



Office of the  
Police Complaint Commissioner

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British Columbia, Canada

PH: 2024-02  
OPCC File: 2015-11014

**NOTICE OF PUBLIC HEARING**

Pursuant to section 138(1) *Police Act*, R.S.B.C. 1996, c.267

**In the matter of the Public Hearing into the Conduct of  
Constables Kory Folkestad, Eric Birzneck, Derek Cain, Josh Wong,  
Beau Spencer, Hardeep Sahota, and Nick Thompson  
of the Vancouver Police Department**

To: Mike Easson (Complainant)

And to: Constable Kory Folkestad (Members)  
Constable Eric Birzneck  
Constable Derek Cain  
Constable Josh Wong  
Constable Beau Spencer  
Constable Hardeep Sahota  
Constable Nick Thompson  
c/o Vancouver Police Department  
Professional Standards Section

And to: Chief Adam Palmer  
c/o Vancouver Police Department  
Professional Standards Section

**SUMMARY**

1. On August 13, 2015, Myles Gray died after members from the Vancouver Police Department (“VPD”) responded to a 911 call and used significant force to subdue and restrain him. He was unarmed. There is no video footage of the incident. VPD members are the only surviving witnesses to much of what transpired that day.
2. A police discipline authority (the “Discipline Authority”) held a discipline proceeding (the “Discipline Proceeding”) under the *Police Act* (the “Act”). At issue were allegations that (i) seven VPD members abused their authority by intentionally or recklessly using

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Police Complaint Commissioner

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unnecessary force, and (ii) six of those seven VPD members neglected their duties by failing to make or furnish notes and/or required reports in a timely way. In accordance with the Act, the Discipline Proceeding was closed to the public.

3. In findings released October 7, 2024 (the “DA Decision”), the Discipline Authority dismissed all the allegations of misconduct. Mr. Gray’s family has asked me to arrange a public hearing before a retired judge. For the reasons set out in this Notice, I determined on November 27, 2024, that it is necessary in the public interest to arrange a public hearing.
4. The DA Decision notes that the procedural framework for discipline proceedings under the Act “is strangely lopsided.” For example, the Act allows respondent members to choose who can testify. In this case, witnesses with potentially relevant evidence were not called to testify at the Discipline Proceeding, and the evidence of the five members who did testify was not tested through cross-examination. The Discipline Authority had to decide the case despite having identified discrepancies and inconsistencies in statements made by VPD members and limits in the evidence before him.
5. The alleged misconduct in this case is serious and connected to a tragic loss of life, and there is meaningful uncertainty as to what happened. In such circumstances, it is appropriate for the public to know that the best available evidence has been gathered, tested, and considered before a final decision is made. As the Discipline Authority stated, a public hearing before a retired judge encourages the testing of evidence and can resolve some of the shortcomings inherent in a discipline proceeding. In the particular circumstances of this case, I believe a full and transparent accounting at a public hearing is required to preserve public confidence in the investigation of misconduct and the administration of police discipline.
6. In making my determination, I was mindful that it has been over nine years since Mr. Gray’s death. During that time, various procedures have unfolded and the public has come to learn some of what happened on the day Mr. Gray died. The length of time that these matters have been ongoing has surely had a significant toll on all concerned, especially Mr. Gray’s family and the respondent members and their families. However, there has yet to be a transparent process where all relevant evidence can be explored before a decision-maker with authority to make findings about misconduct under the Act. While revisiting these traumatic events at a public hearing may be challenging, I have determined that doing so is necessary to search for truth and fulfill the purposes of the Act.

## **BACKGROUND**

7. This Background section gives a cursory and high-level overview of information relevant to my decision to call a public hearing. It is not an exhaustive summary. I anticipate all relevant information will be explored during the public hearing process.

### **Events of August 13, 2015**

8. On August 13, 2015, Mr. Gray was a 33-year old man who left his truck at a business and went walking in Burnaby, B.C. Some civilians saw Mr. Gray acting erratically. Mr. Gray interacted with a woman and sprayed her with water from a garden hose. The woman's son called 911 and Mr. Gray walked away.
9. Constable Sahota was the first VPD member to arrive. She reported talking to Mr. Gray then returning to her marked VPD wagon and calling for cover over the police radio. Constables Birzneck and Folkestad were the first cover members to arrive. Constables Sahota, Birzneck, and Folkestad spoke with each other and then approached Mr. Gray.
10. Constables Sahota, Birzneck, and Folkestad reported that Mr. Gray did not comply with verbal directions. Constable Birzneck deployed his Oleoresin Capsicum ("OC") spray. All three members then reported using force in an attempt to subdue and handcuff Mr. Gray. While this was underway, Constables Wong and Thompson arrived and joined the physical struggle. Constables Cain and Spencer were next to arrive and also joined the physical struggle.
11. Throughout the altercation, which lasted approximately six minutes, varying combinations of the seven respondent members applied force and restraints to Mr. Gray. This included punches, kicks, knee strikes, baton strikes, OC spray, a headlock, vascular neck restraints, a hobble, and handcuffs. The use of force caused numerous injuries to Mr. Gray, including dense bruising, lacerations, bleeding in his brain and testes, and fractures to his nose, right eye socket, third right rib, and cartilage in his throat. During the altercation, one respondent member was hit in the face and another was cut when he hit his head on a branch.
12. At some point after Mr. Gray was in handcuffs, he lost consciousness. Although he regained consciousness for a time, he lost it again. By this point, firefighters and paramedics had arrived. Despite efforts, nobody was able to revive Mr. Gray after he lost consciousness the second time. Mr. Gray died at the scene.

13. None of the respondent members involved in the altercation wore body cameras or carried Conducted Electrical Weapons (CEWs, or Tasers).

#### **Proceedings under the *Police Act***

14. On August 14, 2015, the VPD provided information to the Office of the Police Complaint Commissioner (“OPCC”) regarding the death of Mr. Gray. On August 19, 2015, the Police Complaint Commissioner (“Commissioner”) initiated an investigation under the Act. The Commissioner suspended this process pending the outcome of an investigation by the Independent Investigations Office of BC (“the IIO”) into possible criminal conduct by the respondent members.
15. The IIO filed a report with the BC Prosecution Service recommending criminal charges against VPD members involved in the incident with Mr. Gray. On December 16, 2020, the BC Prosecution Service announced it would not lay criminal charges.
16. On January 29, 2021, the suspended investigation under the Act resumed. Mr. Gray’s brother in law, Mike Easson, was added to the ongoing proceedings as a Complainant under the Act. An investigation was conducted by the Royal Canadian Mounted Police (“RCMP”). As discussed further below, the process eventually led to a Discipline Proceeding before Chief Constable Neil Dubord (since retired) of the Delta Police Department, sitting as Discipline Authority.

#### **Coroner’s Inquest**

17. At the same time the resumed matter under the Act was underway, steps were also being taken under the *Coroners Act*.
18. Under the *Coroners Act*, inquests are generally mandatory for deaths that occur while a person was detained by or in the custody of a police officer. At the end of an inquest, the jury must make findings of fact about certain matters and may make recommendations. The jury does not find fault. It cannot make findings of legal responsibility or express any conclusions of law.
19. The VPD reported the death of Mr. Gray to the BC Coroners Service. The BC Coroners Service held an inquest into his death, which ran from April 17 to May 1, 2023. It was open to the public and livestreamed. The Coroner’s jury heard from 42 witnesses, including

civilians who interacted with or saw Mr. Gray that day, the respondent members, firefighters and paramedics who also attended the scene, and a forensic pathologist.

### **The Discipline Proceeding in this Case**

20. The Discipline Proceeding first convened on March 24, 2023. Its purpose was to examine the following allegations of misconduct:

a) Against each of Constables Sahota, Folkestad, Wong, Thompson, Cain, and Spencer:

**Misconduct #1:** *Abuse of authority contrary to section 77(3)(a)(ii)(A) of the Police Act*

**Misconduct #2:** *Neglect of duty contrary to section 77(3)(m)(ii) of the Police Act*

**Date of alleged misconduct:** August 13, 2015

b) Against Constable Birzneck:

**Misconduct #1:** *Abuse of authority contrary to section 77(3)(a)(ii)(A) of the Police Act*

**Date of alleged misconduct:** August 13, 2015

21. After the Discipline Proceeding was first convened, various respondent members made preliminary applications that required rulings from the Discipline Authority, including for particulars, additional disclosure, and the exclusion of evidence.

22. The evidentiary portion of the Discipline Proceeding ran for two days on March 4 and 5, 2024. It was closed to the public. The respondent members chose not to call any witnesses. In accordance with the Act, this meant no discipline representative was appointed to present the case against the respondent members to the Discipline Authority.

23. The Discipline Authority reviewed written materials and heard what he described as “relatively brief evidence” from five of the seven respondent members. The Discipline Authority excused the other two respondent members from attending for medical reasons. There was no cross-examination of the five respondent members who testified. Although the investigating RCMP officer was available for testimony, the respondent members had no questions for him.

24. After the evidence closed, all seven respondent members made written legal submissions to the Discipline Authority through their separate counsel. While Mr. Easson made submissions as the Complainant, the Discipline Authority did not find it necessary to consider them.

## The Discipline Authority's Decision

25. The Discipline Authority rendered the DA Decision on October 7, 2024.
26. The Discipline Authority did not substantiate the allegations that respondent members intentionally or recklessly used unnecessary force. He found the respondent members used significant force that caused numerous injuries to Mr. Gray. However, the Discipline Authority concluded the respondent members had grounds to arrest Mr. Gray and to be concerned about his potential for violence, and that no individual officer was shown to have intentionally or recklessly used unnecessary force during their efforts to subdue and restrain him.
27. The Discipline Authority also did not substantiate the allegations of neglect of duty. He found that members have a well-recognized duty to make notes immediately after an incident. However, he also found there is an exception to this duty where a police officer is subject to investigation by the IIO and may face criminal charges. In addition, the Discipline Authority found that where a member does make notes, there is no clear legal duty requiring them to promptly furnish those notes to criminal or disciplinary investigators.
28. In reaching his conclusions, the Discipline Authority said the evidence before him was "limited in some ways." He said there were "discrepancies and inconsistencies" in members' statements and noted he "...did not have the benefit of cross-examination nor the usual kind of testing of evidence...". The Discipline Authority added that if there had been an acceptable way for the officers to be questioned, "...perhaps the goal of getting to the facts of what actually happened between the various members of the Vancouver Police Department and Mr. Gray on August 13, 2015 might have been achieved."
29. Commenting on discipline proceedings generally, the Discipline Authority stated:
- "...Police Act* discipline proceedings are entirely unlike trials or many administrative tribunal hearings. The evidence is almost totally a written record, and there is no cross-examination. While the respondent officers may challenge findings in the [Final Investigation Report] or the records, the converse is not true; there is nobody there to challenge the officers' evidence or submissions. It is a strangely lopsided process...
- Given this, there are inherent and unavoidable limitations to what a *Police Act* [discipline proceeding] can do. With no testing of the evidence or arguments - with no counterweight - any Discipline Authority will be confined to the findings arising on the available evidence, which may be untested and might be incomplete."

30. The Discipline Authority contrasted this with the conduct of a public hearing, which he described as a process that "...encourages the testing of evidence in a contested, trial-like process...". The Discipline Authority did not suggest that cross-examination or other testing of the evidence would have caused him to reach different conclusions. Instead, he said, "My point is that I will never know."

### **Myles Gray's Family Requests a Public Hearing**

31. Mr. Gray is survived by his mother, sister, and brother in law (together, the "Gray Family"). As stated above, Mr. Gray's brother in law is Mr. Easson who is a Complainant in this matter.

32. On October 29, 2024, the Gray Family sent a request stating they are united in asking that a public hearing be held.

33. In their request, the Gray Family submits that the Discipline Authority did not have access to important evidence, including from the forensic pathologist who testified at the inquest, and the Emergency Health Services personnel who attended at the scene.

34. The Gray Family's request also raises concerns about what they describe as "...the apparent deliberate disregard of established note taking procedures." They believe the age of the case should not prevent a public hearing, as they saw "...no apparent age-related problems at the inquest except those caused by a deliberate failure to record events contemporaneously."

35. In the end, the Gray Family concluded that "...the Discipline Authority ought to have considered more evidence than he did. The result is that the public is left wanting."

### **A PUBLIC HEARING IS NECESSARY**

36. Section 138(1) of the Act requires the Commissioner to arrange a public hearing or review on the record if the Commissioner considers that a public hearing or review on the record is necessary in the public interest, having regard for all relevant factors including those listed in section 138(2) of the Act.

37. Having considered those and other factors, I decided a public hearing is necessary in the public interest for reasons that include the following:

- a) At issue is whether seven VPD members used unnecessary physical force in an altercation with an unarmed man who lost consciousness and died at the scene. A member of our community lost his life and his surviving loved ones have experienced emotional and psychological harm as a result. The relevant issues relating to the use of force are indisputably of the utmost seriousness.
- b) Also at issue is whether or to what extent the respondent members were required to make timely notes of the events and/or furnish the notes or prepare required reports or statements. This is a serious issue in its own right. If subject officers are exempted from requirements to make and preserve contemporaneous notes while criminal investigations or proceedings are pending, valuable evidence would not be memorialized or be available to assist memories that fade with the passage of time. It is in the public interest to get clarity on these matters, including whether relying on advice from a union representative impacts a member's potential liability for misconduct.
- c) The Discipline Authority noted that the Act limited the evidence before him at the discipline proceeding. Given the seriousness of the alleged misconduct at issue, the public needs to know that the best available evidence has been gathered, tested, and considered before a final decision is made. Without a public hearing in this case, public confidence in policing, the handling of complaints, and the disciplinary process would be undermined.
- d) There is a reasonable prospect that a public hearing will assist in better understanding the truth of what happened on August 13, 2015. It will allow the best available evidence to be presented and tested in a transparent way before a retired judge. Members cannot be compelled to testify, but adverse inferences may be drawn if they do not. Other witnesses with relevant evidence could be called to testify, such as the civilians, firefighters, paramedics, and medical experts who previously gave evidence at the Coroner's inquest. Public hearing counsel, members or their agents or counsel, and my counsel ("Commission counsel") will be able to ask questions of the witnesses and make submissions once the evidence is complete. Mr. Easson or his agent or counsel will also be able to make submissions on behalf of the Gray Family. A retired judge hearing comprehensive evidence and submissions will be better placed to make the credibility and other findings needed to appropriately determine this case.



- e) It is arguable that the Discipline Authority's conclusions regarding the decisions to physically engage Mr. Gray or apply the levels of force that were used could change with the benefit of the additional and better evidence at a public hearing.
  - f) It is arguable that the Discipline Authority incorrectly applied the law with respect to the duties of members to make and preserve timely notes or otherwise account for steps taken in the performance of their duties, including the decision of the Supreme Court of Canada in *Wood v. Schaeffer*, 2013 SCC 71. Among other things, the Discipline Authority does not appear to have adequately considered the possibility of requiring subject members to make timely notes, while leaving questions around the disclosure or use of such notes in pending criminal investigations or proceedings to be determined by other decision-makers with jurisdiction over such matters.
38. In making my decision, I considered whether a public hearing under the Act was needed when there has already been a Coroner's inquest. A Coroner's inquest and a public hearing under the Act serve different purposes. A Coroner's inquest does not find fault or reach legal conclusions. In my view, there is still a need for a public hearing about police misconduct under the Act to allow for a proper accounting of the members' actions where all relevant evidence and varying perspectives can be presented to a decision-maker.
39. I was also deeply mindful that it has now been more than nine years since Mr. Gray died. This matter has been examined by various other bodies over this time, such as the IIO, the BC Prosecution Service, and the Coroner's Office. This has surely taken a significant toll on everyone, especially Mr. Gray's family and the respondent members and their families. I recognize that a public hearing will take additional time and require that people revisit traumatic events.
40. I carefully considered whether it might be better to bring closure by allowing the DA Decision to be the last word on this matter. However, questions remain unasked and unanswered. Noting the challenges expressed by the Discipline Authority, a public hearing would provide a far better opportunity for true accountability under the Act in all the circumstances of this case.
41. For all the reasons described above, I have determined that a public hearing is necessary in the public interest. While the request from the Gray Family was an important consideration in making this determination, it was not in and of itself determinative. I would have arranged a public hearing regardless.

## THE PUBLIC HEARING

42. I decided on November 27, 2024, to arrange a public hearing pursuant to sections 138(1) and 138(2.1) of the Act. This Notice records and communicates the reasons for that decision and the appointment of a retired judge to act as adjudicator.
43. Section 143(2) of the Act states that a public hearing is a new hearing concerning the conduct that was the subject of an investigation or complaint. Section 143(3) of the Act states that a public hearing is not limited to the evidence and issues that were before a discipline authority at a discipline proceeding.
44. In my view, the public hearing should consider the following:
- Allegations that each of Constables Sahota, Birzneck, Folkestad, Thompson, Wong, Spencer, and Cain committed *Abuse of Authority* by intentionally or recklessly using unnecessary force on Mr. Gray in the performance or purported performance of their duties, contrary to section 77(3)(a)(ii)(A) of the Act.
  - Allegations that each of Constables Sahota, Folkestad, Thompson, Wong, Spencer, and Cain committed *Neglect of Duty* by neglecting, without good or sufficient cause, to promptly and diligently do anything it was their duty as a member to do, specifically by failing to make and preserve contemporaneous notes and/or to furnish required reports or statements in a timely way, contrary to section 77(3)(m)(ii) of the Act.
45. The Discipline Authority did not rule on the potential liability of the respondent members as accessories to misconduct under section 77(3)(b) of the Act. He raised the question but found it would be unfair to consider since the members had not been notified that the issue could be raised at the Discipline Proceeding. However, a public hearing is a new hearing that is not limited to the issues and evidence that were before the Discipline Authority. Whether such an allegation should be pursued is a matter for the public hearing process.
46. Pursuant to section 143(4) of the Act, public hearing counsel will present to the adjudicator the case relative to each allegation of misconduct against each respondent officer. The OPCC will provide disclosure in due course to the public hearing counsel, the respondent members or their agents or counsel, and Commission counsel.
47. Pursuant to section 143(5) of the Act, public hearing counsel, the respondent members or their agents or counsel, and Commission counsel may:

- a) call any witness who has relevant evidence to give, whether or not the witness was interviewed during the original investigation or called at the Discipline Proceeding;
  - b) examine or cross-examine witnesses;
  - c) introduce into evidence any record or report concerning the matter; and
  - d) make oral or written submissions, or both, after all the evidence has been called.
48. Pursuant to section 143(7) of the Act, the Complainant, or his agent or counsel, may make oral or written submissions, or both, after all the evidence has been called.
49. Pursuant to section 144(1) of the Act, a person - other than public hearing counsel, the respondent members or their agents or counsel, or Commission counsel - may apply to be a participant at a public hearing by applying to the adjudicator in the manner and form required by the adjudicator.
50. Pursuant to section 143(9) of the Act, an adjudicator presiding over a public hearing in this case must do the following:
- a) decide whether any misconduct has been proven;
  - b) if misconduct has been proven, determine the appropriate disciplinary or corrective measures to be taken in accordance with section 126 of the Act; and
  - c) recommend to the chief constable or the board of the VPD any changes in policy or practice that the adjudicator considers advisable in response of the matter.

#### **APPOINTMENT OF RETIRED JUDGE**

51. Section 142(1) of the Act requires the Commissioner to appoint a retired judge to preside over a public hearing as adjudicator. An appointment under section 142(1) must be made pursuant to section 177.2 of the Act.
52. Section 177.2 of the Act requires the Commissioner to request the Associate Chief Justice of the Supreme Court of British Columbia to consult with retired judges of the Provincial Court, Supreme Court, and Court of Appeal and recommend retired judges who the Commissioner may include on a list of potential adjudicators. Appointments under the Act are to be made in accordance with published procedures established under section 177.2(3) of the Act.

53. I have published on the OPCC website the appointment procedures established under section 177.2(3) of the Act (the “Appointment Procedures”), and the list of retired judges who may be appointed for purposes of, among other things, section 142 of the Act.

54. In accordance with the Appointment Procedures, I have appointed the Honourable Elizabeth Arnold-Bailey, retired Supreme Court Justice, to preside as Adjudicator in these proceedings pursuant to sections 141(1) and (2) of the Act. I have considered the factors set out in the Appointment Procedures, namely:

- a) the provision under which the appointment is being made;
- b) the current workloads of the various retired judges;
- c) the complexity of the matter and any prior experience with the Act; and
- d) any specific expertise or experience of a retired judge with respect to a particular issue or sensitivity associated with the matter.

55. The Honourable Elizabeth Arnold-Bailey has confirmed her availability to preside over this matter and reported no conflicts. She has significant experience and expertise with the provisions of Part 11 of the Act, including as an adjudicator appointed for the purposes of reviews on the record. In her former roles as a Justice of the Supreme Court and a Judge of the Provincial Court, she presided over many criminal and civil trials.

56. Dates for the public hearing have not yet been determined. As required by the Act, the public hearing will commence at the earliest practicable date.

Inquiries with respect to this matter may be directed to the Office of the Police Complaint Commissioner:

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DATED at the City of Victoria, in the Province of British Columbia, this 11th day of December, 2024.



Prabhu Rajan  
Police Complaint Commissioner

Office of the  
Police Complaint Commissioner