



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 2023-23532
December 12, 2023

To: [REDACTED] (Complainant)

And to: Constable [REDACTED] (Members)
Constable [REDACTED]
c/o Victoria Police Department
Professional Standards Section

And to: Chief Constable Del Manak
c/o Victoria Police Department
Professional Standards Section

And to: The Honourable Judge Mark Takahashi, (ret'd) (Retired Judge)
Retired Judge of the Provincial Court of British Columbia

And to: Her Worship Mayor Barbara Desjardins, Lead Co-Chair
Her Worship Mayor Marianne Alto, Deputy Co-Chair
c/o Victoria & Esquimalt Police Board

On March 16, 2023, our office received a complaint from [REDACTED] describing his concerns with members of the Victoria Police Department (VicPD). The OPCC determined [REDACTED] complaint to be admissible pursuant to Division 3 of the *Police Act* and directed the VicPD to conduct an investigation.

Sergeant [REDACTED], as the investigator, considered the following allegations in the investigation:

1. *Abuse of Authority* pursuant to section 77(3)(a)(i) of the *Police Act* which is oppressive conduct towards a member of the public, including, without limitation, intentionally or recklessly making an arrest without good and sufficient cause.
2. *Abuse of Authority* pursuant to section 77(3)(a)(ii)(B) of the *Police Act* which is oppressive conduct towards a member of the public, including, without limitation, in the

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Police Complaint Commissioner

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performance or purported performance of duties, intentionally or recklessly detaining or searching any person without good and sufficient cause.

3. *Neglect of Duty*, pursuant to section 77(3)(m)(ii) of the *Police Act*, which is neglecting, without good or sufficient cause to promptly and diligently do anything that it is one's duty as a member to do.

On October 31, 2023, Sergeant [REDACTED] completed her investigation and submitted the Final Investigation Report to the Discipline Authority.

On November 15, 2023, Inspector [REDACTED], as the Discipline Authority, issued his 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 determined that the allegation of *Abuse of Authority* pursuant to section 77(3)(a)(i) of the *Police Act*; *Abuse of Authority* pursuant to section 77(3)(a)(ii)(B); and *Neglect of Duty*, pursuant to section 77(3)(m)(ii) of the *Police Act*, against Constable [REDACTED] and Constable [REDACTED] 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

On March 16, 2023, VicPD members conducted a *Motor Vehicle Act* traffic stop and requested the driver of the vehicle to provide his driver's licence and vehicle registration, to which the driver complied. The Complainant, a passenger in the vehicle, was also requested to provide identification but declined, advising the members he did not have to identify himself to police as he was the passenger and this was a traffic related stop.

While speaking to the occupants of the vehicle, the members made observations upon which they formed the belief that they had reasonable grounds to arrest both occupants for *Possession of a Controlled Substance for the Purpose of Trafficking* (PPT).

The driver and complainant were asked to exit the vehicle and were searched incidental to arrest. The complainant was provided his section 10(b) Charter Rights; however, the driver was not. The vehicle was searched and no evidence to support PPT was discovered and the complainant and driver were subsequently released at the scene.

A police report documenting the traffic stop was not completed at the time and neither officer made any police notes pertaining to the incident.

Discipline Authority's Decision

The Discipline Authority determined that the members had both the statutory and common law authority to investigate the *Motor Vehicle Act* offence, which included the traffic stop.

Regarding the decision to arrest the occupants of the vehicle for PPT, the Discipline Authority found that on an objective basis, the grounds articulated by Constable [REDACTED] justifying the arrest fell “slightly short” of reasonable grounds to believe. At the time of the arrest the members did not identify evidence of violations of the CDSA.

According to the Discipline Authority, having found that the members lacked the requisite grounds to make the arrests, the subsequent searches incidental to arrest were also unlawful. However, the Discipline Authority determined it did not appear that the conduct of the members, pertaining to the arrest and search, rose to the level of misconduct.

In relation to the requirement for the members to complete a police report, the Discipline Authority found that the members had a duty to complete a report regarding the incident and the members neglected their duty. However, the Discipline Authority determined the members committed an “administrative error” that had no negative impact on public safety or the criminal justice system and as a result, the failure to complete a police report did not rise to the level of misconduct.

OPCC Decision, Section 117 of the *Police Act*

The evidentiary record appears to support that the members were engaged in the lawful execution of their duties pertaining to the traffic stop.

However, based on a review of all available evidence, I have a reasonable basis to believe that the decision of the Discipline Authority is incorrect with respect to the determination regarding the arrest and search of the occupants and of the vehicle as well as the failure to document the incident.

In my view, the members lacked reasonable grounds to arrest the vehicle occupants for any offence. In my view, the evidence supports that the members relied upon their subjective beliefs which are not objectively reasonable. The search of the vehicle therefore was not lawful. I am also concerned with the apparent inadequate application of the obligations with respect to section 10(b) of the Charter.

In relation to the lack of documentation by the members at the time, the record supports that the failure to document the incident is contrary to VicPD policy. While a report was eventually completed, it was only done so after the issue arose as a result of the complaint that was filed.

In my view, the evidentiary record is fulsome, and the evidence supports a conclusion that the actions of the members support the allegations of *Abuse of Authority* and *Neglect of Duty* and therefore requires further review.

Therefore, pursuant to section 117(4) of the *Police Act* and based on a recommendation from the Associate Chief Justice of the Supreme Court of British Columbia, I am appointing Mark Takahashi, retired Provincial Court Judge, to review this matter and arrive at his own decision based on the evidence.

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.



Clayton Pecknold
Police Complaint Commissioner

cc: [REDACTED], Registrar
Sergeant [REDACTED], Victoria Police Department
Inspector [REDACTED], Victoria Police Department