PH: 2024-01
OPCC Files: 2022-21398
2023-25106
2023-25107

IN THE MATTER OF THE PUBLIC HEARING INTO THE CONDUCT OF SERGEANT KEIRON MCCONNELL OF THE VANCOUVER POLICE DEPARTMENT IN ACCORDANCE WITH THE POLICE ACT, RSBC 1996, C. 367 AS AMENDED

Public Hearing Counsel	Marilyn Sandford, KC, and Katrina Purcell
Commission Counsel	Brian Smith
Counsel for the Member	Anila Srivastava and Cait Fleck
Public Hearing Dates	March 31 – April 10, April 29 to May 12, 2025
Date of Ruling	March 24, 2025

RULING ON SECTION 150 APPLICATION

Overview

[1] Sergeant McConnell faces a public hearing into allegations of discreditable conduct in the nature of sexual harassment of seven individuals in two different settings over a period of five years. The Commissioner seeks orders pursuant to Section 150 of the *Act* which may be summarized as follows: 1) restricting publication of the names of seven individuals who will testify on the public hearing ["the seven individuals"] and of any information that would tend to identify them; 2) maintaining confidentiality of the public hearing disclosure in order to protect the privacy interests of the seven individuals; 3) establishing a process for preserving confidentiality where the public seeks access to any exhibits or materials filed in the proceeding; and 4) prohibiting remote access to the proceedings.

[2] The parties agree that the names of the seven individuals and any information that may tend to identify them should be withheld, and they have agreed on further terms pertaining to confidentiality and remote access. The agreed terms are contained in the accompanying Order that I make today.

[3] There was an initial issue as to whether the ban on publication needed to include the name of the Member in order to fully protect the identity of the witnesses. The witnesses were given an opportunity to provide input into that question and none has sought that the ban be extended in that fashion.

[4] I will here touch briefly on the reasoning behind the terms of the Order.

Section 150

[5] The full text of Section 150 reads as follows:

> *Power to prohibit or limit attendance or access*
>
> **150** (1) An adjudicator may, by order, prohibit or restrict a person or a class of persons, or the public, from attending all or part of a public hearing or review on the record, or from accessing all or part of any information provided to or held by the adjudicator of a public hearing or review on the record,
>
> (a) if there is an assertion of privilege or immunity over the information,
>
> (b) for any reason for which information must or may be excepted from disclosure by the head of a public body under Division 2 of Part 2 of the *Freedom of Information and Protection of Privacy Act*, or
>
> (c) if the adjudicator has reason to believe that the order is necessary for the effective and efficient fulfillment of the adjudicator's duties under section 141(10) *[review on the record]* or 143(9) *[public hearing]*.
>
> (2) In making an order under subsection (1), an adjudicator must not unduly prejudice the rights and interests of any person against whom a finding of misconduct, or a report alleging misconduct, may be made.

Ban on Publication of Witnesses' Names

[6] Counsel for the Commissioner, Mr. Smith, relies on the wording of Section 150(1)(b) of the *Act*, and advances the application on freedom of information and privacy principles. I raised the question of whether there may also be authority under Section 150(1)(c) to impose a publication ban in order to ensure the efficient and effective conduct of a hearing. In any event, many of the same principles will likely apply, whichever section is relied upon.

[7] Section 150(1)(b) permits restrictions on the public's access to information "provided to or held by the adjudicator." The powers under this section encompass a spectrum from orders restricting the dissemination of pieces of information to orders prohibiting any public access to the proceedings. As pointed out by Commission Counsel, the incorporation of *FIPPA* considerations imports an analysis of whether the disclosure of personal information in a particular matter constitutes "an unreasonable invasion of privacy," and a *Charter of Rights* analysis, weighing the public interest in an open process against the individual privacy interests that are at stake.

[8] Commission Counsel submits that disclosure of the names of the witnesses will create an affront to their dignity beyond that inherent in the nature of the allegations; in reliance on case law such as *Fedeli v. Brown*[1]. In *Fedeli,* the court concluded that disclosure of a sexual assault complainant's name may subject her to "unnecessary trauma and embarrassment" and deter her from willingness to come forward. Counsel have easily agreed that the nature of the allegations in this

[1] *Fedeli v. Brown*, 2020 ONSC 994;

matter are such that the seven individuals' names should be withheld, and that part of the Order is non-contentious. There is an established body of case law dealing with the need to protect the privacy interests of complainants and affected persons who are required to testify in relation to allegations of sexual transgressions against them.

[9] The cases make it clear that part of the public interest justification for a publication ban is to avoid the chilling effect on future complainants or witnesses. That concern is not specifically addressed by Section 150, which refers to effects on the immediate proceedings, or privacy interests of involved individuals, but the public interest clearly figures prominently in the overall aims and objectives of the *Police Act*. In that respect, the issue of confidentiality in the context of a public hearing also engages the public interest in both encouraging participation in the process by those with privacy interests at stake, and in providing open access to the proceedings and information about them. The broader the restrictions sought in a particular matter, the more consideration will need to be given to the effect on the public's right to access and information.

[10] As I have noted, an adjudicator also has a discretion to act under Section 150(1)(c) when it appears that "the order is necessary for the effective and efficient fulfilment of the adjudicator's duties" in relation to the public hearing. A conclusion that a witness may be uncomfortable identifying themselves publicly while under summons to testify in an open hearing of this nature might permit an order to be made under (c) to alleviate their concern and thereby permit an effective and efficient unfolding of the evidence. However, an order under that section would in any event likely require the same weighing of interests as that engaged in (b).

[11] The matter of publication bans has of course been codified for criminal purposes in Section 486.4 of the Criminal Code, making such bans mandatory in many cases. As pointed out by Commission Counsel, when the need for witness protection arises in civil or administrative matters, the applicable common law and *Charter of Rights* analysis centres on weighing the open court principle and accompanying *Charter* rights of freedom of expression and freedom of the press against the public interest in confidentiality for vulnerable witnesses. In general, the public's rights to access and information have easily ceded to the privacy rights of the witnesses, and there are many examples in civil cases of bans on publication that mirror the provisions of the Criminal Code.

[12] Commission Counsel underlines the following passage in *Fedeli*:

> [9] The privacy interests of a person who makes an allegation of sexual assault or sexual harassment in a civil proceeding is high, <u>particularly when she has not initiated the civil proceeding</u>. A complainant may be subject to unnecessary trauma and embarrassment, both for herself and her family, if she is identified. Without protection of her privacy interests, a person who has been sexually assaulted or sexually harassed may be unwilling to come forward. Further, the failure to afford such protection to a person alleging sexual assault or sexual harassment may deter other persons from coming forward to report sexual misconduct. …[2]

[13] In relation to the individuals for which the order is sought in this matter, Commission Counsel states:

[2] *Fedeli v. Brown*, supra, at para 9.

> 23. …While two of the [seven individuals] eventually became registered complainants, the other five remain affected persons – and none stand to gain personally from the outcome. Simply put, they are being asked to share sensitive personal information about experiences of sexual harassment to further the public interest objectives of the Act. In this context, their privacy interests are high and deserving of protection.
>
> 25. …It is anticipated the [seven individuals] will provide sensitive information about personal experiences of sexual harassment. Knowing their identities would add little value to the public's understanding of the issues and the importance of addressing sexual harassment in settings related to education and work. Considered in this context, the names and other identifying information of the [seven individuals] constitutes "personal information" the disclosure of which would be an "unreasonable invasion of privacy".

[14] Public Hearing Counsel agrees with the submissions of Commission Counsel, and requests that the order include a ban on recording and reproducing any of the proceedings, which has been included in today's Order. Counsel for the Member agrees with the suggested terms and addresses the question of whether the ban needs to be extended to the name of the Member in order to prevent the identification of the seven individuals, which is discussed below.

[15] Commission Counsel cited a number of OPCC cases, all available on the OPCC website, in which bans on publication of witnesses' names and identifying information have been made[3]. None of those included the reasons for making the ban, other than protection of witnesses. All counsel were provided with a draft of the Order in this matter and signed off on the wording before it was made public.

[16] Based on the helpful submissions of all counsel and in particular those of Counsel for the Commissioner, I am satisfied that the terms of the ban on publication of the names of the seven individuals that are included in the Order are the minimum requirements for protecting their privacy interests, and the least intrusive to the public's interest in access to information about the hearing.

Remote Access

[17] Since the Coronavirus pandemic, some OPCC proceedings have been either livestreamed by video or audio through the OPCC website, or remote access has been afforded to interested participants, including members of the media. Prior to the pandemic, such access had not been provided, as far as I am aware. The issue of interplay between confidentiality issues and remote access has not been addressed in any prior OPCC rulings as far as I am aware.

[18] Counsel are aligned in their submissions that in order to safeguard the seven individuals' privacy, it is in the public interest not to provide remote access to the proceedings, even to accredited journalists, should they apply. Counsel have acknowledged the provisions of the BC Supreme Court Media Policy relating to recording of proceedings and remote access for accredited journalists, but they submit that the terms of that policy do not provide a *right* of remote access, and, as with the Supreme Court's policy relating to recording devices in the courtroom, are subject to any applicable

[3] De Haas Public Hearing, PH 18-01; Keleher Public Hearing, PH 20-01; Name Withheld, RR 24-01; see also Sandhu Review on the Record, RR 20-03.

publication bans.[4] These types of applications in the Supreme Court appear to be dealt with on an administrative basis, and I am not aware of any reported cases dealing with the interaction between remote access and publication bans.

[19] I note that there are no media applications in this matter for remote access, and the public hearing is set to commence one week from now. Commission Counsel suggests that in the absence of any such applications, the requested Order prohibiting remote access should be granted, and may be revisited if the issue arises. I agree. The matter is largely an administrative one at this stage, and such an order is clearly open to me to make under Section 150. I am aware that counsel are in the process of arranging video attendance by one or more witnesses, which adds a layer of logistics in affording public remote attendance. I understand that the venue may not easily accommodate remote telephone or video attendance by multiple parties. These kinds of multi-media matters, sometimes referred to as "hybrid," in my experience often make the process unwieldy, with attempts to ensure that those attending in person and those attending remotely have the same ability to hear, see, and participate, as required.

[20] In addition, Counsel agree that policing remote attendance and preventing potential dissemination of voice recordings on social media would be difficult, and the risks of that occurring in violation of the terms of the Order would outweigh the advantages of facilitating attendance by those who are unable to attend in person.

[21] I am satisfied that I have the authority under Section 150 to prohibit remote access to the Public Hearing, and that the circumstances of this matter justify the requested term of the Order.

Member's Name

[22] As indicated, Counsel for the Member agrees with the need for a ban on publication of the names and identifying information in relation to the witnesses, and in her submissions, also addressed the issue of whether it may be necessary for the Member's name to be withheld in order to afford the required protection of privacy. As she aptly put it, "The devil is in the crafting of a sufficiently protective order," adding, "Without anticipating the manner in which counsel intend to conduct their examinations," [the Member] expects that will include such details as the witness's rank, position and posting in the department, the time frame of their service, and the names of other witnesses to the event who were also employees of the department.

[23] Member's Counsel submitted that withholding the witnesses' names in those circumstances, while permitting the publication of the Member's name, rank, position and facts about his tenure in the department, might be an exercise in futility. She submitted that in the case of students of the Member, facts such as the educational institution, courses taken, and timing of them may also tend to identify them, albeit to a lesser extent. Member's Counsel referred to the "mosaic effect" first articulated in relation to the identification of police informants[5], which is the ability to piece together information from the relevant proceeding with information from other sources, or which is publicly available, to arrive at an identity of a person whose identification has been prohibited.

[4] https://www.bccourts.ca/supreme_court/media/PDF/Policy%20on%20Use%20of%20Electronic%20Devices%20in%20Courtrooms%20-%20FINAL.pdf

[5] e.g. *R. v. McKay,* 2016 BCCA 391

[24] In one of the prior OPCC cases cited, RR 24-01, the member's name was withheld, although there are no published submissions by counsel or a ruling. In that matter, the Commissioner withheld the name in the Notice of Review on the Record, stating as follows:

> 28. The Member and affected persons have not been identified in this order so the Adjudicator may consider her authority under of section 150 of the Act with respect to any privacy interests or other considerations related to this matter including but not limited to the privacy of any past or present NWPD employees.

[25] The ban was continued through the proceedings, with the following comments about the reasoning behind it, contained in a ruling relating to an application for participation under Section 144:

> [23] There is a ban on publication of the name of the persons affected by the conduct of the former member or any evidence that would tend to identify them. I will at this time continue the ban on publication of the former member's name out of an abundance of caution, not yet being in a position to assess whether an articulation of the former member's actions in connection with the review might tend to identify those affected.

[26] The ban in that matter was continued, "to preserve the ban on publication of the employees' identities," into the final decision. The matter involved workplace sexual harassment in a department smaller than the one involved in these proceedings.

[27] The Commissioner as the head of a public body is of course bound by the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("FIPPA") at first instance and would be governed by it in relation to decisions about publishing the results of the public hearing, or any announcements, such as the Notice of Public Hearing, relating to it. It is notable that in this matter, the Commissioner elected not to withhold the Respondent Member's name in the Notice of Public Hearing, and that is consistent with the positions of Commission Counsel and Public Hearing Counsel in relation to the member's name, on this application.

[28] Commission Counsel submits that withholding the identity of the respondent member at a public hearing is an extraordinary measure and should only be taken if it is necessary to avoid unacceptable impacts on the witnesses' privacy interests. He points out that the Member's name, rank, home department, and history as an instructor in various educational institutions have been in the public domain for nearly nine months, since the Notice was issued, and submits that withholding that information at this point will have little or no practical effect on anyone's ability to identify the seven individuals:

> "[It is expected] that there will be a final public decision that contains enough meaningful information that readers will understand the issues and the outcome. …members of the public will likely be able to search key terms about the events described in that decision and connect them back to the Notice of Public Hearing and related media reports. In these circumstances, protecting the Member's identifying information will not meaningfully contribute to maintaining the privacy of the [seven individuals] and would be an unjustified departure from the open court principle.

[29] Commission Counsel submits that perfect anonymity cannot be guaranteed and the additional step of withholding the Member's name in these circumstances will add little protection to the witnesses, and will detract significantly from the right of the public to information about the proceeding. Public Hearing Counsel joined him in that position, pointing out that the prior publication of his name would make any subsequent ban "of limited feasibility" and distinguishing the cases

dealing with informer privilege on the basis of a passage from *R. v. McKay*[6] [cited by Member's Counsel] to the effect that "informer privilege cannot be balanced against other administration of justice concerns."

[30] Member's Counsel observed that the media attention arising from the Notice was restricted to a time proximate to its issuance, and that subsequent searches disclosed only the Notice and no further media attention. She pointed to the publication ban issued in RR 24-01 which included the name of the Member "in case" the facts disclosed in the review combined with the name of the member would tend to identify the persons affected by his conduct. She also pointed to PH 20-01 in which the publication ban included the name of the member until after the misconduct allegation was established, and after the complainant agreed she could be identified by initials. Those decisions support a view, which I expressed in RR 24-01, that until the evidence was led (or in the case of a review on the record, distilled), it was not possible to determine the extent to which established facts might permit a member of the public, or of a proximate group such as those in the same workplace or educational institution, to piece together the identity of a complainant or witness who, before providing evidence, had been able to remain anonymous.

[31] Accordingly, at the outset, I had some significant concerns about whether details of the timing and location of the incidents and the relationships between the individuals and the Member might engage the "mosaic effect". Those concerns led to my request that the positions of the seven individuals in regard to continued publication of the Member's name be ascertained. In this respect, I noted that Section 486.4 of the Criminal Code provides certain rights of participation for witnesses and victims in relation to bans on publication. I was aware that in at least one prior OPCC matter the complainant was represented by counsel, who participated in decisions pertaining to how to protect the complainant's privacy interests. Some of the witnesses in this matter also had counsel who could be asked to assist in assessing the issue.

[32] Counsel on the public hearing have since obligingly been able to confirm that none of the seven individuals wish to pursue a ban on publication of the Member's name. In light of that, Member's Counsel quite properly declined to make further submissions in relation to extending the ban. While there are situations in which respondent members might themselves advance the need for a ban on their name to protect the privacy interests of persons related to them, the Member is not advancing that argument in this matter. In the absence of an application on the part of any witness to include the Member's name in the ban, therefore, I conclude that there is no basis on which to do so. I am nonetheless indebted to counsel for their helpful submissions and assistance in the matter.

[33] If there are any lingering concerns about the extent to which facts arising in the evidence led in this matter, if published, may tend to identify a witness, the following quote from Justice Lamer (as he then was) in Canadian Newspapers Co. v. Canada (Attorney General)[7] bears repeating:

> In my view, it is sufficient to say that media people are certainly competent enough to determine which information is subject to the ban; if not, the judge in his or her order can clarify the matters which cannot be published.

[6] R. v. McKay, 2016 BCCA 391 at para. 151

[7] Canadian Newspapers Co. v. Canada (Attorney General), 1988 CanLII 52 (SCC), [1988] 2 SCR 122

[34] I will add, for future reference, that I believe it is open to an adjudicator under Section 150 to direct that a Member's name not be published, if to do so would tend to identity a complainant or affected person through linked facts, even if it has previously been published. Prior notices on the OPCC website could be appropriately redacted to address privacy concerns and protect the witnesses' anonymity for future purposes, even if there were means of linking the witnesses with the Member's name from prior media attention. It is also my view that an adjudicator has a duty to ascertain or confirm that no such privacy interests are at stake, before confirming publication of a Member's name in relation to a public proceeding under the *Police Act*.

[35] I found assistance in this respect in a case reported as *A.B. v. C.D.*[8], in which Madam Justice Gray of the BC Supreme Court considered the need for a ban on publication of the defendant's name in a civil suit for sexual assault brought by the complainant against a teacher at her high school, following a criminal conviction in which his name had been published. The plaintiff provided evidence that the details that were published about the criminal case enabled students at the high school to identify her.

[36] Justice Gray considered the fact that the defendant's name had been published in connection with the criminal proceedings, and referred to the right of an individual to say "enough is enough," expressed in *Phillips v. Vancouver Sun*[9]. She concluded: "such an order is necessary to prevent a serious invasion of the plaintiff's privacy because reasonably alternative measures will not prevent the risk, and … the salutary effects of the ban outweigh the deleterious effects." Justice Gray considered issues such as the size of the particular community or setting; the uniqueness of the defendant's name; the number of other similar allegations; evidence from the applicant witness about the effects of prior reporting; and the fact that the defendant's name was a small "sliver" of the information that would be available to the public.

[37] Justice Gray also addressed the apparent advantage to a defendant of having his name withheld, concluding that it was a natural consequence of the ban on publication of the complainant's identifying details, and observing that such orders occurred as a matter of course in cases where the complainant was related to the defendant.

[38] I agree that although it is sometimes referred to as "protection" of the defendant's name, the protection being contemplated is the privacy of others, who are innocent in the matter, and the "protection" afforded to the defendant is merely the inevitable result of a conclusion that publication of his name along with the evidence to be led would tend to identify someone whose privacy deserves to be protected.

[39] Concerns about the so-called "mosaic effect" in relation to details that will be disclosed in evidence in a public matter under the *Police Act* in my view therefore attract a duty on the part of an adjudicator to consider the extent of any publication ban and, to the extent possible, ensure either that those who are potentially affected are fully aware of the risks that may arise from the evidence, or that caution is exercised in deciding how best to preserve their privacy interests.

[8] A.B. v. C.D., 2010 BCSC 1530, https://canlii.ca/t/2d4sw
[9] Phillips v. Vancouver Sun, 2004 BCCA 14

Conclusion

[40] The Member's name will not be the subject of a publication ban. The remaining terms of the accompanying Order, prepared with the assistance of counsel, are in my view required at this time to protect the privacy interests of the seven individuals and to permit the efficient and effective conduct of the hearing. I find that these terms are the least intrusive means of safeguarding the witnesses' privacy interests while preserving the public's right to information and access to the proceedings.

[41] The Order provides that these terms may be revisited or amplified, if it becomes apparent, as the evidence unfolds or the witnesses weigh in, that modifications or clarification are required.

Dated this 24h day of March, 2025.

Carol Baird Ellan, Retired Judge
Adjudicator