

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 THE BRITISH COLUMBIA  
POLICE ASSOCIATION FOR LIMITED PARTICIPANT STATUS**

Counsel for the Applicant, BC Police Association:	M. Kevin Woodall
Public Hearing Counsel:	Bradley Hickford
Commission Counsel:	Christopher Considine KC
Counsel for Ms. Gray:	Ian Donaldson KC
Counsel for Cst. Folkestad:	Christine Joseph
Counsel for Cst. Birzneck:	Michael Shirreff, Greg Cavouras
Cst. Cain:	In Person
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
Counsel for Chief Constable VPD:	David T. McKnight, Naomi Krueger
Adjudicator's Counsel:	Greg DelBigio KC

## Introduction

1. This is an unopposed application brought on behalf of the British Columbia Police Association, pursuant to s. 144 of the *Police Act* [R.S.B.C. 1996] c. 367 [the *Act*], for limited participation status in the Public Hearing directed by the BC Police Complaint Commissioner to inquire into the circumstances surrounding the death of 33-year-old Myles Gray. Mr. Gray died on August 13, 2015, after being apprehended by the seven police constables of the Vancouver Police Department [VPD] named above.
2. As it will be the subject of the Public Hearing, an intentionally brief description of events leading to Mr. Gray's death is contained in my previous ruling dated April 4, 2025, regarding the participation applications of other parties. I will not repeat it here. Having heard no evidence I express no views and make judgment whatsoever about what exactly occurred or why.
3. The issue I am to decide here is whether the limited participation sought by the BC Police Association [the Applicant] meets the statutory test set out in s. 144(2) of the *Act*.

## The Application

4. The Applicant seeks to participate in a limited way in the Public Hearing scheduled to commence on January 19, 2026. Specifically, the Applicant seeks to have counsel make written submissions on the following legal issues:
  - i. The scope and timing of the police officers' duty to prepare notes and statements when they are, or likely to be under criminal investigation, as a result of their use of force;
  - ii. When police officers prepare notes or statements as described above, the logistical and procedural steps that must be taken to ensure that the officers' common law and *Charter* rights are not infringed;

- iii. Whether, and to what extent, the “parties rule” applicable in criminal prosecutions applies to the allegations in which several officers have used force in common against an individual or individuals; and
  - iv. Recommendations that the Adjudicator may consider making pursuant to s. 143(9) of the *Act*.
- 5. Counsel for the Applicant also seeks to make oral submissions not to exceed one hour on the issues set out above, and to leave to apply to make submissions on further legal issues that may arise during the Public Hearing.
- 6. The Applicant does not seek to participate during the hearing of evidence. Nor does it, if leave is granted, seek to make submissions on the merits of the allegations. The Applicant also does not seek to receive disclosure or to participate in the case management conferences currently underway. If leave to participate on the terms sought is granted, the Applicant will accept whatever deadlines are agreed to by the parties or ordered by the Adjudicator.

#### **About the Applicant and the Participation Sought**

- 7. The Applicant is an association comprised of all the unions and associations that represent all the municipal police officers in the province below the rank of Inspector. At present, it represents about 3,000 police officers.
- 8. It is submitted on their behalf that the law concerning the rights and obligations of police officers to prepare notes, and their duty to account in statements and reports about on-duty events when they are under criminal investigation for their conduct in those same events, is presently under active consideration and development in BC. It is further submitted that the findings of law made by the Adjudicator in this case are likely to have a considerable impact on the development of this area of law.

9. In his written submission counsel for the Applicant also pointed out the recognized duties of police officers sometimes come into conflict:

Police officers are often called upon to use force in situations where officers arrive at the scene where an altercation is already in process [sic.]. Police officers have duties to assist fellow officers, and they have duties to prevent and control breaches of the peace. At the same time, police officers have a duty to prevent conduct by fellow police officers that is clearly criminal in nature. The interchange between these duties has been the subject of comment in criminal and quasi-criminal cases, but it is nevertheless a complex area that is under continual development.

10. As such, their counsel submits that municipal police officers in BC who are represented by the Applicant “have a professional and personal interest in the legal rules that may develop, in whole or in part, from the decisions of the Adjudicator in this case.”

### **The Statutory Test**

11. Section 144 of the *Act* states that:

(2) 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) 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.

12. Section 145 permits an adjudicator of a public hearing to specify the manner and extent of a participant’s participation, their rights and responsibilities as a participant, and to place any limits or conditions on a participant’s participation. It also permits an adjudicator to make different types of orders for different participants.

### **Findings in relation to this Application**

13. Given the allegations of misconduct facing the Members at the upcoming Public Hearing, I find that the interests of the municipal police officers represented by the Applicant may well be affected by findings I am obliged to make. Therefore, the factor to be considered in s. 144(2)(a) is answered in the affirmative.
14. Without making any findings, it may be observed that there may be a tension, or conflict between the legal or professional duties that might rest upon a police officer to make notes and complete reports, and the right against self-incrimination that a police officer who is under investigation might have or the extent of that right. As I understand it, the extent of those rights or duties, the balance between them, and the application of those rights and duties to this particular case will be something I will be required to decide.
15. The perspective offered by the Applicant on this difficult issue appears to be a unique and important one insofar as it claims experience with this issue and has no direct interest in the factual findings required to be made at the Public Hearing. It may assist when I am called upon to consider legal issues relevant to findings as to the alleged misconduct and when I am considering recommendations as to policy or practice. Nor would it unduly complicate or lengthen the proceedings. Therefore, I find that the Applicant's participation at the level sought is likely to further the conduct of the Public Hearing and satisfies the factor to be considered in s. 144(2)(b).
16. Lastly, counsel for the Applicant submits as I may make recommendations that would directly impact the Police Board of the VPD, the Chief Constable, the police officers of the VPD, and potentially the interests of all municipal police officers in BC, it enhances the fairness of the Public Hearing to grant the Applicant an opportunity to be heard on these issues. I accept that is so.

17. Therefore, the last factor to be considered in s. 144(2)(c) is also answered in the affirmative.

### **Conclusion and Orders**

18. Having reviewed the factors to be considered as set out in s. 144(2) of the *Act* and having concluded that the participation sought by the Applicant meets those factors, I grant the Applicant limited participant status in the upcoming Public Hearing on the exact terms as sought, except for one item.

19. Regarding the three matters (as set out in Para. 4 above Items i, ii, and iv) for which I am granting the Applicant partial participant status as sought, Mr. Woodall may provide written submissions. As very experienced counsel I anticipate that Mr. Woodall will make oral submissions of a reasonable length on the legal issues he has identified at a time to be determined once the Public Hearing is underway.

20. The one exception is as follows. At Para. 4 iii above the Applicant seeks to have their counsel make submissions regarding “Whether, and to what extent, the “parties rule” applicable in criminal prosecutions applies to the allegations in which several officers have used force in common against an individual or individuals”.

21. This issue, at least insofar as it is captured by s. 77(3)(b) of the *Act*, and any potential application it may have to the proceedings at the Public Hearing, is an issue to be decided in a pre-hearing application that is likely to be heard in November 2025.

22. Specifically, during case management conferences to prepare for the Public Hearing I directed that should Public Hearing Counsel seek to rely on that provision of the *Act*, the preferred course in my view was for Mr. Hickford to

bring an application prior to the hearing itself in order that I may determine the issue.

23. Mr. Hickford filed his application on this point dated September 23, 2025, entitled "Notice of Application of Public Hearing Counsel, Bradley Hickford, to Determine whether Section 77(3)(b) of the Police Act is Applicable to Determining Liability of the Respondent Members as Accessories to Misconduct".

24. If Mr. Woodall, on behalf of the Applicant, seeks to make submissions on that legal issue I grant him leave to apply promptly in writing. I direct that he is to receive a copy of the Application to inform himself of its nature. If he is granted leave, then I will consider what other materials he ought to be provided with.

25. At present, I have yet to set the schedule for the filing of Responses and Replies, if any. At this point I anticipate those dates will be in the latter half of November, to be followed promptly for the date for the hearing of Mr. Hickford's Application.

26. If Mr. Woodall seeks to address legal and policy issues other than those specifically referred to herein, as may arise during the Public Hearing, he will need to seek leave to do so.

Dated at the City of Kelowna, British Columbia, this 2nd day of October, 2025

*Elizabeth A. Arnold-Bailey*

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