

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996 c.367

and

IN THE MATTER OF A REVIEW OF AN ALLEGATION

OF MISCONDUCT AGAINST CST [REDACTED] AND

CST [REDACTED] OF THE CENTRAL SAANICH POLICE SERVICE

NOTICE OF DECISION

(Section 117 of the *Police Act*)

NOTICE TO: Mr. [REDACTED] Complainant

AND TO: Constable [REDACTED]

Constable [REDACTED]
[REDACTED] Members

AND TO: Sergeant [REDACTED]
c/o Saanich Police Department Investigating Officer

AND TO: Inspector [REDACTED]
c/o Saanich Police Department 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 Members alleged to have taken place on March 30, 2022.
2. I have been appointed Adjudicator in connection with this matter as a result of the Police Complaint Commissioner's (the "Commissioner") order of July 18, 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 allegations of misconduct by the Members:

i. Constable [REDACTED]

- (a) Neglect of Duty pursuant to section 77(3)(m)(ii) of the *Police Act*, for failing to provide [REDACTED] (the “Complainant”) with his Charter rights after arresting him;
- (b) Neglect of Duty pursuant to section 77(3)(m)(ii) of the *Police Act* for failing to adequately investigate the assault allegation brought forward by the Complainant; and
- (c) Abuse of Authority pursuant to section 77(3)(a) of the *Police Act* for telling the Complainant that he would go to jail if he did not sign an undertaking to appear and for not explaining the release conditions of the undertaking prior to telling the Complainant to sign the undertaking or he would go to jail.

ii. Constable [REDACTED] :

- (a) Abuse of Authority, pursuant to 77(3)(a)(ii)(B) of the *Police Act*, for searching the Complainant’s vehicle without good and sufficient cause;
- (b) Neglect of Duty, pursuant to section 77(3)(m)(ii) of the *Police Act*, for failing to provide the Complainant with his access to counsel after the Complainant requested counsel; and
- (c) Deceit, pursuant to section 77(3)(f)(i)(B) of the *Police Act*, for writing in a PRIME report and police notes that the Complainant did not want access to a lawyer when he did.

4. My conclusions reached as a result of a review of those allegations in the context of the Final Investigation Report dated June 5, 2023 (the “FIR”) can be summarized as follows:

- (a) With respect to Cst. [REDACTED] I have concluded that all three allegations appear to be substantiated; and
- (b) With respect to Cst. [REDACTED] I have concluded that
 - i. the allegations of Neglect of Duty and Deceit appear to be substantiated, and
 - ii. the allegation of Abuse of Authority does not appear to be substantiated.

5. In accordance with section 117(11) of the *Police Act*, my decision on matters that do not appear to be substantiated are final and conclusive.

6. A full consideration and reasons for my conclusions as to the misconduct allegations can be found below, as are the next steps required by all parties.

II. Alleged Misconduct, Complaint and Investigation History

7. The misconduct alleged is as follows. On March 30, 2022 the Complainant made a 911 call to report an assault against him by the daughter of an acquaintance at the acquaintance's property in the town of Central Saanich. The Complainant alleged that the attending officers failed to investigate his report of assault by failing to obtain a statement from him and instead arresting him for obstruction for filming his interaction with police. The Complainant asserted that his Charter rights were not provided until approximately 90 minutes after his arrest during which time he remained in the police vehicle in handcuffs. When his Charter rights were ultimately provided the Complainant alleged that he was not provided access to counsel as requested. Further, the Complainant alleged that prior to being released from the scene he was advised that he would go to jail if he did not sign an undertaking to appear and that the arresting Member refused to answer his questions about the undertaking, a document the Complainant was unfamiliar with. The Complainant stated that the conduct of the Central Saanich police officers who attended the scene was motivated by his race as someone who identifies as black. The Complainant noted that the members made racial comments, stating to the Complainant's wife "do not dare play the race card", accusing him of being an "illegal immigrant" and contacting immigration authorities.
8. On April 11, 2022 the Office of the Police Complaint Commissioner (the "OPCC") received a complaint from the Complainant concerning his involvement with the Central Saanich Police Service ("CSPS") on March 30, 2022. The OPCC determined the complaint to be admissible pursuant to Division 3 of the *Police Act* and directed the CSPS to conduct an investigation which took place through the summer and fall of 2022.
9. On March 3, 2023 the Commissioner decided that the Complainant's complaint should be investigated externally. The Commissioner referred the matter to the Saanich Police Department (the "SPD") and SPD Sgt. [REDACTED] was appointed as the Investigating Officer. SPD Insp. [REDACTED] was delegated by SPD Chief Constable Dean Duthie to act as the Discipline Authority pursuant to section 134 of the *Police Act*.
10. On June 5, 2023 the Investigating Officer completed his investigation and submitted the FIR to the Discipline Authority. On June 19, 2023 the Discipline Authority issued his decision pursuant to section 112 of the *Police Act*. The decision concerned five members of the CSPS and identified 13 allegations of misconduct against the members including nine allegations of Abuse of Authority, three allegations of Neglect of Duty and one allegation of Deceit. The Discipline Authority determined that none of the allegations were substantiated.
11. On June 20, 2023 the Commissioner received a request from the Complainant that a retired Judge be appointed to review the FIR pursuant to section 117 of the *Police Act* and 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 the Discipline Authority's decision is incorrect. After reviewing the Discipline Authority's decision the Commissioner concluded that there was reason to believe that the decision was incorrect with respect to Cst. [REDACTED] and Cst. [REDACTED]. The Commissioner was concerned with the Members failure to properly investigate the Complainant's report of an assault, the Complainant's detention including the provision and documentation of Charter rights to the Complainant, and the manner in which the Complainant was released from custody when his questions were not properly answered. The Commissioner also voiced concerns relating to the Member's actions with reference to the Complainant's race and immigration status.

12. On July 18, 2023 the Commissioner ordered a review pursuant to section 117(4) of the *Police Act* of the Discipline Authority's determination that allegations of misconduct directed at Cst. [REDACTED] and Cst. [REDACTED] could not be substantiated.
13. Complaints of misconduct concerning the action of the other members involved on March 30, 2022 are not included in my terms of reference pursuant to the Commissioner's section 117(4) order to review.
14. 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.
15. In reviewing the FIR, I have concluded that there is also a potential misconduct issue with respect to Cst. [REDACTED] search of the Complainant's vehicle.

III. Section 117 of the *Police Act*

16. 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.
17. 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.

18. 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, which in turn includes witness statements, summaries of audio statements and audio recordings of the statements as well as eight videos which records the Complainant's interaction with Members and others at the scene. 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*

19. 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:

(a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,

(i) intentionally or recklessly making an arrest without good and sufficient cause,

(ii) in the performance, or purported performance, of duties, intentionally or recklessly

(A) using unnecessary force on any person, or

(B) detaining or searching any person without good and sufficient cause, or

(iii) when on duty, or off duty but in uniform, using profane, abusive or insulting language to any person including, without limitation, language that tends to demean or show disrespect to the person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status,

family status, physical or mental disability, sex, sexual orientation, age or economic and social status;

...

(f)"deceit", which is any of the following:

(i)in the capacity of a member, making or procuring the making of

(A)any oral or written statement, or

(B)any entry in an official document or record,

that, to the member's knowledge, is false or misleading;

(ii)doing any of the following with an intent to deceive any person:

(A)destroying, mutilating or concealing all or any part of an official record;

(B)altering or erasing, or adding to, any entry in an official record;

(iii)attempting to do any of the things described in subparagraph (i) or (ii);

...

(m)"neglect of duty", which is neglecting, without good or sufficient cause, to do any of the following:

(i)properly account for money or property received in one's capacity as a member;

(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.

20. 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.

21. The misconduct alleged that is the subject of this section 117 review is as follows:

██████████

- (a) Neglect of Duty pursuant to section 77(3)(m)(ii) of the *Police Act*, for failing to provide the Complainant with his Charter rights after arresting him; ;
- (b) Neglect of Duty pursuant to section 77(3)(m)(ii) of the *Police Act* for failing to adequately investigate the assault allegation brought forward by the Complainant; and
- (c) Abuse of Authority, pursuant to section 77(3)(a) of the *Police Act* for telling the Complainant that he would go to jail if he did not sign an undertaking to appear and for not explaining the release conditions of the undertaking prior to telling the Complainant to sign the undertaking or he would go to jail;

██████████:

- (a) Abuse of Authority, pursuant to 77(3)(a)(ii)(B) of the *Police Act*, for searching the Complainant's vehicle without good and sufficient cause;
 - (d) Neglect of Duty, pursuant to section 77(3)(m)(ii) of the *Police Act*, for failing to provide the Complainant with his access to counsel after the Complainant requested counsel; and
 - (b) Deceit, pursuant to section 77(3)(f)(i)(B) of the *Police Act*, for writing in a PRIME report and police notes that the Complainant did not want access to counsel when he did.
22. 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

Circumstances Leading to Alleged Misconduct

23. The Complainant provided a number of statements including the original Complaint and subsequent statements to Investigating Officers. In summary, the Complainant identifies as a black man and resides with his wife and children in ██████████. He is a member of the ██████████ and has an ██████████. He voluntarily assists ██████████ particularly the elderly, with their ██████████ problems. As a result of the pandemic Zoom meetings became more common and his services more in demand. It was in that capacity that he met ██████████, a ██████████ who was also a member of the ██████████. On March 30, 2022 the Complainant received a call from Mr. ██████████ who wanted to meet with him at the ██████████ residence on ██████████ in Central Saanich. The Complainant agreed to meet Mr. ██████████.
24. The subsequent events that led to the complaints of misconduct all occurred after the Complainant attended on Mr. ██████████ at his home.
25. It is impossible on the basis of the information contained in the FIR to know exactly what happened or even precisely why Mr. ██████████ wanted to meet with the Complainant. Mr. ██████████ in a statement provided to the Investigating Officer indicated that the Complainant attended his property with a number of contractors for the purpose of determining whether or not the property was suitable for the placement of motor homes or trailers. The Complainant was not precise in his various statements as to why he was being asked to attend. He made no mention of attending with a number of contractors. He did say he attended reluctantly because he and his wife had planned a games night at their ██████████ home.
26. Adjacent to Mr. ██████████ home was a barn with a fenced in area in front of it. From the various witness statements, it appears that this was the property Mr. ██████████ wanted to show the Complainant in terms of potential development. The

27. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED] On the day in question Ms. [REDACTED] received a call from Ms. [REDACTED] asking her to come and collect her father. At the time Ms. [REDACTED] was on the property with her brother and dogs. When Ms. [REDACTED] arrived at the property the Complainant's vehicle was blocking the gate and Ms. [REDACTED] asked the Complainant to leave. She said he refused to budge. As she was confronting the Complainant and her father she said her father grabbed her hair and tried to pull her to him. She pushed her father away and that push also contacted the Complainant. Ms. [REDACTED] says at that point the Complainant said that she had hit him in the face.
28. Not surprisingly the Complainant had a different version of events. In his view Ms. [REDACTED] was aggressive with both he and her father. He maintains that Ms. [REDACTED] struck him in the face and also assaulted another male who was there. He says that he attempted to de-escalate the situation and indeed the video (one of eight made available to the Investigating Officer) shows the Complainant trying to calm the situation as he moves Mr. [REDACTED] towards the Complainant's vehicle. The Complainant is heard saying on a video that the situation was getting out of control and that he would call the police which he subsequently did.
29. The first call to police was made at 5:29 PM March 20, 2022 by [REDACTED] Ms. [REDACTED] daughter and Mr. [REDACTED] granddaughter. She told police that there was someone at her grandfather's house who had been told to stay away from it. The issue, she told the operator, was caused by her grandfather. The dispatcher in turn told the responding members that the caller was on her way to the property. The dispatcher provided additional information that suggested the elderly male, Mr. [REDACTED] and the caller's grandfather, was giving all of the family's money away.
30. At approximately the same time the Complainant called police. The dispatcher told the responding members that she had a male named [REDACTED] on the line who was

the subject of another filed complaint suggesting that he was trying to defraud the elderly male. The call was classified as a necessary response to a “disturbance”.

31. On his call to the CSPA, the Complainant said he had been assaulted by Ms. [REDACTED]. The Complainant told police that he was trying to have a conversation with a friend of his when a lady came up, got very irate and pushed him. When asked where she hit him the Complainant said that she first took the gate and slammed it against him and that she hit him against his shoulder and pushed him away.

Evidence Regarding the Alleged Misconduct

32. The Record contains statements from the Complainant, Mr. [REDACTED] Ms. [REDACTED] and a number of other civilian witnesses. There are also statements from Cst. [REDACTED] and Cst. [REDACTED] and three other members of the CSPA. Eight video clips aid in clarifying the evidence. Below is a summary of the key evidence arising from the FIR.
33. Cst. [REDACTED] authored a PRIME report and provided a statement to the first Investigating Officer. Cst. [REDACTED] was the first member on scene. He had never met any of the parties but was privy to the information conveyed to him by the dispatcher. He decided that he needed to figure out what was going on and his first approach was to the elderly male, Mr. [REDACTED]. He attempted to converse with Mr. [REDACTED] but was interrupted by the Complainant who started recording the Member on his cell phone and continually repeated “I want your name and badge number”. Cst. [REDACTED] tried to defuse the situation by suggesting that he would speak to the Complainant and all of the other parties but that the Complainant needed to stop repeating his demand for a name and badge number and needed to stop recording his attempts to interview Mr. [REDACTED]. When the Complainant refused to comply Cst. [REDACTED] told him that if he did not stop he would be arrested for obstruction. He did not stop and the Complainant was subsequently arrested for obstruction, handcuffed behind his back and placed into the back of a police car.
34. Cst. [REDACTED] continued to interview the other parties present. He spoke at some length to Ms. [REDACTED] and her daughter. They told Cst. [REDACTED] that the Complainant was attempting to defraud Mr. [REDACTED]. They indicated that Mr. [REDACTED] suffers from [REDACTED] had declined due to old age. They alleged that the Complainant had taken Mr. [REDACTED] to the bank the day before and Mr. [REDACTED] had taken out [REDACTED] in cash. They indicated that the Complainant was attempting to take advantage of Mr. [REDACTED].
35. Cst. [REDACTED] was also shown video clips which indicated that there had been some pushing between Ms. [REDACTED] and the Complainant. Armed with the information he had received from dispatch, and the information received from Mr. [REDACTED] daughter and granddaughter, Cst. [REDACTED] concluded that no assault had occurred.

36. Cst. [REDACTED] did not complete his interview with Mr. [REDACTED] and never interviewed the Complainant.
37. Cst. [REDACTED] also failed to advise the Complainant of his Charter right under section 10(b) of the *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the "Charter"), to be informed of his right to retain and instruct counsel without delay. The Complainant's Charter rights were subsequently provided by Cst. [REDACTED] approximately 90 minutes after the arrest. When asked to explain the delay Cst. [REDACTED] replied that he did not really have a reason for the delay, he was not sure if he forgot or whether there was just so much going on. He said he still had not figured out "what the heck " was going on when he arrested the Complainant. He said that best practice is to read an arrested individual their Charter rights from a card as soon as possible.
38. The Complainant's version of the initial encounter is significantly different. He maintained that after Cst. [REDACTED] arrival, a female Constable (who later turned out to be Cst. [REDACTED] arrived and approached Ms. [REDACTED] and stated words to the effect "do not worry we are here to protect you". The Complainant was immediately concerned that the CSPS were taking sides. As a black man he was concerned that he was being singled out and consequently felt it appropriate to video his interaction with the members and to insist that they provide their names and badge numbers. In other words, he was approaching the tense situation believing that the police had made up their minds. At the same time the police were approaching the situation with information suggesting that the Complainant was attempting to defraud a [REDACTED] man with [REDACTED].
39. Cst. [REDACTED] also provided a statement. He said that he arrived on the scene after the other members. Cst. [REDACTED] told him that the Complainant was alleging an assault but that was not the case. The other CSPS members provided him with the back story of why police were called. It was Cst. [REDACTED] impression that there were some issues with who the Complainant was as he had no form of identification on him when arrested. Cst. [REDACTED] therefore decided to search the Complainant's vehicle and in it he found a [REDACTED] driver's license. From his experience in traffic, he concluded that the Complainant was not authorized to drive in British Columbia. He decided to seize the [REDACTED] driver's license.
40. At some point Cst. [REDACTED] asked why the Complainant had been arrested and whether he had been provided with his Charter rights. Initially, Cst. [REDACTED] had assumed that the Complainant's Charter rights had been read to him at the time of the arrest. Learning that the Charter rights had not been given he read the Complainant his "charter rights for obstruction". He told the Complainant that he had the right to counsel and reported in a statement that the Complainant said he did not want to speak to a lawyer. In a follow-up interview Cst. [REDACTED] was presented with a video taken by the Complainant's wife at the scene. In the video Cst. [REDACTED] is heard to state "you want to talk to your own lawyer, okay." The

Complainant maintains that he did wish to speak to a lawyer. Of note, Cst. [REDACTED] also recorded in his PRIME report that the Complainant did not wish to talk to a lawyer. In a subsequent answer to questions posed by the Investigating Officer Cst. [REDACTED] said he interpreted the Complainant's response that he wanted to talk to his own lawyer as meaning he wanted to talk to his own lawyer later.

41. Cst. [REDACTED] also phoned enforcement for the Canadian Border Services to see whether or not the Complainant was in the country legally. He did this because the Complainant was carrying the [REDACTED] driver's license. In his statement Cst. [REDACTED] said that he searched the vehicle because there was a concern that the Complainant was lying about who he was and he had no way of proving who he was.
42. The issue of whether the attending members were able to identify the Complainant is unclear from the Record. There is no question that the civilians at the scene identified the Complainant. In his statement Cst. [REDACTED] indicated that the Complainant produced photo identification and it was on that basis that he decided to release him on an undertaking to appear. The PRIME report prepared by Cst. [REDACTED] indicates that the Complainant had an address, phone number and a British Columbia driver's license. The Complainant in his statement conceded that he did not possess a valid BC driver's license. He said he was a citizen of the world and travelled widely and therefore relied on his [REDACTED] Driver's license. He agreed he had been in British Columbia for some [REDACTED].
43. During the interaction between CSPS and the Complainant, the Complainant's wife and his [REDACTED] Mr. [REDACTED] arrived on the scene and began videotaping. That video with audio shows the Complainant's wife continually asking why the Complainant is in custody. In particular, she wants to know why her husband was arrested when he was the one who called the police alleging an assault. She did not receive what she considered to be an appropriate explanation. At all times she was patient and controlled in her inquiries with the members at the scene. She explained that she had not been able to reach her husband but had spoken with Mr. [REDACTED] who told her that her that both he and her husband had been punched by his daughter, Ms. [REDACTED]. Mr. [REDACTED] explained to her that the Complainant continued to speak when he was told not to and that he had been subsequently arrested. The Complainant's wife wanted to know why Ms. [REDACTED] was allowed to drive off, having assaulted her husband and he remained in custody in the back of the police car. At one point she suggested that the only difference was his skin colour. Cst. [REDACTED] took exception to that comment and said it was insulting and that there were other explanations. The one he offered was that police had investigated the Complainant's allegation and that no assault had occurred. The Complainant's wife wanted to know whether or not they had interviewed Mr. [REDACTED] or the Complainant. No answer was provided.

VI. The Law

Abuse of Authority

44. Adjudicator Pitfield in a decision under Section 117 *Police Act* [2014-9919] had this to say about the offence of abuse of authority:

[29] Abuse of authority is a disciplinary breach of trust. While “breach of public trust” is not defined in the *Police Act*, it should be construed to reflect the public expectation that police will act in a manner that is not offensive to the public, to the policing profession generally, or to the police force in which an officer is a member.

[30] Rather than being exhaustively defined, abuse of authority embraces any conduct that may be regarded as oppressive to a member of the public. That result flows from insertion of the words including, without limitation, before the description of certain kinds of conduct with greater particularity. It is an error to conclude that only intentional or reckless conduct can constitute an abuse of authority.

45. Oppressive conduct is not defined in the *Police Act*. A variety of Canadian courts have had occasion to explore the definition in the context of corporate law. It has been described as “conduct that is burdensome, harsh or wrongful or which lacks probity or fair dealing or has been done in bad faith (*O’Connor v Winchester Oil and Gas Inc.* (1986), 69 BCLR 330). In *BCE Inc. v 1976 Debenture Holders*, 2008 SCC 69 the Supreme Court of Canada used the same terminology and suggested it could also include a “visible departure from the standards of fair dealing”, and an “abuse of power.”
46. Cases that have dealt with intentional or reckless conduct suggest that recklessness in the context of wilful misconduct means an awareness of the duty to act or subjective recklessness as to the existence of the duty. Similarly in *R. v. Dickson*, 2006 BCCA 490, the court defined recklessness as follows: Reckless means careless of the consequences, heedless, or lacking prudence or caution.

Neglect of Duty

47. Pursuant to *Hawkes v. McNeilly* 2016 ONSC 6402, the offence of Neglect of Duty, generally, requires that:
- i. a duty existed,
 - ii. the respondent police officer neglected or omitted to promptly and diligently discharge the relevant duty, and
 - iii. there is no "lawful excuse" (read: good or sufficient cause) for the failure.

48. Neglect of Duty must be more than just a mistake or error of judgement: to constitute neglect of duty, the conduct must include an element of wilfulness in the police officers neglect or there must be a degree of neglect which would make the matter cross the line from a mere job performance issue to a matter of misconduct. The context in which a police officer's discretion or judgement is exercised must be carefully examined to see whether or not the exercise of that discretion was warranted: *Dickinson v. Ontario Provincial Police*, 2018 ONCPC 20.
49. I also accept that breaches of the Charter are not necessarily disciplinary offences. There must be a serious blameworthy element and not simply a mistake of legal authority.

Deceit

50. I set out what I viewed to be the legal test for Deceit in: OPCC Decision of Review on the Record, RR 18-03 ("OPCC RR 18-03")

The essential elements of this potential misconduct are as follows: 1. The member made or attempted to make an oral or written statement or, 2. The member "procured" or attempted to procure the making of oral or written statement, 3. That statement was made or procured in the member's capacity as a police officer, 4. That statement was false or misleading, 5. The member had knowledge that the statement was false or misleading

VII. Analysis

Allegations of Misconduct Against Constable [REDACTED]

- (a) **Neglect of Duty pursuant to section 77(3)(m)(ii) of the *Police Act*, for failing to provide the Complainant with notice of his Charter rights after arresting him.**
51. 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.**

[Emphasis added]

52. 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.”
53. 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).

54. The right to access counsel is also embedded within the CSPS Policies (OD 080 Arrest & Release and OI 010 Prisoner Custody and Cell Block Operations) as contained in the FIR.
55. On March 30 2022 at 5:46 PM, the Complainant was arrested for obstruction by Cst. [REDACTED] and placed in the rear of a police vehicle. Cst. [REDACTED] acknowledged in his statement that he did not provide the Complainant with notice of his Charter rights upon arrest. When S/Sgt. [REDACTED] (the original Investigating Officer) asked Cst. [REDACTED] what the reason for the delay was, Cst. [REDACTED] stated, “Yeah, I, I, I don’t, I don’t really have a reason, uh for the, for the delay. I, like, I’m not sure if, if it’s uh, I forgot, or whether, um, there just seemed to so much going on, I didn’t wanna take the time to, to, to do that. Um, y’know, it just, it felt like things unfolded like pretty quickly. And I still hadn’t figured out what the heck was going on.” Cst. [REDACTED] further commented on when he would normally give Charter rights to someone and stated, “Y’know, it depends on the situation. So, yeah, best practice is we like to do it right away. I mean if it’s, if it’s uh, a dynamic situation, and we’re still looking for information, then, tha’, that may be delayed, slightly. It’s not ideal. Um, so I would, the answer to my question is, best practice is, is to uh, to read that verbatim from the Charter card. As soon as you can. Right a’, as soon as, as soon as the guys been arrested.”
56. The Complainant was eventually provided his Charter rights by Cst. [REDACTED] at 7:11 PM, almost 90 minutes after arrest.
57. There is no question that Cst. [REDACTED] had a duty to provide the Complainant with his Charter rights and that he did not fulfil that duty. The only remaining question is whether or not he had good and sufficient cause to not fulfil that constitutional obligation. In my view there does not appear to be good and sufficient cause. Cst. [REDACTED] explanation that he “did not really have a reason” is simply not sufficient nor is it enough to suggest that there was a lot going on.
58. In my view this allegation of Neglect of Duty appears to be substantiated on the Record before me.

(b) Neglect of Duty pursuant to section 77(3)(m)(ii) of the *Police Act* for failing to adequately investigate the assault allegation brought forward by the Complainant.

59. The CSPS Policy on Assault investigations OB 020 states in 3.8 that “all persons involved in the assault, which includes the victim(s), witnesses and suspects, should be separated and interviewed with written statements obtained as soon as possible.” Indeed, the policy is simply a codification of what any adjudicator with experience knows: discretion or judgement should never be exercised until the adjudicator has heard both sides of the story.
60. Cst. [REDACTED] was aware that he was responding to a 911 call alleging an assault and another 911 call alleging a disturbance. After interviewing Ms. [REDACTED] her daughter and other members of their family at the scene he concluded that the alleged assault had not occurred. He chose not to interview the Complainant, nor did he interview Mr. [REDACTED] who he knew, from what he had heard, was with the Complainant. The Complainant’s written statement to the CSPS about the alleged assault occurred after the Complainant proactively initiated a new file days later. Constable [REDACTED] took this call, requested a statement and video from the Complainant, which was then forwarded to Cst. [REDACTED]. Cst. [REDACTED] reviewed the material and again concluded that the allegation of assault either did not occur or did not meet charge approval standard.
61. It may well be that, having interviewed Ms. [REDACTED] and her family, Cst. [REDACTED] concluded that the Complainant was taking advantage of Mr. [REDACTED] who was allegedly suffering from [REDACTED]. This section 117 Review is, of course, limited to the Record and for the purpose of this Review it is not necessary to attempt to sort out whose version of events is accurate. Undoubtedly, there had been ongoing tension within the [REDACTED] family.
62. It appears that Cst. [REDACTED] was influenced by one version of events which led him to forego interviewing the Complainant, which was contrary to the job that he had been assigned to do. It appears therefore that this allegation of Neglect of Duty has been substantiated.

(c) Abuse of authority, pursuant to section 77(3)(a) for telling the Complainant that he would go to jail if he did not sign an undertaking to appear and for not explaining the release conditions of the undertaking prior to telling the Complainant to sign the undertaking or he would go to jail.

63. One of the eight videos that forms a part of the record was taken by the Complainant’s wife and entitled “Police Brutality”. In that video, which contains audio and comments added later (which I have not taken into consideration) Cst. [REDACTED] presents the Complainant with an undertaking to appear, refuses to answer questions posed to him by the Complainant and tells the Complainant that if he does not sign the undertaking to appear he will go to jail. The “go to jail” comment

is made after the Complainant indicates he is not going to sign the undertaking. The Complainant told Cst. [REDACTED] that he has never been to jail.

64. Below is a transcription of the relevant portions of the videos pertaining to this allegation of misconduct:

Cst. [REDACTED] Hey [REDACTED] we've got some paperwork to do so come out. Stand right there and I will explain some things to you ok and you will be free to go.

Complainant: Can I ask a question Sgt?

Cst. [REDACTED] No lets just do this and then you can... ok, one thing at a time (Indecipherable)

The Complainant then discusses why he was given a violation ticket to other members.

Cst. [REDACTED] So I am going to give you this paper here and ask you to sign (indecipherable).

Complainant: No not sign, I am not going to sign.

Cst. [REDACTED] You are not going to sign? Do you want to be released right now or do you want to go to jail?

...

Cst. [REDACTED] You are already arrested and we're trying to release you, so you are already under arrest, we're trying to release you, if you don't want to be released, then we can take you back to jail, we'd like to release you.

Complainant: I never went to jail officer. I was never in jail in life...

Cst. [REDACTED] We don't want to take you to jail, we'd like to release you on paperwork.

Complainant: So officer...

Cst. [REDACTED] The signature that you give me... indicates that you received (Indecipherable conversation).

Cst. [REDACTED] So would you like to be released, yes or no?

Complainant: Officer...

Cst. [REDACTED] Would you like to be released, yes or no?

Complainant: Officer

Cst. [REDACTED] How long do you want to keep playing this game?

Complainant: I would like to speak

Cst. [REDACTED] But you speak over and over and over. Its really simple, I've got some documentation, paperwork to give to you, if you've signed the line saying that you received the paper, I will explain it to you and then you will be free to go, you can contact a lawyer and all the rest of it.

Complainant: If I don't sign the paperwork will I be taken to jail?

Cst. [REDACTED] Yeah

Complainant: Ok I will sign

65. An undertaking to appear is a legal document that contains mandatory conditions and conditions added at the discretion of the police officer. The conditions may require an individual to remain within a specific territorial jurisdiction, not attend at certain addresses or communicate with certain individuals, attend for purposes of fingerprinting and attend court at a specified date and time. Other conditions may also apply. At the time this incident occurred an accused was bound by the undertaking even if they refused to sign it (currently *Criminal Code*, RSC, 1985, c. C-46, s. 500(4)). The intent in this case was clearly to limit the Complainant's attendance at the scene of the disturbance and alleged assault and to compel him to attend for photographing and fingerprinting. If Cst. [REDACTED] believed that the Complainant would not comply, his obligation was to take the Complainant before a justice within 24 hours. Cst. [REDACTED] obligation therefore was to carefully explain the undertaking to the Complainant and to ensure that he understood the seriousness of the conditions since the breach of the conditions would carry legal consequences. It almost goes without saying that this duty would require Cst. [REDACTED] to answer questions posed by the Complainant
66. Cst. [REDACTED] after procuring the Complainant's signature, did explain briefly the undertaking to the Complainant. A careful review of the video shows the Complainant calmly asking Cst. [REDACTED] if he could ask a question and being told no. Cst. [REDACTED] handling of the release is troublesome. His conduct towards the Complainant and refusing to answer the Complainant's questions, compelling him to sign an undertaking before explaining it to him and threatening jail if he did not sign is troublesome. The question is whether or not it is oppressive and abusive. In other words, was Cst. [REDACTED] conduct a "visible departure from the standards of fair dealing".
67. I have concluded that Cst. [REDACTED] conduct in releasing the Complainant appears to meet the test for abuse of authority and I therefore find this allegation appears to be substantiated.

Allegations of Misconduct Against Constable [REDACTED]

(a) Abuse of Authority, pursuant to 77(3)(a)(ii)(B) of the *Police Act*, for searching the Complainant's vehicle without good and sufficient cause.

68. This allegation is more difficult to analyse, mostly as a result of an incomplete Record. Cst. [REDACTED] in his statement indicated that he saw photo identification which was sufficient to allow him to identify the Complainant and issue an undertaking to appear. He then recorded a BC driver's license number in his PRIME report. The Complainant conceded he did not have a BC driver's license. It is impossible, on the basis of the Record to know whether or not the [REDACTED] driver's license was the photo identification being referred to by Cst. [REDACTED]. It is also important to note that Cst. [REDACTED] had been provided the back story to all of this by the other members on the scene when he arrived. Certainly, the allegations that the Complainant was defrauding Mr. [REDACTED] were readily apparent in the information provided to the members at the scene.

69. Constable [REDACTED] in his statement, indicated that he searched the vehicle the Complainant was driving because he was concerned that the Complainant was lying about who he was and he had no way of proving who he was. This would make sense if the Member believed that they were dealing with a person, perpetrating a fraud on an elderly individual with [REDACTED] and who had no identification when arrested. On the Record it appears clear that Cst. [REDACTED] accepted that the arrest of the Complainant was appropriate and lawful. On the basis of the convoluted Record, I am unable to conclude that Cst. [REDACTED] did not have good and sufficient cause to search the vehicle incidental to what he believed to be the lawful arrest of the Complainant.

70. I find this allegation of misconduct unsubstantiated.

(b) Neglect of Duty, pursuant to section 77(3)(m)(ii) of the *Police Act*, for failing to provide the Complainant with his access to counsel after the Complainant requested counsel.

71. Cst. [REDACTED] in discussions with Cst. [REDACTED] recognized that the Complainant had not been provided his 10(b) Charter rights and that the Complainant had been seated in the back of the police car for more than 90 minutes. In the earlier Neglect of Duty allegation with respect to Cst. [REDACTED] I outlined the law with respect to the provision of Charter rights. The *Charter* states in section 10 that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right. The purpose of this right is to provide an arrest or detained person with an opportunity to obtain legal advice about their current situation. There is not only the informational component of telling someone this right, but it is equally important to provide someone with an opportunity to obtain advice on how to exercise that person's rights (*R. v. Manninen*, 1987 CanLII 67 (SCC), [1987] 1 SCR 1233). Furthermore, the term "without delay" has been interpreted to mean "immediately" (*R. v. Suberu*, 2009, para. 41, *supra*). If there are delays in providing

access to counsel, they must be justified by exceptional circumstances, otherwise, there should be no reason to not allow the accused person to telephone a lawyer (*R. v. Strachan*, 1988 CanLII 25 (SCC), [1988] 2 SCR 980). Although there may be times when it may be impracticable to facilitate private access to counsel, the right to counsel cannot be displaced by the mere assumption of impracticability. Police have a duty to take proactive steps to facilitate access to counsel and the “duty of the police is to provide access to counsel at the earliest practical opportunity” (*R. v. Taylor*, 2014 SCC 50 (CanLII), [2014] 2 SCR 495 at paras. 31-35).

72. It is clear on the Record that the Complainant indicated to Cst. [REDACTED] that he wished to speak to his own lawyer. Cst. [REDACTED] said he interpreted this to mean that the Complainant wanted to speak to his own lawyer later. The video taken by the Complainant’s wife and referred to above also captured the discussion between Cst. [REDACTED] and the Complainant. In that video Cst. [REDACTED] is heard to say “You want to talk to your own lawyer, ok.” Moreover, Cst. [REDACTED] concedes that he told Cst. [REDACTED] that the Complainant did not want to speak to a lawyer. He also recorded that in his PRIME Report.
73. Cst. [REDACTED] was assisting Cst. [REDACTED] who had failed to read the Complainant’s Charter rights as he was obligated to do. In fulfilling that obligation, he accepted the duty to properly advise the Complainant of his Charter rights and to take substantive steps to ensure that the Complainant, who wished to contact a lawyer, could exercise that right. Cst. [REDACTED] was not significantly engaged after reading the Charter rights and there does not appear to be any good and sufficient cause for neglecting to carry out his obligation to ensure the Complainant had access to his lawyer.
74. I find this allegation appears to be substantiated.
- (c) **Deceit, pursuant to section 77(3)(f)(i)(B) of the *Police Act*, for writing in a PRIME report and police notes that the Complainant did not want access to a lawyer when he did.**
75. This allegation is in relation to Cst. [REDACTED] writing in a PRIME report and police notes that appear in the Record that the Complainant did not want access to a lawyer when he did.
76. As outlined in OPCC RR 18-03 and above, the essential elements of this potential misconduct are as follows:
 - (a) the member made or attempted to make an oral or written statement or,
 - (b) the member “procured” or attempted to procure the making of oral or written statement,
 - (c) that statement was made or procured in the member’s capacity as a police officer,
 - (d) that statement was false or misleading,

(e) the member had knowledge that the statement was false or misleading.

77. Clearly, Cst. [REDACTED] did write in a PRIME report and police notes that the Complainant did not want access to a lawyer when he knew he did. Cst. [REDACTED] explanation is that he had nothing to gain by denying the Complainant a call to a lawyer and that what he was really saying was that the Complainant wanted to talk to his own lawyer later. The essential elements of this misconduct in my view appear to have been met since Cst. [REDACTED] clearly knew that the statement that the Complainant did not wish to speak to a lawyer was false.
78. The allegation of misconduct of Deceit appears to be substantiated.

VIII. Conclusion

79. 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 FIR which, if proven, could substantiate the following misconduct allegations and require the taking of disciplinary or corrective measures:

Cst. [REDACTED]

- (a) Neglect of Duty pursuant to section 77(3)(m)(ii) of the *Police Act*, for failing to provide the Complainant with his Charter rights after arresting him;
- (b) Neglect of Duty pursuant to section 77(3)(m)(ii) of the *Police Act* for failing to adequately investigate the assault allegation brought forward by the Complainant; and
- (c) Abuse of Authority, pursuant to section 77(3)(a) of the *Police Act* for telling the Complainant that he would go to jail if he did not sign an undertaking to appear and for not explaining the release conditions of the undertaking prior to telling the Complainant to sign the undertaking or he would go to jail.

Cst. [REDACTED]

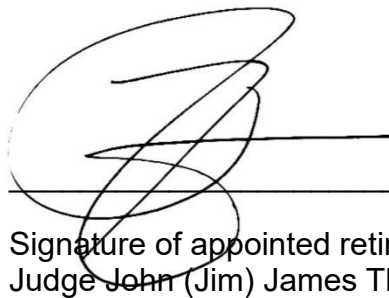
- (a) Neglect of Duty, pursuant to section 77(3)(m)(ii) of the *Police Act*, for failing to provide the Complainant with his access to counsel after the Complainant requested counsel; and
 - (b) Deceit, pursuant to section 77(3)(f)(i)(B) of the *Police Act*, for writing in a PRIME report and police notes that the Complainant did not want access to a lawyer when he did.
80. In accordance with section 117(11) of the *Police Act*, my decision on the misconduct matters that are not substantiated are final and conclusive.

81. In the notice of appointment, the Commissioner also expressed concern that the Discipline Authority had not adequately assessed Cst. [REDACTED] actions during the incident that appeared to have referenced the Complainant's race and immigration status. The Commissioner noted that the actions he was concerned with included advising the Complainant's wife not to "play the race card" and calling the Canadian Border Services Agency to confirm the Complainant's immigration status in the absence of a reasonable basis to do so. I have carefully reviewed the Record. It was apparently the Complainant's wife who suggested that perhaps it was because of the Complainant's race that he was in custody while Ms. [REDACTED] was not. Cst. [REDACTED] comments in response to this concern bordered on the unprofessional as he continued to emphatically deny the Complainant's wife's suggestion. I note that Sgt. [REDACTED] witnessed the exchange between the Complainant's wife and Cst. [REDACTED] and did not intercede. However, as inappropriate as they may be, in my view they do not amount to misconduct.
82. The Commissioner is also concerned that the Members involved questioned the Complainant's immigration status and contacted the Canadian Border Services Agency. Under ordinary circumstances this would be of significant concern. However, the fact pattern here indicates that allegations were being made about the Complainant suggesting that he had perpetrated a fraud and was continuing to take advantage of an elderly gentleman who suffered from [REDACTED] and [REDACTED]. That was the information that Cst. [REDACTED] had when he made the call. In my view, after the discovery of the [REDACTED] Driver's License it was appropriate for the members to attempt to clarify who the Complainant was and if he was in Canada legally.

IX. Next Steps

83. I hereby notify the relevant parties of the next steps in this proceeding, pursuant to subsections 117(7) and (8) of the *Police Act*.
84. Considering the factors in section 120 of the *Police Act*, and in particular section 120(3), I am willing to offer a prehearing conference to Cst. [REDACTED] and Cst. [REDACTED] with respect to the misconduct allegations that appear to be substantiated.
85. I am directing the Members to advise the Registrar within five days once a decision has been made on whether or not to accept the offer of a prehearing conference.
86. The range of disciplinary and corrective measures set out in the *Police Act* which I would consider appropriate in the current case includes:
- (a) give the member advice as to their conduct;
 - (b) reprimand the member verbally; and/or
 - (c) reprimand the member in writing.

87. Pursuant to s.113 of the *Police Act*, the Complainant has the right to make submissions:
 - (a) at a discipline hearing (as per section 117(8)(b)) or,
 - (b) if the members accept a prehearing conference, (as per section 120(6) and (7) of the *Police Act*), to the prehearing conference authority, within 10 business days of receiving notice of their right to do so under these sections.
 88. Pursuant to section 119, at a disciplinary hearing, the Members 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.
 89. 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.
 90. A pre-discipline proceeding conference call will be convened by telephone on September 29, 2023 at 9:00AM with the Members, or counsel on their behalf. At that time, dates will be canvassed that are convenient to commence the disciplinary 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.
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 Signature of appointed retired judge
 Judge John (Jim) James Threlfall (rt.)

Date: September 14, 2023