

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

AND

**IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT
AGAINST CONSTABLE [REDACTED] OF THE
SURREY POLICE SERVICE**

DECISION PURSUANT TO SECTION 117 OF THE *POLICE ACT*

TO: [REDACTED]

AND TO: Constable [REDACTED]
Surrey Police Service

AND TO: Chief Constable Norm Lipinski
Surrey Police Service

AND TO: Acting Inspector [REDACTED]
Surrey Police Service

AND TO: Sergeant [REDACTED]
Surrey Police Service

AND TO: Prabhu Rajan
Police Complaint Commissioner

AND TO: Xwopokton (Harley Chappell)
Acting Chair, Surrey Police Board

Introduction

[1] This is a review of an internal departmental decision that a police officer was not guilty of “neglect of duty”, as that term is defined in s. 77 of the *Police Act*, R.S.B.C. 1996, c. 367 [PA]. That decision dealt with a complaint by [REDACTED] (“Mr. A”), against Constable [REDACTED] (“Cst. B”) of the Surrey

Police Service (“SPS”). The complaint revolves around Cst. B’s failure to notify Mr. A and other members of his family of the death of Mr. A’s brother, [REDACTED] (“Mr. C”). More particularly, it focuses on Constable B’s failure to search the contact list in Mr. C’s cellphone for information that could assist in identifying his next-of-kin.

[2] Sergeant [REDACTED] (“Sgt. D”) of the SPS investigated the complaint and submitted a Final Investigation Report (“FIR”) to Acting Inspector [REDACTED] (“A/Insp. E”) of the SPS. Acting as a “Discipline Authority”, A/Insp. E found Cst. B had not engaged in misconduct.

[3] After being advised of A/Insp. E’s decision, Mr. A asked the Police Complaint Commissioner, Prabhu Rajan, to appoint a retired judge to act as an Adjudicator and review the matter. Mr. Rajan appointed me to conduct that review.

[4] For the reasons that follow, I find that the evidence in the FIR is not capable of supporting a finding that Cst. B engaged in misconduct.

What is to be Determined on This Review

[5] A review under s. 117(1) is an examination of the record provided by the Commissioner to the Adjudicator. It takes place without live witnesses or additional evidence or submissions. It is not an appeal from the Discipline Authority’s decision and that decision is not provided to the Adjudicator. What the Adjudicator receives is the FIR which, by virtue of s. 98(5) of the *PA* must include the following:

- (a) a brief account of the investigative steps taken;
- (b) a complete summary of the relevant evidence;
- (c) a list of all witnesses interviewed by the investigating officer;
- (d) a list of all records related to the investigation;
- (e) the investigating officer’s assessment of the evidence and analysis of the facts.

In addition, an Adjudicator receives all the evidence and records referred to in the FIR: s. 98(6).

[6] An Adjudicator conducting a s. 117(1) review does not finally resolve factual disputes. Rather, an Adjudicator's task is to determine whether "the evidence referenced in the [FIR] appears sufficient to substantiate the allegation and require disciplinary or corrective measures": s. 117(8)(d)(i). The two possible outcomes of a review are set out in subsections (9) and (10):

(9) If, on review of the investigating officer's reports and the evidence and records referenced in them, the retired judge appointed considers that the conduct of the member or former member appears to constitute misconduct, the retired judge becomes the discipline authority in respect of the matter and must convene a discipline proceeding, unless section 120(16) [prehearing conference] applies.

(10) If, on review of the report and the evidence and records referenced in it, the retired judge decides that the conduct of the member or former member does not constitute misconduct, the retired judge must include that decision, with reasons, in the notification under subsection (7).

[7] In OPCC File No. 2022–22748 (July 19, 2023), Adjudicator Baird Ellan said this in regard to the fact that a determination that the evidence "appears to substantiate the allegation" is merely a preliminary finding:

[56] The threshold is lower than proof of misconduct, which is required at a discipline proceeding. Because Section 117(9) designates the Section 117 reviewer as the discipline authority for the purposes of a discipline proceeding, at the Section 117 stage the reviewer must be careful not [to] draw premature conclusions that misconduct has been proven: *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970 at para. 39.

[57] The review is therefore an assessment of the evidence that falls somewhere between "apparent" misconduct and "proven" misconduct; specifically, whether the evidence "appears sufficient to substantiate" misconduct. While that test may entail some weighing or assessment of the evidence, in particular where there are conflicts, the analysis should not contain any assumptions that the evidence will be interpreted a certain way at a discipline proceeding, where the discipline authority may have the benefit of evidence or submissions on behalf of the member.

[58] The confusion created by the wording of Section 117(8)(d)(i) has been the subject of judicial comment in the past (*Scott* at para. 39), and I will observe here that while there is no onus on the member, the preliminary conclusion required by the section about the "apparent sufficiency" of the evidence is open to challenge at a discipline

proceeding in whatever fashion the member may see fit to challenge it, and the discipline authority, despite being the person who has found the evidence apparently sufficient, must approach the discipline proceeding with an open mind about the outcome.

[8] More recently, in OPPC File No. 2022-22066 (August 14, 2024), Arbitrator Ehrcke described the role of an arbitrator in the following terms (at pp. 7-8):

In short, my task on this section 117 review is to review the Final Investigation Report and the evidence and records referenced therein, and to make my own decision of whether the member's conduct appears to constitute misconduct under section 117(9) or whether the conduct of the member does not constitute misconduct under section 117(10).

It is important to note that my review under section 117 is not an appeal from any previous determination. It is not a review of the reasons of the Discipline Authority nor is it a review of the Police Complaint Commissioner's reasons for rejecting the decision of the discipline Authority. Rather, my mandate under section 117(1) of the *Police Act* is to review the Final Investigation Report and the evidence and records referenced in it and then make my own decision on the matter.

The Focus of this Review

[9] By virtue of s. 112(5)(b) of the *PA*, A/Insp. E's decision is "final and conclusive, unless the police complaint commissioner appoints a retired judge under s. 117(1)", which reads:

If, on review of a discipline authority's decision under section 112(4) or 116(4) that conduct of a member or former member does not constitute misconduct, the police complaint commissioner considers that there is a reasonable basis to believe that the decision is incorrect, the police complaint commissioner may appoint a retired judge recommended under subsection (4) of this section to do the following:

- (a) review the investigating officer's report referred to in section 112 or 116, as the case may be, and the evidence and records referenced in that report;
- (b) make her or his own decision on the matter;
- (c) if subsection (9) of this section applies, exercise the powers and perform the duties of discipline authority in respect of the matter for the purposes of this Division.

[10] In his notice in this matter, the Commissioner sets out why he considers there to be a reasonable basis for believing A/Insp. E's decision is incorrect. After noting that A/Insp. E classified the matter as a "misstep" rather than

misconduct and found that Cst. B “‘was acting in good faith’ and his conduct was not willful, intentional, or deliberate”, the Commissioner stated:

The number of steps that [Cst. B] took to identify next of kin is not what is at issue. Neither is whether [Cst. B] was acting in good faith or morally blameworthy. Rather, what is at issue is the overall reasonableness of his investigation. In my view, it is not reasonable for a member to neglect basic or obvious investigative steps, such as searching the electronic devices located on scene when attempting to identify a deceased person’s next of kin. In 2025, it should be fairly standard, and what should be objectively expected, for an officer to look at the contacts in an unlocked cellphone to help identify a deceased person’s next of kin.

Misconduct / Neglect of Duty

[11] Section 77 of the *PA* contains a comprehensive definition of “misconduct”.

In this case, the following portions of s. 77 are relevant:

- (1) In this Part, “misconduct” means
 - (b) conduct that constitutes
 - (ii) a disciplinary breach of trust described in subsection (3) of this section
- (3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of trust, when committed by a member:
 - (m) “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;
- (4) It is not a disciplinary breach of trust for a member to engage in conduct that is necessary for the proper performance of authorized police work.

Discovery of Mr. C’s Body and Efforts to Identify Next of Kin

[12] Mr. C resided in an apartment building in Surrey. On the afternoon of September 13, 2023, his landlord contacted the police to report he had not heard from Mr. C for some time. Cst. B, who was in uniform and driving a marked police vehicle, was dispatched to the building, where he spoke with the landlord.

[13] Cst. B queried two police databases—Canadian Police Information Centre (“CPIC”) and Police Records Information Management Environment (“PRIME”)—and determined that Mr. C was the registered owner of a vehicle and that his

driver's license listed a different Surrey address. Those queries did not provide information with respect to Mr. C's family members.

[14] Cst. B asked for other officers to check to see if Mr. C was at the other address and received a negative response. He also asked for a check to be done to see if Mr. C had been admitted to hospital and, again, received a negative response.

[15] Cst. B, together with Constable [REDACTED] of the SPS ("Cst. F") located Mr. C's vehicle in the building's parkade. Nothing about it was suspicious.

[16] After obtaining a key to Mr. C's apartment from the landlord, Cst. B and Cst. F went to the apartment door. No one answered when they knocked. Cst. B then tried the door handle. The door was unlocked. When Cst. B opened the door he saw Mr. C's body in the corner of the living room. It was apparent Mr. C had been dead for some time.

[17] Cst. B notified two of his supervisors, Sergeant [REDACTED] ("Sgt. G") and Corporal [REDACTED] ("Cpl. H"), both members of the Royal Canadian Mounted Police. At this time the SPS and the RCMP shared policing responsibilities in Surrey and, under a memorandum of understanding, members of the SPS were assigned to work under the RCMP's command. Cst. B also notified the B.C. Coroners Service and the Surrey Fire Service, to check for a gas leak.

[18] Sgt. G., Cpl. H, and other officers attended at the apartment, as did the coroner and Fire Service. Mr. C's death was not considered suspicious.

[19] After the coroner had concluded her examination, Mr. C's body was removed from the apartment.

[20] Cst. B looked through the apartment for documents, but did not find anything that would assist in identifying Mr. C's next of kin. There was also

nothing in Mr. C's wallet—which was removed from his front pocket—that would assist in that regard.

[21] Cst. B noted there were electronic devices in the apartment. (He later told Sgt. D that he could not recall what devices were in the apartment and that he did not examine any cellphones that may have been there.)

[22] Cst. F returned the apartment key to the landlord. Cst. B told the landlord that he would attempt to reach out to Mr. C's next of kin. The police did not remove any property from the apartment.

[23] Later that day, Cst. B contacted an RCMP unit known as IntelEDX but was unable to obtain any information that would assist in identifying Mr. C's next of kin. He also contacted B.C. Vital Statistics for information that might assist, but the response was negative.

[24] On the morning of September 14, 2023, a sergeant in the Surrey RCMP Occurrence Report Unit sent a message to Cst. B with the subject line "ORU Follow-Up", which included the following:

Please complete the Human Death Report Template and submit to Coroner's Office. Submit to file any photos taken at the scene. Was [sic] there any statements taken from persons who last saw the deceased alive, maybe the (COM)?

Next of Kin notification still has to be done. Please continue to look for NOK.

[25] An RCMP Follow-up Report indicates Cpl. H was given the following assignment on September 14, 2023:

PLS REVIEW & ENSURE NOK IS COMPLETED BY MBR. THX.

The "Followup status" line at the bottom of this report—which appears to have been entered on October 15, 2023— states "CONCLUDED".

[26] On September 23, 2023, Cst. B sent an email with the subject line "[Police file number omitted] Assistance in locating NOK" to Corporal [REDACTED]

("Cpl. J"), Corporal [REDACTED], and Cpl. H, all of whom were his RCMP supervisors:

Hello,

Just looking for the options available to GD to search for an NOK. I had emailed IntelEDX at E Division who could not locate any family of the deceased.

Based on the history, there may be family in Ontario.

What are some of the other methods available to locate an [sic] NOK?

Thank you,

[27] Cpl. J replied:

I have reviewed the file and at the end of the day we can only do what we can do.

I assume [the landlord] has no emergency contact info? Usually when somebody rents they need to prove that.

Has [Mr. C] been fingerprinted? They ask for NOKs on those.

Unless we at least have a name of a possible NOK and a Jurisdiction where they might be, no point in reaching out anywhere in Ontario.

If none of the above pans out, update the file and advise the Coroner, then CH.

[28] On September 29, 2003, Cpl. H sent an email to Cst. B, on the "Assistance in locating NOK" email thread:

Sgt [name omitted] received a call from to [sic] coroner today (Josh [telephone number omitted]) as the PRIME file hasn't been updated they assumed no work had been done. I updated them that work has been done but you've been sick as well. I called the coroner and spoke with him regarding the efforts done. He asked when would be a reasonable time to consider all efforts exhausted, I told him that you would call/email him on nights to further apprise him and if you're not in, I would follow up with him on our start of our next block.

He said once we've exhausted all efforts, he will start the next part of the process but he just needs that confirmation before starting. Update your file ASAP as well.

Thanks,

[29] On October 7, 2023, Cst. B emailed Cpl. H, with a copy to Cpl. J, on the "Assistance in locating NOK" thread:

Hello Cpl. [H],

So there was no NOK information provided to the landlord and Surrey Cells was contacted who also stated that they do not have any information on NOK's [sic] as well.

I will update the file and let the BC Coroners Service know.

Thank you for your help!

[30] After sending this email, Cst. B emailed the Coroners Service:

Hello [REDACTED],

At this time, I have consulted with my supervisors and we have exhausted our efforts in searching for an NOK for the deceased.

Thank you.

[31] He then filed the following General Occurrence Report:

Human Death report completed.

[Cst. B] has consulted with D1 NCO's and has exhausted all efforts available to Surrey Patrol to locate a NOK.

- No record found at residence.
- No mention of NOK in police files.
- IntelEDX at E Division was negative for results.
- Surrey Cells do not keep records of NOK.

BC Coroner's Service has been updated as well.

[32] An RCMP Follow-up Report indicates Sgt. G was given the following assignment on October 15, 2023:

PLS RVW FILE & ENSURE ALL'S DONE TO LOCATE NOK. MBR
DEAL W/EXHBT

The "Followup status" line at the bottom of this report—which appears to have been entered on October 18, 2023—states "CONCLUDED".

[33] After the Coroners Service learned Mr. C's next of kin could not be located, it so advised the Public Guardian and Trustee of British Columbia, which arranged for Mr. C's body to be cremated.

How Mr. C's Family Learned of his Death

[34] On December 12, 2023, Mr. A received a letter from the Canada Revenue Agency addressed to "Estate of the late [Mr. C]". As a result, he contacted the Coroners Service to obtain more information. There is nothing in the FIR indicating how the CRA connected Mr. A and Mr. C. On December 19, 2023, Mr. C's father called the Surrey RCMP to obtain information concerning his son's death.

[35] Mr. A and Cst. B spoke on January 3, 2004. Cst. B provided Mr. A with the landlord's email address and told him the landlord had been advised that Mr. C's family would be contacting him to collect Mr. C's personal belongings. He further advised that the police had not removed anything from the apartment.

The Complaint Process

[36] Mr. A filed a complaint with the Civilian Review and Complaints Commission of the RCMP in regard to Mr. C's family not being notified of his death. That complaint referred to Cst. B as a member of the RCMP. As Cst. B is a member of the SPS, the Commission forwarded the complaint to the Office of the Police Complaint Commissioner. The OPCC received the complaint on February 28, 2024. This resulted in Sgt. D initiating an investigation into Cst. B's conduct on June 12, 2024. That investigation concerned an allegation of neglect of duty for failing to take appropriate steps to notify next of kin of Mr. C's death.

[37] In an email, Mr. A advised Sgt. D:

Yes, I have his phone. The officer left it on the kitchen counter. The phone is fully open, no passwords, I have his wallet, all family members are listed in his phone contacts.

[38] Sgt. D completed his investigation on January 14, 2025, and submitted a FIR to A/Insp. E. On January 30, 2025, A/Insp. E, acting pursuant to s. 112 of the *PA*, issued a decision in which he found that the allegation of neglect of duty did not appear to be substantiated.

[39] Mr. A was advised of A/Insp. E's decision. On February 10, 2025, Mr. A asked the Commissioner to appoint a retired judge to review the FIR pursuant to s. 117 of the PA. On February 28, 2025, I was appointed to conduct that review.

Sgt. G's Statement

[40] During his investigation, Sgt. D. posed a number of questions to Sgt. G by email (I have merged their emails for ease of reading):

1. What direction, if any, did you give to Cst. [B]?
Direction on the file was given by the Corporal who attended as the Supervisor.
2. Did you have any information or receive any information regarding a NOK of the deceased?
I was not aware of any information of a NOK, and only found out some time later of an [sic] NOK not being found. The Corporal advised me that all steps were taken by Cst. [B] to locate a NOK.
3. Did you provide any direction to Cst. [B] on steps to locate an [sic] NOK.
All direction given on file was given by the Corporal on scene.
4. Do you have any notes in regarding an [sic] NOK on the file?
I have no notes in regards [sic] to any NOK.
5. Did you speak with the Coroner or the Coroner's office on this file?
I had no further involvement and the Coroner was not in attendance prior to my leaving the scene. I did not speak to the Coroner at any time after the file either.
6. In your opinion, did Cst. [B] take all reasonable steps available to him at the time to identify an [sic] Nok?
In my opinion, based on the information provided to me by the Corporal, all reasonable steps were taken by Cst. [B] at the time to identify a NOK.

Police Policies

[41] The FIR contains Policy OP 4.46 "Sudden Death Investigations" from the SPS's Policy Manual: Operations. Section 2.1 states "This policy applies to all Members". Section 3.2 provides:

If SPS investigates a sudden death, SPS will be responsible for notifying the next of kin, if applicable.

[42] The section entitled "Duties of Members First on Scene" includes:

- 4.5. The first member to arrive at the scene will be responsible for suspect management (if applicable), preservation of the evidence and the crime scene. While awaiting additional resources, Members must:
 - iv. obtain information including, but not restricted to:
 - (e) next of kin
- 4.6. If during investigation, the cause of death is established to be non-criminal, the Coroner assumes full responsibility for the incident. The investigating Member will document their rationale in PRIME as to why the death is established as non-criminal independent of the Coroner's opinion. The investigating Member may conclude the file unless otherwise requested or directed by the Coroner to provide further assistance, in which case the Member will continue the investigation to assist the coroner.

[43] The section entitled "Deceased Property" includes:

- 4.17. In most cases of non-suspicious deaths, prior to body removal, and when possible, Members will remove all valuables from the body, clothing and personal property of the deceased.
...
- 4.19. If the next of kin is not immediately available or there is no next of kin, Members will secure the valuables and personable property for safekeeping as outlined in OP 5.1 *Seized Property*.

(Note: OP 5.1 is not in the FIR.)

[44] The first provision in the "Next of Kin Notification" section reads:

- 4.21. SPS is responsible for notifying the next of kin for any death the SPS investigates.

There is nothing in the remainder of this section or elsewhere in OP 4.46 in regard to what steps an officer can or should take to identify next of kin.

[45] The FIR also contains Surrey RCMP policy OM 41.3.200 "Human Deaths". There is nothing in this policy in regard to notifying next of kin.

[46] The FIR indicates Cst. B received training on RCMP Policy OM41.3.200 in January 2022. He was not required to take training on SPS Policy OP 4.46.

Analysis

The Essential Facts

[47] As mentioned above my task on a s. 117(1) review is not to finally resolve factual disputes. Rather, my task is to determine whether the evidence referenced in the FIR appears sufficient to substantiate the allegation and require disciplinary or corrective measures; put otherwise, the issue before me is whether the actions or inactions of Cst. B appear to constitute misconduct. In this case, there are no factual disputes. With that in mind, what follows is a summary of the essential facts established by the contents of the FIR:

- Cst. B was the first officer to respond to the landlord's call and was the person who discovered Mr. C's body;
- Upon discovering Mr. C's body, Cst. B notified two of his supervisors, Sgt. G and Cpl. H, who came to the apartment;
- Mr. C's death was not considered suspicious;
- By virtue of SPS Policy OP 4.46, Cst. B became responsible for notifying Mr. C's next of kin;
- Cst. B was aware of electronic devices in the apartment but did not pay any particular attention to them; those devices included Mr. C's cellphone;
- Cst B looked through Mr. C's wallet and documents in the apartment for next-of-kin information but did not find anything in that regard;
- After Mr. C's body was removed from the apartment the police secured the premises and returned the key to the landlord; none of Mr. C's possessions, including his cellphone, were removed;
- Cst. B searched several police databases and made a number of other enquiries seeking to identify Mr. C's next of kin; those efforts were unsuccessful;
- The day following the discovery of Mr. C's body, Cst. B sent an email to his supervisors seeking advice with respect to what he might do to identify next of kin; the supervisor who replied did not mention Mr. C's cellphone as a possible source of next-of-kin information;
- A few weeks later, Cst. B advised his supervisors he had been unable to identify any next of kin; he then filed a report to that effect, summarizing the steps he had taken;

- After becoming aware Mr. C. had died, Mr. A obtained Mr. C's unlocked cellphone from the landlord; the contact list in that cellphone contains the names and telephone numbers of members of Mr. C's family.

The Search of a Deceased's Electronic Devices

[48] As the Ontario Divisional Court succinctly stated in *Hawkes v. McNeilly*, 2016 ONSC 6402 at para. 22, "There can be no neglect of duty unless there is first a duty." In the present matter, having regard to SPS Policy OP 4.46, ss. 4.5, 4.21, it is clear that in sudden-death situations SPS members have a duty to ascertain and notify the next of kin of the deceased. This, in my view includes the duty to take reasonable steps to fulfill those duties. In this case, those duties rested primarily with Cst. B.

[49] There can be no question but that a deceased's electronic devices such as personal computers and cellphones may contain information that either identifies next of kin or assists in identifying them. However, what authority the police have to search those devices in non-criminal sudden-death investigations is, in my view, an open question. This issue is not addressed in the FIR, which I note does not contain any SPS or RCMP policy with respect to searching electronic devices, or anything that suggests it is standard practice to do so in sudden-death investigations. I am also not aware of any statutory provision or jurisprudence that addresses the search of electronic devices in sudden-death investigations.

[50] What I am aware of is that the Supreme Court of Canada has imposed limits on the extent to which police can search electronic devices: see, e.g., *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657 (specific authorization needed to search a computer located during the execution of a search warrant); *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621 (limits placed on the extent to which police can search a cellphone incidental to an arrest). Whether the ancillary powers doctrine originally set down in *R. v. Waterfield*, [1964] 1 Q.B. 164 (Ct. Crim. App.), which has been applied by the Supreme Court of Canada, operates to

clothe the police with common law authority to search electronic devices for next-of-kin information appears to me to be a complex question; one not capable of being answered in the context of the present review.

[51] In light of this, and because I have concluded that, in any event, Cst. B's conduct does not amount to misconduct, I will proceed on the assumption Cst. B could lawfully have searched the contact list in Mr. C's cellphone.

The Test for "Neglect of Duty"

[52] In the FIR, Sgt. D references several Ontario decisions which stand for the proposition that neglect of duty involves an element of "willfulness in the police officer's neglect or there must be a degree of neglect which would made the matter cross the line from a mere job performance issue to a matter of misconduct": *Hawkes* at para. 30; *G.(P.) v. Ontario (Attorney General)* (1996), 90 O.A.C. 103 (Div. Ct.) at para. 83; *Korchinski v. Office of the Independent Police Review Director*, 2022 ONSC 6074 (Div. Ct) at para. 45. This view is also reflected in Ontario Civilian Police Commission decisions: *Neild v. Ontario Provincial Police*, 2018 ONCPC 1 at para. 18; *Gannon v. Windsor Police Service*, 2024 ONCPC 28 at para. 67. However, the legislative framework in Ontario is different from that in British Columbia.

[53] The neglect-of-duty provision considered in these Ontario cases was in a *Code of Conduct* enacted by regulation made pursuant to the former *Police Services Act*, R.S.O. 1990, c. P. 15. Although this regulation went through a number of iterations before being repealed on April 1, 2024, the portion relevant to the present discussion remained essentially unchanged. It read (as set out in para. 19 of *Hawkes*, O. Reg. 123/98 General):

- 2(1) Any chief of police or other police officer misconducts if he or she engages in,
 - (c) Neglect of duty, in that he or she,
 - (i) without lawful excuse, neglects or omits promptly and diligently to perform a duty as a member of a police force,

[54] This wording mirrored that found in the *Code of Professional Conduct Regulation*, B.C. Reg. 205/98, made pursuant to the *PA*, until the current s. 77(3)(m)(ii) was enacted by the *Police (Misconduct, Complaints, Investigations, Discipline and Proceedings) Amendment Act, 2009*, S.B.C. 2009, c. 28, s. 10. A side-by-side comparison of the former and current *PA* neglect-of-duty provisions is helpful:

<u>Previous Provisions</u>	<u>Current Provisions</u>
s. 4(1) In this Code, disciplinary default means	s. 77(1) In this Part, “misconduct” means
(b) neglect of duty.	(b) conduct that constitutes
s. 6. For the purposes of section 4(1)(b), a police officer commits the disciplinary default of neglect of duty if	(ii) a disciplinary breach of trust described is subsection (3) of this section
(a) the police officer, <u>without lawful excuse</u> fails to promptly and diligently	(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of trust, when committed by a member
(ii) perform his or her duties as a police officer,	(m) “neglect of duty”, which is neglecting, <u>without good or sufficient cause</u> , to do any of the following:
s. 17 Unless otherwise specified in this Code, a police officer commits a disciplinary default if the police officer <u>intentionally or recklessly</u> committed the act or omission constituting the disciplinary default.	(ii) promptly and diligently do anything that it is one’s duty as a member to do;
[Emphasis added.]	[Emphasis added.]

As can be seen, the amendments replaced “without lawful excuse” with “without good or sufficient cause”, and removed the requirement that an officer have acted “intentionally or recklessly”. However, the requirement to have acted “intentionally or recklessly” was retained for other types of misconduct: e.g., “abuse of authority” (s. 77(3)(a)(i), (ii)); “damage to police property” (s. 77(3)(d)(i)); “damage to property of others” (s. 77(3)(e)(i)).

[55] The effect of the amendments in relation to neglect of duty was discussed by former Police Complaint Commissioner Lowe in his decision in OPCC File No. 2011-6912 (February 20, 2013) at p. 4:

The changes to the *Police Act* in 2010 removed the mental requirement of “intentionally or recklessly” in the Misconduct of Neglect of Duty. This removal of mental requirement resulted in a commensurate change from the requirement of “without lawful excuse” to “without good or sufficient cause.” This removal of the requirement for proof of a subjective mental state and the moderation to the standard of “without good or sufficient cause” is consistent with a legislative focus on an objective standard of reasonableness in determining whether or not a neglect of duty constitutes misconduct.

In my view, the use of the term “good or sufficient cause” broadens the basis upon which a Neglect of Duty may be excused from misconduct beyond its legislative predecessor “lawful excuse”.

In reviewing the misconduct of Neglect of Duty as set out in s. 77(3)(m)(ii) of the *Act*, the statutory elements should be applied as follows:

1. The determination of whether a duty exists in the circumstances, and if so, the nature of the duty;
2. Whether or not the conduct of the Officer constitutes neglect of that duty; and, if so,
3. Whether there exists good or sufficient cause to excuse the neglect.
 - Good or sufficient cause: objective standard of what a reasonable police officer with similar training, knowledge, skills and experience would have done in the same circumstances.
 - The spectrum of performance spans from when a member clearly takes no action, and fails to perform any aspect of their required duties, through to level in which a member performs their required duties in an exemplary fashion. The difficulty in determining whether misconduct has occurred lies in the middle of the spectrum and must be resolved through the application of the objective standard of reasonableness in terms of the Officer’s conduct.

[Emphasis added.]

[56] Commissioner Lowe’s analysis was cited with approval in OPCC File No. 2021-19627 (February 25, 2024). After referring to the change having shifted the focus to an objective standard of reasonableness, Arbitrator Hoy stated:

67. Whether the breach in question amounts to neglect of duty requires the application of what the objective standard of reasonableness might be as there are a multitude of officer performance circumstances that may attract analysis. Both advertent and inadvertent conduct can result in findings of negligence but it is to be determined on the yardstick of objective reasonableness.

[57] Also germane is Arbitrator Oppal's decision in OPPC File No. 2022-22059 (September 29, 2023), wherein he said this with respect to s. 77(3)(m)(ii) of the *PA*:

20. The section creates a disciplinary breach of trust known as "neglect of duty". Whereas other types of police misconduct may involve deliberate and intentional conduct — an obvious example being an officer's excessive use of force — by definition "neglect of duty" will generally involve inaction. It is the failure to do something that an officer was under a legal duty to do. There are three essential elements that constitute neglect of duty. First, there must be a duty to do some positive act, that is to say an officer was under a duty to take certain actions. Second, there must be evidence establishing that the officer neglected that prescribed duty. Third, and this is relevant in this case, there must be evidence of no good cause or insufficient cause that provides an explanation for the failure to execute that duty. That is to say, *actus reus* has been proven.

[Emphasis added.]

At para. 22, he noted that the element of "willfulness" referred to *Hawkes* and *G.(P.)* is not required in British Columbia because the wording of s. 77(3)(m)(ii) is different from the Ontario *Code of Conduct*.

Conclusion with Respect to Cst. B

[58] Adopting the framework set out by Commissioner Lowe in OPCC File No. 2011-6912, I have concluded the evidence in the FIR is not sufficient to substantiate misconduct by Cst. B. In reaching this conclusion I have proceeded on the basis that: (i) Cst. B had a duty to notify Mr. C's next of kin; (ii) that duty included taking reasonable steps to identify next of kin; (iii) information that could assist in identifying next of kin was likely to be found on Mr. C's cellphone; and (iv) Cst. B had authority to search the contact list in that cellphone.

[59] What is determinative is that it is beyond peradventure that Cst. B had good and sufficient cause—i.e., an objectively reasonable explanation—for not

having searched Mr. C's cellphone. While Cst. B was aware of his duty to notify next of kin there is no indication he had ever received training on what steps to take to identify next of kin or had previously been tasked with doing so. In addition, there is no operational policy he could have consulted for assistance. When his efforts to identify next of kin proved fruitless, he did what any reasonable officer in his position would have done, he sought guidance from more senior officers who were his supervisors. In the responses he received, he was never advised to search Mr. C's cellphone. In light of this, it cannot be said his failure to search that cellphone rises to the level of misconduct warranting disciplinary action. To paraphrase Arbitrator Oppal in OPCC File No. 2022-22059, that Cst. B's supervisors never advised him to search Mr. C's cellphone provides an explanation for his failure to do so.

Concluding Comment

[60] It would be helpful to include guidance in OP 4.46 on the types of enquires that can be made in attempting to identify next of kin, and to provide training in that regard. This should include whether, and if so, to what extent, electronic devices can be searched for next-of-kin information in non-criminal sudden-death investigations.



S. David Frankel, K.C.
March 31, 2025