

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 APPLICATIONS FOR PARTICIPANT STATUS**

(Made by MARGARET GRAY, the CHIEF CONSTABLE OF THE VANCOUVER  
POLICE DEPARTMENT,  
and the BC CIVIL LIBERTIES ASSOCIATION)

Public Hearing Counsel:	Bradley Hickford
Commission Counsel:	Christopher Considine KC
Counsel for Ms. Gray:	Ian Donaldson KC
Counsel for Chief Constable VPD:	David T. McKnight
Counsel for BC Civil Liberties Assoc.:	Aislin Jackson, Meghan McDermott
Counsel for Cst. Folkestad:	Christine Joseph
Counsel for Cst. Birzneck:	Michael Shirreff, Greg Cavouras
Counsel for Cst. Cain:	Glen Orris KC
Counsel for Cst. Wong:	Kevin Westell
Counsel for Cst. Spencer:	Claire Hatcher
Counsel for Cst. Sahota:	Brad Kielmann

Counsel for Cst. Thompson:

Scott R. Wright

Adjudicator's Counsel:

Greg DelBigio KC

### **Introduction**

1. On December 11, 2024, Mr. Rajan, the BC Police Complaint Commissioner, in the Notice of Public Hearing, directed a public hearing take place to inquire into the circumstances surrounding the death of 33-year-old Myles Gray, who died after police constables of the Vancouver Police Department used force to subdue and restrain him. The Commissioner found that a public hearing “is necessary in the public interest”, in accord with s. 138(1) of the *Police Act* [R.S.B.C. 1996] c. 367 [the *Act*], having had regard for all relevant factors, including those listed in s. 138(2). As it will be the subject of the public hearing, the description of events leading to Mr. Gray’s death are intentionally brief and, in offering this brief description, I of course make no judgment whatsoever about what exactly occurred or why.
2. The two issues I am to decide at this time, well prior to the commencement of the public inquiry on January 19, 2026, are: which of the applicants named above may be granted participant status at the Public Hearing (in addition to those specified by the *Act*. And, if a party is permitted to participate, are there any terms appropriate to define or limit their participation?
3. The applicants for participant status pursuant to s. 144(1) are: 1) Margaret Sheila Gray, the mother of Myles Gray; 2) the Chief Constable of the Vancouver Police Department [VPD]; and 3) the British Columbia Civil Liberties Association [BCCLA]. Each applicant has filed a detailed application with affidavit material and referred to legal authorities in support.
4. In addition, Responses were filed by Public Hearing Counsel, Commission Counsel, and on behalf of Cst. Cain. The BCCLA filed a Reply. I have read and carefully considered all these materials.

### **Brief Background**

5. The incident at issue occurred during the afternoon of August 13, 2015, when Myles Gray was observed to be behaving erratically, and causing a disturbance in a residential neighbourhood in Burnaby, BC. This resulted in a man making a call to 9-1-1.
6. One VPD police officer responded to the call and, after dealing briefly with Mr. Gray, she called for police backup. Additional officers arrived at the scene. The police decided to arrest Mr. Gray. A physical struggle took place between Mr. Gray and the seven VPD police officers who attended.
7. These seven police officers face allegations of misconduct under the *Act* at this Public Inquiry. They are VPD Constables Kory Folkestad, Eric Birzneck, Derek Cain, Josh Wong, Beau Spencer, Hardeep Sahota, and Nick Thompson, to whom I will refer collectively as the “Members”.
8. The Members restrained Mr. Gray, and he became unconscious. Soon thereafter, he was pronounced dead at the scene. Other than the VPD members themselves, there were no witnesses to the physical struggle between Mr. Gray and the VPD Members. There is no video footage of the incident.
9. In the Notice of Public Hearing the Commissioner commented on a number of matters relevant to his decision to order a public hearing related to this incident.
10. This included reference to the investigation carried out by the Independent Investigation Office [IIO], which is an independent office required by law to investigate incidents when a police officer is at the scene of an incident and it appears a person may have died or suffered serious harm as a result of the actions of the officer, or if it appears that an officer may have broken the law. After a lengthy investigation, the IIO concluded that there were reasonable grounds to believe that the officers may have committed criminal offences and

submitted their file for charge assessment to the BC Prosecution Service on March 1, 2019.

11. Next, on December 16, 2020, after further consultation with the IIO, the reception of additional evidence, and further review and consideration of the available evidence, the BC Prosecution Service determined the charging standard for the laying of criminal charges against any of the Members had not been met, and therefore the Crown would not be laying any criminal charges against any of the Members regarding their interaction with Mr. Gray.
12. Between April 17 and May 1, 2023, a coroner's inquest into Mr. Gray's death took place. His death was ruled to be a "homicide", and a detailed "Medical Cause of Death" was set out, reflecting aspects of the deceased's state of mind, physical condition, and the injuries noted on his body, in the context of specific actions and forms of restraint attributed to the Members' actions.
13. The *Act* requires police discipline proceedings against a member be held in abeyance until the issue of criminal charges has been settled, or the prosecutions have been completed. Therefore, after the BCPS had determined that criminal charges would not be proceeded with by the Crown against the Members in this case, the police complaint process under the *Act* was engaged and discipline proceedings took place.
14. The allegations of misconduct considered in the disciplinary proceedings were that:
  - 1) the Members abused their authority in the performance of their duties by intentionally or recklessly using unnecessary force on Mr. Gray (contrary to s. 77(3)(a)(ii)(A) of the *Act*); and
  - 2) Six of the seven Members neglected their duty by failing to make or furnish notes and/or the required reports in a timely way regarding their dealings with Mr. Gray (contrary to s. 77(3)(m)(ii) of the *Act*).

15. Among the reasons articulated by the Commissioner for ordering a public hearing in this case were aspects of the findings of the Disciplinary Authority released on October 7, 2024. The Commissioner noted that the Disciplinary Authority referred to several difficulties he saw with how the *Act* operated, including the inability to test the evidence given by the Members who did give evidence by cross-examination; the lack of evidence; and certain discrepancies and inconsistencies in the evidence. The end result was the Disciplinary Authority dismissed all the allegations of misconduct against the Members, based on a lack of reliable evidence, remarking “My point is that I will never know”.
16. The Commissioner, in ordering a public hearing in this case, stressed the importance of a full and fair public hearing to address the issue of use of force in this case. He clearly articulated his concerns regarding the note-taking issue, and the effect of contemporaneous notes and reports not being made by members involved in incidents such as this, and therefore not being available to assist memories that fade with the passage of time (Notice of Public Hearing, at p.8). He underscored the need for this Public Hearing in order that the public knows “that the best available evidence has been gathered, tested, and considered before a final decision is made.” Otherwise, he stated “public confidence in policing, the handling of complaints, and the disciplinary process would be undermined.”
17. Once again, it is imperative that I emphasize that previous proceedings or decisions made by the Commissioner are not determinative of the outcome of this hearing and will not influence my decision in any way. However, for the sake of these applications, I consider the allegations to be the same, or substantially the same, as those previously ruled on by the Disciplinary Authority and referred to in the Notice of Public Hearing.

## **Relevant Sections of the Act**

18. Subsection 144(2) sets out the factors that an adjudicator is to consider regarding applications for participation:

- On receiving an application under subsection (1), an adjudicator may accept the applicant as a participant after considering all of the following:
- (a) whether, and to what extent, the person's interests may be affected by the findings of the adjudicator;
  - (b) whether the person's participation would further the conduct of the public hearing;
  - (c) whether the person's participation would contribute to the fairness of the public hearing.

19. The *Act* permits the adjudicator to address the level of participation in accordance with the factors to consider in s. 144(2). Section 145 states:

- (1) Subject to section 146 [rights of participants to counsel, immunities, protection against incrimination or liability in other proceedings], an adjudicator of a public hearing may make orders respecting
  - (a) the manner and extent of a participant's participation,
  - (b) the rights and responsibilities, if any, of a participant, and
  - (c) any limits or conditions on a participant's participation.
- (2) In making an order under subsection (1), the adjudicator may
  - (a) make different orders for different participants or classes of participants, and
  - (b) waive or modify one or more of the adjudicator's orders as necessary.

### **1. The Application of Margaret Sheila Gray**

20. Ms. Gray, the mother of Myles Gray, seeks to be a participant in this public hearing. She is represented by Ian Donaldson KC. Through her counsel, at this time she is only asking that she be provided with full disclosure in the normal course of any materials the parties intend to rely on at the hearing. She also asks that any further extent of her participation be determined later, before or during the hearing.

21. In her Affidavit, sworn February 14, 2025, Ms. Gray sets out her efforts over many years and in different forums (civil lawsuit commenced, the investigation by the IIO, the review by the BCPS, the police discipline proceedings under the *Act*, and at the inquest) to determine how it was that the force used by the Members that resulted in the death of her 33 year old son, Myles, was not unnecessary and excessive. It is clear that even after 10 years this coming August Ms. Gray remains firmly resolved to find out, to the greatest degree possible, how it was that her son died as a result of his interaction with the Members. She referred to the great loss and sadness caused to her and her family by Myles' death and the circumstances of it.
22. Ms. Gray is also motivated to find out what may be done to prevent other families in the future from suffering the pain and loss caused by the death of a beloved family member in similar circumstances.
23. It is also clear that with disclosure from the coroner and the able assistance of Mr. Donaldson, she was able to introduce evidence as to the immediate cause of Myles' death that had considerable impact on the findings at the inquest.
24. In considering the factors set out in s. 144(2), I find that Ms. Gray's application meets all three of the considerations listed there. Her interests and those of her family will most certainly be affected by the findings I make in this case. I also find, looking at the inquest and the effect that evidence and representations on her behalf had in that forum, that her participation would likely further the conduct of the Public Hearing. And finally, her participation on behalf of the deceased's family is important in this case and is likely to significantly contribute to the fairness of the Public Hearing.
25. For these reasons, I find it appropriate to grant her participant status pursuant to s. 144, and I grant the relief sought in her application.

26. In particular, pursuant to s. 145, I direct that full disclosure is to be made by the Public Hearing Counsel to her counsel, and through her counsel to her, of any materials the parties intend to rely on at the upcoming Public Hearing.
27. Given the sensitive nature of these materials and taking into account the comments of Commission Counsel in his Reply, any and all of the materials to be disclosed pursuant to this order are to be on the terms of an undertaking as agreed upon between counsel. In the event that counsel are unable to settle the terms of the undertaking, they may make further submissions to me in such form as they agree or I direct.
28. As requested, Ms. Gray may make further applications to seek changes or expansion of the extent of her participation later, before or during the hearing, also pursuant to s. 145.

## **2. The Application of the Office of the Chief Constable of the VPD**

29. The Office of the Chief Constable of the VPD also seeks participant status in this matter. Specifically, the Chief Constable seeks participant status pursuant to s. 144, and full disclosure in the normal course of any materials the parties intend to rely on at the hearing pursuant to s. 145.
30. The Chief Constable also seeks permission to examine and cross-examine witnesses and lead evidence on issues relating to the VPD's training, policies, and procedures, which is within the range of orders permitted under s. 145(1)(a) and (c).
31. The issue of "standing" has been clearly considered, and in my respectful view, wisely and concisely dealt with by my learned colleague, Adjudicator Baird Ellan KC.
32. In *Re Ludeman and Logan* (s. 144 Application), PH2019-01 (10 March 2020) she held:



[23] As to who is the “person” who will participate under Section 144, in practicality, I expect that in addition to Counsel for the Chief Constable, representatives of the department who are responsible for training and the interpretation of policy and practice will attend and monitor the evidence at the hearing, and instruct counsel. Certainly it is not contemplated that the Chief Constable himself will attend. While legally the Vancouver Police Department is a sub-entity of the City of Vancouver, it is convenient to refer to it as the “department” as if it were an entity, as is done in many places in the Police Act [eg. Section 77(1)(h)]. I do not find it necessary to decide in this case whether the department itself has status as a “person” to request participation under Section 144, since the application in this case has been made by the Chief Constable. [...]

33. I too, am of the view that the Chief Constable may delegate his responsibilities at this Public Hearing to those within the VPD with expertise and experience regarding the VPD’s training, policies and procedures.

34. I note that Public Hearing Counsel and the Commissioner’s Counsel do not object to the Chief Constable of the VPD seeking participant status, disclosure, and the ability to examine and cross-examine witnesses, and to put documents to witnesses and lead evidence on issues related to the VPD’s training, policies, and procedures. Nor have counsel for the Members raised any objections.

35. Assessing the Chief Constable’s application in relation to the factors I am to consider set out in s. 144(2), it is clear that the Chief Constable of the VPD or his designates have a significant interest in the issue of the training, policies, and procedures with regard to its members. The participation of counsel on behalf of the Chief Counsel will “further the conduct of the public hearing.” Similarly, their participation will contribute to the fairness of the public hearing, most particularly in relation to the part of the Adjudicator’s task pertaining to making recommendations to the Chief Constable and/or the members of the Vancouver Police Board. Given that s. 143(9)(c) states an adjudicator at a public hearing “must” recommend to chief constable or the board of a municipal police department “any changes in policy and practice that the adjudicator

considers advisable in respect of the matter”, I find this circumscribed role for the Chief Constable of the VPD, in this case will advance that aspect of the proceedings.

36. That said, I will not permit the focus of the hearing to be diverted to the issue of the VPD’s training, policies, and procedures at the expense of obscuring the other important tasks I am obliged to fulfil. They are as set out in s. 143(9)(a) and (b): to decide whether any misconduct has been proven against these Members, and if so, to determine the appropriate disciplinary or corrective measures to be taken.
37. The extent of cross-examination, particularly of any of the Members who chose to give evidence, the issue of which documents may be put to witnesses, and the witnesses counsel wishes to call on behalf of the Chief Constable, will be carefully scrutinized by me to ensure that the hearing remains properly focused on the issues I am required to determine, and to ensure that the hearing remains fair to the Members against whom the allegations are made. However, these issues will be addressed after disclosure has been made to counsel for the Chief Constable.
38. Therefore, the orders sought in paras. 1, 2, and 3 of the Chief Constable’s application are granted.
39. It is my view that an undertaking should be entered into in relation to the disclosure provided to Mr. McKnight and his client. In the interests of fairness to all, it is most important that the disclosure materials remain closely held at this time. As I have found with respect to Ms. Gray, counsel may address this and come to suitable terms for an undertaking or may seek my assistance to settle them.

### **3. The Application of the BC Civil Liberties Assoc.**

40. In its application the BCCLA seeks participant status pursuant to s. 144 of the *Act*. As a participant the BCCLA seeks to be able to cross-examine witnesses, receive full disclosure in the normal course of any materials the participants intend to rely on at the hearing, to file written submissions and to present oral argument pursuant to s. 145. In the alternative, the BCCLA seeks participant status, with the extent of its participation to be determined at the Public Hearing.
41. I have read materials and submissions filed on behalf of the BCCLA. I note that the issues upon which they seek to make submissions are likely to be the main issues at this public hearing: whether the degree of physical force used was appropriate and what legal test should be applied to assess its appropriateness; whether and to what extent police officers are required to make timely notes after their involvement in use-of-force events resulting in death; and the appropriate use and disclosure of officer notes about events that result in the death of a member of the public. Indeed, these matters go directly to the two allegations of misconduct that appear to be issues at the Public Inquiry. In my view, however, that is not determinative of whether they ought to be granted participant status at this time. Identifying the likely issues is not the only consideration when assessing an application for participant status under s. 144.
42. In his Response Mr. Hickford, Public Hearing Counsel, stated his opposition to the BCCLA having any form of participant status or receiving disclosure. Mr. Orris KC, counsel for Member Cain, similarly stated his opposition on behalf of his client.
43. Mr. Hickford's main objection rests on the BCCLA's position that they are deeply involved in issues of law enforcement oversight and that they have concerns with the issue of lack of note taking. When it was stated on behalf of

the BCCLA that “it is in the public interest to get clarity on these matters”, Mr. Hickford submitted that is the role of the Office of the Police Complaints Commissioner [OPCC], which has been legislated through the Police Act to address those issues. Thus, his objection is that the involvement of the BCCLA in relation to the live issues in the upcoming Public Hearing would be a duplication of what the OPCC is mandated to do.

44. In addressing the strength of their interest in these issues at para. 13 of their application, counsel for the BCCLA admits that their interest is an indirect one, as opposed to a direct one, but is significant nonetheless. Their interest in police oversight “lies at the core of its purpose”. The BCCLA seeks to address any flaw in the process as those flaws may undermine the public’s confidence. In other words, the BCCLA wants to make sure that the Public Hearing is done properly. Mr. Hickford submits that the BCCLA does not have any mandate or authority to fill that role.

45. Commission Counsel, Mr. Considine, takes a different approach. While the OPCC does not oppose the application of the BCCLA for participant status, he notes that the public hearing process under the Police Act is designed to be a fair and open process, in the service of the public interest. He then lists various things that should well serve the public interest at the Public Hearing: including an experienced and independent adjudicator; the involvement of many senior counsel for the Members and in other roles; participation on behalf of Ms. Gray and the family (if her application is granted); participation by the Chief Constable of the VPD on the terms sought (if granted); and that the Public Hearing will be open to the public and media to attend. I understand his point is that it may not be necessary in this case to grant the BCCLA participant status.

46. In determining whether to grant the BCCLA participant status, I have considered all the factors listed in s. 144(2).

47. First, with regard to “whether, and to what extent, the person’s interests may be affected by the findings of the adjudicator”, while I have no trouble accepting that the BCCLA does and has done much to highlight potential and actual violations of civil liberties and has worked in many forums to alleviate such abuses in BC and elsewhere, I find I am unable at this time that this elevates the interests of this society and its members to a level commensurate with the level of participation sought in this application.
48. Second, I am not satisfied at this time that the participation of the BCCLA “would further the conduct” of this Public Hearing. Until the Public Hearing is underway, and I have heard a significant body of evidence, it is quite simply not a determination I am able to make. At that time, I will be able to assess the degree to which their participation “would further the conduct of the public hearing”.
49. As to whether the BCCLA’s “participation would contribute to the fairness of the public hearing”, this too is not something I cannot properly assess until the hearing is underway.
50. Therefore, I am not prepared to grant the BCCLA participant status in the Public Hearing at this time. However, I stress that the upcoming Public Hearing will be open to the public. I encourage representatives of the BCCLA to attend and maintain a “watching brief”.
51. I am also prepared to hear a further application by the BCCLA for limited participation at a later date, once sufficient evidence has been heard.

### **Summary of Findings**

52. Therefore, my findings in relation to these applications for participant status at the Public Inquiry are as follows:

1. Margaret Sheila Gray is granted participant status pursuant to s. 144 and is entitled to be provided with full disclosure, in the normal course, of any materials the parties intend to rely on at the hearing pursuant to s. 145. The extent of her participation at the hearing will be determined later, before or during the hearing. An undertaking between counsel is required to safeguard the sensitive nature of these materials prior to production in the course of the Public Hearing. If counsel cannot agree on the terms of the undertaking they are to seek my assistance.
2. The Office of the Chief Constable is granted participant status pursuant to s. 144 and is entitled to be provided with full disclosure, in the normal course, of any materials the parties intend to rely on at the hearing. The Chief Constable, through counsel, is permitted to examine and cross-examine witnesses, put documents to witnesses, and lead evidence on issues relating to the VPD's training, policies, and procedures.
3. The orders sought in the application of the BCCLA are denied, with a direction that they are at liberty to re-apply after a significant body of evidence has been heard.

Dated at the City of Kelowna, British Columbia, this 4<sup>th</sup> day of April, 2025

Elizabeth A. Arnold-Bailey

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

Adjudicator