

December 19, 2023

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996 C. 367

AND

IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT AGAINST  
CONSTABLE [REDACTED] OF THE VANCOUVER POLICE DEPARTMENT

**NOTICE OF ADJUDICATOR'S DECISION**

TO: Mr. [REDACTED] Complainant

AND TO: Constable [REDACTED] Member

AND TO: Sergeant [REDACTED] Investigating officer  
c/o Metro Vancouver Transit Police

AND TO: Mr. Clayton Pecknold Police Complaint Commissioner

**Introduction**

1. This matter arises out of a complaint made by [REDACTED] regarding the circumstances surrounding his arrest by members of the Vancouver Police Department (VPD) Emergency Response Team (ERT) on February 22, 2023. Mr. [REDACTED] was walking a friend's dog in Yaletown when he was forcibly arrested by the ERT. A VPD surveillance team had requested the ERT assist in arresting a man the team had been following earlier that day. The man being followed fit the description of a suspect wanted on a Canada wide

arrest warrant for a serious violent offence committed in Calgary. The ERT moved into position behind the man at which time Constable [REDACTED] fired two shots from an ARWEN weapon (a type of firearm used by police that shoots projectiles designed to incapacitate a suspect) that struck the man and knocked him to the ground. The suspect was arrested and handcuffed. A further investigation by the ERT determined this individual was [REDACTED] [REDACTED] and not the person wanted by the Calgary police. Mr. [REDACTED] was treated at the scene by paramedics and released shortly thereafter.

2. Mr. [REDACTED] filed a complaint with the Office of the Police Complaint Commissioner on February 23, 2023 alleging misconduct against the officers who arrested him. The Police Complaint Commissioner reviewed the circumstances outlined in the complaint and determined that the complaint was admissible. He found that the conduct of the officers would, if substantiated, constitute misconduct and that the conduct could be potentially defined as Abuse of Authority (intentionally or recklessly using force on any person) pursuant to section 77(3)(a)(ii)(A) and Discreditable Conduct (conduct likely to bring discredit on the police department) pursuant to section 77(3)(h) of the Police Act. Sergeant [REDACTED] of the Metro Vancouver Transit Police was assigned to conduct an investigation pursuant to section 92 of the Police Act.
3. Sergeant [REDACTED] submitted his Final Investigation Report on September 28, 2023 to the Discipline Authority. Sergeant [REDACTED] concluded that Constable [REDACTED] did act in a manner that could be seen as oppressive conduct toward a member of the public by intentionally or recklessly using unnecessary force on any person, which could constitute Abuse of Authority. Sergeant [REDACTED] also concluded there was no evidence that Constable [REDACTED] used homophobic slurs in his dealings with Mr. [REDACTED]

and he held that the member did not act in a manner that would be found to be discreditable conduct.

4. On October 16, 2023, Inspector [REDACTED], as the Discipline Authority, issued his decision pursuant to section 112 of the Police Act. Inspector [REDACTED] identified two allegations of misconduct against Constable [REDACTED] specifically Abuse of Authority pursuant to section 77(3)(a)(ii)(A) and Discreditable Conduct pursuant to section 77(3)(h) of the Police Act. He found that both allegations did not appear to be substantiated.
5. The Police Complaint Commissioner reviewed the allegations and the alleged conduct and considered that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect.
6. On November 14, 2023 the Police Complaint Commissioner appointed me to review the investigating officer's report, the evidence and the records pursuant to section 117 of the Police Act.

### **Section 117**

7. The statutory authority governing this review is set out in Section 117 of the Police Act. If, on review of a discipline authority's decision under section 112(4) or 116(4) that conduct of a member or former member does not constitute misconduct, the Police Complaint Commissioner considers that there is a reasonable basis to believe that the decision is incorrect, the Police Complaint Commissioner may appoint a retired judge recommended under subsection (4) of this section to do the following:
  - (a) review the investigating officer's report referred to in section 112 or 116, as the case may be, and the evidence and records

- referenced in that report;
- (b) make her or his own decision on the matter;
- (c) if subsection (9) of this section applies, exercise the powers and perform the duties of discipline authority in respect of the matter for the purposes of this Division.

Section 117(6) The Police Complaint Commissioner must provide the appointed retired judge with copies of all reports under sections 98, 115 and 132 that may have been filed with the Police Complaint Commissioner before the appointment.

Section 117(7) Within 10 business days after receiving the reports under subsection (6), the retired judge appointed must conduct the review described in subsection (1)(a) and notify the complainant, if any, the member or former member, the police complaint commissioner and the investigating officer of the next applicable steps to be taken in accordance with this section.

Section 117(8) Notification under subsection (7) must include:

- (a) a description of the complaint, if any, and any conduct of concern,
- (b) a statement of a complainant's right to make submissions under section 113,
- (c) a list or description of each allegation of misconduct considered by the retired judge,
- (d) if subsection (9) applies, the retired judge's determination as to the following:
  - (i) whether or not, in relation to each allegation of misconduct considered by the retired judge, the evidence referenced in the report appears sufficient to substantiate the allegation and requires the taking of disciplinary or corrective

- measures;
- (ii) whether or not a prehearing conference will be offered to the member or former member under section 120;
- (iii) the range of disciplinary or corrective measures being considered by the retired judge in the case, and
- (e) if subsection (10) applies, a statement that includes the effect of subsection (11).

Section 117(9) If, on review of the investigating officer's report and the evidence and records referenced in them, the appointed retired judge considers that the conduct of the member or former member appears to constitute misconduct, the retired judge becomes the discipline authority in respect of the matter and must convene a discipline proceeding, unless section 120 (16) applies.

Section 117(10) If, on review of the report and the evidence and records referenced in it, the retired judge decides that the conduct of the member or former member does not constitute misconduct, the retired judge must include that decision, with reasons, in the notification under subsection (7).

8. A review of the Section 117 case law and the case cited as 2016 BCSC 1970 defines my role as the adjudicator. I must review the material delivered under subsection 117(6) and determine whether or not the conduct of the member appears to constitute misconduct. The law is clear that, because the adjudicator may become the discipline authority in relation to discipline proceedings, my job is not to reach conclusions about the conduct of the member; rather, it is to assess only whether it appears to constitute misconduct.

9. The review is a paper-based process of the record provided by the Commissioner. There are no witnesses or submissions. Section 117(1)(b) directs the adjudicator to make “her or his own decision on the matter.”

### **Reports and Material Considered**

10. Pursuant to sec. 117 (6) the Commissioner provided the following materials for my review.
  - (a) Final Investigation Report of Sergeant [REDACTED] and attachments described as: registered complaint, OPCC notices, Mr. [REDACTED] statement, officers’ statements, supporting documents, video and legislation/police policy/case law.
  - (b) Additionally, I have considered the Notice of Appointment of Retired Judge dated November 14, 2023, and the relevant case law and statutory authority.

### **Section 117(8)(a) Description of the Complaint and Conduct of Concern**

11. The conduct of concern relating to Constable [REDACTED] arose out of the arrest of [REDACTED] on February 22, 2023. Constable [REDACTED] was a member of the ERT assigned to apprehend [REDACTED] who was a suspect allegedly involved in a violent home invasion in Calgary. The Calgary police believed Mr. [REDACTED] was in Vancouver and possibly armed. The suspect was located on February 22, 2023 by a VPD surveillance team in the Yaletown area of Vancouver. The ERT team, including Constable [REDACTED] moved into position. Constable [REDACTED] fired at the suspect with an ARWEN firearm. After the arrest, it was determined that the suspect the VPD had been surveilling was Mr. [REDACTED] not Mr. [REDACTED]. Mr. [REDACTED] happened to be in the neighbourhood and was walking his friend’s dog. In the complaint he filed, Mr. [REDACTED] who described himself as a gay male, stated that the

officers were verbally abusive. In the interview with Sergeant [REDACTED] he said that Constable [REDACTED] called him a faggot. The conduct of concern here is whether Constable [REDACTED] intentionally or recklessly used unnecessary force against [REDACTED] and whether his conduct was discreditable.

### **Section 117(8)(c) – Allegations of Misconduct Considered**

12. Having reviewed the evidence referenced in the Final Investigation Report, I identify the following allegations of misconduct against Constable [REDACTED] that could appear to be substantiated:

1. Abuse of authority by intentionally or recklessly using unnecessary force on Mr. [REDACTED] contrary to section 77(3)(a)(ii)(A) of the Police Act.
2. Discreditable Conduct which is when on duty conducting himself in a manner that he knows, or ought to know, would be likely to bring discredit on the VPD contrary to section 77(3)(h) of the Police Act.

13. I am mindful of the limitation to the definitions of misconduct in Section 77 found in Section 77(4):

77(4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.

### **Section 117(8)(d)(i) Whether the Evidence Appears Sufficient to Substantiate the Allegation**

14. Sergeant [REDACTED] as part of his investigation, reviewed the formal Office of the Police Complaint Commission (OPCC) complaint of Mr. [REDACTED] and the statement he gave on April 13, 2023. He considered the general occurrence reports of several members of the ERT and surveillance teams. He interviewed Constable [REDACTED] on September 11, 2023 and he interviewed other ERT members including Constables [REDACTED] [REDACTED] [REDACTED] [REDACTED] and Sergeant [REDACTED]. This material is referred to in his Final Investigation Report and forms part of the record forwarded to me by the Commissioner.
15. Upon a review of the Record I am satisfied the following circumstances surrounding the incident are not in dispute:
  - a) On February 16, 2023 the VPD received a request for assistance from the Calgary Police Service to attempt to locate two individuals, Mr. [REDACTED] and Ms. [REDACTED], who were believed to be in Vancouver. There were arrest warrants for these individuals. Mr. [REDACTED] was wanted for a home invasion where a firearm was used and discharged.
  - b) On February 22, 2023 at 15:30 hours a VPD surveillance team located a man walking at Drake Street and Seymour Street in Vancouver. The surveillance team believed the man matched the description of Mr. [REDACTED]. This person was photographed and that photograph was sent to Calgary police officer Constable [REDACTED]. Constable [REDACTED] advised the VPD that he believed the male in the photograph was [REDACTED], however he also stated that he had not seen the man in person for four months.
  - c) The Calgary Police Service had previously obtained a tracking warrant for Mr. [REDACTED] telephone. The tracking information was



sent to the VPD. On February 22, 2023 at 15:07 hours Mr. [REDACTED] telephone was being tracked by GPS to an area that was close to (168 meters away) where the male suspect was walking.

- d) At 16:53 hours the suspect entered a residence at [REDACTED]  
[REDACTED] The surveillance team contacted the VPD ERT and a plan was made to have the ERT arrest the man as he exited the residence.
- e) At 17:45 hours the man exited [REDACTED]. He was wearing the same clothing the surveillance team had observed him wearing earlier. The man was now walking a small dog on a leash.
- f) ERT members (Constables [REDACTED] [REDACTED] [REDACTED] and [REDACTED] were in the area in an unmarked police van. They exited the vehicle and approached the suspect from behind. Constable [REDACTED] yelled at the suspect "Police, get on the ground, show me your hands". The man did not comply. Constable [REDACTED] thought the man was reaching a hand towards his waistband. Given the history of violence and use of a firearm, Constable [REDACTED] fired his ARWEN weapon twice striking the man in the abdomen and buttocks. The ERT subdued the suspect and took him into custody.
- g) The man shot by Constable [REDACTED] turned out to be [REDACTED] and not [REDACTED]. Mr. [REDACTED] said he did not hear the ERT yelling at him because he was wearing a toque and listening to music on his earbuds.

16. The CCTV footage obtained by the VPD captures the ERT arriving in the area and the arrest of Mr. [REDACTED] Sergeant [REDACTED] analyzed and described the CCTV footage. In the Final Investigation Report at page 75 he

states:

The available CCTV of the incident was from [REDACTED], Vancouver. Two cameras captured Mr. [REDACTED] just before and during the incident. One camera was from inside the lobby of [REDACTED] and had a view through the front window to the south sidewalk of [REDACTED] just in front of the main door and lobby to the building. The second is from the interphone camera that captures just outside the main door and west down the south sidewalk from the main door.

The lobby camera captures Mr. [REDACTED] walking the dog just prior to his arrest. It also captures just the nose of the police vehicle, as it pulls up behind Mr. [REDACTED] on [REDACTED] and as the members approach him from behind.

The interphone camera provides a fairly clear view of Mr. [REDACTED] being struck with the Arwen and being arrested. This camera captures the duration of the interaction of Mr. [REDACTED] with members of the Vancouver Police.

From CCTV review the time from the ERT members arriving and exiting the vehicle to the time Mr. [REDACTED] was struck with the Arwen round is 10 seconds. Mr. [REDACTED] does not turn around at any point until immediately before he is struck with the first Arwen round. Exactly when the second Arwen round strikes Mr. [REDACTED] is not clear on the video. Mr. [REDACTED] is walking with the dog leash in his right hand and his hands appear to already be in the generally area of his waist line as police approach from behind. Mr. [REDACTED] does not make any attempt to raise his hands as he briefly looks back however he very likely would not have been aware of what commands were being

given or that they were directed at him.

17. In his police statement made at the time of the arrest and in his subsequent interview with Sergeant [REDACTED] Constable [REDACTED] stated that his use of force in firing the two rounds from the ARWEN weapon during the arrest was necessary because the suspect was non compliant, was understood to be violent and possibly armed and he appeared to be reaching towards his waistband where a weapon might be.
18. Constable [REDACTED] was interviewed on September 11, 2023. He stated to Sergeant [REDACTED]

When we uh, drove into the block to challenge the suspect uh, we disembarked our vehicle. Um, I was less lethal, and I saw the suspect on the east side of the street. When we exited the vehicle I gave various commands to the suspect that we're the police, show us his hands uh, "Get on the ground." Um, uh, and as well, due to the area, we were conducting a [indiscernible] takedown because it was the safest means possible because he was away from everybody else. Um, there were people on the west side of the street as well as further south on the east side of the street, which was concerning for me as a backdrop issue in the event that maybe we uh, you know, either missed an ARWEN shot or if we had to use lethal force, with potential backdrop issues. As a result, I triangulated on the suspect so my backdrop would be the concrete building behind him. Um, while we were giving verbal commands, while I was giving verbal commands to the suspect um, I observed the suspect um, was being noncompliant as he was uh, had his hands near his waistband, at which time I deployed a single ARWEN round uh, towards his abdomen area. And then I observed him turn from uh, the, the uh, sh-, uh, deployment of

the ARWEN um, in his abdomen area, and again I deployed that because I was, treated him as armed and dangerous. I believed he wa-, had access to firearms and was uh, capable of having a firearm on his possession at the time. Uh, as he turned um, I wa-, processed the, the... I [indiscernible] continued to fear for my safety, fear for the bystanders' safety in the street um, putting the public, police and the suspect's safety um, in chronological order. At which time he uh, I perceived him to turn and conceal his hands and turn away from police, at which time I delivered a second ARWEN round to him, striking him in the uh, left buttocks area, in the upper thigh. And at which time he was on the ground and we affected the arrest of the suspect.

Later in the same interview with Sergeant [REDACTED] Constable [REDACTED] said:

SGT [REDACTED] Right. Okay. And um as you came up on, now, now known to be Mister [REDACTED] um, did you think he knew, knew you were there? Did you feel like he knew you were there? Or did he say anything to you or look at your at any point?

CST [REDACTED] Uh, he, he looked at, when... He looked at us when we started giving commands, I started giving commands. Um, [indiscernible] again [indiscernible] flashlights um, to illuminate the area, illuminate him. Um, I believe that he saw us, he knew that we were police, and again um, his actions of um, you know, moving his hands to, to a waistband um, [indiscernible] looking around, which obviously, processing the scene, but at the same time I believed that he was potentially looking for maybe a means of escape, which is also common with uh, people who have committed these type of offences, and...

SGT [REDACTED] Mmhmm.

CST [REDACTED] ...I believed that he was, again, the suspect out of Calgary. Uh, so he was also deemed uh, to be uh, dee-, deemed as a flight risk and... But again uh, I believe that he knew who we were at the time, due to our loud commands and our presence that we were there.

19. Sergeant [REDACTED] asked Constable [REDACTED] whether he called Mr. [REDACTED] a faggot. Constable [REDACTED] stated:

SGT [REDACTED] Sure. So, I mean one, one point I'm going to cover off is uh, did you hear any of the other members or did you, yourself, at any point refer to Mister [REDACTED] as a "faggot"?

CST [REDACTED] Uh, myself, no. Um, I was there for the [indiscernible]. I didn't hear anything of that nature uh, along those lines. No.

SGT [REDACTED] Okay. Uh, and then at any point um, did you have any conversation with him around his sexuality um, or the fact that he was a gay individual?

CST [REDACTED] No, I did not. No.

SGT [REDACTED] Okay. All right. And were you aware that Mister [REDACTED] was a gay individual before he stated it to other members or yourself?

CST [REDACTED] No, I did not.

SGT [REDACTED] No. And did he state that at some point when you were there?

CST [REDACTED] Uh, he stated that he uh, was gay when we were making an arrest, like when we were um, had put, made, affected the arrest, and pe-, we're trying to identify him and asked if uh, if he had any idea where his girlfriend was...

20. [REDACTED] was interviewed by Sergeant [REDACTED] on April 13, 2023. He was asked to describe what happened as he was walking the dog. He stated:

SGT [REDACTED] Okay. All right. Um, so when you brought the dog out for the walk around three-, or sorry, 5:20-ish um, can you walk us through exactly what you saw, heard, and how that played out for you?

MR [REDACTED] I saw and heard nothing. I had these headphones in.

SGT [REDACTED] Okay. So...

MR [REDACTED] [Overtalking]...

SGT [REDACTED] ...you were wearing AirPods?

MR [REDACTED] Yeah. Are you familiar with the automatic setting they have when you hear?

SGT [REDACTED] Uh, I'm not. No. So please, yeah, let us know.

MR [REDACTED] Noise-cancelling.

SGT [REDACTED] Okay.

MR [REDACTED] 100% noise-cancelling. Can't hear anything. And I'm also clinically deaf in my right ear, so...

Later in the same interview with Sergeant [REDACTED] Mr. [REDACTED] said:

SGT [REDACTED] Okay. So um, yeah. So you're taking uh, the dog for a walk. You've got earphones in, you're listening to some music. Um, did you hear anything at all before you were struck with um, what I'm going to call - it is an Arwen round?

MR [REDACTED] Nothing.

SGT [REDACTED] So you didn't hear any-... Okay.

MR [REDACTED] Uh, one thing I'm walking the dog, the next thing I'm down on the ground, coming around, with a swarm of officers on me and the do-, and a canine.

SGT [REDACTED] Right. Okay.

MR [REDACTED] Uh, it's, it's my assumption I was knocked out because there's, there's a blank.

21. Mr. [REDACTED] described being beaten and tossed around by the police officers. He said:

MR [REDACTED] Um, I remember being beaten and tossed around. Uh, they were screaming at me uh, things about where's my girlfriend. Being obviously a gay man, as far as I can [indiscernible], you know? Um, and uh, when I told them that my boyfriend lives upstairs and my husband lives in Toronto and I said, "You go around shooting gay boys for fun?" He said, "I would shoot you again, faggot."

Sergeant [REDACTED] asked Mr. [REDACTED] whether he included the word faggot in his complaint to the Police Complaint Commission. Mr. [REDACTED] said:

SGT [REDACTED] Okay. Now is that something you initially um, told the Office of the plaint-, uh, Police Complaints Commission in your initial report, or is that something you remembered after the fact?

MR [REDACTED] No, I put that in, I put the homophobic slurs in, in the report. Um, you know, he was like uh, some-, something like uh, "You think being gay makes you different from anyone else? I would shoot you again, faggot."

SGT [REDACTED] Okay. And uh, so the, the one that you recall saying that was a redheaded officer? Is that correct?

MR [REDACTED] Mmhmm. Yeah. [9-second pause] Like every homophobic bully that I ever had in high school.

SGT [REDACTED] Right. Okay. Now was there any other officers that made any, any remarks to you uh, in relation to your sexuality?

MR [REDACTED] No.



22. In the Final Investigation Report, the investigating officer carefully analyzed the issue of whether the member intentionally or recklessly used unnecessary force against Mr. [REDACTED]. Sergeant [REDACTED] considered the case law, the Vancouver Police Department's use of force policy and the National Use of Force Model. He reviewed the member's conduct having regard to section 25(1) of the Criminal Code and he concluded that Constable [REDACTED] had reasonable grounds to believe that the suspect was Mr. [REDACTED] and that the arrest was lawful; however, he found that Constable [REDACTED] acted in a manner that could be seen as oppressive conduct toward a member of the public by intentionally or recklessly using unnecessary force. In the Final Investigation Report he states:

The analysis of the evidence demonstrated the force used by Constable [REDACTED] being the rapid deployment of two Arwen rounds against Mr. [REDACTED] is believed to be excessive. This was based on the short time frame before the force was used and the fact that the second Arwen round may not have been necessary.

Sergeant [REDACTED] submits there is evidence to satisfy the balance of probabilities test concerning this misconduct allegation. The preponderance of the evidence shows that Constable [REDACTED] had the lawful authority to carry out his duties but that his actions may not have been necessary when using force, by why of delivering two Arwen rounds to Mr. [REDACTED].

Sergeant [REDACTED] also dealt with the allegation of discreditable conduct. He stated:

That Constable [REDACTED] did not act in a manner that would be found to

be discreditable conduct. There was no evidence found that he used homophobic slurs in his dealing with Mr. [REDACTED]

23. In OPCC File No. 2016-11867 Adjudicator Carol Baird Ellan reviews the test to be considered under section 25. At paragraph 32 she states:

“The investigating officer considered the member’s actions from the point of view of whether the arrest complied with Section 25(1) of the Criminal Code. In the recent case of *Akintoye v White*, 2017 BCSC 1094 Fleming J. considered the test under Section 25. She stated:

[97] Section 25(1) is not a source of extra police powers. Instead it operates to justify the use of force when a police officer’s conduct is permitted pursuant to a separate statutory or common law power.

[98] The defendants accept that under s. 25, they bear the onus of proving on a balance of probabilities, three requirements described in *Chartier v. Graves*, [2001] O.J. No. 634 at para. 54(S.C.), as follows:

1. the officer’s conduct was required or authorized by law in administering or enforcing the law;
2. he or she acted on reasonable grounds in using force; and
3. he or she did not use unnecessary force.

[99] The third requirement focuses on the level or degree of force used.

[100] In *R v. Nasogaluak*, 2010 SCC 6 (CanLII), the Supreme Court of Canada specified the degree of “allowable” force is constrained by the principles of proportionality, necessity and reasonableness, cautioning: “courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences” (at para. 32).

[101] A subjective-objective or modified objective test is applied to assess the reasonableness of a police officer’s belief that the force used was necessary: he or she must subjectively believe the force used was necessary and that belief must be objectively reasonable in all the circumstances.

[102] Recognizing police officers often engage in dangerous and demanding work that requires them to react quickly, they are not expected to measure the level of force used “with exactitude”. Put another way, they are not required to use the least amount of force necessary to achieve a valid law enforcement objective. Although entitled to be wrong in judging the degree of force required, an officer must act reasonably (*Crampton v. Walton*, 2005 ABCA 81 (CanLII) at para.22). The common law accepts that a range of use of force responses may be reasonable in a given set of circumstances (*Bencsetler v. Vancouver (City)*, 2015 BCSC 1422 (CanLII) at para. 153). The reasonableness, proportionality and necessity of the police conduct are assessed in light of those circumstances, not based on hindsight.”

24. Section 117(1)(a) and (b) of the Police Act requires me to consider Sergeant [REDACTED] report and the evidence and records and then make my own decision on the matter. I agree with the comments of the Adjudicator Baird Ellan in OPCC 2016-11867 where she said:

“While my task is not to review his decision, rather to consider the issues and reach my own conclusion, I find it instructive to consider the matter from the perspective of a trained officer, particularly in assessing the reasonableness of the member’s response from a policing perspective. In doing so I nonetheless bear in mind that the test has an objective component”

25. The evidence and the records would appear to support the member’s subjective belief that he needed to gain control of and quickly apprehend the suspect he believed was [REDACTED] and who appeared to be non compliant and possibly armed. Constable [REDACTED] fired his weapon twice. Constable [REDACTED] said there was a high risk to the public and the police which justified his use of force. The member’s subjective belief regarding his use of force however is not determinative of the matter.

26. In my view, it is important to consider that the apprehension and arrest of the suspect happened very quickly. The portion of the video depicting the confrontation lasts about 10 seconds. Constable [REDACTED] described the suspect as non-compliant. He said the suspect turned around, looked at the members, gave the police “the 1000 yard stare”, would not comply with commands and instead moved his hands down towards his waist. Mr. [REDACTED] said he did not see or hear anything before he was knocked to the ground. He said he “blanked out”. I am satisfied that the incident would have been emotionally upsetting for everyone involved. What actually happened in those ten seconds may not be clear from the video and it is not surprising that Constable [REDACTED] and [REDACTED] subjective impressions of what occurred are different. Those perceptions and recollections may eventually be resolved following an assessment of the credibility and reliability of their testimony. As well, it may not be clear which officers spoke to Mr. [REDACTED] and what, if anything, was said to him. Mr. [REDACTED] said he blanked out and I accept he was injured and in pain. The record shows that Sergeant [REDACTED] and Sergeant [REDACTED] also spoke to Mr. [REDACTED] however, Mr. [REDACTED] said that the only officer who called him a faggot was Constable [REDACTED]
27. While the subjective beliefs of the member must be considered, the allegation of abuse of authority involving intentional or reckless use of unnecessary force must be assessed objectively to determine whether what the member believed and did was reasonable. In OPCC File No. 2016-11505 the Adjudicator discussed the meaning of recklessness in the context of the Police Act. He said:

I would add that the use in the Police Act of the word “reckless” (in both of the s. 77 subsections at issue here) is consistent with the fact

the Police Act disciplinary matters involve an objective component. That is to say, the assessment of a misconduct allegation is not dictated by the individual officer's personal intention of "good faith", rather it also involves an objective question as to the reasonableness of what the officer believed and did. While an officer's subjective belief will always be relevant, and may mitigate a misconduct allegation, the analysis does not start and end with the subjective component. It is necessary to assess objectively whether what the officer believed and did was reasonable.

28. After considering the evidence, it appears there are questions as to whether it was objectively reasonable for Constable [REDACTED] to conclude that the suspect posed a threat serious enough to justify the force used. The evidence objectively considered raises questions whether the member recklessly used unnecessary force in controlling and subduing the suspect. As well, it appears there are questions as to when and under what circumstances Constable [REDACTED] spoke to [REDACTED] and whether what he may have said to Mr. [REDACTED] amounts to conduct the member knew, or ought to know, would be likely to bring discredit on the VPD.
29. The issue to be determined at this stage is whether the evidence appears sufficient to substantiate misconduct. Based on the materials and evidence, I find the evidence appears sufficient to substantiate the allegations that Constable [REDACTED] recklessly used unnecessary force and conducted himself in a manner that he knew, or ought to know, would be likely to bring discredit on the VPD.

### **Conclusion and Next Steps**

30. After reviewing the Final Investigation Report and the evidence and

records I am satisfied that the conduct of the member appears to constitute misconduct.

31. I hereby notify the relevant parties of the next steps pursuant to sections 117(7) and (8) of the Police Act.
- a) The complainant has the right pursuant to section 113 of the Police Act to make submissions at the discipline proceeding.
  - b) I have determined that the range of disciplinary or corrective measures being considered for Constable [REDACTED] includes:
    - i. Suspend the member without pay for not more than 30 scheduled working days.
    - ii. Require the member to undertake specified training or retraining.
    - iii. Require the member to participate in a specified program or activity.
32. Considering the factors in section 120 of the Police Act, I am willing to offer the member a prehearing conference.
33. The member may, pursuant to section 119(1) file with the discipline authority a request to call and examine or cross-examine one or more witnesses listed in the Final Investigation Report. Such a request must be made within 10 business days of this notification.

Dated at Victoria British Columbia  
December 19, 2023

*David Pendleton*  
David Pendleton  
Adjudicator