



Office of the
Police Complaint Commissioner

British Columbia, Canada

NOTICE OF APPOINTMENT OF RETIRED JUDGE

Pursuant to section 117(4) of the *Police Act*

OPCC File 2022-22066

July 31, 2024

To: Constable [REDACTED] (Members)
Constable [REDACTED]
c/o Vancouver Police Department
Professional Standards Section

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

And to: The Honourable Judge William Ehrcke, K.C. (ret'd) (Retired Judge)
Retired Judge of the Supreme Court of British Columbia

And to: Mr. Frank Chong
Chair, c/o Vancouver Police Board

On September 9, 2022, based on information provided by the Vancouver Police Department (VPD) and a request by the VPD to initiate an investigation into part of the matter, the former Police Complaint Commissioner ordered an investigation into the conduct of Constable [REDACTED] and Constable [REDACTED]. VPD Professional Standards investigator, Sergeant [REDACTED], conducted an investigation into this matter.

On June 11, 2024, Sergeant [REDACTED] completed his investigation and submitted the Final Investigation Report (FIR) to Inspector [REDACTED] (Discipline Authority).

On July 5, 2024, the Discipline Authority issued her decision pursuant to section 112 in this matter. Specifically, the Discipline Authority identified three allegations of misconduct against Constable [REDACTED] and Constable [REDACTED]. The Discipline Authority made the following determinations in relation to the allegations:

- i. The allegation of *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* against Constable [REDACTED] did not appear to be substantiated;

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Police Complaint Commissioner

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- ii. The allegation of *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* against Constable ██████ did not appear to be substantiated; and
- iii. The allegation of *Neglect of Duty* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* against Constable ██████ did not appear to be substantiated.

Pursuant to section 117(1) of the *Police Act*, having reviewed the allegations and the alleged conduct in its entirety, I consider that there is a reasonable basis to believe that the decision of the Discipline Authority is incorrect.

Background

At approximately 3:17 a.m. on June 22, 2022, VPD received an emergency phone call about a male (affected person) who was observed kicking the glass door of the Shoppers Drug Mart at ██████ in Vancouver. The witness reported that the affected person shattered the glass door and entered the Shoppers Drug Mart. Vancouver Police Department members, including Constable ██████ with a Police Service Dog (PSD) and Constable ██████ arrived on scene.

When members approached the Shoppers Drug Mart, the affected person was standing on the interior side of the glass door in an enclosed vestibule in the entrance of the store. The members approached the door and Constable ██████ deployed the PSD through the broken windowpane approximately 18 seconds after arriving. The PSD made contact with the affected person's leg and brought him to the ground. Three members, including Constable ██████ and Constable ██████ entered the store to effect the arrest.

While taking the affected person into custody Constable ██████ delivered a series of foot strikes in quick succession. Constable ██████ had the dog release the affected person and the affected person was handcuffed. Constable ██████ dragged the affected person along the ground out of the store. The affected person was arrested for break and enter, treated on scene for injuries, and taken to the hospital.

Discipline Authority's Decision

The Discipline Authority determined that the force used by Constable ██████ and Constable ██████ was necessary to effect the arrest and was reasonable. The Discipline Authority took into consideration that the affected person was arrestable for break and enter, was non-compliant with police commands to exit the Shoppers Drug Mart, presented a threat to members by "clench[ing] his fists in a fighting stance" before the members could enter, and that the affected person was attempting to "gouge the eyes of PSD ██████ in response to being bitten.

Additionally, the Discipline Authority found that Constable ██████ did not neglect ██████ duty to provide warnings to the affected person before deploying the PSD. The Discipline Authority was satisfied that Constable ██████ provided a verbal announcement before releasing the PSD and had therefore fulfilled ██████ duty to provide a warning that the affected person may be bit by the PSD.

OPCC Decision, Section 117 of the *Police Act*

Based upon my review of all the available evidence, I have a reasonable basis to believe that the decision of the Discipline Authority is incorrect with respect to the unsubstantiated allegations of *Abuse of Authority* with respect to both members and *Neglect of Duty* with respect to Constable [REDACTED]

I consider that the Discipline Authority erred in her assessment of the evidence leading to the deployment of the PSD when she determined that the members were on scene for 18 minutes. This finding formed the factual basis to support the Discipline Authority's finding that Constable [REDACTED] had time to provide sufficient warning to the affected person before deploying the PSD. However, the Investigator indicated in the FIR that the members were on scene for only 18 seconds before deploying the PSD which is supported by objective video evidence. Therefore, I consider this to be a critical factual error in the Discipline Authority's assessment of alleged misconduct given the Discipline Authority relied upon 18 minutes providing ample time for the members to have provided the required warnings and for the affected person to comply.

Additionally, I have a reasonable basis to believe that the Discipline Authority's determination on the reasonableness of the deployment of the PSD and the use of strikes to be incorrect. The Discipline Authority determined that the affected person presented a threat to the members when he took what was described as a "fighting stance" prior to the deployment of the PSD. However, the risk assessment does not appear to consider, based on the video evidence, that the affected person was contained within the vestibule of the Shoppers Drug Mart, between the glass doors and a gate, effectively preventing the affected person from fleeing, and providing a safety barrier between the affected person and the officers. This prevented the affected person from being able to advance on the officers.

Furthermore, the Discipline Authority appears to have not considered the physical status of the affected person, which should have been directly relevant to the members' assessment of risk. Based on the video evidence, it was, or should have been, visibly apparent to the members when they attended on scene that the affected person was of advancing age, dealing with a pronounced right sided abdominal hernia, had a casted right arm, and appeared to be in some type of crisis. Despite these considerations, and the fact that the affected person was physically contained within the vestibule, the PSD was deployed within 18 seconds of the members' arrival on scene. The evidence indicates that members did not undertake any crisis intervention and de-escalation, as well as provided little to no time for the affected person to comply with police directions.

The Discipline Authority also appears to have erred in her determination as it relates to application of kicks by Constable [REDACTED] and the subsequent dragging of the affected person out of the vestibule. Immediately after the PSD was deployed, members entered the vestibule. While the PSD was still biting the affected person, Constable [REDACTED] delivered multiple kicks, in rapid succession, to the affected person's right side, as they were lying on the ground. Constable [REDACTED] indicated that [REDACTED] believed that the affected person was attempting to gouge the eyes of the PSD as the reason for delivering the multiple kicks. The alleged behavior cannot be determined by the video. The rapid succession in which the kicks were delivered suggests

that the member did not engage in an ongoing assessment as required under the National Use of Force Framework.

Constable ██████ reported ██████ considered the affected person's hernia when delivering the kicks; however, delivering rapid succession kicks near the hernia site does not suggest that an appropriate risk assessment was completed. It is also notable that another officer preceded Constable ██████ into the vestibule but appears not to use force.

Constable ██████ then dragged the affected person along the floor amongst the broken glass, while both arms were restrained behind their back, despite the cast on the right arm and the protruding hernia. Prior to dragging the affected person, it appears that Constable ██████ made no attempts to have the affected person stand or to seek the assistance of a third member who was in the vestibule. Although the Discipline Authority determined that the glass on the ground made it unsafe for the members to remain in the vestibule, they did not consider the risk it presented to the affected person. The act of dragging the affected person created a risk to their health and safety, not only due to the presence of broken glass, but also due to the presence of a possible fractured arm and hernia.

The video and documentary evidence does not support that the affected person was in position to cause or imminently cause bodily harm to an officer, any third party, or the PSD to justify use of the PSD, or the application of the kicks. As such, the record reasonably supports that the affected person did not pose an immediate safety risk to officers or the wider public at that time.

Appointment of a Retired Judge

Section 117(1) provides that the Commissioner may appoint a retired judge to review the investigating officer's report, and the evidence and records referenced in that report, and make a decision on the matter. An appointment under section 117(1) must be made pursuant to section 177.2 of the Act.

Section 177.2 of the Act, in turn, requires the Commissioner to request the Associate Chief Justice of the Supreme Court of British Columbia to consult with retired judges of the Provincial Court, Supreme Court and Court of Appeal and recommend retired judges who the Commissioner may include on a list of potential adjudicators. Appointments under the Act are to be made in accordance with published procedures established under section 177.2(3).

On June 13, 2024, I published the OPCC's appointment procedures under section 177.2(3) of the Act (Appointment Procedures) and the list of retired judges who may be appointed for the purposes of sections 117, 135 and 142.

In accordance with the Appointment Procedures, I have appointed the Honourable William Ehrcke, K.C., retired Supreme Court Judge, to review this matter and arrive at their own decision based on the evidence. I have considered the factors as set out in the Appointment Procedures, namely:

- a) the provision under which the appointment is being made;

Office of the
Police Complaint Commissioner

- b) the current workloads of the various retired judges;
- c) the complexity of the matter and any prior experience with the Police Act; and
- d) any specific expertise or experience of a retired judge with respect to a particular issue or sensitivity associated with the matter

Retired Judge Ehrcke has confirmed their availability to review this matter and reported no conflicts.

Pursuant to section 117(9), if the appointed retired judge considers that the conduct of the member appears to constitute misconduct, the retired judge assumes the powers and performs the duties of the discipline authority in respect of the matter and must convene a discipline proceeding, unless a prehearing conference is arranged. The allegations of misconduct set out in this notice reflect the allegations listed and/or described by the Discipline Authority in their decision pursuant to section 112 of the *Police Act*. It is the responsibility of the retired judge to list and/or describe each allegation of misconduct considered in their decision of the matter pursuant to section 117(8)(c) of the Act. As such, the retired judge is not constrained by the list and/or description of the allegation as articulated by the Discipline Authority.

The Office of the Police Complaint Commissioner will provide any existing service records of discipline to the Discipline Authority to assist him or her in proposing an appropriate range of disciplinary or corrective measures should a pre-hearing conference be offered or a disciplinary proceeding convened. If the retired judge determines that the conduct in question does not constitute misconduct, they must provide reasons and the decision is final and conclusive.

Finally, the *Police Act* requires that a retired judge arrive at a decision **within 10 business days after receipt of the materials** for review from our office. This is a relatively short timeline, so our office will not forward any materials to the retired judge until they are prepared to receive the materials.



Prabhu Rajan
Police Complaint Commissioner

cc: [REDACTED], Registrar
Sergeant [REDACTED], Investigator, Vancouver Police Department
Inspector [REDACTED], Discipline Authority, Vancouver Police Department