish that he adequately considered those lesser force options.

[180] The other circumstances a dog handler is directed to consider in making his decision to apprehend by a bite include the seriousness of the offences (characterized by the member as [REDACTED]; the potential risk to the person being apprehended (in the absence of any apparent risk of harm to any other person at that time); whether the person could be apprehended at a later time (already discussed); and, any injury likely to result from a police dog bite.

[181] None of these factors were addressed by the member in his statement or report in a way that in my view establishes that he was sufficiently mindful of the cautions associated with his decision to use an intermediate weapon in these circumstances. While he and the expert both pointed to the need to prevent the continuation of the offences, again, that is a justification for the arrests, but it fails to address why that had to happen, for these offences, at the time that it did, by taking steps that would inevitably result in the youth being bitten by the dog.

10. CONCLUSION & NEXT STEPS

[182] I find that the member’s application of the police service dog in connection with the arrest of the youth was a reckless use of unnecessary force, and misconduct under Section 77(3)(a)(ii)(A) is proven. Section 125(2) provides that the member may make submissions as to appropriate disciplinary or corrective measures within 10 business days of receipt of the Form 3 that accompanies these reasons.

DATED this 23rd day of November, 2023.



Carol Baird Ellan, PCJ, Ret’d, Discipline Authority