

OPCC File No.2023-23240

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

AND

IN THE MATTER OF A REVIEW PURSUANT TO SECTION 117

AND

IN THE MATTER OF AN ALLEGATION OF MISCONDUCT AGAINST

CONSTABLE ██████████ OF THE
VANCOUVER POLICE DEPARTMENT**NOTICE OF ADJUDICATOR'S DECISION UPON REVIEW**

TO: Ms. ██████████ Complainant
c/o Personal Representative

AND TO: Constable ██████████ Member
c/o Vancouver Police Department
Professional Standards Section

AND TO: Sergeant ██████████ Investigator
c/o Vancouver Police Department
Professional Standards Section

AND TO: Inspector ██████████ Discipline Authority
c/o Vancouver Police Department
Professional Standards Section

AND TO: Chief Constable Adam Palmer Chief Constable
Vancouver Police Department

4. The alleged misconduct by the Member came to the attention of the Disciplinary Authority in the course a larger discipline proceeding relating to the conduct of four VPD members during the arrest of the Complainant, after which she was transported to the VPD jail where she was detained for several hours.

Statutory and Legal Requirements Applicable to a s. 117 Review

5. For those unfamiliar with the process, the *Act* under which this review takes place is a provincial statute that has been the subject of amendment and judicial review by the courts. Its goal is to integrate the interests of police officers, individual civilians, and in certain instances broader community interests, into a fair and just police complaint procedure.
6. Under the Act s. 117(1) gives the Commissioner the authority to appoint a retired judge to review the decision of a disciplinary authority when the Commissioner considers there is a reasonable basis to believe that the disciplinary authority's decision that the member or former member's conduct did not constitute misconduct is incorrect.
7. Section 117(1) also sets out the task for the reviewing retired judge, which is to:
 - (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. [Emphasis added.]
8. Section 117(9), referred to immediately above, is engaged if, on review, the retired judge considers the police conduct at issue "appears to constitute misconduct". If this occurs:

[...] the retired judge becomes the discipline authority in respect of the matter and must convene a discipline proceeding, unless s. 120(16) [a prehearing conference] applies. [Emphasis added.]

9. If the retired judge decides that they are unable to agree with the discipline authority's finding of no misconduct, and considers the police conduct at issue to constitute apparent misconduct, s. 117(8)(d) contains the test to be applied in reaching such a determination. It requires the retired judge to include in the notification their determination as follows:

- (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;
 - (iii) the range of disciplinary or corrective measures being considered by the retired judge in the case...[Emphasis added.]

10. Thus, as specified in s. 117(8), the test to be applied by the retired judge on a s. 117 review is to determine whether the evidence “appears sufficient to substantiate the allegation of misconduct and require[s] the taking of disciplinary or corrective measures”. A finding that the evidence appears sufficient to substantiate the alleged misconduct places the retired judge in the role of disciplinary authority, and the complaint proceeds on that basis.

11. This articulation of the task of the retired judge on a s. 117 review, when contrasted with the wording in s. 117(1)(b) that he or she makes their “own decision” on the matter (s. 117(1)(b)), has caused some confusion. This is discussed in *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970. In that decision Mr. Justice Affleck addressed this issue (at para. 30):

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

12. Therefore, it is important to note that while s.117(1)(b) directs the retired judge to come to their own decision, it is incorrect for the judge's reasons to stray into a conclusive analysis of the evidence such that they appear to have pre-judged the case. Nor should the reasons contain language indicative of bias. This is because when there is a finding that there appears to be sufficient evidence to substantiate the incident of alleged police misconduct, the s. 117 review may well be preliminary to a later hearing in which the retired judge becomes the discipline authority. This is in sharp contrast to a finding by the retired judge that the allegations of alleged misconduct are not substantiated, in which case the judge's decision is final and conclusive (s. 117(11)), and the matter proceeds no further.

Brief Background

13. The Complainant's written complaint to the Office of the Complaint Commissioner was received on January 23, 2023. The main focus of her complaint related to her alleged mistreatment by the four VPD officers who arrested her for assault with a weapon and uttering threats. While she complained about various acts of physical abuse during her arrest and while at the VPD Jail, she did not specifically refer to the actions of the Member at issue here.
14. In a s.112 review the Disciplinary Authority found the allegations of misconduct by the four VPD members of Abuse of Authority by the use of unnecessary force in relation to the Complainant (s. 77(3)(a)(ii)(A)) to be unsubstantiated. In addition, the complaints against two of those members of Neglect of Duty (s. 77(3)(m)) were also found to be unsubstantiated.
15. The Disciplinary Authority also found the Member's alleged misconduct of Abuse of Authority by the use of unnecessary force in relation to the Complainant to be unsubstantiated. It allegedly arose when the Member was one of three SMCs escorting the Complainant down a hallway in the jail, and he was leading the way holding the Complainant's head by her hair.

16. It is this decision the Police Complaint Commissioner has ordered be reviewed here by a retired judge because, using the language of s. 117(1) of the *Act*, he considers “there is a reasonable basis to believe that the decision of the Disciplinary Authority is incorrect.”

Assessing Reliability and Credibility

17. Many different legal authorities address reliability and credibility in relation to the testimony of a witness.

18. In *R. v. Gagnon*, 2006 SCC 17, Justices Bastarache and Abella (at para. 20) recognized this can be a difficult task with numerous components to consider when they stated:

[a]ssessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events...

19. The often-quoted case of *Faryna v. Chorny*, [1952] 2 DLR 354 at 357 continues to be a most helpful authority when considering the evidence of witnesses:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried the conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken.

20. Also of assistance is *R. v. Theriault*, 2020 ONSC 3317, which articulates the clear difference between the credibility of a witness and the reliability of their account, as follows:

[...] there is a distinction between credibility and reliability. Credibility relates to the honesty of the witness' testimony. Reliability relates to the accuracy of the witness' testimony which engages a consideration of the witness' ability to accurately observe, recall and recount an event [...]. At times, a witness may credibly recount an observation or occurrence. However, that evidence may lack reliability for a number of reasons, including the conditions under which the witness made the observation as well as the impact of information received by the witness after an event. A witness whose evidence about some factual matter is not credible cannot be relied on to establish that fact. However, the converse is not automatically true as credibility is not a proxy for reliability. A credible witness may, nonetheless, give unreliable evidence.

21. In *R. v. Sturko*, 2013 ABPC 211, another often-quoted case, reliability is carefully considered by the learned judge as follows:

Reliability involves an assessment of whether the witness's evidence accurately recounts the events testified to. Reliability involves a consideration of the ability to recall, the ability to recount that memory, the ability of the witness at the time of the event to absorb what occurred, the level of cognitive awareness of the witness at the time of the incident, including sobriety, trauma, surprise, fatigue or other mental impairment.

22. Considering the factors relevant to an assessment of the reliability and credibility of a witness's account and keeping in mind the statutory requirements of a s. 117 review, I will turn to the evidence here – first of the Complainant, then of the Member, two other SMCs on duty in the jail, and the jail video evidence.

The Complainant and the Complaint

23. In her written complaint registered with the Office of the Police Complaint Commissioner [OPCC], the Complainant stated that she was 5 ft. 2 in. tall and weighed about 100 lbs.

24. In the Complainant's written complaint her focus was on what had occurred in the building where she resided regarding another resident on a different floor, and what happened to her when the police arrived.

25. She repeated some of these same allegations in her audio-recorded interview on April 30, 2024, conducted by Sgt. [REDACTED] who was investigating her complaint.
26. I refer to several of those otherwise unrelated details in consideration of her reliability and credibility as a witness.
27. The Complainant claimed she was dragged out of a friend's room by those police officers, each officer grabbing one of her limbs. The hallway video footage does not confirm this. The hallway video shows the Complainant coming out of a room having been called out by the police, and then crawling towards the officers, presumably upon their direction. One member had drawn his firearm, another was said to carry a "less lethal" device, while the other two were assigned the roles of communicator and taking control of the suspect. The call pertained to the Complainant threatening another resident and being in possession of a butcher knife.
28. The Complainant also complained of being kneed and elbowed while pushed up against the wall by the arresting officers. The video depicts her resisting being handcuffed, and once handcuffed, being lifted from the floor by several of the officers. Neither of the hallway videos show her being struck by any of the police who attended the call. Nor do they support her version of events.
29. Once at the jail the Complainant complained of being dragged from the wagon. She also complained of being on the ground and trying to shield herself from punches and kicks. The video footage from the jail does not confirm this. Thus, the Discipline Authority did not substantiate any of these allegations.
30. Subsequent to Sgt. [REDACTED] audio-recorded interview of the Complainant on April 30, 2024, he made efforts to contact her again as she had indicated she had some photographs of her injuries caused by the police in this incident. He learned that she had been found deceased in her room by police on May 18, 2024, in the course of a wellness check.

The Member

31. The Member was interviewed by Sgt. [REDACTED] on October 8, 2024. Prior to the interview the Member reviewed the jail video and the detainee observation log. He stated that he did not have any independent recollection of this incident. At that time the Member had been a guard (SMC) at the Vancouver Jail for approximately five years. In that position, he indicated he had hundreds and possibly thousands of interactions with detainees.

32. Based on viewing the video the Member said he could see the detainee (the Complainant) actively resisting the guards who were interacting with her. She was flailing her arms and pulling away. The Member saw himself holding her head by her hair. He indicated that he did this to prevent her from turning around and spitting. He added that he had been spit on numerous times in the jail and he had observed that happening to other guards. He said, "It is not a pleasant experience."

33. The Member said, "Based on the video it did not look like I was pulling on her hair, it looked like I was simply guiding her to the cell, and to break her balance and to keep her moving forward and to prevent the use of force from escalating any further." He could not recall if he used any communications to get the Complainant to comply, but said it was his common practice to use verbal commands when dealing with detainees. He also said that he could not remember if any other jail guards asked for help in controlling her.

34. Follow-up questions were posed to the Member by Sgt. [REDACTED] in writing. They were: "When you were assisting in the escort of Ms. [REDACTED] why did you choose to take hold of her hair? Was there another portion of her body or clothing that you could have held on to?"

35. The Member's written response was:

I chose to hold her hair to gain control of her head as there were no other options available at the time. Had Ms. [REDACTED] been wearing a hoodie, sweater or shirt, I would have taken hold of those items instead. However, based on the video Ms. [REDACTED] was only wearing a tight spaghetti string

tank top and it is not an article of clothing I can easily take hold of.

SMC [REDACTED]

36. Sgt. [REDACTED] interviewed SMC [REDACTED] on July 3, 2024. Prior to the interview SMC [REDACTED] had reviewed the VPD Jail video, the Arrest Report, and the Jail Observation Log. He was on night shift duty on January 18, 2023, assigned the role of “security”, and he was responsible for taking custody of people who came into the jail and searching them.
37. He said that when Ms. [REDACTED] came into the jail he was the cover officer while SMC [REDACTED] spoke to her and conducted the search. He observed SMC [REDACTED] dealing with Ms. [REDACTED] in the pre-hold area. He described Ms. [REDACTED] as non-compliant. She was not following verbal commands and was refusing to stand up.
38. SMC [REDACTED] and SMC [REDACTED] picked her up and moved her to the search area. He described Ms. [REDACTED] as “dead weight”. He observed SMC [REDACTED] search Ms. [REDACTED] while he held her right side after the handcuffs were removed. She refused to speak, and she also refused to provide the name of her lawyer, although she had indicated she wished to speak to her lawyer. Then Ms. [REDACTED] became “dead weight” again and tried to sit against the wall. They escorted her to the nurse’s station so that the nurse could assess her condition. She flopped into the nurse intake chair, and then they picked her up again and escorted her into a jail cell. During the escort she was dragging her feet and refusing to walk anywhere. SMC [REDACTED] described Ms. [REDACTED] behaviour as transitioning from passive to active resistance. Once she was placed in the cell she was checked every 15 minutes.
39. In a follow-up interview with Sgt. [REDACTED] SMC [REDACTED] was asked a number of questions specific to the Use of Force allegation against the Member. He did not recall from memory the part of the video where the Member used force on Ms. [REDACTED] He repeated that she became more

resistant and he took her by the right hand to escort her. He said he was focused on her because she became a dead weight, dragging and kicking her feet out. He said his concern was keeping her safe and preventing other jail guards from being tripped by her legs. When he escorted Ms. [REDACTED] to the cell door he backed away while SMC [REDACTED] finished putting her into the cell. SMC [REDACTED] did not recall asking any other jail guards for help in escorting Ms. [REDACTED]. He did not remember or recall the Member taking hold of her hair.

SMC [REDACTED]

40. SMC [REDACTED] a female guard, was interviewed by Sgt. [REDACTED] on June 26, 2024. Prior to the interview she reviewed the jail video, as well as the observation log relating to this incident.
41. In the audio-recorded interview SMC [REDACTED] said she had a vague memory of searching Ms. [REDACTED] when she came into the Vancouver Jail. She said that she was the contact officer who searched Ms. [REDACTED] and she had two other members to provide cover for her. From watching the video SMC [REDACTED] said she asked Ms. [REDACTED] to remove her jewelry during the search.
42. Initially Ms. [REDACTED] indicated that she did not want to contact a lawyer when SMC [REDACTED] asked. Later Ms. [REDACTED] said she did want to contact a lawyer but then refused to provide the lawyer's name. SMC [REDACTED] could not remember if she offered Ms. [REDACTED] an opportunity to speak to duty counsel, but she believed that once Ms. [REDACTED] calmed down she would be provided with another opportunity to speak to a lawyer. SMC [REDACTED] said that she did not want to use force to get Ms. [REDACTED] into the booth to speak to a lawyer.
43. Once SMC [REDACTED] finished searching Ms. [REDACTED] she began to "mouth off" to the guards. SMC [REDACTED] placed Ms. [REDACTED] in a twist lock, which she described as a physical control technique that provides some discomfort to the detainee in

order to escort them to another location. She could not recall if Ms. [REDACTED] went limp and became passive resistant, but it appeared from the video that she put out her legs and flailed her arms.

44. Once at the nurse's station SMC [REDACTED] said she could see from the video and from the observation log that Ms. [REDACTED] continued to be aggressive towards the guards and could not be immediately assessed by a nurse, so she was involved in escorting Ms. [REDACTED] to a cell using a twist lock.
45. SMC [REDACTED] noted that Ms. [REDACTED] was checked every 15 minutes until SMC [REDACTED] escorted her to speak with the arresting officers. Ms. [REDACTED] was released shortly thereafter and walked away on her own. SMC [REDACTED] recalled that the two of them shared a laugh when they discovered that Ms. [REDACTED] middle name was the same as SMC [REDACTED] first name.
46. SMC [REDACTED] did not recall seeing any other guards using any strikes in relation to Ms. [REDACTED]. She said that based on her observations of the video, she did not believe that Ms. [REDACTED] level of resistance would justify anyone striking her.
47. SMC [REDACTED] was interviewed again by Sgt. [REDACTED] on October 3, 2024, during which she was asked questions specific to the allegation of Use of Force in relation to the Member. She recalled that during the specific moment when she was escorting Ms. [REDACTED] from the nurse's station to the jail cell, she remembered having Ms. [REDACTED] arm in a twist lock. She remembered Ms. [REDACTED] being passive resistant and that was why she had her in a twist lock escort position. SMC did not remember the Member having his hands on Ms. [REDACTED] hair. She also said that when she looked back at the video, she felt confident that they had control of Ms. [REDACTED] because she had one arm, and SMC [REDACTED] had the other. She was so focused on having control of Ms. [REDACTED] arm she did not know if Ms. [REDACTED] was spitting. She could not remember if she asked anyone else to help escort Ms. [REDACTED] to the cell.

Video Evidence

48. I have watched the video evidence, both of the arrest of the Complainant when the police were called to attend multi-unit residence, and the jail video. The former is relevant only to the issue of the Complainant's overall reliability and credibility, whereas the latter depicts the Member's involvement with SMCs [REDACTED] and [REDACTED] while they escorted her down a short hallway to the cell where she was lodged.
49. My first observation is that SMCs [REDACTED] and [REDACTED] were successfully managing the resistance the Complainant was exhibiting from the outset. The views of the jail area indicated that it was orderly, not congested, and that there were at least several other guards in the immediate vicinity. After the truncated stop at the nurse's office, the Complainant became more physically resistant to doing what the guards wanted or expected her do.
50. The jail video did not have sound, so it is not possible to assess the nature of what, if anything, was being said by anyone. When the Complainant did not cooperate, she went limp. At times she used her legs to resist moving. Her level of physical resistance appears to have been effectively managed by SMCs [REDACTED] and [REDACTED] throughout.
51. Given the Complainant's height and weight – 5' 2" and about 100 lbs. according to her – which is generally confirmed by the video, both those officers were larger and significantly outweighed her. In particular, SMC [REDACTED] was a significantly taller and stockier person when compared to the very slight and thin Complainant.
52. The video shows that the Member joined in escorting the Complainant down the short hallway towards an open cell door. With SMCs [REDACTED] and [REDACTED] on either side of the Complainant with each of her arms in a twist lock,

essentially propelling her down the hallway, she appears to be resisting to the extent she was able. The lower part of her body was close to the ground and her legs were folded under her from the knees down.

53. The video shows that in front of this trio was the Member with his left hand clenched in the Complainant's hair at what appears to be the top back of her head. Given the angle of her head as this occurs and its position relative to her body and the Member, it appears that she is being led by her hair by the Member towards the cell, with the SMCs ██████████ and ██████ escorting her as described above. The Member's upper body is partially bent over and angled with his right shoulder leading, and his head partially turned toward the open cell door. The Complainant is essentially on her knees with her legs folded beneath her and her bare feet behind her.

The Elements of Abuse of Authority – Use of Unnecessary Force

54. Misconduct is defined by s. 77 of the *Act* and covers a broad range of conduct. Section 77(1)(b)(ii) establishes the category of "a disciplinary breach of public trust" as described in ss. (3) as follows:

(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:

(a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,

(i) intentionally or recklessly making an arrest without good and sufficient cause,

(ii) in the performance, or purported performance, of duties, intentionally or recklessly

(A) using unnecessary force on any person,

[...] [Emphasis added.]

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

55. Therefore, the elements of this misconduct are:

1. A member engaging in oppressive conduct towards a member of the public;
2. In the performance of the member's duties;
3. Intentionally or recklessly;
4. Using unnecessary force;
5. On another person.

The Issue

56. The only issue here is whether the evidence appears to be sufficient to substantiate the allegation of Abuse of Authority against the Member by the intentional or reckless use of unnecessary force upon the Complainant. Specifically, does the evidence of the Member's conduct in holding the Complainant's head by her hair to escort her to the cell, as shown in the jail video, and commented on by the Member and SMCs [REDACTED] and [REDACTED] appear sufficient to substantiate this allegation?

Findings and Analysis

57. In considering whether the evidence appears sufficient to substantiate the allegation of the Abuse of Authority by the Use of Unnecessary Force against the Member, I note the following:

- The Complainant was not credible or reliable in terms of her account about what happened to her that day. However, her statement about her height and weight is consistent with the video evidence. She appears extremely thin. She also had long, dark hair well below shoulder length and was wearing a sleeveless tank top and baggie sweatpants that hung from her hips. A portion of her midriff was exposed. Her feet were bare.
- It is important to remember in terms of the amount of force considered necessary to be used to move the Complainant to the cell in the jail, that this is not an arrest situation.

- The Complainant had been arrested, handcuffed, escorted to jail, searched and had the handcuffs removed. She was in a secure location with numerous jail guards in the immediate vicinity. She was not in possession of any weapons or any items that could be used as a weapon.
- Without the jail video neither the Member, nor SMCs [REDACTED] or [REDACTED] would have recalled the Member “holding her [the Complainant’s] head by her hair”. He explained that he did this to prevent her from turning around and spitting. He also said in relation to his holding her head by her hair that “it looked like I was simply guiding her to the cell, and to break her balance and to keep her moving forward...”
- The Member’s explanations are based on viewing a video in relation to a situation he does not recall.
- Neither the Member, nor the two SMCs recall any spitting by Complainant.
- One might reasonably expect if the Complainant was spitting or trying to spit at them, one of them might have remembered, or it would have been entered in the observation log, given the potential health risk to guards posed by exposure to bodily fluids. One could also reasonably expect to have seen a reaction on the video from the SMCs and the Member at the time had that occurred.
- There is no indication that the two SMCs escorting the Complainant asked for assistance from the Member or were in need of the same.
- Had the Member’s assistance been necessary, the idea of one guard holding the head of a detainee while other guards are forcibly moving the detainee forward seems to be a poor one, given the risk of injury to a detainee’s head or neck.
- The explanation provided by the Member that he held her head by her hair because there were no other options available given her clothing seems hard to reconcile with the overall control of the Complainant that

SMCs [REDACTED] and [REDACTED] appeared to have. There were other guards in the area and no other detainees were visible in the hallway.

- Given her small size and light weight if there been a significant problem with escorting her to the cell, it seems likely that three guards could have managed, one on each arm with a twist lock, and third grabbing and holding her legs.
- SMC [REDACTED] seemed to recall more about her dealings with the Complainant than either the Member or SMC [REDACTED]. She indicated that when she looked back at the video she felt confident that they had control of the Complainant because she had one limb (meaning arm) and SMC [REDACTED] had the other.

58. In dealing with the elements of misconduct by Abuse of Authority pursuant to s. 77(3)(a)(ii)(A), the only live issue is whether the Member either recklessly or intentionally applied unnecessary force to the Complainant, when he grabbed her head by her hair in the circumstances as described.

59. Special Municipal Constables are bound by the same protocol regarding use of force as regular VPD members. The Investigator in this case, Sgt. [REDACTED] reviewed the Member's conduct in relation to the National Use of Force Model (reflected in the VPD Regulations and Procedures Manual) in his Final Investigation Report. He noted that the Complainant engaged in passive and active resistance and found that the Member applied the lowest level of physical force to the Complainant, soft physical control, by holding her by the hair to keep her off balance and to keep her from spitting on any of the guards escorting her. He appeared to accept the Member's explanation that grasping her hair was the next most effective item, given that her shirt could have easily been pulled off. He also noted that the Complainant had not complained of having her hair pulled and submitted that the Member had not pulled her hair but had "merely grasped it" and pushed her head down.

60. In the Notice of Appointment of Retired Judge, it is noted by Mr. Rajan, the Police Complaint Commissioner, that the Disciplinary Authority left open the question about whether the force used here by the Member was “unnecessary force.”
61. Having carefully reviewed the evidence the best evidence appears to be the jail video that depicts the actions of the Member. The position of the Member’s left hand clenched in the Complainant’s hair and the downward position of her head relative to that of his hand and left arm, as well as his body position, appear to indicate the Member’s application of considerable force upon the Complainant, albeit for a short time of about four to five seconds.
62. Without evidence that the Complainant was likely to engage in spitting behaviour towards the guards or was actually doing so while being escorted to the cell in the jail, the force applied by the Member appears to have been unnecessary in all the circumstances and to have been at least reckless.
63. In arriving at this conclusion, I am mindful that police officers are not required to use only the absolute least amount of force to achieve their objective, and that the amount of force used by an officer is not to be assessed to a “nicety”. In *R v Nasogaluak*, 2010 SCC 6, the Supreme Court considered the amount of force used by police in effecting an arrest in the context of s. 25(1) of the *Criminal Code*, and stated the following:

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

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218]

64. These general statements of the applicable law must be taken into account when assessing the amount and nature of the force used by police. However, the circumstances of individual cases require a careful analysis of the amount of force necessary to be used, especially when detainees are in custody at a jail and appear to pose at best a minimal threat to themselves and others.

Conclusion and Next Steps

65. To conclude, upon reviewing the evidence in this matter, and pursuant to s. 117(8)(d) of the *Act*, I am satisfied that the evidence does appear to be sufficient to substantiate the allegation of Abuse of Authority by the Member, by his recklessly use of unnecessary force on the Complainant, which is defined as misconduct pursuant to s. 77(3)(a)(ii)(A) of the *Act*.

66. It follows that the taking of disciplinary or corrective measures may be required to be taken in relation to this alleged misconduct. Having considered the factors set out in s. 120(3) of the *Act*, I have decided to offer the Member a pre-hearing conference regarding this substantiated allegation.

67. In that regard, pursuant to s. 117(8)(d)(iii), I am obliged to set out “the range of disciplinary measures” that I am considering. They include one or both of the following as referenced in s. 126(1) of the *Act*:

- a) A written letter of reprimand;
- b) A requirement that the Member participate in a specific program with regard to the appropriate use of force.

68. Having conducted the review referred to in s. 117(7) of the *Act* I hereby notify the relevant parties of the next steps pursuant to s. 117(8) of the *Act*. In the event that this matter does proceed to disciplinary hearing, I will become the Disciplinary Authority and will convene a disciplinary hearing unless the matter is resolved at the pre-hearing conference stage.

69. Section 118(1) of the *Act* provides that a discipline hearing concerning the apparently substantiated misconduct allegation must be convened within 40 business days of notice of this decision. The Member may, pursuant to s. 119(1), file with the Discipline Authority a request to call and examine or cross-examine one or more of the witnesses listed in the Final Investigation Report.

70. Having found, based on my review of the evidence and material before me, that the misconduct alleged against the Member is supported, insofar as the evidence appears sufficient to substantiate the allegation, the matter will be dealt with as set out above and accordance with the applicable provisions of the *Act*. Thank you.

Dated the 13th day of January, 2025, at Kelowna, British Columbia

The Hon. Elizabeth A. Arnold-Bailey
The Honourable Elizabeth A. Arnold-Bailey
(British Columbia Supreme Court, Ret'd)