

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
CERTAIN OFFICERS OF THE VANCOUVER POLICE DEPARTMENT

NOTICE OF ADJUDICATOR'S DECISION

TO:	██████████	(the "Complainant")
AND TO:	Constable ██████████ c/o Vancouver Police Department Professional Standards Section	("Cst. T")
AND TO:	Constable ██████████ c/o Vancouver Police Department Professional Standards Section	("Cst. U")
AND TO:	Constable ██████████ c/o Vancouver Police Department Professional Standards Section	("Cst. D")
AND TO :	Chief Constable A. Palmer c/o Vancouver Police Department Professional Standards Section	("Chief Constable Palmer")
AND TO:	Sgt. ██████████, Investigator c/o Vancouver Police Department Professional Standards Department	(the "Investigator")
AND TO:	Prabhu Rajan Police Complaint Commissioner	(the "Commissioner")

**DECISION PURSUANT TO SECTION 117(7) OF THE POLICE ACT, R.S.B.C. 1996,
c.367 AND AMENDMENTS THERETO**

AND NOTIFICATION OF NEXT STEPS

I- Decision Summary

1. This is a decision made pursuant to section 117(7) of the *Police Act* relating to certain complaints of misconduct concerning Csts. T, U and D (the “Members”) alleged to have taken place April 6, 2022, involving an indigenous female (the “Affected Person”).
2. I have been appointed Adjudicator in connection with this matter as a result of the Commissioner’s order of March 25, 2024 made in accordance with section 117(4) of the *Police Act*.
3. In accordance with my appointment as Adjudicator, I have considered the evidence available in the Final Investigation Report dated February 9, 2024 (the “FIR”), in relation to specific allegations of misconduct by the Members set out in a complaint filed by the Complainant April 17, 2023 (the “Complaint”).
4. In issuing his order confirming my appointment to review the FIR and Complaint delivered by the Complainant, the Commissioner limited the scope of this review to the actions of the Members. A prior discipline proceeding decision had that found that certain other allegations involving the use of force by other officers were not substantiated. The Commissioner confirmed that there was no reasonable basis to believe that those decisions were incorrect.
5. As a result of my review of the FIR, and in accordance with section 117 of the *Police Act*, I have determined that the evidence considered appears sufficient to substantiate certain alleged misconduct concerning the Members, potentially requiring consideration of disciplinary or corrective measures on two disciplinary breaches of public trust:
 - (a) Discourtesy with respect to the Affected Person, contrary to section 77(3)g of the *Police Act*; and
 - (b) Neglect of duty with respect to the Affected Person contrary to section 77(3)m (ii) of the *Police Act*.

6. The next steps are set out below, but include the offer of a pre-hearing conference for each of the Members. Failing resolution through that process, a new disciplinary proceeding on the misconduct allegations that appear to be substantiated involving the Members will commence May 29, 2024.

II History of Proceedings and details of the Complaint - Section 117(8)a

7. On April 6, 2022, an incident took in the Downtown Eastside of Vancouver that resulted in the arrest of the Affected Person.
8. As will be further outlined below, public complaints had been received by the Vancouver Police Department (“VPD”) from several sources citing erratic, violent and dangerous actions of the Affected Person.
9. Ultimately, several officers attended in response to the complaints and secured the arrest of the Affected Person, in part, through the use of a bean bag gun projectile.
10. On April 17, 2023 the Complainant submitted a registered Complaint to the Office of the Police Complaint Commissioner (the “OPCC”) with respect to the circumstances of the Affected Person’s arrest.
11. The Complaint included a brief summary of allegedly improper actions of the Members and others during the course of the Affected Person’s arrest, and immediately thereafter.
12. Following a review by OPCC staff, the Complaint was accepted as admissible and forwarded to the Professional Standards Section of the VPD for investigation.
13. As noted in the Complaint, the misconduct alleged initially related to the inappropriate use of force with respect to the Affected Person during the course of her arrest. However, the Complaint also alleged, that the Members had stood over the Affected Person laughing while she was handcuffed and crying out as she lay on the ground in apparent pain or distress.
14. The Investigator completed his investigation and submitted the FIR to the relevant Discipline Authority on February 9, 2024.
15. On February 26, 2024, the Discipline Authority, issued her decision pursuant to section 112 of the *Police Act* concerning this matter. The Discipline Authority found that the misconduct alleged was not substantiated against the Members, or the other officers on duty at the relevant time.

16. On March 19, 2024 the Commissioner received a request from the Complainant to appoint a retired judge to review the FIR pursuant to section 117 of the *Police Act*.
17. In an order made March 25, 2024, the Commissioner determined that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect, in part.
18. Specifically, the Commissioner expressed the view that the Discipline Authority was incorrect in finding that the Members did not act in a discourteous manner contrary to section 77(3)g of the *Police Act*.
19. The Commissioner made the decision to refer the issue of the misconduct allegation involving the Members for review in accordance with section 117 of the *Police Act*.
20. A decision to refer the file for review by a retired judge under section 117 is an exception to the normal prohibition of further review specifically set out in section 112(5) of the *Police Act*.
21. This review has focused on an analysis of the Members' conduct with respect to the Affected Person in the context of the FIR.

III Section 117 Police Act

22. As noted, the statutory authority governing this review is found in section 117 of the *Police Act*.
23. Specifically, subsection 117(6) of the *Police Act* imposes a duty on the Commissioner to provide the Adjudicator with copies of all reports under section 98, 115 and 132 that may have been filed with the Commissioner prior to the Adjudicator's appointment in relation to the allegations of misconduct.
24. The central role of the Adjudicator as set out in subsections 117 (8) and 117(9) of the *Police Act* is to independently review the material delivered under subsection 117(6), and to determine whether or not the conduct of any of the Members, or any of them, appears sufficient to substantiate misconduct within the meaning of Part 11 of the *Police Act* requiring disciplinary or corrective action.
25. The law is clear that a review under section 117 is a paper based process of the record provided by the Commissioner. It takes place without live witnesses, additional evidence or submissions from any of the parties involved.

26. A section 117 review is not an appeal of earlier decisions concerning misconduct, nor is it a redetermination in any manner of other proceedings, including court proceedings, that may have a connection to the misconduct alleged.
27. It is not the Adjudicator's role to decide the facts concerning the matters in issue at this stage in the process. Rather, the adjudicative role at this stage is to determine whether or not the evidence appears to substantiate potential misconduct requiring some form of sanction or corrective measures.
28. The duty of an Adjudicator under subsection 117(1)b is to reach their own decision based on the materials submitted for review alone, without submissions or further evidence adduced by way of a hearing.
29. The Supreme Court of British Columbia has provided specific guidance on the role of Adjudicators serving under section 117 of the *Police Act*. In *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970, the Honourable Mr. Justice Affleck considered an earlier Adjudicator decision provided under section 117, noting as follows:

[27] *There are two troubling aspects to the approach to his task taken by the retired judge.*

[28] *The first is his implicit interpretation of s. 117(9) of the Act that it permitted him at an early stage of his inquiries to reach conclusions about the petitioner's conduct.*

[29] *In Florkow v. British Columbia (Police Complaint Commissioner), 2013 BCCA 92, Newbury J.A. observed that part XI of the Act, where s. 117 is found, "is not a model of clarity". Section 117(9) fits that description, but in my opinion it is clear that it authorized the retired judge to do no more than express a view that the petitioner's conduct on April 22, 2016 "appears" to have been misconduct. To have gone beyond an expression of a preliminary review by giving extensive reasons using conclusory language, such as asserting that the petitioner's "conduct was a marked and serious departure from the standard reasonably expected of a police officer" is not consistent with the scheme and object of the Act and the intention of the legislature (see Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 at para. 21.*

[30] *In my opinion the legislature did not intend the retired judge, whose ultimate role could include presiding over a disciplinary hearing involving the very person whose conduct he had already determined was improper, nevertheless could use language, before a hearing had taken place, that on any reasonable reading left no doubt in the mind of the petitioner that the retired judge had already made up his mind that the petitioner was guilty of the misconduct alleged.*

[37] *In my opinion, the retired judge improperly conflated the issue of whether the petitioner was in the course of his lawful duties when he entered the complainant's home and arrested her, with the other issue of whether the petitioner was guilty of*

misconduct by abusing his authority as defined in the [Police Act](#). That conflation is apparent from the retired judge's conclusion that:

It follows, therefore, that the question of whether A/S Scott abused his authority must be determined according respect for the factual findings of the trial judge. Respect for those findings of fact would result in the conclusion that A/S Scott had abused his authority. ...

[39] [Section 117](#) of the [Police Act](#) is unfortunately worded in some respects. On one possible interpretation a retired judge appointed pursuant to the [Act](#) is directed to reach conclusions about the conduct of a member of a police force before a disciplinary hearing has been conducted by the retired judge in respect of that conduct. I do not accept the legislature intended such an approach to be taken. If that was the appropriate interpretation it would inevitably raise a serious issue of an apprehension of bias when the retired judge made preliminary findings adverse to the petitioner and was then required to conduct a disciplinary hearing. I conclude that the retired Judge adopted an interpretation which has now led to that unfortunate outcome.

30. This review has been undertaken in accordance with the foregoing principles and law.

IV Records submitted for review

31. In accordance with subsection 117(6) of the *Police Act*, the Commissioner has provided the FIR for my review which was prepared by the Investigator. Also included were electronic copies of the FIR documents, interviews, audio records and videos.
32. The materials provided by the Commissioner detail much of the encounter between the Members, the Affected Person, other attending police officers and certain members of the public. The FIR comprises 62 pages of narrative, plus extensive related attachments, audio and video files.
33. The Complaint submitted includes a general description of the conduct in question and a link to a publicly posted video recording of the encounter between the Affected Person and police officers.
34. The FIR and related materials were delivered to me March 27, 2024. Section 117(9) of the *Police Act* confirms that my review must be completed within 10 business days of receiving disclosure with notice to the relevant parties of my decision and next steps. The outside date to deliver a decision under section 117 is April 12, 2024.

V Misconduct and the Police Act- Allegations considered
– Sections 117(8)c and 108 Police Act

35. The evidence set out in the FIR outlines the perspectives of the Members and others concerning the unfolding of events involving the Affected Person. The report also includes important collateral materials on VPD policies, case law and general principles associated with specified officer training.
36. The FIR does not, however, contain material outlining the details of the Affected Person's perspective of events, beyond that set out in the video recording and sentencing materials. It appears that several attempts to locate the Affected Person were made by the Investigator, without success.
37. Fortunately, as noted above, video recordings arising from a camera system in the alley immediately adjacent to the area of the Affected Person's arrest have been made available and incorporated into the FIR. This recording, and a large number of other audio recordings, provide an important series of perspectives on the various interactions between the Affected Person, the Members and other parties.
38. Turning to the specifics of possible misconduct under section 77 of the *Police Act* , it appears that two provisions may have relevance to this review as follows:

77(1) In this Part, "misconduct" means

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

(g) "discourtesy", which is failing to behave with courtesy due in the circumstances towards a member of the public in the performance of duties as a member; and

(m)"neglect of duty", which is neglecting, without good or sufficient cause, to do any of the following:

(ii) promptly and diligently do anything that it is one's duty as a member to do;

39. An important overall limitation to the definitions of misconduct in section 77 of the *Police Act* is found in subsection 77(4) as follows:

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.

40. This review must independently assess the circumstances of the Members' interactions with Affected Person, the actions of the various parties and the totality of the circumstances relating to the same as set out in the FIR.
41. It is important to confirm that this review is not a decision on proven facts, but rather an assessment of all relevant evidence disclosed in the FIR in order to determine whether or not such evidence appears to substantiate, or could substantiate, allegations of professional misconduct arising under section 77 of the *Police Act*.

VI The Evidence arising from the Final Investigation Report

42. My review of the FIR and the evidence and records referenced in it discloses the following evidence, which if proven, may have relevance to the questions of misconduct raised in this review.
43. I note, of course, that identifying the facts that appear to form the basis of evidence relevant to the allegations does not result in the conclusion that such facts will ultimately be proven if matters proceed to Disciplinary Proceeding.
44. The evidence in the FIR that I have considered relevant to the matters in issue appears to confirm, without proving, the following general evolution of events:

The initial complaints concerning actions of the Affected Person

- (a) On April 6, 2022 at approximately 11:50 a.m., police dispatch received multiple reports of a female acting erratically and threatening a security guard with some form of knife in the Downtown Eastside area of Vancouver;
- (b) At 11:56 a.m., Cst. J responded to the calls with his partner Cst. T;
- (c) Shortly thereafter, the two members arrived on scene and located one of the alleged victims, a local security guard;
- (d) The guard provided the members with a description of the female in question and outlined the nature of the alleged threat with a knife;
- (e) The members noted that the general description of the female in question closely matched that of the female reported by other callers;
- (f) The members formed the opinion that the female in question, the Affected Person, had committed assault with a weapon and possession of a weapon for a dangerous purpose;
- (g) The members also believed that the Affected Person posed a real risk of possible grievous bodily harm or death to those in the immediate area;
- (h) The members located the Affected Person and followed her into the west lane of the 400 block of Main Street, and then the south lane of the 100 block of Hastings Street;

- (i) Cst. J made repeated loud demands of the Affected Person to stop for the police;
- (j) The Affected Person refused to comply with demands made to stop and continued walking into an alley;
- (k) The Affected Person was followed by the Members and a small group of other officers now on scene as backup;
- (l) The Affected Person continued to refuse police demands to stop and next moved adjacent to a dumpster throwing an object held in her hand into the bin;
- (m) The Affected Person then carried on further up the alley defiantly refusing repeated police directions to stop;
- (n) Cst. J continued demands for the Affected person to stop, who was then flanked by Cst. T and other members;
- (o) The demands to stop were accompanied by a series of loud and clear warnings confirming that unless the Affected Person complied, she would be hit by a bean bag shotgun discharge;
- (p) After multiple warnings, the Affected Person continued to refuse to comply with police directions, but did dispose of something in an adjacent garbage bin as she walked;
- (q) Cst. J continued to believe that the Affected Person could still have a knife and therefore posed a significant risk to the public and members present in the alley;
- (r) Cst. J also appears to have been aware that the Affected person presented with at least some mental health issues;
- (s) Repeated demands were made by members present to the Affected Person saying : *"Show me your hands"* and *"Get on the ground now"*;
- (t) The Affected Person refused to comply with all orders of police;
- (u) At approximately 12:00 p.m. a single bean bag round was discharged by Cst. J directed to the rear buttocks area of the Affected Person in an effort to subdue her for arrest;

Arrival of Csts. D. and U

- (v) After being struck, the Affected Person responded in apparent pain, however, still did not comply with demands to get on the ground;
- (w) Cst. D then joined Csts. J and T confronting the Affected Person as further demands were made for her to get on the ground;
- (x) The Affected Person next backed up toward an adjacent building while dropping several items from her hands;
- (y) Further demands for the Affected Person to get on the ground were made by members on scene. However, the consistent reply from the Affected Person was repeatedly *"No"*;
- (z) Ultimately the Affected Person slumped to the ground in a squatting position adjacent to a building facing the members on scene;
- (aa) An arrest team of five members, including Csts. T, U and D all moved toward the Affected Person at approximately 12:01 p.m.;
- (bb) The Affected Person was taken into custody and fully taken to ground. At that point handcuffs were applied as the Affected Person lay on her right side;
- (cc) Cst. J made a call for Emergency Health Services ("EHS") to attend the scene at approximately 12:04p.m.;

- (dd) The call was noted by Cst. J to be a routine call for service;
- (ee) Cst. T and another member, Cst. A did a brief search incident to arrest of the Affected Person briefly rolling her on her back, then returning her to lay on her right side;
- (ff) The video related to this incident and member statements do not disclose what, if any discussion took place with the Affected Person during the brief search incidental to her arrest, and in particular, whether or not questions relating to the wellness of the Affected Person were posed;
- (gg) Csts. T, U and D all formed up around the Affected person then laying on the concrete while other officers left to search for evidence and provide secondary cover;
- (hh) At this point the Affected Person was loudly crying out in apparent distress or pain;
- (ii) None of the three Members responded to the Affected Person's cries but rather continued to talk among themselves, then began laughing together;
- (jj) The Members submit that the laughter was not related to the Affected Person in any manner, but rather a shared private experience that caused them all to laugh for a short period of time;
- (kk) None of the three Members appear to have performed a wellness check of the Affected Person or communicated with her while her cries took place and the laughter continued;
- (ll) At 12:16 p.m. Cst. J advised the Affected Person of the reasons for her arrest and advised her of the relevant Charter rights associated with her arrest;
- (mm) A further Charter warning to the Affected Person was issued at 12:29 p.m. arising from Cst. J's belief that charges of Uttering Threats were likely;
- (nn) EHS staff arrived at approximately 12:42 pm but did not undertake an assessment of the Affected Person until 13:12 p.m. due to privacy concerns; and
- (oo) The Affected Person was uncooperative and refused treatment or transfer to a hospital.

VIII Analysis of the Misconduct Allegations- Sections 117(8)(d) & (i) of the Police Act
Does the evidence appear sufficient to substantiate the allegations of misconduct on the part of some, or all, of the Members?

- 45. I now turn to an analysis of the evidence relating to the misconduct allegations.
- 46. At this stage I must consider whether or not the evidence set out in the FIR that is summarized above appears sufficient to substantiate allegations of misconduct concerning the Members.
- 47. The analysis under section 117 of the *Police Act* does not result in findings of fact on any alleged misconduct beyond determining whether or not a possible misconduct allegation appears substantiated against a member based on analysis of the facts set out in the FIR.
- 48. Having considered the unproven evidence summarized above, it appears that two allegations of possible member misconduct might arise from the body of material relating to each of the Members:

- (a) An allegation of professional discourtesy pursuant to section 77 (3) g of the *Police Act*. (“*Misconduct Allegation # 1*”) Such an allegation of misconduct could be based on the assertion that in all of the circumstances, standing over the Affected Person immediately after her arrest and laughing was a failure to behave with appropriate courtesy, both to the Affected Person and members of the public in the immediate vicinity ; and
- (b) An allegation of neglect of duty, without good and sufficient cause, pursuant to section 77(3) m (ii) of the *Police Act* (“*Misconduct Allegation #2*”). Such an allegation could be based on the assertion that in all of the circumstances, the Members monitoring the Affected Person had a common law duty to check on her wellness in a timely manner once she began crying out in apparent severe pain and anguish after her arrest.

49. Collectively I will refer to the foregoing as the “Misconduct Allegations”.

Misconduct Allegation # 1

- 50. It appears that there is no issue that all Members were acting in the performance of their duties as they participated in the arrest, handcuffing and containment of the Affected Person.
- 51. It also appears that the evidence relevant to the Members actions included the following circumstances:
 - (a) A series of complaints had been received from members of the public concerning the erratic and potentially dangerous behaviour of the Affected Person, including threats with a knife like object;
 - (b) A series of demands were directed to the Affected Person from officers dispatched to investigate matters. The demands including repeated orders that the Affected Person stop and submit to police control, all of which were ignored;
 - (c) Police awareness of the fact that it had been alleged that the Affected Person had threatened a member of the public with a knife-like object . It was also apparent to the officers concerned that the Affected Person retained objects in her hands as she was surrounded by police down a small alley;
 - (d) After refusing several police demands to submit and get on the ground, a warning was given to the Affected Person that a bean bag shot would be discharged unless she immediately complied with police orders. No such compliance took place;
 - (e) Cst. J appears to have been aware before the discharge of the bean bag gun that some elements of the Affected Persons actions may have been influenced by possible mental health issues;
 - (f) The Affected Person was a small, young, indigenous woman, obviously distraught and acting erratically as police issued demands for compliance;

- (g) As the Affected Person was surrounded, she had backed up close to an adjacent building. Shortly thereafter, she was struck with a bean bag projectile somewhere in her lower back to upper leg area. The Affected Person recoiled in pain but did not submit to police demands immediately;
- (h) The Affected Person ultimately slouched and was promptly surrounded by four to five police officers who completed her arrest, handcuffing and a basic check for weapons incidental to her arrest;
- (i) While on the ground the Affected Person was apparently very distraught and began loudly wailing in anguish, or pain, while surrounded by the three Members; and
- (j) Other members of the public were also in the alley observing the arrest.

52. Taking into consideration all of the relevant circumstances, it appears that police had successfully ended a potentially dangerous situation. The actions of the Affected Person were significant enough to warrant the attendance of multiple officers and the discharge of a bean bag shotgun to subdue the Affected Person. As well, the possible continued threat of a brandished knife was ended with the Affected Person handcuffed and laying on the ground. In all of the circumstances, as the Members stood over the Affected Person, they did so at the apparent conclusion of a serious series of events.
53. The Members appear to maintain that their laughter while standing over the Affected Person had nothing to do with the individual arrested, but rather resulted from a shared private experience.
54. One key element of the Complaint appears to relate to the laughter of the Members while standing guard over the Affected Person.
55. The FIR does not contain any direct evidence from the Affected Person as to how the Members' laughter may have affected her.
56. However, members of the public present at the arrest of the Affected Person, as shown on the video referenced in the FIR, appear to have clearly voiced their displeasure with the laughter that was taking place amongst the Members.
57. As well, the Complainant, who was not on scene, appears to have expressed the view that the actions of the Members upset her greatly in that it did not seem that they treated the Affected Person with dignity or basic humanity during the course of her arrest.
58. Of particular apparent concern to the Complainant was the fact that the Members appeared to be laughing while the Affected Person was crying out in apparent pain or anguish.

59. In considering the actions of the Members, I am mindful of the legal context for the discharge of their sworn duties. At paragraph 35 of the Supreme Court of Canada decision in *R. v Nasogalauk*, 2010 SCC 6, the Court confirmed that:

[35] Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in R. v. Bottrell (1981), 60 C.C.C. (2d) 211 (B.C.C.A.):

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude.

60. Having considered the foregoing, it does not appear that there are any exigencies noted in the FIR that could mitigate a possible finding of discourtesy on the part of the Members.

61. The term “courtesy” is defined by the Oxford dictionary as “..polite behaviour that shows respect for other people..”

62. Considering all of the circumstances, regardless of the motivation for the Members to be laughing while standing over a vulnerable young woman who had just been arrested and handcuffed, it appears that the actions of the Members could not be characterized as courteous to a reasonable objective observer.

63. Laughter in such circumstances by police officers, regardless of the reason for that laughter, would appear to have been inappropriate and potentially seen as demeaning and dismissive of the Affected Person and her issues to an objective observer.

Misconduct Allegation #2

64. The second misconduct allegation considered again relates to all three Members.

65. This further allegation of misconduct is that the Members appear to have neglected their collective duty to take reasonable steps to protect the life of the Affected Person after her arrest.

66. Such an allegation of professional misconduct is again characterized as a disciplinary breach of trust pursuant to section 77 of the *Police Act*, specifically, section 77(3)m (ii) of that Act.

67. As noted in the evidentiary summary above, it appears that the Affected Person was acting erratically before her arrest. As well, with the discharge of the bean bag projectile and its impact on the Affected Person's body, it also appears that she was immediately in some pain and distress.
68. Immediately after the discharge of the bean bag projectile, Cst. J appears to have made a call to EHS to attend on scene to assess the Affected Person. It also appears that the call was logged as routine.
69. In the result, the final assessment by EHS appears to have taken place almost an hour after the Affected Person's arrest.
70. Immediately after being taken to ground and handcuffed, it appears that the Affected Person was crying out loudly, and in apparent pain. These wails from an apparently distraught and vulnerable person laying on her side on the pavement would appear to have been evident to any persons in the immediate vicinity.
71. The Members appear to have been standing over the Affected Person immediately after her arrest talking and laughing amongst themselves as these loud wails continued.
72. There does not appear to be any evidence in the FIR as to action taken by any of the Members to perform a basic wellness check on the Affected Person, nor to inquire as to why she was crying out so loudly.
73. The video records and written reports do not appear to disclose whether or not any communication took place between the Affected Person and the Members as she lay on the ground immediately after her arrest.
74. As the Investigator notes at paragraph 77 of the FIR, one of the core common law duties of a peace officer is to protect life.
75. In the circumstances of this case, it appears that each of the Members knew that immediately after her arrest, the Affected Person was in apparent distress and pain.
76. Although it is does not appear to be clear from a review of the FIR, the Members may have been aware by radio that EHS has been requested to attend on scene. However, again there appears to be no evidence as to when that attendance might take place.
77. In the meantime, it appears that the three Members were all standing above the Affected Person as she cried out repeatedly, and taking no action to assist her, or talk to her.

78. Given the apparent vulnerable status of the Affected Person, the bean bag discharge, the forced take down of the Affected Person by multiple officers and the application of handcuffs as the subject lay on her side, it appears that each of the Members would have been aware of the potential risks to the Affected Person of some form of injury resulting from her arrest. This state of awareness would, it appears, be heightened by the cries from the Affected Person.
79. The apparent failure of the Members to interrupt their discussion and laughter to perform a basic wellness check on the Affected Person would appear to have been a breach of their common law duty to protect her life.
80. It appears that such a check might have identified possible injuries to the Affected Person that could have resulted in a request for a higher priority EHS response, or some form of immediate first aid.
81. The Members apparent failure to discharge this duty further accentuates the perception of disrespect and lack of civility arising from the Members in their limited dealings with the Affected Person.

IX Conclusion

82. The foregoing conclusions are not, as noted, findings of fact, but rather an assessment of the evidence in the FIR made pursuant to section 117(8)d of the *Police Act*, none of which has been proven at this stage of the proceedings.
83. I am further satisfied that there are some areas of uncertainty on the facts in the FIR concerning:
 - (a) Exactly what took place between the Affected Person and the Members as she was arrested and briefly checked for the possession of weapons. As noted above, the video and written statements appear to provide little clarity on this point;
 - (b) Precisely what each Member knew about the vulnerabilities of the Affected Person, referenced in the reports of Cst. J as the arrest took place;
 - (c) The awareness of each Member, if any, of the call for EHS to attend on scene and their expectations with respect to the same;
 - (d) The rationale for the Members not to respond to the cries and wailing of the Affected Person immediately after her arrest;
 - (e) The Members' belief as to the nature of their duty and responsibilities as they stood around the Affected Person immediately after her arrest. In particular, did the Members consider that they had a duty to ensure the safety and protection of the Affected Person subsequent to her arrest and detention, and if so, to what extent?

- (f) Furthermore, in terms of the laughter that appears to have taken place, do the Members still believe it reflected professional conduct from the perspective of members of the public in the area of the arrest and basic courtesy to the Affected Person? If so, why?
- (g) How the training of each of the Members and VPD policing policies had relevance to the unfolding of events with the Affected Person; and
- (h) Sgt. P indicated to the Investigator that he was the dayshift police supervisor in the Downtown Eastside area on the day of the incident with the Affected Person. Although Sgt. P appeared to indicate that he did not remember police officers speaking ill of any person or laughing after the Affected Person was arrested, he also appeared to confirm that:

"If police officers were laughing at the female in custody, Sgt. P would have dealt with it immediately. He doesn't tolerate it as a Sergeant and he doesn't tolerate it as a person" FIR paragraphs 45.3 and 45.4.

It would be useful to know:

- (i) Sgt. P's views on the explanation provided by the Members concerning the apparently admitted laughter that appears to have taken place in the immediate aftermath of the Affected Person's arrest; and
- (ii) Whether or not that explanation alters Sgt. P's view on the propriety of laughing that appears to have taken place immediately following the Affected Person's arrest. And if so, why.

- 84. Considering all of the material in the FIR and the foregoing analysis, I have determined, pursuant to Section 117(9) and 117(8)(d)(i) of the *Police Act*, that there appears to be evidence set out in the FIR which, if proven, could substantiate both of the Misconduct Allegations with respect to each of the Members.
- 85. I have further determined that such findings, if ultimately proven as facts, could potentially requiring the taking of disciplinary or corrective measures against each of the Members on both Misconduct Allegations.
- 86. The range of disciplinary and corrective measures set out in the *Police Act* which I might consider appropriate in the current case will, of course, be affected by the section 126 factors, most of which are not in evidence at this stage of review.
- 87. However, based on the information in the FIR that is available, the range of disciplinary and corrective measures that may be considered appropriate includes the imposition of a suspension without pay for the alleged professional misconduct relating to the Misconduct Allegations, together with a requirement that the Members engage in further training on the issues raised by the Misconduct Allegations.

88. In setting out that range of possible disciplinary and corrective measures, I note the guidance provided in section 126(3) of the *Police Act* with respect to this issue:

126(3) If the discipline authority considers that one or more disciplinary or corrective measures are necessary, an approach that seeks to correct and educate the member concerned takes precedence, unless it is unworkable or would bring the administration of police discipline into disrepute.

X Next Steps

89. I hereby notify each of the Members of the next steps in this proceeding, pursuant to subsections 117(7) and (8) of the *Police Act*.

Discipline Proceeding

90. Section 118(1) of the *Police Act* provides that a discipline hearing concerning the substantiated Misconduct Allegations must be convened within 40 business days of notice of this decision. That date is set for **May 29, 2024** in Vancouver B.C. commencing at 9:30 a.m.

91. The Registrar will confirm the location for the hearing by notice to the parties.

Right to request the calling of witnesses

92. Pursuant to section 119 of the *Police Act*, at a disciplinary proceeding, each Member may request permission to question witnesses.

93. Such a request must be made within 10 business days of receipt this notification, which will be delivered to the Members through the VPD Professional Standards Section effective April 5, 2024.

94. If the Members, or any of them, wish to request permission to call witnesses in accordance with the process in section 119 of the *Police Act*, they must do so in writing on or before **April 19, 2024** through the Registrar.

95. If a request to call witnesses is not made by a member by April 19, 2024, the right to request the calling of witnesses will expire without further notice to the Members.

Pre-hearing conference

96. Considering the factors in section 120 of the *Police Act*, and in particular section 120(3), I am willing to offer a prehearing conference to each of the Members with respect to the Misconduct Allegations.
97. In establishing timelines with respect to the offer of a prehearing conference, I have taken into consideration the following factors:
- (a) My statutory mandate as Discipline Authority to commence a disciplinary proceeding within 40 business days of the date of this decision (section 118(1) of the *Police Act*);
 - (b) The rights of each of the Members to request permission to call witnesses within 10 days of receiving this decision (section 119 of the *Police Act*);
 - (c) My duty as Discipline Authority to consider and rule on any witness requests received for permission to call witnesses within 5 business days of receiving the same;
 - (d) Section 27 (2) of the *Interpretation Act* which provides as follows:

27(2) If in an enactment power is given to a person to do or enforce the doing of an act or thing, all the powers that are necessary to enable the person to do or enforce the doing of the act or thing are also deemed to be given.

and;
 - (e) The requirement established by section 127 (3) b of the *Police Act* to provide not less than 15 business days' notice to the Members of the date of the Discipline Proceeding, in the prescribed form.
98. Considering the factors in paragraph 99, the offer of a prehearing conference will remain open for acceptance until **May 6, 2024**, 21 business days after delivery of this decision to the Members through the Professional Standards Section of VPD.
99. If any of the Members has not accepted the offer of a prehearing conference by delivery of notice of that acceptance in writing to the Registrar before the end of the business day May 6, 2024, the offer will expire and be withdrawn without further notice to any of the Members.
100. In establishing this deadline, I am satisfied that:
- (a) The imposition of a deadline for the acceptance of a prehearing conference process is required to allow the other statutory timelines to be met; and
 - (b) Section 27 (2) of the *Interpretation Act* provides clear authority to set such a deadline in order to meet the various statutory timelines established in connection with this matter as an ancillary power to the completion of my duties with respect to the completion of a Discipline Proceeding.

101. In the event one or more of the Members elects to accept the offer of a prehearing conference, the parties should expect that I will exercise my authority under section 123(10) of the *Police Act* to adjourn the commencement of the Discipline Proceeding.

Complainant's right to make submissions

102. The Complainant will receive a copy of this notification decision.
103. This section is directed toward notifying the Complainant of the next steps with respect to the consideration of the Complaint, and the Complainant's right to make submissions in the proceedings that next take place.
104. Section 113(1) the *Police Act* provides as follows:
- (1) At any time after receiving a copy of the final investigation report in this matter but at least 10 business days before the date of any discipline proceeding, or, if a prehearing conference is to be held, within 10 business days after receiving notice under Section 120(6), the complainant may make written or oral submissions, or both, to the discipline authority or the prehearing conference authority, as the case may be, in relation to one or more of the following matters:*
- (a) the complaint;*
 - (b) the adequacy of the investigation;*
 - (c) the disciplinary or corrective measures that would be appropriate.*
105. The Complainant should be aware that the matter which is the subject of the Complaint will either be resolved:
- (a) at a prehearing conference; or
 - (b) proceed to a discipline proceeding.
106. The interrelation of Sections 113 and 120 of the *Police Act* in this matter means that it is open to the Complainant to make submissions any time prior to the deadline provided in Section 120(6) with respect to a prehearing conference.
107. However, if the Members, or some of the Members, do not accept a prehearing conference, the Complainant may make submissions with respect to the Discipline Proceeding by **May 13, 2024**, that being 10 business days prior to the commencement of the hearing.

108. The scope of the permitted submissions is set out in section 113 of the *Police Act* which provides, in part, as follows:

...the complainant may make written or oral submissions, or both, to the discipline authority in relation to one or more of the following matters:

(a) the complaint;

(b) the adequacy of the investigation;

(c) the disciplinary or corrective measures that would be appropriate.

109. The Complainant may file written submissions through the Registrar of the OPCC and may also request an opportunity to provide submissions orally.

Case Conference Call

110. A pre-Discipline Proceeding case conference call will be convened by telephone **May 10, 2024 at 9:00 am** with each of the Members, and/or Counsel on their behalf.

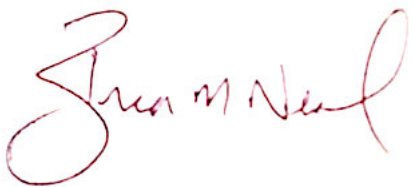
111. At that time, dates will be canvassed that are convenient to commence the evidentiary component of the Disciplinary Proceeding.

112. The Registrar will advise the relevant parties as soon as possible of the conference call details.

113. In the event that date is unsuitable to any of the Members or their counsel, such party will advise the Registrar immediately and provide an indication of available dates and times for a conference call to be convened.

114. The Registrar may be reached at: [REDACTED]

Dated at Victoria, B.C. April 5, 2024



Brian M. Neal KC (rt)