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

REASONS AND RULING ON THE APPLICATION OF CST. BIRZNECK FOR PARTICULARS IN RELATION TO THE ALLEGED MISCONDUCT

Counsel for the Applicant, Cst. Birzneck:	Mike Shirreff
Counsel for Cst. Cain, in support of the Application:	Glen Orris KC
Public Hearing Counsel, in Response:	Bradley Hickford
Complaint Commissioner's Counsel, in Response:	Christopher Considine KC
Counsel for Chief Constable VPD:	David T. Mc Knight
Adjudicator's Counsel:	Greg DelBigio KC

Date of Hearing:	October 28, 2025
Place of Hearing:	Vancouver, BC
Date of Reasons:	December 10, 2025

Introduction

1. On December 11, 2024, Mr. Prabhu Rajan, the Police Complaint Commissioner [Commissioner] ordered that a public hearing be held under s. 138(1) and (2.1) of the *Police Act* [the *Act*], into alleged professional misconduct by the seven Vancouver Police Department officers named above regarding the death of Myles Gray on August 13, 2015.

2. The basic facts are that on August 13, 2015, the police responded to a 9-1-1 call directing them to a residential area at 3700 block of SE Marine Drive in Vancouver, BC, regarding a man who was behaving erratically. Although the seven members [the Members] did not arrive at once, they all arrived at the scene and had dealings with Mr. Gray. It is alleged that all seven of them used force against Mr. Gray, who died as a result of those multiple uses of force.

3. The Public Hearing is to commence on January 19, 2026, and is set to continue for up to ten weeks. It is likely to be a lengthy and complex hearing due to the nature of the allegations of misconduct alleged, the involvement of the Members in a single brief incident, and the testimony of approximately 36 witnesses to be called by Public Hearing Counsel. It will include expert evidence regarding the use-of-force protocols and police policy, and the expert evidence of a toxicologist, and a pathologist regarding Mr. Gray and the nature and extent of his injuries. In addition, the Members may testify, and they may call other evidence.

4. This is the first prehearing application brought in advance of the public hearing. Although this Application is brought on behalf of Cst. Birzneck, the other Members also seek to receive particulars should they be ordered.

5. In the Notice of Public Hearing (at para. 44) the allegations relevant to this Application are set out as follows:

> Allegations that each of [the Members] 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.

6. Section 77(1)(b)(ii) of the *Act* defines "misconduct" to include conduct that constitutes "a disciplinary breach of public trust described in subsection (3)".

7. Section 77 sets out the misconduct at issue here:

> (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,
>
> […]
>
> (4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work. [Emphasis added.]

The Issue

8. This Application gives rise to only one issue: is further specificity or particularization of the misconduct of *abuse of authority* alleged against Cst. Birzneck (and each of the other Members) required to ensure that the Public Hearing into their conduct is procedurally fair?

9. Counsel for Cst. Birzneck on behalf of his client, and the other Members apply for particulars, arguing that the allegations as framed are insufficient. Public Hearing Counsel is opposed.

Position of the Applicant, Cst. Birzneck

10. The very able submissions of Mr. Shirreff on behalf of Cst. Birzneck start with the statement "It is a fundamental tenet of a fair administrative law process that the person facing jeopardy has the right to know the case against them." He submits

"This is a key pillar of a procedurally fair process." He continues, "Unfortunately, even at this late juncture, so many years after the underlying events, Cst. Birzneck and his colleagues have *never* been told exactly which aspects of their interactions with Mr. Gray might potentially have been an abuse of authority, as that term is defined in section 77(3)(a) of the *Police Act*."

11. Mr. Shirreff proceeded to set out the lengthy history of the police complaint process commenced by an Order of Investigation on August 19, 2015, six days after the incident. The Order issued by the Commissioner that stated it "was satisfied that [Mr. Gray's] death could be seen to have been the result of conduct of a member of the Vancouver Police Department." As required by the *Act*, the police complaint investigation was suspended by an in-depth investigation of this incident and the actions of Cst. Birzneck and the other Members by the Independent Investigation Office [IIO], followed by a review by the BC Prosecution Service that concluded on December 16, 2020, with a decision that no criminal charges were to be laid against any of the Members.

12. Then on January 29, 2021, the suspension under the *Act* was lifted and the investigation under the *Act* resumed. On July 19, 2021, the OPCC issued an Order for External Investigation and an Amended Notice of Designation of External Discipline Authority. At that time the OPCC had access to the IIO investigation file. This Notice stated:

> In addition, it has been reported that significant use of force was used to take Mr. Gray into custody which included, strikes, applications of the lateral neck restraint, kicks, punches, baton strikes, and pepper spray. Some of these applications of force reportedly may have occurred while Mr. Gray was hobbled and largely contained on the ground. I am of the opinion that the conduct alleged against [the Members] and Cst. Gravengard, if substantiated, would constitute misconduct. The misconduct could potentially be defined as follows [with reference to the wording of s. 77(3)(a)(ii)(A) of the *Act*].

According to the history of this matter, the above description has never been expanded or modified.

13. On January 31, 2023, Sgt. Nash, the external investigator issued his revised final investigation report [FIR]. In the FIR Sgt. Nash concluded that all the force used by Cst. Birzneck in his dealings with Mr. Gray was “objectively necessary.”

14. On February 13, 2023, Chief Officer David Jones, who was the Discipline Authority under the Act, issued his decision under s. 112. Despite the conclusion reached in the FIR (which included two reports of Inspector Butler, a use-of-force expert), he concluded that there did appear to be sufficient evidence to support a finding that the abuse of authority “may” be substantiated against Cst. Birzneck, without specifying what conduct of Cst. Birzneck informed his views. Counsel for Cst. Birzneck sent a letter to Chief Jones to request particulars. Counsel for Csts. Folkestad and Thompson made similar requests.

15. On September 29, 2023, the Commissioner appointed Chief Constable Dubord as the Discipline Authority in the proceedings under the Act, as Chief Jones was retiring. On October 10, 2023, Chief Dubord declined to provide particulars as it was “crystal clear from all the materials disclosed that the bases for all the allegations stem from the officers’ interaction with and infliction of injuries on Myles Gray on August 13, 2025.” He also introduced the new concept of respondent officers potentially being found to have committed misconduct based on the actions of other officers (s. 77(3)(b) “accessory to misconduct”). When Chief Dubord issues a Notice of Discipline Proceeding to Cst. Birzneck he described the allegation in full as “Misconduct #1: Abuse of authority contrary to section 77(3)(a)(ii)(A) of the Police Act”, with the stated dated of the alleged misconduct as August 13, 2015.

16. The Discipline hearing took place before Chief Dubord on March 4-5, 2024, and he issued his findings on October 7, 2024. He concluded that “the level and timing of force used by Cst. Birzneck were no more than what was reasonably (objectively) necessary.” Chief Dubord also found that it would be unfair to assess the respondent officers’ actions as “accessories” to misconduct.

17. On December 11, 2024, the Commissioner issued a Notice of Public Hearing, which included the following statement:

> …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 additional and better evidence at a public hearing.

Counsel for Cst. Birzneck pointed out that this reference in the Notice of Public Hearing did not refer to any specific evidence or a legal basis for the above statement, and notably this was the first time it had been asserted that the initial decision to physically engage Mr. Gray may have been inappropriate.

18. Mr. Shirreff also referred to the three occasions earlier this year at Case Management Conferences where I asked Public Hearing Counsel about providing particulars to counsel for each of the Members. It was first raised by me in Memorandum No. 3 to Counsel where I stated:

> I am planning to ask Public Hearing Counsel, Mr. Hickford, if he plans to provide notice to counsel and to me as Adjudicator that particularizes the misconduct alleged against each and all Members. There are seven Members whose conduct will be examined at the hearing and who might be subject to disciplinary measures if misconduct is found. It is possible that the evidence will show different Members engaged in different conduct, at different times, and for different periods of time, one from another. I am of the view that to ensure fairness for the Members and facilitate an orderly proceeding this degree of particularization is important.

19. On July 7, 2025, counsel sent a letter to Public Hearing Counsel asking for a cogent and particularized statement on the allegations against Cst. Birzneck, with the following questions: 1) "Which specific use or uses of force by Cst. Birzneck are alleged to have been "unnecessary"? 2) "Is it being alleged that Cst. Birzneck "intentionally" or "recklessly" used "unnecessary force"? 3) "Against which standard will the "necessity" of the force be assessed? Counsel asked questions as well in relation to s. 77(3)(b), "accessory to misconduct".

20. On August 9, 2025, Public Hearing Counsel's response included the following:

1. Cst. Birzneck should be prepared to defend all applications of force he applied to Mr. Gray. This would include the use of OC spray, baton strikes, both applications of the Vascular Neck Restraint and any other applications of force that are established through the evidence led and accepted in these proceedings.

2. Absent some dramatic change in the evidence, I will be taking the position that Cst. Birzneck was reckless in using unnecessary force.

3. The standard assessing the necessity of the use of force should be "objectively reasonable". (Public Hearing Counsel also responded to several questions regarding s. 77(3)(b)).

21. Mr. Hickford stated, "I take the position that the quality and clarity of the disclosure and my itemized response to your questions are more than sufficient to enable Cst. Birzneck to properly prepare his defence."

22. In his argument, Mr. Shirreff's submission is that this response is "effectively that 'Cst. Birzneck should defend every application of force applied to Mr. Gray, including those listed and those not listed, and including those that may be established through evidence led at the hearing.'

23. Mr. Shirreff reviewed the authorities submitted in support of a fair administrative law process in this case. In his written materials he set out a summary of legal principles supported by those cases, as follows:

    a. A respondent to a professional discipline matter where the end of their career is a possible outcome is entitled to procedural fairness at the "higher end of the scale": *Mondesir v. Manitoba Assn. of Optometrists*, 2001 MBCA 183.
    b. The allegations must be set out in a way that is sufficiently particular to allow a fair hearing and a fair defence: *Sen v. Discipline Committee of College of Physicians and Surgeons of Saskatchewan*, 1969 CanLII 615 (SKCA); *Re Golomb and College of Physicians and Surgeons of Ontario*, 1976 CanLII752 (ONSC);

Visconti v. College of Physicians and Surgeons of Alberta, 2010 ABCA 250.

c. The level of specificity must be sufficient to raise the allegation from the general to the specific, and a court should be "rigorous" in its consideration of the specificity of the allegations: *Mondesir*; *Fitzpatrick v. Alberta College of Physical Therapists*, 2012 ABCA 207.

d. Where an allegation is broad, such as "professional misconduct" (or "abuse of authority"), it is particularly important for the respondent to know with reasonable certainty what conduct is alleged to have been inappropriate: *Golomb*.

e. It is not acceptable to 'wait and see' what misconduct the evidence at a hearing might reveal – the allegations must be set out with specificity in advance: *Fitzpatrick*; *Nowoselsky v. Alberta College of Social Workers (Appeal Panel)*, 2011 ABCA 58 (cited with approval in *Nguyen v. Chartered Professional Accountants of British Columbia*, 2018 BCSC 620.

[Full citations added.]

Submissions on behalf of Cst. Cain, in support of the Application

24. Mr. Orris, counsel for Cst.Cain, included in his Response excerpts from the *Revised Final Investigation Report*, prepared by Sgt. Nash who conducted the investigation under the *Act* in relation to this incident. Specifically, he included paras. 79-112 from the section "Global Timeline of Officers' Actions and Uses of Force". In these materials Sgt. Nash "created a narrative of the incident, compiled from the totality of the statements provided by Constables Birzneck, Sahota, Folkestad, Wong, Thompson, Cain and Spencer, as well as materials from the VPD file #..." The report (at para. 80) states:

> The narrative below reflects what Sgt. Nash believes likely occurred; however, Sgt. Nash notes that while the officers' recollections had similarities, as one would expect, they were not exactly the same. Therefore, there is no way to accurately state with certainty what occurred,

> in what order, and, for example, that the following uses of force occurred in the particular or order outlined below."

25. That said, I note the quoted portions set out a very detailed chronology of events, linked to timed radio broadcasts. The account describes a scenario in which the first three officers engaged with Mr. Gray, two more officers attended to assist, and as Mr. Gray continued to resist, two more officers arrived to assist. Two of the officers then withdrew due to being injured in the altercation. This then accounts for the seven Members facing allegations of use of unnecessary force under s. 77(3)(a)(ii)(A). Other officers became involved after Mr. Gray lost consciousness.

26. Mr. Orris placed this information before me to show the sequence of events in relation to the three groups of officers who attended, indicating that his client, Cst. Cain, was one of the last two Members to arrive and engage with Mr. Gray while he was resisting.

27. Mr. Orris submits this whole matter was a dynamic episode from beginning to end. Various Members attended at different times with some overlap. He made specific references to Cst. Cain's use of force, and submits:

> Assuming this evidence is approximately what will be evidence at this inquiry, it is a simple matter for the PHC [Public Hearing Counsel] to particularize what behaviour of Cst. Cain as outlined in these paragraphs constitutes unnecessary force. Equally, the PHC should be able to particularize how Cst. Cain is an accessory to such use of unnecessary force and to specify the officer using such force to which Cst. Cain is an accessory.

Submissions on behalf of Cst. Thompson in support of the Application

28. Counsel for Cst.Thompson also filed a brief response in support of Cst. Birzneck's Application. In it he referred to some facts regarding his client.

29. Specifically, Cst. Thompson arrived at the scene with Cst. Wong. On the way he heard radio transmissions indicating that Mr. Gray was not complying with police

demands. Based on what Cst. Thompson could hear, he believed that Mr. Gray was experiencing psychosis, and that the officers on scene needed immediate help. When Cst. Thompson arrived, he saw officers engaged with Mr. Gray and that OC spray had been deployed. Cst. Folkestad was injured. The officers were trying to get Mr. Gray into handcuffs and Cst. Thompson applied force to Mr. Gray. Cst. Thompson did not observe that these applications of force had any effect on Mr. Gray, who continued to violently resist. After other officers arrived they were able to get Mr. Gray handcuffed.

30. During this process Cst. Thompson suffered a laceration to his head from a nearby tree. Cst. Thompson called for medical assistance and he grabbed Cst. Folkestad, who was also injured, and they moved towards the street. As they did so, Cst. Thompson saw that Mr. Gray had regained consciousness and again began thrashing violently in the same manner. He heard yelling and chaos at the scene, but he never returned to Mr. Gray's location.

31. Cst. Thompson seeks particulars in relation to his alleged breach of s. 77(3)(a)(ii)(A), in order to know with specificity what he must prepare to respond to at the hearing. At a minimum, he submits that the particulars should indicate what specific use(s) of force employed by him were said to be unnecessary, what conduct of his renders his allegedly unnecessary force "reckless", and against what policing standards – VPD, national, or otherwise, and are Cst. Thompson's reckless use(s) of force alleged to have been unnecessary?

Public Hearing Counsel in Response

32. In his response to the submissions on behalf of Cst. Birzneck and the other Members, Mr. Hickford agreed that it is a fundamental tenet of a fair administrative law process that the person facing jeopardy has the right to know the case against them.

33. He referred to the Notice of Public Hearing, which refers to each of the Members, and states the allegation of abuse of authority by the intentional or reckless application of unnecessary force in the performance or purported performance of their duties contrary to s. 77(3)(a)(ii)(A) of the Act.

34. He then referred to paras. 8 through 13 of the Notice of Public Hearing, particularly para. 11, as follows:

> 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, OC spray, a headlock, vascular neck restraints, a hobble, and handcuffs. The 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.

35. Public Hearing Counsel then referred to the pathologist's report which itemizes and describes 60 separate external injuries that he observed and photographed on Mr. Gray's body. In addition, Mr. Hickford listed nine significant internal injuries, which he says without doubt may be attributed to the Members as a result of the altercation they had with Mr. Gray.

36. Then, Mr. Hickford referred to a statement Cst. Birzneck gave to an investigator in which he lists the uses of force that he applied to Mr. Gray, that range from his presence as a police office, to voice commands to Mr. Gray to get down on his knees or sit down, to displaying an OC canister, to displaying a baton, to spraying him with OC spray in the face, and then moving into strikes, kicks, getting Mr. Gray to the ground, putting him in a bear hug from behind, applying the vascular neck restraint twice, the second application being held until officers confirmed they had handcuffed Mr. Gray.

37. Public Hearing Counsel reviewed a summary of radio calls prepared by the IIO and referred to the fact that approximately one and a half minutes passed from when Cst. Birzneck first engaged with Mr. Gray until he deployed the OC spray in his

face, and Csts. Sahota and Folkestad “went hands on” in an effort to place handcuffs on Mr. Gray.

38. Mr. Hickford indicated that he responded by letter dated August 9, 2025, to Cst. Birzneck’s counsel’s request for particulars dated July 7, 2025. In Mr. Hickford’s submission he provided answers to the questions posed and “they more than adequately” addressed any concerns that Cst. Birzneck could have had with respect to the case he has to prepare to defend against. Mr. HIckford submitted that:

> Surely considering that response, the Notice of Public Hearing, and all the disclosure that I have referenced in the preceding paragraphs, it cannot be said that Cst. Birzneck is being treated unfairly in that the material he has been provided is lacking because it does not contain sufficient particulars to enable him to properly prepare his defence.

39. Mr. Hickford reminded me that prior conclusions or decisions about this matter are irrelevant and should have no bearing on this Public Hearing. He also referred to the fact that the public hearing is a new hearing (s. 143(2)) concerning the conduct of a member or former member, and that the public hearing is not limited to the evidence and issues that were before a discipline authority in a discipline hearing (s. 143(2)).

Police Complaint Commissioner’s Counsel in Response

40. In his Response on behalf of the Commissioner, Mr. Considine referred to part of the Notice of Public Hearing, which included the following at para. 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.

41. Mr. Considine also referred to the further particularization of the allegations against Cst. Bizneck, made in the response (August 9, 2025) by Public Hearing Counsel, to a request for particulars made on behalf of Cst. Birzneck, dated July 7, 2025.

42. Among the authorities Mr. Considine referred is *Gill v. Canada (Attorney General)*, 2006 FC 1106 [*Gill*], which quotes extensively from *Re Golomb and the College of Physicians and Surgeons of Ontario*, (1976) 68 D.L.R. (3d) 25 (Ont. Div. Ct.), and S.A. de Smith, *Judicial Review of Administrative Action* (1959).

43. In *Gill*, an RCMP member was alleged to have breached the RCMP Code of Conduct. The Federal Court Justice considered what sufficient notice ought to contain. Relevant to this Application was "a separate statement of each alleged contravention", and "a statement of the particulars of the act or omission constituting each alleged contravention." In *Gill* the Court stated:

> (4) The statement of particulars contained in the notice is to contain sufficient details, including, if practicable, the place and date of each contravention alleged in the notice, to enable the member who is served with the notice to identify each contravention in order that the member may prepare a response and direct it to the occasion and events indicated in the notice.

44. Referring to *R. v. Sharpe*, 2004 BCSC 241, at paras. 4, 10, and 11, the following principles are stated in relation to the standard of particularization: "each count must provide sufficient details to inform the accused of the charge, but need not set out facts which disclose the Crown theories where there may be more than one way the offence may be made out on the evidence"; "[t]he Crown is not required to disclose its theories through particularization"; and "[t]he Crown must disclose in each count the elements of the offence charged but not the precise acts said to constitute the offence."

45. On behalf of the Commissioner, Mr. Considine's written Response summarizes the notice provided to Cst. Birzneck via the Notice (of Public Hearing) in terms of the allegations alleged, the date, place, and the basic details of how Cst. Birzneck

approached Mr. Gray (along with the other officers) and gave Mr. Gray verbal directions that he did not comply with. Cst. Birzneck deployed OC spray, and then he along with other officers used force to attempt to subdue and handcuff Mr. Gray. This force, applied by various combinations of officers, included punches, kicks, knee strikes, baton strikes, OC spray, a headlock, vascular neck restraints, a hobble, and handcuffs.

46. Mr. Considine also indicated that Cst. Birzneck had also received significant disclosure, which although it did not directly inform him of the allegations against him, should assist him in understanding the evidence that may be presented at the public hearing.

47. Finally, he concluded by reference to s. 143 of the *Act* and the fact that the public hearing is a *de novo* hearing, and its function is to allow the Adjudicator to consider all available evidence pertaining to the allegations to determine whether they are substantiated. Given that particularization here is not in relation to a criminal proceeding, albeit one involving a complex sequence of events involving multiple officers and various applications of force against Mr. Gray, he submits that it is open to me to find that sufficient particulars have been provided.

Analysis and Findings

48. It cannot be disputed that procedural fairness is a fundamental component of the duty to act fairly: *Martineau v. Matsqui Institution*, [1980] 1 SCR 602 [*Martineau*], at p. 631; and *Vento Motorcycles Inc. v. Mexico*, 2025 ONCA 82 [*Vento*].

49. In *Martineau* the Supreme Court's focus was whether natural justice and fairness could be integrated into a broader duty to act fairly, which determined the jurisdiction for *certiorari* in relation to s. 18 and s. 28 of the *Federal Court Act*, decided in the context of prison discipline hearings. Dickson J., writing for Laskin CJC and McIntryre J., stated:

> 8. In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person

> claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and with fairness. [Emphasis added.]

50. Moving ahead 45 years, procedural fairness in Canada is robust, as can be seen in the judgment of Huscroft JA, in *Vento*, (concurred in by Trotter, JA and Dawe JA), where the issue was an allegation of bias on behalf of the representative of Mexico to the tribunal, established under the North American Free Trade Agreement:

> [25] Depending on the nature of the proceedings and the decision to be made, and taking into account the procedural choices of the decision maker, a fair hearing may require relatively minimal procedural protection. But it may also require something much more substantial, approximating the protections accorded in a judicial proceeding including disclosure, a right to counsel, an oral hearing and, ultimately, a decision with reasons. See *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817. The requirements of a fair hearing are tailored not only to protect litigants' interests but also to ensure that those subject to state authority are treated with respect. Thus, a failure to provide a fair hearing may be caused by procedural defects that are relatively minor in nature, or by more significant defects that affect the substantive decision reached.
>
> [29] The common law has historically been strict in response to a breach of procedural rights. A failure to provide a fair hearing has resulted in the quashing of the substantive decision, regardless of the result that might otherwise have [been] obtained. It has never been necessary for an applicant seeking relief to establish that the outcome of the relevant decision would – or even might – have been different but for the unfair hearing procedure. Procedural fairness is "an independent, unqualified right" rooted "in the sense of procedural justice which any person affected by an administrative decision is entitled to have"; courts may not "deny that right and sense of justice on the basis of speculation as to what the result might have been": *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 661. [Emphasis added.]

51. Next, I move to procedural fairness decisions in which the party facing penalty, discipline, or sanction, has a long-standing and clearly articulated right to know the case alleged against them. I have already referred to the authorities provided by counsel for Cst. Birzneck in support of their application for particulars on his behalf

and on behalf of the other Members. Some authorities are recent and some are not. I take them into consideration.

52. In a recent and comprehensive decision, I note the governing principles related to procedural fairness in the context of professional employment were clearly expressed by Masuhara J. in *Whieldon v. British Columbia College of Nurses and Midwives*, 2021 BCSC 1648 [*Whieldon*]. The case was a judicial review of the decision of the BC College of Nurses and Midwives regarding a citation of Ms. Whieldon, who was a perinatal nurse whose administration of oxytocin to newborn infants was found not to meet required protocols.

53. Justice Masuhara pointed out at para. 37 "Judicial review of whether the duty of procedural fairness has been met by an administrative decision-maker involves an application of the correctness standard."

54. Masuhara J. summarized the law as follows:

> [38] As further stated in *Vavilov* at para. 133, the decision-maker must afford "greater procedural protection when the decision in question involves the potential for significant personal impact or harm", such as "decisions with consequences that threaten an individual's . . . dignity or livelihood". The inclusion of the term "livelihood" clearly implicates professional disciplinary panels. The particular salience of the duty and goals of procedural fairness to administrative hearings involving employment and professional misconduct was recognized in *Kane v. Board of Governors of University of British Columbia*, [1980] 1 S.C.R. 1105 at 1113.
>
> [39] The duty of procedural fairness includes the principle of *audi alteram partem*, which requires that individuals be made aware of the case against them. It also includes a requirement to sufficiently specify, in unambiguous language, any charges of professional misconduct such that their target has meaningful opportunity to respond to them: *Donegan v. Association of Professional Engineers and Geoscientists of British*

> *Columbia*, 2001 BCSC 1448 at paras. 36, 41-44 [*Donegan*]; *MacLeod v. Alberta College of Social Workers*, 2018 ABCA 13 at paras. 24, 28 [*MacLeod*]. These charges are to be communicated to the respondent by the citation. The burden is on the professional association to prove the charges on the balance of probabilities. [Emphasis added.]

In Ms. Whieldon's circumstances Masuhara J. found:

> [60] The circumstances of this professional disciplinary process give rise to an elevated duty of procedural fairness. Considering the relevant factors from *Baker,* I find that: (i) the hearing before the Panel was quasi-judicial; (ii) the decision seriously impacted the petitioner's professional (and almost certainly personal) life by implicating her livelihood and issues of self-worth and dignity bound up in her employment; and (iii) given the foregoing, the petitioner had an elevated expectation of procedural fairness, that certainly extends to proper construal of the charges levied against her.
>
> [61] As noted above, the duty of procedural fairness includes a requirement to notify the respondent of the particulars of the case against them. This includes the specific content of the charges against them. This requirement is vital. [Emphasis added.]

55. Proper and fulsome notice to the Members of the nature of the force used and how it may be characterized as "unnecessary" is of vital importance here. The outcome of this Public Hearing for each of the Members is of critical importance to their lives and livelihoods. Long-standing careers may be in jeopardy. The public nature of these proceedings underscores the profound effect these proceedings may have on the health, reputation and personal dignity of each of the Members. This was a highly publicized and tragic incident, and there is every reason to believe that the evidence at this Public Hearing and its outcome will also be highly publicized. Suffice to say that rare is the skilled professional who has their competency and integrity challenged in a public forum.

56. The question here, and the disagreement between the parties, is whether the allegations as set out in the Notice of Public Hearing sufficiently specify the allegations of misconduct such that the requirements of procedural fairness are satisfied.

57. Comparisons with criminal applications for further and better particulars do not particularly assist, as to a large extent particulars in criminal cases have been replaced by disclosure. The test to be met by the Crown for proper disclosure in *R. v. Stinchcombe*, [1991] 3 SCR 326, is an onerous one, which if not met may result in *Charter* relief for the accused.

58. I have considered *Sharpe* (a criminal case with one accused and one alleged victim, and three offences relating to sexual matters), which was referred to by counsel for the Commissioner. In that case Edwards J. stated at para. 4, “each count must provide sufficient details to inform the accused of the charge, but need not set out the facts which disclose the Crown theories where there may be more than one way the offence may be made out”.

59. In my view this case may be distinguished on its facts and how different a criminal trial and a public hearing alleging professional misconduct are. The “counts” here, if one may call them that - seven of them – all the same, in relation to seven people regarding the same incident, each of them doing different things and assessing the situation as occurred - clearly do not “provide sufficient details to inform” each person of their alleged misconduct. I do not view what is being sought as a theory. The misconduct alleged is generic. The criminal offences as alleged in *Sharpe* were not. Therefore, whether the trial court decision in Sharpe stands for a general principle of law, or merely an application of general principles to the facts, it is distinguishable from the facts before me.

60. In the present case there are certain facts about which there can be no doubt that suffice as basic particulars. There can be no doubt that the allegations refer to the interaction between the Members and Mr. Gray, on August 13, 2015, at an address

in in Vancouver, close to the border with Burnaby, and at a location in Burnaby, both in the Province of British Columbia, that resulted in significant injuries to Mr. Gray, who died at the scene. The actual struggle between various Members and Mr. Gray is estimated to have lasted for about six minutes (with further dealings with other officers and several of the Members once Mr. Gray had been subdued and went into medical distress). Therefore, it was relatively short.

61. The Members have been through two separate, thorough investigations, an in-depth review of their involvement by Crown Counsel, and then the investigation process and the Discipline Proceedings under the *Act*. I have included a summary of those events, not to dwell on their outcomes, but to show that nothing was added along the way to the allegations of use of unnecessary force to identify individual Members' roles or acts.

62. I understand in preparation for this Public Hearing, the Members' counsel have received comprehensive disclosure that includes materials from both prior investigations, and from other sources. However, that disclosure does not further information as to what each of the Members is alleged to have done, among their many actions and responses, that may constitute the misconduct alleged. A different use-of-force expert has been recently retained and in early November provided his report to Public Hearing Counsel, who in turn has provided it to counsel for the Members.

63. Given all that has gone before, at this point, one may very reasonably ask what could possibly be left to include in particulars?

64. The answer to this question lies in the very wording of s. 77(3)(a)(ii)(A), which when combined with the nature of this intense, multi-officer interaction with Mr. Gray where almost every conceivable type of force they had at their disposal (other than use of a firearm) was used in their effort to detain or arrest Mr. Gray over a very brief period of time. Different Members did different things at different times during the incident to attempt to control Mr. Gray. The interaction was fast and complex

and the situation was highly dynamic. There were and are no witnesses to the altercation with Mr. Gray, other than the Members themselves.

65. The answer to this question is made more complicated by the fact that "force" refers to a continuum between a verbal command at one end, and lethal force at the other, compounded by the fact that different Members, used different methods of force against Mr. Gray, at different times. The interaction between Mr. Gray and the Members appears to have been fast, chaotic and fluid.

66. I appreciate that to particularize this type of misconduct in these circumstances is no easy task. Unlike in many of the cases cited, there is no requirement in the *Act* for a citation to be issued that typically describes more fully the alleged misconduct. However, in this case each Member seeks to know what act or actions of theirs constituted the force that is alleged to be unnecessary. This request is reasonable and supported by the legal authority to which I have referred.

67. Therefore, for example, and without making any finding in this regard, it is possible the force used early in the interaction was reasonable and that subsequent force may amount to misconduct.

68. On the other hand, the force used at the outset may have been unnecessary if the first three of the Members who approached Mr. Gray and sought to detain him did not have lawful grounds to do so.

69. Or Public Hearing Counsel may take the position that every application of force, by each of the Members, throughout the engagement with Mr. Gray amounts to misconduct. If that is the case, particulars could be easily provided or arguably may not be required at all, because every use of force, whether a verbal command at the lower end of the spectrum, or the use of a vascular neck restraint towards the top end, may amount to unnecessary force.

70. If, however, the position of Public Hearing Counsel is that not every use of force by every member constitutes misconduct, a line must be drawn between that which is permissible and that which is alleged to constitute misconduct, in order that each of the Members know, in advance, what he or she is defending against. This might be expressed through reference to a point in time. For example, if particularized, an allegation might state: The member engaged in misconduct through excessive use force through all and any uses of force against Mr. Gray after a particular point in time. That point in time might differ as between the members. Or this might be expressed through reference to the specific uses of force each member is alleged to have used, and which are alleged to constitute the misconduct.

71. In my view, it is also important for the first three of the Members, Cst. Birzneck, Folkestad, and Sahota, to be advised whether the fact that they approached Mr. Gray and sought to detain him is considered lawful or unlawful in terms of grounds to arrest or detain him. That has considerable impact on the force they were entitled to use, such that any force may be characterized as unnecessary. Given the investigations into this matter and the statements provided it is likely that matter could be particularized.

Conclusion

71. For these reasons, and to answer the precise question, I am satisfied that further particulars are needed to uphold the procedural fairness which is due to the Members in these proceedings. In these reasons I have suggested ways in which this might be done, but I leave it to Public Hearing Counsel to draft as he sees fit, in keeping with these reasons.

72. I hasten to add that despite my preference for particulars to be issued as indicated by my comments in Memorandum No. 3 to Counsel, during the hearing of this application and since, I have carefully considered the submissions that do not support the issuance of particulars as I am aware of the potential pitfalls that may arise. However, based on the authorities cited to me and the authorities I

have referred to, the facts as alleged, and considering all the circumstances of this matter in view of the upcoming public hearing, I have determined that to not order particulars in these circumstances would be an error such that it outweighs the potential pitfalls of declining to do so. During the written submissions or the hearing of this Application none of the counsel have raised any objection based on jurisdiction that would prevent me from considering and ruling upon this Application.

73. I fully appreciate, pursuant to s. 143(2) and (3), that a public hearing is a new hearing regarding the conduct of a member or former member, and is not limited to the evidence and issues that were before a discipline authority in a discipline hearing. Section 143(6)(a) provides that an adjudicator "may receive and accept information that the adjudicator considers relevant, necessary and appropriate…" In the unusual circumstances of this matter, which are not limited to its age, apparent complexity, and tragic outcome, further particulars will assist with my determinations regarding relevance.

74. I appreciate too that this Public Hearing is very important for the reasons articulated by the Commissioner in the Notice of Public Hearing. He decided that it is necessary in the public interest for a retired judge to conduct a public hearing to carefully examine the available evidence, including *viva voce* (live) testimony of witnesses subject to cross-examination, in order to determine whether any of the Members engaged in misconduct when dealing with Mr. Gray, who tragically died at the scene. It must, also be a fair hearing for the Members whose conduct will be scrutinized and analyzed.

Dated at the City of Kelowna, British Columbia, this 10th day of December, 2025

Elizabeth A. Arnold-Bailey

The Honourable Elizabeth A. Arnold-Bailey (BCSC Ret'd)

Adjudicator