

September 11, 2024

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

AND

IN THE MATTER OF A REVIEW OF AN ALLEGATION OF MISCONDUCT AGAINST  
CONSTABLE [REDACTED] AND CONSTABLE [REDACTED] OF THE  
VANCOUVER POLICE DEPARTMENT

**NOTICE OF ADJUDICATOR'S DECISION**

TO: Constable [REDACTED] Members  
Constable [REDACTED]

AND TO: Sergeant [REDACTED] Investigating officer  
c/o West Vancouver Police Department

AND TO: Mr. Prabhu Rajan Police Complaint Commissioner

**Introduction**

1. This matter arises out of an incident that occurred on November 24, 2022 in Vancouver, British Columbia. Officers of the Vancouver Police Department (VPD) conducted what they described as a high-risk traffic stop of a taxi. The purpose of stopping the taxi was to arrest the taxi's passenger Mr. [REDACTED] for breach of probation. Some of the officers were aware of Mr. [REDACTED] criminal record, his alleged involvement in drug trafficking and the possibility he may be armed or have access to a weapon. Mr.

██████████ was ordered several times to get out of the taxi. Eventually he complied and exited the taxi. The officers, including Constable ██████████ and Constable ██████████, were in positions around the taxi as Mr. ██████████ stepped out of the rear passenger seat. Mr. ██████████ was ordered to get on the ground and crawl towards the officers. He did not comply and Constable ██████████ shot Mr. ██████████ with a weapon described as a less lethal beanbag shotgun. Mr. ██████████ fell to the pavement with his back to the officers. Constable ██████████ who was a member of the VPD canine unit, then deployed ██████████ police dog, which bit Mr. ██████████ twice. Other officers moved in to take Mr. ██████████ into custody.

2. Because Mr. ██████████ was bitten and injured, the VPD was required to report the matter to the Police Complaint Commissioner pursuant to section 89 of the Police Act. The Police Complaint Commissioner reviewed the circumstances and directed that an investigation into the matter be conducted. Sergeant ██████████ of the West Vancouver Police Department was assigned to conduct an investigation pursuant to section 92 of the Police Act.
3. Sergeant ██████████ submitted his Final Investigation Report on April 9, 2024 to the Discipline Authority. Sergeant ██████████ concluded that Constables ██████████ and ██████████ did not intentionally or recklessly use excessive force toward Mr. ██████████. He recommended that the allegation of Abuse of Authority be unsubstantiated.
4. On April 23, 2024, Inspector ██████████, as the Discipline Authority, issued his decision pursuant to section 112 of the Police Act. Inspector ██████████ identified the allegation of misconduct against the members, specifically Abuse of Authority pursuant to section 77(3)(a)(ii)(A) of the Police Act. He found that the allegation did not appear to be substantiated.

5. The Police Complaint Commissioner reviewed the allegation and the alleged conduct and considered that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect.
6. On July 25, 2024 the Police Complaint Commissioner appointed me to review the investigating officer's report, the evidence and the records pursuant to section 117 of the Police Act.

### **Section 117**

7. The statutory authority governing this review is set out in Section 117 of the Police Act. If, on review of a discipline authority's decision under section 112(4) or 116(4) that conduct of a member or former member does not constitute misconduct, the Police Complaint Commissioner considers that there is a reasonable basis to believe that the decision is incorrect, the Police Complaint Commissioner may appoint a retired judge recommended under subsection (4) of this section to do the following:
  - (a) review the investigating officer's report referred to in section 112 or 116, as the case may be, and the evidence and records referenced in that report;
  - (b) make her or his own decision on the matter;
  - (c) if subsection (9) of this section applies, exercise the powers and perform the duties of discipline authority in respect of the matter for the purposes of this Division.

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

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

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

- (a) a description of the complaint, if any, and any conduct of concern,
- (b) a statement of a complainant's right to make submissions under section 113,
- (c) a list or description of each allegation of misconduct considered by the retired judge,
- (d) if subsection (9) applies, the retired judge's determination as to the following:
  - (i) whether or not, in relation to each allegation of misconduct considered by the retired judge, the evidence referenced in the report appears sufficient to substantiate the allegation and requires the taking of disciplinary or corrective measures;
  - (ii) whether or not a prehearing conference will be offered to the member or former member under section 120;
  - (iii) the range of disciplinary or corrective measures being considered by the retired judge in the case, and
- (e) if subsection (10) applies, a statement that includes the effect of subsection (11).

Section 117(9) If, on review of the investigating officer's report and the evidence and records referenced in them, the appointed retired judge

considers that the conduct of the member or former member appears to constitute misconduct, the retired judge becomes the discipline authority in respect of the matter and must convene a discipline proceeding, unless section 120 (16) applies.

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

8. A review of the Section 117 case law and the case cited as 2016 BCSC 1970 defines my role as the adjudicator. I must review the material delivered under subsection 117(6) and determine whether or not the conduct of the member appears to constitute misconduct. The law is clear that, because the adjudicator may become the discipline authority in relation to discipline proceedings, my job is not to reach conclusions about the conduct of the member; rather, it is to assess only whether it appears to constitute misconduct.
9. The review is a paper-based process of the record provided by the Commissioner. There are no witnesses or submissions. Section 117(1)(b) directs the adjudicator to make "her or his own decision on the matter."

### **Reports and Material Considered**

10. Pursuant to sec. 117 (6) the Commissioner provided the following materials for my review.
  - (a) Final Investigation Report of Sergeant [REDACTED] and attachments described as: Police Act notices, Mr. [REDACTED] statement, Constable

█████ statement, Constable █████ statement, other VPD officers' statements, supporting documents, video, police policy and a Use of Force expert opinion.

(b) Additionally, I have considered the Notices of Appointment of Retired Judge dated May 22, 2024 and July 25, 2024, and the relevant case law and statutory authority.

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

11. The conduct of concern relating to Constables █████ and █████ arose out of the arrest of █████ on November 24, 2022. VPD Constable █████ and his partner Constable █████ initially identified Mr. █████ These officers were patrolling in the Downtown Eastside of Vancouver when they saw Mr. █████ getting into a taxi. Constable █████ understood there was an outstanding warrant for Mr. █████ arrest for breaching probation. The officers pursued the taxi, stopped it and ordered Mr. █████ to get out. Constables █████ and █████ called for backup because they were aware of Mr. █████ criminal record. They were concerned he may be violent and in possession of a weapon. Several officers arrived in patrol cars and surrounded the taxi. Mr. █████ was told to get out, however he remained in the taxi for several minutes. A large crowd had gathered and people were filming the incident. When Mr. █████ did step out, he was facing several officers who were pointing weapons at him. He yelled at them to "go ahead shoot me" and they were yelling, "get on the ground". In one of the videos Mr. █████ is seen turning to his right, stepping toward the taxi with his arms extended and his hands above the roof of the taxi. At this time Constable █████ discharged █████ beanbag shotgun, knocking Mr. █████ to the pavement. Constable █████ who had █████ police dog on a leash, moved forward and the dog bit Mr.

leg. The conduct of concern here is whether Constables and intentionally or recklessly used unnecessary force against

### **Section 117(8)(c) - Allegation of Misconduct Considered**

12. Having reviewed the evidence and records referenced in the Final Investigation Report, I identify the following allegation of misconduct against Constables and that could appear to be substantiated:

1. Abuse of authority by intentionally or recklessly using unnecessary force on Mr. contrary to section 77(3)(a)(ii)(A) of the Police Act.

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

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

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

14. Sergeant as part of his investigation, reviewed the Office of the Police Complaint Commission (OPCC) order for External Investigation. He considered the general occurrence reports of several VPD officers. He interviewed Constable on December 6, 2023 and Constable on November 9, 2023. He also interviewed other VPD officers including Constables and Sergeant This material is referred to

in his Final Investigation Report and forms part of the record forwarded to me by the Commissioner.

15. Upon a review of the Record I am satisfied the following circumstances surrounding the incident are not in dispute:
  - a) On November 24, 2022, a number of officers of the VPD were familiar with Mr. [REDACTED] and knew he had criminal record. The VPD believed he was involved in trafficking drugs and he was considered to be armed and dangerous. When Constables [REDACTED] and [REDACTED] saw him getting into the taxi at 14:12 hours they understood he was arrestable for an outstanding warrant.
  - b) The taxi was pulled over shortly thereafter and the driver, Mr. [REDACTED] quickly ran from the taxi. Several VPD officers arrived at the scene to assist in the arrest. Mr. [REDACTED] remained in the taxi for about five to six minutes. He sat in the rear of the taxi and appeared to be speaking on his telephone. During this time he was repeatedly told by the police to get out of the vehicle.
  - c) At approximately 14:18 hours Mr. [REDACTED] exited the taxi, left the rear passenger door open and turned to face the police. One of the videos, which records 79 seconds of the incident as he stands by the taxi, shows Mr. [REDACTED] with his arms at his side at waist level. He does not have a weapon in his hands. Although the audio portion of the video does not capture all that is said, I accept that Mr. [REDACTED] is telling the police to “go ahead and shoot me” and the police are yelling, “get down, get on the ground”.

- d) This standoff lasts for a brief period of time and then Mr. [REDACTED] turns to his right, takes a step towards the taxi with his arms and hands raised at shoulder level. At this point Constable [REDACTED] discharges [REDACTED] shotgun and Mr. [REDACTED] legs buckle. He looks back toward the police and appears to be hit twice more by beanbag projectiles. He falls to the pavement out of sight. For the remaining 60 seconds of this video Mr. [REDACTED] is not visible; however with 37 seconds left on the video one can hear another shotgun discharge. On a separate 30-second video, Constable [REDACTED] is seen shooting Mr. [REDACTED] as he is lying on his stomach with his head pointing away from the officers.
- e) The footage in this 30-second video shows Constable [REDACTED] loading the shotgun and shooting Mr. [REDACTED]. It also shows Constable [REDACTED] deploying [REDACTED] police dog. At the start of the video several officers, including Constables [REDACTED] and [REDACTED] are standing at the rear of a police car about 1½ car lengths away from where Mr. [REDACTED] is laying on the pavement. Constable [REDACTED] said Mr. [REDACTED] was on the ground with his back to the police. [REDACTED] could not see Mr. [REDACTED] hands, so [REDACTED] fired a 4<sup>th</sup> beanbag. The sound of this discharge occurs 20 seconds into the video. In the remaining 10 seconds Constable [REDACTED] is seen moving towards Mr. [REDACTED] holding [REDACTED] police dog by a leash. In the 5 seconds before he is bitten, Mr. [REDACTED] can be seen sitting on his buttocks facing the officers with his hands showing. He is not holding a weapon.
16. The video footage obtained by the VPD shows VPD officers arriving in the area where Mr. [REDACTED] is arrested. Sergeant [REDACTED] analyzed and described the videos. In his Final Investigation Report at page 87 he states:

In reviewing the video VID-20231212-WA0016.mp4, you can hear police providing direction to Mr. [REDACTED] to exit the vehicle advising him that if he follows directions he will not be hurt. Mr. [REDACTED] eventually exits the vehicle and is provided more directions including to get onto his stomach and place his arms to the side.

Mr. [REDACTED] disobeyed police direction and yelled, "If you want to shoot me, shoot me" twice and then he turned toward the open rear door of the unoccupied, unsearched cab with his hands in the air.

In the background, you can hear the barking of PSD [REDACTED] from the area of the group of police officers and the female voice of Cst. [REDACTED] directing Mr. [REDACTED] "Do not get back in that cab".

The audio of the member saying "don't get back in that cab" is clearer in audio file VID-20231212-WA0016 Cut.wav. The audio is different than what was said by Mr. [REDACTED] during his interview.

17. In his police statement at the time of the arrest and in his subsequent interview with Sergeant [REDACTED] Constable [REDACTED] stated that [REDACTED] use of force in firing the four rounds from the beanbag shotgun during the arrest was necessary because Mr. [REDACTED] was non compliant, was understood to be violent and possibly armed and he appeared to be reentering the taxi possibly to get a weapon or flee the scene.

18. Constable [REDACTED] was interviewed on October 17, 2023. [REDACTED] told Sergeant [REDACTED]

IK: I get out uh, [REDACTED] clearly says to me, [REDACTED] is in that car 66 and now I know [REDACTED] from name, but I know that he's a

gang member, he's violent um, and that he's confronted police officers before and uh, he's got a history of violence. So, I, I knew that um, and obviously most importantly ██████████ told me that this, he's watched him breach and he is arrestable. So, taking, taking him at his word. Um, we uh, begin what we call code five prottt, uh, code five protooo, protocols and for those listening, that's basically a uh, a high-risk vehicle arrest –

UK: Hmm, hmm, hmm.

IK: --um, so, without going into the police process and police tactics um, we provided clear commands for the uh, for ██████████ to exit the vehicle and basically follow prrr, subsequent commands.

CL: Okay.

IK: Um, while we do that I uh, the driver of the taxi gets out and sprints and I've been a police officer ten years uh, I know it's uh, intangible as I guess you could say but I know what a terrified person looks like and that taxi driver sprinted east to the other side of the street and then north and I knew he, something terrible had happened in that taxi cause, he was terrified. Um, but obviously at the time I didn't have time to debrief um, I'm dealing with ██████████ in the vehicle. Uh, what I'm thinking at that time uh, with these high-risk vehicle arrests is obviously I'm looking at the back of a taxi, I don't have um, with a non-compliant uh, subject, I don't what he's got in that taxi, I don't know why that taxi driver ran um, there's just a lot of unknowns that are just very dangerous for police um, yeah. So, commands are given um, if memory serves, I actually didn't get my beanbag shot gun out at first um, but then I realized this is gonna be a

protracted situation um, where a beanbag shotgun or the extended (U/I) baton weapon but I'm gonna call it a bean bag um, would be appropriate because the closer the police officers do a code five arrest to the back of the taxi the more dangerous it is cause, there's less reactionary time. So, uh, I went back to my car, got my bean bag shot gun from the locked (U/I) loaded it um, cause, in patrol ready we don't have it loaded um, and then came back to the police officers.

UK: Hmm, hmm.

IK: We gave uh, a series of commands and then at some point and I, I, I, if memory serve, I don't know where (U/I) went, [REDACTED], [REDACTED] exited the passenger's side rear door uh, of the compartment of the taxi. He left the door open to uh, of the taxi opened and that's an important detail to know. Uh, we're giving more commands to [REDACTED], he is loud, he's aggressive, he's non-compliant and he's saying uh, shoot me. Um, so, now basically uh, when you're looking at like, the use of force continuum, at this point we have a non-compliant suspect uh, with access to the rear of a taxi that has not been searched so, there could potentially be weapons there uh, he is known to be violent. I know he's a gang member, he's in the Downtown Eastside, which is uh, uh, unbelievable violent, I've worked there for ten years um, it's almost given that people have weapons. Uh, he's saying shoot me, shoot me so, now there's this kind of a suicide by cop angle so, the risk to the public, the risk to the police and the risk to him is, is incredibly high. So, if we're looking at the use of force continuum that dial spins, I would, I would argue and I believe personally uh, no doubt in my mind to the higher of assaultive like, the risk is, is incredible here. Um, so, that point um, after a series now given, he's saying shoot me, shoot me, he turns towards the open

compartment of the taxi um, and I realized that, you know, he could easily grab something from within the back of that taxi and there was no, and I wasn't gonna let that happen uh, due to the risk to the public and the police and him so, I deployed a bean bag and now I would say, you know, I shot one, assessed uh, didn't have any effect uh, I fired one quickly after, assessed uh, then a third time. Uh, the third bean bag he sat down on his butt and then rolled over to the west and he's a large man, [REDACTED], uh, we're still giving commands and I pause and assessed and uh, when he rolled over to his side uh, uh, uh, his left arm was, he kind of rolled his back to police and his left arm I couldn't control or did not see um, and so, we had more command, more command and then I thought to myself, you know, I don't know with his left hand, he could be accessing something from his waist band and I would have no clue um, and so, then I deployed one more bean bag which would could I see, he rolled over um, think uh, and rolled over and then I re, and I assessed again and I realized, you know, at this point I can, I can still have my uh, bean bag shot gun uh, at, at the ready but I don't, I, I didn't feel like it was appropriate, I think there was uh, uh, another use of force uh, that would be more appropriate at this time and that was the dog because we need to get —

UK: Hmm, hmm.

IK: -- [REDACTED] away from that uh, uh, from that, that uh, taxi or at least gain control of him. Um, and so, then at that point uh, the dog was deployed and uh, Constable uh, uh, [REDACTED] the canine handler can speak to that but those are the reasons why I deployed the bean bag because it has a high end assaultive and an extremely risky situation and as an acting supervisor um —

Later in the same interview Sergeant [REDACTED] asked Constable [REDACTED] to describe Mr. [REDACTED] behavior. Constable [REDACTED] said:

CL: Okay. Um, now can we go the, the (U/I) use of force framework there and that, and that diagram.

IK: Certainly.

CL: So, you're saying that in your opinion based on all the facts, you put him at assaultive.

IK: Yeah.

CL: Um, I made disagree slightly with you and that's—

IK: Sure.

CL: --and this, this is not, I don't want to argue about this and that—

IK: Sure.

CL: --um, do, I know he was unsearched—

IK: Yeah.

CL: --right, that's correct um, that there was possibly weapons in the car and everything—

IK: Yeah.

CL: --was he, explain to me if I was sitting in Victoria at a desk—

IK: Yeah.

CL: --how if this person is not having physical contact with you—

IK: Yeah.

CL: --or who doesn't have a known weapon at that time—

IK: Sure.

CL: --how he could be assaultive?

IK: Yeah. Uh—

CL: (U/I) you see what I'm saying, I'm saying like, give me a—

IK: A hundred percent.

CL: --bit more and just kind of—

IK: And uh, it, it's a, a good question because I can understand from the public's perspective, they don't understand the just uh, the perspective of a police officer and nor should they and I get it. This is um, it's scary and it's, it's loud and it's um, even is unpleasant to look at what happened. Um, why I would categorize him as assaultive even though yes, he's not, you know, he's not as clear as simple as like, someone punching me in the fact like that—

CL: Right.

IK: -- is uh, like, that's an assault --

CL: Gotcha.

IK: --but the --

UK: Hmm, hm.

IK: --yeah, so, you have like, passive resist well, sure, okay, you have a guy uh, I'd would call him passive resistant cause, he's non-compliant turning into a unsearched --

UK: Hmm, hmm, hmm, hmm.

IK: --compartment in the taxi uh, with a history of weapons and violence um, I would, all of those are kind of like, factors would put me into a decision like, sure, is he actively resisting, absolutely but the danger to the police and the potential danger for the police and the public I would argue would be uh, uh, like, almost assaultive. It would be, sorry, it would be assaultive because it's the, the fff, the potential harm to the public is so high and the risk so high uh, that would be assaultive, that would be argument.

19. In [REDACTED] police statement and in a subsequent interview with Sergeant [REDACTED] Constable [REDACTED] explained that [REDACTED] was called as backup and to assist the arrest team should [REDACTED] police dog be needed. [REDACTED] stated that [REDACTED] was aware of Mr. [REDACTED] history, could see that he was not complying with the officers orders and that Constable [REDACTED] use of the beanbag

shotgun was not effective. In [REDACTED] November 9, 2023 interview [REDACTED] said:

CS: Uh, [REDACTED] is the one that deployed the beanbag striking [REDACTED] in the leg in an effort to create motor dysfunction allowing a window of opportunity to take [REDACTED] into custody.

CL: Hmm, hmm, hmm.

CS: Um, at that point and I'm sss, can't speak for [REDACTED] at this point but something needed to happen. He was uh, making an attempt to get back into a, a, the cab. Again, a space that we do not have control over, we cannot observe uh, potentially could be weapons and a whole plethora of issues. Also, you know, I don't know if the keys are out of this taxi at this point and the vehicle is a means of again, fleeing, escape, couldn't afford him the opportunity to get back into that taxi, possibly use the vehicle as a weapon in this situation. We had a massive crowd around us including in front of the taxi itself which we didn't have the ability to direct at the time. Um, so, beanbag rounds were sent um, striking [REDACTED] in the leg. Uh, [REDACTED] to me at the time seemed impervious to the pain of the beanbag round essentially making them ineffective uh, continued to yell at police members. So, not even the beanbag rounds deployed onto [REDACTED] leg changed his behavior, his attitude, his conveying of violence towards police, his attempt to try and –

CL: Hmm, hmm.

CS: --get back into the cab. Um, finally he turned away from the members uh, and screamed again for the multiple times just fucking shoot me, come over here and just fucking shoot me um, and then

made a move to get back into the rear of the taxi seat like I said which is a huge issue for us. Um, at this point I determined that the beanbag rounds had little to no effect, negotiations were not successful, our presence was clearly not successful either. Travelling through the um, use of force model, the dog being an intermediate weapon, the previous intermittent weapons clearly not having any effect, our presence not having effect, our negotiations uh, more than enough time with negotiations and giving him the opportunity to surrender had zero effect. Uh, a growing crowd, growing aggressive crowd uh, a lot of people that were now in uh, harm's way of him as well um, and continually giving him the opportunity to access the taxi and his waistline and stuff like that.

CL: Hmm, hmm, hmm.

CS: I believe our windows of opportunity were closing to get Mr. [REDACTED] safely into custody without any issues to him or anybody else on scene including members. Um, hmm, hmm, hmm, because he made the attempt like I said to back into the taxi another beanbag round was fired. At this point [REDACTED] did fall to the ground um, continued to yell at police on the ground and then he placed his hands underneath his body. Um, we are fractions of a second, he has accessing a weapon undern there to make a determination or react with that, given him ample opportunity at this point to comply with police. Uh, once he's down on his stomach and not showing his hands after direction to show his hands and comply uh, and clearly the beanbag rounds are not working –

CL: Hmm, hmm, hmm.

CS: --uh, to get him into custody I make the decision to deploy PSC [REDACTED] to prevent from ggg, one getting back into the taxi as he was starting to lift himself up and two, to prevent him to continue to waist, reach into his waistline uh, cause, at this point I was uh, had the information that he had a weapon, that there was reason why he was not showing his waistband, not showing his hands, scurrying around in the cab for the longest time with his hands in his lap, threatening to kill the taxi driver--

20. In the Final Investigation Report, the investigating officer analyzed the issue of whether the members intentionally or recklessly used unnecessary force against Mr. [REDACTED]. Sergeant [REDACTED] considered the case law, the Vancouver Police Department's Use of Force policy, the British Columbia Provincial Police Standards, the National Use of Force Framework and the Use of Force opinion of Sergeant Bartlett. He reviewed the members' conduct having regard to section 25(1) of the Criminal Code and the decision of R. v. Cook and he concluded that Mr. [REDACTED] arrest was lawful. He found that the members' use of force was necessary given the circumstances and that the force was proportional and appropriate to the level of resistance demonstrated by Mr. [REDACTED]. Sergeant [REDACTED] concluded that the force used by Constable [REDACTED] and Constable [REDACTED] was neither intentionally nor recklessly excessive toward Mr. [REDACTED].
21. In OPCC File No. 2016-11867 Adjudicator Carol Baird Ellan reviews the test to be considered under section 25. At paragraph 32 she states:

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

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

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

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

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

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

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

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

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

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

23. Having reviewed the report, it appears that Constable [REDACTED] subjectively believed [REDACTED] needed to gain control of and quickly apprehend Mr. [REDACTED] who appeared to be non compliant and possibly armed. Constable [REDACTED] fired [REDACTED] weapon four times. Constable [REDACTED] said there was a high risk to the public and the police, which [REDACTED] said justified [REDACTED] use of force.

Having reviewed the report, it appears that Constable [REDACTED] subjectively believed that Mr. [REDACTED] was non compliant and that Constable [REDACTED] efforts to gain control and apprehend Mr. [REDACTED] were ineffective. To prevent Mr. [REDACTED] from reentering the taxi and possible accessing a weapon, [REDACTED] deployed [REDACTED] police dog. Constable [REDACTED] said that Mr. [REDACTED] assaultive behavior put the public and police at risk, which [REDACTED] said justified [REDACTED] use of force.

The subjective beliefs of Constable [REDACTED] and Constable [REDACTED] regarding their use of force however are not determinative of the matter.

24. In my view, it is important to consider that the apprehension and arrest of Mr. [REDACTED] after he exited the taxi happened very quickly. Mr. [REDACTED] remained in the taxi for about 4 to 5 minutes during which time the police were telling him to get out and get on the ground. Mr. [REDACTED] told Sergeant [REDACTED] that while he was in the taxi he was speaking to his lawyer on his telephone. Once Mr. [REDACTED] was out of the taxi the available video captures his apprehension. The incident lasts about 80 seconds. Constable [REDACTED] said Mr. [REDACTED] would not comply with commands. It appeared to Constable [REDACTED] that Mr. [REDACTED] might try to reenter the taxi possibly to get a weapon. Constable [REDACTED] initially shot Mr. [REDACTED] 3 times. The video footage also shows that prior to Constable [REDACTED] moving towards Mr. [REDACTED] with [REDACTED] police dog he was sitting on the pavement facing the officers with his hands and arms at his side. Constable [REDACTED] told Sergeant [REDACTED] that Mr. [REDACTED] was not complying, rather he was putting himself in a position to defend himself against the dog. In [REDACTED] opinion Mr. [REDACTED] was not surrendering prior to the dog making contact with him.
25. While the subjective beliefs of the member must be considered, the allegation of abuse of authority involving intentional or reckless use of unnecessary force must be assessed objectively to determine whether what the member believed and did was reasonable. In OPCC File No. 2016-11505 the Adjudicator discussed the meaning of recklessness in the context of the Police Act. He said:

I would add that the use in the Police Act of the word “reckless” (in both of the s. 77 subsections at issue here) is consistent with the fact the Police Act disciplinary matters involve an objective component. That is to say, the assessment of a misconduct allegation is not dictated by the individual officer’s personal intention of “good faith”, rather it also involves an objective question as to the

reasonableness of what the officer believed and did. While an officer's subjective belief will always be relevant, and may mitigate a misconduct allegation, the analysis does not start and end with the subjective component. It is necessary to assess objectively whether what the officer believed and did was reasonable.

26. After considering the Final Investigation Report, the videos, the evidence and records, and the members' understanding of when and under what circumstances the use of force is appropriate and justified, it appears there are questions as to whether it was objectively reasonable for Constable [REDACTED] and Constable [REDACTED] to conclude that Mr. [REDACTED] posed a threat serious enough to justify the force they used.
27. The issue to be determined at this stage is whether the evidence appears sufficient to substantiate misconduct. Based on the materials and evidence, I find the evidence appears sufficient to substantiate the allegation that Constable [REDACTED] and Constable [REDACTED] recklessly used unnecessary force.

### **Conclusion and Next Steps**

28. After reviewing the Final Investigation Report and the evidence and records I consider that the conduct of the members appears to constitute misconduct pursuant to section 117(9) of the Police Act.
29. I hereby notify the relevant parties of the next steps pursuant to sections 117(7) and (8) of the Police Act.
  - a) The evidence appears sufficient to substantiate the allegation of misconduct and requires the taking of disciplinary or corrective measures.

- b) I have determined that the range of disciplinary or corrective measures being considered for Constable [REDACTED] and Constable [REDACTED] includes:
- i. Suspend the member without pay for not more than 30 scheduled working days.
  - ii. Require the member to undertake specified training or retraining.
30. Considering the factors in section 120 of the Police Act, I am willing to offer the members a prehearing conference.
31. The members may, pursuant to section 119(1) file with the discipline authority a request to call and examine or cross-examine one or more witnesses listed in the Final Investigation Report. Such a request must be made within 10 business days of this notification.

Dated at Victoria British Columbia  
September 11, 2024

*David Pendleton*

David Pendleton  
Adjudicator