

PH: 2024-02
OPCC File: 2015-11014

**IN THE MATTER OF
THE POLICE ACT R.S.B.C. 1996 c. 367 AS AMENDED
AND 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**

Before: The Honourable Elizabeth Arnold-Bailey, Adjudicator

**RULING ON THE APPLICATION OF PUBLIC HEARING COUNSEL
TO INCLUDE “ACCESSORY TO MISCONDUCT” (s. 77(3)(b) *Police Act*)
AS A POSSIBLE BASIS FOR LIABILITY FOR MISCONDUCT**

Public Hearing Counsel, Applicant:	Bradley Hickford
Counsel for the BC Police Complaint Commissioner:	Christopher Considine KC
Counsel for Cst. Birzneck, in Response:	Greg Cavouras/Mike Shirreff
Counsel for Cst. Folkestad, in Response:	Christine M. Joseph
Counsel for the Chief Constable of the VPD:	David T. McKnight
Agent for the BC Police Assoc. Written Response:	M. Kevin Woodall
Adjudicator’s Counsel:	Greg DelBigio KC
Date of Hearing:	November 13, 2025
Place of Hearing:	Vancouver, BC
Date of Decision:	January 2, 2026

Introduction

1. In the Notice of Public Hearing, dated December 11, 2024, in its first paragraph, the Police Complaint Commissioner [PCC] outlined the event that gives rise to the upcoming hearing:

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. Immediately after stating the allegations of misconduct to be considered in the Notice of Public Hearing, the Commissioner stated the following (at para. 45) regarding s. 77(3)(b):

The Disciplinary 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 before the Discipline Authority. Whether such an allegation should be pursued is a matter for the public hearing process. [Emphasis added.]

3. Both Public Hearing Counsel [PHC], Mr. Hickford, and Counsel for the PCC, Mr. Considine, submit that the above paragraph provides sufficient notice to the Members that they may be liable for being an “accessory to misconduct” by “knowingly being an accessory to any conduct set out in this subsection, including, without limitation, aiding, abetting, counselling or being an accessory after the fact”.

4. Therefore, at the upcoming Public Hearing into allegations of police misconduct Mr. Hickford seeks to include as a further basis for liability for misconduct, being an “accessory to misconduct”, pursuant to s. 77(3)(b) of

the *Police Act*, RSBC 1996 c. 367 as amended [the *Act*]. This is opposed by counsel for all the Members.

5. In referring to the brief factual description of incident above and any of the other “facts” that have been referred to during this Application, I am fully aware that evidence about this incident will be led at the Public Hearing. Witnesses will testify and be cross-examined, submissions will be made regarding who among the seven respondent members [Members] used what type of force, and in what circumstances; and whether PHC has proven that the force used was unnecessary and therefore constituted misconduct. The facts are not yet established, but I refer to some alleged facts to provide the context for this Application.

6. The misconduct alleged against the Members comes under two headings, *Abuse of Authority* and *Neglect of Duty*. This application only pertains to *Abuse of Authority* allegations, which are set out in the Notice of Public Hearing (at p.10, para. 44) as follows:

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.

The Issues

7. The three issues that arise in this Application are:

- 1) Does the wording of s. 77(3)(b) alone, or as interpreted in the broader context of the *Act*, permit me as the Adjudicator at this Public Hearing to add allegations of “accessory to misconduct” to the misconduct already alleged against the Members?

- 2) If not, does the reference to s. 77(3)(b) contained in the Notice of Public Hearing provide a sufficient basis upon which to add it as a basis of potential liability at the upcoming hearing?
- 3) If there is jurisdiction to add s.77(3)(b) “accessory to misconduct” as a basis for liability, should I exercise my discretion to do so in the circumstances of this case, or would that result in procedural unfairness to the Members?

8. To address these issues, it is necessary to examine certain provisions of the *Act*, the Notice of Public Hearing, and procedural fairness in term of notice to the Members as to the case against them, in advance, in order that they have a proper opportunity to prepare and mount their defence.

9. I have carefully considered the excellent submissions I have received on these issues, and I thank counsel for them. In examining each of these issues, I will refer to various points they contain. However, in the interests of brevity and timeliness, except for the submissions of the applicant, PHC, Mr. Hickford, and Counsel for the PCC, Mr. Considine, I will not summarize the submissions made on behalf of the Members.

10. Mr. Kevin Woodall, acting as Agent for the BC Police Association, which has limited participation status under s. 144(2) of the *Act*, filed extensive written submissions in relation to the application of s. 77(3)(b) to police actions involving the use of force by multiple officers in the context of the test set out in *Berntt v. City of Vancouver*, 1999 BCCA 345. In his application to make submissions, dated October 9, 2025, he stated that “The first set of issues focus on whether it is appropriate to permit Public Hearing Counsel and other parties to rely on s. 77(3)(b) at all, given the facts of this case and its procedural history. The BCPA does not apply for leave to make submissions on those issues.” Therefore, as thorough and informative as

those submissions may be, I have not considered them in relation to this application.

Summary of the Applicant's Submissions

11. As PHC, Mr. Hickford brought the present application. In his submissions he referred to the mental element required for a member to be an “accessory to misconduct”, given that s. 77(3)(b) of the *Act* requires knowledge, whereas subsection 77(3)(a)(ii)(A) regarding the use of unnecessary force refers to “intentionally or recklessly”. He also pointed out that there appears to be very little jurisprudence relating to the allegation of “accessory to misconduct”, except in *Rogers v. Edmonton (Police Service)*, 2016 ABCA 216 [*Rogers*].

12. After reviewing the facts and the regulation in *Rogers*, Mr. Hickford submitted that comments in the judgment imply the legal test for this type of police misconduct, quoting para. 4 from the judgment:

On the findings here, it is plain that the use of a higher degree of moral culpability than would apply in the criminal context – namely, actual knowledge – was a sufficient but not [a] necessary basis for finding discreditable conduct. In other words, a person may abet under s. 5(2)(e)(vi) of the Police Service Regulation with a blameworthy state of mind less than knowledge of the act that constitutes the central component of abetting under 5(2)(e)(iv). What those lesser degrees of moral culpability might be are something we need not address today and we decline to do so.

13. Mr. Hickford then referred to the underlying decision of the Alberta Law Enforcement Review Board, *Petropoulos v. Edmonton (Police Service)*, 2015 ALERB 6 (CanLII) at para. 38:

We acknowledge the evidence that, when Redlick and Petropoulos emerged from behind the building and re-entered the police car, Petropoulos bore no visible signs of injury and indeed it appeared that he and Redlick were conversing in a non-hostile fashion. However, when

taken as a whole the conclusion reached by the Presiding Officer was reasonable. The chain of events would lead a rational, objective person to question what was going on. Rogers did not ask any questions of Redlick; nor did he intervene in any way. Rather, he drove into a deserted area away from view, opened the door for Redlick and watched silently as his partner escorted Petropoulos out of the car and around the corner of the building. It was reasonable for the Presiding Officer to not accept Rogers' claim that he had no idea what was going to occur or that perhaps Petropoulos was to become some sort of "source" in relation to same matter. The Board finds the decision of the Presiding Officer to be reasonable and upholds the conviction of Rogers. [Emphasis added.]

14. Mr. Hickford submitted that "the question to be asked in determining whether s. 77(3)(b) applies in the present circumstances is, would "the chain of events lead a rational, objective person to question what was going on."

15. He then referred to para. 11 of the Notice of Public Hearing where the PCC stated:

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.

16. PHC submitted that the facts stated in the above paragraph will be borne out in evidence to be heard at the Public Hearing. His position is that the Members were "acting in concert." He then reviewed aspects of the timeline of events during the short time that the Members interacted with Mr. Gray, as indicated by the radio communications of various Members just prior and during their struggle to arrest Mr. Gray. He also referred to parts of a statement by Cst. Sahota about the events.

17. Mr. Hickford also referenced in some detail the report of the pathologist, Dr. Orde, who performed a postmortem examination of the body of Mr. Gray. In his report, Dr. Orde itemized sixty separate external injuries and nine significant internal injuries to Mr. Gray.
18. In conclusion, Mr. Hickford submitted that the chronology of events contained in the summary of relevant radio calls shows a “chain of events [that] would lead any rational, objective person to question what was going on”, and that the Members were acting in concert in their continued application of force upon Mr. Gray. On this basis, he submitted that they could be characterized as accessories to each other’s misconduct. Therefore, PHC’s position is that s. 77(3)(b) “accessory to misconduct” allegation should be included as an additional allegation of misconduct against each of the Members at the Public Hearing.
19. In response to the questions to counsel I posed in Memorandum No. 11, Mr. Hickford responded that: 1) it is not necessary for the Notice (of Public Hearing) be amended, and the reference in Para. 45 of the Notice is sufficient; 2) there is no jurisdiction in the *Act* to make such an amendment because the Adjudicator’s jurisdiction is statutorily derived; and 3) as the reference to s. 77(3)(b) in the Notice at para. 45 “clearly refers to s. 77(3)(b) of the Police Act as being an issue that may be pursued as a result of the public hearing process it is [...] appropriate for [me] to consider the issue and exercise [my] discretion as [I] see fit.”

Summary of the Submissions of Counsel to the PCC

20. In his submissions on behalf of the PCC, Mr. Considine referred to sections 143(2) and 143(3) of the *Act*, which state that a public hearing is a new hearing concerning conduct that was the subject of an investigation or complaint, and is not limited to the evidence and issues that were before the

discipline authority at the discipline hearing. He also referred to the fact that the Discipline Authority in this case did not rule on the potential liability of the Members as accessories to misconduct under s. 77(3)(b), although the Disciplinary Authority raised the question. The Disciplinary Authority did not consider it fair to include and consider it in his decision since the Members had not been notified that potential liability for “accessory to misconduct” would be raised.

21. Mr. Considine points out the Members have now had notice that s. 77(3)(b) liability for misconduct could be an issue at the Public Hearing, given the Commissioner’s reference to it in the Notice of Public Hearing. Therefore, the Members knew it was potentially an issue as of December 11, 2024. Given that a public hearing is a new hearing not confined to the evidence and issues before the Discipline Authority (s. 143(2) and (3)), it is within the Adjudicator’s discretion to include as “accessory to misconduct” as a basis for potential liability. At para. 7 of his submissions Mr. Considine states “The Notice, and Public Hearing Counsel in later communications have provided particulars to the Respondent officers, including with respect to which acts may ground an allegation under 77(3)(b).”
22. Mr. Considine reminded me that as the Public Hearing is a *de novo* hearing, it is within my discretion to add “accessory to misconduct” as a potential basis for liability. He also submitted it may be in the public interest for me to be able to consider the s. 77(3)(b) the “accessory to misconduct” provision after I have heard all the evidence.
23. In response to the questions I posed in Memorandum No. 11, Mr. Considine submitted that: 1) no formal amendment to the Notice of Public Hearing is necessary to add “accessory to misconduct” allegations to the allegations to be considered at the hearing; 2) the *Act* requires at the disciplinary authority stage that the disciplinary authority or retired judge provide a list or description of each allegation of misconduct to be considered in their review (s. 112(2)(c), s.

116(2)(c), s. 117(8)(c)), which is to be contrasted with the role of public hearing counsel, who is appointed “to present the case relative to each allegation of misconduct” (s. 138(7), with similar language in s. 143(4)); 3) as the public hearing is a *de novo* hearing and not limited to the evidence and issues that were before the discipline authority (s. 143(4)), I am permitted to include consideration of liability based on “accessory to misconduct”; 4) as the Notice of Public Hearing refers to the “accessory to misconduct” issue, it provides reasonable notice to the Members of potential liability as “accessories to misconduct”; 5) the statute does not require the Notice of Public Hearing to specify the precise allegations that may be considered at a public hearing; and 6) the Members are entitled to a high degree of procedural fairness at the Public Hearing.

Issue 1): Does the wording of s. 77(3)(b) alone, or as interpreted in the broader context of the Act, permit me as the Adjudicator at this Public Hearing to add allegations of “accessory to misconduct” to the misconduct already alleged against the Members?

24. To understand the complexity of this Application it is necessary for me to review the provisions of the *Act* that govern the process regarding complaint and PCC initiated investigations, the scope and manner of investigations conducted by independent police members, and the levels of review and adjudication, which in this case preceded the Public Hearing ordered by the PCC.

25. The powers and duties of the PCC are defined in Division 2 of the *Act*. Within that Division, and pursuant to s. 51.02(h), the powers and duties in relation to public hearings under s. 138 of the *Act* are non-delegable.

26. Part 11 of the *Act* addresses ‘Misconduct, Complaints, Discipline and Proceedings’. Section 76, which is under Part 11, defines “adjudicator”,

“misconduct”, “public hearing”, and “public hearing counsel”. Each of those definitions refers to other sections of the *Act*.

27. “Misconduct” is defined in s. 77(1) and (2) of the *Act*.

28. Section 77(3) sets out the various kinds of misconduct for which police officers may be held to account and contains an enumeration of the types of conduct that “constitutes a disciplinary breach of trust”. The subsection, set out below, includes the misconduct alleged here against each of the Members of intentional or reckless use of unnecessary force on any person (s. 77(3)(a)(ii)(A)) and the misconduct that PHC seeks to have included for consideration at the Public Hearing, namely “accessory to misconduct” (s. 77(3)(b)):

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

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

[...]

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

A. using unnecessary force on any person,

[...]

(b) “accessory to misconduct”, which is knowingly being an accessory to any conduct set out in this subsection, including without limitation, aiding, abetting, counselling or being an accessory after the fact;

[...]

[Emphasis added.]

29. Section 77(3)(b), the subject of this Application, defines “accessory to misconduct” as “knowingly being an accessory to any conduct set out in this subsection”. In the *Act* it is followed by a list of actions or behaviours, ranging

from discourtesy to neglect of duty, which if proven, would amount to misconduct. Notably, it also defines a distinct basis upon which “accessory to misconduct” may be alleged, investigated, or substantiated, namely “including without limitation, aiding, abetting, counselling or being an accessory after the fact”. (Emphasis added.)

30. Therefore, s.77(3)(b) is a broad, separate and distinct basis upon which misconduct may be complained about, alleged, investigated, evaluated and adjudicated.
31. Moving to the complaint/investigation phase of the *Act*, s. 78 permits a “complaint concerning any conduct of a member or former member that is alleged to be misconduct” to be registered; and s. 80 and s. 81 define the process that occurs after a complaint of misconduct has been received.
32. Section 93 grants authority to the PCC to order an investigation into the conduct of a member, “regardless of whether a complaint is made”, “if at any time information comes to the attention of the police complaint commissioner” concerning conduct that “would, if substantiated, constitute misconduct”.
33. Section 98 requires an investigating officer to file a final investigation report, and s. 101 requires members to fully cooperate with “the investigation”.
34. “Complaints” may, after investigation, become “allegations”. Section 112 governs the process in which a discipline authority reviews the final investigation report. Subsection 112(2)(a) refers to “the complaint”, and 112(2)(c) requires that there be a “list or description of each allegation considered by the discipline authority”.
35. “Allegations of misconduct” are subject to evaluation under the *Act*, for example, ss. 112(2)(d)(i) requires a discipline authority to determine, “in

relation to each allegation of misconduct”, whether or not the evidence “appears to substantiate the allegation”.

36. A discipline authority’s decision can be reviewed under s. 117. Section 117(8)(c) requires that notification to the member include “a list or description of each allegation of misconduct considered by the retired judge”.
37. Discipline proceedings may be convened pursuant to s. 118, and s. 119(1)(c) requires that the member be given “a notification of misconduct”. Section 124(2) requires that “each allegation of misconduct against the member” be read to the member, and the member “must be asked to admit or deny each of those allegations.”
38. Pursuant to s. 125(1)(a), the discipline authority must “make a finding in relation to each allegation of misconduct against the member...as to whether the misconduct has been proven.”
39. Turning now to the statutory provisions regarding public hearings, s. 138 grants authority to the PCC to arrange a public hearing. Section 138(2) is a non-exhaustive list of factors for the PCC to consider in making that decision, and s. 138(2)(a) refers to “the nature and seriousness of the complaint or alleged misconduct.”
40. When the PCC decides there will be a public hearing, s.138(7) requires that the PCC “must...appoint legal counsel to present to the adjudicator the case relative to each allegation of misconduct against the member...”
41. While the *Act* addresses the notice that must be given when the PCC has determined that a public hearing is necessary, s. 138(4) only addresses the persons who must be notified. This includes the member “whose conduct is the

subject of concern”, but the *Act* is otherwise silent with respect to the content of the Notice of Hearing.

42. Section 143(2) provides that “[a] public hearing is a new hearing concerning the conduct of a member...that was the subject of an investigation or complaint under this Division.”

43. Section 143(3) provides that “[a] public hearing is not limited to the evidence and issues that were before a discipline authority in a discipline proceeding.”

44. Section 143(4) provides that “[f]or the purposes of a public hearing, public hearing counsel must present to the adjudicator the case relative to each allegation of misconduct against the member or former member concerned.

45. And finally, by virtue of s. 143(9)(a) the adjudicator must “decide whether any misconduct has been proven. [Emphasis added throughout.]

46. There is, however, some statutory language that might suggest a public hearing may have a more expansive and perhaps even a poorly defined scope. I refer to the following: “the member ...whose conduct is the subject of concern” (s. 138(4)(b)) regarding notice if a public hearing is to be held); the reference to a public hearing not being limited to “the evidence and issues” before the discipline authority (s. 143(3)); and the adjudicator must “decide whether any misconduct has been proven” (s.143(9)(a)).

47. Considering this Application in view of the wording of s. 77(3)(b) and provisions of the *Act* referred to above, I note the following:

- i. The *Act* is replete with the words “allegation” and “allegation of misconduct”.
- ii. It sets out a statutory process for complaints to be received about police conduct or for the PCC to initiate an investigation, for complaints of alleged misconduct to be investigated resulting in a final

investigation report, and then determined by a discipline authority, for select reviews of certain determinations, and for reviews on the record and public hearings upon the direction of the PCC.

- iii. The power of the PCC in s. 138 in relation to public hearings is non-delegable.
- iv. The PCC directs that a public hearing take place and sets out the basis upon which it is to proceed.
- v. The role of PHC as defined in the *Act* makes it very clear that they must present to the adjudicator the case relative to each allegation of misconduct.
- vi. The wording of s. 77(3)(b), insofar as the “accessory to misconduct” may arise in relation to any of the conduct listed in s. 77(3) that constitutes misconduct, may not be interpreted as automatically becoming a live allegation if the non-accessory form of misconduct is alleged. It has no special or overarching power under the *Act* as an “add on” form of misconduct. Rather, it appears as one of many forms of conduct that may be alleged to be misconduct.
- vii. While a public hearing is “not limited to the evidence and issues before the discipline authority”, I do not consider the reference to “issues” to permit me as an adjudicator to add new allegations of misconduct at the public hearing stage.
- viii. To add a new allegation of misconduct pursuant to s. 77(3)(b) at the public hearing level means that likely, it has not been investigated, evaluated, reviewed or adjudicated upon prior to that point.

48. I note that while the incident here was investigated at several levels over time, there was no recognition of allegations of “accessory to misconduct” being a possibility against the Members until the Discipline Authority noted the possible relevance of misconduct based on s. 77(3)(b) liability in his Reasons for Decision, dated October 7, 2024.

49. As the Adjudicator, the focus of this Public Hearing is, after hearing all the evidence and submissions, to determine whether the specific allegations of misconduct against each of the Members as set out in the Notice of Public Hearing have been proven. The evidence and the submissions must relate to those specified allegations of misconduct. In this way, a public hearing under the *Act* is more akin to a trial than a public inquiry.

50. I also state the obvious, which is that an adjudicator exists and operates through the provisions of the *Act*. An adjudicator does not have the inherent jurisdiction that a superior court has. Hence the jurisdiction to add a new allegation of misconduct at this stage, if it exists, must lie within the *Act*.

51. In conclusion, it is my view the answer to **Issue 1)** must be that neither the wording of s. 77(3)(b), nor the broader context of the *Act* grants me the jurisdiction to add allegations of “accessory to misconduct” to the misconduct already alleged against each of the Members to be determined at the Public Hearing.

Issue 2): Does the reference to s. 77(3)(b) contained in the Notice of Public Hearing provide a sufficient basis upon which to add it as a basis of potential liability at the upcoming Public Hearing?

52. Immediately after stating the allegations to be considered in the Notice of Public Hearing, the Commissioner stated the following (at para. 45) regarding s. 77(3)(b):

The Disciplinary 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 before the Discipline Authority. Whether such an allegation should be pursued is a matter for the public hearing process. [Emphasis added.]

53. Both Mr. Hickford and Mr. Considine submit that the above paragraph provides sufficient notice to the Members that they may be liable for being an accessory to misconduct by “knowingly being an accessory to any conduct set out in this subsection, including, without limitation, aiding, abetting, counselling or being an accessory after the fact”.
54. In my respectful view more is required. It is not sufficient notice to suggest “whether” an additional allegation of misconduct should be pursued is “a matter for the public hearing process”. In essence, the PCC’s comment in the Notice of Hearing is an invitation to be considered. However, I also note that the authority of the PCC in relation to public hearings is non-delegable (s. 51.02(h)). Although the *Act* is silent about what the Notice of Public Hearing is to contain, in my view it is not for me as an adjudicator at the public hearing stage to add additional allegations of misconduct. The extent of the Members’ jeopardy should be clear and unequivocally stated in the Notice of Public Hearing.
55. Given how the *Act* is structured, I do not interpret the reference to “issues” in s. 143(3) to include new allegations of misconduct (“A public hearing is not limited to the evidence and issues that were before a discipline authority ...”). A public hearing may receive new evidence that was not before the discipline authority at the discipline hearing, if it is “relevant, necessary and appropriate” (s. 143(6)(a)). An adjudicator must deal with the “issues” that arise during the hearing in context of the evidence and the *Act* regarding the allegations to be determined. I do not interpret this to extend to adding new allegations of misconduct.
56. To permit an allegation of “accessory to misconduct” to be added to this Public Hearing would also mean defining how the Member was alleged to have been an accessory, which could be by “aiding”, “abetting”, “counselling”, or “being an

accessory after the fact”. In addition, s. 77(3)(b), by virtue of the words “including without limitation”, offers other undefined routes to liability. That being the case, adding “accessory to misconduct” here would involve further additional definition regarding how it was alleged to have occurred.

57. To add allegations of misconduct as “accessories to misconduct” to the allegations to be determined at this Public Hearing would require additional specification as to the means by which any of the Members acted as accessories to the misconduct of other Members. It has been suggested that as the Adjudicator I could engage in that exercise after I have heard all the evidence. With respect, that process in this case seems fraught with potential legal difficulties, and most certainly would not constitute notice to each Member of their alleged involvement as an “accessory to misconduct” under s. 77(3)(b).
58. In his submissions PHC sought to strengthen the case for including “accessory to misconduct” by submitting that the Members could be regarded as “acting in concert”.
59. His reference to the *Rogers* case (and related decision of the Alberta Law Enforcement Review Board), focused on the legal test for the mental element of an accessory, and whether a state of mind less than knowledge of the actions of the principal would suffice. The facts and the regulation at issue are very different than the situation reflected in this Application. Furthermore, issues relating to the required mental element for a finding of “accessory to misconduct” would only arise in the event I accepted that the *Act* permitted me to add it in the circumstances of the present case, which I do not.
60. Therefore, to answer the questions posed in **Issue 2**), the reference to s. 77(3)(b) in the Notice of Public Hearing, is not sufficient to permit allegations of misconduct by being “accessories to misconduct” to be added to the allegations of misconduct facing each of the Members. Furthermore, in my view there is no jurisdiction under the *Act* for an adjudicator embarking on a public

hearing to add new allegations of misconduct not contained in the Notice of Public Hearing. That discretion appears to rest only with the PCC.

Issue 3): If there is jurisdiction to add s. 77(3)(b) “accessory to misconduct” as a basis for liability, should I exercise my discretion to do so in the circumstances of this case, or would that result in procedural unfairness to the Members?

61. As I indicated in my previous reasons in relation to this Public Hearing, it cannot be disputed that the Members are entitled to a high degree of procedural fairness at the Public Hearing. I refer to my earlier ‘Reasons and Ruling on the Application of Cst. Birzneck for Particulars in Relation to the Alleged Misconduct’, dated December 10, 2025, at paras. 48-54.
62. It is a fundamental tenet of procedural fairness in a fair administrative law process that the person facing jeopardy has the right to know the case against them, in advance, so that the person may have proper opportunity to prepare and advance his or her defence.
63. There were at least four opportunities for the misconduct of “accessory to misconduct” to be added as the case of alleged misconduct by the Members proceeded through the various steps under the *Act*. A summary of this process is as follows:
- i. The incident between Mr. Gray and the Members occurred on August 13, 2015.
 - ii. The Independent Investigations Office [IIO] took over the investigation of this matter very soon after it occurred. When that investigation was completed, the IIO forwarded the case to the BC Prosecution Service, which in 2020 determined that there were no grounds for criminal charges against any of the Members.

- iii. The investigation of the incident by the Office of the Police Complaint Commissioner [OPCC] under the *Act* resumed in 2021, having held in abeyance while the other investigations took place.
- iv. On July 29, 2021, after reviewing considerable materials from the IIO investigation the (former) PCC issued a notice that set out “potential misconduct” that may have been committed by the Members. It did not contain a reference to any allegations under s. 77(3)(b).
- v. The PCC’s notice clearly stated the allegations to be investigated. It also stated that the investigator “must” report any information that was not the subject of the investigation, which if substantiated, would constitute misconduct, to the OPCC and the Chief Constable of the relevant department.
- vi. The investigator, Sgt. Nash, investigated the matter, and submitted a revised final investigation report that analyzed the conduct of the Members in detail. The Members participated in the investigation as required.
- vii. Section 108(1)(c) of the *Act* requires the investigating officer to immediately report conduct that “would constitute misconduct, if the information were substantiated”. Sgt. Nash did not report any further incidents of misconduct.
- viii. During this time Sgt. Nash had to submit ongoing reports to the PCC throughout the investigation. The PCC did not modify the scope of the investigation.
- ix. After receiving the revised final investigation report the Discipline Authority issued a decision under s. 112 of the *Act*. Section 77(3)(b) “accessory to misconduct” allegations were not mentioned.
- x. The first suggestion that the matter might be expanded to include s. 77(3)(b) misconduct was in the letter dated October 10, 2023, which was issued after the direction for investigation from the PCC,

after the lengthy investigation by Sgt. Nash, and after the Discipline Authority had issued his s. 112 decision.

xi. Counsel for Cst. Birzneck sought clarification on this issue, and it does not appear to have been addressed.

64. The Notice of Public Hearing, dated December 11, 2024, is the first real indication that adding allegations of s.77(3)(b) misconduct to the substance of the Public Hearing was a possibility, keeping in mind that the earlier comment of the Discipline Authority accompanied a finding of no misconduct. This occurred nine years and four months after the incident with Mr. Gray (August 13, 2015).

65. I find that adding allegations of “accessory to misconduct” pursuant to s. 77(3)(b) now, given the history of this matter would amount to significant procedural unfairness for the following reasons:

- Ten years and five months have passed since the Members had contact with Mr. Gray.
- The Members did not receive any indication that s. 77(3)(b) liability was being considered by the OPCC and the PCC until the Notice of Public Hearing, dated December 11, 2024, was issued.
- The Notice of Public Hearing did not direct that s. 77(3)(b) liability was to be determined at the Public Hearing.
- In the history of this matter under the *Act* there were at least four points where allegations of further or different misconduct could have been ascertained and added. This did not happen.
- Memories fade with time and recollections tend to address what needs to be addressed.
- Allegations of s. 77(3)(b) “accessory to misconduct” are factually complex, particularly in a fast-paced, stressful situation like this one. It is unreasonable to expect the Members to accurately recall additional details from this incident now, over ten years later, that could have a

bearing on their liability to additional, legally complex allegations of “accessory to misconduct”.

Conclusion

66. In summary, Mr. Hickford’s Application to include “accessory” as a basis upon which misconduct might potentially be found in this upcoming public hearing is denied. I have considered Mr. Hickford’s submissions about how the alleged misconduct might be captured by the accessory provision of the *Act*. While that might be, the fact remains that the Members have so far not been investigated for and invited to answer to that allegation. Further, and for the reasons set out above, I find that I do not have the jurisdiction to grant Mr. Hickford’s Application. However, if I am in error in this regard, I also find that it would be procedurally unfair to the members for the application to be granted. It is not necessary for me to comment upon whether the Members could have or should have been investigated for roles as accessory to the alleged misconduct of other Members. The fact is they were not, and I find it would be procedurally significantly unfair to add new allegations that the Members must answer and defend against at this late stage.

Dated at the City of Kelowna, British Columbia, this 2nd day of January, 2026

Elizabeth A. Arnold-Bailey

The Honourable Elizabeth Arnold-Bailey (BCSC Ret’d)
Adjudicator