PROVINCE OF NEW BRUNSWICK

IN THE MATTER OF THE *NEW BRUNSWICK POLICE ACT*

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

CHIEF PAUL FIANDER

Complainant

- and -

CONSTABLE SHAWN DOUCET

Respondent

DECISION

Appearances:

James LeMesurier, Q.C. and Lara Greenough, Esq. For the Complainant

Jamie Eddy, Esq. and Jessica Bungay, Esq. For the Respondent

Hearing dates: June 25th, July 16th, July 26th, and July 27th, 2021

1. This is a decision in a matter arising from a Notice of Arbitration Hearing dated May 13th, 2021 (the "Notice of Arbitration Hearing", Exhibit 1) issued by Chief Paul Fiander (the "Chief") of the Miramichi Police Force (the "MPF") in respect of Constable Shawn Doucet (the "Officer").

2. The Officer was hired by the MPF in 2019 as a full-time constable, subject to probation.

3. The Notice of Arbitration Hearing advances five complaints (the "Complaints", which are also individually referenced as "Count 1", "Count 2", "Count 3", "Count 4", and "Count 5" below) against the Officer. The Complaints allege violations of the *Code of Professional Conduct Regulation* Conduct (Regulation 2007- 81) – Police Act (the

"Code" or the "Code of Conduct").

The Complaints

4. A Notice of Police Act Investigation dated January 27, 2020 was issued by the Chief to the Officer on or about January 28, 2020 (Exhibit 11).

5. Exhibit 11 alleges as follows:

> It is alleged that Constable Shawn Doucet, of the Miramichi Police Force, on the 21st day of January, 2020, without lawful excuse, had in his possession stolen property, thereby engaging in discreditable conduct, as described by Section 36 (1)(a)(ii) of the Code of Professional Conduct (Regulation 2007 – 81) – Police Act, thereby committing an offence under Section 35 (a) of the Code of Professional Conduct (Regulation 2007 – 81) – Police Act. ("Count 1", Exhibit 1)

6. A second Notice of Police Act Investigation also dated January 27, 2020 (Exhibit 12) was issued by the Chief to the Officer and served on or about January 28, 2020. That Notice of Police Act Investigation advances four additional charges against the Officer as follows (though only the charges identified below as "Count 2" and "Count 3" proceeded to arbitration before me):

> It is alleged that Constable Shawn Doucet, of the Miramichi Police Force, on the 4th day of October 2019, without just cause, deployed a conducted energy weapon while it made contact with an individual, thereby engaging in discreditable conduct, as described by s. 36(1)(a)(ii) of the Code of Professional Conduct (Regulation 2007- 81) - Police Act, thereby committing an offence under s. 35(a) of the Code of Professional Conduct (Regulation 2007-81)- Police Act. ("Count 2", Exhibit 1)
>
> And that: Constable Shawn Doucet, of the Miramichi Police Force, on the 4th day of October 2019, without just cause, deployed a conducted energy weapon while it made contact with an individual, thereby abusing his authority as a member of a police force, as described by s. 41 (b) of the Code of Professional Conduct (Regulation 2007- 81) -

> Police Act, thereby committing an offence under s. 35(f) of the Code of Professional Conduct(Regulation 2007- 81) - Police Act.
>
> And that: Constable Shawn Doucet, of the Miramichi Police Force, on the 4th day of October 2019, without just cause, deployed a conducted energy weapon while it made contact with an individual, thereby failing to work in accordance with Miramichi Police Force policy with respect to the use of conducted energy weapons, as described by s. 37 (b) of the Code of Professional Conduct (Regulation 2007- 81) - Police Act, thereby committing an offence under s. 35(b) of the Code of Professional Conduct(Regulation 2007- 81) - Police Act. ("Count 3", Exhibit 1)
>
> And that: Sawn Doucet, of the Miramichi Police Force, on the 7th day of January 2020, without lawful excuse disobeyed a direct order from the Deputy Chief of Police by approaching a suspect of a criminal investigation, in which the subject officer was the victim, when ordered not to do so by the Deputy Chief of Police, thereby engaging in insubordinate behaviour as described by s. 46(b) of the Code of Professional Conduct (Regulation 2007- 81)- Police Act, thereby committing an offence under s. 35(k) of the Code of Professional Conduct (Regulation 2007- 81) - Police Act.

7. A Notice of Suspension dated January 28, 2020 was issued by the Chief to the Officer (Exhibit 13). Also on January 28, 2020, the Officer executed a Suspended Member: Responsibilities During Suspension Notice (Exhibit 14).

8. A third Notice of Police Act Investigation, dated March 17, 2020, was issued by the Chief to the Officer and served on March 24, 2020 (Exhibit 23), alleging as follows:

> It is alleged that Constable Shawn Doucet, of the Miramichi Police Force, on the 17th day of March, 2020, without lawful excuse, disobeyed a direct order from Superintendent Randy Hansen of the Miramichi Police Force, by failing to report to the front reception desk of the Miramichi Police Force headquarters at 0:900 hours, as ordered to do so under the terms of a Notice of Suspension which had been served on, and acknowledged by Shawn Doucet on January 28, 2020, thereby engaging in insubordinate behaviour as described by Section 46 (b) of the Code of Professional Conduct (Regulation 2007 – 81) - Police Act and thereby

> committing an offence under Section 35 (k) of the Code of Professional Conduct (Regulation 2007 – 81) - Police Act. (“Count 4”, Exhibit 1)

9. Further, a fourth Notice of Police Act Investigation, dated July 22, 2020 was issued by the Chief to the Officer and served on July 23, 2020 (Exhibit 24), alleging as follows:

> It is alleged that Constable Shawn Doucet, of the Miramichi Police Force, between the first day of November, 2019 and the thirtieth day of November, 2019, without lawful excuse failed to exercise sound judgment and restraint in respect of the use and care of a firearm, by consistently not properly securing his police issued firearm when not on duty, as described by Section 42 (c) of the Code of Professional Conduct (Regulation 2007 – 81) - Police Act thereby committing an offence under Section 35 (g) of the Code of Professional Conduct (Regulation 2007 – 81) - Police Act. (“Count 5”, Exhibit 1)

10. The Complaints referenced in Counts 1, 2, 3, and 4 above were made by MPF Deputy Chief Brian Cummings (the “Cummings Complaints”).

11. The Complaint referenced in Count 5 above was made by Bryannah James, the Officer’s former spouse (the “James Complaint”).

12. The Chief issued a Notice of Settlement Conference (Exhibit 28) to the Officer regarding Counts 2, 3, and 4, which Notice was served on the Officer on June 9, 2020 and which Settlement Conference was scheduled to take place on July 21, 2020.

13. The Settlement Conference referenced in Exhibit 28 was later postponed from July 21, 2020 to September 10, 2020. A notice of this postponement dated July 13, 2020 (Exhibit 29) was served on the Officer on July 14, 2020.

14. The Chief issued a second Notice of Settlement Conference (Exhibit 30) to the Officer regarding Count 1, which Notice was served on the Officer on September 1, 2020 and which Settlement Conference was scheduled to take place on September 10, 2020.

15. The Chief issued a third Notice of Settlement Conference (Exhibit 31) to the Officer regarding Count 5, which Notice was served on the Officer on September 10, 2020 and which Settlement Conference was scheduled to take place on September 22, 2020.

16. The Settlement Conference conducted on September 10, 2020 did not result in a settlement and, by correspondence dated September 11, 2020 (Exhibit 32), the Chief advised the New Brunswick Police Commission (the "Commission") that he intended to issue a Notice of Arbitration on September 24, 2020, after completion of the scheduled September 22, 2020 Settlement Conference.

17. The Officer did not attend the Settlement Conference held on September 22, 2020. The Chief advised the Commission by correspondence dated September 22, 2020 (Exhibit 33) of this fact and indicated that "next steps" were being discussed with the Chief's legal counsel.

18. Although the Chief had, in Exhibit 32, indicated an intention to issue a Notice of Arbitration on September 24, 2020, no such Notice was issued. Instead, on September 29, 2020, the Chief notified the Officer by correspondence of that date (Exhibit 34) that his employment was terminated effective immediately (the "Termination of Employment").

19. In correspondence dated October 5, 2020, the Chief notified the Commission of the Termination of Employment (Exhibit 35). In Exhibit 35, the Chief also advised the Commission that:

> "As a result of Constable Doucet's termination we have loss (*sic*) jurisdiction in regards to the processing of all outstanding matters pending against him under the New Brunswick Police Act."

20. The Chief corresponded with Bryannah James on October 5, 2020, as well (Exhibit 36) in

which he stated:

> "Under the provisions of the New Brunswick Police Act, a police force loses jurisdiction to continue with the processing of Police Act related matters once a member is no longer employed with a police force."

21. On October 8, 2020, the Commission responded to Exhibit 35 in correspondence addressed to the Chief (Exhibit 37), in which it stated:

> "As Mr. Doucet is no longer an employee of the Miramichi Police Force, nor a member of a police force defined by the New Brunswick Police Act, no further proceedings under the Police Act are applicable and the above-noted NBPC files have been closed."

22. The Commission also corresponded with the Officer on October 8, 2020 (Exhibit 38), advising as follows:

> "The NBPC has no jurisdiction to process a complaint under the Police Act against any person who is not a police officer. Our four files noted above are closed."

23. During the period from September 29, 2020 to April 21, 2021, the Officer sought judicial review of the Chief's decision concerning the Termination of Employment. On April 21, 2021, the New Brunswick Court of Queen's Bench issued a decision that quashed the Termination of Employment (the "Court Decision").

24. By correspondence dated May 10, 2021, the Chief advised the Commission of the Court Decision (Exhibit 40) and cited the following excerpt:

> "Cst. Doucet remains a member of the Miramichi Police Force retroactive to September 30, 2020 until such time as his status may change in conformity with the provisions of the Police Act."

25. The Notice of Arbitration Hearing (Exhibit 1) was issued on May 13, 2021 and, by correspondence dated June 2, 2021, the Commission appointed me as the arbitrator to hear this matter (Exhibit 53).

26. At the time that Exhibits 1 and 53 were issued, the Province of New Brunswick remained under a Declaration of Emergency arising from the COVID-19 pandemic.

27. On June 11, 2021, Bill 53 - An Act Respecting the Police Act, received Royal Assent (the "Amendment").

28. Two preliminary issues in respect of the Arbitration Hearing were raised by the Officer in June 2021 and addressed in an Interim Decision made by me on July 14, 2021 (the “Interim Decision”):

    a. The Officer requested a postponement of the Arbitration Hearing in order to instruct legal counsel; and

    b. The Officer objected to the conduct of the Arbitration Hearing virtually on the Zoom platform.

29. The Arbitration Hearing was commenced on June 28, 2021 with the consent of the Officer and the Chief. On June 28, 2021, the proceedings in the Arbitration Hearing were limited to my reading of each of the five Counts referenced in the Notice of Arbitration Hearing to the Officer and his responses. The Officer denied each of the five Counts.

30. The Arbitration Hearing resumed in an in-person hearing conducted in Moncton on July 16, 2021 and in Miramichi on July 26 and 27, 2021. A further procedural hearing was conducted virtually on July 22, 2021 to address procedural issues previously raised by the parties.

31. On July 26, 2021, the Officer’s counsel issued correspondence to the Chief’s counsel summarizing the Officer’s challenges to my jurisdiction in respect of the Arbitration Hearing (the “Jurisdictional Challenges”, Exhibit 54).

32. During the course of the Arbitration Hearing, fourteen witnesses testified:

a. Cst. Ian Kaulbach
b. Sgt. Andrew McFarlane
c. Deputy Chief Brian Cummings
d. Sgt. Jody Whyte
e. Cst. Ethan Baisley
f. Sgt. Dana Hicks
g. Stacey Dunfield
h. Inspector Eric Levesque
i. Superintendent Randy Hansen
j. Inspector Steve Robinson
k. Sgt. Robert Bruce
l. Tristan Jones
m. Evelyn Gilliss
n. Bryannah James

33. In addition to the testimony of the witnesses, fifty-four exhibits were entered into evidence, which are listed in Appendix A.

34. The Officer was not present at the Arbitration Hearing on July 26 and 27, 2021. His absence was a matter of concern since, in *C.U.P.E, Local 2404 et al. v. Grand Bay-Westfield,* 2005 NBQB 313 (CanLII), the exclusion of a grievor from an arbitration hearing was found to constitute a violation of the duty of fairness owed to the grievor.

35. Counsel for the Officer confirmed that the Officer consented to the Arbitration Hearing proceeding in his absence. However, an executed waiver to that effect was sought and obtained from the Officer, which waiver is dated July 26, 2021 (Exhibit 42).

36. On July 27, 2021, the parties agreed that the Arbitration Hearing would include the submission of arguments in writing in accordance with the following schedule:

> August 13, 2021: The Chief made written submissions regarding the substance of the Counts; the Officer made written submissions regarding his Jurisdictional Challenges.
>
> August 20, 2021: The Chief responded to the Officer's written submissions regarding his Jurisdictional Challenges; the Officer was to respond to the Chief's written submissions regarding the substance of the Counts, but the Officer did not do so.
>
> August 25, 2021: The Chief and the Officer were to reply to the other party's respective responses. The Officer did file a reply to the Chief's submissions on the Jurisdictional Challenges, at which time the Arbitration Hearing ended.

37. In making this Decision, I have carefully considered the testimony of the witnesses, the contents of the exhibits, and the submissions of the Chief and the Officer, including the authorities that have been cited, regardless of whether specifically referenced in this Decision. The Arbitration Hearing has involved a serious matter concerning the Officer's employment and the public interest.

The Jurisdictional Challenges

38. The Officer advanced six Jurisdictional Challenges, which are enumerated in Exhibit 54 and also in the written submission filed on behalf of the Officer and dated August 13th, 2021. The Jurisdictional Challenges are determined below.

Jurisdictional Challenge 6: Time Limitations Under the Police Act and the Code

39. I have chosen to address Jurisdictional Challenge 6 first, in part because it was referenced

in the Interim Decision.

40. On June 11, 2021, the New Brunswick Legislature gave Royal Assent to amendments (the "Amendments"). As a result "of the Amendments, Section 11 (a) of the Act currently reads as follows:

> 11 The Arbitrator shall:
> (a) Commence an Arbitration Hearing within 30 days after the date the Notice of Arbitration Hearing is served.

41. On May 13, 2021, when the Notice of Arbitration Hearing (Exhibit 1) was issued, the Code required that the Arbitration Hearing be conducted within thirty days of the appointment of the arbitrator.

42. The Officer submits that, because the Amendments contemplate the commencement of an arbitration hearing within thirty days after the issuance of a Notice of Arbitration Hearing, this Arbitration Hearing ought to have commenced within thirty days of the issuance of Exhibit 1. Exhibit 1 was issued by the New Brunswick Police Commission on May 13, 2021. It is notable that the Amendments did not take effect until June 11, 2021 and, if the Officer's argument in this regard were to be accepted, the Arbitration Hearing would have been required to commence within three days of the amendments coming into force. This, of course, would have been a practical implausibility.

43. I do not accept the Officer's interpretation of the amended ss.11. The Amendments were not in force and effect as of the date of the issuance of the Notice of Arbitration Hearing (Exhibit 1), nor were the Amendments in effect at the date of my appointment on June 2, 2021 (Exhibit 55). On those dates, Section 11 of the *Code* required that the Arbitrator conduct an arbitration hearing within thirty days after appointment.

44. However, it is clear on its face that ss.11 applies only to Notices of Arbitration Hearing served after ss.11 came into force. The language used in ss.11 is prospective as it says that the Arbitration Hearing is to commence 30 days after the Notice **is** served. Had the legislature intended that subsection to apply to ongoing proceedings where the Notice **had already been served**, it had to say so directly. There is a presumption that the law is not to have retroactive or retrospective application in the absence of clear language to the contrary:

> 1. It is presumed that the legislature does not intend legislation to be applied retroactively – that is, to be applied so as to change the past legal effect of a past situation.
>
> This presumption is strong. However, it can be rebutted by clear, express language indicating that the legislation is meant to apply retroactively. It can also be rebutted by necessary implication.
>
> 2. It is presumed that the legislature_does not intend legislation to be applied retrospectively unless the legislation confers a benefit or was enacted to protect the public.
>
> The weight of this presumption is unclear, but the better view is that it is variable, depending on factors such as the nature of the disadvantage imposed by the legislation and the degree to which imposing it would be arbitrary or unfair.
>
> Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc., 2014) at 25.25.

45. I find that the legislature did not intend to attach new consequences (a new, shorter limitation period for commencing the arbitration hearing) to the past service of the Notice of Arbitration Hearing. Had that been the intention, the new ss.11 would have said that the hearing much commence "within 30 days after the date the Notice of Arbitration Hearing is or has been served" or words to that effect. The use of the prospective "is" forcloses any interpretation that the legislature intended to change the timeline for

commencing a hearing where a Notice of Arbitration Hearing had already been served, as in this case.

46. Further, considering the effect of the interpretation advanced by the Officer, I conclude that it would create a result that was arbitrary and unfair. On June 28, 2021, twenty-six days after my appointment, the Arbitration Hearing in this matter was commenced by the reading of the charges to the Officer in accordance with the provisions of the Act.

47. Applying the amendments to this present case would have the effect of extinguishing the matters raised in the Notice of Arbitration Hearing (Exhibit 1) without determination of the serious matters raised therein. The Officer would benefit from the arbitrary coming into force date, which just so happens to have been only a few days short of the 30 days after the Notice of Arbitration Hearing was served. That unfair result cannot have been the intention of the legislature in enacting the amendment to ss.11.

48. Alternatively, if my interpretation of ss.11 is incorrect, then I will also consider the submissions made by the Officer in support of his interpretation.

49. The Officer relies in part on *Sullivan on the Construction of Statutes* to support his argument that the Amendments required this Arbitration Hearing to commence within thirty days of the service of the Notice of Arbitration Hearing (Exhibit 1):

> 25.111 The presumption that procedural legislation in (*sic*) intended to have an immediate effect is partially codified in Canadian Interpretation Acts.
>
> Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc., 2014) at 25.111.

50. The *New Brunswick Interpretation Act*, RSNB 1973, c I-13, s. 8(2) reads:

> 8(2) Where an enactment is repealed in whole or in part or a regulation revoked in whole or in part and other provisions are substituted therefor,
> (a) every person acting under the enactment or regulation so repealed or revoked shall continue to act as if appointed under the provisions so substituted until another is appointed in his stead,
> (b) every bond and security given by any person appointed under the enactment or regulation so repealed or revoked shall remain in force, and all offices, books, papers and things made or used under the repealed or revoked enactment or regulation shall continue as before the repeal so far as consistent with the substituted provisions,
> (c) every proceeding taken under the enactment or regulation so repealed or revoked may be taken up and continued under and in conformity with the provisions so substituted, so far as consistently may be,
> (d) the procedure established by the substituted provisions shall be followed so far as it can be adapted in the recovery or enforcement of penalties and forfeitures incurred and in the enforcement of rights, existing or accruing under the enactment or regulation so repealed or revoked, or in any proceedings in relation to matters that have happened before the repeal or revocation, and…
>
> 8(3) Where an enactment is repealed in whole or in part or a regulation revoked in whole or in part and other provisions are substituted by way of amendment, revision or consolidation the repeal or revocation does not affect the validity of
> (a) any act, deed, right, title grant, assurance, descent, will, registry, filing, by-law, rule, order in council, proclamation, regulation, contract, lien, charge, capacity, immunity, matter or thing done, made acquired, established or existing at the time of the repeal or revocation…
> (c) any office, appointment, commission, salary, remuneration, allowance, security or duty, or any matter or thing appertaining thereto established or existing at the time of the repeal or revocation, or
> (d) any other matter or thing whatsoever had, done, completed, established, existing or pending at the time of the repeal or revocation, where it is not inconsistent with or repugnant to the provisions so substituted.

51. In *Laquerre v. Gendarmerie Royale du Canada*, 1995 Carswell Nat. 1162, the Federal Court determined that, when a new prescription period was enacted during the life of an existing R.C.M.P. disciplinary process, the matter of the time limitation was one of

substantive law and not procedural law. The effect of that determination was that the new prescription period was found not to have application to the existing discipline process.

52. The decision in *Laquerre v. Gendarmerie Royale du Canada, supra* is comparable to the present matter: in it, the Applicant, a police officer, was charged under the discipline provisions of the *Royal Canadian Mounted Police Act,* R.S.C. 1985, c. R-10 (the "Old Act"). The Old Act was amended by the *Royal Canadian Mounted Police Act,* R.S.C. 1985, c. R-10 as am. R.S.C. 1985, 2nd Supp., c. 8 (the "New Act"). The New Act came into force in June 1988. As the Court observed in para. 41 of the decision, the New Act prescribed a one-year limitation period in which to bring charges against an officer while the Old Act imposed no time limitation. In May 1989, the R.C.M.P. advanced discipline charges against the Applicant in respect of allegations related to incidents in 1987 and 1988. The Court found that the charges could proceed against the Applicant under the Old Act.

53. In *Cloutier v. Leclair,* 2006 PSLRB 5, Arbitrator Guindon followed the decision in *Laquerre* and concluded that a new time limit set out in a new statute did not apply to a matter begun under the former statute. In doing so, the arbitrator referred to the decision of the Federal Court of Appeal in *Picard v Canada (Public Service Staff Relations Board)*, [1978] 2 F.C. 296 (Fed. C.A.).

54. Further, in *Sullivan on the Construction of Statutes* at 25.117:

> …when the effect of applying the new provision is either to extinguish the action that was still viable when the provisions came into force… more than time is at stake. In such a case, the provision affects the substantive rights of the parties and cannot be considered purely procedural."

55. Under former ss.11, the parties had an expectation that the Arbitration Hearing would be commenced within 30 days of my appointment. From the perspective of

the Chief, he had a right to have the substance of the matter determined. In accordance with *Laquerre*, *supra, Cloutier*, *supra,* and the excerpt from Sullivan cited above, this was a substantive right. Pursuant to ss.8(3)(a) of the *Interpretation Act*, such substantive rights are preserved upon amendment to the legislation.

56. Further, more than the Chief's right to have the charges determined was at issue. Likewise, the substantive rights of the Officer would also be affected by his preferred interpretation. When Exhibit 53 was issued, the statutory requirement was to conduct the arbitration hearing within thirty days after the arbitrator's appointment. The Arbitration Hearing was commenced on June 28th, 2021, twenty-six days after my appointment. The Amendments were given Royal Assent on June 11, 2021; the Notice of Arbitration Hearing was issued on May 13, 2021; and my appointment was made on June 2, 2021. As stated in the Interim Decision, the Officer submitted on June 17, 2021 that he had been unable to retain and instruct counsel as of that date and he requested a sixty-day adjournment to do so. The substantive rights of the Officer were at risk and would have been negatively impacted if the Arbitration Hearing had commenced on or before thirty days from May 13, 2021.

57. Having considered the arguments of the Officer and the Chief in respect of this matter, as well as all of the circumstances of the case, I conclude that the Officer's argument in respect of Jurisdictional Challenge 6 must fail.

Jurisdictional Challenge 1: Closure of all files relating to conduct complaints by both the Chief and the Commission

58. Following the Termination of Employment, the Chief issued correspondence to the New Brunswick Police Commission dated October 5, 2020 (Exhibit 35) in which the Termination of Employment was referenced. In Exhibit 35, the Chief stated:

> "As a result of Constable Doucet's termination we have loss (sic) jurisdiction in regards to the processing of all outstanding matters pending against him under the New Brunswick Police Act."

59. Similarly, in correspondence from the Chief to a complainant, Bryannah James, also dated October 5, 2020 (Exhibit 36), the Chief stated:

> "Under provisions of the New Brunswick Police Act, a police force loses jurisdiction to continue with the processing of Police Act related matters once a member is no longer employed with the police force."

60. In response to Exhibit 35, the New Brunswick Police Commission corresponded with the Chief on October 8, 2020 (Exhibit 37). In that correspondence, Jennifer Smith, the Executive Director of the New Brunswick Police Commission stated:

> "As Mr. Doucet is no longer an employee of the Miramichi Police Force, nor a member of a police force as defined by the New Brunswick Police Act, no further proceedings under the Police Act are applicable and the above-noted NBPC files have been closed."

61. Further, also on October 8, 2020, the New Brunswick Police Commission corresponded with the Officer (Exhibit 38), in which correspondence the Officer was advised that:

> "The NBPC has no jurisdiction to process a complaint under the Police Act against a person who is not a police officer. Our four files noted

above are closed."

62. Obviously, had the Termination of Employment continued in effect, the arbitration hearing in this matter would not have occurred and this decision would be unnecessary. However, that was not the case. Instead, the Officer made an application for judicial review of the Termination of Employment. In March 2021, the New Brunswick Court of Queen's Bench granted the Officer's application and quashed the Termination of Employment. Specifically, the Court of Queen's Bench determined that:

> 1. The decision of the Respondent, Chief Fiander, dated September 29, 2020 terminating the employment of Constable Doucet is removed into this Honourable Court and quashed;
>
> 2. Constable Doucet holds the status of police officer pursuant to the Police Act and all measures of discipline or dismissal must be done in conformity with the provisions of the Police Act;
>
> 3. <u>Constable Doucet remains a member of the Miramichi Police Force retroactive to September 30, 2020 until such time as his status may change in conformity with the provisions of the Police Act</u> …" (emphasis added).
>
> (the "Court Decision")

63. The Court Decision had the effect of extinguishing the Termination of Employment as if it did not occur. On this point, reference is made to Blake's *Administrative Law in Canada:*

> An order quashing a decision or order, without a reference back, does not preclude a tribunal from dealing with the matter. Its proceedings may be continued as if the part of the proceeding that was quashed had not yet taken place….Even where all steps in a proceeding are quashed, the tribunal may continue the proceeding, although it must start again at the beginning.
>
> Blake, Sara. *Administrative Law in Canada,* 5th ed. (Markham: LexisNexis), 2011 at p. 229.

64. As a result, the Officer's employment effectively continued from September 30, 2020 as if uninterrupted.

65. After the Court Decision, the Chief resumed the Police Act process relating to the Complaints. The Officer has argued that the Police Act makes no provision for the resumption of proceedings in respect of the complaints after the Chief and the New Brunswick Police Commission had already declared a loss of jurisdiction and, in the case of the Commission, closure of its files.

66. In support of his position in this regard, the Officer makes the arguments that there is no inherent power for an administrative decision maker or tribunal to re-open a file and reconsider a decision. In that regard, the Officer cites *U.E.S., Local 298 v. Bibeault*, [1998] 2 S.C.R. 1048 at paragraph 118 and *Judicial Review of Administrative Action in Canada*. From the latter authority, the Officer cites as follows:

> "Administrative adjudicators and other decision makers to whom the duty of fairness applies have no inherent jurisdiction to re-hear, reconsider or vary a decision once it has been finalized. Rather, having rendered a final decision, they are functus officio."
>
> *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing 2010), Donald Brown, Q.C. and John Evans, at page 1263.

67. The principle of *functus officio* was described by Sopinka, J., in *Chandler v Alberta Association of Architects*, 1989 CanLII 41, [1989] 2 SCR 848 at pp. 861-862:

> As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been

> a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, *supra*.
>
> To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings…

68. The Officer's position depends upon the conclusion that the Chief made a final decision to terminate the procedures under the Police Act in respect of the Complaints. The Officer correctly observes that the Police Act provides express statutory authority to re-open a concluded file in five specific circumstances (see ss. 27.6 (1), 27.6 (2), 27.9 (1), 29.5 and 28.5 of the Police Act). As has been observed by the Officer, none of these circumstances of statutory authority are applicable in this case.

69. That, however, does not end the matter. This is not a case in which any decision was made by the Chief or the Commission regarding the Complaint. Instead, an intervening circumstance, the Termination of Employment, resulted in a temporary loss of jurisdiction over the procedures under the Police Act in respect of the Complaints.

70. The Chief argues that, in identifying a loss of jurisdiction resulting in closure of his files in respect of the Complaints, he did not make a "decision" in respect of the merits of the Complaints themselves. The Chief cites *Canada (Attorney General) v. Cylien*, 1973 Carswell Nat.92, at paragraph 14:

> "When, however, the Board takes a position with regard to the nature of its powers upon which it intends to act, that "decision" has no legal effect. In such a case, nothing has been decided as a matter of law."

71. The Chief has cited authorities in support of his position that, on the quashing of a termination of employment of a probationary police officer, disciplinary proceedings in effect at the time of the termination may continue:

> "A police board may continue its efforts to dismiss the probationary constable notwithstanding that the initial decision was quashed. Such further efforts constitute a continuance of the original proceedings and do not represent new proceedings which might give rise to questions regarding limitation periods."
>
> Ceyssens, Paul. Legal Aspects of Policing (Salt Spring Island, British Columbia: Earl's Court Legal Press Inc.), 1994 (loose-leaf updated 2019, update 35), Chapter 5 at 46.

72. Additionally, the decision in *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, 117 D.L.R. (3d) 604 is instructive. In that case, disciplinary proceedings commenced against an officer that were not completed because of a termination of employment that was subsequently quashed were properly continued after the Officer's reinstatement.

73. In my view, the proceedings against the Officer in respect of the Complaints had not been made the subject of a "final decision" by the Chief or the Commission. Rather, the proceedings that would have otherwise lead to a decision were interrupted by a loss of jurisdiction resulting from the termination of employment. Once the termination of employment was quashed, resulting in a resumption of the Officer's employment as if the termination had not occurred, the Officer cannot benefit in a twofold manner from the quashing of the termination of employment by obtaining reinstatement and, at the same time, having the proceedings in respect of the Complaints extinguished. As a result, Jurisdictional Challenge 1 must fail.

Jurisdictional Challenge 2: Notice of Arbitration Hearing was untimely

74. The Officer asserts that the Chief failed to serve a Notice of Arbitration Hearing in respect of the Complaints in a manner compliant with ss. 29.4 (4) of the *Police Act*. That provision reads as follows:

> 29.4 (4) If, in the opinion of the Chief of Police, the parties to the settlement conference fail to reach a settlement within a reasonable period of time, the Chief of Police shall serve a Notice of Arbitration Hearing on the police officer.

75. The Officer notes that, by correspondence to the Commission dated September 11, 2020 (Exhibit 32), the Chief indicated his intention to serve the Officer with a Notice of Arbitration Hearing on September 24, 2020. The Chief did not do so. It was not until May 13, 2021, that the Notice of Arbitration Hearing (Exhibit 1) was served.

76. The Officer submits that the failure of the Chief to serve the Notice of Arbitration Hearing in a timely fashion following the failure to achieve a settlement constitutes a deprivation of jurisdiction. The Officer submits that the period of time that passed between the Settlement Conferences and the issuance of the Notice of Arbitration Hearing (Exhibit 1) is unreasonable and therefore inconsistent with the requirement of s. 29.4(4) of the Police Act. However, no assessment of a "reasonable period of time" for serving a Notice of Arbitration Hearing was offered.

77. In response, the Chief argues that no evidence of prejudice to the Officer has been adduced regarding his delay in issuing the Notice of Arbitration Hearing (Exhibit 1). In that regard, the Chief relies upon the case of *Masters v. Kiproff and Toronto Police Service*, 2006 ONCPC 3, in which a 256 day delay in issuing a Notice of Hearing was considered. In that case, it was determined that no prejudice had been incurred by the officer in question as a result of the delay and, therefore, the hearing could proceed.

78. It is notable that the Police Act did not impose a specific time requirement for the service of a Notice of Arbitration Hearing. Under the Act, the Chief is given a "reasonable period of time" in which to serve the Notice of Arbitration Hearing. I take the use of the term "reasonable" as requiring consideration of the entire context.

79. Here the delay was much less than that in *Masters v. Kiproff and Toronto Police Service, supra*. The second settlement conference occurred on September 22, 2020 and the Officer was terminated on September 29, 2020, a period of 7 days. The termination temporarily removed the Chief's jurisdiction to issue the Notice of Arbitration Hearing. As a result, I do not consider the time between September 29, 2020 and April 21, 2021 (the date the termination was quashed) to be relevant to the delay calculation. The Notice of Arbitration Hearing was issued 23 days after the Judicial Review decision. This amounts to a total delay of 30 days before the Chief issued the Notice of Arbitration Hearing. In the circumstances, I do not consider a 30 day delay to be an unreasonable period of time for the purposes of ss.29.4(4) of the Act.

80. Similarly, in this case, no evidence of prejudice was advanced by the Officer regarding the Chief's delay in issuing the Notice of Arbitration Hearing (Exhibit 1). For that reason, it is concluded that Jurisdictional Challenge 2 must fail.

Jurisdictional Challenge 3: Notification of the Substance of the Complaint Pursuant to Subsection 27.4 (1) of the Police Act

81. The Police Act requires that the Chief must provide the Officer with notice in writing of the substance of a conduct complaint:

> 27.4(1)The chief of police shall give the police officer notice in writing of the substance of the conduct complaint immediately after the chief of police receives the conduct complaint under subsection 27.3(1).

82. The Officer has argued that the Notices provided to him of the conduct complaints that formed the basis of the Notice of Arbitration Hearing (Exhibit 1) were insufficient. These Notices are Exhibits 11, 12, 23 and 24.

83. In respect of Exhibit 11, it should be noted that the conduct complaint in question arose in respect of behaviour alleged to have occurred on January 21, 2020. Exhibit 11 is dated

January 27, 2020 and the Officer accepted service of Exhibit 11 on January 28, 2020.

84. Exhibit 12 relates to four conduct complaints. The last of these conduct complaints arose from behaviour alleged to have occurred on January 7, 2020; the remaining three arose from behaviour alleged to have occurred on October 4, 2019. The timing of the conduct complaints contained in Exhibit 12 that relate to behaviours alleged to have occurred on October 4, 2019 is disconcerting in respect of the requirements of ss. 27.4 (1); however, the evidence of Evelyn Gilliss received in the course of the Arbitration Hearing was to the effect that she did not advance the subject matter of the October 4, 2019 conduct complaints to the MPF until January 2020. I accept that evidence.

85. Exhibit 23 advances a conduct complaint regarding alleged behaviours alleged to have occurred on March 17, 2020. Exhibit 23 is dated March 17, 2020 and was served on the Officer on March 24, 2020.

86. Exhibit 24 is a conduct complaint regarding conduct that was alleged to have occurred between November 1, 2019 and November 30, 2019. Exhibit 24 is dated July 22, 2020 and was served on the Officer on July 23, 2020. There is no evidence that the Chief was aware of the conduct underlying Exhibit 24 until July 2, 2020, which is the date the complainant, Bryannah James, testified that she advanced her complaint to the Chief (the "James Complaint", Exhibit 18).

87. In respect of Exhibits 11, 12, 23, and 24, the central question is whether these are compliant with the requirements of ss. 24.7 (1). I am satisfied that each of these Notices to the Officer provided him with "notice in writing of the substance of the conduct complaint" made against him and that the Chief provided these notifications "immediately after…" receiving the same. Each of the allegations contained in Exhibits 11, 12, 23, and 24 are described as an offence under the Code of Professional Conduct.

Additionally, each of the allegations addresses the behaviour in question and the date(s) that it was alleged to occur.

88. The Chief cites the decision in *White v. Dartmouth (City),* [1991] NSJ. No. 337 in support of the proposition that the substance of the notification to a police officer in respect of a conduct complaint is central to the provision of natural justice:

> There is no denial of natural justice if the party has had reasonable notice of the substance of the allegations against her or him and had been given the opportunity to respond. *White v. Dartmouth (City),* [1991] NSJ No. 337, at paragraph 41.

89. I am satisfied that the Officer was provided with notice in writing of the conduct complaints in question in compliance with ss. 27.4 (1). Consequently, the Officer's submission in respect of Jurisdictional Challenge 3 must fail.

Jurisdictional Challenge 4: Characterization of Complaint

90. The Officer argues that the Chief failed to comply with ss. 25.2(5) of the Police Act when he failed to provide to Deputy Chief Bryan Cummings written notice of the characterization of the Complaints made by the Deputy Chief against the Officer. Subsection 25.2(5) of the Police Act provides as follows:

> 25.2(5) Where the Chief of Police or Civil Authority makes a decision on characterization, the Chief of Police or civil authority shall give the Complainant and the Commission notice in writing of the decision.

91. The Chief acknowledges in his written argument that Deputy Chief Cummings was not provided with written notice of the Chief's decision on the characterization of Deputy Chief Cummings' complaint.

92. Because there is no dispute regarding the fact that Deputy Chief Cummings did not

receive the Characterization Notice contemplated in ss. 25.2 (5) of the Police Act, the question to be determined is what impact that omission has with respect to the proceedings.

93. The Officer submits that the notice of characterization provision [ss. 25.2 (5)] is mandatory in nature, such that a lack of compliance deprived the Chief and the Commission of jurisdiction to proceed further with those particular Complaints. The Officer relies on several authorities in support of his position, including *Kingsbury v. Heighton,* 2003 N.S.C.A. 80, in which the Nova Scotia Court of Appeal considered the omission of a mandatory step in a police disciplinary scheme. In its decision, the Nova Scotia Court of Appeal found as follows:

> In my opinion, these cases support the proposition that whenever in the Police Act or Regulations the word "shall" is used in connection with a material step in the procedure, such step is mandatory, not directory. The omission of such step has the effect of depriving the Board or the Chief Officer, as the case may be, of jurisdiction in the matter… These provisions are disciplinary in nature, affecting the fundamental rights of the police officer respecting his or her professional career. All material requirements must be complied with. The case law demonstrates that there is a clear statutory intent that a police officer is not to be disciplined except pursuant to the procedures set out in the Police Act and the Regulations.

94. The decision in *Kingsbury v. Heighton, supra*, references that the use of the word "shall" in the Police Act or Regulations in connection with a material step in the procedure is mandatory and not directory. In that case, the procedural step that was omitted was clearly material as it related to the rights of the officer who was accused of wrongdoing.

95. If the Officer's position regarding the Characterization Notice is accepted, then, the Complaints advanced by Deputy Chief Cummings must fail because the Chief was deprived of jurisdiction to proceed in respect of those complaints.

96. The Chief's submission in respect of the Characterization Notice may be summarized as: 25.2 (5) of the Police Act is directory rather than mandatory and, therefore, failure to provide the Characterization Notice does not extinguish the Chief and/or the Commission's jurisdiction with respect to the Cummings' Complaint. The Chief relies on several authorities in this regard including *Royal Newfoundland Constabulary Police Complaints Commission v. Oates,* 2003 N.L.C.A. 40. In that case, a Complaint against a police officer was referred directly to an adjudicator when the governing legislation required that the referring commissioner "shall refer the matter to the chief adjudicator on the panel …". Since no chief adjudicator had been appointed in the case, it was referred to another adjudicator.

97. In *Royal Newfoundland Constabulary*, the majority of the Court found that use of the word "shall" in a procedural step the Royal Newfoundland Constabulary Act, SNL 1992, c. R-17 was directory and not mandatory. The relevant section read as follows:

> 28 (1) Following an investigation of a complaint, where the commissioner determines that the decision of the chief or deputy chief appealed under subsection 25(3) or (4) was properly made, he or she may dismiss the complaint and confirm the decision of the chief or deputy chief.
>
> (2) Following an investigation of a complaint and where the commissioner does not dismiss a complaint and confirm the decision of the chief or deputy chief under subsection (1) and does not effect a settlement under section 26, he or she shall refer the matter to the chief adjudicator of the panel appointed under section 29 who shall conduct a hearing into the matter or refer it to another adjudicator… (emphasis added)

98. The majority in *Royal Newfoundland Constabulary Police Complaints Commission v. Oates, supra* found that use of the word "shall" attracts a *prima facie* interpretation of statutory provision as mandatory, but that the whole scope of the legislation, the public duty

advanced by the legislation, and possible prejudice to the parties are all factors that, in that case, overcame the presumption.

99. The Newfoundland Court of Appeal stated at paragraph 2:

> … Even though "shall" both grammatically and by virtue of s. 11 (2) of the Interpretation Act denotes the imperative, paradoxically, in the domain of statutory interpretation, it often does not.

In that case, the court prescribed the general interpretive approach, as advanced by Lord Campbell in *Liverpool Borough Bank v. Turner* (1860), 30 L.J.C.H. 379 (Eng. C.H.) at pp. 380 – 381:

> It is the duty of the courts of justice to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed.

100. In Sullivan on the Construction of Statues, Ruth Sullivan states that the word "shall" is always imperative:

> If breaching an obligation or requirement imposed by "shall" entails a nullity, the provision is said to be mandatory; if the breach can be fixed or disregarded, the provision is said to be directory. The term "directory" is unfortunate insofar as it implies that "shall" is sometimes not imperative, that it sometimes has the force of a mere suggestion. The confusion is compounded when "mandatory" and "imperative" are used interchangeably – that is, when "mandatory" is used to indicate that a provision is binding or "imperative". These are distinct concepts. "Shall" and "must" are always imperative (binding); neither ever confers discretion, but they may or may not be mandatory; that is breach of a binding obligation or requirement may or may not lead to nullity…
>
> Sullivan on the Construction of Statues, 5th Edition (Markham, ON: Lexis Nexis 2008), at page 75.

101. In the *Royal Newfoundland Constabulary* case, Roberts, J.A. references three major rules regarding the displacement of a *prima facie* presumption that "shall" is mandatory:

> 1. "…it is the duty of the courts to try and get at the real intention of the legislature by carefully considering the whole scope of the statute." (para. 5)
> 2. When "a public duty is imposed and the statute requires that it be performed in a certain manner or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory, only in cases where injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative." (para. 6, citing Maxwell on the Interpretation of Statutes, 10th ed. (1953), pp. 376-377)
> 3. Possible prejudice to the parties. (para. 7)

102. In *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),* [1995] 4 S.C.R. 344, McLauchlin, J., as she then was, interpreted the word "shall" as it appeared in subsections 51 (3) and 51 (4) of the 1927 Indian Act. In that case, McLauchlin, J., observed that:

> This court has since held that the object of the statue, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory: British Columbia (Attorney General) v. Canada (Attorney General), 1994 CanLII 81 (S.C.C.).

103. Applying the principle adopted by the Supreme Court of Canada in *British Columbia v. Canada*, *supra* and *Blueberry River Indian Band v. Canada, supra*, to this case requires consideration of the object of the *Police Act*. In this regard, the Court of Queen's Bench has stated in *Secord v. Saint John Board of Police Commissioners* that the purpose of the *Police Act* and Regulations is to provide protection to the public from the abuse of police power and the protection of police officers from unwarranted disciplinary action.

> Second and Arsenault v. Saint John Board of Police Commissioners, 2006 N.B.Q.B. 65 at paragraph 84.

104. The Characterization Notice is public right rather than a private right of the police officer against whom a complaint is made. While, in *Kingsbury v. Heighton, supra*, the notice entitlement in question applied to the subject police officer, that is not the case in respect

of the Characterization Notice. As the Newfoundland Court of Appeal stated in *Royal Newfoundland Constabulary, supra* at para. 17:

> It makes no logical sense to frustrate a scheme put in place by the legislature to allow a citizen a user-friendly police complaint procedure by holding that every step along the way is mandatory.

105. In the circumstances, I find that the use of the word "shall" in ss.25.2(5) is directory. The failure of the Chief to give notice to the Deputy Chief does not impact on any right of the Officer and it was therefore not material. Further, it is notable that Deputy Chief Cummings did not invoke his entitlement to Characterization Notices. In *Canada (Labour Relations Board) v. Transair Ltd.,* [1977] 1 S.C.R. 22, the Supreme Court of Canada determined that a third party cannot invoke the rights of another party. The effect of finding the obligation to give the Characterization Notice was mandatory would be to allow the Officer to defeat the charges against him by invoking the rights of another party. This, in my view, would frustrate the scheme of the *Act*.

106. As I have found that the requirement of the Characterization Notice was directory, the failure to provide the Characterization Notice to Deputy Chief Cummings does not extinguish the Chief's jurisdiction over the Cummings Complaints. As a result, the Officer's submissions in respect of Jurisdictional Challenge 4 must fail.

Jurisdictional Challenge 5: Notice of Police Act Investigation

107. Section 28 (2) of the Police Act states that:

> 2 If a Chief of Police proceeds with an investigation under ss. (1), he or she shall give the complainant and the police officer notice in writing of such.

108. The Officer's key argument in respect of Jurisdictional Challenge 5 is that the requirement of s. 28(2) of the Police Act is mandatory and, since Deputy Chief

Cummings did not receive notice in writing that the Chief was proceeding with an investigation under s. 28(1), the Chief was deprived of any jurisdiction to proceed with the Cummings Complaints.

109. The uncontroverted evidence of Deputy Chief Cummings was that he did know that the Chief proceeded with an investigation of the Cummings Complaints. However, Deputy Chief Cummings was not provided with written notice from the Chief to that effect. As with respect to Jurisdictional Challenge 4, the Deputy Chief has not objected to the lack of written notice and the Officer is attempting to avoid a determination on the merits of the charges by asserting the rights of another.

110. For the reasons outlined above in respect of Jurisdictional Challenge 4, I conclude that the Chief's technical failure in respect of the required notice to the Deputy Police Chief was a failure to comply with a directory requirement and was not mandatory in nature. Therefore, Jurisdictional Challenge 5 fails.

The Merits of the Complaints

111. The Notice of Arbitration Hearing (Exhibit 1) advances allegations that the Officer breached the *Code of Conduct*. Each of the allegations are considered below.

112. The Police Act prescribes the standard of proof that is to be applied in respect of the Complaints:

> 32.6(1) If the arbitrator finds on a balance of probabilities that a member of a police force is guilty of a breach of the code, the arbitrator may impose any corrective and disciplinary measure prescribed by regulation.

Count 1: Discreditable Conduct: Theft of Boots

113. Count 1 alleged against the Officer relates to a pair of boots that had been issued to Constable Ian Kaulbach by the MPF:

> It is alleged that, on January 21, 2020, without lawful excuse, the Officer had in his possession stolen property and that this behaviour constituted discreditable conduct under ss. 36 (1)(a)(ii) of the Code. Section 35 and ss. 36 (1) of the Code read as follows:
>
> 35 A member of the police force commits a breach of the Code if he or she does any of the following:
> (a) engages in discreditable conduct as described in Section 36;
>
> 36 (1) A member of a police force engages in discreditable conduct if:
> (a) the member, while on duty, acts in a manner that is:…
> (ii) likely to bring the reputation of the police force with which he or she is employed into disrepute.

114. In evaluating Count 1, I refer to the test for discreditable conduct that was set out by the Nova Scotia Police Review Board in *Re v. Smith*, 2005 CanLII 77786 (NS PRB), which was cited with approval by Arbitrator Haines in The Chief of Police, Fredericton Police Force v Cherie Campbell (unreported):

> The test for "discreditable conduct" is primarily an objective one. Specifically, in Paul Ceyssens', Legal Aspects of Policing, the author states on pages 6-10:
>
> "Rather than making the difficult choice of which among these approaches is appropriate for our case, we have combined elements from each and arrived at the following principles:
>
> 1. The test primarily is an objective one.
> 2. The Board must measure the conduct of the officer by the reasonable expectations of the community.
> 3. In determining the reasonable expectations of the community, the Board may use its own judgment, in the absence of evidence as to what the reasonable expectations are. The Board must place itself in the position of the reasonable person in the community, dispassionate and fully apprised of the circumstances of the case.

4. In applying this standard the Board should consider not only the immediate facts surrounding the case but also any appropriate rules and regulations in force at that time.
5. Because of the objective nature of the test, the subjective element of good faith (referred to in the *Shockness* case) is an appropriate consideration where the officer is required by the circumstances to exercise his discretion."

115. The reasonable expectations of the community are guided by the *Code of Conduct*.

116. Constable Kaulbach testified in the Arbitration Hearing that he had left the boots in the MPF locker room and that the boots were taken without his permission. A number of witnesses testified that the boots had gone missing while in the access- controlled area of the locker room. The MPF had issued communications to staff regarding the boots and a requirement that they be returned, and that the boots had not been returned as of January 21, 2020.

117. Constable Kaulbach testified that he did not give anyone permission to take the boots.

118. In a statement given to Investigator Levesque [Exhibit 9 (a)], the Officer confirmed that he took the boots and also that he wore the boots.

119. The boots had been known to be missing as of January 10, 2020 at 17:52:55, when email correspondence from Deputy Chief Bryan Cummings (the "Deputy Chief") was sent to MPF members, including the Officer (Exhibit 2). Further notifications were issued to MPF members, including the Officer, on January 13, 2020 (Exhibit 3), January 14, 2020 (Exhibit 4) and January 20, 2020 (Exhibit 5). Further, text message exchanges between Deputy Chief Cummings and the Officer on January 13, 2020 (Exhibits 7 and 8) also confirmed to the Officer that the boots were missing.

120. Between January 10, 2020 and January 21, 2020, the Officer maintained that he did not

have possession of the boots. The Officer did not testify in the Arbitration Hearing and did not offer any evidence to explain his failure to advise the MPF of the fact that he had taken the boots [Exhibit 9(a) at 1:49:53].

121. In the Exhibit 9(a) recording of an investigation interview regarding Count 1, the Officer suggested that the MPF had previously issued to him a new pair of boots similar to Cst. Kaulbach's missing boots. The Officer misplaced his own new boots and, according to him, he put Cst. Kaulbach's missing boots on by mistake. According to the Officer, he thought the missing boots were his.

122. Eventually, after Deputy Chief Cummings, Cst. Kaulbach, and others made inquiries addressed to the Officer to find Cst. Kaulbach's missing boots (see Exhibits 2, 3, 4, 5, 7, and 8), the Officer contacted Cst. Ethan Baisley on January 21, 2020 (the "Baisley Contact"). Cst. Baisley testified about the Baisley Contact and was a credible witness. According to Cst. Baisley, the Officer advised him that there was a bag on the Officer's deck at this home with boots in it. Cst. Baisley recovered the boots. Cst. Kaulbach testified that the boots recovered by Cst. Baisley were, in fact, the missing boots. Like Cst. Baisley, Cst. Kaulbach was a credible witness.

123. In the Exhibit 9(a) interview, the Officer explained that: i) he had intentionally lied to Cst. Baisley about the missing boots during the Baisley Contact by advising that the Officer had made some telephone calls about the boots and that someone had dropped the boots off to the Officer's house [see Exhibit 9(a) interview, 3:39:00 – 3:43:00, approximately and, also, Exhibit 9(a) interview, 2:07:50-2:08:00, approximately] (the "Lie to Baisley"); ii) at the time of his Lie to Baisley, he knew that the MPF was considering charging him (the Officer) under the Criminal Code of Canada (the "Charge Intention"); iii) he told the Lie to Baisley as an effort to deflect the possible charge; iv) he only considered telling the truth about the boots after it became clear to the Officer

that the Lie to Baisley had not deflected the Charge Intention; and v) although he attempted to contact Deputy Chief Cummings for the purpose of telling the truth, he did not follow through.

124. The Officer told the Lie to Baisley at a time when he knew that the MPF had already considered the boots to be stolen, and he did so with the intention of deflecting the Charge Intention. Not only did the Officer have Cst. Kaulbach's boots in his possession for approximately ten days while knowing, at the same time, that the MPF was considering the matter as a possible theft (see Exhibit 5), by January 21, 2020 he knew of the Charge Intention and told the Lie to Baisley as a means of thwarting it. According to the Officer, it was only after the boots were returned to Cst. Baisley that the Officer then checked his hockey gear bag to find his own pair of boots.

125. In the Exhibit 9(a) interview, the Officer provided an explanation for his possession of Cst. Kaulbach's boots (the "Explanation"). In summary, the Explanation was that the Officer had been on a leave from work and when he returned in early January 2020 he could not remember where his own new boots were. He found a pair in the locker room at the police station and assumed them to be his (these were actually Cst. Kaulbach's boots). The Officer wore Cst. Kaulbach's boots and kept them until January 21, 2020. They were not his size. For more than a week, the Officer believed that some of his coworkers were accusing him of having Cst. Kaulbach's boots, and he even received a direct text message from Deputy Chief Cummings who inquired if the Officer had the boots. Eventually, he became aware of the Charge Intention, as well. Yet, the Officer did not think to check his hockey gear bag for his own boots until after telling the Lie to Baisley.

126. The Officer's Exhibit 9(a) interview contains a number of inconsistencies. It also confirms that he intentionally and strategically told the Lie to Baisley. As a result, the

credibility of the Officer's Exhibit 9(a) is diminished and, where the content of the Exhibit 9(a) interview conflicts with the evidence of other witnesses who testified, the evidence of those other witnesses is preferred.

127. Having considered the evidence adduced in respect of Count 1 and the submissions of the parties, I find that:

b. the Officer was aware that Cst. Kaulbach's boots were missing and that they were considered to have been stolen;

c. the Officer understood, for at least a week, that Cst. Kaulbach's boots had gone missing from the locker room after the Officer had been unable to locate his own boots; that the Officer had found a pair of similar boots in the locker room in the timeframe that Cst. Kaulbach's boots had gone missing; and that Cst. Kaulbach's boots were at least a half a size larger than any footwear the Officer wears. On the subject of the Officer's footwear size, he said in his Exhibit 9(a) statement that he wears sizes 9 – 10; however, in his testimony, Cst. Kaulbach testified that, during a night shift that commenced on January 9, 2020, the Officer told Cst. Kaulbach that he (the Officer) wears size 8.5 boots. Cst. Kaulbach also testified that his missing boots were size 10.5. I accept the evidence of Cst. Kaulbach in those regards.

d. the Officer suspected, well before the Lie to Baisley and his return of the boots, that members of the MPF believed he had taken Cst. Kaulbach's boots;

e. the Officer also became aware of the Charge Intention before he told the Lie to Baisley;

f. the Officer was in possession of Cst. Kaulbach's boots for at least ten days before he located his own boots in his hockey gear bag.

128. The Chief has submitted that the Officer had actual knowledge that he was in possession of stolen property on January 21, 2020. The Chief argues in the alternative that the Officer had implied knowledge that he was in possession of stolen property, and relies on the Ontario Court of Appeal decision in *R v. Rashidi-Alavije*, 2007 ONCA 712 in support and, particularly, para. 19:

> What is "wilful blindness" in this context? Where a person has become aware of the need for some inquiry about whether there was a prohibited

> drug in the suitcase or the item, in this case a suitcase, but declines to make the inquiry because he does not wish to know the truth, or would prefer to remain ignorant, in other words, is "wilfully blind" to the facts, the law still holds that person criminally responsible, as if he had actually knowledge. Wilful blindness is the state of mind of someone who is aware of the need to make an inquiry and deliberately fails to do so. It is imputed knowledge.

129. The wilful blindness test in *R v. Rashidi-Alavije, supra* was affirmed in *R v. Thompson,* 2021 ONCA 559 (CanLII) at para. 17.

130. In this case, the Officer became aware, well before January 21, 2020, of the need for some inquiry about whether the boots he obtained in the locker room were Cst. Kaulbach's missing boots. Instead, he remained wilfully blind to the truth.

131. On a balance of probabilities, I conclude that the Officer knew prior to telling the Lie to Baisley that he had at least imputed knowledge that he was in possession of stolen property and that his behaviour in respect of Count 1 violated the reasonable expectations of the community. As such, it amounts to discreditable conduct under ss. 36 (1)(a)(ii) of the Code and Count 1 is founded.

Count 2: Discreditable Conduct – Deploying a Conducted Energy Weapon Without Just Cause

132. Count 2 alleges that:

> It is alleged that Constable Shawn Doucet, of the Miramichi Police Force, on the 4th day of October 2019, without just cause, deployed a conducted energy weapon while it made contact with an individual, thereby engaging in discreditable conduct, as described by s. 36(1)(a)(ii) of the Code of Professional Conduct (Regulation 2007- 81) - Police Act, thereby committing an offence under s. 35(a) of the Code of Professional Conduct (Regulation 2007-81)- Police Act. ("Count 2", Exhibit 1)

133. Regarding Count 2, Sgt. Dana Hicks testified that he and the Officer attended at the New Brunswick Community College in Miramichi ("NBCC") on October 4, 2020 to provide pepper spray training to students in the NBCC's Police Foundations course.

134. A conducted energy weapon (a "tazer") was alleged to have been deployed at the NBCC by the Officer on October 4, 2020.

135. Sgt. Andrew Macfarlane testified that he is a Use of Force Instructor for the MPF. As a Use of Force Instructor, he provides training to MPF members in respect of tazers and other intermediate forms of force.

136. Sgt. Macfarlane testified that the MPF has a policy regarding the use of tazers which is titled Policy 6.10.1 Use of Force – Conducted Energy Weapon (CEW) (the "Tazer Policy", Exhibit 48). Additionally, Sgt. Macfarlane referenced the MPF Operational Manual (the "Manual", Exhibit 49). Beginning at page 6 of the Manual, it is indicated that a Tazer may only be deployed by MPF members in limited circumstances which do not include demonstrating the tazer to a student in an informational setting.

137. The Tazer Policy indicates that deployment of a tazer includes an arc demonstration. This form of deployment sends a visible arc of electric current between the bays of the weapon without deploying the Smart cartridges.

138. Evelyn Gilliss, who was a staff member of the NBCC in October 2019, testified that, following the pepper spray training conducted on October 4, 2019, one of the students involved, Tristan Jones, advised Ms. Gilliss that he had been tazered by one of the MPF officers after the pepper spray training (the "Tazer Incident").

139. Ms. Gilliss was unsure what to do about Mr. Jones's comment to her. She testified that

she considered the matter to be serious, especially because the NBCC had previously considered and decided against allowing tazer training On January 15, 2020, she decided that she should advise the MPF of Mr. Jones's comment, and so she notified Deputy Chief Cummings. Deputy Chief Cummings confirmed Ms. Gilliss' report, which he noted in a report marked as Exhibit 51.

140. On January 16, 2020, Deputy Chief Cummings interviewed Tristan Jones about the Tazer Incident. Mr. Jones' written statement was entered as Exhibit 46, and in his testimony, Mr. Jones confirmed the contents of Exhibit 46.

141. Mr. Jones described that, on October 4, 2019, an MPF officer arched a tazer and then touched Mr. Jones's upper left thigh with it for a split second. Mr. Jones indicated that he felt "a little zap".

142. In an interview with Inspector Steve Robinson in March 2020, the Officer gave a statement regarding the Tazer Incident. A recording of the Officer's statement to Inspector Robinson was entered into evidence as Exhibit 41.

143. In the Exhibit 41 statement, the Officer admits that, on October 4, 2019, some NBCC students had asked the Officer to demonstrate a Tazer and he agreed.

144. The Officer described in the Exhibit 41 statement that:

g. he had definitely tazered himself during the Tazer Incident, but the Officer could not recall if he had tazered any student;
h. he did take the MPF training on use of the Tazer from Sgt. MacFarlane, and he knew that the Tazer was not supposed to be used in a group setting;
i. he was aware that he was not qualified to provide tazer training or demonstrations;

j. he may have made contact with a student using the tazer (Exhibit 41, 19:25-19:35, approximately);
k. while he does not recall drive stunning a student with the tazer, he definitely was prepared to do so and would have done so if the student wanted to experience it (Exhibit 41, 25:25-25:30, approximately);
l. tazer training was not scheduled to be a component of the pepper spray training at the NBCC;
m. he did not think about the Tazer Policy when he demonstrated the tazer to the NBCC students (Exhibit 41, 26:50-27:11, approximately);
n. the MPF partners with the NBCC in a variety of ways, and the Officer felt that by demonstrating the tazer to NBCC students, he was simply furthering the partnership;
o. he considered his use of the tazer on October 4, 2019 to constitute training and, therefore, no reporting was needed under the Tazer Policy.

145. In determining whether the Office engaged in discreditable conduct in respect of the Tazer Incident, the same legal considerations apply as are cited above from Re Smith, 2005 CanLII 77786 (NS PRB) and The Chief of Police, Fredericton Police Force v Cherie Campbell (unreported).

146. Count 2 also references s. 36(1)(a)(ii) of the Code of Conduct:

> 36 (1) A member of a police force engages in discreditable conduct if:
> (a) the member, while on duty, acts in a manner that is:…
> (ii) likely to bring the reputation of the police force with which he or she is employed into disrepute.

147. In this case, the Officer had accompanied Sgt. Hicks to the NBCC to lead a pepper spray training session. While present at NBCC for that purpose, the Officer engaged in discussion with NBCC Police Foundations students who expressed curiosity about being tazered, and the Officer provided a demonstration. The MPF had an ongoing relationship with the NBCC and the Officer had been called upon to assist with training students. I am satisfied on a balance of probabilities that the Officer performed arc demonstrations for the students, that he applied the tazer to himself and that he also applied it to Tristan

Jones. On that point, I favour the evidence of Tristan Jones, which confirmed that he was in fact tazered. However, I am not satisfied on a balance of probabilities that the Officer's actions in this regard offend the reasonable expectations of the community. In this case, the NBCC and the MPF have a multi-faceted relationship that includes pepper spraying NBCC students. I am not convinced that the community would reasonably expect tazer demonstrations by the MPF to be improper when pepper spray training is permitted. Count 2 is unfounded.

Count 3: Deploying a conducted energy weapon without just cause and in violation of the MPF Tazer Policy

148. Count 3 alleges that:

> Constable Shawn Doucet, of the Miramichi Police Force, on the 4th day of October 2019, without just cause, deployed a conducted energy weapon while it made contact with an individual, thereby failing to work in accordance with Miramichi Police Force policy with respect to the use of conducted energy weapons, as described by s. 37 (b) of the Code of Professional Conduct (Regulation 2007- 81) - Police Act, thereby committing an offence under s. 35(b) of the Code of Professional Conduct (Regulation 2007- 81) - Police Act. ("Count 3", Exhibit 1)

149. Section 35(b) of the Code of Conduct reads as follows:

> 35 A member of a police force commits a breach of the code if the member does any of the following:…
> (b) neglects their duties as described in section 37…

150. Section 37 of the Code of Conduct states:

> 37A member of a police force neglects their duties if
> (a) the member, without lawful excuse, fails to promptly and diligently
> (i) obey or carry out any lawful order, or
> (ii) perform their duties as a member,
> (b) the member fails to work in accordance with official police force policies and procedures,
> (c) the member leaves an area, detail or other place of duty without due permission or sufficient cause or, having left an area, detail or other place

> of duty with due permission or sufficient cause, fails to return promptly, or
> (d) the member is absent from or late for duty without reasonable excuse.

151. I rely upon and do not intend to restate the evidence that relates to Count 3 and that has been canvassed in respect of Count 2. It is, however, important to observe that, according to Sgt. MacFarlane's testimony, which I accept as credible, the Officer's use of a tazer at the NBCC on October 4, 2019 constituted a violation of the Tazer Policy (Exhibit 48) and the Manual (Exhibit 49). I agree. Further, in his Exhibit 41 statement, the Officer expresses that he did not think about the Tazer Policy before demonstrating the tazer on October 4, 2019, and he expresses some recognition that his action did or violate the Tazer Policy. On a balance of probabilities, I find that the Officer did violate s.35(b) by failing to work in accordance with the MPF's Tazer Policy and Manual. Count 3 is, therefore, founded.

Count 4: Failing to report

152. Count 4 alleges that:

> It is alleged that Constable Shawn Doucet, of the Miramichi Police Force, on the 17th day of March, 2020, without lawful excuse, disobeyed a direct order from Superintendent Randy Hansen of the Miramichi Police Force, by failing to report to the front reception desk of the Miramichi Police Force headquarters at 0:900 hours, as ordered to do so under the terms of a Notice of Suspension which had been served on, and acknowledged by Shawn Doucet on January 28, 2020, thereby engaging in insubordinate behaviour as described by Section 46 (b) of the Code of Professional Conduct (Regulation 2007 – 81) - Police Act and thereby committing an offence under Section 35 (k) of the Code of Professional Conduct (Regulation 2007 – 81) - Police Act. ("Count 4", Exhibit 1)

153. In respect of Count 4, the Officer was interviewed by and gave a statement to Inspector Steve Robinson, which statement is contained within Exhibit 41.

154. The basis of Count 4 is found in Exhibit 14, a document titled "Suspended Member: Responsibilities During Suspension". Exhibit 14 was executed by the Officer on January 28, 2020 at the time that he was issued a Notice of Suspension (Exhibit 13). Exhibit 14 contains five direct orders, one of which was:

> You are ordered to attend Miramichi Police Force Headquarters to report to the front reception desk, dressed in business casual attire on each Tuesday at 09:00 hours and to continue to report as directed. (the "Reporting Order")

155. Inspector Randy Hansen testified that he met with the Officer on January 28, 2020, during which meeting he explained Exhibits 13 and 14 to the Officer. Inspector Hansen reviewed each of the direct orders contained in Exhibit 14 with the Officer. Inspector Hansen was cross-examined at length in the Arbitration Hearing. Regarding Exhibit 14, he confirmed that:

    p. the Officer was only approximately two hours late for reporting on March 17, 2020;
    q. Inspector Hansen does not recall if there were documents that had to be served on the Officer on March 17, 2020;
    r. The Officer gave a reason for failing to comply with the Reporting Order.

156. I accept Inspector Hansen's evidence regarding the Reporting Order.

157. In his Exhibit 41 statement, the Officer confirmed that he failed to comply with the Reporting Order on March 17, 2020.

158. Section 35(k) of the *Code of Conduct* reads as follows:

> 35 A member of a police force commits a breach of the code if the member does any of the following:…
> (k) engages in insubordinate behaviour as described in section 46;…

159. Section 46 of the Code of Conduct states:

> 46 A member of a police force engages in insubordinate behaviour if the member
> (a) is insubordinate by word, act or demeanour, or
> (b) without lawful excuse, disobeys, omits or neglects to carry out any lawful order.

160. In respect of Count 4, it is clear that the Reporting Order was provided to and understood by the Officer. In his Exhibit 41 statement, the Officer made this statement in response to a question by Inspector Robinson about whether the Officer had forgotten to report:

> "Well, not even that – it's just my mind was, you know, I don't even want to get into the – my other part of my life that's going on, Steve…" (see Exhibit 41, 49:23 – 52:07, approximately).

161. The evidence confirms that the Officer was aware of the Reporting Order, but that he was in the midst of a contentious family matter with Bryannah James in March 2020 and, on the date in question, he was visiting with his children in the morning of March 17, 2020. Understandably, the Officer's preference was to continue visiting with his children rather than reporting to the MPF in compliance with the Reporting Order.

162. I have sympathy for the Officer's circumstances. However, this is not a case in which the evidence indicates that the Officer forgot about the Reporting Order or made an honest mistake in failing to comply with it. Rather, the Officer made a choice not to comply with the Reporting Order. When he was contacted by the MPF on March 17, 2020 after failing to comply, the Officer was able to make the arrangements to change into business casual attire (as required in the Reporting Order), to coordinate care for his children and to drive from Bathurst to Miramichi, all in less than approximately two hours.

163. In G. (P.) v Ontario (Attorney General), [1996] O.J. No. 1298, the Ontario Court of

Justice reviewed the concept of "honest mistake". In that decision, the Court referenced the decision in Pollock v Hill (November 19, 1992) (Ont. Bd. of Inquiry) [unreported], which comments on wilfulness as a contributing factor in misconduct. Here, there was a wilful decision on the part of the Officer in respect of the Reporting Order. Simply put, he was experiencing significant conflict with Ms. James, he was visiting with his children, and he decided to continue with that visit rather than complying with the Reporting Order. To the Officer's credit, once contacted by the MPF he did attend at the MPF Headquarters later on March 17, 2020. However, he did not comply with the Reporting Order. Count 4 is founded.

Count 5: Failing to exercise sound judgment regarding firearm

164. Count 5 alleges that:

> It is alleged that Constable Shawn Doucet, of the Miramichi Police Force, between the first day of November, 2019 and the thirtieth day of November, 2019, without lawful excuse failed to exercise sound judgment and restrain in respect of the use and care of a firearm, by consistently not properly securing his police issued firearm when not on duty, as described by Section 42 (c) of the Code of Professional Conduct (Regulation 2007 – 81) - Police Act thereby committing an offence under Section 35 (g) of the Code of Professional Conduct (Regulation 2007 – 81) - Police Act. ("Count 5", Exhibit 1)

165. Count 5 arises from a complaint made by Bryannah James on July 2, 2020 (Exhibit 18). In Exhibit 18 at page 3 of 6, Ms. James stated that:

s. she lived with the Officer for seven years prior to their breakup in December 2019, although the Officer's presence in their home was sporadic in November 2019;

t. for the entirety of the Officer's employment with the MPF while he resided with Ms. James, the Officer did not secure his firearm properly when off duty. I place no weight on the evidence of the Officer's practice of not securing his weapon prior to the charging

period, (ie; November 1, 2019 to November 30, 2019);

u. the Officer's failure to properly secure his firearm caused Ms. James concern because she and the Officer had young children in their home;

v. the Officer was at home with Ms. James only sporadically in November 2019; and

w. the last time that she witnessed the Officer failing to store his firearm in an unsafe manner was "around the middle of November 2019".

166. Ms. James testified in the Arbitration Hearing and confirmed the contents of Exhibit 18.

167. On cross-examination, Ms. James was confronted with a Consent Order dated January 25, 2021 to which she was a party in respect of her separation from the Officer (Exhibit 50). The Consent Order indicates, in the first recital, that the Officer and Ms. James separated on or around September 2019. Ms. James acknowledged that this was incorrect and that she brought that to her lawyer's attention but, ultimately, she agreed to it.

168. Ms. James also acknowledged that she did not make her complaint earlier but she made her complaint when she did because she was concerned that the Officer would obtain access to their children and she was concerned about the children's safety.

169. Section 35(g) of the Code of Conduct reads:

> 35 A member of a police force commits a breach of the code if the member does any of the following:…
> (g) improperly uses and cares for firearms as described in section 42;…

170. Section 42 of the Code of Conduct states:

> 42 A member of a police force improperly uses and cares for firearms if the member
> (a) when on duty, has in their possession any firearm other than one that is issued by the police force to the member,

> (b) when on duty, other than when on a firearm training exercise, discharges a firearm, whether intentionally or by accident, and does not report the discharge of the firearm as soon as is practicable, or
> (c) fails to exercise sound judgment and restraint in respect of the use and care of a firearm.

171. The concern that arises regarding Count 5 is that several inconsistencies in the evidence have arisen. First, Ms. James clearly advanced two different timeframes regarding her separation from the Officer: one in September 2019 (Exhibit 50) and one in December 2019 (Exhibit 18). That is not a minor issue, since Count 5 alleges misconduct in November 2019.

172. The Chief has argued that the issue of the date on which the Officer and Ms. James broke up is a collateral fact and, therefore, is subject to the collateral fact rule.

173. In my view, the decision of the Alberta Court of Queen's Bench in *Elgert v. Home Hardware Limited*, 2010 ABQB 66 (CanLII), para. 12 is helpful in assessing collateral facts rule:

> [12] The definition of "collateral" was central to the case of R. v. Krause at the appeal level. Taggart J.A. considered "collateral" to be a question of degree assessed on the facts of each case, and went on to state at paragraph 120 that whether or not credibility is a collateral to a fact at issue depends directly upon the relevancy of the witness' words and conduct to that issue:–
>
>> 120 There are several meanings of "collateral" including "secondary" and "indirect". In law, the word collateral may be used in two senses -- materiality and relevancy: Wigmore on Evidence, Vol. 1A (Tiller's Rev. pp. 1101-1104). Evidence to prove a fact may be inadmissible because it is probative of a fact which is immaterial (or not in issue), or because, even though probative of a fact in issue its admission would cause confusion of issues, surprise and unfair prejudice. The substantive law determines

> what facts are material, The rules of evidence determine the admissibility of evidence which is tendered to prove a fact in issue: *Wigmore on Evidence*, Vol. 1A (Tiller's Rev. s. 2). The general rule of evidence is that evidence is not admissible to contradict an answer which a witness has given on cross-examination regarding a collateral fact. Collateralness, in the sense of relevancy, is a question of degree. In some cases, the previous circumstance upon which it is proposed to cross-examine the witness will be so extraneous to a fact in issue, or to the proof of a fact in issue, that it is clearly collateral. In some cases, the relevancy of the proposed evidence may be marginal. In other cases, the proposed evidence is clearly not collateral.

174. In this case, the evidence regarding the date on which Ms. James and the Officer separated is immaterial. Whether or not they separated in September 2019 or in December 2019 does not determine the material issue, which is whether or not the Officer was at home with Ms. James at times in November 2019. On this point, Ms. James's evidence was credible. She testified that the Officer was present at her home in November 2019. No evidence to the contrary was adduced.

175. A second credibility issue arose in respect of the motive for Ms. James making her complaint (Exhibit 18). On this point, Ms. James's delay in making her complaint is noted against her expressed concern about the safety of her children. If the Officer had been leaving his firearm unsecured in the reach of the children, surely that would be a matter of fundamental and urgent concern to Ms. James and surely she would have felt it necessary to complain to the MPF long before she complained on July 2, 2020. In fact, she testified that she made the Exhibit 18 complaint in July 2020 because she was concerned that the Officer might obtain child access rights and that his failure to secure his firearm would then put her children at risk. However, according to Ms. James, that risk had existed throughout her cohabitation with the Officer while he was employed by the MPF. The concern that Ms. James had relates to her inability, after her separation

from the Officer, to manage the risk as she had previously been doing according to her testimony. As an example, Ms. James testified that, when the Officer failed to properly store his firearm at her home, she would seek to rectify the situation – sometimes by hiding the weapon from her children. When the Officer was not at Ms. James's home, she had no such ability.

176. The Chief has noted that, in the Consent Order (Exhibit 50), a requirement was included at para. 10 that the Officer would safely store and lock all of his firearms away from his children. This provision supports Ms. James's explanation. I find that her evidence was credible.

177. Ms. James stated in Exhibit 18 that the last time she saw the Officer store his firearm in an unsafe manner was around the middle of November 2019. Ms. James also testified that she witnessed the Officer not secure his weapon while in her home on more than one occasion in November. Count 5 asserts that between the first day of November 2019 and the thirtieth day of November 2019, the Officer failed to exercise sound judgment and restrain (*sic*) in respect of the use and care of a firearm, by consistently not properly securing his police issued firearm when not on duty. I am satisfied, on a balance of probabilities, that Ms. James' testimony supports a finding that the Officer consistently failed to properly secure his firearm during the month of November 2019.

178. In *New Brunswick Police Commission v Smiley*, 2017 NBCA 58 at para. 43, the Court of Appeal opined that:

> …when the Code references failure "to exercise sound judgment and restraint in respect of the use and care of a firearm", it means any and all firearms, including those which may be the personal property of the member. Further, while s. 42(a) and (b) both contain the phrase "when on duty", those words do not appear in s. 42(c).

179. In my view, the evidence supports a finding on a balance of probabilities that the Officer

failed to exercise sound judgment and restraint by consistently not properly securing his firearm. Consequently, Count 5 is founded.

Conclusion

180. In this case, five counts of misconduct were alleged against the Officer. The Officer advanced six jurisdictional challenges in respect of the Arbitration Hearing. After careful consideration of the evidence and the submissions of counsel for the Chief and the Officer, I have concluded that I have jurisdiction to determine the five counts. Further, I have concluded that Counts 1, 3, 4, and 5 are founded; Count 2 is unfounded.

181. In light of these findings, consideration must be given to a disciplinary or corrective measure. In this regard, the decisions of Arbitrator George Filliter in Chief of Police, Fredericton Police Force v Corporal Randy Reilly, 2012 CanLII 85155 (NBLA) at para. 166 and Chief of Police, Saint John Police Force v Constable Christopher Messer, (September 11, 2013, unreported) at para. 115 both cite sentencing factors that have been prescribed in police misconduct cases. The application of these factors to the Officer's case must be taken in the context that the Officer did not testify at the Arbitration Hearing and did not call any witnesses. The *Code Of Conduct* contemplates a range of disciplinary and corrective measures:

> 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.

182. It is clear that the Officer had a series of misfortunes during the period between December 2019 and April 2020. He was involved in a separation from Ms. James; he was experiencing at least some separation from his children; he was involved in a car accident (see Exhibit 8); he was transitioning to a different home. However, these do not absolve the Officer of his wrongdoing, and the Officer did not adduce evidence that he was, in respect of any of Counts 1, 3, 4, and 5, unable to discern the requirements of his position as a police officer and the impropriety of his conduct in each instance. His misconduct spanned a number of incidents over a period of months.

183. Additionally, the Officer did not adduce evidence of any rehabilitation program or intervention that would increase his ability to avoid future misconduct. He did not make any written submissions regarding the substance of the Counts, either.

184. In respect of Count 1, Stacey Dunfield testified that, on February 25, 2020, the Officer communicated to her that, in his view, "[he] didn't do anything wrong", or words to that effect. The Officer was similarly unrepentant in respect of Count 3 (Exhibit 41) and Count 4 (Exhibit 41).

185. Counts 1, 3, 4, and 5 involved misconduct that is serious in nature that negatively demonstrate a significant lack of regard by the Officer for the responsibility of a police officer. As the New Brunswick Court of Appeal stated in *The New Brunswick Police Commission v. Smiley*, 2017 NBCA 58 (CanLII) at para. 40:

> Because of the enormous authority, trust and responsibility we place in or on police officers, which is well known before they pursue such a career, much is expected. In New Brunswick, these expectations have been codified, and are set out above. In my opinion, where the Code states, for

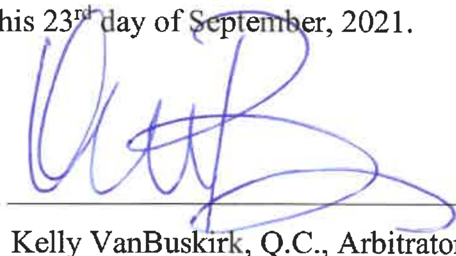
> example, that a member of a police force is "to act at all times in a manner that will not bring discredit on his or her role as a member of a police force", it means exactly what it says: at all times.

186. In *Chief of Police, Fredericton Police Force v Constable Cherie Campbell*, (January 6, 2016), unreported (Haines), the officer in question had been charged in Maine for theft. Although she was not convicted, she was subjected to disciplinary proceedings in respect of the incident. Arbitrator Haines imposed dismissal as the appropriate discipline. The Court of Queen's Bench of New Brunswick upheld the discipline: *Campbell v. The Chief of Police, et al*, 2016 NBQB 225 (CanLII). While the officer in the *Campbell* case had a prior discipline record, she was also had a longer service record than does the Officer.

187. Taken together, Counts 1, 3, 4, and 5 reflect serious violations of the high standard of conduct expected of police officers. Counts 3 and 5 demonstrate the Officer's failure to meet the standard required of police officers in respect of the control and use of weapons. Counts 1 and 4 reflect a disregard for the MPF.

188. Unfortunately, the Officer has not met the standard required of him, and his failures have demonstrated disregard on his part for the expectations imposed on the position of police officer. Given the seriousness and multiplicity of his misconduct, including his failure to comply with the Tazer Policy and the Reporting Order, his failure to properly secure his firearm, and his involvement in the matter regarding Cst. Kaulbach's boots, I find that dismissal is the appropriate disciplinary measure.

DATED at Saint John, New Brunswick, this 23rd day of September, 2021.



Per: ______________________________

Kelly VanBuskirk, Q.C., Arbitrator

PROVINCE OF NEW BRUNSWICK

IN THE MATTER OF THE *NEW BRUNSWICK POLICE ACT*

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

CHIEF PAUL FIANDER

Complainant

- and -

CONSTABLE SHAWN DOUCET

Respondent

SCHEDULE A
LIST OF EXHBITS

Exhibit #	**Description**	**Date**	**Objection**
1	Notice of Arbitration Hearing	2021-05-13	No
2	Email from A. McFarlane to various recipients	2020-01-10	No
3	Email from B. Cummings to various recipients	2020-01-13	No
4	Email from I. Kaulbach to various recipients	2020-01-14	No
5	Email from B. Cummings to various recipients	2020-01-20	No
6	Email from I. Kaulbach to various recipients	2020-01-22	No
9A	Video statement given to Investigator Levesque (part1)	2020-03-12	No
9B	Video statement given to Investigator Levesque (part2)	2020-03-12	No
10	Appointment of Investigator Levesque	2020-07-13	No

11	Notification of Police Act Investigation	2020-01-27	No
12	Second Notification of Notice of Police Act Investigation	2020-01-27	No
13	Notice of Suspension	2020-01-28	No
14	Suspended Member: Responsibilities During Suspension	2020-01-28	No
15	Email 1 from R. Hansen to J. Whalen with attachments	2020-02-04	No
16	Email 2 from R. Hansen to J. Whalen with attachments	2020-02-04	No
17	NBPC Complaint Form – Deputy Chief B. Cummings	2020-03-17	No
18	NBPC Complaint Form – Bryannah James	2020-07-02	No
19	Correspondence 1 from Chief P. Fiander to L. Chaplin	2020-01-27	No
20	Correspondence 2 from Chief P. Fiander to L. Chaplin	2020-01-27	No
21	Correspondence from Chief P. Fiander to L. Chaplin	2020-03-17	No
22	Correspondence from Chief P. Fiander to L. Chaplin	2020-07-14	No
23	Third Notice of Police Act Investigation	2020-03-17	No
24	Fourth Notice of Police Act Investigation	2020-07-22	No
25	Appointment of Investigator (Inspector Robinson)	2020-01-27	No
26	Appointment of Investigator (Inspector Robinson)	2020-03-17	No
27	Appointment of Investigator (Craig MacDougall)	2020-07-22	No
28	Notice of Settlement Conference	2020-06-09	No
29	Memorandum re: postponement of settlement conference	2020-07-13	No
30	Second Notice of Settlement Conference	2020-09-01	No
31	Third Notice of Settlement Conference	2020-09-10	No
32	Correspondence from Chief P. Fiander to L. Chaplin	2020-09-11	No
33	Correspondence from Chief P. Fiander to L. Chaplin	2020-09-22	No
34	Correspondence from Chief P. Fiander to S. Doucet	2020-09-29	No
35	Correspondence from Chief P. Fiander to L. Chaplin	2020-10-05	No
36	Correspondence from Chief P. Fiander to B. James	2020-10-05	No

37	Correspondence from J. Smith to Chief P. Fiander	2020-10-08	No.
38	Correspondence from J. Smith to S. Doucet	2020-10-08	No
39	Correspondence from J. Smith to B. James	2020-10-08	No
40	Correspondence from Chief P. Fiander to L. Chaplin	2021-05-10	No
41	Video statement given to Investigator Robinson	2020-04-22	No
42	Waiver executed by S. Doucet	2021-07-28	No
43	Email from Deputy Chief B. Cummings to R. Hansen	2020-03-17	No
44	Handwritten notes of R. Bruce	2020-03-17	No
45	Email from R. Bruce to Investigator Robinson	2020-04-01	No
46	Written statement regarding incident involving T. Jones	2020-01-16	No
47	Email from A. Macfarlane to Investigator Robinson	2020-04-08	No
48	Miramichi Police Force Policy 6.10.1	2017-01-06	No
49	Excerpt from MPF Operational Manual, pp. 6-10	2013-02-28	No
50	Consent Interim Order	2021-01-25	No
51	Initial Officers Report -1, Deputy Chief B. Cummings	2020-01-15	No
52	Investigation Report (Follow-up)-1	2020-01-16	No
53	Correspondence from L. Chaplin to K. VanBuskirk	2021-06-02	No
54	Correspondence from J. Eddy to J. LeMesurier, Q.C. and Lara Greenough	2021-07-26	No