



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 2023-23394
November 14, 2023

To: Mr. [REDACTED] (Complainant)

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

And to: Inspector [REDACTED] (Discipline Authority)
c/o Metro Vancouver Transit Police
Professional Standards Section

And to: The Honourable Judge David Pendleton (ret'd) (Retired Judge)
Retired Judge of the Provincial Court of British Columbia

And to: His Worship Mayor Ken Sim
Chair, c/o Vancouver Police Board

On February 23, 2023, our office received a complaint from Mr. [REDACTED] describing his concerns with members of the Vancouver Police Department. The OPCC determined Mr. [REDACTED] complaint to be admissible pursuant to Division 3 of the *Police Act* and directed Metro Vancouver Transit Police to conduct an investigation.

On September 28, 2023, Sergeant [REDACTED] completed his investigation and submitted the FIR, following additional directed investigative steps by this office, to the Discipline Authority.

On October 16, 2023, Inspector [REDACTED], as Discipline Authority, issued a decision pursuant to section 112 of the Act in the matter. He identified two allegations of misconduct against Constable [REDACTED] specifically:

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Police Complaint Commissioner

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1. *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act*, which is oppressive conduct towards a member of the public, including, without limitation, in the performance or purported performance, of duties, intentionally or recklessly using unnecessary force on any person.
2. *Discreditable Conduct*, pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department.

The Discipline Authority determined that both the allegation of *Abuse of Authority* and *Discreditable Conduct* against Constable [REDACTED] did not appear to be substantiated.

Pursuant to section 117(1) 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 *Abuse of Authority* allegation and use of force used by the respondent member.

Background

According to the information received by the OPCC, VPD Emergency Response Team (ERT) officers were seeking to arrest an individual who apparently resembled the Complainant. The individual the VPD sought to arrest was the subject of an outstanding Canada Wide Warrant in relation to a violent criminal offence.

At the time of the incident the Complainant was walking his small dog on a downtown street while listening to music on earphones. According to the evidence, VPD ERT members were attempting to arrest the Complainant, whom they believed to be the person subject to the Warrant. During the attempted arrest, the Complainant was struck by two Arwen rounds, which were discharged from an AR-1 less lethal impact baton weapon carried by Constable [REDACTED]. Video footage of the arrest and the use of force contained within the evidentiary record reveals an approximate 10 second envelope from the attempted arrest to deployment of the Arwen rounds.

The Complainant was apprehended and placed in handcuffs. However, soon thereafter the members discovered the mistaken identity and the Complainant was released.

The investigation revealed that the Complaint suffered significant bruising from being struck by the projectiles. In addition, the Complainant, who identifies as a member of the 2SLGBTQ+ community describes being the target of homophobic slurs by Constable [REDACTED].

Discipline Authority Decision

The Discipline Authority determined that the arrest of the Complainant was lawful. He determined it would not have been appropriate for members to approach the subject of the warrant in a casual manner; given the nature of the call, the offences under investigation, and the belief he was armed and dangerous.

The Discipline Authority believed the verbal commands, the firearms deployed at the “ready position”, and the subsequent Arwen deployment, and handcuffing were necessary, reasonable, and proportionate to the circumstances.

More specifically, the Discipline authority noted Mr. [REDACTED] had earphones in at the time, and Constable [REDACTED] construed Mr. [REDACTED] lack of response to police commands and physical actions as non-compliant behaviour. The Discipline Authority did not find the deployment of the Arwen round as reckless behaviour, as such the allegation of *abuse of authority* was not substantiated.

With regard to the allegation of *discreditable conduct* the Discipline Authority found that there was no evidence to support that Constable [REDACTED] or any police officer made homophobic slurs towards the Complainant.

Request for Appointment of a Retired Judge

On October 27, 2023, I received a request from counsel for the Complainant that I appoint a retired judge to review the FIR pursuant to section 117 of the Act and make his or her own decision in the matter. The request notes that the Decision of the Discipline Authority has not sufficiently considered a number of factors that have impacted the decision including: there was inadequate steps taken by Members to confirm the identity of the Complainant prior to moving in to arrest them, the Discipline Authority has not addressed the video evidence depicting the behaviour of the Complainant and the rapid response by the Member, the Discipline Authority did not properly consider the Member’s choice of utilizing an intermediate weapon - including the deployment of two rounds from the Arwen weapon, and that the Discipline Authority has not sufficiently assessed the credibility of the relevant parties especially in consideration of the alleged homophobic slurs directed towards the Complainant.

OPCC Decision, Section 117 of the *Police Act*

Based on a review of all of the available evidence, and in consideration of the request of the Complainant, I have a reasonable basis to believe that the decision of the Discipline Authority is incorrect with respect to the determinations that the force used by police was reasonable and proportional and also in regard to the alleged homophobic comments.

In relation to the use of force, the video evidence supports that the affected person was unaware of anyone behind him until the very last moment. He was walking his dog, and his physical actions were consistent with that activity nor were they suggestive of being aggressive, threatening, or dangerous. The subjective grounds provided by the member, including his perception that the affected person was actively resistant as the result of not complying, do not in my view render the deployment of the less lethal shotgun to be objectively reasonable in these circumstances.

In addition, it appears there may have been insufficient consideration given to further attempts at dialogue and de-escalation before using an intermediate weapon to gain compliance. The evidence supports a reasonable conclusion that the Complainant had insufficient opportunity to perceive that he was the subject of police attempts to arrest him let alone an opportunity to comply.

I have additional concerns with the alleged comments of a homophobic nature. Evidence was provided by the Complainant that there was a discussion about his sexual orientation at the scene during the incident. In particular, I disagree with the Discipline Authority's determination that there is no evidence of the homophobic comments having been made in this matter and am of the view that is this insufficiently weighed by the Discipline Authority.

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 the Honourable David Pendleton, 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], Metro Vancouver Transit Police

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