

**IN THE MATTER OF THE
PUBLIC HEARING INTO THE COMPLAINT AGAINST
SERGEANT BRENT KELEHER
A MEMBER
OF THE VICTORIA POLICE DEPARTMENT**

Public Hearing Counsel –	Bradley Hickford
Counsel for the Respondent – Sergeant Brent Keleher –	David Butcher, Q.C.
Counsel for Adjudicator –	Gregory DelBigio, Q.C.
Counsel for Commissioner –	Christopher Considine, Q.C.
Dates of Hearing -	June 30, July 9, 10, August 17, 18, 19, September 16, 17, November 25, 26, 2021

INTRODUCTION

1. Sergeant Brent Keleher of the Victoria Police Department is alleged to have committed *discreditable conduct* pursuant to Section 77(3)(h) of the *Police Act* R.S.B.C. 1996 c.367 ("the *Act*"). The specific allegation reads as follows:

That on May 12, 2018 the member committed *Discreditable Conduct* pursuant to Section 77(3)(h) of the *Police Act*, which is, on or off duty, conducting himself in a manner that the member knows, or ought to know, would likely bring discredit on the municipal police department.

2. The specific allegation of *discreditable conduct* is related to a sexual act that took place between Sgt. Keleher and the complainant N.O.

3. A public hearing was held pursuant to Section 138(1) of the *Act*.

PROCEDURAL HISTORY

4. On June 19, 2018 the Victoria Police Department commenced an investigation into the off-duty conduct of Sgt. Brent Keleher. Sgt. Keleher was alleged to have committed sexual assault while being off duty. The incident was alleged to have taken place in the City of Vancouver. Pursuant to the *Act* the Police Complaint Commissioner appointed the Vancouver Police Department to conduct an external investigation which involved the appointment of a Discipline Authority. A criminal investigation had been concluded with the Crown declining to authorize charges.

5. However on February 4, 2019 the complainant, N.O., filed a complaint with the Office of the Public Complaint Commission ("OPCC") alleging that she was sexually assaulted by a Victoria police officer. Accordingly, she was added as a complainant to the proceedings.

6. On June 13, 2019 the Discipline Authority concluded that the allegations did not appear to be substantiated. On July 11, 2019 pursuant to Section 117(4) of the *Act* the Commissioner appointed Retired Provincial Court Judge James Threlfall to conduct a review of the decision of the Discipline Authority.

7. On August 20, 2019 retired Judge Threlfall determined that the evidence was sufficient that the member appeared to have committed *discreditable conduct*. Mr. Threlfall then assumed the responsibility of the Discipline Authority and the matter proceeded to a hearing. Mr. Threlfall concluded that there was insufficient evidence to conclude that a sexual assault had taken place and therefore found "in the absence of a finding of sexual assault that the member's actions are not sufficient to establish the allegation of misconduct as alleged".

8. The complainant was informed of the decision and filed a request for a public hearing. The Commissioner agreed. He stated:

"In my view, the allegation of *discreditable conduct* cannot be restricted to the discrete question of whether a sexual assault occurred. Accordingly a hearing under Section 138(1) of the *Act* was ordered"..

EVIDENCE

9. It will be useful to make reference to the parties involved and their relationships to one another. With the exception of Ms. Sarah McKay ("Ms. McKay"), the remaining parties are all residents of Victoria. The complainant, N.O., is 35 years of age. She is a nurse. She is married to B.O. Ms. McKay resides in South Surrey. She and N.O. have been friends since they attended middle school in Victoria. Robert Scott, referred to in these proceedings as Mr. Scott, is a friend of Julian Dunford, N.O. and Ms. McKay. Ms. McKay and Mr. Scott not only knew each other from Victoria but both attended college in the United States on athletic scholarships; Ms. McKay on basketball scholarship and Mr. Scott on a baseball scholarship. In fact, N.O. had visited them at their schools in Indiana. Julian Dunford is a City of Victoria Firefighter and friend of Sgt. Keleher. N.O. knew of Sgt. Keleher because she had worked as a nurse with Sgt. Keleher's wife who was also a nurse in the emergency room at a Victoria Hospital. Thus the parties were generally well acquainted with one another.

10. On the weekend of May 11-13, 2018 N.O. travelled from Victoria to South Surrey to spend time with her long-time friend Sarah McKay. N.O. had given birth to a son some nine months prior to the weekend. It was intended to be a getaway weekend for her. N.O. arrived at the Tsawwassen ferry terminal on Friday evening where she was picked up by Ms. McKay. They went to the Cactus Club in Surrey where they had dinner.

11. By coincidence Julian Dunford, Mr. Scott and Sgt. Keleher also residents of Victoria came to Vancouver in order to celebrate a bachelor party for Mr. Dunford. A number of their friends had also joined them to celebrate the occasion. The party was held on the Friday evening at the Four Seasons Hotel. While a number of the party goers went home to Victoria, the remaining three decided they would stay in Vancouver for the Saturday. They determined that the Four Seasons was somewhat expensive. Accordingly, Sgt. Keleher made a reservation at the Coast Hotel on Hastings Street.

12. I will now refer to the events of the day which ultimately led to these proceedings. At approximately 10:30 a.m. N.O. and Ms. McKay had brunch at the White Spot restaurant in South Surrey. N.O. testified that she had a double caesar at breakfast and later she had a beer when they returned to Ms. McKay's residence. After that they went to a bar in White Rock where they shared one half-litre of wine. They later went to a restaurant in White Rock called Charlie Don't Surf where she had four sleeves of beer.

13. On Saturday morning Mr. Dunford, Mr. Scott and Sgt. Keleher met for breakfast at restaurant near the waterfront. They had drinks with their breakfast. According to Mr. Dunford, he, Mr. Scott and Sgt. Keleher went into Gastown where they had a couple of beers. They then went to the Parq Casino where Mr. Dunford drank vodka sodas. They were there for one and one-half to two hours. At approximately 4:00 p.m. they went to the Shark Club which is a sports bar on Georgia Street where they watched a hockey game.

14. Earlier in the afternoon N.O. learned that Mr. Scott and others were also in Vancouver. They texted each other. Mr. Scott invited N.O. and Ms. McKay to join them at the Shark Club. N.O. and Ms. McKay decided that they would go to the Shark Club by taxi. The plan was for one of the two to pay the taxi fare to Vancouver and the other person would pay for the return trip to South Surrey. It was their plan to return to Surrey at the end of the evening because Ms. McKay's daughter shared a residence with Ms. McKay and they were concerned about her being alone. N.O. stated that she was mildly intoxicated when she got into the taxi to go downtown.

The Shark Club

15. They arrived at the Shark Club at approximately 7:30 p.m. and joined the three men who had arrived earlier. They were all watching Las Vegas Golden Knights hockey game on television. It would be an understatement to say that a considerable amount of alcohol was consumed by everyone. Not surprisingly the evidence relating to the amount that each party had to drink varies considerably. When asked how much she had to drink at the Shark Club, N.O. could not recall but said "the drinks just kept on

coming". She said she was heavily intoxicated. Mr. Dunford said that he drank 15 vodka sodas that were "probably doubles".

Dublin Calling

16. At some point the parties left the Shark Club in order to go to a club called Dublin Calling, which is on Granville Street. Not surprisingly there is a significant conflict in the evidence as to the time they left the Shark Club. Mr. Dunford has no recollection as to when they left the Shark Club. It is clear however, that the parties walked from Shark Club, on Georgia Street, to Dublin Calling; approximately eight blocks away. It is interesting to note that Ms. McKay thought that the group arrived at Dublin Calling after midnight. She is in obvious error. In his evidence Sgt. Keleher had no recollection as to how he got to Dublin Calling. N.O. could not recall walking to Dublin Calling. Mr. Scott said, "we were all very intoxicated". All parties were drinking while at Dublin Calling.

The Roxy

17. Eventually parties decided to go The Roxy. The Roxy is a well-known Vancouver nightclub situated on Granville Street, one block from Dublin Calling. Ms. McKay had been there on prior occasions and knew some people who worked there. According to the police report, the parties arrived at The Roxy at 23:51 hours and stayed for approximately two hours. The activities at The Roxy are well-documented on video. During the course of the hearing the video was played numerous times. The videos depict the parties moving from one spot to another in the club. The parties were interacting with themselves and with others. There was dancing. They were all drinking. Ms. McKay who is 6'7" tall assumed the role of somewhat of a protector of N.O. because of N.O.'s apparent level of intoxication. The video shows N.O. being physically supported by Ms. McKay. It also depicts N.O. sitting on Sgt. Keleher's lap. N.O. is seen on the video interacting with various people. While at The Roxy Mr. Scott met a person identified in these proceedings as "the nurse from Kamloops". She was never identified by name.

Coast Hotel

18. The parties left The Roxy sometime before 2:00 a.m. They went to The Coast Hotel where Sgt. Keleher had reserved a room. The video from the registration desk at the hotel sets the time of arrival at 1:54 a.m. Rather than return to South Surrey, which was the initial plan, Ms. McKay determined that the preferred option was to stay in the hotel with the men rather than taking a taxi back to Surrey. She said they did this, "because we were both really drunk", referring to herself and N.O.. The video from The Coast Hotel registration desk showed that N.O. appeared to require physical assistance, which she received from both Ms. McKay and Sgt. Keleher. It appears that N.O. and Sgt. Keleher arrived moments after the remaining members of the party. Again there is some confusion as to how the parties got to the Coast Hotel which is on West Hastings Street. There is some suggestion that at least some of them took a taxi to the hotel. While Sgt. Keleher had reserved one room, the party now numbered six people, including the nurse from Kamloops.

19. Eventually all six people took the elevator to the room reserved by Sgt. Keleher. There has been considerable evidence that N.O. got into a confrontation with the nurse from Kamloops. She was upset at her presence. Apparently she was concerned because she knew that Mr. Scott had a girl friend in Victoria. Rather than express her concern to Mr. Scott, she instead got into a verbal confrontation with the nurse from Kamloops. The room that had been reserved had two beds. There were now six people. The problem relating to accommodation was partially resolved by Mr. Scott and the nurse from Kamloops getting their own room. The remaining people chose to stay in the one room. Ms. McKay and Mr. Dunford shared one bed.

20. There is a significant conflict in the evidence as to what took place next. N.O. testified that her first memory of the hotel room was being there with Ms. McKay, Mr. Dunford and Sgt. Keleher. She said that she remembers going to the bathroom, removing her bodysuit and shorts and getting into bed. She testified that:

"... I was very drunk and we'd been drinking all day since the morning. I was tired."

She said she was alone in the bed. She was wearing only her bra and underwear. At some stage it became apparent to her that she was not alone. She said she awoke while being touched. She said that her memory is that she was "in and out" and she did not want to be touched. She said that she felt Sgt. Keleher touching her and whispering to her. She has little or no recollection as to what he had said. She said that she was in and out of consciousness, but woke up to find that someone was "touching my breasts". When asked for her reaction to someone touching her breasts, she stated:

- A. "I remember not wanting to be touched. I was in and out."
Q. "Okay. Did you say anything?"
A. "No not that I know of."
Q. "Did you do anything."
A. "Not that I know of, no."
Q. "So how long did that touching of your breasts go on?"
A. "I'm not sure. I'm not sure."
Q. "So what happened next?"
A. "I remember feeling something inside of me, inside of my vagina."
Q. "You felt something inside of your vagina?"
A. "Yes."
Q. "Did you know what that was?"
A. "No."

She said he was whispering things to her but she did not respond. She went on to state that Sgt. Keleher pulled her arm back and onto his body. When asked what she thought he was doing she stated that she wasn't sure.

"And then realizing that he was putting my hand on his penis and I took my arm away. And then he pulled my arm back again and onto him."

She went on to state that "...he was wearing boxers or briefs of something. She also testified that "I just curled up. I was terrified."

21. In cross examination she agreed that she did not know the sequence of the events from going to bathroom, getting undressed and getting into bed. She agreed that she was not sure whether Sgt Keleher was already in the bed ahead of her. She agreed that she put her back up against his front. However she completely disagreed

with the suggestion she deliberately moved her body against the front of his body. She said she really had no memory of the events. She disagreed with the suggestion that she passionately kissing him. She made it clear that she did not consent to Sgt. Keleher's actions.

22. Sgt. Keleher has an entirely different version of the facts. According to him, he and N.O. went into the hotel room. He recalled there were two beds. They laid on the bed near the window, above the covers, before the rest of the group arrived. He testified that he massaged her head and shoulders. He said she told him "it felt nice". When the other people in their group arrived in the room there was a confrontation between N.O. and the nurse from Kamloops. Some time thereafter the nurse from Kamloops and Mr. Scott left to get their own room. Sgt. Keleher said N.O. then went into the bathroom; at this time he removed his clothes with the exception of his boxers. When N.O. came out of the bathroom she was wearing only a strapless bra and thong panties. She climbed into bed along side him. He said Mr. Dunford and Ms. McKay were in the bed next to them having sex. Sgt. Keleher testified that N.O. moved toward him in a spooning position and turned on her side. He rubbed her arm, shoulder and hips. He said things became very intense between himself and N.O.; they were kissing passionately and she was moaning. She reached over and touched his penis. She arched her hips. He put his finger in her vagina and began stimulating her. He went on to say that things became quiet passionate and he said to her, "I wish I could fuck you". She replied, "I really want you to fuck me". He came to the conclusion that things had gone too far and that he did not wish to have sex with her. He testified that he withdrew and said to her, "can we keep this to ourselves." and that "you are not the only one with something to loose". It was his testimony that she was awake the entire time and that she consented to the sexual activity.

23. N.O. testified that she has no memory of anything until she awoke at 7:45 a.m. and got dressed. She said that Sgt. Keleher told her not to say anything to anyone about what took place. At that time Ms. McKay awoke and dressed. They took a taxi to Ms. McKay's home in South Surrey. She told Ms. McKay that she thought Sgt. Keleher was touching her while she was asleep. She was then driven to the ferry where she

met Mr. Dunford and Sgt. Keleher. She said that while she was on the ferry she went to the deck and was concerned about what had been done to her. She said, "I wasn't sure if I'd been raped while I wasn't conscious". She said she was scared and had vague memories of what had taken place in the hotel room. Her husband met her at the ferry.

24. On Tuesday or Wednesday the following week N.O. told her husband about the incident. He was enraged and punched a hole in the wall of their bedroom. He demanded to know Sgt. Keleher's name and what happened. She told her husband that she had trouble trying to piece the events of the evening together. On Friday, May 18th she attended at the sexual assault clinic in Saanich.

25. On June 8, 2018 she reported the incident to the Vancouver Police. An investigation had been commenced. On July 9, 2018 N.O. became involved in two telephone conversations with Sgt. Keleher. The two telephone calls were made under police supervision during which N.O. was wearing a wire. The conversations initiated by the police were recorded and were played at the hearing. Sgt. Keleher had no knowledge that a police investigation was underway or that his conversation was being monitored and recorded. The recordings were played at the hearing.

26. It appears that N.O. is calling Sgt. Keleher because she does not remember what happened on the night in question. She believes she was sexually assaulted. She told him that she needs his help so she knows what took place. His response is as follows:

"....um, I mean, if, if it's kind of – if it helps put anything at ease, we did not have sex that night. I know, I know you were pretty drunk and you might not have a full recollection but we did not have sex."

See Exhibit 2, tab 7 Intercept #1 July 9, 2018, lines 41-44

27. On the second intercepted call he told her he did not think she remembered what happened.

28. It is clear that during the recorded calls Sgt. Keleher was assuring N.O. that they did not have sexual intercourse and that he was not groping her while she was asleep or passed out. They also led her to believe that she was consenting to his sexual advances. During the recorded conversation N.O. asked Sgt. Keleher what made him think she wanted to "hook up" (participate in sexual activity). She replied as follows:

Tab 7 of the second intercept of July 9, 2018, Sgt. Keleher states as follows:

"Something that you said that morning kind of lead me to think that you didn't really remember what happened. I can't remember exactly what it was that, that you said and I just felt bad about what had happened and like guilty. And just, and yeah".

29. In the intercepted phone call he told N.O. that he didn't know how her hand ended up on his penis. That assertion is obviously in conflict with the evidence he gave at the hearing. Wherein he stated that she reached over and touched his penis.

30. It is apparent from the intercepted phone calls that Sgt. Keleher was providing information to N.O. in order to assure her that they did not have sexual intercourse and that he was not groping her when she was asleep or when she was passed out. Of course Sgt. Keleher did not know that the calls were being recorded.

Analysis

31. The allegation in these proceedings is that Sgt. Keleher committed *discreditable conduct* pursuant to s.77(3)(h) of the *Police Act*. These specific allegation reads as follows:

"That on May 12, 2018 the member committed *Discreditable Conduct* pursuant to Section 77(3)(h) of the *Police Act*, which is, on or off duty, conducting himself in a manner that the member knows, or ought to know, would likely bring discredit on the municipal police department."

The specific conduct which gives rise to the allegations relate to a sexual encounter that took place while he was off-duty. Policing is a profession where off-duty conduct is subject to scrutiny. Police in Canada are highly respected. The public has a high

expectation of police conduct whether on duty or off. The Act specifically addresses off-duty conduct.

32. The case most often cited for off-duty conduct is the decision of the Ontario Civil Police Commission. In the Matter of the Police Services Act, R.S.O. 1990, C.P.15, as amended:

92. 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."
93. It is not necessary to establish actual discredit. As the Commission noted in Silverman and Ontario Provincial Police (1997), 3 O.P.R. 1181 (O.C.C.P.S.) at 1187: "The measure used to determine whether or not conduct is discreditable is the extent of the potential damage to the reputation and image of the service should the action become public knowledge."
94. It is not even necessary that the conduct in question offend, frighten or be "vexatious" to the individual who is the object of the action in question. This is reflected in a number of Commission decisions. An example is Burdette and Guelph Police Service (13 May, 1999, O.C.C.P.S.).

33. Mr. Butcher has raised a concern that the allegations of discreditable conduct have not been particularized. Under some circumstances the failure to do so could be of some concern. The purpose of particulars can be to ensure that the proceedings are fair. However, I am comforted by the fact that all parties were fully aware of the fact that the conduct which gives rise to the apparent misconduct is related to the sexual encounter. In fact Sgt. Keleher has admitted to the sexual act. Thus the primary issue is whether N.O. consented to the sexual act, which Sgt. Keleher admits to, or if she did not, whether Sgt. Keleher had an honest but mistaken belief that she had consented. Based on the manner which the evidence was presented both in examination and chief

and cross examination, and based on how the final arguments were framed, the primary issue is whether N.O. consented to the sexual act.

34. This is of course not a criminal trial. Sgt. Keleher is not charged with a criminal offence, and it is not necessary to determine whether Sgt. Keleher is guilty of having committed a criminal offence. Nonetheless, both Mr. Butcher and Mr. Hickford, have referred to criminal law principles governing consent and sexual assault in their submissions. While the proceedings under the Act are not necessarily governed by the provisions of the Criminal Code, it is of some assistance to make reference to the principles of the criminal law. In the circumstances I will consider:

- (a) Whether N.O. consented to the sexual activity;
- (b) Whether Sgt. Keleher believed that she consented and, if so, whether Sgt. Keleher's belief arose from recklessness or a failure to take reasonable steps in the circumstances known to him as to whether or not she was consenting; and
- (c) I will also be addressing whether N.O. had the capacity to consent and the issue of honest but mistaken belief on the part of Sgt. Keleher.

35. It is not in dispute that Sgt. Keleher had a sexual encounter with N.O.. Sgt. Keleher's response to the allegation of discreditable conduct is that N.O. consented to the sexual activity that took place between them. It is argued in the alternative that, in any event, he had an honest belief that she did in fact consent. Counsel for Sgt. Keleher has argued that:

"N.O. was intoxicated to a degree that impaired her memory but not so stupefied as to vitiate her capacity to consent. She fully consented and was an active participant in the sexual activity, or in the alternative, he had an honest belief in communicated consent. It is trite that Sgt. Keleher does not have to prove any of those things."

36. For the purposes of the offence of sexual assault consent is defined under Section 273.1(1) of the Criminal Code the relevant parts of that section read as follows:

"Consent means, for the purposes of Sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question."

(1.1) Consent must be present at the time the sexual activity in question takes place"

37. Thus a complainant's state of mind becomes a relevant factor. As stated above a complainant's consent must be voluntarily given. Thus the capacity to give consent is relevant.

38. There are three issues that are relevant in these proceedings and they are related one to the other. They are consent, capacity and credibility. The allegations are that N.O. did not consent to the sexual activity that took place between her and Sgt. Keleher; and in any event, because of her advanced state of intoxication, she did not have the necessary capacity to consent and in fact did not consent. The onus is on public hearing counsel to prove on a balance of probabilities that the complainant, N.O., did not consent to the sexual activity. In order to make a finding of discreditable conduct the evidence needs to be clear, cogent, and convincing.

39. I will review the relevant evidence regarding N.O.'s drinking since it is clearly related to the issue of capacity. At 10:30 a.m. on Saturday N.O. and Ms. McKay had brunch at the White Spot Restaurant where she had a double caesar. Upon returning to Ms. McKay's residence N.O. had a beer. Thereafter, they went to a bar in White Rock where she had a one-half litre of wine. At a different bar, N.O. had four sleeves of beer. She testified she was mildly intoxicated when she got into the taxi to go downtown. She could not specifically recall how much she had to drink at the Shark Club but said, "the drinks just kept coming". She said she was heavily intoxicated. She had no recollection of walking to Dublin Calling. Mr. Scott testified that, "we were all very intoxicated" while they were at Dublin Calling.

40. Much has been said about the video evidence from The Roxy. N.O. appears to be physically supported and guided at times by Ms. McKay. The video shows the

parties are milling around the club. Everybody was drinking. I agree with Mr. Butcher, counsel for Sgt. Keleher that no clear inference can be drawn with respect to N.O.'s level of intoxication from the videos alone. However the video evidence must be considered together with the plethora of evidence relating to N.O.'s level of intoxication.

41. The evidence relating to N.O.'s level of intoxication is overwhelming. All witnesses, including Sgt. Keleher, have testified with respect to her level of intoxication. In fact, on the intercepted telephone calls Sgt. Keleher is heard advising her as to what transpired because of her apparent lack of recollection. He goes to great pains to ensure her that they did not have sexual intercourse. Implicit is his clear knowledge that she has little or no recollection of the events of the evening because of her level of intoxication. In fact, all parties were aware of her vulnerability and/or assisting her.

42. On the issue of credibility I find N.O. to be credible. She was truthful. She was believable. She answered the questions in cross-examination in a straight forward manner and did not resile from her evidence that at no time did she consent to the sexual encounter that took place. In any event, it is clear from the evidence which is both uncontradicted and overwhelming that she did not have the necessary capacity to consent. She has described her state of mind as being "in and out". In cross examination she expressed some uncertainty with respect to the sequence of events. I attribute the inconsistencies to her level of intoxication. All parties, including Sgt. Keleher, were clearly protective of N.O.. In her state she was clearly vulnerable.

43. While she has described her state of mind as being "in and out" she nevertheless is clear that she did not want to participate in this sexual activity. It follows based on the whole of the evidence, I find that N.O. did not consent to the sexual encounter that took place between her and Sgt. Keleher. The element of voluntariness is lacking. Moreover, she lacked a capacity to consent. The evidence given by Sgt. Keleher with respect to her apparent voluntary participation in the sexual activity is clearly contrary to the evidence given by the remaining witnesses. It is clear from their evidence that they saw N.O. as being vulnerable and in need of protection. That much is clear from the video evidence from the Roxy and the apparent care that was taken by everyone, including Sgt. Keleher, as to her vulnerability. Sgt. Keleher's evidence that she

consented and was a willing participant in the sexual encounter is clearly inconsistent with the balance of the testimony. Counsel in their respective arguments have dealt with the law of sexual assault at length. It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that formed the subject matter of the charge, where:

(a).The accused's belief arose from:

- (i). the accused's self defence intoxication;
- (ii). the accused's recklessness or willfulness blindness; or
- (iii). any circumstances referred to section 265(3) or section 273.1(2) or (3) in which no consent is obtained.

(b).The accused did not take reasonable steps known to the accused at the time to ascertain that the complainant was consenting, or

(c).There is no evidence that the complainants voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

I must keep in mind that the allegation is one of discreditable conduct having regard to the whole of the circumstances. I am not required to make any finding with respect any allegation of sexual assault. I find that Sgt. Keleher was, at the very least, reckless as to whether N.O. consented to the sexual act. Surely it must have been apparent to him, as an experienced officer, that she was clearly vulnerable. Accordingly I must reject his position that she was an equal and consenting participant in the sexual encounter.

44. I must now go on to consider whether Sgt. Keleher had an honest belief that she communicated consent. Again, Sgt. Keleher does not have to prove on the evidence that she did not consent or that he did not have an honest belief. Rather it is for public hearing counsel to prove that he did not have an honest but mistaken belief. The law is clear that an accused person must have an honest but mistaken belief that she consented whether by words or conduct. There is no evidence direct or indirect that could lead one to the conclusion that Sgt. Keleher had an honest but mistaken belief

that she consented. Based on the whole of the evidence, I find that Sgt. Keleher did not have an honest but mistaken belief that N.O. consented to the sexual contact. As well, from the whole of the evidence, It appears that she was barely aware of her circumstances during the relevant time. If Sgt. Keleher believed that N.O. consented to the sexual contact, that belief could not be honestly held on a consideration on the whole of the circumstances. An honest belief in consent cannot be based on a guess or assumption.

45. In conclusion I am firmly convinced on a balance of probabilities that Sgt. Keleher committed an act of discreditable conduct.


The Honourable Wally Oppal, Q.C.

This 12th day of August 2022