

Abbotsford, British Columbia, November 30, 2012

OPCC File No. 2010-5294

DA File No. 10-16

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

**AND IN THE MATTER OF  
A DISCIPLINE PROCEEDING RESPECTING  
CONSTABLE "X"  
OF THE ABBOTSFORD POLICE DEPARTMENT**

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**FINDINGS OF DISCIPLINE AUTHORITY  
AT DISCIPLINE PROCEEDING  
(section 125(b))**

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**Introduction**

A discipline proceeding has been held regarding two allegations of misconduct made against Cst. "X" and denied by him. There is a third allegation of misconduct, admitted by Cst. "X", which is not being resolved during this proceeding. That allegation is to be dealt with by Chief Constable Rich of the Abbotsford Police Department, of which Cst. "X" is a member. Having said that, the allegations are three parts of one interwoven, protracted event and I will necessarily be making references to the admitted misconduct and drawing my own conclusions about it in order to make sense of the two allegations dealt with at this discipline proceeding. In so doing it is not my intention to interfere with or usurp the hearing that will in due course be held by Chief Constable Rich.

**Background**

In May 2010 Mr "C" filed a complaint with the office of the Police Complaint Commissioner. The basis of the complaint was that Cst. "X" a member of the Abbotsford Police Department, using his office as a police officer, forced him to pay money. Additionally he set out in the complaint that Cst. "X" had done an illegal search on him through "CEPAK" (CPIC). The complaint was determined to be admissible and, if substantiated, would constitute misconduct pursuant to section 77 of the Police Act. An investigation followed during which the investigator, Sgt. Fefchak, took a

statement from Cst "X" on November 23, 2010. Because some of the contents of that statement respecting use of the CPIC system appeared to be inconsistent with computer and GPS records a further statement was taken from the constable by Sgt. Fefchak on March 9, 2011. As a result of his investigation Sgt. Fefchak, in his Final Investigation Report, identified four possible disciplinary defaults as follows:

1. Cst. "X" used his position as a police officer to force Mr "C" to repay monies.
2. Cst. "X" used the CPIC to conduct a search on Mr "C" for personal reasons.
3. Cst. "X" disclosed the results of the CPIC search to his girlfriend "Y".
4. Cst. "X" provided information in his statement of November 23, 2010 regarding use of the CPIC which was not in accord with computer records.

In due course allegation # 1 was not substantiated, # 2 was. The non-substantiation of the first allegation of misconduct ended that matter. Although substantiated, allegation # 2 will not, because of the peculiarities of the new *Police Act*, as pointed out by the Supreme Court of British Columbia, be dealt with by me in this process.

My findings with respect to the two remaining allegations which have been denied by Cst. "X" are set out below.

#### Improper Disclosure

Mr. Woodall correctly notes that the *Code of Professional Conduct Regulation* is applicable to this allegation since the admitted disclosure occurred on, or shortly after, October 23, 2009, prior to the amendments to the *Act* came into force the next year (the deceit allegation, in relation to the November 23, 2010 statement, occurred after the amendments came into force).

Section 4 of the Code defined "improper disclosure of information" as a "disciplinary default". The relevant portions of Section 8 of the Code stated:

#### **Improper disclosure of information**

**8** For the purposes of section 4 (1) (d), a police officer commits the disciplinary default of improper disclosure of information if the police officer

- (a) except as required in the performance of his or her duties, as authorized by his or her supervisor or as required by due process of law,
  - (i) discloses information that is acquired by the police officer in the course of being a police officer...

Section 17 of the Code stated:

**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.

Cst. "X" admits that his accessing of the CPIC system was for personal reasons and therefore misconduct. In order to assess whether the disclosure of information was contrary to the Code, it is necessary to briefly set out the circumstances in which the information was obtained and what that information was.

The constable had conducted a name search of Mr "C" through CPIC on the morning of October 23, 2009 (the CPIC records show afternoon times but that is because the CPIC system is based in Ottawa). Mr "C" had, that day, commenced working on a renovation at the residence of "Y" (a constable with the Police Department and the girlfriend of Cst. "X", where Cst. "X" also lived. Among other information provided in the search of Mr "C" 's name, under 'REMARKS', was the following entry:

"2) SUSPECT OF CHILD EXPLOITATION OFFENCES. IF CHECKED OBTAIN DET  
3) AILS, WHERE, WHEN, AND WHOM WITH AND  
4) FORWARD SAME TO CST "T" OF THE RCMP ICE TEAM VIA  
5) TELEPHONE AT ."

Cst. "X" in his statement to Sgt. Fefchak on November 23, 2010, referring to the CPIC search said (lines 284-291; 296-300):

"Well like I mean there's some stuff that came back on it and I was kinda taken back by it. Uh, one - one of them was something to do with ICE and I - I'm - I'm not sure if ICE is what I thought it meant. And uh, it was sealed. Like there's nothing -- you couldn't get any information on that, but there was a file related to Mr "C" with ICE. And I think ICE has to do something with uh, children or something like that, or - I'm not even positive what it is. I know that it was sealed and you couldn't access that .... Uh, and there was certain thing that came back about him about uh, possible stuff with children I think....

"...from the feeling I got I wasn't sure and I - it took me two, three days and I said "Y". I don't know if I should tell you this or not. I said well you're a police officer, I can advise you of this....I said there's some stuff with children that you might want to be aware, be careful with your children around the house"

In her statement to Sgt. Fefchak on October 25, 2010, "Y" : acknowledges having received CPIC information from Cst. "X" (lines 435-438):

"Uh, and then he was not interested at all in seeing the ticket. And – then he said look, I – I have concerns with – I don't want this guy around the kids anymore. I don't know what to tell you about this but there's some flags there that you need to be cautious of, so."

"Y" : acknowledged that she understood there were flags through CPIC.

At the discipline proceeding Cst. "X" was much more specific about the meanings of the entries against Mr "C" 's name than he had been when queried by Sgt. Fefchak (p. 81, l. 23 to p. 82, l. 4):

"As I did the check, there is an ICE, Integrated Child Exploitation, that came onto the CPIC. Integrated Child Exploitation is in regards to individuals that are involved in child exploitation, sexual deviant (sic) with children, pornography, all kinds of different criminal activities with children."

Cst. "X" said in answer to a suggestion by his counsel that the entry indicated to him that Mr "C" "had committed child exploitation" (p. 86, ll. 6-7) which he immediately qualified by accepting that it was not a criminal matter and that Mr "C"

was only a suspect, however as a suspect a matter of concern to him.

Although a matter of concern he did not inform "Y" : that day but waited a "couple of days" (p. 88, l. 7). His explanation at the hearing for finally disclosing the information was that he had been told by "Y" : after a couple of days that Mr "C"

had been "making some bizarre comments to her" (p. 88, ll. 11-12), had invited her daughter to go swimming with him, had entered her bedroom (which had nothing to do with the construction), had looked into her "panty drawers and bra drawers" (p. 88, l. 21) and asked her details about her work as a police officer with vice projects.

Mr "C" was never questioned by Sgt. Fefchak regarding the allegations noted immediately above but was asked whether he had sexually come on to "Y" :. This he denied. While his feelings of being intimidated by Cst. "X" did not arise until later on, those feelings are indicative of what powers he felt were possessed by police officers and supports a conclusion that it is highly improbable that he would have engaged in the kind of conduct alleged by "Y" :, particularly looking into her panty and bra drawers.

While it is possible that "Y" told Cst. "X" about the alleged bizarre comments without his knowing that the matters referred to therein had, at least for the most part, not likely happened, it is more probable that, given that nothing was done by him over the next two weeks to deal with what he perceived as a potential threat, he was aware that there was little or no substance to the statements of "Y" regarding Mr "C" 's alleged improprieties, particularly the one referencing looking into "Y" 's panty and bra drawers.

A cursory examination of Mr "C" 's complaint or a reading of his statement to Sgt. Fefchak clearly indicate how intimidating he found his dealing with Cst. "X". The fact that Cst. "X" did not use his office as a police officer to extort money from him and that allegation was not substantiated does not alter the fact that he was very concerned in his dealing with Cst. "X", on one occasion asking whether the comment by Cst. "X" that there would be ramifications if he didn't repay monies in connection with the contract "meant that he (Cst. "X") was going to beat me up" (lines 45-46).

On the morning of October 23, 2009, Mr "C" had received a ticket for having tinted windows on his vehicle. On arriving at "Y" 's residence he told her about the ticket. In her statement to Sgt. Fefchak she indicated that Mr "C" had given the ticket to her complaining that the police were rude and had kept him for a long time. She said she kept the ticket at her house and intended to show it to Cst. "X". However Cst. "X" had told her he had seen two vehicles parked outside her home and had run both plates, one of which came back to Mr "C". He then told her about "flags" raised by the CPIC; that Mr "C" was flagged. She recalls him saying "There's some special unit that thinks is - that monitors sex offenders" (lines 517-518).

While not stating an exact time when Cst. "X" told her that he had run the plates, one of which came back to Mr "C", it is clear from "Y" 's statement that it was very close in time to Mr "C" 's receipt of the ticket and in any event within a couple of days of the search. Cst. "X" had not run Mr "C" 's plate. The information she had could only have come from Cst. "X"

The conclusion which I draw is that Cst. "X" was not being truthful to "Y" and the most reasonable inference flowing from that is that he did not wish to disclose the improper search. The only other conclusion which could reasonably be gleaned from both her statement and his was that the two of them acted in concert, again, to protect Cst. "X" from disclosure of the CPIC search. Each points to the conclusion that not only did Cst. "X" not run the plates but he knew he had not run them when he spoke to Sgt. Fefchak.

Cst. "X" who, in his words, did not meet Mr "C" until "probably two or three weeks into" the renovation (Nov. 23, lines 25-26) said "Y" brought the ticket to his attention and that he might have seen the ticket quickly but "never like held it and like kept it with me or something like that" (Nov. 23, lines 208-209).

Mr "C" does not agree with the statements of "Y" and Cst. "X" regarding the ticket. He indicated in his statement to Sgt. Fefchak that he might have told "Y" that he had received a ticket but never showed or gave the ticket to her. He said he never asked her to check into it: "You can't check into a tinted window ticket, there's nothing to do.... I just paid the ticket" (lines 566-567, 573). Nowhere in her statement does "Y" say that Mr "C" asked her to check the ticket. She did say referencing her conversation with Mr "C" "so I said to him like give me the ticket, I'll show it to him" (lines 946-947). However I do not discount the possibility that "Y" interpreted her conversation with Mr "C" as his wish to have the ticket looked into.

For the purposes of this decision I am satisfied that while "Y" may have seen the ticket briefly it was not kept by her nor shown by her to Cst. "X". This helps to explain why Cst. "X" ran Mr "C" 's name. While as indicated by him, he had heard that Mr "C" had been stopped for an unusually long period of time in connection with the tinted window ticket and, as further indicated, had received information from "Y"; it is highly probable that the only information he received was a name. Had "Y" retained the ticket it is likely that, in providing information to Cst. "X", he, as an experienced officer in the Integrated Road Safety Unit, would have asked "Y" to provide the full name of Mr "C" as it appeared on the ticket or even more likely would have asked her for the plate number which, although difficult to read, was also on the ticket. There is no evidence that he did either. He knew that the more information provided the better the CPIC result. The second CPIC search provided Mr "C" 's middle name which, as indicated, was on the ticket. While Cst. "X" now acknowledges that he did an improper CPIC search that was not his initial position. "F" in his statement to Sgt. Fefchak said that he had spoken to Cst. "X" and had wanted to know if (Cst. "X") did a CPIC search on (Mr "C") and Cst. "X" said "...no. Somebody might have but it wasn't him" (line 175).

Cst. "X" 's statement to Sgt. Fefchak that he ran two plates is more evidence that he considered running Mr "C" to be improper. It is highly unlikely that he would remember running two plates (where there is no independent evidence of such having occurred, only Cst. "X" "belief" that plates were run) and yet forget the circumstances of a name search which was done twice and the results of which were of significant concern to him. It was a concern as he considered Mr "C" to be a potential threat to the children of "Y". How much of a threat he actually

considered Mr "C" to be problematic however in that no statements were made by him or "Y" to Sgt. Fefchak, nor evidence given at this hearing to indicate that either of them had ever confronted Mr "C" regarding their concerns, nor taken any specific steps to safeguard the children. Mr "C" continued working in the house for approximately two weeks after the disclosure of the CPIC information to "Y". "Y" agreed with Sgt. Fefchak that Mr "C" was "a fairly soft mannered man...not a very uh – he's not uh, a maybe strong personality" (lines 744-745) and that Cst. "X" "has a very strong personality" (line 749). Would a police officer with a strong personality living in a common law relationship with another police officer, if seriously concerned, not take some step to ameliorate the situation giving rise to the concerns? The non actions of Cst. "X" were inconsistent with his expressed concerns.

Considering the evidence as a whole I am satisfied on a balance of probabilities that Cst. "X" rather than having a pressing concern for the safety of "Y" children, was more concerned with the possible of discovery of his improper CPIC search. Even had I decided that the concern for the children existed at such a level that something needed to be done, I am not satisfied that his only or best option was to warn "Y".

The *Police Act* in force at the time sets out the duties of a municipal police officer which, basically stated, are to preserve the peace and prevent crime. Those duties may include but are not limited to warning persons who may be potential victims of criminal activity. A warning is one way of meeting the duty imposed but in all cases the giving of a warning depends on the circumstances. Here Cst. "X" was initially uncertain whether or not to warn "Y" and he stated that he waited a couple of days. He was aware from the CPIC display that he could contact Cst. "T" whose name and phone number were part of the CPIC information. Cst. "X" was unable in his evidence to offer any explanation for having failed to do so. Nor is there any evidence that he contacted his superiors in the Abbotsford force. His expertise was road safety, not investigation of child exploitation offences. Resources for the latter were available to him. It is clear to me that warning "Y"; although concerned about its propriety, was in his mind the only option, not because it was best for "Y" and her children but because it was the only way to avoid revealing that he had conducted an improper CPIC search. That is not to say that Cst. "X" did not have a genuine concern for "Y" and her son and daughter but only that for a period of time the greater concern was in connection with a CPIC run on Mr "C" 's name.

The Courts in different circumstances (failing to warn as opposed to providing information by way of warning where there is a general duty not to disclose such information) have set out when a warning is appropriate. While not strictly on point to the circumstances here the private civil law with respect to failure to warn is that police

officers have a public duty to the public at large and only in limited circumstances to individual members of the public. In cases of perceived danger to individuals, unless there is a specific identifiable threat to a specific, identifiable individual or group of individuals, there is no duty to warn. It would seem that statement of the law is applicable here. In Cst. "X" 's case it is clear that not only was there no specific identifiable threat, there was a very limited understanding by Cst. "X" of what the threat might be. He had retrieved information about an individual who had been convicted of nothing but suspected of unspecified child exploitation offences. Surely his first duty was to identify the threat by contacting Cst. "T" or getting further instructions from his superior, as it is clear that time was not a critical factor. I have not overlooked the evidence of Sgt. Fefchak that Cst. "X" "was compelled" to tell "Y".

: the result of the CPIC search even though he had improperly accessed the CPIC system. For the reasons above I do not agree with Sgt. Fefchak that his duty compelled him to tell "Y" : what he had discovered. Perhaps Sgt. Fefchak placed the duty more accurately by stating "when he saw the information he put his policeman's hat on and he...he had a duty to somehow to protect those children in that house from <sup>Mr "C"</sup>

" (p. 67, l. 23 to p. 68, l. 1). The manner chosen by Cst. "X" was not the correct way to "somehow protect (the) children" given the amount of time available to him to exercise other options and given the low level of his concern as demonstrated by his failure over the following two weeks to accost Mr "C" about his activities around the house and about the contents of the CPIC.

I reject the submission that it would have been speculative for Cst. "X" to have contacted his superior or Cst. "T" as a means of protecting the children. Rather it is a reasonable inference to draw from the evidence, particularly when Cst. "T" has provided his phone number and has asked that details be provided. I acknowledge that the circumstances in this case are not precisely what Cst. "T" likely had in mind but unquestionably it is information on which he would have acted to ensure the safety of "Y" : children even if it was only to check the CPIC entry which would have revealed that Mr "C" was not suspected of child exploitation offences.

I have also considered the submission that as "Y" : was also a police officer it was not improper to disclose to her the contents of the CPIC. I am satisfied she could not have been in a better position (as a police officer) to receive that information than was Cst. "X" . If she did not have a legitimate police based reason to access the CPIC information herself, Cst. "X" , who obtained it improperly, could not legitimately pass it on to her, nor could she legitimately receive it.

With respect to the submission that there was no policy which would have prevented Cst. "X" from disclosing the information obtained from CPIC I refer to appendix 34 included with the Final Investigation Report which states among other things:



- (1) The Abbotsford Police Department will participate in, and conform to, the Canadian Police Information Centre System.
- (5) All information contributed to or received from CPIC is supplied in confidence and must be protected against disclosure to unauthorized agencies or individuals.
- (6) The information stored in the CPIC system is for law enforcement purposes only. This information shall not be released or disclosed to unauthorized persons or agencies.

In determining if there was improper disclosure I refer also to the Oath of Confidentiality of Cst. "X" also contained in the materials accompanying the Final Investigation Report. No matter what Cst. "X" says about his memory of events when he was later interviewed it was clear to him at the time he did the CPIC search he was bound by his oath not to disclose his CPIC information except as required by his official duties or as duly authorized. In this case I am satisfied, as previously indicated, that "Y" was not a person qualified to receive the results of the CPIC search.

I have also considered the concerns raised on behalf of Cst. "X" with respect to Mr "C" 's wishes to use the complaint filed by him against Cst. "X" as a means of settling a small claims action commenced against him by "Y". This in no way affects my view of the general reliability of the statements made by Mr "C".

#### Providing Details of a CPIC search which were inconsistent with computer records

As noted earlier, this allegation arose after amendments to the Act came into force. The applicable paragraph of subsection 77(3) of the Act states:

- (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;

Most of the details concerning Cst. "X" 's accessing of the CPIC system are set out above and I will only briefly refer to them here.

On October 23, 2009 Cst. "X" did a name search in the CPIC system on Mr "C" and a second search on Mr "C". A statement was taken from him by Sgt Fefchak on November 23, 2010 in which he stated that the CPIC search was a 'plate' search, that is, that he had obtained the information by running the licence plate of Mr "C" 's vehicle as part of his police duties, which vehicle he had seen in front of "Y" 's house in White Rock. A later search of CPIC and GPS records disclosed that the search was not done by running a licence plate and that Cst. "X" was not in White Rock at the time of his search.

With this information Sgt. Fefchak took a second statement from Cst. "X" on December 7, 2010. In the second statement Cst. "X" reiterated his belief that he had run a licence plate to obtain the CPIC information, even though acknowledging it was clear from the records he had not done so. He said he based his belief, at least in part, on the fact that he runs hundreds of plates on a daily basis and on the lapse of time between getting the CPIC information and his November 23<sup>rd</sup> statement. To be more specific, he said he recalled seeing two vehicles in front of the house in White Rock, a green Cherokee and a white van, and ran both plates, one coming back to Mr "C". He said the search was for police purposes. As previously indicated there is no evidence that Mr "C" 's vehicle plate was ever run; there is evidence that it was not run between October 1 and December 1, 2009, other than by the Surrey officer who gave him the ticket shortly before 10:00 am on October 23 (Appendix 16)

The evidence all points to an attempt by Cst. "X" to hide the fact that he had done an improper search and may well have been influenced by "F" 's threat to "have his ass" (line 36) if he had done such a search. To avoid discovery, the temptation to make up a story of a plate search was irresistible.

In conclusion, with respect to the allegation of improper disclosure I am satisfied that the allegation has been proven on a balance of probabilities and summarize below, the factors which have lead to that conclusion:

- 1) Cst. "X" was not truthful in telling "Y" : he had done a plate search;
- 2) He waited a couple of days to tell her about the search;
- 3) Although stating he was concerned for the safety of "Y" ' children there is no evidence that he did anything to ensure their safety (other than making his disclosure to "Y" ) nor that he observed her doing anything;
- 4) He never spoke to Mr "C" about the information contained in the search or about allegations of inappropriate conduct around "Y" 's house or with her children;

- 5) There were other better options available to him to protect the children than telling "Y"; namely contacting his superior officer or Cst. "T" as he had sufficient time without putting the children at additional risk;
- 6) He lacked sufficient details of the child exploitation suspicions concerning Mr "C"

All of the above indicates to me that his concern for the children was not so pressing that he had no option but to tell "Y". It was clear to me that protecting himself from a disclosure of an improper search was what chiefly motivated Cst. "X" even to the extent of lying to "Y" about the manner in which he had conducted the search. He was obligated not to disclose CPIC information to unauthorized individuals. "Y" was not authorized. The evidence is clear that he had plenty of time to contact Cst. "T" or his superior but chose to protect himself from the risk of exposure of the improper CPIC search.

With respect to the remaining allegation a summary of relevant factors is set out below and the evidence as a whole satisfies me on a balance of probabilities that Cst.

"X" provided details of a CPIC search which were inconsistent with CPIC records. I find the allegation to be proven.

- 1) In his statement of November 23, 2010 Cst. "X" said he did a plate search of Mr "C" 's vehicle on October 23, 2009. That was not done;
- 2) He was untruthful in telling "Y" he had done a plate search; he had done a name search;
- 3) He was not in White Rock at the time he did the search and therefore not outside "Y" ' house;
- 4) He said he recalled a plate search for which there is no evidence of such a search ever having been done, but said he could not recall 2 name searches the results of which impacted him personally and, according to him, put "Y" ' children at risk;
- 5) He told "F" he had not done a CPIC search on Mr "C"
- 6) The whole of the evidence satisfies me that Cst. "X" was endeavouring, when giving his statement, to conceal the fact of the improper search and was probably influenced, at least in part, by "F" 's aforementioned threat.

## Conclusion

Accordingly, on the allegations before me on this discipline proceeding, I find the misconduct has been proven with respect to each allegation.

Pursuant to s. 15(1)(c) of the Act, I invite for my consideration submissions as to the appropriate disciplinary or corrective measures for each allegation, and I anticipate that counsel for Cst. "X" will wish to schedule a date to do so, with the various parties to be provided notice of such date, as coordinated by the Registrar.

DATED at Vernon, British Columbia, this 30th day of November, 2012.

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Dennis B. Overend  
Retired Judge and Discipline Authority