

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

**AND**

**IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT  
AGAINST  
CERTAIN OFFICERS OF THE VANCOUVER POLICE DEPARTMENT**

**NOTICE OF ADJUDICATOR'S DECISION  
PURSUANT TO SECTION 117(7) POLICE ACT**

**ADJUDICATOR BRENT G. HOY  
APPOINTED RETIRED JUDGE  
SECTION 117(4)**

**AND**

**NOTIFICATION OF NEXT STEPS**

TO: Constable [REDACTED]  
c/o Vancouver Police Department  
Professional Standards Department

(Cst. [REDACTED])

AND TO: Constable [REDACTED]  
c/o Vancouver Police Department  
Professional Standards Department

(Cst. [REDACTED])

(the "Members")

AND TO: Sergeant [REDACTED]  
c/o Vancouver Police Department

Professional Standards Department

(Investigator)

AND TO: His Worship Mayor Ken Sim  
Chair, c/o Vancouver Police Board

AND TO: Mr. Clayton Pecknold  
Police Complaint Commissioner

(Commissioner)

### **DECISION SUMMARY**

1. Pursuant to Section 117(4) of the Police Act issued on December 29, 2022 by the Police Complaint Commissioner, I was appointed as Adjudicator concerning complaints of misconduct by Constables [REDACTED] and [REDACTED] which occurred on September 6, 2021. This is my decision.
2. On December 8, 2021 upon the request of the Vancouver Police Department, the Commissioner ordered an investigation into a matter which had occurred on September 6, 2021. This is a section 93 investigation. After further investigative steps as directed by the Commissioner were completed, the Final Investigation Report (FIR) dated November 16, 2022 was submitted by Sergeant [REDACTED] Inspector [REDACTED] [REDACTED] as Discipline Authority, issued her decision pursuant to Section 112 of the Act on November 30, 2022. In her assessment she identified one allegation of misconduct against both officers contrary to Section 77(3)(a)(ii)(A), Abuse of Authority and found it was not substantiated.
3. The commissioner was of the view this was incorrect.
4. I am required to list and describe each allegation of misconduct that may arise after my review of the incident as contained in the FIR and its evidence and documents without influence from any determinations made by others and come to my own conclusions as to whether or not there appears to be sufficient evidence to substantiate the allegations of potential misconduct.

5. Upon my review of the Final Investigation Report (FIR) and its' evidence and records, I have identified the following allegations of misconduct which appears to constitute misconduct:
- (i) Cst. ■ Abuse of Authority in the performance of his duties did intentionally or recklessly use unnecessary force on a member of the public by using a beanbag shotgun on 2 occasions, contrary to Section 77(3)(a)(ii)(A) of the Police Act.
  - (ii) Cst. ■ Abuse of Authority in the performance of his duties did intentionally or recklessly use unnecessary force on a member of the public in the course of arrest by kicking him in the head or shoulder contrary to Section 77(3)(a)(ii)(A) of the Police Act.
  - (iii) Cst. ■ and Cst. ■ Abuse of Authority in the performance of their duties did intentionally or recklessly use unnecessary force on a member of the public in the course of arrest by hitting his head onto the hood of a police vehicle, contrary to Section 77(3)(a)(ii)(A) of the Police Act.
6. Next Steps are set out at the end of this decision.

#### **SUMMARY OF STATUTORY PROCEDURE FOR SECTION 117 REVIEW**

7. Upon review, where the Commissioner considers there is a reasonable basis to believe that the Disciplinary Authority's decision is incorrect (Section 117 (1)) he may appoint a retired judge as recommended by the Associate Chief Judge of the Supreme Court (Section 117(10) and (4)) which appointment I have received.
8. Within 10 business days of receipt of copies of all reports from the Commissioner, I am required to review the investigating officer's reports and evidence and provide notification of the next applicable steps. (Section 117(7) and (8)).
9. Where applicable the affected person has the right to make submissions. (Section 117 (8)(b) and Section 113). In this instance this is not applicable

as this is a Section 93 investigation by the Commissioner.

10. If it is determined there “appears to be sufficient evidence to substantiate the misconduct allegation” (Section 117(9)), I will become the discipline authority (Section 117(9) and Section 117(1) (c)), provide notification of next step (Section 117(8) and will convene a discipline proceeding, subject to whether a prehearing conference applies (Section 120(16)).
11. If it is determined there is no misconduct then my decision, with reasons, is final (Section 117(10) and (11)).
12. This is an independent review of the final investigative record (Section 117(1)(a)) and is done without witnesses or submissions. I am required to make my “own decision on the matter” (Section 117(1)(b)).

## **THE LAW ON SECTION 117 REVIEWS**

13. Guidance as to how a Section 117 review is considered can be found in Justice Affleck’s decision of *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970. The question of determining whether the evidence “appears sufficient to substantiate misconduct” is to do no more than express a preliminary view based on the final investigative report as to whether there appears to be sufficient evidence to establish misconduct. An analysis of a particular misconduct with “conclusory language” runs the risk of predetermining the issues. These questions should properly be resolved at the disciplinary hearing. To do otherwise would be adverse to questions of fairness and “invite criticisms of bias” without having had the process of a fulsome disciplinary hearing with a retired judge who has an open mind free from any final predeterminations upon the evidence.
14. Conversely, if the evidence is such that the allegations of misconduct is not substantiated, then the assessment requires a review of the element(s) of the misconduct explaining why it has failed to meet the legal threshold. This entails weighing the evidence as it relates to the various legal components of the misconduct under consideration. Section 117(10) statutorily requires reasons to be given.

15. Unless the finding is unsubstantiated, I firmly keep in mind the limitations of review that there are no findings of facts or rulings of law and that it is only a preliminary review of the allegations such that they appear sufficient to substantiate misconduct.

#### **CIRCUMSTANCES OF EVENTS ON SEPTEMBER 6, 2021.**

16. On September 6, 2021 a summary of a 911 call relates a complaint had been received from the [REDACTED] on [REDACTED]. At 01:49, the 911 caller, advises six males had been ejected 20 minutes earlier. They were considered overly intoxicated. They had returned, two of whom carried cricket bats. The complaint noted the bats were being swung at people outside, destroying property, throwing stanchions, and making threats. In a subsequent update the caller further relates no one was injured, stanchions had been thrown about, there were threats of violence and “not in danger.”
17. They were noted to be heading north towards BC Place Stadium and still possessed the bats. Descriptions were given of the suspects. The affected person was noted wearing a grey reflective vest, black hoodie, black sweat pants and was carrying a cricket bat.
18. Computer Aided Dispatch (CAD) records the incident at 0:150 with Csts. [REDACTED] and [REDACTED] responding. CAD notes the location of 4 persons, 2 of whom had bats. As the events progressed Csts. [REDACTED] and [REDACTED] came upon the group along with another patrol unit and other officers. These are marked police vehicles and the officers were in full uniform.
19. Csts. [REDACTED] and [REDACTED] focused their attention on the affected person and one other as they chased them on foot. Cst. [REDACTED] had taken his beanbag shotgun.
20. Reproduced is part of Cst. [REDACTED] General Occurrence (GO) report from September 6, 2021. This was written at 03:36 and states the following:

At 0151 hrs, PC's were nearby and assisted another unit who had located a group of 4 males at Carrall Street and Pacific Blvd. matching the same description with 2 wielding cricket bats.

PC's unsure of the extent of the damage that had been caused or the extent of any injuries to other on scene.

PC █ exited the police vehicle in full police uniform with his bean bag shotgun in hand and challenged the males.

2 males stopped and appeared compliant while 2 other males ran Northbound around the West side of Rogers Arena. Cst. █ was satisfied that all parties involved knew they were being challenged by police given the marked police vehicle and police uniforms.

Cst. █ believed the males were arrestable for assault with a weapon and mischief and therefore pursued the male who continued to wield a large bat while actively fleeing from police.

Cst. █ was approximately 30 feet behind the male (identified as the "affected person") and yelling "Police! Stop running! Get on the ground."

Cst. █ was confident that the affected person heard Cst. █ commands but was continuing to flee to evade police custody.

The affected person ran north bound toward Griffiths Way into a corner with no obvious out. The affected person began to slow and look back at Cst. █ with the bat in hand. Cst. █ was unsure whether the affected person was going to turn on Cst. █ with the bat in hand in a continued effort to escape police custody.

Cst. █ believed the affected person committed the offence of assault with a weapon and mischief and was not going to stop despite all verbal commands given for him to surrender.

To prevent any further harm to the public or other personal property, Cst. █ delivered one bean bag round toward the affected person which missed.

The affected person through (“threw”) the bat and ran around a corner of a cement wall in an attempt to conceal himself. The affected person was looking around as if he was searching for a way out and a direction to run. Cst. █ delivered 2 more bean bag round to the thigh of the affected person which led to him lying on the ground.

Cst. █ was unsure whether the affected person was armed with any other weapons underneath his stomach/waistband are and therefore directed the affected person to crawl toward Cst. █ away from the area he attempted to conceal himself from members.

The affected person did not listen to commands. Cst. █ delivered one more bean bag round to the affected person’s thigh and gave him verbal direction to crawl toward Cst. █. The affected person complied and was taken into custody without further incident.

The bat the affected person was wielding was collected on scene and tagged as evidence.

All bean bag rounds and 3 / 4 shell casings were collected from the scene and tagged at the property office by (another officer).

21. From Cst. █ Subject Behaviour-Officer Response Report (SOBR) completed on September 6, 2021 at 02:55 the narrative portion is substantially the same as that recorded in his GO report. Within the form portion he answers various questions pertaining to the use of the beanbag shotgun. Of note he was asked if he used communication in the incident and records these words “Police stop, get on the ground.” He recorded 4 rounds were fired and 3 had impacted on the right and left thigh at a distance of about 6 – 10 meters. Of the type of behavioural classification, he checked “Assaultive”.
22. Cst. █ had also completed a follow-up interview with Sergeant █ on March 16, 2022 and October 13, 2022.

23. From the March 16 interview he adds details of the night's events. They include his perception of the events. He explained his concerns when he caught up to the affected person as he ran behind an alcove. He thought he was in an area enclosed by a fence; that the other person who was initially with the affected person was unaccounted for; that he may be hiding with the possibility of returning to confront him and that the affected person remained hidden and not complying with police directions. He adds that he did not know what other weapons he might have on him and that he was recently reported as violent, intoxicated and unpredictable. Furthermore, he did not want to go into the concealed area and that his partner was hundred meters away assisting other members. The following is part of his follow-up interview:

Again, Cst. █ goal was to get the affected person to come out into view where he could easily be seen and where Cst. █ could be easily seen so that others could come to Cst. █ aid in the event they got into some sort of wrestling match. He gave the affected person commands, "come on out, come on out from behind the wall".

The affected person was not listening. He was belligerent and yelling. In order to get the affected person to come out and gain compliance, he delivered another beanbag round to him, which led to him dropping down to his knees and then onto his stomach.

Cst. █ again stopped to reassess. The affected person was now laying on the ground but still in a concealed area, still yelling back at Cst. █ still not listening to commands to come out to Cst. █ Cst. █ did not want to go to the affected person; he wanted the affected person to come to him so that Cst. █ was in control of the situation. Again, Cst. █ did not know what was in the affected person's waistband or what he might have underneath him and of course Cst. █ did not want to conceal himself from arriving help.

Cst. █ gave the affected person several loud commands and believed he was gesturing with his hands, pointing to a spot in front of him: "come to me, come to me, come on out". The affected person did not follow that direction and continued to be non-compliant. At that



point Cst. █ believed it was necessary to gain additional compliance from the affected person and he delivered one more beanbag round to the affected person's thigh.

This appeared to work and the affected person crawled toward Cst. █ to an area where Cst. █ felt was safe and that he could control the affected person. At that point he noted his partner had caught up and was there. Cst. █ felt the situation was much safer at that point with his partner there even though the other person was not yet accounted.

Sergeant █ asked Cst. █ some clarifying questions:

Sergeant █ noted to Cst. █ that CCTV footage at one point shows "the affected person" with his hands up, potentially showing compliance. Cst. █ stated that he did not have that perspective and did not see indications of "the affected person" complying and giving up. Cst. █ perspective, and from where he was observing "the affected person" (which is a very different angle than the view of the CCTV camera) was that although he was ordering "the affected person" to come out from behind that concealed area with loud clear directions, "the affected person" was not following his directions. This is when he deployed the second beanbag round.

24. Cst. █ also explains the circumstances surrounding the incident at the police vehicle saying by his experience he has been horse kicked in the knee and testicles and been spat upon. He has seen other officers get head butted. These incidents having occurred by drunk, belligerent, non-compliant persons while in handcuffs. That the affected person was throughout his contact drunk, belligerent and non-compliant until he was loaded into the police wagon for transportation to jail. He was of the view that given his overall non-compliance, the objective of removing him as quickly as possible was for the purpose of removing "further potential harm or injury to the affected person and the police." By securing him over the hood of the car it removes his ability to spit, headbutt and kick.

25. As far as any observations he might have of the incident surrounding Cst. ■■■ foot with the affected person at the time of arrest he had none.
26. From his follow up statement of October 13, 2022 Cst. ■■■ does not recall the exact moment when Cst. ■■■ was present explaining he was focused on the affected person but notes it would have been at some point prior to Cst. ■■■ moving in to arrest the affected person.
27. As well he adds that the reason he wanted the affected person to crawl out was:
- ... based on the affected persons demonstrated continued non-compliance, and his disregarding of every opportunity to take direction from the members to be taken into custody without additional use of force.
28. Further in this statement he notes he would have used the same tactics whether he knew Cst. ■■■ was there or not.
29. Cst. ■■■ completed his GO report on September 6, 2021 at 02:51. His report records the following:

On September 6, 2021 at 0149 hours, (COM) ■■■ called police from ■■■. ■■■ advised that there was 4x males (names deleted) "the affected person plus 3 others" on-scene who were ejected. The males were in possession of bats and damaging property in the lobby and swinging the bats at bystanders. ■■■ advised that the males were intoxicated, violent and belligerent. Police later located the 4 males at Pacific/Abbott St, in which they fled. (name deleted) "The affected person" fled north-west towards BC place in which he was uncooperative (in possession of the bat), which led to a less lethal bean bag round being deployed. All parties were taken into custody. (names deleted) "The affected party and another" were deemed the aggressors in possession of the bats. No parties involved wanted to pursue charges. Based on the tenure of violence and their intoxicated state, (names deleted) "the affected party and another" were arrested for breach of peace.

(names deleted) "The other 2 persons" released from the scene. Car 10 attended and Sgt. [REDACTED] attended scene. Minor injuries. File concluded.

30. The narrative portion adds these notes about the chase:

Police continued to make announcements to stop, but the affected person was non-compliant and still in possession of the bat. Police closed the distance and the affected person appeared exhausted and still non-compliant. At this time the affected person was in possession of a bat, non-compliant, posed a tenure of violence and based on the information received arrestable.

PC's made several more announcement in which the affected person refused to comply, which resulted in a less lethal bean bag being deployed.

31. A subsequent interview was conducted with him by Sergeant [REDACTED] on March 16, 2022 and October 13, 2022.

32. From Cst. [REDACTED] statement of March 16 it says in part the following:

9. Cst. [REDACTED] partner Cst. [REDACTED] advised him that the affected person went around an alcove with a green patch at the back of the open-air parking lot they were in just to the east of BC Place. Cst. [REDACTED] could see the affected person in the alcove and both he and Cst. [REDACTED] made multiple announcements, "Vancouver Police, you are under arrest, get on the ground". The affected person was non-compliant.

15. When Cst. [REDACTED] arrived in the parking lot with Cst. [REDACTED] the affected person was standing behind the alcove area on the green patch. He observed the affected person get hit with a beanbag round there, and also when the affected person was non-compliant in coming out of the (alcove) area. Again, he did not observe the initial round fired and does not recall exactly how many beanbag rounds were fired.

33. Cst. ■ describes the affected person as “Active Resistant.” He was not listening to their commands.
34. In discussing his interaction with the affected person in the course of arrest he had no recollection of any contact his foot may have had with him until after seeing the video clip. In explaining what occurred these words were used:

... After looking at the video, he stated he stood up and stepped over the affected person’s head. It looks like his foot might have brushed the affected person’s head, but at the time he had no intention of this and wasn’t even aware of it. He was unaware of even making a “collision” with his facial region. Again, he stepped over, adjusted his stance and it looks to him like when he adjusted his stance, his foot might have brushed the affected person’s face.

35. Turning to the events at the hood of the police car Cst. ■ explains that as they were preparing to escort him to the vehicle the affected person was not willing to get up. Both Csts. ■ and ■ assisted him in standing. He continued to yell at them and was spitting at bit in the process. As they proceeded to the vehicle he expressed it in this manner:

... the affected person was not “walking freely”, he wasn’t lifting his feet, he was kind of leaning back, being somewhat passively resistant. Cst. ■ stated that they were like, “we’re going to walk you here; we still need to search you, we’re unaware if you have weapons.” Cst. ■ stated that as they were walking him and moving forward towards the police vehicle, and in looking at the video, it appears that his hips collide with the vehicle first, causing him to break his posture and causing his torso to go over the hood.

36. Cst. ■ also remarked that from his personal experience it is best to conduct a search in this position as it does not give the person the opportunity to head butt or kick.
37. The affected person acknowledges he was very drunk. Other observations on this include those by Cst. ■ from his supplemental report of March 16,

2021 noting him as intoxicated with a strong odour of liquor, poor motor functions in standing, belligerent, yelling, posturing and slurred speech. Cst. ■ said he was very intoxicated, belligerent and was yelling at himself and Cst. ■

38. Two other interviews were conducted by Sergeant ■ This relates to Cst. ■ and Cst. ■ who had arrived in their police vehicle to assist Csts. ■ and ■ in the detention of the affected person. Cst. ■ was interviewed on March 22, 2022. He recalls searching the affected person who was in custody. He did not recall his demeanor and does not recall the affected person saying much of anything. He had no recollection if he was intoxicated.
39. Cst. ■ was interviewed on March 28, 2022. She observed the affected person was impaired and had an odour of alcohol. She adds of his demeanor that he was quiet and was compliant in her interactions with him. She notes her recollection of specific events has faded with the passage of time.
40. The jail NCO notes him to be intoxicated, with an odour of alcohol, glazed eyes, incoherent slurred speech and unsteady on his feet.
41. The affected person's ability to speak English was remarked upon by Sergeant ■ observing at one point in the course of his interview summary of him on February 22, 2022, that he appeared to be "searching for right word to describe how he was pushed against the car." Cst. ■ also observed that English was not his first language and had to speak to him slowly to ensure he understood what she was saying.
42. The affected person is male of South Asian heritage, aged 21 years. He was interviewed by Sergeant ■ on February 22, 2022. This was an audio-recorded interview conducted by telephone. He was given the opportunity to review the CCTV recordings but declined.
33. I have in the course of reviewing the FIR listened to the audio recording made of the affected person by Sergeant ■ I have also read the summary of this interview. Included here is most of the audio interview.

On occasion I had difficulties understanding what was said by the affected person. This is not an official transcription but only my effort to transcribe as best as I can its contents.

Q. Ok my name is Sergeant [REDACTED] I'm with the Vancouver Police Professional standards section. I'm on the phone with Mr. [REDACTED]  
[REDACTED]

A. Yes

Q. And this is in relation to OPCC file number 2021-20286. So Mr. [REDACTED] this is about an incident that happened back on September 6. You and your friends were at a club and there was some problems there and you were asked to leave. Some things happened and the police ended up wanting to speak with you. You and your friends ran and the police caught up with you near BC Place and they arrested you and one of the things they did is they used something called a bean bag shot gun and they hit you with that.

A. Yah

Q. So the reason we're having this interview is I would like to hear from you your perspective of what happened and from when you first saw the police. And if you can just tell me everything that happened after that. So please go ahead.

A. Yah so when saw the police like - so - like - I was just got so scared so that's why I just ran - I was so drunk so I just think like to run - so I ran - that happened

Q. Ok and what happened when the police - you were hiding near BC Place and then what happened when the police found you.

A. They just checked my focus and all that things - like my phone - my wallet - all that things - yah

Q. Ok and when the police stopped you, did they give you directions. What did they tell you to do - to lie down on the ground

A. Yah Yah - they said lie down - like put your hands behind your back.

Q. Yes.

A. And just crawl and all that things.

Q. Ok

A. Crawl on the ground - yah

Q. And did they hit you with a beanbag? The beanbag shotgun?

A. Yah yah.

Q. Can you explain why they did that

A. Because I ran.

Q. Ok and were you following the directions of the police officer

A. Yah - after that - yah. They said - they said - I remember that - They said to me crawl after like after that I was hit by the bullet - I just laying on the ground right - I just slipped right - then they said to me crawl I will crawled and then they like come on me and they were like 2 guys - 2 policemen - and they told me to crawl and to put one hand behind the back - and they just handcuffed me - and all that.

Q. Ok and then what happened after they handcuffed you.

A. And then so much cops comes there right (indecipherable) like 20 cops were there - and then early police officer checked me one by one - and they checked my focus and all that things.

Q. Ok - and Mr. [REDACTED] - do you - how do you feel about that interaction - do you feel that - do you feel that the police treated you appropriately

A. Yah - kind of - but like - like - I was just asking for water - and they didn't give me water but they had water too - they were drinking in front of me - I was asking like for 30 minutes like - can I get one glass of water - and they didn't give me water even when I was at the police station - and then when I was in the cell - the prison cell and then they said like now you can have water

Q. Ok

A. And like I was like so thirsty - and like my - and my toe was so paining then.

Q. Ok and part of my investigation - is about umm - the use of force - that the police used when they arrested you - can you tell me about that - can you describe

A. I was following all their orders right - they tell me to crawl - they tell me to stand - I stand - and I can't stand on my leg cause my leg is so paining me right now - so can you help me - yes yes they help me - and they just put my head on that uh uh car - the car bonnet - like they bumped me on that.

Q. Yah. Do you think they did that too hard?

A. Yah - my ear is paining for 2, 3 days.

Q. Yah. And when they pushed you against the car what part of your body hit the car

A. My face - like my right side of face.

Q. The right side of your face



A. Yah

Q. And before that - and I'm sorry to jump around but - when they first found you and they were giving you instructions

A. No they don't don't give me any instructions then when they found me.

Q. They didn't - did they ....

A. Like the bouncer guy - like the security guy

Q. Yes

A. He is like abusing us in Punjabi. He's also Indian right.

Q. Ok

A. That security guy – I think so - he's like abusing us - we just ran away from him actually and (indecipherable) ... the police chasing us.

Q. Ok - fair enough - and ok - and we can talk about that later but I'm more concerned with the actions of the police and making sure that the police treated you appropriately ok. So I just want to make sure to find out from you that if there is anything else that happened during your interaction with the police that you thought not right or caused you injury or anything like that.

A. Yah - I just want to know how to deal with that - its still paining me right now - right now

Q. Oh – ok – did you see a doctor as a result of that

A. No no

Q. Ok - so you don't have any medical records or anything you can provide to me

A. No (indecipherable).

Q. Yah. Were there any injuries - those are the injuries to your leg right.

A. Yah. That one on my right side; that one is paining until now.

Q. And what about your face and your head. Did you have any injury to your face and your head

A. No no – its fine

Q. Ok – well – can you tell me if there anything else you would like to tell me about that incident. What happened. Were you released from the jail

A. Yah

Q. And what did they tell you when they released you

A. They said like ah - don't go to downtown – go home - and they said want us to book a taxi or something - and I said no - going to call my buddies - and my buddies come there and pick me up and I go to my home like back in Abbotsford.

Q. Ok – is there anything else you can think of that you would like to tell me.

A. Yah – like they call the police for no reason. The main thing is we went to the club right. They gave us last table. The other table was in the centre – they gave us last table right – and then I said ok – like that's fine - And then they do one more thing – one more group come - you have to sit with them - and like why - and there was one more (indecipherable) - there was more guy – a friend – (indecipherable) - another guy at the first table - I know them right - so went to the first table and then they started pushing me out and

all that - and all my friends - like why are you pushing them - just go out - just go out (indecipherable).

Q. Who was it - what was your friends name that you ran with the police with - umm because you were with one guy when you ran from the police - I forget his name - can you tell me his name. I have it in my police report

A. Ah yah - his name is [REDACTED]

Q. [REDACTED]

A. Yah – ok (indecipherable)

Q. Who was carry the cricket bat - was it you or [REDACTED]

A. A cricket bat?

Q. A cricket bat. Was it a cricket bat? For cricket – or was it something else – you guys were carrying something

A. Yah yah - it was a cricket bat

Q. Ok

A. We had it

Q. And why did you guys have a cricket bat – that is a side question.

A. Ah well – the thing is – they were just following me – the security guy – and then we go to our car (indecipherable)

Q. Oh – ok – so you got the cricket bat from your car

A. No – yah yah; the cricket bat - (indecipherable)

Q. Can I get it back – uh because somebody is coming - we play with that

(discussion about return of the bat)

Q. [REDACTED] – just a couple more questions - would you describe yourself as intoxicated that night – were you drinking?

A. I – I was drinking whiskey - I only drink whiskey - like I went to the club – so I had some shots

Q. So were you drunk

A. Yah at that time I were

Q. Ok - and were you very drunk – do you think

A. Ahh – I - kinda – yah – like I had too much - like I don't do it regularly - like once a month

Q. So do you have any other concerns - not like – I understand you were a little frustrated at the club but let's not worry about the club – do you have any other concerns about the way that the police treated you - other than about the way about the water – you didn't get any water – but was there any other concerns about the police

No; I was just good;

(discussion about OPCC oversight and misconduct and return of the bat; interview ended).

43. Also considered are a series of CCTV security footage obtained from BC Place. These are video only images and records the parties' interaction from 3 different angles. There are a variety of video clips from each of the camera angles showing either the original format video recordings or zoomed in cropped images and slow-motion speed.

44. The first camera apparently records the affected person being chased by Cst. █ during which the officer takes a stance to fire his shotgun. One can apparently see Cst. █ is also running behind Cst. █. In this part of the pursuit the affected person is apparently seen tossing the cricket bat. This was later apparently retrieved by Cst. █.
45. In the second camera from a different view perspective their interaction apparently occurs in a grassy alcove area. There the affected person can apparently be seen looking back from the direction he came with his hands up as he comes to the corner of the alcove. Within moments of his hands in a raised position he apparently falls to the ground. There he apparently laid on his side with his hands either clasped over the back of his neck or head. Cst. █ apparently enters within view of this camera with his shotgun raised. Cst. █ is apparently to his left. As the officers apparently approach the affected person he appears to rolls onto his stomach prone to the ground with his hands in the back of his head area. This video apparently shows Cst. █ slightly ahead and to the left of Cst. █ when this occurred. After this the affected person is seen to apparently drag himself with the use of his arms to the yellow marked curbed portion of the roadway. He is then handcuffed. The scenario is also apparently depicted in camera 3 from a different angle.
46. From camera 3 both officers are apparently seen walking closer to the affected person while he lay on the ground. The officers are apparently side by side with Cst. █ slightly ahead of Cst. █. Cst. █ is apparently gesturing and pointing to the ground in front of him. Meanwhile Cst. █ is apparently pointing his shotgun at the affected person. Both officers appear to be saying something to the affected person. At this point a flash of light apparently emits from the shotgun. As in camera 2 the affected person can be seen to apparently drag himself by his arms to the curb when he is then handcuffed by Cst. █ with Cst. █ assisting.
47. After the affected person appears to have been secured in handcuffs on the curb area of the roadway there appears to be some contact between Cst. █ foot with the affected person's head or shoulder area. Both cameras 2 and 3 appear to depict this movement to varying degrees. At the end of the cuffing process Cst. █ gets up from his kneeled position and

appears to make a motion with his right leg towards the affected person's head or shoulder area. The affected person's body appears to move. If there was contact it appears to be low impact.

48. Also from camera 3, after the affected person has been handcuffed, Cst. [REDACTED] appears to walk away from the arrest site and then return with something. As this occurred Cst. [REDACTED] apparently stood near the affected person.

49. The third camera video also apparently shows what occurred as the affected person was brought to a standing position at the curb and escorted by Csts. [REDACTED] and [REDACTED] to a police vehicle. At the hood of the police car it appears that the affected person's head made contact with it. Camera 2 appears to show the same scene although its quality is only fair and does not depict the entire episode.

50. Also reviewed are photographs of the affected person's thighs which appear to depict 2 bruises. One appears to be located on the exterior upper part of his right thigh and the second appears to be on the back of his left thigh about 6 inches up from the knee pit.

51. From Sergeant [REDACTED] FIR at paragraph 207 he notes the behaviour of the affected person after the search on the hood of the police car.

Sergeant [REDACTED] submits CCTV video shows that when the affected person was laying prone on the ground after being handcuffed, it appeared that, despite his non-compliance up to that point, he had "given up" and was compliant. Video also shows that after the affected person was escorted to the police car and searched there, he again appeared compliant, in as far as he did not appear to struggle or resist and in fact lay cooperatively against the car even in the absence of immediate oversight by police members who stood several feet away from the affected person.

52. The Sergeant was of the view that this behaviour does not detract from the officer's perception of the affected person's non-compliant behaviour.

53. Sergeant [REDACTED] reviewed The National use of Force Model (NUF) which identifies 5 types of behaviour an officer may face with corresponding types of responses. How it applies relies upon the officers' perception with responses ranging from lethal force, intermediate weapons, and physical control. These responses are categorized as "hard or soft" for the purposes of tactical considerations. Throughout the assessment by the officer communication remains a prominent feature. These assessments are also subject to continual reassessments given changes in circumstances in order that the officers' response is reasonable to ensure officer and public safety. The 5 behaviour categories are listed as follows:

- a. Compliant – this individual obeys all lawful orders and direction by an officer.
- b. Passive Resistance – this individual does not physically interfere with an officer's attempt at control, but does nothing to assist. Common examples of this resistance would be "dead weight", a protest "sit-in", the body going limp, refusing to leave an area and not obeying a lawful order.
- c. Active Resistance – this individual doesn't physically assault the officer, but actively resists in such a manner that won't allow the officer to control. Often accompanying this type of resistance in "Verbal Non-Compliance" (refusing a lawful order or direction). Examples of this resistance are pushing or pulling away from the officer or attempting to flee.
- d. Assaultive – This individual not only resists a police action, but actually attempts to physically assault the officer. This type of resistance is sometimes preceded by "pre-assault" cues, commonly known as "Psychological Intimidation" (clenching of fists, facial expressions, threats, etc.), and verbal non-compliance. (Note: An officer would be justified to respond physically even against "pre-assault" cues).
- e. Deadly Force Actions – This individual violently resists. The resistance level exhibited attempts to seriously harm or kill the officer. Examples of these actions are a weaponless serious assault, multiple assailant attack, police disarming and an attack with any type of weapon.

54. VPD Policy Section 1.2.1 – Use of Force – Justification was also reviewed by Sgt ██████ which policy approves the use of beanbag shotguns by those who are qualified as was the case for Cst. █. With the Policy in mind the Sergeant expressed the view that “the LLSG, as a distance weapon, is the ideal tool in the circumstances to gain control of a resistive subject.”
55. The FIR analysis also contained an opinion from Sergeant ██████ who is an instructor and developed the curriculum for Patrol Tactics for Recruit Training at the JIBC (Justice Institute of BC) Police Academy. Sergeant ██████ presented a scenario that reflected the incident involving Cst. █ and queried whether the officer’s conduct conforms to best practices. His analysis was positive.
56. Furthermore, Sergeant ██████ reviewed various articles on perception when an officer is under threat. He was examining the topic of visual and auditory exclusion in such circumstances. The articles are “*Tunnel vision and chronic stress: How to manage your physiological responses* by Dr. Jarrod Sadulski found on *Police 1.com*: “*New Invisible Gorilla*” Study Adds To Proof of “*Inattentive Blindness*” found in *Force Science* magazine; *Perception, Recall & Use of Force Incidents – The Impact of Attentional Load on Policing* found in a *Lexipol* article.” Of the latter article the discussion was the stress officers encounter when force is used and its effects upon perception. The side effects include tunnel vision. That is “*the tendency to focus on the perceived threat, to the exclusion of all other stimuli. As a result, the officer may fail to perceive peripheral activities.*”

## THE LAW

57. At this juncture a review of some of the relevant law is helpful to guide this discussion.
58. The following is noted from the SCC decision regarding the use of force. *R v. Nasogalauk* (2010) 1 SCR 206 at para. 32,34 and 35:

*(32) the Crown emphasized the issue of excessive force in its submissions to this Court, arguing strenuously that the police officers had not abused their authority or inflicted unnecessary injuries on Mr.*



*Nasogaluak. But police officers do not have an unlimited power to inflict harm on a person in the course of their duties. While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against member of our society, given its grave consequences.*

*(34) Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended to likely to cause death or grievous bodily harm, unless he or she believes that it is necessary to protect him or herself, or another person under his or her protection, from death or grievous bodily harm. The officer's belief must be objectively reasonable. This mean that the use of force under s 25(3) is to be judged on a subjective-objective basis (Chartier v. Greaves, (2001) OJ No. 634 (QL)(SCJ), at para. 59). If force of that degree is used to prevent a suspect from fleeing to avoid a lawful arrest, then it is justified under s 25(4), subject to the limitations described above and to the requirement that the flight could not reasonably have been prevented in a less violent manner.*

*(35). Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson JA explained in R v. Bottrell (1981), 60 CCC (2d) 211 (BCCA):*

*In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should*

*have been directed that the appellant could not be expected to measure the force used with exactitude. (p218)*

59. From Arbitrator Arnold-Bailey's decision in OPCC File No. 2021-19261 she discussed the phrase "intentionally or recklessly." "That mere negligence is not a sufficient basis upon which to find misconduct." She observed the element of the meaning of "wilful misconduct" and "recklessness" was considered in *Peracomo v. Telus Communications Co.*, 2014 SCC 29:

*(57) In other contexts, "wilful misconduct" has been defined as "doing something which is wrong knowing it to be wrong or with reckless indifference;" "recklessness" in this context means "an awareness of the duty to act or a subjective recklessness as to the existence of the duty": R v. Boulanger, 2006 SCC 32, (2006) 2 SCR 49, at para. 27 citing Attorney General's Reference (No. 3 of 2003), (2004) EWCA Crim 868, (2005) QB 73. Similarly, in an insightful article, Peter Cane states that "(a) person is reckless in relation to a particular consequence of their conduct if they realize that their conduct may have that consequence, but go ahead anyway. The risk must have been an unreasonable one to take": Mens Rea in Tort Law" (2000), 20 Oxford J. Legal Stud. 533, at p. 535.*

*(58) These formulations capture the essence of wilful misconduct as including not only intentional wrongdoing but also conduct exhibiting reckless indifference in the face of a duty to know. This view is supported by two of the key authorities relied on by the appellants and they are, as I see it, sufficient to deal with the issue raised on this appeal.*

60. Arbitrator Neal reminds us at para 100 of his decision in OPCC File No. 2020-17317 that the lawfulness of the conduct of the officers is one of context. He notes these decisions on this point. From *Berntt* (*Berntt v. Vancouver (City)*, 1999 BCCA 345) and *Anderson v. Smith*, 2000 BCSC 1194 at para. 51 the law is summarized as follows:

*(51) Consideration must be given to the circumstances as they existed at the time. Allowance must be made for the*

*exigencies of the moment, keeping in mind that the police officer cannot be expected to measure the force with exactitude: Wackett v. Calker (1965), 51 DLR (2d) 598 at 602 (BCCA); R v. Botrell, supra at 218; Allrie v. Victoria (City), (1993) 1 WWR 655 at para 20 (BCSC); Levesque v. Sudbury Regional Police Force, (1992) OJ No.512 (QL) (Ont. Gen. Div); Breen v. Saunders (1986), 39 CCLT 273 at 277 (NBQB); Berntt v. Vancouver (City), supra at 217. This may include the aura of potential and unpredictable danger: Schell v. Truba (1990), 89 Sask. R. 137 at 140 (Sask CA)(in dissent). There is no requirement to use the least amount of force because this may expose the officer to unnecessary danger to himself: Levesque v. Sudbury Regional Police Force, supra.*

61. Arbitrator Baird-Ellan in her decision of OPCC File No. 2018-15276 refers to the case of *Akintoye v. White*, 2017 BCSC 1094 – it contains a comprehensive summary of the law relating to use of force:

*(101) A subjective-objective or modified objective test is applied to assess the reasonableness of a police officer’s belief that the force used was necessary: he or she must subjectively believe the force used was necessary and that belief must be objectively reasonable in all the circumstances.*

*(102) Recognizing police officers often engage in dangerous and demanding work that requires them to react quickly, they are not expected to measure the level of force used “with exactitude”. Put another way, they are not required to use the least amount of force necessary to achieve a valid law enforcement objective. Although entitled to be wrong in judging the degree of force required, an officer must act reasonably (Crampton V Walton, 2005 ABCA 81 (CanLII) at para. 22). The common law accepts that a range of use of force responses may be reasonable in a given set of circumstances (Bencsetler .v Vancouver (Cit), 2015 BCSC 1422 (CanLII) at para. 153). The reasonableness, proportionality and necessity of the police conduct are assessed in light of those circumstances, not based on hindsight.*

62. Arbitrator Baird Ellen OPCC File No. 2018-15276 decision also reflected on an evaluation of good faith from the wording of Section 77(3)(a) which refers to intentional or reckless behaviour in using unnecessary force. While the conduct was done under the cloak of the common law duty to protect life it nonetheless still requires such belief to be measured on the subjective/objective test. Arbitrator Oppal's decision was referred to at para 55:

*As noted by Adjudicator Oppal in the Section 117 Review on OPCC File no. 2016-11505, where an officer's actions go beyond misapplication of the law to a failure to apply the analysis that is required in relation to a decision to escalate his or her intervention, it can amount to recklessness. Good intentions or good faith are not a full answer to misapplications of force or authority, if, assessed against an objective yardstick, the proper analysis was not applied. I would add to that, the yardstick has been clearly established to be that of the trained officer applying the legal principles in the field, in the circumstances that exist at the time the decision is made or analysis is applied, which is why I have endeavoured to consider the evidence from the officer's point of view.*

#### **ESSENTIAL ELEMENTS OF MISCONDUCT BY UNNECESSARY USE OF FORCE CONTRARY TO SECTION 77(3)(a)(ii)(A) AND OTHER RELEVANT STATUTORY PROVISIONS**

63. The following are the elements to be evaluated when considering whether unnecessary force was used on another person contrary to Section 77(3)(a)(ii)(A):

- (a) Was the Member in the performance of their duties;
- (b) Was unnecessary force used;
- (c) Was the unnecessary force used done intentionally or recklessly.

64. Furthermore, Section 77(4) limits any assessment of a disciplinary breach of trust if the conduct being examined is necessary in the proper performance of authorized police work.

65. Section 25 of the Criminal code is also relevant in this review and states the following:

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

*(b) as a peace officer or public officer,*

*is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.*

## **DISCUSSION - CONCLUSIONS**

66. As stated at the outset of this decision at paragraph 13, 14 and 15 I am mindful to ensure there are no findings of facts or rulings of law as this is only a preliminary review of the allegations to determine if they appear sufficient to substantiate misconduct.

## **MISCONDUCT ALLEGATION (1)**

67. I accept Cst. █ was in the performance of his duties as he chased the affected person. However, there remains other elements to be considered as he came upon him in the alcove area.

68. There are 2 instances when the member appears to have decided to deploy the shotgun which shall be considered separately.

69. The first beanbag round which impacted the affected person raises several questions. Findings of facts will have to be made as to what Cst. █ saw and did and his explanations for the same when one considers the various CCTV images. The video appears to show the affected person with his hands up. Officer safety concerns appears to require assessment along with the force used and in this context a determination of the issue of intention or recklessness.

70. Of the second incident the CCTV appears to show Csts. ■ and ■ facing the affected person and pointing to the ground in front of them. Cst. ■ explains his ongoing concerns for potential weapons. It appears the affected person lay prone on the ground with his hands over the top of his head before he was apparently shot a second time. Again, findings of facts need determination along with his explanation for officer safety considerations, the amount of force used and whether it was intentional or reckless requires assessment.
71. Sgt. ■ provided other material in his FIR. They included articles by a psychologist, the National Use of Force Model (NUF), VPD Policy and Sgt ■ assessment of the circumstances presented and force used. These will also require weighing on the question of assessing the officer's reasonableness of his conduct from an objective/subjective analysis.

### **MISCONDUCT ALLEGATION (2)**

72. This allegation appears to have occurred in the events surrounding the time period when the affected person was handcuffed as he laid on the ground at the curb. After he was placed into handcuffs the CCTV recording appears to show Cst. ■ stand up and make a motion with his foot towards the head or shoulder area of the affected person. The CCTV also appears to show a movement of the affected person's upper body. The affected person does not complain about this event in his statement. Cst. ■ denies any recollection of the incident and in any event if it occurred says it was accidental.
73. A determination must be made of the facts presented as to whether there was some deliberate or innocent application of force. The issue of intent or recklessness also requires assessment.

### **MISCONDUCT ALLEGATION (3)**

74. After the affected person was hand cuffed an incident appears to have occurred as he was moved from the curb to a police car. He was to be searched. It appears from the CCTV that Csts. ■ and ■ had hit the affected person's head against the hood of the vehicle. In explanation the officers

note the affected person's belligerence, uncooperative behaviour both prior to and as they moved him to the vehicle and their experience with others who had been arrested having been spit at, horse kicked and otherwise combative.

75. Findings of facts needs to be made plus an assessment of intent and recklessness.

**CST. ■ - NOTIFICATION OF MISCONDUCT ALLEGATION (1) AND (3) AND NEXT STEPS SECTIONS 117(7) AND (8)**

76. Applying the standard of review at this stage of the proceedings, pursuant to Section 117(9) and 117(8)(d)(i) of the Police Act, I find there appears to be evidence set out in the FIR which, if proven, could substantiate Misconduct Allegation (1) and (3) in relation to Cst. ■

77. I hereby notify Cst. ■ of the next steps in this proceeding pursuant to Section 117(7) and (8) of the Police Act.

78. Cst. ■ will be offered a prehearing conference pursuant to Section 120 with respect to Misconduct Allegation #1 and #3. If he declines a prehearing conference, a discipline proceeding must be convened within 40 business days of this Notification, or by March 30, 2023.

79. I direct that Cst. ■ advise the Registrar whether he accepts a prehearing conference within 5 business days upon either the later of:

1. The expiry of 10 business days of the time for making a request for witnesses under Section 119(1); or
2. The expiry of 5 business days of a decision by the discipline authority pursuant to Section 119(3)(a) accepting or rejecting a request to call witnesses.

80. If Cst. ■ does not accept the offer of a prehearing conference within the time frame set out in the paragraph above, the offer is withdrawn and a discipline proceeding will be convened on March 30, 2023.

81. The range of disciplinary and corrective measure set out in Section 126(1) which I would consider appropriate in the current case subject to the constable's service record of discipline includes:

- (a) Require the member to take training or retraining relating to arrest, use of force and de-escalation techniques. Section 126(1)(f);
- (b) A suspension from service without pay, Section 126(1)(c)

**CST. ■ - NOTIFICATION OF MISCONDUCT ALLEGATION (2) AND (3) AND NEXT STEPS SECTIONS 117(7) AND (8)**

82. Applying the standard of review at this stage of the proceedings, pursuant to Section 117(9) and 117(8)(d)(i) of the Police Act, I find there appears to be evidence set out in the FIR which, if proven, could substantiate Misconduct Allegation (2) and (3) in relation to Cst. ■

83. I hereby notify Cst. ■ of the next steps in this proceeding pursuant to Section 117(7) and (8) of the Police Act.

84. Cst. ■ will be offered a prehearing conference pursuant to Section 120 with respect to Misconduct Allegation #1 and #3. If he declines a prehearing conference, a discipline proceeding must be convened within 40 business days of this Notification, or by March 30, 2023.

85. I direct that Cst. ■ advise the Registrar whether he accepts a prehearing conference within 5 business days upon either the later of:

- 3. The expiry of 10 business days of the time for making a request for witnesses under Section 119(1); or
- 4. The expiry of 5 business days of a decision by the discipline authority pursuant to Section 119(3)(a) accepting or rejecting a request to call witnesses.

86. If Cst. ■ does not accept the offer of a prehearing conference within the time frame set out in the paragraph above, the offer is withdrawn and a discipline proceeding will be convened on March 30, 2023.



87. The range of disciplinary and corrective measure set out in Section 126(1) which I would consider appropriate in the current case subject to the constable's service record of discipline includes:

- (c) Require the member to take training or retraining relating to arrest and use of force. Section 126(1)(f);
- (d) A suspension from service without pay. Section 126(1)(c).

**OBITER DICTA – MISCONDUCT (NEGLECT OF DUTY - TAKING NOTES)**

88. Questions were raised by the Commissioner about the lack of hand written notes by the officers and possible misconduct amounting to neglect of duty. Sergeant [REDACTED] provided a comprehensive summary of VPD policy, JIBC training and various authorities. They were helpful in this discussion.

89. Note taking is a fundamental duty of the police. It should be contemporaneous to the event. It obviously aids in one's recollection of circumstances. Its details or lack thereof can be of significance as to how evidence might later be weighed. How it is recorded is not confined to hand written notes. The officer's electronic records of events are part of note taking. Indeed, VPD policy recognizes this form of documentation. There are no concerns in this area of police conduct. This does not rise to the level of possible reviewable misconduct.



Brent G. Hoy  
Section 117(4) Police Act  
Appointed Retired Judge

February 1, 2023