

February 7, 2025

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

DISCIPLINE AUTHORITY'S FINDINGS AND REASONS UNDER SECTION 125(1)(b)

(Supplement to Form 3)

TO: Constable [REDACTED]  
Member

AND TO: Christine Joseph  
Counsel for Constable [REDACTED]

AND TO: Prabhu Rajan  
Police Complaint Commissioner

## I. Discipline Proceeding

1. This Discipline Proceeding pursuant to sections 123 to 125 of the Police Act pertains to allegations of misconduct against Constable [REDACTED]. The allegations, which are set out below, concern, firstly, whether Constable [REDACTED] intentionally or recklessly used unnecessary force, and, secondly, whether the member's conduct was discreditable.

## II. History of Proceedings

2. This matter arises from a complaint made by [REDACTED] regarding the circumstances of his apprehension and arrest by members of the Vancouver Police Department (VPD) Emergency Response Team (ERT) on February 22, 2023. 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 and knocked the man to the ground. The suspect was arrested and handcuffed. A further investigation by the ERT determined the person arrested was [REDACTED] and not the person wanted by the Calgary police. Mr. [REDACTED] was treated at the scene by paramedics and released shortly thereafter.
3. 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.
4. Sergeant [REDACTED] submitted his Final Investigation Report (FIR) on September 28, 2023 to the Discipline Authority. Sergeant [REDACTED] found

the evidence demonstrated 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 decided that the member did not act in a manner that would be found to be discreditable conduct.

5. 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.
6. The Police Complaint Commissioner reviewed the allegations and the alleged conduct and determined that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect.
7. 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. On December 19, 2023, I decided the evidence appeared sufficient to substantiate the allegations and a Discipline Proceeding was ordered.
8. The Discipline Proceeding convened on February 13, 2024 and was adjourned from time to time pursuant to section 123(10). Constable [REDACTED] testified on September 17, 2024. Ms. Joseph, counsel for Constable [REDACTED] filed her submission and the matter was adjourned to January 29, 2025.
9. Pursuant to section 125(1) this decision is due February 12, 2025.

### III. Allegations and the Police Act

10. The two allegations of misconduct pursuant to the Police Act that are relevant to this Discipline Proceeding are set out in Section 77(3).

“Misconduct” means:

(3) Subject to subsection (4), any conduct described in the following paragraphs constitute a disciplinary breach of public trust, when committed by a member:

(a)(ii) in the performance or purported performance, of duties, intentionally or recklessly  
(A) using unnecessary force on any person

(h) discreditable conduct, 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.

11. Section 125(1)(a) requires me as discipline authority to decide, in relation to each allegation of misconduct, whether the misconduct has been proven. Applicable case law establishes that the standard of proof is a balance of probabilities, and the question is whether there is clear, cogent and convincing evidence establishing that the actions of the member amount to misconduct.

### IV. Evidence

12. The records considered in this proceeding consist of the FIR and accompanying documents. As well, I have considered the testimony of

Constable [REDACTED] the complainant's section 113 submission and the written submission of counsel.

## V. Discussion of the Evidence

13. In the Section 117 decision following my review of the paper record I described Constable [REDACTED] conduct of concern as follows:

The conduct of concern relating to Constable [REDACTED] arose out of the arrest of [REDACTED] on February 22, 2023. The Calgary Police Department had requested the VPD assist it in apprehending and arresting [REDACTED] who was allegedly involved in a violent home invasion in Calgary. The Calgary police believed Mr. [REDACTED] was in Vancouver and possibly armed. Constable [REDACTED] was a member of the VPD ERT assigned to apprehend Mr. [REDACTED]. A 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 his interview with Sergeant [REDACTED] Mr. [REDACTED] 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.

14. At this Discipline Proceeding I have considered the FIR and the records referenced in it, the section 113 submission of Mr. [REDACTED] and the testimony of Constable [REDACTED] and I am satisfied the evidence proves:

- 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]. 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) The 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] and Constable [REDACTED] were yelling at the suspect "Police, get on the ground, show me your hands". Constable [REDACTED] was also present with his police dog, which was barking loudly. The suspect did not stop walking nor did he comply with the officers' commands to get on the ground and show his hands.
- g) The VPD obtained CCTV footage of the apprehension of the suspect. The first camera images show the suspect walking the dog holding the dog leash in his right hand. The second camera images (approximately 10 seconds of footage) shows the police vehicle arriving, the officers approaching the suspect from behind, and the suspect falling to the pavement. The remaining footage on the second video captures the suspect being handcuffed and later receiving treatment from Emergency Health Services.
- h) The CCTV images are grainy and do not clearly depict what happened in those 10 seconds. Constable [REDACTED] testified that he approached the suspect from behind and off to the right. The camera images show the suspect turns to his right towards Constable [REDACTED]. Constable [REDACTED] testified that the suspect's right hand was up near his face or chest area as he turned to look at the member. Constable [REDACTED] said, "when he turned and looked at us I knew at that moment he saw us. I made eye contact with him". I am satisfied that the CCTV proves that the suspect

turns to his right, sees a police officer and within a few seconds is hit twice by the ARWEN.

- i) Constable [REDACTED] believed the suspect's right hand moved downwards towards the area around his waistband. The member's perception was that the suspect might be reaching for a weapon.
- j) The CCTV images show the suspect holding the dog leash and his hands remain at waist level. He does not raise his hands but he does turn briefly to his right towards Constable [REDACTED] before falling down.
- k) The complainant, [REDACTED] was struck twice by ARWEN rounds. The first hit him in the right abdomen and the second hit his left buttock. Mr. [REDACTED] was wearing a toque and listening to music on his ear buds. Constable [REDACTED] and the other ERT officers did not see the ear buds and had no way of knowing Mr. [REDACTED] could not hear them. I am satisfied the evidence proves the suspect did not comply with officer's commands to stop, to show his hands, and to get on the ground because he was not aware the police were behind him and he did not hear the ERT yelling at him.
- l) The evidence proves that a suspect shot by Constable [REDACTED] turned out to be [REDACTED] and not [REDACTED]. Mr. [REDACTED] was not a threat to the public or the police, he was not armed, and he was unaware the police were running up towards him yelling commands. Mr. [REDACTED] was simply in a neighbourhood walking a dog on a leash. Unfortunately for Mr. [REDACTED] he bore a striking physical resemblance to [REDACTED]. The ERT and Constable [REDACTED] relying on their surveillance teams advice that the suspect



was [REDACTED], mistakenly apprehended and arrested the wrong man.

15. As I said in my section 117 decision, the arrest happened very quickly and Constable [REDACTED] was reacting, as he said, to a “fast-moving high risk situation”. Having considered the testimony of Constable [REDACTED] and Mr. [REDACTED] section 113 submission, it is clear that their subjective perceptions of what occurred were different and I will deal with these matters in the Analysis below.

## VI. The law

16. Section 125(1)(a) requires me as Discipline Authority to decide, in relation to each allegation of misconduct, whether the misconduct has been proven. This Police Act hearing is a civil process. The applicable case law establishes that the standard of proof is a balance of probabilities, and the question is whether there is clear, cogent and convincing evidence establishing that the actions of the officer amount to misconduct. (F. H. McDougall (2008) SCC 53)
17. Counsel for the member relies on the decisions in R. v. Nasogalauk, R. v. Grafton, R. v. Kempton, R. v. Power, R. v. Jacobsen and R. v. Berntt. I am satisfied the legal principles expressed in these authorities are applicable to this Discipline Proceeding. I agree the police should not be judged against a standard of perfection (Nasogalauk) and that it is both unreasonable and unrealistic to impose an obligation on the police to employ only the least amount of force that might successfully achieve their objective (R. v. Kempton). In R. v. Berntt the court held:

“The question is not whether the officer was wrong., but whether he lacked reason for his or her belief. This applies equally to the

existence of facts. Provided the officer had an honest and reasonable belief, the trier of fact must ignore the fact the belief was mistaken.”

18. I am satisfied that, while the subjective beliefs of the member must be considered, the allegations of misconduct in section 77(3)(a)(ii)(A) and (3)(e) 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.

## VII. Analysis

### **Discreditable Conduct Allegation**

19. Ms. Joseph, in her written submission, argues that the evidence does not prove on a balance of probabilities that Constable [REDACTED] conduct towards Mr. [REDACTED] was discreditable. The Police Complaint Commissioner was concerned that Constable [REDACTED] may have said to Mr. [REDACTED] “I would

shoot you again, you faggot". Ms. Joseph maintains that Constable [REDACTED] never used those words and that none of the other ERT officers interviewed by Sergeant [REDACTED] recalled hearing Constable [REDACTED] use such language. Counsel also pointed to the evidence of Sergeant [REDACTED] who was interviewed by Sergeant [REDACTED] Sergeant [REDACTED] said Mr. [REDACTED] asked why the police were "shooting gay guys". Sergeant [REDACTED] explained to Mr. [REDACTED] that "being gay had nothing to do with the reasons why we arrested you". Sergeant [REDACTED] told Sergeant [REDACTED] he did not hear any officers use the term faggot.

20. Sergeant [REDACTED] in the FIR at page 75 said:

Mr. [REDACTED] also stats that he was called a "faggot" by Constable [REDACTED] None of the witness officers heard this and this is refuted by Constable [REDACTED] It is noted that Mr. [REDACTED] made no mention of the specific term "faggot" being used in his initial complaint to the OPCC on February 23, 2023. Based on a balanced on probabilities Sergeant [REDACTED] cannot say that the term faggot was used against Mr. [REDACTED] during his interactions with Constable [REDACTED]

21. Ms. Joseph also argues that the evidence relating to Mr. [REDACTED] movements while he was being surveilled, his claim he was dragged by the police towards the ambulance and his failing to report the homophobic slur in his original complaint to the OPCC raise questions regarding his credibility.
22. Having considered the record, the CCTV images and the testimony of Constable [REDACTED] I have concerns regarding Mr. [REDACTED] reliability and credibility relating to the allegation of discreditable conduct. I found Constable [REDACTED] to be a careful, thoughtful and credible witness. I accept that he did not use the term faggot. The others officers present

corroborated his evidence. The CCTV images do not show Mr. [REDACTED] being dragged by the police as he alleged. As well, Mr. [REDACTED] told Sergeant [REDACTED] he did not leave the apartment except to walk the dog. The surveillance evidence proves that Mr. [REDACTED] was out of the apartment for approximately 45 minutes without the dog. It appears that he was not being truthful regarding his movements that day. In his formal complaint to the OPCC dated February 23, 2023, Mr. [REDACTED] did not report that the police subjected him to homophobic slurs. I agree with Ms. Joseph that it would be reasonable to expect Mr. [REDACTED] would mention this when it was fresh in his mind; however, it was not until April 13, 2023, during his interview with Sergeant [REDACTED] that he mentioned the word faggot. I find that the arrest would have been traumatic for Mr. [REDACTED] and he was injured. He told Sergeant [REDACTED] "it's my assumption I was knocked out because there's, there's a blank". I accept he may have had difficulty recalling specific details surrounding the arrest; however, I find that his evidence regarding what the officers may have said to him is not credible or reliable. I am satisfied the evidence does not prove that Constable [REDACTED] called Mr. [REDACTED] a faggot. I agree with counsel that the evidence does not prove on a balance of probabilities the member conducted himself in a manner that would be likely to bring discredit to the VPD.

### **Unnecessary Use of Force Allegation**

23. Ms. Joseph submits that the member was justified in using force to apprehend and arrest the suspect he believed was [REDACTED]. Sergeant [REDACTED] at page 58 of the FIR said:

Prior to Mr. [REDACTED] being identified as Mr. [REDACTED] many observations of him were made by various surveillance members, this was not a case of a rushed decision to identify Mr. [REDACTED] as Mr.

██████████

Sergeant ██████████ is of the opinion that the surveillance conducted was appropriate and that the correct checks were used on order to attempt to make the best identification of Mr. ██████████ that they could.

Given Mr. ██████████ violent history, the seriousness of offence with use of firearm, which he was wanted for, and the fact he was believed he be avoiding his warrants in Calgary; the option of utilizing surveillance to attempt to identify of Mr. ██████████ and then using ERT members for a high-risk arrest, would be appropriate in this circumstance. In scenarios such as this, using a patrol member to simply walk up to the individual and ask for identification, would not be the safest or most viable option for the police members or the public.

Unfortunately even with these layered checks to attempt to correctly identify Mr. ██████████ Mr. ██████████ was mistakenly identified as a wanted violent offender, which he is not.

Sergeant ██████████ concluded that the arrest of the suspect was lawful. At page 79 of the FIR he said:

The evidence shows that the respondent officer had reasonable grounds to believe that Mr. ██████████ was Mr. ██████████ who was wanted on warrants for serious offences out of Calgary at the time of arrest. Members were acting on the information provided by other officers and their direct supervisor at the time. This information was reasonable and provided them with the lawful authority to arrest Mr. ██████████ based on the fact they had a reasonable belief that Mr. ██████████ was the suspect that had active Canada wide warrants for his arrest.

I agree that Constable [REDACTED] had reasonable and probable grounds to arrest the suspect.

24. Constable [REDACTED] testified at the Discipline Proceeding. He described the close resemblance between the surveillance team's photograph of the suspect and the "wanted poster" of [REDACTED]. He was aware of the serious allegations regarding the use of a firearm by Mr. [REDACTED]. Constable [REDACTED] explained the plan formulated by the ERT to carry out a "high risk" arrest of the suspect and the use of lethal and less lethal weapons (the ARWEN). Constable [REDACTED] described his training and previous experience using the ARWEN weapon. I accept he is qualified to deploy and use the ARWEN in situations he determines justify its use having regard to the VPD's Use of Force Policy and the National Use of Force Policy. He has a clear understanding of the policy considerations and the circumstances for when it is appropriate to use less lethal force. He described the suspect's behavior as "passively to actively resistant" which, he said, justified his use of force.
25. Constable [REDACTED] testified that he was yelling as he approached the suspect from an angle behind and off to the right. Constable [REDACTED] believed "the dog leash was in the suspect's left hand and his right hand moved from his face or chest area downward towards his waist (see transcript pages 174-176 and 201). The member thought the suspect may be reaching for a weapon and he decided that the safety of the public and the police justified firing the first round from the ARWEN. The video evidence appears inconsistent with Constable [REDACTED] description of where the suspect's hands were (the CCTV images appear to show Mr. [REDACTED] hands remain at waist level and he does not appear to switch the leash he previously had in his right hand to his left hand). However, I am satisfied it would be wrong to conclude that the member's perceptions (regarding the

movement of hands) are not credible or reliable because the video does not clearly capture what Constable [REDACTED] sees from his angle. Sergeant [REDACTED] in his testimony, said that the video does not capture the officer's perceptions and assessments of what he is seeing. He agreed, "we don't have a camera angle that would replicate what Constable [REDACTED] is seeing". The CCTV footage shows Mr. [REDACTED] legs buckle as he was hit by the first round. He turned to his left as he fell. Constable [REDACTED] believed that Mr. [REDACTED] was trying to conceal his hands as he turned away. He said, "my perception was he was turning away and concealing his hands so I deployed the 2<sup>nd</sup> round" (see transcript pages 188-189). I find that the member's subjective belief that he needed to use force in these circumstances was justified and reasonable. The issue is whether objectively the member recklessly used unnecessary force.

26. Section 25 of the Criminal Code authorized Constable [REDACTED] when acting within the lawful execution of his duties to use force provided he acted on reasonable grounds and the force he used was necessary for that purpose. I am satisfied that the evidence proves that Constable [REDACTED] was acting in the lawful execution of his duties on February 22, 2023. He was a member of the ERT assigned to apprehend and arrest a suspect wanted in Alberta for a violent home invasion. I find the evidence proves that Constable [REDACTED] training and understanding of the National Use of Force Model would lead him to believe that the suspect's behavior was, as he said, passively to actively resistant. I am satisfied the evidence proves that the member had an honest and reasonable belief that the suspect was intentionally non-compliant, that the ERT needed to quickly apprehend the suspect who may be armed with a weapon, that there was no option to deescalate and that the member's force options were limited to use of the less lethal ARWEN weapon given the circumstances. When viewed objectively, I am satisfied that the two rounds he delivered were reasonable and necessary. The video shows the first round hitting Mr.

██████ His legs buckle and he turns as he is falling to the pavement. Constable ██████ testified he fired the second round because he could not see the suspect's hands. I am satisfied that it was objectively reasonable for Constable ██████ to believe the suspect continued to be a threat. I find that his firing the second ARWEN round was not reckless and was necessary. The authorities relied on by counsel that were referred to earlier establish that police actions should not be judged against a standard of perfection and officers are not required to use only the least amount of force to successfully achieve their objective. Once the suspect was handcuffed the evidence proves that the ERT and Constable ██████ did not use any unnecessary force. The mistakes that were made during this arrest (mistaking Mr. ██████ for Mr. ██████ mistaking the suspect was intentionally not complying with commands to surrender and mistaking the suspect was reaching for a weapon) do not, in my opinion, amount to police misconduct. There is no clear, cogent and convincing evidence that proves Constable ██████ recklessly used unnecessary force in arresting Mr. ██████

## VIII. Conclusion

27. The evidence does not prove on a balance of probabilities that Constable ██████ recklessly used unnecessary force to arrest Mr. ██████.
28. The evidence does not prove on a balance of probabilities that Constable ██████ conducted himself in a manner that he knew, or ought to know, would be likely to bring discredit on the VPD.

*David Pendleton*

David Pendleton

Adjudicator

February 7, 2025