

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 DISCIPLINE AUTHORITY'S DECISION**

TO:	Constable [REDACTED] c/o Claire Hatcher, Counsel	( "Cst. T")
AND TO:	Constable [REDACTED] c/o Scott Wright, Counsel	("Cst. U")
AND TO:	Constable [REDACTED] c/o Mike Sherriff, Counsel	("Cst. D")
AND TO:	Prabhu Rajan Police Complaint Commissioner	(the "Commissioner")

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## I Executive Summary of Decision

- (1) This is a decision made pursuant to sections 123 to 125 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 a young indigenous female ( the “Affected Person” ).
- (2) In accordance with my appointment as Discipline Authority, I have considered the evidence set out in the Final Investigation Report dated February 9, 2024 ( the “FIR” ) authored by the Investigator (the “Investigator”). The FIR sets out evidence in relation to specific allegations of misconduct by the Members set out in a complaint filed by a complainant April 17, 2023 (the “Complaint”).
- (3) As a result of my review of the FIR, and in accordance with section 117 of the *Police Act*, I determined that the evidence available appeared to be 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*; (“Misconduct Allegation #1); and
  - (b) Neglect of duty with respect to the Affected Person contrary to section 77(3)m (ii) of the *Police Act* (“Misconduct Allegation #2)(Collectively the “Misconduct Allegations”)
- (4) At the outset of the Discipline Proceeding, the Members each confirmed that they had decided to admit the misconduct allegation of Discourtesy. The Members each did so on the understanding that the specific discourtesy, laughing while standing over the arrested Affected Person, was in no way focused on that person but rather based on a private matter.
- (5) On the second allegation of misconduct by way of neglect of duty, evidence was received from each of the Members at the Discipline Proceeding concerning their individual interactions with the Affected Person. Also considered were the submissions of the Complainant.
- (6) Having considered all of the evidence and submissions of the parties, I have found that the second allegation of misconduct, neglect of duty, has not been substantiated with respect to each of the Members.

- (7) Although I have found that each Member had a positive duty to safeguard and assess the wellbeing of the Affected Person after the discharge of the bean bag gun and arrest, I have also found that, after considering the testimony of the Members, each had in fact made basic efforts to assess the wellbeing of the Affected Person in accordance with their training while awaiting the arrival of summoned emergency health services (“EHS”).
- (8) While, in hindsight, the extent and scope of those efforts may well be criticized as insufficient in all of the circumstances, the nature of any possible neglect of professional duty with respect to the conduct of the wellness check of the Affected Person does not rise to the level of misconduct for any of the Members.

## **II Introduction and Overview**

- (9) This is a Discipline Proceeding convened pursuant to sections 123-125 of the *Police Act*.
- (10) These proceedings arise with respect to a complaint filed April 17, 2023 on behalf the complainant. The Complaint related to an alleged misconduct by the Members on April 6, 2022 focused on the Affected Person.
- (11) Two disciplinary breaches of trust arising from the Complaint were considered involving the Members, namely:
- (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*.
- (12) In accordance with section 117 of the *Police Act*, a review of the Misconduct Allegation was undertaken. The review concluded on April 5, 2024 reported that there appeared to be evidence set out in the FIR which, if proven, could substantiate the Misconduct Allegations with respect to the Members, potentially requiring the taking of disciplinary or corrective measures.

## **III History of Proceedings**

- (13) On April 6, 2022, several Vancouver police officers replied to a dispatch centered on the Downtown Eastside. The dispatch advised of reports of a young indigenous woman brandishing a knife like weapon towards several persons. The Members were part of the group of officers responding to the dispatch.

- (14) The various officers attending to the dispatch located the Affected Person and attempted to complete her arrest. The Affected Person did not comply with multiple requests to comply with police directions.
- (15) Ultimately, the Affected Person was cornered and a single projectile from a bean bag gun was discharged. In the result, the Affected Person went to ground and was handcuffed.
- (16) Throughout the process, the Affected Person was calling out and wailing.
- (17) The arrest of the Affected Person was witnessed by several members of the public and recorded on a local video system.
- (18) On April 17, 2023 the Complaint was received by the OPCC. The Complaint was not filed by the Affected Person, but rather a member of the public. The Complaint was determined to be admissible and the VPD was directed to conduct an investigation.
- (19) On February 26, 2024 the FIR was completed and delivered to the former Discipline Authority. On February 26, 2024 the former Discipline Authority issued her decision pursuant to section 112 of the Police Act. The decision found that the allegations of misconduct by way Discourtesy by the Members did not appear to be substantiated.
- (20) In reviewing the former Discipline Authority's decision, the Commissioner determined that there was a reasonable basis to believe that the decision was incorrect. The Commissioner therefore issued an order pursuant to section 117(4) of the Police Act for a review of the matter by a retired Judge. I was subsequently appointed by the Commissioner to conduct that review.
- (21) On April 5, 2024 my review of this matter pursuant to section 117(7) of the Police Act concluded with an order that the Misconduct Allegations move to a hearing by way of Discipline Proceeding.
- (22) The Discipline Proceeding hearing with respect to this matter began on June 3, 2024 and with adjournments required to accommodate the parties, concluded December 13, 2024.

#### **IV Misconduct and the Police Act**

- (23) Section 77 of the *Police Act* sets out the definition of "misconduct" relevant to the allegations of misconduct concerning the Members. Specifically, subsection 77 provides, in part, as follows:

*i. 77 (1) In this Part, "misconduct" means*

- (a) *conduct that constitutes a public trust offence described in subsection (2), or*
- (b) *conduct that constitutes*  
  - (ii) *a disciplinary breach of public trust described in subsection (3) of this section.*

(2) *A public trust offence is an offence under an enactment of Canada, or of any province or territory in Canada, a conviction in respect of which does, or would likely*

- a. *(a) render a member unfit to perform her or his duties as a member, or*
- b. *(b) discredit the reputation of the municipal police department with which the member is employed.*

(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.*

(24) 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.*

(25) These proceedings are not an adjudication of claims or defences raised in other matters, or an appeal of other decisions under the *Police Act*. Rather, this decision reflects an examination of all of the evidence submitted in these proceedings related to the allegations of misconduct defined by subsection 77 of the *Police Act*, as qualified by subsection 77(4).

(26) Unlike the section 117(7) *Police Act* review process, the test in a discipline proceeding is proof of the alleged misconduct based on clear and cogent evidence, not simply the appearance of evidence that might substantiate possible misconduct.

## **V Governing Legal Principles**

- (27) The authorities provided by Counsel for the Members augment a number of other authorities widely known in consideration of *Police Act* misconduct allegations. Notable are the decisions in *Lowe v Diebolt*, *Scott v OPCC* and *Lobel & Hoang*.
- (28) The standard to be applied in these proceedings is proof on the balance of probabilities based on clear, convincing and cogent evidence. Throughout this decision, any findings of fact have been established on that basis.
- (29) As Discipline Authority I must not judge the actions of the Members with the benefit of perfection that could be achieved in hindsight. *Dickinson*, 2018 ONCPC 20.
- (30) Finally, the actions of each Member must be considered separately.
- (31) I have reviewed all of the authorities submitted and summarized some of the materials below in my analysis.
- (32) All authorities are set out in the FIR, or submissions, and have each been marked as exhibits in these proceedings.

## **VI Records submitted for review**

- (33) The following records were entered as exhibits in this proceeding:
- a. The FIR, dated February 9, 2024, comprises 62 pages of narrative, plus related attachments. The report details the evidence of relevant parties concerning the conduct of several officers on the date in question. The FIR also provides background on law considered relevant by the Investigator;
  - b. A flash drive containing the FIR records and video of the incident in question;
  - c. Two submissions by the Complainant;
  - d. The submissions of Counsel for the Members, including several relevant authorities.
- (34) These materials, and the testimony of the witnesses, collectively comprise the record with respect to these proceedings (the “Record”).

## **VII Evidence at the Discipline Proceeding**

### **Investigator**

(35) The Investigator testified at the discipline proceeding. In addition to submitting the key records for admission as exhibits, the Investigator answered questions with respect to the FIR, Members' training records and other related matters.

(36) I have accepted the evidence of the Investigator and credible and trustworthy.

### **Cst. T.**

(37) Cst. T testified that she initially began working as a special constable jail guard for two years before she became a police officer in December of 2019 graduating from the Justice Institute in 2020.

(38) Cst. T further explained that her initial policing assignment had been to District 1, adjacent to the Downtown Eastside. She further confirmed that she had been certified as a First Aid provider recertified annually on CPR standards.

(39) At the time of the incident in question, Cst. T confirmed that she had only worked a few shifts in the area.

(40) Cst. T acknowledged that she understood that the Affected Person was in many respects a vulnerable young woman, circumstances that Cst. T had confronted on many occasions before.

(41) With respect to the alleged misconduct by way of discourtesy, as noted above, Cst. T admitted that misconduct. Cst. T was forthright and genuine in expressing her regret for the concerns expressed with respect to the Members laughing while standing over the Affected Person.

(42) With respect to the second allegation of misconduct, Cst. T confirmed that she understood the concern with respect to a possible neglect of duty by not focusing on the need to protect the life of the Affected Person.

(43) However, Cst. T was clear in her evidence that she did not believe that the Affected Person was ever at risk, even after the discharge of the bean bag gun.

(44) Cst. T confirmed that her perspective that after the arrest and handcuffing of the Affected Person, there was no bleeding evident, the yelling continued which indicated breathing was not an issue and that an ambulance had been called on a routine priority basis.

- (45) Cst. T further confirmed that she took on the role of undertaking a search of the Affected Person incidental to her arrest. The Member's evidence also confirmed that, in her view, the search incidental to arrest also included a basic welfare check of the Affected Person. The result of that check did not disclose any apparent risks to the life or health of the subject.
- (46) Cst. T also confirmed that it is her usual practice to ask the subject of a search if there were any underlying injuries. However, with candor, the Member advised that she could not specifically recall whether or not those inquiries had been made with respect to the Affected Person. She also noted that she could not recall the Affected Person complaining about a specific injury, other than the general impact of the bean bag projectile.
- (47) With respect to VPD policy 1.4.6, Cst. T confirmed that in her view, she had no specific duty to render medical assistance to the Affected Person in the absence of a manifest injury.
- (48) In Cst. T's view, lacking medical training, her best option was to await the arrival of the called ambulance staff while monitoring the Affected Person.
- (49) The Member augmented that position by noting that had she seen evidence of the Affected Person turning blue, or having manifest difficulty breathing, she would have had a positive duty to intervene and if necessary, apply CPR processes until emergency health staff arrived on scene.
- (50) I find that Cst. T was a credible, trustworthy and reliable witness in all respects. Without doubt she demonstrated clear insight into the key issues, particularly the public effect of the laughing that took place, and how that demonstrated discourtesy.
- (51) It is also clear that Cst. T seriously regrets what took place and how it affected the Affected Person and members of the public present at the arrest.

#### **Cst. U**

- (52) Cst. U also testified as to his involvement with the Affected Person.
- (53) Much like Cst. T, Cst. U began his career as a jail guard ultimately moving to policing in 2019 graduating from the academy in 2020.
- (54) Cst. U testified that he assumed the role of "hands on" officer in the attempt to arrest and handcuff the Affected Person. In that role, Cst. U testified that in applying the handcuffs, he saw the Affected Person's front and back and saw no apparent injury.



- (55) Cst. U confirmed that he had no discussion with the Affected Person and saw no manifest change in her behavior or yelling after the bean bag projectile had been discharged. Cst. U also confirmed that as part of the process of applying handcuffs, he undertook a basic wellness check of the Affected Person with no issues arising.
- (56) Cst. U saw no need for immediate medical intervention with the Affected Person. However like Cst. T, Cst. U confirmed that such would have been required had the subject's breathing or wellbeing seriously deteriorated.
- (57) Furthermore, Cst. U reported that he too believed that he had a duty to monitor the person in custody to continually assess changes in her wellbeing, and that he performed those duties.
- (58) At the end of Cst. U's testimony in chief, I asked Counsel if the Member wished to specifically address the discourtesy issue. Cst. U's response was strained and while admitting that the laughing reflected poorly on the Members present, did not express regret for the actions taken.
- (59) I find that Cst. U was credible in his testimony. However, his lack of candor with respect to the discourtesy issue raises other concerns as to his complete understanding of the misconduct alleged.
- (60) His commentary on the discourtesy misconduct allegation was perfunctory, and really limited to admitting misconduct, but confirming that the Affected Person was not the subject of the laughter.
- (61) However, those issues are more relevant at the section 126 stage, rather than in the findings of misconduct.

**Cst. D**

- (62) Cst. D was hired by VPD in the early part of 2020 and began working as a police officer in October 2020. Cst. D was assigned to District 2 general patrol duties.
- (63) Prior to commencing work with VPD Cst. D had been employed as a duty manager of passenger screening at Vancouver Airport. In that capacity Cst. D secured first aid and CPR qualifications.
- (64) On April 6, 2022 Cst. D was working on his own which the dispatch related to the Affected Person came through as a "weapons/threat" call.

- (65) Cst. D arrived and followed Cst. T and other officers as they attempted to secure control of the Affected Person by verbal commands.
- (66) Cst. D reported that the Affected Person was “wailing” and responding in a nonsensical manner as other officers attempted to gain control of the situation by continuing to issue commands.
- (67) Cst. D advised that it was his initial assessment that the Affected Person may well have been suffering from mental health issues and was seen as a vulnerable person.
- (68) Immediately after the bean bag was deployed, Cst. D advised that he joined other members to form an “arrest pod” approaching the Affected Person who was then partially prone. Cst. D secured the Affected person’s legs while other members secured her hands to allow for handcuffs to be applied.
- (69) The member reported that while securing the Affected Person’s legs, he checked for blood, bruising or broken bones but saw none. Having overheard a request from another member for EHS to attend the scene, Cst. D concluded that nothing further in the way of medical assistance for the Affected Person was required. In particular, Cst. D was certain that nothing came to his attention that would have warranted escalating the call priority for medical assistance to EHS.
- (70) In terms of the wailing from the Affected Person, Cst. D noted that nothing major changed after the bean bag projectile was deployed. He acknowledged that suffering a hit from the projectile would have caused the Affected Person pain. However, Cst. D did not consider that there was an evidence of significant new pain that would have warranted medical intervention.
- (71) Cst. D acknowledged that the laughter that took place over the Affected Person on the ground was discourteous. He showed genuine insight into why the actions taken were discourteous, notwithstanding the fact the laughter was not focused on the Affected Person or her situation. Cst. D confirmed that discourtesy arose because the actions were in all of the circumstances unprofessional.
- (72) Having considered Cst. D’s evidence, I accept the same as credible, reliable and trustworthy in all respects.
- (73) I find that Cst. D honestly reported on the evolution of events with the Affected Person and showed genuine insight into the issues arising from that arrest, including the acknowledged lack of professionalism in laughing while standing above the Affected Person.

### **Position of Counsel for Cst. T**

- (74) The position of Counsel for Cst. T was set out in written submissions, subsequently augmented by oral submissions during the course of this Discipline Proceeding.
- (75) Counsel for Cst. T confirmed that the member had acknowledged misconduct by way of discourtesy, but submits that any misconduct beyond that acknowledgment was not substantiated.
- (76) Counsel submitted that Cst. T conducted a “dual purpose search incident to arrest and welfare check” right after the initial arrest of the Affected Person. In doing so, she satisfied herself that there was no risk to the Affected Person’s life.
- (77) Counsel further submits that Cst. T had no duty beyond the checks undertaken based on her training and VPD policy, specifically, policy 1.4.6.
- (78) Counsel argues that there is no clear, cogent or compelling evidence that Cst. T had a duty to check on the Affected Person’s welfare beyond the checks undertaken and that therefore, no neglect of duty has been proven.

### **Position of Counsel for Cst. U**

- (79) Counsel for Cst. U also submits that there was no neglect of duty proven with respect to the Member.
- (80) Counsel notes that the testimony of Cst. U augmented the Video evidence by confirming that the Member had observed the Affected Person’s entire back and front after the arrest, noting no apparent injuries.
- (81) Counsel submits that at no time did Cst. U note anything requiring urgent medical attention, nor was there any change in behavior that would warrant immediate medical intervention.
- (82) Counsel notes that the Member did not notice any bleeding or breathing issues relating to the Affected Person during his ongoing monitoring, nor did he consider that it was his duty to have a conversation with the Affected Person about any possible injuries.
- (83) Counsel submits that Cst. U was aware of the collateral checks undertaken by Cst. T and Cst. D, none of which drew to his attention the need for anything additional to be done for the Affected Person.

(84) Counsel references *R. v Tag El Din* 2021 ABPC 157 and section 1.4.6 of VPD policing policy to confirm that members are responsible for the well-being and protection of people in their custody and must ensure that a person in custody receives appropriate medical assistance. Counsel submits that Cst. U complied with that standard and that no neglect of duty was proven to have taken place.

(85) Counsel notes that Cst. U was aware that emergency health services had been called to attend to the Affected Person, albeit on a non-urgent priority. Counsel further notes that there is no evidence that any efforts to ask the Affected Person about possible injuries might have elicited a response, or affected her wellbeing.

(86) Counsel specifically submits that:

*“It would be possible in nearly every case to conceive of ways officers could have made their interactions with an arrestee more delicate. In these circumstances, officers recognized the need for medical assistance. They followed their training to assess for an emergency. None was noted.”*

Submissions of Cst. U, para 53.

(87) In summary, Counsel for Cst. U submits that the evidence does not support proof of any neglect of duty. In the event a neglect of duty is proven, Counsel submits that Cst. U had good and sufficient cause to conduct himself as he did.

(88) Counsel therefore submits that there has been no clear, cogent and convincing evidence supporting proof of neglect of duty on the part of Cst. U.

## **IX Submissions of Counsel for Cst. D**

(89) The submissions of Counsel for Cst. D closely mirror those of Cst. U. Counsel specifically argues that none of the objective information available to the three Members, including Cst. D created a duty of further intervention by any of the Members.

(90) Counsel submits that as none of the Members are trained medical personnel or mental health care workers, their duty to the Affected Person is limited both in VPD policy and law.

(91) Counsel submits that all three Members met their legal duties and obligations to the Affected Person in terms of ensuring her health and safety. Counsel therefore submits that there is no basis to find a neglect of duty on the part of any Member, including Cst. D.

- (92) Counsel submits that Cst. D had no further duty beyond the basic search incident to arrest. Counsel further submits, based on Ontario decisions referenced in submissions, that a degree of “willfulness” must be proven to establish neglect of duty.
- (93) Counsel submits that all Members, including Cst. D fully complied with VPD policy 1.4.6 with respect to the post arrest condition of the Affected Person in that medical assistance had been called, and a basic wellness check completed by all three Members. It is submitted that none identified a need for immediate or urgent medical intervention or action of the part of the Members present.
- (94) Counsel for Cst. D acknowledges that the Member knew that there would have been some pain afflicting the Affected Person as a result of the bean bag strike. However, it is submitted that Cst. D believed that the strike had been deployed in a manner so as not to seriously harm the Affected Person.
- (95) Counsel notes that all three Members present conducted their own basic assessment of the Affected Person post arrest, and all reached the same conclusion: no further intervention was required.
- (96) Counsel further notes that Cst. D’s evidence was that had he noticed anything of concern with respect to the Affected Person, he would have radioed for a more urgent medical response on scene.
- (97) Counsel submits that although the Affected Person appeared to be experiencing some degree of discomfort or pain, it did not demand anything beyond the steps taken by the Members.
- (98) Counsel therefore submits that there is no proven neglect of duty on the part of Cst. D.

**X Submissions of the Complainant**

- (99) The Complaint was not filed by a witness to the arrest of the Affected Person, but rather a person who had reviewed a video of that event. The submissions with respect to that complaint made pursuant to section 113 of the Police Act were twofold:

- (a) one, a submission 38 pages in length dated April 30, 2024;
- (b) and a second supplementary submission dated May 13, 2024.

Both have been entered as exhibits in these proceedings.

- (c) Part of the submissions related to officers who were not the subject of the section 117 proceedings. OPCC staff advised the Complainant that the Commissioner’s appointment order under section 117 was limited to consideration of the conduct of the Members.

(100) The essence of the Complainant's submission can be summarized as follows:

- a. That the Members acted disrespectfully by laughing standing together over the prone Affected Person;
- b. That the conduct of the Members negatively affected not only the Affected Person, but also the members of the public who were witnesses to the arrest;
- c. That Members and other officers present for the arrest lied about laughing while standing over the Affected Person and intimidated witnesses;
- d. That the investigation reflected by the FIR failed to accurately assess available evidence resulting in an improper conclusion that misconduct allegations against the Members were not substantiated;
- e. That the use of force to subdue, arrest and handcuff the Affected person was completely inappropriate in all the circumstances. In particular, the Complainant argues that de-escalation was required along with greater sensitivity with respect to a person who appeared to suffering mental health issues;
- f. That it was a failure of the Members duties as officers to leave the Affected Person, an individual in apparent pain and distress, without immediate care and attention. Specifically, the Complainant notes that 8 VPD officers were on scene and that none seemed to offer any first aid assistance to the Affected Person as she lay on the ground in apparent pain.

(101) The portions of the Complainant's submissions that are not relevant to the conduct of the Members, specifically the alleged misconduct of other officers, has not been considered in the context of this review..

## **XI Evidence not in Dispute**

(102) After considering all of the evidence, the Record does not disclose any dispute with respect to the many of the facts relating to the Misconduct Allegations, namely that:

### **a. The initial complaints concerning actions of the Affected Person**

(103) On April 6, 2022 at approximately 11:50 a.m., police dispatch received multiple reports of a young indigenous female acting erratically and threatening a security guard with some form of knife in the Downtown Eastside area of Vancouver;

(104) At 11:56 a.m., Cst. J responded to the calls with his partner Cst. T;

(105) Shortly thereafter, the two members arrived on scene and located one of the alleged victims, a local security guard;

- (106) The guard provided the members with a description of the female in question and outlined the nature of the alleged threat with a knife;
- (107) The Members noted that the general description of the female in question closely matched that of the female reported by other callers;
- (108) 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;
- (109) 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;
- (110) The grounds for arrest of the Affected Person were well established in law;
- (111) 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;
- (112) Cst. J made repeated loud demands of the Affected Person to stop for the police;
- (113) The Affected Person refused to comply with demands made to stop and continued walking into an alley;
- (114) The Affected Person was followed by the Members and a small group of other officers now on scene as backup;
- (115) 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;
- (116) The Affected Person then carried on further up the alley defiantly refusing repeated police directions to stop;
- (117) Cst. J continued demands for the Affected person to stop, who was then flanked by Cst. T and other members;
- (118) 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;
- (119) 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;

- (120) 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;
- (121) Cst. J was also aware that the Affected person presented with at least some mental health issues;
- (122) Repeated demands were made by members present to the Affected Person saying : *"Show me your hands"* and *"Get on the ground now"*;
- (123) The Affected Person refused to comply with all orders of police;
- (124) 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;
- (125) The lawful grounds for discharge of the bean bag weapon to control and effect the arrest of the Affected Person were well established in law;

**Arrival of Csts. D. and U**

- (126) After being struck, the Affected Person responded in apparent pain, however, still did not comply with demands to get on the ground;
- (127) Cst. D then joined Csts. J and T confronting the Affected Person as further demands were made for her to get on the ground;
- (128) The Affected Person next backed up toward an adjacent building while dropping several items from her hands;
- (129) 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"*;
- (130) Ultimately the Affected Person slumped to the ground in a squatting position adjacent to a building facing the members on scene;
- (131) An arrest team of five members, including Csts. T, U and D all moved toward the Affected Person at approximately 12:01 p.m.;
- (132) 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;



- (133) Cst. J made a call for Emergency Health Services (“EHS”) to attend the scene at approximately 12:04p.m;
- (134) The call was noted by Cst. J to be a routine call for service as there were no obvious injuries to treat, however, it was believed that a professional medical assessment was required after the bean bag strike to ensure no unknown injuries existed;
- (135) 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;
- (136) 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;
- (137) 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;
- (138) At this point the Affected Person was continuing to loudly cry out in apparent distress or pain;
- (139) None of the three Members responded to the Affected Person’s cries but rather continued to talk amongst themselves, then began laughing together;
- (140) The cause for the laughter was not related to the Affected Person in any manner, but rather a shared private experience that caused the three Members all to laugh for a short period of time;
- (141) At that time, there were other members of the public observing events with the Affected Person;
- (142) 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;
- (143) 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;
- (144) 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
- (145) The Affected Person was uncooperative and refused treatment or transfer to a hospital.

- (146) The remaining facts are, at least to some extent, in dispute. There are minor, but important, differences in the evidence of the various parties on several key issues.

## **XII Misconduct Allegation # 1 – Finding of Facts in dispute**

- (147) The first misconduct allegation relates to the actions of the three members acting in concert to laugh while standing over the handcuffed and prone Affected Person.
- (148) I find that there is no doubt that the Members did indeed laugh in the circumstances alleged and in the presence of members of the public.
- (149) I also find, however, that the laughter arose as a result of a shared private joke between newly appointed members. It was not focused on or related to the circumstances of the Affected Person in any way.
- (150) The difficulty, however, is that the public perception of that laughter easily led members of the public, and the Complainant, to assume that the Members were treating the Affected Person with disrespect.
- (151) I cannot find that the Members intentionally acted in such a manner, however, the public perception clearly was to the contrary. Those actions were, in all of the circumstances reckless. And for the purposes of considering the possible misconduct of the Members, that perception has significant weight.
- (152) The Members having had the opportunity to reflect on their actions and review matters with Counsel, have each acknowledged that the allegation of misconduct by way of Discourtesy has been established. I commend the Members for acknowledging that while their actions in laughing was based on a private matter, the professionalism expected of police officers is not met by doing so in such circumstances.
- (153) I find that with those additional facts, Misconduct Allegation # 1 is substantiated with respect to each of the Members.

## **XIII Misconduct Allegation # 2**

- (154) The second misconduct allegation relates to the actions of each of the Members in dealing with the Affected Person subsequent to her arrest.

- (155) The allegation raises the issue of evidence that appears to substantiate neglect of duty with respect to the Affected Person contrary to section 77(3)m (ii) of the *Police Act*

**XIII (a) Preliminary Matter-**  
**Fairness of Misconduct Allegation #2 arising in the section 117 Decision**

- (156) As a preliminary matter, Counsel for Cst. D raised an argument in an appendix to submissions that indirectly challenges the fairness of the Member being required to address Misconduct allegation # 2 in this proceeding. The argument is expressed as follows:

*“Cst. D also wishes to comment briefly on the history of this proceeding. Although no specific relief is being sought in relation to this issue, Cst. D wants to ensure that the record reflects his position that the neglect of duty allegation should not have been added to the matter at such a late stage in the statutory process.”*

- (157) No relief is sought in connection with these submissions.
- (158) Cst. D’s supplemental submissions note that neglect of duty was not specifically investigated nor included in the FIR.
- (159) It is submitted that the *Police Act* does not allow a retired judge acting under section 117 of the *Police Act* to come to a decision raising a new matter, such as Misconduct Allegation # 2, that was not dealt with in the FIR.
- (160) Neither of the other two Counsel have made specific submissions on this point.
- (161) Inasmuch as the supplemental submissions of Cst. D indirectly raises an issue concerning the fundamental fairness of these proceedings, the arguments must be addressed.
- (162) Having considered Counsel’s submissions and the relevant statutory provisions, it is my view that Cst. D’s arguments with respect to the consideration of Misconduct Allegation # 2 are incorrect. Let me explain.
- (163) Section 117 of the *Police Act* provides for the appointment of a retired judge to undertake the following duties:
- (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 a 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.

(164) The decision rendered under section 117(7) must include a notification to the relevant Member of the following:

(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 [*complainant's right to make submissions*],

(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 require 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 [*prehearing conference*];

(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).

(165) Nowhere in section 117 is there any requirement imposed on the retired judge to focus only on the allegations of possible misconduct raised in the FIR, or even the former Discipline Proceeding.

(166) Rather, the wording of sub section 117(8) (a) makes it clear that the duty of the retired judge is to identify "*any conduct of concern*" in the record and to list or describe each allegation of possible misconduct identified.

(167) Clearly, the limiting factor in the consideration of possible misconduct is the record provided to the retired judge under section 117(6) of the Police Act.

(168) However, if there are facts in a FIR or elsewhere in the record supporting possible misconduct, it is the duty of the retired judge to consider those facts in the context of section 77 and determine what misconduct might appear to be substantiated, whether or not it was previously identified as such.

- (169) Cst. D's supplemental argument implicitly raises the fairness to a member of being forced to address new allegations of misconduct at the section 117 stage. Let me simply note that all members facing a possible hearing with respect to misconduct arising out of a section 117 review have the option to request the right to call witnesses under section 119 of the Police Act. Cst. D elected not to pursue that option.
- (170) As well, members proceeding to a discipline hearing have the ability to make application to the adjudicator for further investigation under section 132 of the Police Act. Here, no such application has been made by Cst. D.
- (171) Members, of course, have the right to testify and provide evidence on issues in dispute at a discipline proceeding. Cst. D exercised his right to do so in these proceedings.
- (172) Finally, members have the right to cross examine the investigator in a discipline proceeding, including a review of all the contents of the FIR. Again, Cst. D exercised that right in these proceedings.
- (173) Having considered all of the foregoing I cannot find that Cst. D has been denied any component of procedural fairness as a result of responding to the section 117 report that concluded that there appeared to be evidence available in the record of possible misconduct by way of neglect of duty.

**XIII (b) Members' evidence**

- (174) I will now turn to consideration of the facts relevant to each Member in turn.
- (175) The actions of each Member in dealing with the Affected Person were partially reflected in the video contained in the FIR. Audio of the interactions in question was very poor.
- (176) In the case of each Member, Counsel walked them through the details of their actions as shown on the video. The augmented evidence enhanced the factual basis of the Members' individual actions in dealing with the Affected Person as reflected in the FIR and in particular, the Video.

**XIII (c) Cst. T**

- (177) With respect to Cst. T, after considering all of the evidence, I find as follows:
- (a) That Cst. T approached the arrested Affected Person with two goals: to complete a search incident to arrest and to undertake a basic wellness check;

- (b) As noted above, Cst. T considered the Affected Person to be a vulnerable, potentially emotionally disturbed person in possession of a knife or similar weapon;
- (c) The Member also believed that the Affected Person may have suffering from mental health issues or drug induced impairment;
- (d) At no point in Cst. T's interaction with the Affected Person did the Member believe that there was a risk to the Affected Person's life or health;
- (e) Cst. T reported that after the bean bag strike, the Affected Person was breathing without impairment and not seen to be bleeding in any way. Nor were any specific complaints heard from the Affected Person, beyond soreness arising from the site of the bean bag projectile strike;
- (f) Cst. T was aware from a radio transmission that another Member had requested the attendance of EHS to do a routine check on the Affected Person;
- (g) As the lead female officer on scene, Cst. T assumed responsibility for doing the search incident to arrest of the Affected Person. However, I find that the search was delayed for approximately a minute while the Members laughed amongst themselves while standing over the prone Affected Person;
- (h) It was Cst. T's general practice to conduct searches incident to arrest by asking the subject whether or not they had any injuries. I cannot find whether or not that practice took place in connection with the Affected Person;
- (i) During the pat down of the Affected Person, I find that the subject loudly protested that Cst. T had placed something in her pocket. I do not find that such took place; Rather, I find that Cst. T proceeded to do a complete external search of the Affected Person and the pockets of her pants with care and diligence;
- (j) Cst. T acknowledged that she had both a duty to conduct the search incident arrest and complete a welfare check of the Affected Person;
- (k) As a result of her observations during the search incident to arrest, Cst. T noted no conditions relating to the Affected person indicating bleeding, difficulty in breathing or other symptoms that may have required member intervention or a change in the priority for EHS on scene; and
- (l) Cst. T had considered the wailing that had been emanating from the Affected person both before the bean bag strike and thereafter and did not consider the same to be indicative of an urgent need to protect the life and health of the Affected Person.

**XIII (d) Cst. U**

- (178) With respect to Cst. U, after considering all of the evidence, I find that:
- (a) Cst U arrived on scene after the bean bag had been deployed against the Affected Person;
  - (b) Cst. U assumed the duties of a “hands on” officer and took responsibility for securing the handcuffs to the Affected Person with the assistance of the other Members;
  - (c) As Cst. U attempted to apply the handcuffs, he checked the Affected person for obvious injuries and found none requiring urgent medical attention or intervention;
  - (d) Cst. U did not engage the Affected Person in any discussion about her possible injuries;
  - (e) Cst. U’s training was to conduct a basic wellness check post arrest to ensure no immediate medical issues were observed; and
  - (f) Cst. U continued to monitor the Affected Person post arrest for any obvious change in her condition. None was observed.

**XIII (e) Cst. D**

- (179) With respect to Cst. D, after considering all of the evidence I find that:
- (a) Cst. D had observed the Affected Person before the deployment of the bean bag gun. He noted that she was yelling and refusing to comply with police orders while brandishing some form of knife;
  - (b) Cst. D move in after the bean bag strike with Csts. T and U to complete the arrest. Cst. D took control of the Affected Person’s legs in that process;
  - (c) Cst. D was able to see the area where the Affected Person had been struck by the bean bag projectile. Throughout the arrest he was able to observe and check much of the Affected Person;
  - (d) None of Cst. D’s observations of the Affected Person disclosed any obvious injury requiring urgent medical care. Specifically, Cst. D observed no bleeding, difficulty breathing or broken bones;

- (e) Cst. D did not engage the Affected Person in any discussion about her possible injuries;
- (f) Cst. D's training was to conduct a basic wellness check post arrest to ensure no immediate medical issues were observed; and
- (g) Cst. D continued to monitor the Affected Person post arrest for any obvious change in her condition. None was observed.

**XIV Duty arising pursuant to section 77(3)m (ii) of the Police Act**  
**– Common Law and Policy**

- (180) At common law, peace officers have a general duty to preserve peace, prevent crime and protect life: *Dedman v the Queen* [1985] 2 S.C.R. 2 at pp 11-12
- (181) The common law duty of members has been further refined by VPD department policy, specifically, VPD Regulations and Policing Manual, Section 1.4.6. That policy provides as follows:

**1.4 Arrest & Detention 1.4.6 Arrest of Persons with Injuries or Other Apparent Medical Risks** (Effective: 2021.09.23)

*POLICY People in police custody are vulnerable, and entirely dependent on the police to obtain medical assistance for them. Members are responsible for the well-being and protection of people in their custody, and must ensure that a person in custody receives appropriate medical assistance.*

*PROCEDURE 1. If a member believes a person in custody is in need of medical assessment or treatment, the member must request the attendance of BC Ambulance Service (BCAS), Vancouver Fire and Rescue Services (VFRS), or other medical professionals; and*

*2. Ensure the person in custody is transported to hospital if they:*

- a. are unconscious; or*
- b. had naloxone administered prior to, or while in custody; or*
- c. are suspected to have ingested anything that may cause a medical emergency and/or overdose; or*
- d. are incapable of making a rational decision with respect to medical treatment due to intoxication, mental health issue, and/or other medical condition such as a head injury, or*
- e. wish to be transported to hospital for one of the following reasons:*
  - 1. a police dog bite (see RPM Section 1.13.1 Use of Police Service Dogs); or*
  - 2. police use of force (see RPM Section 1.2.1 Use of Force – Justification paragraph 27(c), (d) and (e)); or*
  - 3. is suffering from any other obvious medical concern requiring emergency medical treatment.*



3. *Members should be cognisant that a person in custody has the right to refuse medical treatment, and a member may only use force to provide medical aid in circumstances outlined in RPM Section 1.2.2 Use of Force to Provide Medical Aid.*
4. *Members shall notify a supervisor when a person in custody is sent to the hospital (other than a person who has been arrested solely for intoxication), and ensure that the Jail NCO is notified of the necessary details.*
5. *Members shall remain with a hospitalized person in custody at all times, unless instructed otherwise by a supervisor. When the person in custody only requires brief hospitalization, they may be guarded by the escorting or arresting member.*
6. *If during the course of the medical treatment, it becomes apparent that the person in custody will require treatment for an extended period of time, the guarding member shall notify their supervisor of the expected time period involved.*

(182) The misconduct alleged in Misconduct Allegation # 2 relates to an alleged neglect of duty on the part of each of the Members to properly assess and deal with possible injuries sustained by the Affected Person while she remained in their custody, thereby potentially affecting her life and safety.

(183) Misconduct arising by way of an alleged neglect of duty under section 77(3)(m) of the Police Act requires proof beyond a balance of probabilities of three components:

- (a) The existence of a duty;
- (b) Evidence that the member concerned had neglected to promptly and diligently perform that duty; and
- (c) Evidence that the member's neglect of duty took place without good or sufficient cause.

## **XV Analysis**

### **(I) Existence of a duty towards the Affected Person**

(184) I find that each of the Members were aware that the Affected Person was:

- (a) A young, indigenous woman,
- (b) Obviously distraught or acting irrationally,
- (c) Exhibiting violent behavior while brandishing some form of knife,
- (d) Refusing to comply with police demands to drop the knife and submit to arrest,
- (e) Moving away from police up an alley,
- (f) Potentially experiencing mental health or substance abuse issues,
- (g) Crying and arguing with members on scene as she walked away,
- (h) Refusing multiple demands to comply with directions issued by the members on scene to drop the knife and submit to arrest.

(185) I further find that each of the Members believed that the Affected Person was at the point of her arrest and thereafter, a vulnerable person.

(186) Once the arrest of the Affected Person took place, I find that the Members each had a duty under VPD policy 1.4.6 to safeguard the wellbeing and protection of that person, including appropriate medical assistance. This is, I find, a component of the Members' common law duty as peace officers.

(187) The issue, however, is whether or not the nature of the duty of each of the Members was static, or variable, based on the circumstances of the person in custody for whom each of the Members was responsible.

**I (a) Submissions of Counsel – Members' duty to conduct wellness checks**

(188) Counsel for the Members each submitted that the duty of a member does not change towards a person in their care while in custody. Each acknowledged, however, that what may be required to give effect to that duty would likely vary depending on the circumstances of each case.

(189) For example, Counsel each noted that the obvious existence of a severe injury would undoubtedly result in a more immediate need to summon EHS staff on scene.

(190) However, Counsel noted that police officers are not generally trained medical staff, nor social workers. As such, it was the joint submission of Counsel that issues requiring medical attention or the intervention of other professionals was best left to those professionals.

(191) The submission made was that the Member's duty was to assess circumstances in relation to an arrest, and take the action required to address those circumstances. In that regard, all acknowledged the vulnerability of the Affected Person in considering the Members' actions post arrest.

(192) A final submission on this issue related to the admitted misconduct by way of Discourtesy. Counsel for Cst. T argued that if there were any gaps in the discharge of the Members' duties to the Affected Person subsequent to her arrest, such gaps were properly addressed through the admission of the misconduct in Misconduct Allegation # 1.

(193) Considering all of the evidence, and relevant law, I am satisfied that the discharge of duties of the Members towards a person in their custody can never be static, but rather must vary and adapt according to circumstances known to the Members at the time of the arrest.

(194) Here, after securing the Affected Person, the Members' duties at common law and under VPD policy were to:

- (a) do a reasonable assessment of the circumstances before them;

- (b) to conduct a wellness check that would address those circumstances to ensure and protect the health, safety and wellbeing of the Affected Person; and
- (c) to act immediately if issues were identified that might raise concerns of apparent medical ,or other risks, potentially adversely affecting the subject’s health, safety or wellbeing, including physical injuries.

**I (b) Findings on the Existence of the Members’ duty with respect to wellness checks**

- (195) I find that each Member had been trained to complete a basic wellness check as an incident to arrest looking for obvious injuries, bleeding or breathing problems.
- (196) The Members’ training also required that while the Affected Person remained under their control, each Member had a duty to monitor the arrested person to look for and changes in condition.
- (197) The first component of the section 77(3)(m) analysis has therefore been established.

**(II) Neglect of Duty towards the Affected Person**

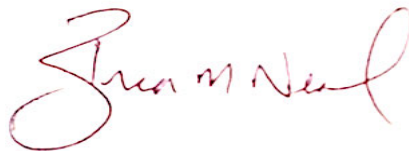
- (198) The oral evidence of the Members significantly expanded on the information available for review concerning the interaction of each Member with the Affected Person.
- (199) Common law and section 1.4.6 of VPD policy sets out broad duties for members dealing with an arrested individual with *“injuries or other apparent medical risks”*.
- (200) There is nothing specific at common law or under VPD policy 1.4.6 requiring a “wellness check” incident to arrest, however, each of the Members confirmed that their training had noted the need for that task to be completed as part of the initial search of an arrested person.
- (201) Following the arrest of the Affected Person, a call was immediately placed to EHS requesting the attendance of an ambulance crew.

- (202) At that point I cannot find that any of the officers on scene, including the Members, were aware of any specific medical condition or issue relating to the health, safety or wellbeing of the Affected Person. The call was made, I find, out of an abundance of caution to ensure that any issues arising from the bean bag strike, or the Affected Person's vulnerable condition were addressed.
- (203) As found above, each Member undertook varying degrees of a basic physical wellness check of the Affected Person. The checks in each case looked to identify obvious wounds, bleeding or breathing issues relating to the Affected Person.
- (204) Each of the three Members came to the same conclusion, that there were no life, health or safety issues manifest relating to the Affected Person, nor any complaint from that person as to any particular injury.
- (205) I find that none of the three Members asked the Affected Person about any injuries she may have sustained.
- (206) I also find that the three Members generally monitored the Affected Person while awaiting the EHS team and noted no evident change in that person's circumstances.
- (207) I do not find that any material delay in the wellness check arose subsequent to the arrest of the Affected Person.
- (208) As noted above, the "duty" imposed on each of the Members is partially set out in VPD Policy 1.4.6. Considering all of the evidence I find that each Member had discharged that duty in accordance with their training through:
- (a) The wellness check on the Affected Person subsequent to her arrest;
  - (b) The immediate call made to summon EHS staff by other attending officers; and
  - (c) The monitoring of the Affected Person for possible changes in her condition prior to the arrival of EHS.
- (209) Ideally, asking the Affected Person, a vulnerable person, about any possible injuries would have been wise. However, given the aggressive and combative actions taken by the Affected Person prior to and subsequent to her arrest, it appears that the Members did not engage in those discussions.
- (210) Considering the additional oral evidence of the Members, and all of the foregoing circumstances, a finding, in hindsight, that a failure to engage the Affected Person in a discussion concerning possible injuries was a neglect of duty, would not be reasonable.

- (211) As noted above, it is not my duty at law to judge the actions of the Members with the benefit of perfection that could be achieved in hindsight.
- (212) I find that each of the Members performed the basic wellness checks of the Affected Person as they thought appropriate in the circumstances in accordance with their training, particularly in light of the fact that each knew EHS had been summoned to the arrest scene.
- (213) There being no finding of a neglect of duty on the part of any of the Members with respect to Misconduct Allegation #2, consideration of any “good or sufficient cause” for the Members’ actions is not required.

**XVI Conclusion – Misconduct Allegation # 2**

- (214) As a result of the foregoing analysis, I have determined on a balance of probabilities that Misconduct Allegation # 2 has not been substantiated with respect to any of the Members based on the material in the FIR , as augmented by Member testimony in the Discipline Proceeding.
- (215) As set out in section 125 of the Police Act, submissions on appropriate disciplinary or corrective measures must be made within 10 business days of receiving the Form 3 in these proceedings. As service is effected on counsel electronically, that date is January 6, 2025.
- (216) I note, however, that Counsel have advised that they are seeking an adjournment of that deadline to facilitate the provision of written submissions.
- (217) The adjournment sought will extend to January 17, 2025 . I have approved that application to accommodate scheduling issues for Counsel in accordance with section 123(10) of the Police Act. Submissions will be due on that date.



Brian M. Neal, K.C.(rt)  
Discipline Authority  
December 18, 2024  
Victoria, B.C.