

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, c. 367
AND
IN THE MATTER OF CONSTABLE [REDACTED], AND ACTING
SERGEANT [REDACTED]

NOTICE OF ADJUDICATOR'S DECISION

TO: Constable [REDACTED] Vancouver Police Department
AND TO: Acting Sergeant [REDACTED] Vancouver Police Department,
AND TO: Chief Constable Lorne Zapotichny, New Westminster Police Service,
AND TO: Chief Constable Jim Chu, Vancouver Police Department
AND TO: Inspector John de Haas, Vancouver Police Department
AND TO: Mr. Stan Lowe, Police Complaint Commissioner

Overview

[1] At approximately 0156 hours on November 8, 2008, Constable [REDACTED] who was on active duty at the time, received a telephone call from her common law spouse, Mr. [REDACTED]. He reported that when driving home after consuming alcohol at a downtown Vancouver establishment, he collided with a parked motor vehicle. He left the scene and continued driving to the couple's residence.

[2] The conduct of Constable [REDACTED] and her immediate supervisor, Acting Sergeant [REDACTED] in response to the information provided by Mr. [REDACTED] resulted in six allegations of misconduct against Constable [REDACTED] and Acting Sergeant [REDACTED]:

Allegation 1: That on November 8, 2008, it is alleged that Constable [REDACTED] acted in a manner to wit: failed to disclose to her supervisor information she received from her common law husband with respect to a motor vehicle collision, that if proved would constitute misconduct pursuant to s. 77(3)(m)(ii) or s. 77(3)(h)(i) of the *Police Act*;

Allegation 2: That on November 8, 2008, it is alleged that Constable [REDACTED] and Acting Sergeant [REDACTED] acted in a manner to wit: failed to disclose to Constable [REDACTED] and Constable [REDACTED], the investigators of a possible hit and run accident, information received by Constable [REDACTED] from her common law husband with respect to a motor vehicle collision, that if proved would constitute misconduct pursuant to s. 77(3)(m)(ii) or s. 77(3)(h)(i) of the *Police Act*.

Allegation 3: That on November 8, 2008, it is alleged that Constable [REDACTED] acted in a manner to wit: agreed to write up the investigation file and investigate the collision in which her common law husband was a suspect, while knowing she was in an obvious conflict of interest, that if proved would constitute misconduct pursuant to s. 77(3)(m)(ii) or s. 77(3)(h)(i) of the *Police Act*.

Allegation 4: That on November 8, 2008, it is alleged that Acting Sergeant [REDACTED] acted in a manner to wit: allowed Constable [REDACTED] and Constable [REDACTED] to refuse to investigate the possible hit and run accident and allowed Constable [REDACTED] to continue on a course of action that he knew, or ought to have known, was a conflict of interest, that if proved would constitute misconduct pursuant to s. 77(3)(m)(ii) or s. 77(3)(h)(i) of the *Police Act*.

Allegation 5: That on November 8, 2008, it is alleged that Constable [REDACTED] acted in a manner to wit: submitted and "concluded" an incomplete and/or inaccurate police report with respect to the possible hit and run accident, that if proved would constitute misconduct pursuant to s. 77(3)(m)(ii), s. 77(3)(h)(i), or 77(3)(f)(i)(B) of the *Police Act*.

Allegation 6: That on November 8, 2008, it is alleged that Acting Sergeant [REDACTED] acted in a manner to wit: failed to review the file submitted by Constable [REDACTED] when it was brought to his attention by Constable [REDACTED] and Constable [REDACTED] due to their concerns that the information contained within the report appeared inadequate, that if proved would constitute misconduct pursuant to s. 77(3)(m)(ii) of the *Police Act*.

[3] The conduct from which the allegations arose was investigated by two senior members of the Vancouver Police Department. Each concluded that the conduct of officers [REDACTED] and [REDACTED] did not constitute a disciplinary default within the meaning of the *Code of Professional Conduct Regulation*, B.C.Reg. 205/98. The office of the Police Complaint Commissioner considered the internal investigations to be inadequate. Consequently, on February 24, 2010, the Commissioner ordered an external investigation to be undertaken by Sergeant Neil Collins of the New

Westminster Police Service Professional Standards Unit. The Commissioner summarized his reasons for so doing in the following terms:

Based on the information contained in the VPD Professional Standards Investigation file, I am of the opinion that the alleged misconduct by the respondents, if proven could constitute one or more disciplinary defaults under the *Police Act Code of Professional Conduct Regulation*. [B.C.Reg. 205/98]

I confirm the characterization of this matter as Public Trust and, pursuant to s. 55(3) of the *Police Act*, I hereby order that the Respondents be investigated for the disciplinary defaults of Deceit, Neglect of Duty and Discreditable Conduct as defined by the *Police Act Code of Professional Conduct Regulation*.

I am also satisfied that I have received sufficient information to warrant exercising my statutory authority and in the public interest, order an external investigation. The external investigation into these allegations shall include any other potential disciplinary defaults, or attempted disciplinary defaults, pursuant to s. 4(1) and s. 4(2) of the *Code of Professional Conduct Regulation* that may have occurred in relation to this incident.

[4] In his final investigation report dated November 22, 2010, Sergeant Collins concluded that Allegations 3 and 4 could be substantiated, but the others, not.

[5] December 2, 2010, Inspector [REDACTED], a member of the Vancouver Police Department acting as the delegated discipline authority, issued a decision stating his conclusion that none of the allegations had been substantiated. The Commissioner reviewed the decision and concluded that there was a reasonable basis to believe that it was incorrect in relation Allegations 1 through 4. As a consequence, the writer was appointed as an adjudicator pursuant to s. 117 of the *Police Act* with the obligations imposed by s. 117(3) of the *Act* in relation to Allegations 1 through 4, namely:

To review the investigating officer's report and the evidence and records referenced in that report;

To make [my] own decision on the matter; and

If the conduct complained of appears to constitute misconduct, to exercise the powers and perform the duties of discipline authority in respect of the matter.

[6] The Commissioner does not dispute the conclusion stated in the final investigation report that Allegations 5 and 6 should not be substantiated.

[7] I have reviewed the lengthy and thorough final investigation report and the addenda or appendices attached thereto including the two internal investigation reports compiled by the Vancouver Police Department; the transcripts of interviews with Constable [REDACTED], Acting Sergeant [REDACTED], and Constables [REDACTED] and [REDACTED]; and the general occurrence report pertaining to the incident. The materials were provided to me on January 4, 2011. Notification of the next steps to be taken must be provided within 10 business days of that date meaning not later than January 18, 2011.

Facts

[8] The bare facts are relatively straight-forward. At the time of the conduct in question Constable [REDACTED] had been a member of the VPD for approximately 3.5 years. She was working in a single-member patrol car in her assigned district on the night of November 7 and the early morning of November 8. Acting Sergeant [REDACTED] was her immediate supervisor on the night in question. He was also the supervisor to Constables [REDACTED] and [REDACTED].

[9] Mr. [REDACTED] was variously described as Constable [REDACTED] common law boyfriend or spouse. Whatever terminology is appropriate, the couple was co-habiting in a domestic relationship on November 8, 2008.

[10] Constable [REDACTED] personal cellular telephone records indicate that she received a call from Mr. [REDACTED] at 0153 hours on November 8. Constable [REDACTED] did not answer and Mr. [REDACTED] left a voice mail message. Constable [REDACTED] retrieved his voice mail message at 0155 hours. She called Mr. [REDACTED] at 0156 hours. They spoke for approximately 16 minutes. Constable [REDACTED] acknowledges that Mr. [REDACTED] told her that he had had a few drinks downtown and that he had struck a parked motor vehicle when driving home. He said he did not know where the accident had occurred or the make and model of the vehicle he had struck. He had not attempted to locate the owner. He left the scene and drove to the residence he shared with Constable [REDACTED]. There is no evidence that Mr. [REDACTED] advised Constable [REDACTED] of the time of the collision. The location of the accident as

described by Mr. [REDACTED] was in Constable [REDACTED] patrol district, but the residence she shared with him was not.

[11] After her conversation with Mr. [REDACTED], Constable [REDACTED] finished writing up a report on another incident with which she was involved, and then went in search of a damaged vehicle on Semlin Street which is where Mr. [REDACTED] thought the incident had occurred. Constable [REDACTED] could not recall whether she had also looked for a damaged vehicle on nearby Victoria Drive.

[12] Constable [REDACTED] reported nothing of her conversation with Mr. [REDACTED] or her search for the vehicle he had struck on the police radio. At approximately 0250 hours Constable [REDACTED] telephoned her supervisor, Acting Sergeant [REDACTED], about the call from Mr. [REDACTED] her fruitless search for the damaged vehicle, and her desire to "make the situation right". Constable [REDACTED] stated that Acting Sergeant [REDACTED] told her there was not a lot that could be done at that point and he did not suggest any course of action to her.

[13] At approximately 0335 hours on November 8, Constables [REDACTED] and [REDACTED] observed a parked car in the 400 block of Victoria Drive which appeared to have been damaged in a hit and run incident. They embarked upon an investigation and reported their find on the police radio. Constable [REDACTED] heard that report on her car radio. Soon thereafter, Acting Sergeant [REDACTED] telephoned Constable [REDACTED], as opposed to communicating by means of the police radio, to say that he was going to the scene that had been located by Constables [REDACTED] and [REDACTED] and she should also attend. She proceeded to the scene as directed.

[14] When Acting Sergeant [REDACTED] arrived at the scene Constable [REDACTED] was about to knock on the door of the residence of the registered owner of the vehicle. Acting Sergeant [REDACTED] instructed him to refrain from doing so. Constable [REDACTED] reports that he asked Acting Sergeant [REDACTED] why he should refrain from notifying the owner and Acting Sergeant [REDACTED] responded by saying "trust me, just hang on".

[15] When Constable [REDACTED] arrived at the scene, she and Acting Sergeant [REDACTED] had a conversation to which Constables [REDACTED] and [REDACTED] were not parties. They discussed options and the likely relationship between the damaged vehicle and Mr. [REDACTED] report to Constable [REDACTED]. Neither Constable [REDACTED] nor Acting Sergeant [REDACTED] told Constables [REDACTED] and [REDACTED] of Constable [REDACTED] earlier telephone conversation with Mr. [REDACTED]. Constable [REDACTED] inspected a piece of debris at the scene that was of the same colour as Mr. [REDACTED] vehicle. All of the circumstances point to the fact that the damaged vehicle located by Constables [REDACTED] and [REDACTED] was that which had been struck by the [REDACTED] vehicle.

[16] Unaware of the most relevant and material circumstances, and thinking that they had enough information to write up the incident, Constables [REDACTED] and [REDACTED] left the scene to take a meal break at a nearby Subway outlet. There is no suggestion that when they left the scene, anyone other than Constables [REDACTED] and [REDACTED] were going to complete the investigation into the likely hit and run incident, or write up the incident report.

[17] After Constables [REDACTED] and [REDACTED] departed, Constable [REDACTED] and Acting Sergeant [REDACTED] engaged in further conversation. They decided that Constable [REDACTED] should meet with Constables [REDACTED] and [REDACTED] and apprise them of her conversation with Mr. [REDACTED].

[18] Constable [REDACTED] met with Constables [REDACTED] and [REDACTED] at the Subway outlet and provided details of her conversation with Mr. [REDACTED]. They advised Constable [REDACTED] that because of the circumstances and Constable [REDACTED] relationship to Mr. [REDACTED], they did not want to be involved in writing up the incident. They insisted that Constable [REDACTED] do so. They advised her to fully describe the information she had received from [REDACTED]. She left Constables [REDACTED] and [REDACTED] knowing that they were not going to write up the incident. She informed Acting Sergeant [REDACTED] of the situation. I am unable to determine whether Constable [REDACTED] told Acting Sergeant [REDACTED] that she would write up the report or he directed her to do so. It is clear that Acting Sergeant [REDACTED] did not instruct her to refrain

from doing so, nor did he require Constables [REDACTED] and [REDACTED] to continue with the investigation and the preparation of a report. Acting Sergeant [REDACTED] knew and approved of the fact that Constable [REDACTED] would write up the investigation report. By this time, it was approximately 0420 hours. The end of the shift was approaching whereupon Constable [REDACTED] and Acting Sergeant [REDACTED] would be off duty for four days.

[19] Constable [REDACTED] wrote up the incident. The general occurrence report described the main offence as "suspicious pers/veh/occurrence" which occurred at 0337 hours on November 8, 2008 and was reported at 0337 hours on November 8, 2008. The damage to the vehicle was estimated at \$500. The record of the time of the incident and the time of the report are incorrect. There is no reliable evidence from which the actual value of the damage to the vehicle can be determined.

[20] Constable [REDACTED] described the incident as follows in the general occurrence report:

On 2008-11-08 at 0400 hours PC [REDACTED] observed a damaged vehicle parked on the west-side of the 400 block of Victoria, faced southbound. The vehicle was bearing BC plate of [REDACTED]. There were no persons around vehicle. Vehicle had the driver's side rear corner damaged, approximately \$500 worth of damage. Damage appears to be fresh. Unable to contact owner. File concluded.

[21] Constable [REDACTED] had reviewed the general occurrence report on the police computer. He thought it inadequate in the circumstances as he knew them. He discussed the inadequacies with Acting Sergeant [REDACTED] shortly before the end of their shift. According to Constable [REDACTED], Acting Sergeant [REDACTED] told to him not worry about it and it was not his concern. Acting Sergeant [REDACTED] did not read the report prepared by Constable [REDACTED] before the shift ended and the officers left for their days off.

[22] On one of his days off, Constable [REDACTED], who was concerned about the manner in which the incident had been handled and the content of the report, contacted Sergeant [REDACTED], the regular sergeant on the patrol team, and alerted him to his concerns. The internal investigation by the Vancouver Police Department

began soon thereafter. Sergeant [REDACTED] asked Constable [REDACTED] to inform him of all she knew about the incident.

[23] Subsequently, another member of the Vancouver Police Department added the following to the general occurrence report on December 1, 2008:

On 08-12-01 at approx 1600 hours I, PC [REDACTED] was asked to complete the following GO requirements for a Hit & Run Motor Vehicle Accident by Sgt. [REDACTED]. I was not present at the scene on 08-11-08, and only recently made aware of the accident.

At approx 1700 hours, I phoned Cst. [REDACTED] at home and asked her the necessary questions to complete the suspect vehicle and persons entity. I also asked her to e-mail me a written account of the telephone conversation she received in regards to the accident, and her subsequent actions. This will be added directly into the report as a PS page.

[24] The email which Constable [REDACTED] may have prepared in response to the request is not in the material before me.

[25] The base facts must be supplemented by reference to the transcript of the [REDACTED] interview with Constable [REDACTED]. She stated that her primary objective upon receiving the call from Mr. [REDACTED] was to locate the vehicle and the owner in order that the incident could be reported to ICBC. When asked if she considered the possibility of initiating an impaired driving hit and run investigation, Constable [REDACTED] responded as follows:

I guess it did and, it was a situation and that I felt extremely conflicted which is why I spoke with um the Acting Sgt. [REDACTED] between being [REDACTED] girlfriend and being a police officer and after when I spoke with [REDACTED] the next day you know it's one of these situations where you want to be his girlfriend but you know don't call me at work if this happens again. [sic]

The Investigator's Findings

[26] As I stated earlier in these reasons, Sergeant [REDACTED] submitted his final investigation report on November 22, 2010. In it he concluded that the failure of Constable [REDACTED] to immediately disclose to her supervisor the information she received from Mr. [REDACTED] with respect to a motor vehicle collision in which he had

been involved did not constitute misconduct; the failure of Constable [REDACTED] and Acting Sergeant [REDACTED] to inform Constables [REDACTED] and [REDACTED] of the information received from Mr. [REDACTED] at the scene of the collision did not constitute neglect of duty or discreditable conduct; Constable [REDACTED] decision to agree to write up the file and investigate the collision in which Mr. [REDACTED] was a suspect, while knowing she was in an obvious conflict of interest, constituted neglect of duty and misconduct; the decision of Acting Sergeant [REDACTED] to allow Constables [REDACTED] and [REDACTED] to refuse to investigate the collision and to allow Constable [REDACTED] to continue on a course of action that he knew, or ought to have known, was a conflict of interest, constituted neglect of duty and action which if known to the public would discredit the reputation of the Vancouver Police Department; the fact that Constable [REDACTED] submitted and "concluded" an incomplete and/or inaccurate police report with respect to the collision did not constitute misconduct or neglect of duty; and the failure of Acting Sergeant [REDACTED] to review the report submitted by Constable [REDACTED] when it was brought to his attention by Constables [REDACTED] and [REDACTED] did not constitute misconduct.

Analysis

[27] Sergeant Collins framed the issue of neglect of duty and misconduct in the context of s. 77 of the *Police Act*. So, too, did the Commissioner when ordering the appointment of an adjudicator to conduct a review pursuant to s. 117 of the *Police Act*. The Vancouver Police Department discipline authority was of a different view. His determination that there was no disciplinary default was made by reference to the *Code of Professional Conduct Regulation*.

[28] In my opinion the question of whether the conduct of either or both of Constable [REDACTED] and Acting Sergeant [REDACTED] warrants disciplinary action must be determined by reference to the *Code of Professional Conduct Regulation* and not by reference to the provisions of Part 11 of the *Police Act* as amended effective March 31, 2010.

[29] Prior to the amendment of the *Police Act*, the *Regulation* promulgated under the *Police Act* defined disciplinary defaults and discreditable conduct. The regulation was repealed effective March 31, 2010 at which time the definition of "misconduct" was incorporated into s. 77 of the *Police Act*. The statutory definition of misconduct differs markedly from the definition of disciplinary defaults in the *Regulation*.

[30] Sections 3 through 7 and 17 of the *Regulation* are relevant for present purposes:

Statement of core values

- 3 This Code is to be interpreted as affirming that all police officers
- (a) accept the duty to act without favour or personal advantage,
 - (b) are committed to treating all persons or classes of persons equally, regardless of 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, and
 - (c) agree to uphold rights and freedoms guaranteed or protected by law.

Disciplinary defaults

- 4 (1) In this Code, "disciplinary default" means
- (a) discreditable conduct,
 - (b) neglect of duty,
 - (c) deceit,
 - (d) improper disclosure of information,
 - (e) corrupt practice,
 - (f) abuse of authority,
 - (g) improper use and care of firearms,
 - (h) damage to police property,
 - (i) misuse of intoxicating liquor or drugs in a manner prejudicial to duty,
 - (j) conduct constituting an offence,

(k) being a party to a disciplinary default, or

(l) improper off-duty conduct.

(2) It is a breach of this Code to commit, or to attempt to commit, a disciplinary default referred to in subsection (1).

Discreditable conduct

5 For the purposes of section 4 (1) (a), a police officer commits the disciplinary default of discreditable conduct if

(a) the police officer, while on duty, acts in a disorderly manner or in a manner that is

(i) prejudicial to the maintenance of discipline in the municipal police department with which the police officer is employed, or

(ii) likely to discredit the reputation of the municipal police department with which the police officer is employed,

(b) the police officer's conduct, while on duty, is oppressive or abusive to any person,

(c) the police officer contravenes a provision of the Act, a regulation, rule or guideline made under the Act, or does not comply with a standing order of the municipal police department with which the police officer is employed,

(d) the police officer withholds or suppresses a complaint or report against any other officer,

(e) the police officer fails to report to an officer whose duty it is to receive the report, or to Crown counsel, any information or evidence, either for or against any prisoner or defendant, that is material to an alleged offence under an enactment of British Columbia or Canada, or

(f) the police officer suppresses, tampers with or fails to disclose to an investigating officer, or to the discipline authority of a respondent, information that is material to a proceeding or potential proceeding under Part 9 of the Act.

Neglect of duty

6 For the purposes of section 4 (1) (b), a police officer commits the disciplinary default of neglect of duty if

(a) the police officer, without lawful excuse, fails to promptly and diligently

(i) obey a lawful order of a supervisor of the police officer, or

(ii) perform his or her duties as a police officer,

(b) the police officer fails to work in accordance with orders, or leaves an area, detail or other place of duty without due permission or sufficient cause or, having left a place of duty with due permission or sufficient cause, fails to return promptly, or

(c) the police officer is absent from or late for duty without reasonable excuse.

Deceit

7 For the purposes of section 4 (1) (c), a police officer commits the disciplinary default of deceit if

(a) the police officer makes or signs a false, misleading or inaccurate oral or written statement or entry in any official document or record, or

(b) the police officer, with intent to deceive, falsify or mislead,

(i) destroys, mutilates or conceals all or any part of an official document or record, or

(ii) alters, erases or adds to any entry in an official document or record.

...

Mental element of disciplinary default

17 Unless otherwise specified in this Code, a police officer commits a disciplinary default if the police officer intentionally or recklessly committed the act or omission constituting the disciplinary default.

[31] By way of comparison, s. 77 of the amended *Police Act* provides as follows:

Division 2 — Misconduct

Defining misconduct

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;

- (b) "accessory to misconduct", which is knowingly being an accessory to any conduct set out in this subsection, including, without limitation, aiding, abetting, counselling or being an accessory after the fact;

- (c) "corrupt practice", which is

- (i) without lawful excuse, failing to make a prompt and true return of, or misappropriating, any money or property received in the performance of duties as a member,

- (ii) agreeing or allowing to be under a pecuniary or other obligation to any person in a manner that would likely be seen

to affect the member's ability to properly perform the duties of a member,

(iii) using or attempting to use one's position as a member for personal gain or other purposes unrelated to the proper performance of duties as a member, or

(iv) using or attempting to use any equipment or facilities of a municipal police department, or any other police force or law enforcement agency, for purposes unrelated to the performance of duties as a member;

(d) "damage to police property", which is

(i) intentionally or recklessly misusing, losing or damaging

(A) any police property, or

(B) any property that is in police custody or the care of which has been entrusted to the member in the performance of duties as a member, or

(ii) without lawful excuse, failing to report any loss or destruction of, or any damage to, any property referred to in subparagraph (i), however caused;

(e) "damage to property of others", which is

(i) when on duty, or off duty but in uniform, intentionally or recklessly damaging any property belonging to a member of the public, or

(ii) without lawful excuse, failing to report any such damage, however caused;

(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);

(g) "discourtesy", which is failing to behave with courtesy due in the circumstances towards a member of the public in the performance of duties as a member;

(h) "discreditable conduct", which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department, including, without limitation, doing any of the following:

(i) acting in a disorderly manner that is prejudicial to the maintenance of discipline in the municipal police department;

(ii) contravening a provision of this Act or a regulation, rule or guideline made under this Act;

(iii) without lawful excuse, failing to report to a peace officer whose duty it is to receive the report, or to a Crown counsel, any information or evidence, either for or against any prisoner or defendant, that is material to an alleged offence under an enactment of British Columbia or Canada;

(i) "improper disclosure of information", which is intentionally or recklessly

(i) disclosing, or attempting to disclose, information that is acquired by the member in the performance of duties as a member, or

(ii) removing or copying, or attempting to remove or copy, a record of a municipal police department or any other police force or law enforcement agency;

(j) "improper off-duty conduct", which is, when off duty, asserting or purporting to assert authority as a member, an officer or a member of the Royal Canadian Mounted Police and conducting oneself in a manner that would constitute a disciplinary breach of trust if the member were on duty as a member;

(k) "improper use or care of firearms", which is failing to use or care for a firearm in accordance with standards or requirements established by law;

(l) "misuse of intoxicants", which is

(i) owing to the effects of intoxicating liquor or any drug, or any combination of them, being unfit for duty when on duty or reporting for duty, or

(ii) without proper authority, making use of or accepting from any other person intoxicating liquor when on duty or when off duty but in uniform in a public place;

(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.

(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.

[32] While there are similarities between the *Regulation* and s. 77 of the *Police Act* with respect to the character of improper conduct, there are also differences. The most material is the fact that the *Police Act* contains no provision comparable to s. 17 of the *Regulation* which stipulated that an officer only committed a disciplinary default if the officer *intentionally or recklessly* committed the act or omission constituting the disciplinary default. Section 77 of the *Police Act* specifically stipulates that in respect of certain kinds of misconduct knowledge and intention are relevant. That appears not to be the case in respect of some other kinds of misconduct described in s. 77 where an objective standard of reasonableness is to be applied.

[33] The *Police (Misconduct, Complaints, Investigations, Discipline and Proceedings) Amendment Act* (Bill 7, 2009) enacted transitional provisions which were to apply to a "transitional complaint" defined as a one arising under a former enactment but in respect of which there had been no disposition under the enactment at the time the amended *Police Act* came into force on March 31, 2010. Section 11(2) of the *Amendment Act* provided as follows:

11(2) Subject to subsection (3) and without limiting sections 35 and 36 of the Interpretation Act, the new enactment applies in respect of a transitional complaint and an investigation or proceeding initiated or instituted under the former enactment.

[34] Section 35(1)(d) of the *Interpretation Act* stipulates that the repeal of an enactment does not affect an offence or contravention arising under the repealed enactment. There is a strong presumption that a new enactment's definition of an offence does not apply to acts or conduct that did not constitute an offence under the repealed enactment. The point was recently discussed by the Court of Appeal in *R. v. Truong*, 2010 BCCA 536, at para. 15:

[15] In *R v. Bickford* (1989), 51 C.C.C. (3d) 181 (Ont. C.A.), Robins J.A. succinctly stated the applicable law of statutory interpretation, at 185:

As a matter of fundamental principle, a statute is not to be construed as having a retrospective operation unless such a construction is made evident by its terms or arises by necessary implication. However, the presumption against retrospective construction has no application to enactments which relate only to procedural or evidentiary matters. Speaking generally, no person can be said to have a vested right in procedure or a right in the manner of proof that may be used against him. *Howard Smith Paper Mills Ltd. v. The Queen*, [1957] S.C.R. 403; *Wildman v. The Queen* (1984), 14 C.C.C. (3d) 321 (S.C.C.). ... His right is to be tried according to law, that is, in accordance with the evidentiary rules and procedural requirements in effect at the time of his trial.

[35] While the procedural changes added to the *Police Act* effective March 31, 2010 do apply to transitional complaints, I am unable to discern anything in the *Police Act* or the *Amendment Act* to suggest that whether conduct prior to March 31, 2010 was offensive should be adjudged by reference to the newly-enacted definition of "misconduct" in s. 77 of the *Police Act*, rather than by reference to the definition of "disciplinary default" and the definitions of "neglect of duty" and "deceit" contained in the *Regulation* with due regard for s. 17 of the *Regulation* stipulating that conduct must be intentional or reckless in order to constitute a disciplinary default.

[36] It is not appropriate, at this juncture, to consider the extent to which intention or recklessness is relevant to the assessment of various kinds of misconduct as defined by s. 77 of the *Police Act*. That determination should be left for consideration in the context post-March 31, 2010 conduct. Similarly, I do not

consider it appropriate to consider whether any of the misconduct described in s. 77 is the same as misconduct described in the *Regulation*.

[37] In my opinion, the appropriate course is to proceed on the basis that the question of whether the conduct of Constable [REDACTED] or Acting Sergeant [REDACTED] should result in disciplinary action must be resolved by reference to the provisions of the *Regulation* without reference to s. 77 of the *Police Act*. That said, the procedural aspects of the amended *Police Act* are fully operational by virtue of the transitional provisions. Moreover, to the extent some kinds of disciplinary action specified in the amended *Police Act* are less onerous than that contemplated by the *Regulation*, the person or persons in respect of whom disciplinary default for pre-March 31, 2010 conduct is found, are entitled to the benefit of the more lenient sanctions if appropriate in the circumstances.

[38] It follows that my task is to assess the evidence accumulated in the course of the external investigation and to determine whether the conduct of either Constable [REDACTED] or Acting Sergeant [REDACTED] appears to have contravened the *Regulation*. I do not consider the fact that the Commissioner has characterized the misconduct as that described by various paragraphs of s. 77 of the *Police Act* to be fatal to the assessment. The question is whether the conduct identified as that of concern appears to constitute a disciplinary default within the meaning of the *Regulation*.

(a) Failure to Disclose Information to Supervisor

[39] The first complaint is that Constable [REDACTED] neglected a duty by failing to disclose to her supervisor information she received from her common law husband with respect to a motor vehicle collision. The external investigator, Sergeant [REDACTED], concluded that the complaint should not be substantiated. The Commissioner has determined that there are reasonable grounds to conclude that that determination is incorrect.

[40] On this point the question is whether, by virtue of s. 6 of the *Regulation*, Constable [REDACTED] committed the disciplinary default of neglect of duty because,

without lawful excuse, she failed to promptly and diligently perform her duty as a police officer. One of the duties confirmed by s. 3(b) of the *Regulation* is the duty to act without favour or personal advantage.

[41] By her own admission in the course of her interview with Sergeant [REDACTED] and as suggested by her conduct in any event, Constable [REDACTED] objective, upon receiving the call from Mr. [REDACTED] was to locate the vehicle that had been struck in order that the owner and ICBC could be notified. She did not intend to take steps to have the law enforced as against Mr. [REDACTED] who, by his telephone admission to her, had acted unlawfully by failing to remain at the scene of the accident in which he had been involved.

[42] Constable [REDACTED] conduct in response to the call from Mr. [REDACTED] indicates that she was aware of the conflict in which she had been placed. She states that she was not familiar with the Vancouver Police Department's regulations and procedures pertaining to conflict of interest.

[43] Her omission to broadcast the fact that she had received information indicating that a parked vehicle had been struck and damaged by a passing motorist to other officers on duty in the patrol zone but the actual whereabouts of the damaged vehicle were unknown so that officers should be on the lookout for it; her omission to broadcast the source of her information; her decision to telephone her supervisor rather than reporting her information and actions on the police radio; and her intention to locate the vehicle so that ICBC and the registered owner could be notified, all support the conclusion that Constable [REDACTED] appears to have acted in a manner that was intended to favour Mr. [REDACTED] by permitting him to avoid sanction for a hit and run violation, and possibly an impaired driving or "over .08" driving investigation. Constable [REDACTED] has proffered no lawful excuse to explain her conduct in response to [REDACTED] call.

[44] It appears that in acting as she did in response to the information she received from Mr. [REDACTED] with whom she had a common law relationship, Constable [REDACTED] failed to promptly and diligently perform one of her duties as a police officer,

namely to facilitate the proper investigation of an offence which had been reported to her, in order to favour Mr. [REDACTED]. Constable [REDACTED] should have declined any involvement in the matter. She should have immediately advised her supervisor of the information she had received in order that the supervisor could decide upon the appropriate course of action, including investigation and follow-up which did not involve Constable [REDACTED].

[45] In my opinion, the evidence in relation to this allegation appears sufficient to substantiate a finding that Constable [REDACTED] committed the disciplinary default of neglect of duty.

(b) Failure to Disclose Information to Investigating Officers

[46] The second complaint is that Constable [REDACTED] and Acting Sergeant [REDACTED] neglected a duty by failing to disclose the information that Constable [REDACTED] had received from Mr. [REDACTED] to Constables [REDACTED] and [REDACTED] who discovered the damaged vehicle and were investigating a possible hit and run accident. The external investigator, Sergeant Collins, concluded that this complaint should not be substantiated. The discipline authority agreed. The Commissioner concluded that there were reasonable grounds to conclude that the determination was incorrect.

[47] The question is whether the failure to promptly and diligently advise the investigating constables at the scene of the information she had received constitutes a failure on the part of either Constable [REDACTED] or Acting Sergeant [REDACTED] to perform a duty that each of them owed as police officers.

[48] Constable [REDACTED] went to the scene of the investigation initiated by Constables [REDACTED] and [REDACTED] at the direction of her supervisor, Acting Sergeant [REDACTED]. She had previously apprised Acting Sergeant [REDACTED] of that which she knew from her conversation with Mr. [REDACTED]. As between the two of them, Acting Sergeant [REDACTED] was the dominant force. Acting Sergeant [REDACTED] actions at the scene and his failure to ensure that the investigating officers were provided with all information that might be relevant to their investigation may have resulted from his

uncertainty about how to manage the obvious conflict. One can only speculate about how events might have unfolded had Constables [REDACTED] and [REDACTED] remained at the scene rather than leaving for a meal break.

[49] In any event, soon after the departure of Constables [REDACTED] and [REDACTED] Constable [REDACTED] and Acting Sergeant [REDACTED] agreed that Constable [REDACTED] must meet with the officers and apprise them of all she knew. The evidence suggests that it was Constable [REDACTED] rather than Acting Sergeant [REDACTED] who directed the process and determined that relevant information should be kept from the investigating officers. The evidence would not appear to support the conclusion that Constable [REDACTED] should be faulted for taking direction with respect to disclosure from Acting Sergeant [REDACTED]. In my opinion, the evidence does not appear to substantiate this complaint as against Constable [REDACTED].

[50] Because of the decision made at the scene soon after the departure of Constables [REDACTED] and [REDACTED] to have Constable [REDACTED] find and fully apprise the constables of her knowledge, I think it more likely that Acting Sergeant [REDACTED] decision not to inform the investigating officers at the scene arose from an error in judgment rather than from an intentional decision by Acting Sergeant [REDACTED] to conceal relevant information.

[51] In sum, the evidence does not appear to substantiate this complaint as against either Constable [REDACTED] or Acting Sergeant [REDACTED].

(c) *Agreeing to Write Up Investigation Report*

[52] The third complaint relates to the fact that Constable [REDACTED] neglected a duty by agreeing to write up the investigation file and to investigate the collision in which Mr. [REDACTED] was a suspect.

[53] On all of the evidence, it does not appear that Constable [REDACTED] intended to breach a duty owed by her as a police officer rather than to comply with an order from a supervising officer. There is reason to question whether Constable [REDACTED] awareness that she was embroiled in a conflict of interest would constitute a lawful

excuse to disobey the order of a supervisor. On balance, given a supervising officer's responsibility to ensure that the law is applied without favour to anyone and his awareness of an obvious conflict, there can be little doubt that the order given by Acting Sergeant [REDACTED] to Constable [REDACTED] was not lawful. In sum, because she appears to have been acting in response to an order from her acting supervisor, it appears that Constable [REDACTED] lacked the necessary intention to breach a duty owed by her as a police officer. This complaint should not be substantiated.

(d) Failure to Provide Appropriate Directions

[54] The fourth complaint is that Acting Sergeant [REDACTED] neglected a duty by allowing Constables [REDACTED] and [REDACTED] to refuse to investigate the possible hit and run accident and allowed, if not directed, Constable [REDACTED] to continue on a course of action that he knew, or ought to have known, was a conflict of interest.

[55] Acting Sergeant [REDACTED] says that he was not versed in the Vancouver Police Department's regulations and procedures pertaining to conflict of interest. Whether or not Acting Sergeant [REDACTED] had been instructed in the management of conflicts of interest, it should have been obvious to him as a matter of common sense that it was inappropriate to allow Constable [REDACTED] to investigate and write up a report in relation to an incident involving her common law partner, Mr. [REDACTED], when the overriding responsibility of a police officer is enforce the law without favour to anyone. If he was not prepared, or felt unable because he was himself a constable serving as a sergeant in an acting role, to direct Constables [REDACTED] and [REDACTED] to carry on with the investigation, the appropriate course for Acting Sergeant [REDACTED] to follow was to inform his supervisor of the difficulty he faced. Responsibility for the investigation and the preparation of a report would undoubtedly have been assigned to an appropriate officer or officers.

[56] Police officers must be aware of their obligation to be scrupulous in the discharge of the duties to which they are sworn, primary among which is the obligation to enforce the law without favour to anyone. The obligation and the burden are onerous, but they must be accepted and discharged, respectively,

without exception. Acting Sergeant [REDACTED] decision to let Constable [REDACTED] proceed, exacerbated by his failure to look at her incomplete and misleading general occurrence report when he was apprised of Constable [REDACTED] concern about its content, can only be construed as an attempt by Acting Sergeant [REDACTED] to permit Mr. [REDACTED] to be accorded favourable treatment that would not have been accorded someone who was a stranger to Constable [REDACTED]. It appears that Acting Sergeant [REDACTED] did not properly discharge his obligation to appropriately supervise the officers accountable to him on November 8, 2008.

[57] The fact that Acting Sergeant [REDACTED] was serving in an acting capacity does not excuse his conduct. I am unable to perceive of any lawful excuse that Acting Sergeant [REDACTED] may have had for managing the conflict in the manner he did. In fact the conflict was not managed at all. The only beneficiary was Mr. [REDACTED] who escaped investigation or sanction in relation to his conduct on November 7 or 8, 2008.

[58] In all of the circumstances, it appears that Acting Sergeant [REDACTED] failed to discharge one of his duties both as a police officer and as an acting supervisor. It appears that the evidence is sufficient to substantiate this complaint.

Notice of Next Steps

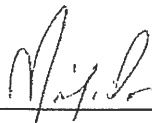
[59] As required by s. 117(8) of the *Police Act*, I hereby provide notice to Constable [REDACTED] and Acting Sergeant [REDACTED] as follows:

- (a) For the reasons set forth herein, the evidence referenced in the final investigation report appears sufficient to substantiate the allegation that Constable [REDACTED] committed the disciplinary default of neglect of duty within the meaning of the *Code of Professional Conduct Regulation* by failing to promptly and diligently disclose to her supervisor information she received from her common law partner, Mr. [REDACTED], with respect to a motor vehicle collision in which he had been involved;
- (b) For the reasons set forth herein, the evidence referenced in the final investigation report appears sufficient to substantiate the allegation that Acting Sergeant [REDACTED] committed the disciplinary default of neglect of duty within the meaning of the *Code of Professional Conduct Regulation* by permitting Constables [REDACTED] and [REDACTED] in relation to whom he was a supervisor, to refuse to investigate a hit and run accident, and by

allowing Constable [REDACTED] to continue with the investigation and to write a report in circumstances where he knew that Constable [REDACTED] was in a conflict of interest.

- (c) A prehearing conference will be offered to each of Constable [REDACTED] and Acting Sergeant [REDACTED];
- (d) Each of Constable [REDACTED] and Acting Sergeant [REDACTED] has the right, pursuant to s. 119 of the *Police Act*, to request permission to call, examine or cross-examine witnesses at the discipline proceeding, provided such request is submitted in writing within 10 business days following receipt of this notice of decision.
- (e) The range of disciplinary or corrective measures being considered include:
 - a. Requiring each of Constable [REDACTED] and Acting Sergeant [REDACTED] to undertake or retake training or retraining in relation to the meaning of conflict of interest and the appropriate management thereof; and
 - b. Reprimanding each of Constable [REDACTED] and Acting Sergeant [REDACTED] in writing.

Dated at Vancouver, British Columbia this 14th day of January, 2011.



Hon. Ian H. Pitfield, Adjudicator and Discipline Authority