



Office of the  
Police Complaint Commissioner

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British Columbia, Canada

PH: 2020-01  
OPCC File: 2018-14861

**NOTICE OF PUBLIC HEARING**

Pursuant to section 138(1) *Police Act*, R.S.B.C. 1996, c.267

**In the matter of the Public Hearing into the Conduct of  
a member of the Victoria Police Department**

- To: Name withheld (Complainant)
- And to: Name withheld (Member)  
c/o Victoria Police Department  
Professional Standards Section
- And to: The Honourable Judge James Threlfall (Discipline Authority)  
Retired British Columbia Provincial Court Judge
- And to: Chief Constable Del Manak  
c/o Victoria Police Department  
Professional Standards Section

**WHEREAS:**

**Investigation**

1. On June 19, 2018, based on information provided by the Victoria Police Department and at their request, the Police Complaint Commissioner ordered an external investigation into the off-duty conduct of a member of the Victoria Police Department in relation to an alleged sexual assault that was reported to have occurred in Vancouver, BC.
2. The Police Complaint Commissioner designated the Vancouver Police Department to conduct the external *Police Act* investigation and to exercise the powers and perform the duties of a Discipline Authority in relation to this matter. The Commissioner also

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Police Complaint Commissioner

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suspended the investigation pending the outcome of a criminal investigation into the off-duty conduct of the member.

3. The *Police Act* investigation resumed on November 28, 2018, after the criminal investigation had concluded without charges.
4. On February 4, 2019, the OPCC received a registered complaint from the affected person in this matter, alleging that she was the victim of a sexual assault by a Victoria Police Department police officer. The affected person was added as a complainant to this matter.

### **Background**

5. On May 11, 2018, the Complainant travelled to the greater Vancouver area to visit with a friend living there. The next day, the Complainant and her friend visited a number of establishments for food and alcoholic beverages. Later in the day, they met with a mutual friend and a group of his friends. The off-duty member was part of this group. They all engaged in significant alcohol consumption throughout the evening.
6. At approximately 2:30 A.M., the group returned to a downtown Vancouver hotel where the off-duty member and his two friends had previously booked a room for the night. The Complainant and her female friend stayed the night at this downtown Vancouver hotel in the room with the off-duty member and his friend.
7. Sexual activity occurred between the Complainant and the off-duty member; however, there is a divergence in the evidence in terms of whether the sexual activity was consensual. The Complainant ultimately reported to police that she was sexually assaulted by the off-duty member while she was incapacitated due to her alcohol consumption.

### **Discipline Authority's Decision**

8. On June 13, 2019, Vancouver Police Inspector Shelly Horne, as the delegated Discipline Authority, issued her decision pursuant to section 112 of the *Police Act* in this matter. Specifically, the Discipline Authority identified one allegation of *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* against the off-duty member and determined that this allegation did not appear to be substantiated.
9. In arriving at the determination, the Discipline Authority found that although the Complainant was highly intoxicated, she was not intoxicated to the degree that she lacked the capacity to consent based on the evidence reviewed. The Discipline Authority found the off-duty member to be a credible witness and his description of the sexual contact with the Complainant supported the proposition that he believed he had consent to touch her sexually.

### **Section 117 of the *Police Act***

10. On July 11, 2019, pursuant to section 117(4) of the *Police Act*, I appointed James Threlfall, retired Provincial Court Judge to review this matter and arrive at his own decision based on the evidence as there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect.
11. On August 20, 2019, retired Judge Threlfall determined that the evidence was sufficient to substantiate that the member appeared to have committed *Discreditable Conduct*. In his decision, retired Judge Threlfall noted that “it [did] not appear that [the member] took steps that were objectively reasonable in light of the circumstances known to him at the time, to ascertain the Complainant’s consent or her ability to consent given her advanced state of intoxication.”
12. Retired Judge Threlfall assumed the responsibilities of the Discipline Authority and the matter was remitted to a discipline proceeding.

### **Discipline Proceeding**

13. On October 24, 2019, the discipline proceeding commenced. Only the member and the investigating officer testified during the Discipline Proceeding. As the member did not request the calling of any witnesses during this proceeding, the Complainant and other witnesses did not have the opportunity to give testimony.
14. Pursuant to provisions contained in the *Police Act*, unless the member whose conduct is the subject of the proceeding initiates a request to call witnesses to testify in the proceeding, there is no other mechanism to allow for the participation of material witnesses. This limits the evidence available to the Discipline Authority who does not have the benefit of assessing the credibility of various witnesses, thus limiting the scope of his review to the evidentiary record provided by the investigator and testimony of the respondent member.
15. On December 19, 2019, following the Discipline Proceeding, and after considering the available evidence and submissions the Discipline Authority determined that the allegation of *Discreditable Conduct* against the member was not substantiated.
16. In arriving at a determination, the Discipline Authority analyzed the *Discreditable Conduct* allegation in terms of whether or not a sexual assault occurred and concluded that,

*The evidence as a whole does not provide clear, cogent and convincing evidence of the proof required to establish the elements of sexual assault.*

*The entire sequence of events leading up to the allegation of misconduct are regrettable and certainly not conduct that one would expect of a [member] of the Victoria Police Department.*

*However, I am unable to find, in the absence of a finding of sexual assault, that [the member's] actions are sufficient to establish the allegation of misconduct as alleged.*

### **Request for Public Hearing**

17. The Complainant and the member were provided a copy of the findings in relation to the allegation of misconduct. The Complainant was informed that if she was aggrieved by the findings she could file a written request with the Police Complaint Commissioner to arrange a Public Hearing or Review on the Record.
18. On January 8, 2020, the OPCC received a request from the Complainant asking that the Police Complaint Commissioner exercise his authority to arrange a Public Hearing pursuant to the *Police Act*.
19. The Complainant stated in her request that a Public Hearing would assist in determining the truth, as she and other witnesses would have the opportunity to testify rather than hearing only from the member with respect to his version of the events.

### **Decision**

20. Pursuant to section 138(1) of the *Police Act*, the Commissioner must arrange a Public Hearing or Review on the Record if the Commissioner considers that there is a reasonable basis to believe: that the Disciplinary Authority's findings under section 125(1) are incorrect; the Discipline Authority has incorrectly applied section 126 in proposing disciplinary or corrective measures under section 128(1); or, if the Commissioner considers that a Public Hearing is necessary in the public interest.
21. Having reviewed the investigation, the Discipline Proceeding and associated determinations, pursuant to section 138 of the *Police Act*, I have determined that a Public Hearing is required and necessary in the public interest. In determining that a Public Hearing is necessary in the public interest, I have considered several relevant factors, including, but not limited to the following:
  - a. The complaint is serious in nature as the allegations relate to non-consensual sexual contact that affects the dignity of a person.
  - b. An arguable case can be made that the Discipline Authority's interpretation or application of Part 11 of the *Police Act* was incorrect. I disagree with the Discipline Authority's conclusion that in the absence of the commission of a sexual assault, the off-duty conduct of the member could not amount to misconduct. In my view, the allegation of *Discreditable Conduct* cannot be restricted to the discrete question of whether a sexual assault occurred. As established in *Mancini v. Constable Martin Courage*, OCCPS #04-09 and widely applied by Discipline Authorities in BC, "the concept of *Discreditable Conduct* covers a wide range of potential behaviours. The test

to be applied is primarily an objective one. The conduct in question must be measured against the reasonable expectation of the community.”

- c. It is necessary to examine and cross-examine witnesses and receive evidence that was not part of the record at the Discipline Proceeding in order to ensure a complete accounting of the events and to allow for the credibility of all parties to be fully assessed;
  - d. There is a reasonable prospect that a Public Hearing will assist in determining the truth; and
  - e. A Public Hearing is required to preserve public confidence in the Victoria Police Department.
22. It is therefore alleged that the member committed the following disciplinary default, pursuant to section 77 of the *Police Act*:
- a. That on May 12, 2018, the member committed *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off-duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department.
23. Pursuant to section 143(5) of the *Police Act*, Public Hearing Counsel, the member, or his legal counsel and commission counsel may:
- a. Call any witness who has relevant evidence to give, whether or not the witness was interviewed during the original investigation or called at the discipline proceeding;
  - b. Examine or cross-examine witnesses;
  - c. Introduce into evidence any record or report concerning the matter; and
  - d. Make oral or written submissions, or both, after all of the evidence is called.
24. Pursuant to section 143(7) of the *Police Act*, the complainant, or her agent or legal counsel, or the Discipline Authority, may make oral or written submissions, or both, after all of the evidence is called.
25. As this matter involves allegations of a sensitive nature names of the Respondent and Complainant have been withheld from this Notice to protect the identity of the Complainant.

**THEREFORE:**

26. A Public Hearing is arranged pursuant to section 137(1) and 143(1) of the *Police Act*.

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27. Pursuant to the recommendation of the Associate Chief Justice of the Supreme Court of British Columbia, the Honourable Judge Wally Oppal, Q.C., retired Supreme Court Justice, is appointed to preside as Adjudicator in these proceedings, pursuant to section 142(2) of the *Police Act*. Dates for the Public Hearing have not yet been determined. The Public Hearing will commence at the earliest practicable date.

28. **TAKE NOTICE** that all inquiries with respect to this matter shall be directed to the Office of the Police Complaint Commissioner:

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DATED at the City of Victoria, in the Province of British Columbia, this 19<sup>th</sup> day of February 2020.



Clayton Pecknold  
Police Complaint Commissioner