

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996 c.267

and

IN THE MATTER OF A REVIEW OF AN ALLEGATION
OF MISCONDUCT AGAINST SERGEANT [REDACTED]
OF THE VICTORIA POLICE DEPARTMENT

NOTICE OF DECISION

(Section 117 of the *Police Act*)

NOTICE TO: Dr. [REDACTED]	Complainant
AND TO: Sergeant [REDACTED] c/o Victoria Police Department Professional Standards Section	Member
AND TO: Sergeant [REDACTED] c/o Victoria Police Department Professional Standards Section	Investigating Officer
AND TO: Inspector [REDACTED] c/o Victoria Police Department Professional Standards Section	Discipline Authority
AND TO: Mr. Clayton Pecknold	Police Complaint Commissioner

I. Decision Summary

1. This is a decision made pursuant to section 117(7) of the *Police Act* relating to certain complaints of misconduct concerning the Member alleged to have taken place on April 16, 2022.
2. I have been appointed Adjudicator in connection with this matter as a result of the Police Complaint Commissioner's (the "Commissioner") Notice of Appointment of Retired Judge of January 11, 2023 made in accordance with section 117(4) of the *Police Act*.
3. As set out below, in accordance with my appointment as Adjudicator, I have considered the evidence available in relation to the following specific allegation of misconduct by the Member:

Neglect of duty involving a failure to advise the Complainant of his right to counsel and a refusal to allow the Complainant to retain and instruct counsel without delay contrary to section 10(b) of the *Canadian Charter of Rights and Freedoms*, s 8, *Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK)*, 1982, c 11 (the “*Charter*”) arising under section 77(3)(m)(ii) of the *Police Act*.

4. My conclusions reached as a result of a review of those allegations in the context of the Final Investigation Report dated December 7, 2022 (the “FIR”) can be summarized as follows:
 - a. The evidence appears sufficient to substantiate the allegation of misconduct above.
5. A full consideration and reasons for my conclusions as to the misconduct allegation can be found below, as are the next steps required by all parties.

II. Introduction & Alleged Misconduct

6. On January 11, 2023 the Commissioner ordered a review pursuant to section 117(4) of the *Police Act* of the Disciplinary Authority’s determination that an allegation of misconduct directed at Sergeant ██████ could not be substantiated.
7. On April 19, 2022 the Office of the Police Complaint Commissioner (“OPCC”) received a complaint from the Complainant detailing his involvement with the Victoria Police Department (“VicPD”) in the early morning hours of April 16, 2022. The Complainant alleged that he was arrested and handcuffed in front of the Strathcona Hotel by Constable ██████ and held in police cells for four to five hours without being provided with the ability to access counsel pursuant to the *Charter*. The Complainant alleged that he was denied the right to make a telephone call to counsel despite repeated requests. The Complainant also asserted that he was not told the reason he was being arrested and handcuffed by Cst. ██████
8. The OPCC deemed the complaint to be admissible pursuant to Division 3 of the *Police Act* and directed the VicPD to conduct an investigation. On December 7, 2022, Sgt. ██████ ██████, who had been designated to conduct the investigation, submitted a Final Investigation Report (“FIR”) to the Discipline Authority, Inspector ██████. Ins. ██████ had been delegated as the Discipline Authority pursuant to section 134 of the *Police Act* by VicPD Chief Constable Del Manak on June 17, 2022.
9. On December 12, 2022 Inspector ██████ issued his decision pursuant to section 112 of the *Police Act*. Insp. ██████ identified one allegation of Abuse of Authority against Constable ██████ and one allegation of Neglect of Duty against Sgt. ██████. Insp. ██████ determined that neither of the allegations were substantiated.

10. On January 2, 2023 the Commissioner received a request from the Complainant that he appoint a retired Judge to review the FIR pursuant to section 117 of the *Police Act* which requires the retired Judge to make his or her own decision in the matter. Section 117 gives the Commissioner authority to make such an appointment if the Commissioner considers that there is a reasonable basis to believe that the Discipline Authority's decision was incorrect.
11. The Commissioner agreed with Insp. ██████ decision with respect to Const. ██████ but disagreed with his determination that the allegation of Neglect of Duty with respect to the Member was not substantiated. In arriving at that decision the Commissioner noted:
 - a. The Complainant's right to counsel is a constitutional right guaranteed by section 10 of the *Charter* that should have been provided without delay or immediately unless there were extraordinary circumstances.
 - b. The Complainant noted that he was incorrectly suggested to be "uncooperative" and/or "violent". Instead, he stated he was compliant with police direction, exhibited no violent behaviour, and did nothing to suggest that he could become violent.
 - c. The delay for more than a couple of hours in providing the Complainant's right to access counsel was unjustified.
12. Specifically, the Commissioner asserted that the Discipline Authority erred in accepting the Member's position that he was justified in suspending the Complainant's right of access to counsel on the basis of the VicPD's policy which permits that right to be suspended if someone in custody is violent or if there is a reasonable concern for safety. The Commissioner observed that the objective evidence reflected in the FIR, which included video footage and witness member statements, did not support the suspension of the Complainant's rights on that basis.
13. In the Notice of Appointment the Commissioner specified that pursuant to section 117(8) of the *Police Act* I am not limited to the allegations considered by the Discipline Authority.

III. Section 117 of the *Police Act*

14. The statutory authority governing this review is found in section 117 of the *Police Act*. Specifically, section 117(6) of the *Police Act* imposes a duty on the Commissioner to provide the Adjudicator with copies of all reports under sections 98, 115 and 132 that may have been filed with the Commissioner prior to the Adjudicator's appointment in relation to the allegation(s) of misconduct. The responsibilities of the Adjudicator are set out in sections 117(8) and 117(9) and direct the Adjudicator to review the material delivered under section 117 and determine whether the conduct of the Member appears to constitute misconduct.

15. The law is clear that a review under section 117 is a paper-based examination of the record provided by the Commissioner. It takes place without live witnesses, additional evidence or submissions from any of the parties involved. The review is not an appeal of earlier decisions concerning misconduct nor is it a redetermination in any manner of other court proceedings that may have a connection to the misconduct alleged. The Adjudicator's focus is not on the correctness of an earlier finding but rather the Adjudicator is to reach their own conclusion about whether the materials they have been provided for review support a finding of apparent misconduct. If the Adjudicator concludes that on the record it *appears* that the actions constitute misconduct the Adjudicator becomes the Discipline Authority and a Discipline Hearing results.
16. In discharge of the obligations under section 117(6) of the *Police Act* the Commissioner has provided a record for review. The record consists of the FIR, witness statements, summaries of audio statements and audio recordings of the statements as well as over 3 hours of video which records the Complainant's interaction with the VicPD. Also included are a variety of exhibits referred to in the FIR. The record also includes a variety of legal authorities referred to by the Investigating Officer. Collectively, I will refer to these materials as the Record.

IV. **Misconduct and the *Police Act***

17. The relevant portions of section 77 of the *Police Act* are as follows:
- 77 (1) In this Part, "misconduct" means
- (a) conduct that constitutes a public trust offence described in subsection (2), or
 - (b) conduct that constitutes
 - (i) an offence under section 86 [offence to harass, coerce or intimidate anyone questioning or reporting police conduct or making complaint] or 106 [offence to hinder, delay, obstruct or interfere with investigating officer], or
 - (ii) a disciplinary breach of public trust described in subsection (3) of this section.
- (2) A public trust offence is an offence under an enactment of Canada, or of any province or territory in Canada, a conviction in respect of which does or would likely
- (a) render a member unfit to perform her or his duties as a member, or
 - (b) discredit the reputation of the municipal police department with which the member is employed.
- (3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:
- ...
 - (m) "neglect of duty", which is neglecting, without good or sufficient cause, to do any of the following:

(i) ...

(ii) *promptly and diligently do anything that it is one's duty as a member to do;*

(iii) promptly and diligently obey a lawful order of a supervisor.

[Emphasis added]

18. An important overall limitation to the definitions of misconduct in section 77 of the *Police Act* is found in subsection 77(4) as follows:

77 (4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.

19. The following allegation of misconduct is relevant to this review:

“neglect of duty”, which is neglecting, without good or sufficient cause, to do any of the following:

(ii) promptly and diligently do anything that it is one’s duty as a member to do.

This review is, therefore, the examination of all of the evidence submitted related to the above noted allegations of misconduct as qualified by section 77(4).

V. The Evidence

Background to Complaint

20. On April 16, 2022, Cst. [REDACTED] was working as a single-person patrol unit for the VicPD. He had started his regular 12-hour nightshift on the evening of April 15, 2022. During the same time, Constable [REDACTED] and Constable [REDACTED] were working together as a two-person patrol unit. Additionally, the Member was working as the on-duty jail supervisor in VicPD cells. Working directly with the Member were the on-duty jailers, Special Municipal Constable (“SMC”) [REDACTED] and SMC [REDACTED].
21. In the early morning hours of April 16, 2022, Cst. [REDACTED] positioned himself in his patrol vehicle across the street and out front of the Strathcona Hotel, located at 919 Douglas Street, Victoria, BC. As part of the Strathcona Hotel, there are a series of establishments that serve liquor and that are contained within the large hotel building including several bars/restaurants and a liquor store. Cst. [REDACTED] had positioned himself in his police vehicle outside these establishments, such that he was able to view the large bar crowd that would typically congregate after the bars closed. The crowd would typically congregate on Douglas Street, directly outside the hotel. This night was consistent with any other usual weekend bar-closing. According to the Complainant and Cst. [REDACTED] the crowd that was congregating outside of the hotel at closing time was quite large.

22. In an audio recorded interview with Cst. [REDACTED] conducted on November 7, 2022 by Sgt. [REDACTED] Cst. [REDACTED] stated that he observed a male who he later identified as the Complainant, an hour or so before bar closing time on the street. He said the Complainant was stumbling on the street, kind of doing the “two steps forward, one step back”. He noticed what the Complainant was wearing.
23. Shortly after bar close, Cst. [REDACTED] noted a male seated on the sidewalk. He was clearly intoxicated and had vomited on himself. However, he was conscious and had some friends with him who were assisting him. In order to ensure this male was okay, Cst. [REDACTED] attended to the male’s location to assess the situation. During that time, Cst. [REDACTED] noted that the male was conscious, drinking sips of water, and was with some of his friends.
24. Cst. [REDACTED] stated that while he was dealing with the intoxicated male, the Complainant came up and identified himself as a paramedic. He said the Complainant was stumbling and his speech was slurred. Based upon his earlier observations of the Complainant he could tell that the Complainant was quite intoxicated by alcohol. He told the Complainant that he was in no shape to be assisting even if he was a paramedic. He said that the Complainant then “changed his tune” and said he was a doctor. Cst. [REDACTED] again told him that he was in no shape to assist and told him to leave. Cst. [REDACTED] maintained that the Complainant continued to try to help and refused to leave. Cst. [REDACTED] said that at one point he took the Complainant by the arm and escorted him away, but the Complainant returned to where the intoxicated male was lying on the sidewalk. Cst. [REDACTED] therefore decided to arrest the Complainant for intoxication in a public place. Cst. [REDACTED] said he informed the Complainant of the reason he was being arrested. The Complainant was immediately handcuffed. Because it was busy at bar close he handed the Complainant off to Cst. [REDACTED] and Cst. [REDACTED] asking them to take the Complainant to cells and to lodge him there until he could sober up and make sound decisions. Cst. [REDACTED] total interaction with the Complainant was approximately two to three minutes. The Complainant was not falling down drunk but was at a “level where you see people start to sway”. That was Cst. [REDACTED] last interaction with the Complainant.
25. The Complainant was interviewed by Sgt. [REDACTED] on October 4, 2022. The Complainant is a medical doctor who resides in [REDACTED]. He was on vacation with his wife on April 16, 2022 staying at the [REDACTED] Hotel in downtown Victoria. His wife was not feeling well, so, with her agreement, he decided to explore Victoria, a city he had not visited before. He found himself at a bar near their hotel in downtown Victoria. He was just leaving the establishment when he saw someone lying on the sidewalk. As a physician he had seen other individuals in medical distress. He did not intend to provide medical care but wanted to see what was wrong with the person and to ensure that they got medical attention appropriate to their condition. He walked over to the person, crouched down and introduced himself, asking what happened and if the individual needed any help. He was not initially aware of a police presence. There was no ambulance. Before the individual could reply he heard someone behind him say “what are you

doing?” He turned around to see a police officer standing behind him. He introduced himself to the officer, told the officer his name, that he was a doctor and that he was not providing medical treatment just speaking with the male to see if he needed any help. He said the police officer responded with “I am sure he wants some drunk guy looking after him”. The Complainant said he was not drunk, was not caring for the male, just speaking to him. The officer responded, “I am sure he does not want that”. Almost immediately the officer told him to stand up and without another word put handcuffs on him and took him to a police car. There were two police officers in the police car. Neither one explained anything to him in terms of what was going on and why he was being arrested. In his statement, the Complainant alleged that there was no conversation with the two officers on the trip to VicPD cells.

26. The Complainant said in his interview that he did have alcohol on the night in question but not a lot: perhaps a couple of actual alcohol drinks. He stated that he was not a big drinker. Asked where he would be in terms of the scale of 1 to 10, with 1 being stone cold sober and 10 being passed out drunk, the Complainant indicated he did not know about a scale and could not put a number on it. The Complainant said however he was low: if there were about 200 people on the street that night he would have been in the bottom 5th percentile of intoxication.
27. Unfortunately, the Complainant was not questioned about his drinking pattern, what he was drinking, where he was drinking, when he began drinking, and whether prior to entering the establishment he had been drinking. The Complainant was not questioned as to what time he left his hotel nor was he asked on October 4, 2022 or later about Cst. ██████ assertion that he had seen the Complainant on the street appearing intoxicated an hour or so before their encounter.
28. There is nothing in the Record to indicate that Cst. ██████ asked the Complainant to produce identification, ascertained where he lived or where he was staying. There is a lack of evidence in the Record to suggest that Cst. ██████ read the Complainant his rights under the *Charter*. Nor was the Complainant ever asked if he at first identified himself as a paramedic.

Evidence Regarding Alleged Misconduct

29. Cst. ██████ was one of the two officers who transported the Complainant to VicPD cells. He recalled little about the file but watched the video of him escorting the Complainant to the booking room. He remembered that he needed to hold the Complainant who was staggering in his stance and weaving back and forth. He did not recall any conversation. He believed the Complainant to be intoxicated. Cst. ██████ evidence was that if there had been anything significant arising from the encounter he would have made notes.
30. Cst. ██████ was the other transporting officer. He had just returned to work after suffering a head injury and his memory of the evening in question is “not the best”.

He remembered that nothing significant happened. He did not remember any signs of intoxication that the Complainant was exhibiting.

31. SMC [REDACTED] was interviewed November 7, 2022. On April 16, 2022, he was working as a SMC in the VicPD cellblock. He recalled the Complainant being brought into the cellblock by Cst. [REDACTED]. He said that the Complainant was a little bit verbal asking "why am I here?". SMC [REDACTED] first saw the Complainant when he was coming inside the sally port. He said the Complainant was "kind of passive". As he was being booked in the Complainant was asking "why are you taking this belt" and "what are you doing to me". SMC [REDACTED] explained to the Complainant that this was part of their job; that they needed to pat him down and itemizes belongings. He recalled asking the Complainant to take his shoes off and again the Complainant was questioning why they needed his shoes to be taken off. SMC [REDACTED] said that the Complainant was verbally kind of resistant but there was no physical action on his part. SMC [REDACTED] could see that the Complainant was a "little bit tipsy". He was "a little bit, not quite like really drunk". The Complainant was not falling down passed out drunk. SMC [REDACTED] believed that the Complainant was impaired; part of it was that the Complainant was intoxicated and the other part was that the Complainant appeared to be thinking that he was wronged in being taken to jail and was repeating himself. SMC [REDACTED] recalled the Complainant knocking on his cell door asking why he was there.
32. SMC [REDACTED] was interviewed November 7, 2022. She reviewed the file and watched some video in order to refresh her memory. Nothing about the event or about the Complainant stood out to her. If there was something abnormal or different she believed she would have recalled it. Her role was to enter the Complainant's information into the computer. Usually if people pound on doors and are really aggressive they will ring a bell for her but she did not recall anything pertinent about the Complainant or anything abnormal.
33. The Member was interviewed on November 7, 2022 in an audio recorded interview. On April 16, 2022 he was working as the supervisor in the VicPD jail. He received a call from Cst. [REDACTED] who told him he was with an intoxicated individual who was inserting himself as Cst. [REDACTED] was trying to render care to another intoxicated person. Cst. [REDACTED] told the Member that the individual was being a little bit obstructive in the police efforts to maintain care for the intoxicated person. The Member was told that the Complainant had identified himself first as a paramedic and then as a doctor. The Complainant was arrested for being in a state of intoxication in a public place because he would not quit being obstructive.
34. At approximately 2:40 AM the Complainant was escorted into cells. The Complainant was well-dressed and handcuffed. The Member's evidence was that the Complainant was listing to the left and not moving straight. His face was red and flushed. He was saying things like "I get a phone call" or "I want a phone call" over and over again. The Member said that the Complainant was not focusing on what the jail staff had to say. The Member said that the Complainant was being argumentative with jail staff about being in jail in the first place: that he should not

be there. He stated that the Complainant, while being processed, was being asked to do certain things and was not listening to what staff had to say. The Member determined that the Complainant was being completely noncompliant and was not listening to what the VicPD officers were instructing him to do. The Member said that at one point the Complainant screamed out “just tell me what you want me to do” and became very short with staff. This indicated to the Member that the Complainant was becoming aggressive with staff. He determined that the Complainant was not listening to their instructions and in the Member’s opinion, wanted to take control of the situation: the Complainant wanted to be heard.

35. The Member indicated that he was making decisions about “operational stuff”, including decisions about access to counsel at the material time. Although access to counsel is codified under the *Charter* and protects the right of those under arrest to retain and instruct counsel in private without delay, the Member noted there is a caveat to that. In making these decisions, one of the things police look to are their operational policies. The Member’s evidence was that specifically, under VicPD Jail Operations and Prisoner Care policy paragraphs 44 and 49, there has to be a reason as to why there would be a delay in access to counsel that must be articulated. In the Member’s view at the material time, there was a potential for violence from the Complainant. The Complainant was not listening to what the police instructions were. The Member concluded that the Complainant would not be able to understand the instruction from counsel if he were in contact with counsel. The Member decided to get the Complainant into his cell as quickly as possible. As they walked to the cellblock the body language the Member observed from the Complainant was in line with the indicia of impairment: hands down, looking for balance, swaying from side to side. The Member’s evidence was that as they reached the entrance of the cell the Complainant put his hands up to refuse to go into the cell which indicated to the Member that the Complainant was actively resisting. The Member concluded that the Complainant was not listening to the Member’s directions. The Complainant was continually interrupting officers and saying that he wants a phone call, that he demands a phone call, that he knows his rights to get a phone call.
36. The Member noted that throughout his time in cells, the Complainant continually knocked on the cell door disturbing other prisoners. The Member viewed the Complainant as totally non-compliant and belligerent. The Complainant ignored instructions and just kept saying “I get a phone call” and “I should not be here”. In terms of the Complainant indicating that he wanted to make a phone call, regardless of whether he was saying he wanted to call a lawyer or his wife, the Member had made the decision that he was suspending the Complainant’s right to call a lawyer based on what he had observed about the Complainant’s behaviour and on his experience as a police officer.
37. The Complainant, not surprisingly, had a different view of the facts. He recalled asking to make a phone call and being placed in cells for what he believed was four or five hours. The Complainant’s evidence was that he was not in the cell passed out, he was not staggering around or not knowing where he was. He

believed the video would show that he was sitting calmly on the bench in the cell other than the occasions where he knocked on the cell door to request a phone call or to let his wife know his whereabouts. At one point after he asked for a phone call someone said something similar to “no one knows where you are right now, think about it”. This confirmed his worst fears. At all material times, the Complainant was very worried that his wife did not know where he was. When he was finally released he had approximately 30 missed calls from his wife who was terrified; worried he was dead or in hospital somewhere.

38. The Complainant did not recall the officer who handcuffed him saying anything about why he was being arrested. He was not quite sure, until he got to the police station, what they were going to do with him. At that point they told him he was going to the drunk tank and that was that.
39. The Record contains the booking information recorded when the Complainant was processed into cells. Strangely, it indicates that he was provided his *Charter* rights when in fact none of the witnesses indicate that that occurred. Of note, none of the police or SMCs were ever asked by the Investigating Officer if they read the Complainant his section 10(b) *Charter* rights.
40. The booking information as set out in the Record lists the Complainant’s residence as British Columbia. The Record does disclose that the Complainant produced a [REDACTED] driver’s license. The record does not disclose that the Complainant was ever questioned about why he was in Victoria or where he was staying.
41. Fortunately, the record also contains in excess of three hours of video recording showing the Complainant’s arrival by police car at the VicPD station, the booking-in process, his walk to cells, his entire time in cells, and his processing out of cells and release. In that video evidence, the Complainant appears to be compliant and relatively calm. There does not appear to be an immediate threat of violence.

VI. VII The Law

42. The law with respect to section 10(b) of the *Charter* is well established. In *R v Suberu*, 2009 SCC 3 the Supreme Court of Canada outlined the following interpretation:

[40] As with “detention”, any interpretation of the phrase “without delay” must be consistent with a purposive understanding of the *Charter* provision in which it occurs. As this Court noted in *R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613, at pp. 641-42, and in *R. v. Bartle*, 1994 CanLII 64 (SCC), [1994] 3 S.C.R. 173, the purpose of s. 10(b) is to ensure that individuals know of their right to counsel, and have access to it, in situations where they suffer a significant deprivation of liberty due to state coercion which leaves them vulnerable to the exercise of state power and in a position of legal jeopardy. Specifically, the right to counsel is meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination.

[41] A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected. In order to protect against the risk of self-incrimination that results from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase “without delay” must be interpreted as “immediately”. If the s. 10(b) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.

[42] To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(b) creates an ill defined and unworkable test of the application of the s. 10(b) right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police. In our view, the words “without delay” mean “immediately” for the purposes of s. 10(b). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the Charter, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention.

43. *In R v. Rover*, 2018 ONCA 745 the Ontario Court of Appeal confirmed that “concerns of a general or non-specific nature, applicable to virtually any search, cannot justify denying access to counsel until a search warrant is executed. The police must actually turn their mind to the specific circumstances of the case, and they must have reasonable grounds to justify the delay. That justification may be premised on the risk of the destruction of evidence, public safety, police safety, or some other urgent or dangerous circumstance. Even when such circumstances exist, the police must take reasonable steps to minimize the delay.”
44. The Supreme Court of Canada reiterated the importance of 10(b) rights in *R. v. Taylor*, 2014 SCC 50, paras. 24-25;

[24] The duty to inform a detained person of his or her right to counsel arises “immediately” upon arrest or detention (*Suberu*, at paras. 41-42), and the duty to facilitate access to a lawyer, in turn, arises immediately upon the detainee’s request to speak to counsel. The arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity. The burden is on the Crown to show that a given delay was reasonable in the circumstances (*R. v. Luong* (2000), 2000

ABCA 301 (CanLII), 271 A.R. 368, at para. 12 (C.A.)). Whether a delay in facilitating access to counsel is reasonable is a factual inquiry.

[25] This means that to give effect to the right to counsel, the police must inform detainees of their s. 10(b) rights *and* facilitate access to those rights where requested, both without delay. This includes “allowing [the detainee] upon his request to use the telephone for that purpose if one is available” (*Manninen*, at p. 1242). And all this because the detainee is in the control of the police and cannot exercise his right to counsel unless the police give him a reasonable opportunity to do so (see *Brownridge v. The Queen*, 1972 CanLII 17 (SCC), [1972] S.C.R. 926, at pp. 952-53).

45. Pursuant to the Record, VicPD operational policies and procedures with respect to Jail Operations and Prisoner Care provides:

49.3 The right to counsel may be suspended if:

49.3.1 the prisoner is violent;

49.3.2 there is a reasonable concern for safety such as a belief that the prisoner will become violent;

49.3.3 the prisoner is not diligent in exercising their right to counsel;

or 49.3.4 there is an ongoing investigation and such access may interfere or compromise that investigation, and in which case any delay shall be documented by the investigating members.

VII. Analysis

46. The obligation to provide an arrested and detained individual with their section 10(b) rights under the *Charter* can only be suspended in very special circumstances and must be justified. As the Ontario Court of Appeal in *R. v Rover* (*supra*) stated:

That justification may be premised on the risk of the destruction of evidence, public safety, police safety, or some other urgent or dangerous circumstance. Even when such circumstances exist, the police must take reasonable steps to minimize the delay.

47. VicPD internal policies do not supersede the *Charter*. The arresting officer, in this case Cst. ██████ should have provided the Complainant with notice of his section 10(b) rights. Certainly, the Member, who was acting as jail supervisor, upon processing the Complainant was constitutionally obligated to provide the Complainant with notice of those *Charter* rights, or at the very least was obligated to ensure that others, including the arresting officer or transporting officers, had advised the Complainant with his *Charter* rights. It appears from his statement that the Member was well aware of his constitutional obligation but chose to suspend the provision of those rights.

48. I have reviewed the video of the Complainant's processing, incarceration, and release. It is over 3 hours in length. There does not appear to be any sign of aggression or any indication of potential violence. Indeed, the other witnesses, although observing signs of alcohol consumption do not note any indication of violence, aggression or danger. Police or public safety does not appear to have been an issue on the basis of the witness statements and a close monitoring of the video provided as part of the Record. There does not appear to be any other urgent or dangerous circumstance that would justify a suspension of the Complainant's 10(b) *Charter* rights. The Member's justification for suspending the Complainant's *Charter* rights does not appear to be supported by the evidence contained in the Record. The Member's subjective opinion that the Complainant would not be able to understand any legal advice provided is not, in law, a justification.
49. Nor, on my review of the Record, do any of the criteria set out in the VicPD policies as noted above appear to have existed at the material time. The Complainant was diligent in attempting to exercise his right to counsel.
50. The Member never appears to have considered the context of the arrest. The Complainant was not aggressive or violent before or after he was detained and handcuffed by Cst. [REDACTED]. The Member appears to have had minimal interaction with the Complainant. There is nothing on the record to indicate that the Member was aware that the Complainant lived in [REDACTED] was visiting Victoria on holiday and staying at the [REDACTED] Hotel. The Complainant was arrested because he was trying to offer assistance to an individual in obvious distress. The Complainant was immediately handcuffed, placed in a police car and driven to the VicPD cellblock. As a visitor to Victoria, he was justifiably concerned that his wife would wonder what happened to him if he was detained in police cells for any extended period of time without making contact with her. His *Charter* rights appear to have never been provided to him. In this context is it surprising that he continued to request a telephone call and was reluctant to be placed in cells? Is it surprising that he continued to question why he was being arrested and what they were going to do to him? The video shows with clarity that he followed all instructions, removed his shoes, belt and jacket and walked with police into a cell where he sat passively for just over three hours. That cell was continually monitored by video, and jail staff must have been aware that the Complainant was sitting on the bench passively, other than at times knocking on the door to try to get somebody's attention. It is difficult to understand from the Record how the Member could have concluded that the Complainant was aggressive and potentially violent.

VIII. Conclusion

51. Applying the standard of review at this stage of the proceedings, pursuant to section 117(9) and 117(8)(d)(i) of the *Police Act*, I find that there appears to be evidence set out in the Record which, if proven, could substantiate the following misconduct allegation and require the taking of disciplinary or corrective measures:

Neglect of duty involving a failure to advise the Complainant of his right to counsel and a refusal to allow the Complainant to retain and instruct counsel without delay contrary to section 10(b) of the *Charter* arising under section 77(3)(m)(ii) of the *Police Act*.

IX. Next Steps

52. I hereby notify the relevant parties of the next steps in this proceeding, pursuant to subsections 117(7) and (8) of the *Police Act*.
53. Considering the factors in section 120 of the *Police Act*, and in particular section 120(3)(b)(ii), I have concluded that a prehearing conference would not be appropriate.
54. Pursuant to s.113 of the *Police Act*, the Complainant has the right to make submissions at a discipline hearing (as per section 117(8)(b)).
55. Pursuant to section 119, at a disciplinary hearing, the Member may request permission to question witnesses. Such a request must be made within 10 business days of this notification. Any such request will be directed to my attention through the Registrar.
56. Section 118(1) of the *Police Act* provides that a discipline proceeding concerning the substantiated misconduct allegations must be convened within 40 business days of notice of this decision.
57. A conference call will be convened by telephone on February 28, 2023 at 9:30 a.m. with the Member, or counsel on his behalf. At that time, dates will be canvassed that are convenient to commence the discipline hearing. The Registrar will advise the relevant parties as soon as possible of the conference call details. In the event that date is unsuitable to one or more of the parties, that party will advise the Registrar immediately and provide an indication of available dates and times for a conference call to be convened.



Signature of appointed retired judge
Judge John (Jim) James Threlfall (rt.)

Date: February 2, 2023