



Office of the
Police Complaint Commissioner

British Columbia, Canada

NOTICE OF APPOINTMENT OF RETIRED JUDGE

Pursuant to section 117(4) of the *Police Act*

OPCC File 2023-24938

April 1, 2025

To: Constable [REDACTED] (Member)
c/o Abbotsford Police Department
Professional Standards Section

And to: Chief Constable Colin Watson
c/o Abbotsford Police Department
Professional Standards Section

And to: The Honourable Elizabeth Arnold-Bailey (Retired Judge)
Retired Justice of the Supreme Court of British Columbia

And to: His Worship Mayor Ross Siemens
Chair, c/o Abbotsford Police Board

On March 12, 2024, based on information provided by the Abbotsford Police Department (APD), the former Police Complaint Commissioner ordered an investigation into the conduct of Constable [REDACTED] and Constable [REDACTED] regarding their arrest of an affected person on November 26, 2023, and associated use of force. APD Professional Standards investigator, Staff Sergeant [REDACTED] (Investigator), conducted an investigation into this matter.

During the investigation, additional allegations of misconduct were identified against Constable [REDACTED] including arresting the affected person for *Obstruction* on December 29, 2023; failing to notify a supervisor of the deployment of oleoresin capsicum (OC) spray or photograph the affected person's injuries after the November 26 arrest; and failing to take reasonable steps to confirm whether the affected person was the subject of an outstanding warrant before making the November 26 arrest.

On October 11, 2024, the Investigator submitted the Final Investigation Report (FIR) to Inspector [REDACTED] (Discipline Authority) and the OPCC. On October 24, 2024, this office rejected the FIR and directed further investigative steps. On February 14, 2024, the Investigator re-submitted the FIR to the Discipline Authority and this office.

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Police Complaint Commissioner

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On March 4, 2025, the Discipline Authority issued his decision pursuant to section 112 of the *Police Act* (Act) in this matter. Specifically, the Discipline Authority made the following determinations with respect to the following three identified allegations of misconduct:

- i. The allegation of *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the Act against Constable [REDACTED] did appear to be substantiated as it related to strikes used when effecting the November 26 arrest. This allegation against Constable [REDACTED] did not appear to be substantiated.
- ii. The allegation of *Abuse of Authority* pursuant to section 77(3)(a)(i) of the Act against Constable [REDACTED] did not appear to be substantiated.
- iii. The allegation of *Neglect of Duty* pursuant to section 77(3)(m)(ii) of the Act against Constable [REDACTED] did appear to be substantiated, specifically failing to photograph the affected person's injuries.

Pursuant to section 117(1) of the Act, having reviewed the allegations and the alleged conduct in its entirety, I consider that there is a reasonable basis to believe that the decision of the Discipline Authority is incorrect with respect to the unsubstantiated allegations against Constable [REDACTED] (Member). I do not have a reasonable basis to believe the decision is incorrect with respect to Constable [REDACTED]

Background

On November 26, 2023, while proactively patrolling to locate persons with outstanding arrest warrants, the Member discussed with his partner about locating and arresting the affected person. The Member and his partner say they believed the affected person had an outstanding arrest warrant, apparently based on something another officer had previously said to the partner. Upon locating the affected person's vehicle parked at the roadside, the Member queried the vehicle's licence plate on CPIC which listed the vehicle as a "pointer" vehicle associated with an arrest warrant. Neither the Member nor his partner read the full CPIC entry at this time. If they had scrolled down, they would have seen the associated arrest warrant was for someone other than the affected person.

At approximately 6:15 a.m., the Member approached the vehicle. The affected person was sleeping in the backseat under a blanket. The Member told the affected person he was under arrest for a warrant. The affected person replied he did not have a warrant and asked to see a copy of the warrant. The affected person says the Member became mad and flustered. The Member says he indicated that he told the affected person he could show the affected person the warrant on his police computer if he came out of the car. However, the interaction escalated when the Member deployed OC spray into the vehicle because, as stated by the Member, the affected person was confrontational and refused directions to show his hands.

When the affected person still did not leave the vehicle after being sprayed with OC spray, the Member partially entered the back seat through an unlocked door and delivered closed fist strikes to the affected person's face. By this time, Constable [REDACTED] had arrived at the scene.

She assisted the Member and his partner in physically removing the Member from the vehicle. After the affected person was on the ground, the Member applied another strike to the face claiming a failure by the affected person to give up his hands. He subsequently applied a strike to the abdomen claiming a failure by the affected person to fully get into the back seat of a police vehicle.

After the affected person was in custody, the Member was advised by his partner that the affected person did not have a warrant. The Member reviewed the CPIC information again and, upon scrolling down the page, observed the warrant was associated to another person. The Member then chartered the affected person for *Obstruction* and released them into the care of paramedics.

Over a month later, on December 29, 2023, with the knowledge of a constable temporarily acting as his supervisor, the Member submitted a Report to Crown Counsel (RTCC) recommending that a charge of *Obstruction* be approved against the affected person stemming from their November 26 arrest. Prior to receiving a response from Crown regarding the RTCC, the Member located and arrested the affected person for *Obstruction* the same day. Crown Counsel later declined to approve the charge recommended by the Member.

Discipline Authority's Decision

The Discipline Authority did not substantiate the allegation of *Abuse of Authority* relating to the arrest on November 26. The Discipline Authority found that the Member had reasonable grounds, although mistaken, to believe that the affected person was arrestable based on the information the Member had previously received from another member about the existence of a warrant regarding the affected person, and the Member's licence plate query showing the vehicle was associated with a wanted person. The Discipline Authority accepted that the Member subjectively believed he had reasonable grounds to arrest and had good or sufficient cause for making the arrest.

The Discipline Authority declined to deal with the allegation of *Neglect of Duty* identified in the Final Investigation Report regarding the Member's failure to confirm who the arrest warrant was for before making the November 26 arrest. In the Discipline Authority's view, that allegation formed part of the assessment for the *Abuse of Authority* allegation relating to that arrest. The Discipline Authority referenced the rule against multiple convictions, also known as the *Kienapple* principle.

With respect to the force used during the November 26 arrest, the Discipline Authority found that the allegation of *Abuse of Authority* appeared to be substantiated against the Member, specifically for using strikes after the deployment of the OC spray and delivering a closed fist strike to the affected person's abdomen while he was handcuffed. The Discipline Authority also found that the allegation of *Neglect of Duty* appeared to be substantiated against the Member for his failure to photograph the affected person's injuries.

The Discipline Authority found the allegation of *Abuse of Authority* relating to the use of force by Constable [REDACTED] was not substantiated.

The Final Investigation Report included a finding that it was subjectively and objectively reasonable for the Member to have arrested the affected person for *Obstruction* on December 29. The Discipline Authority did not conduct an analysis of whether the Member appeared to have committed misconduct in the form of an *Abuse of Authority* in making that arrest.

OPCC Decision, Section 117 of the *Police Act*

I have reviewed the Discipline Authority's decision. I do not have a reasonable basis to believe that the decision is incorrect with respect to the allegation of *Abuse of Authority* against Constable [REDACTED]. It appears she arrived at the scene after the Member's arrest of the affected person was already underway and responded to what she observed. Therefore, the decision of the Discipline Authority with respect to the force used by Constable [REDACTED] during the November 26 arrest is final and conclusive under section 112(5) of the Act.

I do have a reasonable basis to believe that the decision of the Discipline Authority is incorrect with respect to the allegations against the Member relating to his failure to read the full CPIC entry immediately prior to the arrest on November 26, the use of OC spray during the arrest on November 26, and the arrest on December 29.

With respect to the arrest on November 26, the Discipline Authority appears to have erred in placing too much emphasis on the Member's subjective perspective regarding his mistaken belief of an outstanding warrant for the affected person. An arrest is a serious interference with personal liberty that should only be undertaken where necessary. It does not appear there were urgent circumstances requiring immediate action in this case. The Member and his partner had located the affected person's vehicle at approximately 6:15 a.m. They could see the affected person was inside. He was sleeping in the back seat and not in position to drive away quickly.

There was ample time for the Member to read the full CPIC entry to verify the existence of a warrant for the affected person's arrest. Had he done so, he would have learned there was no arrest warrant and none of the subsequent events would have taken place. Indeed, the Member and his partner were able to quickly verify the information after they had already taken the affected person into custody. In these circumstances, it appears to have been reckless for the Member to proceed with the arrest without having read the CPIC entry, and that there was no good or sufficient cause for having done so.

I also have a reasonable basis to believe that the decision of the Discipline Authority is incorrect in the application of the *Kienapple* principle with respect to the allegation of *Neglect of Duty* flowing from the failure to read the entire CPIC entry before making the November 26 arrest. It is my view that this allegation is sufficiently distinct from the *Abuse of Authority* allegation such that it constitutes a separate misconduct allegation that does not conflict with the rule against multiple convictions.

Abuse of Authority in the context of an unlawful arrest requires considerations of whether a member intentionally or recklessly made an arrest without good or sufficient cause. The requirement of intentionality or recklessness introduces a subjective element into the analysis. By contrast, *Neglect of Duty* is a purely objective assessment, asking whether a member neglected without good or sufficient cause to promptly and diligently do anything it was one's

duty as a member to do. In this case, even if the test for *Abuse of Authority* is not met relating to the November 26 arrest, there could still be a finding of *Neglect of Duty* if a decision maker finds the Member's failure to read the full CPIC entry fell below what a reasonable officer would have done in the circumstances. Accordingly, the decision is incorrect given the Discipline Authority's failure to assess the Member's conduct in this regard.

With respect to the use of OC spray during the November 26 arrest, the Discipline Authority decision contains no analysis of this critical component of the abuse of authority allegation relating to the Member's use of force. While the Discipline Authority finds an appearance of misconduct relating to the Member's subsequent use of physical strikes, they do not analyze or make express findings about the Member's choice to employ, and manner of employing, OC spray. The Discipline Authority's decision is incorrect in failing to make any findings about the deployment of OC Spray.

In addition to these concerns, I also note the Discipline Authority has failed to identify or make findings about another potential form of misconduct discussed in the Final Investigation Report – namely, whether the Member committed *Abuse of Authority* in connection with the arrest for *Obstruction* on December 29. The Discipline Authority simply notes the fact of the arrest, and Crown Counsel's subsequent refusal to approve the charge. However, there is no analysis of whether the Member's decision to proceed with the arrest was its own form of misconduct.

In my view, the November 26 arrest was unlawful as it was conducted without warrant for the affected person's arrest. The Member knew there was no warrant yet still decided, over a month later, to make an arrest for obstruction without waiting for Crown to respond to the Member's RTCC. It does not appear there were urgent circumstances requiring him to make the December 29 arrest at that time. The Discipline Authority should have considered these factors and all the available evidence and determined whether there was an appearance that the member had intentionally or recklessly made the December 29 arrest without good or sufficient cause.

Finally, the affected person and the Member have provided different accounts of the interaction and arrest on November 26. The affected person's evidence is that he was asleep and wrapped in a blanket when the Member approached his vehicle, the Member became mad and flustered when challenged about the warrant, and the Member then used a degree of force that was unwarranted. The Discipline Authority has not adequately considered this evidence and instead appears to have uncritically accepted the Member's perspective throughout. At this preliminary stage of the process, the Discipline Authority was to consider only whether there was evidence sufficient to show an appearance of misconduct. The affected person's evidence is relevant and should not be disregarded, especially since the Discipline Authority drew no negative conclusions as to the affected person's credibility.

For example, there is also no attempt to reconcile the Member's statements about displays of aggression or risk of assaultive behaviour with other evidence that the affected person generally remained wrapped in his blanket for most of the physical encounter and responded to the Member's entry into the vehicle by pulling the blanket up under his own chin.

The Discipline Authority's decision also uses language suggesting a general preference for the Member's evidence over that of the affected person. For example, the decision states the

affected person “was known to be anti-police” without explaining the evidentiary basis for the statement or how that is relevant. It also says the affected person was “yelling” or “continued to scream at the Members throughout” without appreciating the circumstances or acknowledging that someone might legitimately be upset during an arrest based on what turned out to be a mistake by police.

Overall, I believe the Discipline Authority failed to adequately consider the possibility that the Member may have been inaccurate or even exaggerated his evidence about the affected person’s conduct to justify both arrests and the associated use of force.

Appointment of a Retired Judge

Section 117(1) of the *Police Act* provides that the Commissioner may appoint a retired judge to review the investigating officer’s report, and the evidence and records referenced in that report, and make a decision on the matter. An appointment under section 117(1) must be made pursuant to section 177.2 of the Act.

Section 177.2 of the Act, in turn, requires the Commissioner to request the Associate Chief Justice of the Supreme Court of British Columbia to consult with retired judges of the Provincial Court, Supreme Court and Court of Appeal and recommend retired judges who the Commissioner may include on a list of potential adjudicators. Appointments under the Act are to be made in accordance with published procedures established under section 177.2(3).

On June 13, 2024, I published the OPCC’s appointment procedures under section 177.2(3) of the Act (Appointment Procedures) and the list of retired judges who may be appointed for the purposes of sections 117, 135 and 142.

In accordance with the Appointment Procedures, I have appointed the Honourable Elizabeth Arnold-Bailey, retired Supreme Court Justice, to review this matter and arrive at their own decision based on the evidence. I have considered the factors as set out in the Appointment Procedures, namely:

- a) the provision under which the appointment is being made;
- b) the current workloads of the various retired judges;
- c) the complexity of the matter and any prior experience with the Act; and
- d) any specific expertise or experience of a retired judge with respect to a particular issue or sensitivity associated with the matter

Retired judge Arnold-Bailey has confirmed their availability to review this matter and reported no conflicts.

Pursuant to section 117(9), if the appointed retired judge considers that the conduct of the member appears to constitute misconduct, the retired judge assumes the powers and performs the duties of the discipline authority in respect of the matter and must convene a discipline proceeding, unless a prehearing conference is arranged. The allegations of misconduct set out in this notice reflect the allegations listed and/or described by the Discipline Authority in their

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decision pursuant to section 112 of the Act. It is the responsibility of the retired judge to list and/or describe each allegation of misconduct considered in their decision of the matter pursuant to section 117(8)(c) of the Act. As such, the retired judge is not constrained by the list and/or description of the allegation as articulated by the Discipline Authority.

The Office of the Police Complaint Commissioner will provide any existing service records of discipline to the Discipline Authority to assist him or her in proposing an appropriate range of disciplinary or corrective measures should a pre-hearing conference be offered or a disciplinary proceeding convened. If the retired judge determines that the conduct in question does not constitute misconduct, they must provide reasons and the decision is final and conclusive.

Finally, the Act requires that a retired judge arrive at a decision **within 10 business days after receipt of the materials** for review from our office. This is a relatively short timeline, so our office will not forward any materials to the retired judge until they are prepared to receive the materials.



Prabhu Rajan
Police Complaint Commissioner

cc: [REDACTED], Registrar
Staff Sergeant [REDACTED], Abbotsford Police Department
Inspector [REDACTED], Abbotsford Police Department