PROVINCE OF NEW BRUNSWICK

IN THE MATTER OF THE *NEW BRUNSWICK POLICE ACT*

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

INSPECTOR MIKE YOUNG, as designate of the Chief of Police, Saint John Police Force

Complainant

- and -

CONSTABLE JONATHAN GRENIER

Respondent

Appearances:

- Jamie Eddy, Esq. and Matthew LeBlanc, Esq. for Robert Bruce, Chief of the Saint John Police Force
- Robert Davidson and Constable Duane Squires for Constable Jonathan Grenier
- Constable Jonathan Grenier

Hearing dates: October 5th, 17th, 31st; November 1st, 9th, 16th, 28th, 29th; December 2nd and 3rd (written submissions), 2022

1. Introduction

1.1. This matter arises from a Notice of Arbitration Hearing issued by Chief Robert M. Bruce (the "Chief") to Constable Jonathan Grenier (the "Respondent") and dated September 1st, 2022, which has been marked in these proceedings as Exhibit 1.

2. The Complaint

2.1. Exhibit 1 outlines the alleged misconduct of the Respondent (the "Allegation"). The

Allegation is that, on March 4th, 2022 while in the Saint John Police Department Station at Peel Plaza in Saint John (the "Station"), the Respondent twice used the word "c-u-n-t" (hereinafter the "c-word'), and that this amounted to discreditable conduct and neglect of duties under sections 35, 36, and 37 of the *Code of Professional Conduct Regulation*, NB Reg 2007-81 (the "Code").

3. Compliance with s. 23(3) of the Code

3.1. Lindsay Theriault and Nilah McLean were sworn in as stenographers in this matter pursuant to s. 23(3) of the *Code*.

4. Appearance of the Respondent and the representatives of the parties

4.1. Section 14 of the *Code* permits the parties to be represented in the hearing of the Allegation. During the hearing of this matter on October 5th, 2022, Mr. Eddy and Mr. LeBlanc identified themselves as the Complainant's representatives. Given the nature of this proceeding and the requirement of s. 26 of the *Code*, the Respondent attended the hearing and confirmed on the record that Mr. Davidson and Mr. Squires are his representatives in this matter and that he has expressly authorized his representatives to bind the Respondent.

5. The appointment of the arbitrator

5.1. I was jointly appointed by the parties. Prior to acceptance of the appointment, however, I confirmed compliance with s. 8 of the *Code*. Additionally, I advised the parties through email correspondences on September 21st and 22nd, 2022 and October 3rd, 2022 that:

a. I am unaware of any circumstances in which I have, or any member of my firm has, provided advice to, or has received information from anyone, in respect of the Allegation;

b. I have, and my firm has, provided and do provide legal advice on matters unrelated to the Allegation to individuals and entities who have or may have interests in this Hearing; and

5.2. The parties confirmed, both in writing prior to my acceptance of appointment as arbitrator and on the record at the outset of the hearing of this matter, that:

c. The parties do not perceive a conflict of interest or any reasonable apprehension of bias on my part in respect of acting as arbitrator in this matter;

d. In any event, the parties expressly waive any conflict of interest or apprehension of bias on my part in respect of active as arbitrator in this matter; and

e. The parties jointly request that I proceed as arbitrator in this matter.

6. Service of Exhibit 1 and the timing of the hearing

6.1. At the commencement of the hearing, the parties confirmed that:

a. Exhibit 1 was personally served on the Respondent on September 6th, 2022 and that the requirement of s. 11 of the *Code* (to commence the hearing within 30 days after the date of service) has therefore been satisfied;

b. The parties received a Notice of Hearing dated September 22nd, 2022 (the "hearing notice") and, consequently, the requirement of s. 10(1) of the *Code* (to notify the parties of the date, time and place of the hearing) was satisfied; and

c. Having commenced on October 5th, 2022, the hearing had to be completed on or before December 4th, 2022 in order to satisfy the requirement of s. 11(b) of the *Code*, unless it is determined that an adjournment that would extend beyond 60 days from October 5th, 2022 is warranted pursuant to s. 21 of the *Code*. In fact, the hearing ended on December 3rd, 2022.

7. Reading of the alleged breach of the *Code* to the Respondent

7.1. In accordance with s. 26(1) of the *Code*, I read the alleged breach of the *Code* to the Respondent at the commencement of the hearing. Because the Respondent was participating virtually due to illness, Mr. Davidson positioned himself close to the computer screen on which the Respondent was appearing to ensure that the Respondent heard the Allegation as read from Exhibit 1.

7.2. After the alleged breach of the *Code* was read, the Respondent was provided an opportunity to admit or deny the Allegation. The Respondent denied the Allegation, which denial was recorded.

8. Preliminary motion regarding the appointment of an investigator within 30 days of the filing of the complaint

8.1. Following the Respondent's denial of the alleged breach of the *Code*, Mr. Davidson advanced a motion challenging the arbitrability of the Allegation (the "Motion"). The

Motion asserts that the Chief failed to appoint an investigator within 30 days of the filing of the Complaint in accordance with s. 28.1(1) of the *Police Act*, SNB 1977, c P-9.2 (the "Act"):

> **28.1**(1) If the chief of police conducts an investigation into a conduct complaint, the chief of police shall, within 30 days after the filing of the complaint
>
> (a) appoint as an investigator a member of a police force to which the police officer being investigated belongs and who is of a higher rank than the police officer being investigated,
>
> (b) appoint as an investigator a member of another police force who is of a higher rank than the police officer being investigated, or
>
> (c) appoint an investigator from the list established and maintained under section 26.2.

8.2. Regarding the Motion, I refer to Decision 1 in this matter, which is dated October 12th, 2022. In Decision 1, I determined that the Complaint was not filed with the Chief on March 9th, 2022 but, instead, was filed with the New Brunswick Police Commission (the "Commission") on March 16th, 2022. I concluded that the appointment of the investigator on April 14th, 2022 was within the time limit imposed by the *Act.*

9. The substantive Allegation

9.1. The Complainant's substantive position regarding the Allegation, in summarized form, is that:

a. The Respondent was present in the Station at 5:45am on March 4th, 2022 (the "Relevant Time");

b. At the Relevant Time:

i. The Respondent was dressed in his police uniform;

ii. The Respondent was in a briefing room at the Station along with other members of his platoon, including SS Hussey;

iii. The Respondent's shift on March 4th, 2022 was scheduled to begin at 5:45am rather than 6:00am due to continuing COVID-19 protocols;

iv. At or after 5:45am, the Respondent used the c-word twice in the presence of his coworkers, including SS Hussey;

v. SS Hussey overheard the Respondent using the c-word and motioned for the Respondent to stop;

vi. The Respondent was either "on duty" and working when he used the c-word because his scheduled shift had officially commenced or because the indicia of being "on duty" and working were sufficient to prove the same;

vii. The Respondent's use of the c-word constituted a violation of the Saint John Police Force's Workplace Conduct Policy (Exhibit 15); and

viii. By using the c-word and by violating Exhibit 15, the Respondent participated in discreditable conduct under s. 36(1)(a)(ii) of the *Code* and neglect of duty under s. 37(b) of the *Code*.

9.2. The Respondent has not contested the Complainant's assertion that he (the Respondent) used the c-word twice on March 4th, 2022 at the Station. Instead, the Respondent has argued that the Allegation cannot succeed because:

a. The Respondent used the c-word before 5:45am on March 4th, 2022 and, therefore, was not "on duty" or working at that time;

b. Alternatively, regardless of whether the Respondent used the c-word before or after 5:45am, his shift briefing had not yet begun and consequently his shift had not begun at that time;

c. If the Respondent was not "on duty" at the relevant time, he cannot be found to have violated s. 36(1)(a)(ii) of the Code. Further, if he were not working at the relevant time, he could not have "fail[ed] to work in accordance with official police force policies and procedures" under s. 37(b) of the Code.

d. In addition, the Respondent has advanced the following arguments in respect of the Allegation:

i. The Allegation has been advanced contrary to the doctrine of double jeopardy, in that the Respondent received corrective measures from SS Hussey on March 4th, 2022 in respect of his use of the c-word;

ii. The Allegation has been advanced contrary to the principles of res judicata and issue estoppel on the basis that SS Hussey implemented

corrective measures on March 4th, 2022 regarding the Respondent's use of the c-word; and

iii. The Allegation has been advanced in a discriminatory manner as a result of the Respondent having previously made a complaint under the *Code* against the Complainant.

10. Defined terms

10.1. For the purposes of this Decision, these defined terms will be referenced:

a. The "Complaint" is the Conduct Complaint made by Inspector Mike Young as the designate of the Complainant and dated March 9th, 2022 (Exhibit 2).

b. The "Station" is the SJPF Station at Peel Plaza in Saint John.

c. "SS Hussey" is SJPF Staff Sergeant Hussey.

d. "DC Dwyer" is SJPF Deputy Chief Honey Dwyer.

e. The "Training" is the workplace conduct training session described by SS Hussey and referenced in para. 16.1 below.

f. The "Prior c-word Discipline" is the disciplinary action referenced in para. 16.1 below.

g. The c-word is as referenced in para. 2.1 above.

h. The "Procedural Objections" are the objections made by the Respondent as referenced in para. 13 below.

i. "SJPF" is the Saint John Police Force.

11. The *Prima Facie* case analysis

11.1. On October 5th, 17th, and 31st, 2022, the Complainant adduced evidence in support of the Allegation. The Complainant called only two witnesses: Staff Sergeant Dwayne Hussey ("SS Hussey") testified on October 17th, and Deputy Chief Honey Dwyer ("DC Dwyer") testified on October 31st. At the conclusion of DC Dwyer's testimony, the Chief's representatives closed their case.

11.2. Under s. 29, the *Code* required a determination as to whether a prima facie case had been

made out against the Respondent. If not, I was required to dismiss the matter.

11.3. On November 13th, 2022, my decision regarding the prima facie case analysis was issued ("Decision 2"). In Decision 2, I referenced *The Chief of Police, Bathurst Police Force v Constable Mathieu Boudreau and Constable Patrick Bulger, October 24th, 2019 (Michaud)* (the *Bathurst* case) and *Levesque v. New Brunswick*, 2010 NBQB 150 (CanLII) (the *Levesque* case) in outlining the very low evidentiary standard applied in a prima facie case determination.

11.4. In the *Bathurst* case, Arbitrator Joel Michaud identified the very minimal standard that operates in respect of that first evidentiary assessment:

> As pointed out in the *Levesque* Case, I am not to decide at this stage if I believe the evidence. Rather, I am to decide whether there is any evidence, if left uncontradicted, to satisfy the reasonable person. That is what I focused on, locating evidence, contradicted or not, which pointed to guilt and which was not obviously illogical, without assessing credibility.
>
> *The Chief of Police, Bathurst Police Force v Constable Mathieu Boudreau and Constable Patrick Bulger*, October 24th, 2019 (Michaud) at para. 39.

11.5. The *Levesque* case referenced by Arbitrator Michaud is also instructive regarding the prima facie case analysis. In that decision, Justice Lavigne wrote that:

> [The plaintiff] has to put forward evidence which if believed, could allow the trier of fact to decide in his favour. The trial judge must consider the sufficiency of the evidence, not weigh it or evaluate its believability. In assessing whether a plaintiff has made out a prima facie case, the judge must assume the evidence to be true and must assign what he or she conceives to be the most favourable meaning which can reasonably be attributed to any ambiguous statements contained in the evidence.
>
> *Levesque v. New Brunswick*, 2010 NBQB 150 (CanLII) at paras. 18 and 19.

11.6. In Decision 2, I determined that the Complainant's evidence was sufficient to establish a prima facie case regarding both the s. 36(1)(a)(ii) and the s. 37(b) elements of the Allegation.

12. The post-prima facie case proceedings

12.1. Following Decision 2, the Respondent was entitled to call evidence. He chose not to do so.

12.2. The *Code* stipulates that the Respondent is not compelled to adduce evidence in his own defence:

> **19**The member of a police force who is alleged to have committed a breach of the code under section 35 is not compelled to testify at the arbitration hearing.
>
> *Code of Professional Conduct Regulation*, NB Reg 2007-81, s. 19.

12.3. While acknowledging s. 19 of the *Code*, the Complainant has argued that an adverse inference should nevertheless be assessed against the Respondent in this case, because the Respondent asserted to SS Hussey that he (the Respondent) would call witnesses:

a. To contradict him regarding particular testimony concerning the operation of COVID-19 shift scheduling protocols on March 4th, 2022;

b. To establish an open practice of the use of slang and vulgar language within the Saint John Police Force; and

c. To establish that SS Hussey had conclusively resolved the c-word incident on his own accord.

The Complainant's submission regarding the application of an adverse inference against the Respondent will be addressed at a later stage in this decision.

12.4. The Respondent's election not to call evidence has triggered a reassessment of the evidence adduced by the Complainant. However, the evidence must now be assessed against the balance of probabilities standard, an evidentiary standard that exceeds the prima facie case standard applied in Decision 2.

13. The Respondent's arguments on double jeopardy, res judicata, issue estoppel, and discriminatory application

13.1. The Respondent has raised a number of arguments that contest the proceedings against him under the *Code* (the "Procedural Objections"). In summary, the Respondent argued that:

a. SS Hussey dealt with and resolved the matter of the Allegation in a corrective meeting on March 4th, 2022, which correction was agreed upon by SS Hussey and the Respondent. As such, this subsequent proceeding under the *Code* violates the doctrines of issue estoppel, res judicata, and

double jeopardy.

b. The Complainant has applied the *Code* in a discriminatory manner against the Respondent as a result of a Code complaint allegedly made by the Respondent against the Complainant.

13.2. I have reviewed the submissions of the parties in respect of these Procedural Objections as well as the totality of the evidence adduced in the hearing.

13.3. In *Galazka v. Ottawa Police Service and Ralph*, 2011 ONCPC 13 (CanLII), the Ontario Civilian Police Commission determined that the doctrine of double jeopardy did not apply in that case, which was also a police disciplinary matter. Additionally, in *Rassouli-Rashti v. College of Physicians and Surgeons of Ontario*, the Ontario Superior Court provided the following guidance on the application of the double jeopardy (in that case, the autrefois acquit element) principle in a professional disciplinary matter:

> [51] The doctrine of autrefois acquit is not available in a disciplinary hearing before the College. Autrefois acquit is a special plea codified in s. 607 of the *Criminal Code* available to an accused in a criminal proceeding. A disciplinary hearing is a civil proceeding.
>
> [52] In the civil context, a party may be able to claim res judicata on the basis of cause of action estoppel. That doctrine is available if the cause of action in a second proceeding is the same as the cause of action decided in an earlier proceeding. Alternatively, issue estoppel applies where three conditions are satisfied: the issue in the current proceeding is the same as the one decided in the prior proceeding; the prior decision is final, and the parties to both proceedings or their privies are the same (*Angle v. Minister of National Revenue*, 1974 CanLII 168 (SCC), [1975] 2 S.C.R. 248 at 254).
>
> *Rassouli-Rashti v. College of Physicians and Surgeons of Ontario*, 2009 CanLII 62055 (ON SCDC)

13.4. In this case, the advancement of the Complaint against the Respondent triggered the process that has been followed by the parties under the *Code*. In fact, Section 3 of the *Code* specifies the manners in which corrective and disciplinary measures can be applied in respect of the Complaint:

> **3** The corrective and disciplinary measures agreed to by the parties to a settlement conference or imposed by an arbitrator shall seek to correct and educate the member of a police force who is alleged to have committed a

> breach of the code under section 35 rather than to blame and punish the member unless
>
> (a) the corrective and disciplinary measures would bring the administration of police discipline into disrepute,
>
> (b) the corrective and disciplinary measures would bring the reputation of the police force with which the member is employed into disrepute, or
>
> (c) the circumstances make it impractical for the parties to a settlement conference to agree to, or the arbitrator to impose, corrective and disciplinary measures that seek to correct and educate the member.

The correction that SS Hussey communicated to the Respondent on March 4th, 2022 for his use of the c-word cannot satisfy the provisions of the *Code* in respect of the Complaint. Even if it could, the uncontroverted evidence of SS Hussey was that his correction of the Respondent on March 4th, 2022 would be final unless the issue was pursued further. It was and, when the Complaint was made, the requirements of the *Code* were triggered. For these reasons, the doctrine of double jeopardy cannot be applied in this matter.

13.5. Regarding the Respondent's arguments in respect of the applicability of res judicata and issue estoppel, the Complainant asserts that these two constructs are actually the same. In *R. v. Mahalingan*, 2008 SCC 63 (CanLII) the Supreme Court of Canada confirmed that issue estoppel is a branch of the res judicata concept:

> [14] The common law developed two doctrines to deal with problems of unfair relitigation, consistency of result and finality. Both come out of the broad concept known as res judicata.
>
> [15] The first branch of res judicata is sometimes called cause of action estoppel in the civil context, or double jeopardy in the criminal context. An argument on this basis asserts that the cause of action in a current proceeding is the same as the cause of action in a proceeding previously litigated, with the result that the current action should not proceed. In criminal law, the double jeopardy principle finds expression in the pleas of autrefois acquit and autrefois convict.
>
> [16] The second branch of res judicata is issue estoppel. Issue estoppel is concerned not with whether the cause of action in two proceedings is the same, but with whether an issue to be decided in proving the current action is the same as an issue decided in a previous proceeding. The causes of action may be (and typically are) different. Issue estoppel in Canada has historically applied to both civil and criminal law.

R. v. Mahalingan, 2008 SCC 63 (CanLII) at paras. 15 and 16.

13.6. The doctrine of action estoppel cannot be applied in this case because the Allegation has not been the subject of prior litigation. This current proceeding is the only litigation proceeding in respect of the Allegation.

13.7. Issue estoppel is a broader doctrine than is action estoppel. In determining if issue estoppel should be applied, the court in *Rassouli-Rashti, supra* referenced the test applied by the Supreme Court of Canada in *Angle, supra*:

a. The issue in the current proceeding is the same as the one decided in the prior proceeding;

b. The prior decision is final; and

c. The parties to both proceedings or their privies are the same.

13.8. In this case, the issue estoppel test fails. First, while SS Hussey did counsel or correct the Respondent regarding his use of the c-word, that outcome cannot address the same matter that is being addressed in this proceeding because a disciplinary matter under the *Code* can only be addressed by agreement of the parties in a settlement conference or by an arbitrator. No agreement was achieved at the settlement conference in this matter (see Exhibit 1, p.2). Consequently, the Allegation must be addressed by me as the arbitrator.

Code of Professional Conduct Regulation, NB Reg 2007-81, s. 3.

13.9. Further, I accept the evidence of SS Hussey to the effect that, when he corrected the Respondent for using the c-word, there was at best a contingent agreement:

> Q. Okay. That's fine, then. And you agreed with him that if he didn't say it again, it would stay at your level, didn't you?
>
> A. I had told Constable Grenier that as far as I was concerned the issue had been dealt with unless someone came forward with -- with -- and made an issue.

Given that a *Code* complaint was made about the incident, it is obviously the case that someone did make an issue of the Allegation and, therefore, any agreement with SS Hussey was not terminal in any event, even if SS Hussey had been able to satisfy s, 3 of the *Code*. SS Hussey had no authority under s. 3.

13.10. It is notable that the Complaint that is at the centre of this arbitration is clearly designated as a conduct complaint and not a service or policy complaint (see Exhibit 2).

13.11. For all of these reasons, the Respondent's arguments regarding the applicability of res judicata and issue estoppel cannot succeed.

13.12. Regarding the Respondent's argument that the Complaint amounts to a discriminatory application of discipline, he has relied on the principles established in the case of *Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd*., 1965 CanLII 1009 (ON LA) (the *KVP* case), 1965 CarswellOnt 618. In *UNIFOR, Local 882 v Maritime Paper Products Limited Partnership*, 2022 CanLII 109448 (NB LA), Arbitrator Filliter referenced the *KVP* case as the source of a test that "…has been universally applied by arbitrators in considering the reasonableness of the unilateral implementation of a policy by an employer which has not been agreed to by the union." The test consists of the following principles:

1. It must not be inconsistent with the collective agreement.

2. It must not be unreasonable.

3. It must be clear and unequivocal.

4. It must be brought to the attention of the employee affected before the company can act on it.

5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.

6. Such rule should have been consistently enforced by the company from the time it was introduced.

UNIFOR, Local 882 v Maritime Paper Products Limited Partnership, 2022 CanLII 109448 (NB LA) at 10.

13.13. The Respondent did not argue that Exhibit 15 is inconsistent with Exhibit 20 or that it is unreasonable. Frankly, it would have been difficult to do so, given the provisions of Exhibit 20, including, Article 23.06, which makes the *Occupational Health and Safety Act*, SNB 1983, c O-0.2 and *General Regulation*, NB Reg 91-191 binding on the parties. Further, the Respondent did not argue that Exhibit 15 was not brought to his attention before it was acted upon (see Exhibit 16), nor that a breach of Exhibit 15 could result in disciplinary action (see Exhibit 15, page 5). Instead, the Respondent has argued that Exhibit 15 is not clear and unequivocal and that it has not been consistently enforced. The

Respondent referenced a *Code* complaint that he had made against the Complainant prior to March 4th, 2022 as a possible motive for the advancement of this Complaint.

13.14. The challenge faced in respect of the complaint made by the Respondent against the Complainant is that the evidence before me is unclear. During his cross-examination of SS Hussey, Mr. Davidson referenced a document to SS Hussey that was not admitted into evidence. It was suggested that the document was a complaint made by the Respondent against the Complainant on January 5th, 2022, but this was not confirmed. Further, under cross-examination SS Hussey advised that he was unaware of any complaint made by the Respondent against the Complainant until a time period after March 4th, 2022:

> Q. Okay. I got a question. You are aware that Constable Grenier filed a complaint against the chief of police back in January, weren't you?
> A. I became aware of it at some point, but –
>
> Q. Right. Before March 4.
> A. No, I don't believe so.
>
> Q. Oh, so you're -- you're the staff sergeant in charge of the platoon that Grenier's on --
> A. M-hm.
>
> Q. -- and you didn't know he filed a complaint against the chief of police?
> A. No, I did not. I knew there was an issue that had been dealt with prior, but I did not remember -- I did not know he had filed a complaint against the chief.
>
> Q. But you know now.
> A. I know now, yes.

No evidence was adduced by the Respondent regarding the complaint made by the Respondent against the Complainant. I have been invited to speculate as to the impact of the Respondent's complaint on the advancement of the Complaint, but I have no evidence on which to base any such speculation. For that reason, I cannot find that the Respondent's complaint against the Complainant has caused inconsistent enforcement of Exhibit 15.

13.15. As for Respondent's argument regarding the clarity of Exhibit 15 and the general consistency of its application, the evidence supports a contention that Exhibit 15 does not provide a specific list of words that constitute violations. However, and as SS Hussey and DC Dwyer testified, it would be difficult and maybe even impossible to do so, given that discriminatory and offensive language evolves and emerges frequently. That said,

Exhibit 15 does identify that discriminatory words that are offensive on the basis of human rights-protected personal characteristics such as sex and gender are prohibited. Further, the evidence indicates that the SJPF has issued discipline with respect to the use of the c-word by an officer who is known to the Respondent. Both SS Hussey and DC Dwyer testified that the SJPF has in the past drawn a distinction between discriminatory words and other offensive words in respect of its application of Exhibit 15; discriminatory words have been made the subject of discipline while non-discriminatory words that are nevertheless offensive have not.

13.16. For reasons outlined below, I find that the Respondent's use of the c-word was discriminatory and, therefore, his being made the subject of the Complaint is consistent with the SJPF's practice according to the evidence before me.

14. The applicable standard of proof

14.1. In their closing submissions, both the Complainant and the Respondent argued that the appropriate evidentiary standard to be applied at this stage is the balance of probabilities test. However, the balance of probabilities test has been defined in different ways, including: 'more probable than not', 'more likely than not', '51% probability', 'proof on a preponderance of probabilities', and 'proof on a preponderance of evidence'.

Li v. Canada (Minister of Citizenship and Immigration), 2005 FCA 1 (CanLII) at paras. 10-28; *Braile v Calgary (Police Service)*, 2018 ABCA 109 (CanLII) at para. 37.

14.2. Argument was made as to the influence, if any, of the concepts of 'clear and convincing' and 'clear, convincing and cogent' evidence on the balance of probabilities test.

14.3. In *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), the Alberta Court of Queen's Bench articulated the engagement of the 'clear, convincing and cogent' evidentiary requirement to satisfy the balance of probabilities test:

> [79] Under s. 71(1), a public body must "prove" that an applicant has no right of access to a record or a part of a record. The public body bears the burden of proof.
>
> [80] The standard of proof the public body must meet is the balance of probabilities: 2019 CPS(QB) at para 5; *Alberta Municipal Affairs* at para 11; F2017-58 at paras 124-125; F2013-13 at para 189.
>
> [81] At paras 126-127 of F2018-58, the Adjudicator elaborated on the

standard of proof as follows:

[para 126] In *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, the Supreme Court of Canada described the qualities of evidence necessary to satisfy the balance of probabilities. The Court stated:

Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[para 127] In an inquiry under the FOIP Act, a public body must provide sufficiently clear, convincing, and cogent evidence to discharge its burden of proving that a discretionary exception to disclosure applies to information it has withheld from an applicant. As the Public Body decided to apply section 27(1)(a) to withhold information from the Applicant, it has the burden of proof under section 71(1) to prove that section 27(1)(a) applies to this information with evidence that is sufficiently clear, convincing, and cogent to meet this purpose.

[82] One allegation of Adjudicator error may be disposed of at this point. It is true that the standard of proof is not one of "clear and convincing evidence" as if that were some elevated alternative to the balance of probabilities or as if proof on the balance of probabilities had to meet some elevated standard of "clear and convincing evidence" (see EPS Brief at para 120). "The more stringent standard of 'clear and convincing evidence' is clearly not the test for balance of probabilities:" *Braile v Calgary (Police Service)*, 2018 ABCA 109 at para 39. However, the Adjudicator did not equate the standard of proof with a standard of "clear and convincing evidence." Rather, the Adjudicator tracked the language of *McDougall*. I interpret the Adjudicator to have meant that the evidence supporting a privilege claim must be sufficiently clear and convincing to satisfy the burden of proof on a balance of probabilities. The Adjudicator did not err in articulating the standard of proof. (emphasis added)

Edmonton Police Service v Alberta (Information and Privacy

Commissioner), 2020 ABQB 10 (CanLII) at paras. 79-82.

14.4. The evidence in this case must, therefore, be assessed against the balance of probabilities standard, the satisfaction of which requires sufficiently clear, convincing and cogent evidence.

14.5. The Complainant has argued that "When a defendant does not call evidence to refute a plaintiff's case, the plaintiff's burden is discharged unless their unchallenged evidence, contradictory or not, and even with a healthy doubt, is not credible." (see Complainant's written submission dated November 19th, 2022 at para. 57). In my view, it is not helpful to introduce yet another formulation of the applicable evidentiary standard. It is more appropriate to observe that, in determining the case, the Complainant's evidence must be assessed against the balance of probabilities standard of proof even in the absence of evidence adduced by the Respondent.

14.6. At this stage, then, the Complainant's evidence must be weighed to determine if it proves on a balance of probabilities that the Respondent violated s. 36(1)(i)(a) and s. 37 of the *Code*, or either of them, on March 4th, 2022.

15. Was the Respondent on duty when he used the c-word? Was the Respondent working when he used the 'c-word"? Does the Respondent's use of the c-word constitute discreditable conduct? Does it constitute a neglect of duty?

15.1. The Complainant has chosen to allege a violation of s. 36(1)(a)(ii) of the *Code* in this matter. The Respondent has correctly observed that the Complainant could have chosen to allege the violation of other provisions of the *Code* but did not. Section 36(1)(a)(ii) reads as follows:

> **36**(1)A member of a police force engages in discreditable conduct if
>
> (a) the member, <u>while on duty, acts in a manner that is</u>
>
> <u>(ii) likely to bring the reputation of the police force with which the member is employed into disrepute</u>…(emphasis added)

15.2. Since the Respondent's use of the c-word on March 4th, 2022 while he was in the Station is not disputed, two key questions that arise under s. 36(1)(a)(ii) are:

> *Question 1:* Does the evidence establish on a balance of probabilities that the Respondent was "on duty" when he used the c-word? and

Question 2: If the answer to Question 1 is "yes", was the Respondent's conduct prejudicial to the maintenance of discipline in the police force?

15.3. The wording of s. 37(b) is:

> 37A member of a police force neglects their duties if…
> (c) the member fails <u>to work</u> in accordance with official police force policies and procedures…(emphasis added)

15.4. Similar to Question 1 under para. 13.2 above, a crucial question in this circumstance is:

Question 3: Does the evidence establish on a balance of probabilities that the Respondent was working when he used the c-word?

15.5. The parties have acknowledged that being "on duty" under s. 36(1)(a)(ii) and working under s. 37(b) are similar in nature but they differ on whether the evidence before me proves that the Respondent was "on duty" and working, or either of these, when he used the c-word on March 4th, 2022. The Complainant has argued that the evidence before me satisfies the balance of probabilities standard on this point; the Respondent submitted that it does not.

15.6. The Respondent has asserted that he was not "on duty" when the c-word was spoken and, therefore, was also not working at that time.

15.7. In support of his position at the time of Decision 2, the Complainant argued that police officers, including the Respondent, are always on duty. In Decision 2, I dismissed that argument for the reasons outlined.

15.8. Also in Decision 2, I found that, to succeed in respect of the s. 36(a)(ii) aspect of the Allegation, the Chief must demonstrate that the Respondent's use of the c-word occurred while he was on duty. In that regard, the evidence was less than perfectly clear:

a. Exhibit 20, the applicable collective agreement, stipulates at Art. 15(b)(i) that "The day shift shall commence between the hours of 0600 and 0700…". Further, Exhibit 5 indicates, at the 5th page titled "Platoon 'B' Day Shift", that The Respondent's shift commenced at 0600 on March 4th, 2022. Yet, SS Hussey testified both that The Respondent's shift on March 4th, 2022 commenced at 5:45am as a consequence of COVID protocols and, also, that the duty day started at 0600.

b. SS Hussey testified that the relevant duty day did not start until the daily

briefing was commenced and that the daily briefing on March 4th, 2022 had not started when the Respondent said the c-word. However, SS Hussey also testified that "We were starting -- we would have been starting for 5:45…" and, in response to the statement "…you said you heard this at 5:45", SS Hussey affirmed "Correct." SS Hussey made numerous references to the Relevant Time in his testimony. Those references appear on the following pages of the transcript of his testimony: 26, 28, 29, 31, 33, 60, 118, and 119.

c. Regarding the use of the c-word and the Relevant Time, SS Hussey's testimony included:

i. In direct examination:

Q. I'm just going to make note of that so we don't -- actually, it takes us to the incident of March 4, 2022 at 5:45 a.m. What was happening on March 4, 2022 at 5:45 a.m.?
A. So B platoon was arriving for shift. We were about to do -- do our morning briefing.

Q. So on -- on the day in question of March 4, where were you at 5:45 a.m. in this room?
A. I was sitting -- if you look at the photograph on the first page – [referring to Exhibit 18]

Q. Okay. And was Constable Grenier there at 5:45 a.m.?
A. Yes, he was.

Q. … And approximately how many other people were in the room on that day at 5:45 a.m.?
A. I believe there would've been about 16? Two sergeants and then the 14 members of patrol.

Q. Okay. And were there any comments that were made during that period of time around 5:45 that caused you any concern?
A. Yes. When I came into the room, I could hear there was conversations happening within the room between different officers. I could tell Constable Grenier was talking to another officer and I heard him use the -- the C-word --

ii. In cross-examination:

Q. What time did [Sergeant] Cooper come in?

A. He came in around 5:45.

Q. He [Sergeant Cooper] was in the room --
A. He was not in the room with us when this -- when it was said.
Q. Right.
A. He came in shortly after.
Q. No, no. But you said that you heard this at 5:45.
A. Correct.
Q. Correct?
A. It didn't take more than a minute for it to be said.
Q. Right. Cooper was not in the room, was he?
A. No, he was not.

15.9. Regarding the time of the Respondent's use of the c-word, SS Hussey stated in direct examination that he heard this happen "around 5:45". However, on cross-examination, SS Hussey was invited to clarify his recollection, and he did so: "Q: But you said that you heard this at 5:45. A: Correct." On review of SS Hussey's testimony, I am satisfied that, on a balance of probabilities, the Respondent used the c-word at the Relevant Time.

15.10. Having determined that the Respondent used the c-word at the Relevant Time, it is necessary to analyse whether or not the Relevant Time marks the commencement of the Respondent's shift on March 4th, 2022. The evidence on this point includes the following testimony of SS Hussey:

i. In cross-examination:

Q. [Referring to Exhibit 20, the collective agreement governing the Respondent's employment] Okay. Now I take your mind over to 15.02(b)(i) on the following page.
A. Yes.
Q. Could you just read that into the record, please?
A. "All members on platoon duty shall be deployed on twelve hour rotating shifts, four shifts on and four shifts off. The day shift shall commence between the hours of 0600 and 0700, and the night shift between 1800 and 1900 hours."

Right. So according to the collective agreement, and Exhibit 5, the duty day starts at six -- 0600, correct?
A. Yes. Yes.
Q. Yeah, okay. And I'm going to put to you that Cooper did not come in the room before 6 a.m.
A. He did. Because I had Mr. Grenier in my office by 6 a.m.

Q. Your evidence this morning was that the briefing didn't start until after Cooper came in, which would've been six or later.

A. No, I did not say that.
Q. What time did Cooper come in?
A. He came in around 5:45.

Q. Okay. So on March the 4th, 2020 --
A. Yes. 2022.
Q. Or 2022, excuse me. In 2022, the duty day started at 6 a.m., correct?
A. We were following COVID protocols, so the shifts --
MR. DAVIDSON: So one second now. I'm going to be putting witnesses on that say those were over.
MR. EDDY: Well, I don't think he's even finished --
Q. Oh, no. I'm giving him a chance to -- to -- to recollect his -- his -- his answer. We will have witnesses go on to say that was over. The collective agreement was never amended, right?
A. No --
Q. Right.
A. I don't believe it was amended, no.
Q. Right. So on March 4 -- I'm going to ask it one more time because I'm going to put Duane [Squires] on, if necessary --
A. M-hm.
Q. -- that the COVID protocol was over on March 4, 2022.
A. I don't recall that it was. I believe we were still following the COVID protocols.

ii. On re-direct examination:

Q. Thank you, Mr. Arbitrator. Just a -- a few narrow questions. Staff Sergeant Hussey, there -- there was some questions that my friend asked you about the -- the start of the shift and the end of the shift? 6 a.m. to 6:00 or whether it was 5:45 -- 5:45 or whatever time it was. What was your understanding as to when the shift started and also whether the -- these COVID rules that you mentioned-- these COVID rules -- can you -- can you explain that?
A. Part of our COVID response is we were running so that the shifts didn't end up in the locker rooms at the same time -- the -- the incoming and the outgoing shift -- so the shift reporting for duty reported 15 minutes early. The other shift would report on time, or for six o'clock. They'd be -- the other shift would already be changed sitting in the briefing room. The outgoing shift would then go to locker room and get changed and leave. So you'd basically be running from 5:45 to 5:45, 6:00 to 6:00.
Q. Okay. And with respect to this platoon on March 4, do you know it was -- if it was 5:45 to 5:45 or 6:00 to 6:00?
A. We were starting -- we would have been starting for 5:45. The other shift -- we were the oncoming shift --
Q. Okay.

A. -- so we would've been coming in for duty 5:45 -- the other shift would've been going in to get changed. The outgoing shift would've been going in for six o'clock to get changed and leave.

15.11. The Respondent raised an interesting question in cross-examination of SS Hussey regarding the commencement of his shift relative to the Relevant Time. Exhibits 5 and 20 suggest that the Respondent's shift was supposed to commence at 6:00am. However, SS Hussey testified that the shift schedule referenced in Exhibits 5 and 20 had been altered by a COVID protocol that amended the commencement of the Respondent's shift from 6:00am to 5:45am.

15.12. It is notable that, in cross-examining SS Hussey, the Respondent put to the witness two assertions regarding the application of the COVID protocol and the shift start time of 5:45am:

> A. We were following COVID protocols, so the shifts --
> MR. DAVIDSON: So one second now. I'm going to be putting witnesses on that say those were over.
>
> Q. Right. So on March 4 -- I'm going to ask it one more time because I'm going to put Duane [Squires] on, if necessary --
> A. M-hm.
> Q. -- that the COVID protocol was over on March 4, 2022.
> A. I don't recall that it was. I believe we were still following the COVID protocols.
> (emphasis added)

The Respondent did not call any evidence in this matter. As a result, the Complainant has argued that an adverse inference should be drawn against the Respondent for having challenged SS Hussey with potential evidence that has not been adduced. In my view, it is unnecessary to apply an adverse inference, because:

i) The Respondent conceded in closing argument that the COVID protocol was in place on March 4th, 2022 and that the Respondent's shift commenced at 5:45am; and

ii) In any event, SS Hussey's testimony on this point confirms, on a balance of probabilities, that the COVID protocols were in place on March 4th, 2022 and that the Respondent's shift commenced at 5:45am on that date. Essentially, SS Hussey confirmed in cross-examination that Exhibits 5 and 20 advanced a shift commencement time of 6:00am, but he maintained throughout that the correct shift start time on March 4th, 2022 was 5:45am.

Consequently, I find on a balance of probabilities that the Respondent's shift commenced at the Relevant Time.

15.13. The Respondent has also argued that his shift on March 4th, 2022 had not yet commenced when he used the c-word, irrespective of the time at which it was used, because the shift briefing had not occurred at that time. SS Hussey testified on this point as follows:

i) in direct examination:

Q. Okay. And maybe I could just stop you there. So before we talk about what happened on March 4, let's talk about how it normally happens at these briefings…
A. Sure. So at the start of a -- a shift we'll have a platoon briefing. All the platoon members will be in attendance at the briefing unless someone was called away for to -- to go do an emergency call or something of that nature or they -- they had a late start to their shift. The sergeants are responsible for preparing the briefing and the shift roster so they'll -- the assignments for the day where everyone is working, what cars they're assigned to, any follow up tasks from the shift before will be assigned.

Q. So did you speak to Constable Grenier at that moment when you were trying to get him to cut it out? I think you're using with your hand kind of a --
A. Cutting motion.
Q. -- cutting motion across your --
A. Correct.
Q. -- across your neck.
A. I did not speak to him at that point at the briefing. By this time, as I said, Sergeant Belyea got him to -- to change the -- the conversation. Sergeant Cooper then came in and we commenced with the briefing. And then following the briefing, I asked Constable Grenier to come to my office.

ii) in cross-examination:

Q. No, no. But you said that you heard this at 5:45.
A. Correct.
Q. Correct?
A. It didn't take more than a minute for it to be said.
Q. Right. Cooper was not in the room, was he?
A. No, he was not.
Q. No. So the briefing can't start until the sergeant putting the roster together comes in, can it?
A. Correct.
Q. Right. So when Grenier said the C-word, the briefing had not started.

A. No, it had not.

Q. Oh, we'll get to that. So -- but you're -- but you're --but you agree with me the briefing duty day did not start when Grenier said his words.
A. The briefing had not started.
Q. So without the briefing, the duty day doesn't start, does it?
A. No. He was in uniform in the briefing room and the briefing had not started.
Q. Without the briefing starting, the duty day does not begin, does it?
A. I --
Q. That's the first thing on the -- on the duty that day. The briefing.
A. Okay.
Q. Right? You agree? Right. So when Grenier said his word, C-words --
A. M-hm.
Q. -- the briefing and the duty day had not started.
A. No, I -- I agree.

Q. It's a work performance issue, as you just said.
A. No. Radio etiquette is performance.
Q. Okay. Just a second, I want to get this clear. What you say on the radio, and what you say before the briefing, they're not work performance issues?
A. You're trying to tell me that he wasn't working yet so that wouldn't be work performance.
Q. I -- yes, he wasn't working. You agree with me he wasn't working.
A. So that wouldn't be work performance, would it?
Q. Okay. That's fine. Okay. So it's -- so it's not work performance. It's before work, correct?
A. Correct.
Q. Okay, then. That's -- I don't mind going slow. So when he said the C-word, it was before work. So therefore it's not a work performance issue.
A. Still be a workplace conduct issue.
Q. Okay. But I -- but I want to go slow on this one because these terms sometimes --
A. Okay.
Q. Okay. So Grenier says the C-word before the work day begins.
A. Yes.
Q. Let's make it simple.
A. It was still in his workplace.
Q. Yeah. It's in his workplace, but it's before the work day begins.
A. Yep.
Q. Before his duty begins.
A. Correct.
Q. Duty and work's the same thing.

A. Yes.
Q. When you're on duty, you're working. You getting paid. Right?
A. Yeah.

10 A. I had put it in at the same time as my notes but didn't put it in in the sentence. I just put in “during briefing” and --
Q. Okay. But we all know now it wasn't during briefing. It was --
A. No, it was before briefing.
Q. Before briefing.
A. Yep.

iii) in re-direct examination

Q. Thank you, Mr. Arbitrator. Just a -- a few narrow questions. Staff Sergeant Hussey, there -- there was some questions that my friend asked you about the -- the start of the shift and the end of the shift? 6 a.m. to 6:00 or whether it was 5:45 -- 5:45 or whatever time it was. What was your understanding as to when the shift started and also whether the -- these COVID rules that you mentioned-- these COVID rules -- can you -- can you explain that?
A. Part of our COVID response is we were running so that the shifts didn't end up in the locker rooms at the same time -- the -- the incoming and the outgoing shift -- so the shift reporting for duty reported 15 minutes early. The other shift would report on time, or for six o’clock. They’d be -- the other shift would already be changed sitting in the briefing room. The outgoing shift would then go to locker room and get changed and leave. So you’d basically be running from 5:45 to 5:45, 6:00 to 6:00.
Q. Okay. And with respect to this platoon on March 4, do you know it was -- if it was 5:45 to 5:45 or 6:00 to 6:00?
15 A. We were starting -- we would have been starting for 5:45. The other shift -- we were the oncoming shift --
Q. Okay.
A. -- so we would’ve been coming in for duty 5:45 -- the other shift would’ve been going in to get changed. The outgoing shift would’ve been going in for six o’clock to get changed and leave.

Having assessed the evidence of SS Hussey on this point, I find on a balance of probabilities that the patrol briefing that took place in the Respondent’s March 4th, 2022 shift had not commenced when he used the c-word. Instead, the briefing was commenced by Sergeant Cooper sometime between 5:45am and 6:00am. As to whether the Respondent was “on duty” and working at 5:45am, however, I note that SS Hussey made several different assertions: a) that the Respondent’s duty and work day had not commenced because the briefing had not started; b) “when you’re on duty, you’re

working. You (sic) getting paid."; and c) "…we would've been coming in for duty 5:45 -- the other shift would've been going in to get changed."

15.14. Does the fact that the briefing had not started at the Relevant Time mean that the Respondent was not "on duty" or working? I have already found that the Respondent's shift commenced at 5:45am. The testimony of SS Hussey regarding the relationship of the briefing to the commencement of the duty day and work day complicates the matter. On this, I understand the Respondent's point, which was very capably made on cross-examination of SS Hussey. However, the totality of the evidence must be considered. In this regard, it is notable that neither Exhibits 5 or 20, both of which were adduced by the Respondent, suggest that the Respondent's work days or duty days are initiated by the commencement of a shift briefing. Rather, both define a specific time (6:00am), which was altered by the COVID protocol to 5:45am.

15.15. If it were the case that an officer's duty day or work day did not commence with a shift briefing rather that a scheduled time, then each police officer's pay would vary depending on the exact time at which their shift briefings commenced. If a briefing were delayed by a few minutes or even longer, each officer would be susceptible to a decrease in pay. That concept is inconsistent with Exhibits 5 and 20.

15.16. In respect of the Respondent's on duty status in this case, the Complainant initially argued that police officers are always on duty. I rejected that argument in this case, given the clear differentiation of "on duty" and "off duty" conduct in the *Code*. Now, the Complainant has also argued that, irrespective of the time at which the Respondent's briefing started, the Respondent was nevertheless on duty and working when he used the c-word. The Complainant makes this contention on the basis of jurisprudence that outlines indicia of on-duty status:

- Wearing or not wearing a uniform;
- Carrying or not carrying a firearm;
- Being required or not required to be in attendance;
- Being required or not required to report for a shift.

See, generally, *Paige v Hanover Police Service*, 2017 CanLII 36559 (ON CPC)

15.17. The Complainant's argument on this aspect is compelling. Here, when the Respondent used the c-word he was in uniform, was present in the Station briefing room with his platoon members and SS Hussey and was simply awaiting the commencement of the shift briefing. As referenced in above, it is implausible that the Respondent was not on duty and was not working at the time he used the c-word. The Respondent acknowledges that, if the briefing on March 4th, 2022 had started a few minutes or even seconds earlier, there

would be no doubt that he was on duty and working.

16. Was it likely that the Respondent's use of the c-word brought the reputation of the police force into disrepute ?

16.1. The Respondent has argued that, even if he was on duty when he used the c-word, that action did not violate s. 36(1)(a)(ii) of the *Code* because it was unlikely to bring the reputation of the Police Force into disrepute. The Respondent supports his argument with the testimony of SS Hussey to the effect that officers' use of vulgarities, profanities, and slang are condoned and permitted by the SJPF. Specifically, SS Hussey testified that "… we [Saint John Police Force management] are lenient on the slang and vulgarities [in the workplace]." The testimonies of SS Hussey and DC Dwyer, taken in total, confirm that, within the Saint John Police Force, the following conditions exist regarding the use of profane and vulgar language by officers:

a. There is a long history of officers using profane and vulgar language;

b. The SJPF has a Workplace Conduct Policy (Exhibit 15) that asserts a "strict zero tolerance policy against any wrongdoing or impropriety under this policy…"

c. The Respondent acknowledged receipt of Exhibit 15 on May 30th, 2021 (Exhibit 16);

d. In May 2021, SS Hussey conducted a training session of approximately 15 minutes with officers including the Respondent (the "Training"). The Training content was outlined in Exhibit 17;

e. The Respondent does not recall the Training, at least as it was put to him by Staff Sergeant Rocca in Exhibit 24 as training that occurred in February 2021 (Exhibit 24, 45:00-46:53);

f. Officers' use of some profane and vulgar words has occurred after the implementation of Exhibit 15 and has not been made the subject of discipline;

g. At least one profane and vulgar word (the c-word) was made the basis for disciplinary action under the *Code* on a date prior to March 4th, 2022 (the "Prior c-word Discipline");

h. The Prior c-word Discipline was imposed against a Sergeant who had

directed the c-word toward at least one female co-worker;

i. The SJPF has not specified to its officers what profane and vulgar words constitute violations of Exhibit 15. However, the SJPF has an unspecified list of words that are considered to be discriminatory on the basis of race, sex, sexual orientation and other personal characteristics;

j. Prior to his use of the c-word on March 4th, 2022, the Respondent knew that directing the c-word toward a co-worker was not acceptable but was unaware that merely saying the c-word, unrelated to anyone in the workplace, was "not OK" (Exhibit 24, :41:00-41:45);

k. On March 4th, 2022, after the Respondent's use of the c-word, he was advised by SS Hussey that there were two words that officers are not allowed to say in the Station anymore: "the n-word and the c-word" (Exhibit 24, 41:30-42:05).

16.2. A distinction does exist between discriminatory words (or words that "…degrade an individual based on personal attributes…" (see Exhibit 15, p. 4) and non-discriminatory but still offensive words (such as profane and vulgar words). That distinction is made clear in Exhibit 15 and in the jurisprudence, some of which I cited in Decision 2: *City of Calgary v Calgary Fire Fighters Association, International Association of Fire Fighters, Local 255*, 2012 CanLii 47218 (AB GAA), in which an arbitration panel found that use of the c-word was repugnant and demeaning towards women; *Smith v. The Rover's Rest*, 2013 HRTO 700 (CanLII), in which the c-word was described as vulgar and misogynistic (see para. 74); and *Ismail v. British Columbia (Human Rights Tribunal)*, 2013 BCSC 1079 (CanLII), in which use of the c-word was found to be adverse treatment under human rights legislation (see para. 339). That said, the profane and vulgar language that the SJPF has condoned in its workplace can also be offensive and inappropriate. The fact that the SJPF has allowed language of this kind to be used in its workplace adds a dimension to determining if the Respondent's use of the c-word was likely to bring the reputation of the SJPF into disrepute, since profane and vulgar language is commonplace. Ultimately, the distinction between a discriminatory word, such as the c-word, and non-discriminatory but profane and vulgar words has to be recognized.

16.3. In her testimony, DC Dwyer testified that officers are held to a higher behavioural standard than most members of the public and that, in her view, the use of the c-word "absolutely" constituted workplace harassment in violation of Exhibit 15.

16.4. In my view, the Respondent's use of the c-word on March 4th, 2022 "…could reasonably be regarded as creating a hostile, intimidating or offensive workplace." (Exhibit 15, p. 4)

16.5. While I conclude that the Respondent's use of the c-word violates Exhibit 15, I also note that Schedule A to the *Code* is not as broad in its application as is Exhibit 15:

> 3(1)This Schedule applies to the conduct of a member of a police force that is directed toward
> (a) another member or group of members, or
> (b) an employee within a police force or group of employees within a police force.
> 3(2)Managers and supervisors are responsible for taking appropriate action to halt workplace harassment of which they become aware. (emphasis added).
>
> *Code of Professional Conduct Regulation*, NB Reg 2007-81, Schedule A

16.6. In Exhibit 24, the Respondent identifies that he understood, on March 4th, 2022, that it was inappropriate to call someone in the workplace the c-word (41:00-41:23).

16.7. An assessment of the Allegation in respect of s. 36(1)(a)(ii) of the *Code* requires consideration of the following elements:

a. The test is primarily an objective one.

b. Measurement of the impugned conduct against the reasonable expectations of the community.

c. In determining the reasonable expectations of the community, it is necessary to consider the perception of a reasonable and dispassionate person in the community who is fully apprised of the circumstances of the case, including any applicable rules and regulations.

d. Where the officer was required by the circumstances to exercise discretion, a subjective element of good faith can be appropriately considered.

Ceyssens, Paul. *Legal Aspects of Policing*. (Saltspring Island: Earlscourt Legal Press, 1994), at 6-17 and 6-18.

16.8. The decision of the Ontario Police Commission in *Biring v. Peel Regional Police Service*, 2021 ONCPC 2 (CanLII) (the *Biring* case) provides assistance in this matter. In that case, the officer in question had made discriminatory statements. The OPC found as follows regarding the use of discriminatory words and the likelihood of it bringing discredit to the reputation of the police force:

> [31] However, we note that the Hearing Officer did write that the conduct of the appellant was "objectively offensive to community standards" which, in our view, would certainly be likely to bring discredit to the reputation of the PRPS. Once it is established that the insulting and discriminatory words were spoken it would be axiomatic that the words from a senior officer in charge of recruiting would be likely to bring discredit to the reputation of the PRPS.

16.9. While the facts of the *Biring* case are not identical to those of this matter, it does support the proposition that, at least in the case of a senior officer, the use of discriminatory words does bring discredit to a police force's reputation.

16.10. Having considered all of the evidence and the submissions of the parties, I conclude that the Respondent's use of the c-word on March 4th, 2022 is likely to have brought the reputation of the SJPF into disrepute and, therefore, constitutes discreditable conduct.

17. Does the Respondent's use of the c-word constitute neglect of duty under s. 37(b) of the Code?

17.1. Having concluded that the Respondent used the c-word while on duty, I refer to the relevant aspect of s. 37 of the Code:

> **37** A member of a police force neglects their duties if…
> (b) the member fails to work in accordance with official police force policies and procedures…
>
> *Code of Professional Conduct Regulation*, NB Reg 2007-81, s. 37(b)

17.2. There is no dispute that Exhibit 15 is an official SJPF policy. Further, the Respondent has acknowledged receipt of Exhibit 15 (see Exhibit 16 and Exhibit 24 at 40:08-40:30 and 43:40-44:43).

17.3. The Respondent candidly described in Exhibit 24 his understanding of Exhibit 15 as of the Relevant Time. He had a partial comprehension of the SJPF's application of Exhibit 15 but not a complete understanding. In this regard, the testimonies of SS Hussey and DC Dwyer confirm that, at least as of March 4th, 2022, the SJPF's enforcement of Exhibit 15 was not complete, as it condoned the use of some profane and vulgar words in its workplace. For example, consider SS Hussey's testimony under cross-examination:

> Q. Yeah. Do you agree that in -- in -- in the dictionary meaning of "C," the word "C" is slang for vagina? Do you agree with that?

A. Yes.
Q. Okay.
A. It's a discriminatory word for vagina.
Q. How about the word “prick”? Is that slang for penis?
A. Yes. Yes, it is.
Q. And you've heard that lots in that room, haven't you? The word “prick.”
A. Yes.
Q. Yeah. And the word F-U-C-K, which is slang for intercourse.
A. Yes.
Q. There's been a litany of them, hasn’t there been?
A. Yes.
Q. Yep. And that that's part --
20 A. That doesn’t discriminate --
Q. Oh --
A. -- against any person or a group.
Q. Right.

A. That's the difference I'm trying to express.
Q. Right. But that's part of the cultural -- the culture that's been created to vent. These people want to vent when they get there in that -- those gatherings before duty, don't they?
A. It's not every day that they're venting before duty. It happens, though.
Q. Lots. That’s -- yeah, lots.
A. Yeah, it’s -- …

17.4. Both SS Hussey and DC Dwyer testified that certain words should not be used in the SJPF workplace. They characterized those words as “discriminatory” in nature. However, while Exhibit 15 prohibits discriminatory behaviour, including the use of words, “that is hostile in nature, and/or intends to degrade an individual based on personal attributes…”, it also prohibits “offensive, insulting, intimidating, and hurtful behaviour…” At least as of March 4th, 2022, the SJPF was not enforcing Exhibit 15 in a comprehensive and complete manner.

17.5. In spite of the manner in which the SJPF was enforcing Exhibit 15 as of March 4th, 2022, the following facts have been established:

a. The Respondent was working at the Relevant Time.

b. The Respondent used the c-word at the Relevant Time.

c. The Respondent had received Exhibit 15.

d. The Respondent knew, as of the Relevant Time, that the c-word was offensive if it was directed at another person.

e. The Respondent had participated in the Training in May 2021, which was only approximately 15 minutes in length. There was no evidence of additional training having been provided.

17.6. The evidence establishes that the Respondent failed to work in accordance with Exhibit 15. Consequently, the Respondent acted contrary to s. 37(b) of the *Code.*

Having concluded that the Respondent violated ss. 36(1)(a)(ii) and s. 37(b) of the *Code*, what is the appropriate corrective and disciplinary response?

18.1. I have found that the Respondent violated sections 36(1)(a)(ii) and 37(b) of the *Code.* Consequently, it is necessary to consider, in the absence of an agreement at a settlement conference, that I impose a corrective and disciplinary measure pursuant to s. 6 of the *Code*:

> **6** The parties to a settlement conference may agree to or an arbitrator may impose one of the following corrective and disciplinary measures or any combination of the following corrective and disciplinary measures:
>
> (a) a verbal reprimand;
>
> (b) a written reprimand;
>
> (c) a direction to undertake professional counselling or a treatment program;
>
> (d) a direction to undertake special training or retraining;
>
> (e) a direction to work under close supervision;
>
> (f) a suspension without pay for a specified period of time;
>
> (g) a reduction in rank; or
>
> (h) dismissal.

18.2. Contextually, s. 34 of the *Code* is notable, in which the police officers' code of conduct is outlined. The responsibilities include: "(a) to respect the rights of all persons;… (g) to act at all times in a manner that will not bring discredit on their role as a member of a police force; and(h) to treat all persons or classes of persons equally, regardless of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition, political belief or activity."

18.3. The Respondent has maintained his position that the Complainant has failed to prove the *Code* violations alleged in Exhibit 1 and, therefore, no corrective and disciplinary action can be or should be imposed. The Respondent reiterates that his use of the c-word was corrected by SS Hussey on March 4th, 2022. The evidence of SS Hussey under cross-examination supports a conclusion that the Respondent has corrected his behaviour:

> Q. Well, you use -- you use the very same word there, "corrected." That's the very same word as in the regulation, right?
> A. Yes. But the context--
> Q. Okay.
> A. -- might make all the difference in the world.
> Q. It sure does. Now, the reason that you know you did the right thing is because he hasn't used it since that meeting, has he?
> A. Not that I've heard.
> Q. Right. So that corrected it, didn't it? Far as you're concerned. Far as your knowledge.
> 1. To my knowledge.

18.4. The Complainant, however, makes reference to the general principles that guide the application of corrective and disciplinary measures in police conduct complaint matters:

a. the public interest: ensuring a high standard of conduct in the constabulary, and public confidence in the constabulary;

b. the employer's dual interest in maintaining discipline in the police workplace and as 'a public body responsible for the security of the public';

c. the rights of a respondent police officer suspected of misconduct being treated fairly; and

d. where individual members of the public are involved (whether or not they register a formal complaint), the process should ensure that the interests of those individuals are protected.

Ceyssens, *supra*, pp. 5-309 and 5-310.

18.5. The Complainant argues that a three day suspension and mandatory training are appropriate measures to address the Respondent's violations of the *Code*. In support, the Complainant references disciplinary measures that were imposed on a higher ranking

officer in the SJPF in the previous year. These a six-month reduction in rank with a commensurate pay reduction, a six-day unpaid suspension, and a direction to work under close supervision. The distinctions between that previous case and the Respondent's are, however, significant, and include a) in the previous case, the offender was held a higher rank; the offender used the c-word in reference to a female officer of the same rank, and also used a discriminatory word in reference to a female officer of an inferior rank. These misconducts appear to have violated not only the SJPF workplace conduct policy but also Schedule A to the *Code*. While the Respondent's use of the c-word was discriminatory and inexcusable, the previous case referenced by the Complainant was clearly different and worse.

18.6. In her testimony, DC Dwyer asserted that the SJPF has a "zero tolerance policy" concerning discriminatory language in its workplace. The problem that arises with the DC Dwyer's testimony in that regard is found in SS Hussey's admission that the SJPF is "…rather lenient n colourful language, vulgarities…" Included in that vulgar language are the f-word and p-r-i-ck. Under cross-examination, SS Hussey acknowledged that he has heard these words frequently in the SJPF workplace:

How about the word "prick"? Is that slang for penis?
10 A. Yes. Yes, it is.
Q. And you've heard that lots in that room, haven't you? The word "prick."
A. Yes.
Q. Yeah. And the word F-U-C-K, which is slang for
15 intercourse.
A. Yes.
Q. There's been a litany of them, hasn't there been?
A. Yes.

Under direct examination, SS Hussey admitted that the SJPF has been lenient in respect of the use of vulgarities:

Q. And with respect to just generally your expectations of your platoon with respect to the use of appropriate language in the workplace, can you expand upon that any further?
A. I can say that we are rather lenient on colourful language, vulgarities. It is a stressful job and sometimes our officers will vent their frustrations. But there are certain words or phrases that would be crossing the line. And anything that would be discriminatory would be a word that would cross the line.

18.7. In my view, the leniency extended by the SJPF to some forms of colourful, vulgar

language is problematic. Returning to Exhibit 15, it is notable that an objective of policy is "To provide a safe work environment for all employees that is free from harassment, bullying, violence and other forms of inappropriate conduct when at work and at work related social functions. (emphasis added)

18.8. Further, and as cited by the Complainant, s. 34 of the *Code* includes a requirement that officers must act in a manner that will not bring discredit on their role as a member of a police force. It does not reflect positively on the SJPF that a zero tolerance policy has been adopted regarding discriminatory language while other offensive language is extended leniency. In Exhibit 24, the Respondent indicated that, while he knew it was wrong to call another person the c-word, he did not know that it was wrong to use the c-word in respect of an action. One can understand how this may be the case, given the evidence that only a short Training session of approximately fifteen minutes was provided to Platoon B officers regarding Exhibit 15, that the Training occurred back in the spring of 2021, and that the use of vulgarities and offensive language has been frequent in the SJPF workplace. In fact, these are, in my view, mitigating factors that must be considered, as they were in *Canadian Union of Public Employees, Local 1418 v New Brunswick (Justice and Public Safety)*, 2016 CanLII 50052 (NB LA):

> 94. So too seen as a mitigating consideration here, is, again, the cited "office culture" of the Moncton probation office. This, I observe, can be described, at times, as "barnyard" like. Further, a failure to hear from the Supervisor "O" is very troubling, and from which I take a negative inference not to have heard from him. The office of Supervisor "O" was adjacent to that of Kelly's, and directly across from both "U" and "Y". Many of Kelly's office behaviours complained of would have been in his sights, including the so-called "humping", the ongoing sexual joking, and other, as testified to, circumstances in or around "Y's" and "U's" offices. As the evidence shows, unchallenged, "O" also apparently participated in disputed behaviours by times.
>
> 95. I also conclude the failure of this Employer to offer training or education appropriate to overcome the normative culture of the Moncton workplace, consistent with its Policy, to be taken as a mitigating factor. I repeat too my concern over the imputed knowledge of challenged Kelly behaviours in the office by the Supervisor "O" and also, as testified to, unnamed Supervisors present when "Y" announced she wanted to change offices, because of Kelly.

18.9. Here, the evidence of SS Hussey indicates that, after having been corrected by SS Hussey on March 4th, 2022, the Respondent has not subsequently been heard making use of the c-word. This is a relevant consideration in respect of the four corrective and disciplinary measures identified by Ceyssens and cited in para. 18.3 above. The challenged faced in

applying these principles is that, based on the evidence received in this matter, the "employer's…interest in maintaining discipline in the police workplace…" has not been as comprehensive as one might have expected.

18.10. I have reviewed carefully the oral and written submissions of the parties. Given all of the circumstances, including the mitigating factors I have referenced, I am satisfied that the Respondent was made aware on March 4th, 2022 that the use of the c-word in any context is unacceptable and that he has not repeated his misconduct since then. As a result, the following additional measures are appropriate and adequate to satisfy the purposes of the corrective and disciplinary aspects of the *Code:*

a. Within fifteen (15) calendar days of the issuance of this Decision, the Respondent shall be issued a written reprimand as follows:

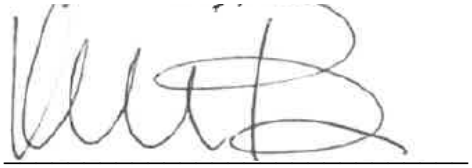
> On March 4th, 2022, you inappropriately used a misogynistic and discriminatory word (the c-word) in the Saint John Police Station. Words that promote discrimination on any one or more prohibited grounds of discrimination under the New Brunswick *Human Rights Act* are not tolerated within the Saint John Police Force.
>
> As a constable, you are held to a high standard of conduct. Your work involves serving and protecting all members of our community. These include individuals whose personal characteristics have attracted historic discrimination and marginalization. All members of the Saint John Police Force, including you, must ensure that your conduct reflects an attitude of equality and fairness for all members of our community;

b. Within ninety (90) calendar days of the issuance of this Decision, the Respondent shall obtain counselling services to be provided or coordinated by Laurett Nwaonumah in respect of his personal circumstances and to address any issue that may have motivated his use of the c-word;

c. Within thirty (30) calendar days of the issuance of this Decision, the Respondent shall make arrangements with the New Brunswick Human Rights Commission to obtain Commission-approved training in these topics: Getting Acquainted with Human Rights and Human Rights and Sexual Harassment.

18.11. Regarding the measures imposed in para. 18.10 above, I hereby retain jurisdiction to address any matters that may arise in respect of implementation and/or non-compliance. While not ordered, it is obviously prudent for the SJPF to consider the provision of additional and comprehensive workplace conduct training to all of its members.

Dated at Saint John, New Brunswick, this 29th day of December, 2022.



Kelly VanBuskirk, K.C., PhD, C.Arb.