



Office of the
Police Complaint Commissioner

British Columbia, Canada

PH: 2023-01
OPCC File: 2019-17245

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
Constable Ron Kirkwood of the Victoria Police Department**

- To: Mrs. Audrey and Mr. Ron Rauch (Complainants)
Ms. Kelly Rauch
Ms. Cheryl Peterson
- And to: Constable Ron Kirkwood (#414) (Member)
c/o Victoria Police Department
Professional Standards Section
- And to: The Honourable Judge Elizabeth Arnold-Bailey (Discipline Authority)
Retired Justice of the Supreme Court of British Columbia
- And to: Chief Constable Del Manak
c/o Victoria Police Department
Professional Standards Section

WHEREAS:

Background

1. Lisa Rauch was a 43-year-old woman who was suffering from several vulnerabilities. At the time of her death, she was unhoused and living as a member of the marginalized and at-risk community in Victoria, BC. She reportedly had lived “on the streets” for significant parts of her life. Ms. Rauch also reportedly requested and sought assistance but was denied, or refused, access to support for substance abuse and mental health challenges.
2. On December 25, 2019, in the early afternoon, Ms. Rauch attended a unit at a supportive housing facility in Victoria. At this location, Ms. Rauch reportedly consumed alcohol and

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drugs and became agitated. It was reported that the resident of the unit became concerned for her safety after Ms. Rauch locked herself in her unit and made a threatening comment. At 4:42 pm, the Victoria Police received a 911 call. The caller reported that Ms. Rauch was in possession of a kitchen knife and threatened the occupants in one of the housing facility units. The caller advised that the occupants inside the unit had managed to leave uninjured and Ms. Rauch was believed to be alone inside the unit.

3. Police attended the call at approximately 4:46 pm, spoke with the owner of the unit, and then attended the unit where they could hear Ms. Rauch from within. The police tied off the door and set about evacuating the facility floor. Ms. Rauch was considered to be a criminal barricaded subject. The Greater Victoria Emergency Response Team (GVERT) was updated with the information at approximately 5:14 pm. Police took steps to communicate with Ms. Rauch through the unit door but were not successful in gaining her voluntary removal.
4. At approximately 6:16 pm, smoke was observed emanating from the unit where Ms. Rauch was present. Subsequently, officers were authorized to breach the door. It was following the decision to breach and enter the unit that the Member deployed three ARWEN rounds into the unit, striking Ms. Rauch in the head. (An ARWEN is an Intermediate Weapon as described in BC Policing Standard 1.2 *Intermediate Weapons and Restraints* “whose normal use is not intended or likely to cause serious injury or death.”) Police entered the unit and located Ms. Rauch who was unresponsive and bleeding from the head. Ms. Rauch was transported to the hospital where she was determined to be in critical condition. She ultimately died at hospital four days later, on or about December 29, 2019.
5. On December 26, 2019, the Office of the Police Complaint Commissioner (OPCC) received the report of this incident from the Victoria Police Department (VicPD) pursuant to section 89 of the *Police Act* (“reporting of death, serious harm”).
6. According to the post-mortem report, Ms. Rauch died as a result of “blunt force head injuries.” The report states that “[t]here was no evidence at autopsy of smoke inhalation or thermal injuries.” No other significant conditions contributions to the death were identified.
7. On January 16, 2020, a Mandatory External Investigation under section 89 of the *Police Act* was ordered and an External Discipline Authority was appointed to examine the circumstances of the matter, including the conduct of the member, as well as training or policy matters arising. In addition, a senior officer of the Vancouver Police Department (VPD) was designated to act as the Discipline Authority pursuant to section 135 of the Act, as it was necessary in the public interest that a person other than the Chief Constable of the VicPD or their delegate be the Discipline Authority in relation to this matter.
8. On December 25, 2019, the Independent Investigation Office (IIO) asserted jurisdiction in relation to this incident and on April 8, 2020, the *Police Act* matter was suspended pending the outcome of the IIO investigation. The IIO completed their criminal investigation into whether or not there were reasonable grounds to believe that the member committed an

offence under an enactment and issued a public report on October 16, 2020, concluding that the matter would not be referred to Crown Counsel for consideration of charges.

9. On October 29, 2020, my office issued a Lifting of Suspension notice and the mandatory *Police Act* investigation proceeded.
10. On November 14, 2020, my office received a registered complaint from Mrs. Audrey and Mr. Ron Rauch regarding the use of force and other circumstances related to the operations of the VicPD in relation to the death of their daughter, Lisa Rauch. In addition, my office received complaints from the sister of Lisa Rauch, Ms. Kelly Rauch, and the daughter of Lisa Rauch, Ms. Cheryl Peterson. These complaints were deemed admissible pursuant to section 83(2) of the *Police Act* and these members of the Rauch family were formally added to the record and recognized as complainants to the investigation.
11. During the course of the *Police Act* investigation, it was identified that the Member dictated a “will-say” document to a supervisor but did not make notes or otherwise sufficiently document the matter, contrary to VicPD policies. The *Police Act* investigation assessed an allegation of *Abuse of Authority* in relation to the use of force by the member and an allegation of *Neglect of Duty* in relation to the lack of documentation.
12. VPD Professional Standards external investigator, Sergeant Andrea Anderson, investigated this matter and on February 14, 2022, she submitted the Final Investigation Report (FIR) to the Discipline Authority.
13. On March 1, 2022, following his review of the FIR, the Discipline Authority from the VPD determined that the two allegations of misconduct against the Member were unsubstantiated.

Section 117 Review

14. On March 24, 2022, pursuant to section 117(1) of the *Police Act*, I considered that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect. Pursuant to section 117(4) of the *Police Act* and based on a recommendation from the Associate Chief Justice of the Supreme Court of British Columbia, I appointed the Honourable Judge Elizabeth Arnold-Bailey, retired Justice of the Supreme Court of British Columbia (the Retired Judge), to review this matter and arrive at her own decision based on the evidence.
15. On June 6, 2022, the Retired Judge issued her decision pursuant to section 117 of the *Police Act*. She determined that one count of *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* did not appear to be substantiated and that one count of *Neglect of Duty* pursuant to section 77(3)(m)(ii) of the *Police Act* appeared to be substantiated. Pursuant to

section 117(9) of the *Police Act*, the Retired Judge assumed the role of Discipline Authority and a discipline proceeding was convened.

Discipline Proceeding

16. On July 26, 2023, following the discipline proceeding, and after considering the available evidence and submissions, the Discipline Authority made the following determination:

Neglect of Duty pursuant to section 77(3)(m)(ii) of the *Police Act* to promptly and diligently do his duty to complete the documentation required by the VicPD's note and report making policies.

Unsubstantiated.

17. In making this finding, the Discipline Authority found that the member was provided legal advice to not provide any statements or make any notes due to his Section 7 Charter right to silence. The Discipline Authority noted that none of the member's supervisors or union agents to whom he spoke informed him that he had a duty to provide additional statements or documents in addition to the brief will-say that he had provided.
18. The Discipline Authority concluded that "the member was entitled to rely on the legal advice of a senior lawyer" and that despite departmental policy requirements, the member "was not under a duty to make notes or provide a statement about his actions or observations until he was advised that he would not be charged criminally with an offence in relation to Ms. Rauch's death."
19. The Complainants and the Member were provided a copy of the Retired Judge's findings in relation to the allegation of misconduct. They were informed that if they were aggrieved by either the findings or determinations, they could file a written request that I arrange a Public Hearing or Review on the Record.

Request for Public Hearing

20. On August 21, 2023, I received a request from the Complainants that a Public Hearing be held with regard to Ms. Rauch's death. In their request, the Complainants identify what they believe to be a number of inconsistencies in the evidence and the information they were provided by the police and the IIO. The Complainants also noted that they "believe that a Public Hearing, where questions can be asked and hopefully answered, will provide us with information we have been deprived of throughout this process" and that they "also believe it is in the public's interest to be aware of what police officers are capable of in their interactions with the public and the steps that are taken to shield them from accountability."

Decision

21. 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 or review on the record is necessary in the public interest.

22. Having reviewed the FIR, associated investigative materials and determinations, pursuant to section 138(1)(d), I consider that a Public Hearing is necessary in the public interest. I have reached this conclusion on the basis of several relevant factors, including but not limited to the following:
 - (a) The incident that resulted in the proceeding is the death of a member of our community. She was a vulnerable person suffering from a mental health crisis. The circumstances surrounding her death require a full accounting. I agree with the Complainants that the circumstances related to police officers accounting for their actions in police involved deaths must bear public scrutiny.
 - (b) The Member discharged a weapon with known potential lethality that resulted in the death of Ms. Rauch. The member did not provide any evidence to the IIO, therefore when making their determination the IIO did not have the benefit of the Member's statement and his subjective perceptions when he discharged the ARWEN. In addition, there are concerns in relation to the possible reckless nature of the use of force in these circumstances, considering the member did not have a clear visual target prior to deployment of the ARWEN, and the reasonableness of the assessed danger posed by Ms. Rauch and the environmental conditions caused by the fire. This requires further examination under oath with respect to the use of force, its reasonableness and proportionality and the associated risks posed to the officers at the scene and the public necessitating the discharge of the ARWEN.
 - (c) I consider that it is necessary to examine and cross-examine witnesses and receive evidence to ensure a full accounting for the use of force and the circumstances of that use of force are fully canvassed. I also consider it necessary to receive legal submissions from more than just the Member's counsel.
 - (d) There is a reasonable prospect that a Public Hearing will assist in determining the truth.
 - (e) In my opinion, an arguable case can be made that the Retired Judge incorrectly applied the law with respect to the duty of police officers to make notes or otherwise

- account for the steps taken while in the performance of their duties, including the decision of the Supreme Court of Canada in *Wood v. Schaeffer*, 2013 SCC 71 (“*Wood*”).
- (f) Finally, as highlighted by *Wood*, the role and intervention of police union representatives and legal counsel within the accountability processes in British Columbia when police cause the death of a person is significant to the public’s confidence in those processes. A Public Hearing is therefore required to preserve or restore public confidence in the investigation of misconduct and the administration of police discipline.
23. It is therefore alleged that Constable Kirkwood committed the following disciplinary defaults, pursuant to section 77 of the *Police Act*:
- i. Constable Kirkwood committed *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* which is oppressive conduct towards a member of the public, including, without limitation, in the performance, or purported performance of duties, intentionally or recklessly using unnecessary force on any person. Specifically, the discharge by the member of the ARWEN rounds that struck Ms. Rauch.
 - ii. Constable Kirkwood committed *Neglect of Duty* pursuant to section 77(3)(m)(ii) of the *Police Act*, which is neglecting, without good or sufficient cause, to promptly and diligently do anything that it is one’s duty as a member to do. Specifically, by failing to complete the documentation required by the VicPD for incidents where the member uses force on a person resulting in serious bodily harm or death.
24. Pursuant to section 143(3) of the *Police Act*, a Public Hearing is not limited to the evidence and issues that were before a Discipline Authority in a discipline proceeding.
25. 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.
26. Pursuant to section 144(1) of the *Police Act*, a person, other than Public Hearing Counsel, Commission Counsel and the member or former member concerned, may apply to be a participant in a Public Hearing by applying to an Adjudicator in the matter and form the Adjudicator requires.

27. Pursuant to section 143(7) of the *Police Act*, the Rauch family, or their agent or legal counsel, may make oral or written submissions, or both, after all of the evidence is called.

THEREFORE:

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

29. Pursuant to the recommendation of the Associate Chief Justice of the Supreme Court of British Columbia, the Honourable Wally Oppal, K.C., retired Court of Appeal 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.

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 4th day of October, 2023.



Clayton Pecknold
Police Complaint Commissioner