

OPCC File No. 2023-23872

IN THE MATTER OF THE POLICE ACT, R.S.B.C CHAPTER 367  
AND  
IN THE MATTER OF A REVIEW PURSUANT TO SECTION 117  
AND  
IN THE MATTER OF AN ALLEGATION OF MISCONDUCT AGAINST  
CONSTABLE [REDACTED] OF THE  
VANCOUVER POLICE DEPARTMENT

**NOTICE OF ADJUDICATOR’S DECISION UPON REVIEW**

TO: [Name Withheld] Complainant

AND TO: Constable [REDACTED] Member  
c/o Vancouver Police Department  
Professional Standards Section

AND TO: Sergeant [REDACTED] Investigator  
c/o Vancouver Police Department  
Professional Standards Section

AND TO: Inspector [REDACTED] Discipline Authority  
c/o Vancouver Police Department  
Professional Standards Section

AND TO: Chief Constable Adam Palmer  
c/o Vancouver Police Department  
Professional Standards Section



not investigate matters herself. The Member also told her in relation to the amount of time it was taking to investigate her case, that as it was not “an in-progress complaint”, such investigations typically took longer. In doing so, he used a rather unfortunate example to try to make his point.

6. This complaint arises in the course of a telephone call that was not recorded or overheard by a third party. Both the Complainant and the Member have provided their recollections of the conversation.
7. The misconduct alleged against the Member is one instance of Discreditable Conduct, pursuant to s. 77(3)(h) of the Police Act, R.S.B.C. Ch. 367 [the Act], by virtue of the comments attributed to him during this conversation.

### **Statutory and Legal Requirements Applicable to a s. 117 Review**

8. For those unfamiliar with the process, the *Act* under which this review takes place is a provincial statute that has been the subject of amendment and judicial comment by the courts. Its goal is to integrate the interests of police officers, individual civilians, and in certain instances broader community interests, into a fair and just police complaint procedure.
9. Under the Act s. 117(1) gives the Commissioner the authority to appoint a retired judge to review the decision of a disciplinary authority when the Commissioner considers that there is a reasonable basis that the disciplinary authority’s decision is incorrect in terms of a finding that the member or former member’s conduct did not constitute misconduct.
10. Section 117(1) also sets out the task for the reviewing retired judge, which is to:
  - (a) review the investigating officer's report referred to in section 112 or 116, as the case may be, and the evidence and records referenced in that report;
  - (b) make her or his own decision on the matter;

(c) if subsection (9) of this section applies, exercise the powers and perform the duties of discipline authority in respect of the matter for the purposes of this Division. [Emphasis added.]

11. Section 117(9), referred to immediately above, is engaged if, on review, the retired judge considers the police conduct at issue “appears to constitute misconduct”. If this occurs:

[...] the retired judge becomes the discipline authority in respect of the matter and must convene a discipline proceeding, unless s. 120(16) [a prehearing conference] applies. [Emphasis added.]

12. If the retired judge decides that they are unable to agree with the discipline authority’s finding of no misconduct, and considers the police conduct at issue to constitute apparent misconduct, s. 117(8)(d) contains the test to be applied in reaching such a determination. It requires the retired judge to include in the notification their determination as follows:

(d) if subsection (9) applies, the retired judge's determination as to the following:

(i) whether or not, in relation to each allegation of misconduct considered by the retired judge, the evidence referenced in the report appears sufficient to substantiate the allegation and require the taking of disciplinary or corrective measures;

(ii) whether or not a prehearing conference will be offered to the member or former member under section 120;

(iii) the range of disciplinary or corrective measures being considered by the retired judge in the case...[Emphasis added.]

13. Thus, as specified in s. 117(8), the test to be applied by the retired judge on a s. 117 review is to determine whether the evidence “appears sufficient to substantiate the allegation of misconduct and require[s] the taking of disciplinary or corrective measures”. A finding that the evidence is apparently sufficient to substantiate the alleged misconduct, places the retired judge in the role of disciplinary authority, and the complaint proceeds on that basis.

14. This articulation of the task of the retired judge on a s. 117 review, when contrasted with the wording in s. 117(1)(b) that he or she makes their “own decision” on the matter (s. 117(1)(b)), has caused some confusion. This is discussed in *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970 [*Scott*]. In that decision Mr. Justice Affleck addressed this issue (at para. 30):

In my opinion the legislature did not intend the retired judge, whose ultimate role could include presiding over a disciplinary hearing involving the very person whose conduct he had already determined was improper, nevertheless could use language, before a hearing had taken place, that on any reasonable reading left no doubt in the mind of the petitioner that the retired judge had already made up his mind that the petitioner was guilty of the misconduct alleged.

15. Therefore, it is important to note that while s.117(1)(b) directs the retired judge to come to their own decision, it is incorrect for the judge’s reasons to stray into a conclusive analysis of the evidence such that they appear to have pre-judged the case. Nor should the reasons to contain language indicative of bias. This is because in the case of a finding that there is sufficient evidence to apparently substantiate the incident of alleged police misconduct, the s. 117 review may well be preliminary to a later hearing in which the retired judge becomes the discipline authority. This is in sharp contrast to a finding by the retired judge that the allegations of alleged misconduct are “apparently unsubstantiated”, in which case the judge’s decision is final and conclusive (s. 117(1)), and the matter proceeds no further.

### **Issue to be Decided**

16. In this case, my review of the evidence of the Complainant and the Member as to reliability and credibility is nothing more or less than an examination of each person’s account of their telephone conversation to see “whether or not, in relation to each allegation of misconduct [...] the evidence referenced in the report appears sufficient to substantiate the allegation.”

## The Basis of the Review Ordered by the Police Complaint Commissioner

17. In the Notice of Appointment of a Retired Judge the Police Complaint

Commissioner [the “Commissioner”] stated the following:

Specifically, it appears that the Discipline Authority failed to adequately address the Member’s own evidence that, in response to the Complainant’s concerns about the timeliness of the criminal investigation, he provided the Complainant with an “extreme example” to explain why other cases may be prioritized. The Member specified that he used the example of an investigation into an in-progress report of a person tied up and violently attacked as a matter that would be dealt with as a “higher priority”.

In assessing whether the Member’s conduct appeared to constitute *Discreditable Conduct*, the Discipline Authority does not appear to have considered the nature of the example the Member acknowledged and its foreseeable adverse impact on the Complainant, and the sensitivity of the approach used to communicate with survivors of sexual assault, noting the historic barriers to reporting faced by survivors in part due to the prevailing stereotypes about sexual assault.

### Standard of Proof

18. The standard of proof in relation to police complaints under the *Act* is the civil burden on the balance of probabilities. This is clearly stated in *F.H. v. McDougall*, 2008 SCC 53, at para. 49:

In civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

19. In the same decision the Supreme Court of Canada stresses (at para. 40) that “context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences.” The strength of the evidence must be such that it clearly satisfies this test, as the Court indicates (at para. 46), stating “evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.”

## Assessing Reliability and Credibility

20. Many different legal authorities address aspects of assessments of witnesses' accounts as to reliability and credibility.

21. In *R. v. Gagnon*, 2006 SCC 17, Justices Bastarache and Abella (at para. 20) recognized this can be a difficult task with numerous components to consider when they stated:

[a]ssessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events...

22. The often-quoted case of *Faryna v. Chorny*, [1952] 2 DLR 354 at 357 continues to be a most helpful authority when considering the evidence of witnesses:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried the conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions... Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken.

23. Also of assistance is *R. v. Theriault*, 2020 ONSC 3317, which articulates the clear difference between the credibility of a witness and the reliability of their account, as follows:

[...] there is a distinction between credibility and reliability. Credibility relates to the honesty of the witness' testimony. Reliability relates to the accuracy of the witness' testimony which engages a consideration of the witness' ability to accurately observe, recall and recount an event [...] At times, a witness may credibly recount an observation or occurrence. However, that evidence may lack reliability for a number of reasons, including the conditions under which the witness made the observation as well as the impact of information received by the witness after an event. A witness whose evidence about some factual matter is not credible cannot be relied on to establish that fact. However, the converse is not

automatically true as credibility is not a proxy for reliability. A credible witness may, nonetheless, give unreliable evidence.

24. In *R. v. Sturko*, 2013 ABPC 211, another often-quoted case, reliability is carefully considered by the learned judge as follows:

Reliability involves an assessment of whether the witness's evidence accurately recounts the events testified to. Reliability involves a consideration of the ability to recall, the ability to recount that memory, the ability of the witness at the time of the event to absorb what occurred, the level of cognitive awareness of the witness at the time of the incident, including sobriety, trauma, surprise, fatigue or other mental impairment.

25. Keeping the standard of proof and the factors bearing on an assessment of the reliability and credibility of a witness's account of what occurred, I will turn to the evidence here – first of the Complainant and then of the Member.

### **The Complaint**

26. In her written complaint to the OPCC the Complainant stated:

I was instructed to call VPD non-emergency line to speak to the investigating officer on my case. I kept being told to call at different times, which was difficult for me because I was in [REDACTED] at the time and the time difference was over [REDACTED] hours, thus it was between 2am and 4am in [REDACTED] when I called. I was calling hoping to confirm the accused was arrested and who the arresting officer was and details about the arrest. I was told I could only speak to the investigation officer. The other officer on my case (Cst. [REDACTED]) was away, and I could only get in touch with Cst. [REDACTED] about the file. She let me know she could not give me any details, and I was instructed to speak to Crown Counsel. Crown redirected me to the police. I called again and spoke to Cst. [REDACTED] and she advised that I could speak to her superior, Cst. [REDACTED]. I said I was not comfortable speaking to him because he was male, but he was the only one available, so I could either speak with him or end the call. He told me that I should not be asking about the case and said that it was none of my business. He refused to give me the information of the arresting officer. He said that by asking any questions about the case that I was putting my case into jeopardy and that it could get thrown out. I said that my case was being mishandled and he asked me how. I told him that the police were not investigating sufficiently. He then proceeded to ask sarcastically "why would the police investigate? the guy didn't break into your house, and you weren't handcuffed to the bed and bleeding".



27. The Complainant concluded her written complaint as follows:

This response caused me immense psychological distress and suicidal ideation. He also said I was “lucky” to have my case taken. He made me feel like I was a problem for wanting updates about my case and/or that my assault was not “violent” enough to be taken seriously. I want to suggest mandated trauma-informed training for police officers who will be investigating sexual assaults and that they cannot speak to the survivors the insensitive way that Cst. [REDACTED] spoke to me.

### **The Complainant’s Evidence**

28. The Complainant was interviewed regarding her complaint on September 26, 2023, by telephone by Sgt. [REDACTED].

29. On September 23, 2021, the Complainant was in [REDACTED] and was calling to the VPD for information about the sexual assault file where she was the alleged victim. She recounted the difficulties she experienced in trying to contact the specific female officers with whom she had previously dealt. She was seeking information about the progress of the police investigation, and whether the male who was the subject of the investigation had been arrested. She also sought details about the arrest, including who the arresting officers were.

30. The Complainant was passed to a number of people in succession at the VPD. She was then directed to speak with a Crown counsel, who directed the call back to the police. Then the Complainant spoke with one of the female officers she had dealt with before, who declined to provide her with the information she sought. Her call was ultimately passed to the Member, who was working in a supervisory capacity. At that point, the Complainant said her choice was to talk to a male officer or end the call.

31. Turning to the Complainant’s account of the conversation, she found the Member’s manner to be “abrupt” while speaking to her. He told her that she should not be asking about the case in that it was none of her business. He refused to give her any information about the arresting officer. He also told her

that she was putting the case in jeopardy by asking about it, and that the case could be thrown out as a result.

32. When the Complainant told the Member that she believed her case was being mishandled, he asked how so. She told him that the police were not investigating the case sufficiently. The Member responded sarcastically, saying why would the police investigate it, as it was not like the guy broke into your house, and you weren't handcuffed or tied to the bed, raped and bleeding. The Member told her that she was lucky to have her case taken in the first place, and his comments made her feel that she was the problem, for wanting updates on her case, and her case wasn't violent enough to be taken seriously.
33. The Complainant also said that she asked the Member if he had ever been awakened at night and had his body invaded, to which he eventually said no. She then told him that he would never understand.
34. The Complainant said her [REDACTED] was a police officer and she knows that this is not how a survivor should be spoken to by a police officer. She said that she was already in a traumatized state, and she had tried to have only female officers attached to her case. She considered that the Member used a very bad stereotype when he said she wasn't handcuffed or tied to the bed, raped and bleeding. Her case had nothing to do with a bed and she considered his response to be completely uncalled for. She said the comments of the Member caused her immense psychological distress and suicidal ideation.
35. The Complainant believed that the conversation would have been recorded, but the officer investigating the complaint advised her that only 9-1-1 calls or non-emergency calls through dispatch are recorded, whereas follow-up phone calls with an officer are not. She said there was no one with her when she made the call, so no one overheard the call from her end.
36. The Complainant said the call with the Member was not that long and she had the impression that he was desperate to end the call. He refused to give her the

name of the arresting officer, which she found out anyway on the Bail Release Order. She felt it was likely that the Member did not tell her the name of the arresting officer because the officer was a male who had nothing to do with her case. She said that she wanted this information for her own peace of mind, but also because she was involved in [REDACTED] and needed this information. She believed that the total length of time she spent on the phone conversing with the female officer and the Member would have been an hour, including the time spent trying to get through to them.

37. The Complainant spoke to several people later about the conversation with the Member and how she felt about it.

### **The Member's Evidence**

38. The Member knew at the time that two female police officers (Cst. [REDACTED] and Cst. [REDACTED] were investigating a sexual assault and that a suspect had been arrested on the file.

39. On the day of the call, he was the acting supervisor and was asked to speak with the Complainant as she was apparently unsatisfied with the information she received from Cst. [REDACTED].

40. In speaking with the Complainant, the Member said she was a little upset and wanted clarification on the investigation. In particular, she wanted to know why the investigation was taking so long. The Member told her that the investigation was on-going and was being taken seriously by the police.

41. The Complainant also wanted to know who the arresting officer was, and he did not give her the officer's name. The Member said that he told her that it was not in her best interests to be doing her own investigation and explained to her that she still needed to go to court to give her testimony. He explained that her testimony had to be her own information and not information that she gathered. He stated the reason he did not give her this information was not that she was

not allowed to have it, but that he did not want to put her in a bad position in relation to her testimony. At the time of the call the Member felt that the Complainant was ok with this.

42. The Member did recall that the Complainant was not happy that the officer arresting the suspect was male, and he did not consider it prudent or necessary to provide her with that officer's name. However, he said that he reassured the Complainant that the officer had done his job and had made extraordinary efforts to arrest the suspect and deal with him appropriately.
43. The Complainant was trying to clarify the situation regarding the speed of the investigation and asked why it was taking so long. The Member said he told her that all investigations proceed at different speeds, some take years or months, and some immediate and violent ones are dealt with in a faster manner because of the time frame.
44. The Member understood that the sexual assault in the case involving her had been reported after the fact and he explained to her that it was not less important as other cases, but the investigation did not have things happening day after day, because that was not what the investigation required. When the Complainant asked him to clarify this, the Member used the example of an "in-progress" call to police. In such cases the police have to deal with the matter at the time it is called in. The Member said he was not being sarcastic in responding to the Complainant, but he felt that what he said was misconstrued by her.
45. When the Complainant heard the Member's example of an in-progress call (she said it referred to a break-in, and a woman being handcuffed to the bed, raped and bleeding), she asked him if that was why she was not getting enough attention paid to her case, and he apologized to her if she had misconstrued what he was trying to say. At the time he felt that she had accepted his apology.

46. His view was that police had been professional and appropriate in communications with the Complainant, and it was unfortunate that she was unsatisfied by what he said. He did not think he said anything insulting at the time.
47. The Member further stated that he made no reference to the Complainant about her being lucky to have her case investigated, and made no reference to her case not being violent enough. At the end of their conversation, he said the Complainant thanked him and he did not think there were any issues with the conversation.
48. He said the conversation with the Complainant took place in a police vehicle on a cell phone.
49. The Member further explained to the investigator that on an in-progress call the investigations move much faster because evidence is available at the time to be collected, whereas when a police investigation occurs after the fact, it is often slower to progress, as there is no DNA or clothing evidence to collect, and police are relying on statements. In this case the Member stated that the suspect was out of province and there was a delay in having him arrested. This is what the Member referred to in his example when he talked to the Complainant about the speed of an investigation. In cases where police deal with a suspect still on the scene, cases sometimes go faster as there is more evidence to immediately process.

### **Findings on the Evidence**

50. Both parties to the conversation agree that: it occurred; the Member did not tell the Complainant the name of the officer who arrested the suspect in her case; and the Complainant had concerns about how the investigation of her case was being handled in terms of delay.

51. With regard to the other comments attributed to the Member by the Complainant:

- that she should not be asking questions about the case as it was none of her business;
- that by asking about the case she was putting the case into jeopardy, and the case could get thrown out as a result; and
- she was lucky to have her case investigated in the first place;

I find that these comments, which the Member denies making, likely were not made by the Member as the Complainant recalls them. Rather, I find it is more likely that the Complainant conflated and selectively recalled parts of what the Member said. Therefore, I do not regard them as sufficiently reliable.

52. Why did this occur? Was it her discomfort as a result of having to talk to a male officer about her case, or frustration at the length of time it took to connect with the female officer, and then the Member who did not provide her with the information regarding the name of the officer who arrested the suspect? Was it her frustration about the amount of time it was taking for the case to move ahead, the lack of notes or a recording to remind her how the conversation with the Member went, a focus on the incident of alleged sexual assault, or continuing trauma as result of the incident itself? I can only speculate.

53. With regard to the evidence of the conversation provided by the Member, I find that he was likely abrupt and at least initially regarded the call as somewhat of an annoying intrusion. I note his account of what he said with regard to the Complainant not undertaking her own investigation of the matter as it might jeopardize her testimony, fits with what an officer in his circumstances might say. His decision not to provide the name of the arresting officer was his to make, and not one to be second guessed.

54. It seems the Member fumbled his account of why some sexual assault cases proceed faster than others. His example, if it was as the Complainant related, about an in-progress sexual assault being the kind of case that may result in a

faster investigation by police, was insensitive and a poorly chosen to make his point. However, I am not satisfied that whatever he did say was linked to the Complainant's circumstances in the way she perceived it. It may well be that the comparison of the circumstances of her case with an in-progress offence was not understood by the Complainant, or she did not wish to hear it as the Member intended it.

55. To be clear, the Member does not dispute what the Complainant said about him mentioning a case where the victim is restrained on a bed and injured when police attend and the suspect is in the vicinity, but I find that it is very clear that he was not comparing her case to such a case to imply that her case was not serious enough to be properly investigated. Whether he described his example in the exact graphic terms reported by the Complainant, (the guy breaking in, the victim handcuffed and tied to the bed and raped and bleeding) or the Complainant embellished them, I also cannot say. However, the point of his clumsy example was to make a comparison to try to explain to the Complainant why her case (which was apparently reported to the police several days after the incident) might pose other investigative steps that take time.

56. I guided by the language in s. 117(8)(d) of the *Act* that requires me to determine whether the evidence "appears sufficient to substantiate the allegation of misconduct and require the taking of disciplinary measures". This requires me to engage in a preliminary analysis of the sufficiency of the evidence, while at the same time being mindful of the decision of Affleck J. in *Scott*, which cautions against engaging in a conclusive analysis at this stage, such that it appears the retired judge on a s. 117 review has prejudged the matter.

57. In the circumstances of this case the absence of corroboration makes it impossible for me to prefer the evidence of the Complaint over that of the Member on a principled basis. I accept that both the Complainant and the Member are doing their best to recall an undocumented phone conversation from September 29, 2021, about which she provided her account a year later on

September 26, 2023, and the Member provided his account on January 4, 2024. However, the evidence of what was said by the Member, and in what context, is insufficient to support the Complainant's version.

### **Finding Regarding Alleged Misconduct**

58. Section 77(3)(h) of the *Act* sets out the misconduct regarded as a disciplinary breach of trust by engaging in "discreditable conduct", which is defined as "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..."

59. To find that conduct amount to "discreditable conduct" one must consider:

- 1) Was the member on or off duty when the alleged misconduct occurred?
- 2) What did the member do or fail to do?
- 3) Was the conduct of the member such that it brings or is likely to bring discredit to the VPD in some way?
- 4) If so, did the member know or ought to have known his actions would likely bring discredit to the VPD?

60. The Member was clearly on duty when he took the call from the Complainant. However, I find the evidence of what the Member actually said to the Complainant in relation to the example he put forward appears insufficient to substantiate an allegation of discreditable conduct. It does not appear to be sufficiently reliable to establish the alleged misconduct to a balance of probabilities.

61. As s. 117(8)(d) of the *Act* requires, for this matter to proceed further, I must find that the evidence "appears sufficient to substantiate the allegation and require the taking of disciplinary measures", and I find that test is not met.

62. Therefore, I find the allegation of misconduct against the Member that he acted in such a way as to bring discredit to the VPD is **unsubstantiated**.



63. As a final comment in relation to this matter I note the apparent difficulty the Complainant encountered in trying to obtain an update on the progress of the investigation of the case involving her. In my respectful view, it ought not to be difficult to set up a mechanism whereby individuals who are the complainants or victims of alleged crimes are able to be advised of the status of the investigations that involve them, and in which they may have suffered injury or trauma. This ought to be able to be done in a timely and efficient way. It also ought not to be difficult to provide training to police members sufficient to increase their sensitivity to such matters during the investigation stage, in order that their actions do not contribute to the trauma and stress of the victims of alleged crimes.

Dated at the City of Kelowna, British Columbia, this 21<sup>st</sup> day of May, 2024.

*Elizabeth A. Arnold-Bailey*

The Honourable Elizabeth A. Arnold-Bailey (BCSC Ret'd)