

CANADA

PROVINCE OF NEW BRUNSWICK

IN THE MATTER OF THE POLICE ACT, S.N.B. 1977, C. P-9.2, AS AMENDED,

AND

IN THE MATTER OF A CONDUCT COMPLAINT AGAINST CONSTABLE JEFF SMILEY BY CHIEF LEANNE FITCH, IN RESPECT OF WHICH A NOTICE OF ARBITRATION HEARING WAS ISSUED ON JUNE 5, 2015 BY ROBERT M. STONEY,CD, ACTING CHAIR OF THE NEW BRUNSWICK POLICE COMMISSION.

BETWEEN: THE NEW BRUNSWICK POLICE COMMISSION

- and -

CONSTABLE JEFF SMILEY

## **DECISION**

Appearances: For the New Brunswick Police Commission – James LeMesurier, Q.C., and Danielle Harding.

For Constable Jeff Smiley, Thomas J. Burke, Q.C.

Hearing Dates: June 15, 2015, November 2, 3, 4 and 5, 2015

Decision Date: December 2, 2015

Before: Cedric L. Haines, Q.C., Arbitrator

**A. BACKGROUND**

1. I was appointed as Arbitrator in this matter pursuant to Section 33.03 of the *Police Act*, S.N.B. 1977, C. P-9.2, as amended, (the “*Police Act*”) and my appointment took effect on June 4, 2015.
2. A Notice of Arbitration Hearing<sup>1</sup> in this matter was issued by the New Brunswick Police Commission on June 5, 2015.
3. The hearing of this matter commenced before me on June 15, 2015 by way of a telephone conference call held for the sole purpose for setting dates for the continuation of the hearing. The parties agreed that the telephone conference call need not be recorded in accordance with the *Recording of Evidence Act*. During the course of the June 15, 2015 telephone conference call, the solicitors for the parties agreed that the hearing of the complaint of Chief Leanne Fitch was for all intents and purposes duly convened and commenced on June 15, 2015. The parties also agreed that the hearing of the complaint of Chief Leanne Fitch would be adjourned until November 2, 2015 and that the hearing would continue on the days following, to and including November 6, 2015. By participating in this telephone conference call, the parties did not waive any right which they may have to raise procedural or preliminary issues with respect to the hearing of this matter. At the conclusion of the telephone conference call the following Interim Order was made by me:

The hearing of the complaint of Chief Leanne Fitch against Constable Jeff Smiley is adjourned to 9:30 a.m. on November 2, 2015 and shall continue on that day and the days following, to and including November 6, 2015, at the Wu Conference Centre, 6 Duffie Drive, Fredericton, NB.

4. On resumption of the hearing of this matter, on November 2, 2015 the stenographer charged with recording the hearing was sworn, appearances of the parties were called for and responded to and the alleged breaches of the *Code of Professional*

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<sup>1</sup> Exhibit C-1.

*Conduct*, New Brunswick Regulation 2007-81 under the *Police Act*, contained in the Notice of Arbitration Hearing were read by me to Constable Jeff Smiley, following which reading he was immediately given the opportunity to admit or deny each of the alleged breaches of the *Code of Professional Conduct*. Constable Smiley denied each of the allegations.

5. The alleged breaches of the *Code of Professional Conduct* contained in the Notice of Arbitration Hearing read as follows:

**Count 1 - Discreditable Conduct**

1) It is alleged that you, Constable Jeff Smiley of the Fredericton Police Force, engaged in discreditable conduct by committing domestic violence upon your common law partner, Kimberly Burnett, on a number of occasions over the period of your relationship, contrary to and in violation of section 36(1)(d)(i) of the *Code*. This constitutes a breach of the *Code* under section 35(a) thereof.

**Count 2 - Party to a Breach of the Code**

2) It is alleged that you, Constable Jeff Smiley of the Fredericton Police Force, on or about February 27, 2014, were a party to a breach of the *Code* when you counselled Constable Samantha McInnis of the Fredericton Police Force to not disclose that you had firearms in your possession while bound by an undertaking to turn over any firearms in your possession, contrary to and in violation of section 47 of the *Code*. This constitutes a breach of the *Code* under section 35(1) thereof.

**Count 3 - Improper Use and Care of Firearms**

3) It is alleged that you, Constable Jeff Smiley of the Fredericton Police Force, between December 24, 2013 and February 28, 2014 improperly used and cared for firearms when you failed to exercise sound judgment and restraint in respect to the use and care of firearms in that your Possession and Acquisition License (PAL) expired on December 24, 2014<sup>2</sup>, contrary to

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<sup>2</sup> The reference to “December 24, 2014” as the expiry date for the Possession and Acquisition Licence (PAL) is obviously a typographical error. The evidence at the hearing clearly showed that the expiry date of the Possession and Acquisition Licence (PAL) was “December 24, 2013”. The case was argued on the basis that Constable Smiley’s Possession and Acquisition Licence (PAL) had expired on December 24, 2013. No mention of this obvious typographical error was made by the Commission or Constable Smiley during the course of the hearing or in the post-hearing briefs submitted by legal counsel for the parties. The typographical error only came to my attention during the course of preparation of this decision.

and in violation of section 42(c) of the Code. This constitutes a breach of the Code under section 35(g) of the Code.

#### **Count 4 – Improper Use and Care of Firearms**

4) It is alleged that you, Constable Jeff Smiley of the Fredericton Police Force, on or about February 27, 2014 improperly used and cared for firearms when you failed to exercise sound judgment and restraint in respect of the use and care of firearms in that you were in possession of a Lakefield Mossberg 12 gauge pump action shotgun loaded with two shells in the magazine, contrary to and in violation of section 42(c) of the Code. This constitutes a breach of the Code under section 35(g) of the Code.

6. The provisions of the *Code of Professional Conduct* respecting the breaches of the *Code* referred to in the Notice of Arbitration Hearing read as follows:

#### **Breach of the code**

35 A member of a 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;
- (b) neglects his or her duties as described in section 37;
- (c) engages in deceitful behaviour as described in section 38;
- (d) improperly discloses information as described in section 39;
- (e) commits corrupt practice as described in section 40;
- (f) abuses his or her authority as described in section 41;
- (g) improperly uses and cares for firearms as described in section 42;
- (h) damages police force property as described in section 43;
- (i) misuses intoxicating liquor or drugs in a manner prejudicial to duty as described in section 44;
- (j) is convicted of an offence as described in section 45;
- (k) engages in insubordinate behaviour as described in section 46;
- (l) is a party to a breach of the code as described in section 47; or
- (m) engages in workplace harassment as described in Schedule A.

#### **Discreditable 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
  - (i) prejudicial to the maintenance of discipline in the police force with which he or she is employed, or
  - (ii) likely to bring the reputation of the police force with which he or she is employed into disrepute,
- (b) the member, while on duty, is oppressive or abusive to any person,

- (c) the member, while off duty, asserts or purports to assert authority as a member of a police force and does an act that would constitute a breach of the code if done while the member is on duty,
- (d) the member, while on or off duty,
  - (i) contravenes a provision of the Act, the regulations under the Act or a rule, guideline or directive made under the Act,
  - (ii) withholds or suppresses a complaint or a report concerning a complaint,
  - (iii) fails to report to a member of a police force whose duty it is to receive the report, or to Crown counsel, any information or evidence, either for or against any prisoner or defendant, that is material to an alleged offence under an Act of the Legislature, an Act of another province or territory of Canada or an Act of the Parliament of Canada,
  - (iv) tampers with information that is material to a proceeding or potential proceeding under Part III, III.1 or III.2 of the Act, or
  - (v) fails to disclose to the investigator, or to the chief of police or civic authority, as the case may be, information that is material to a proceeding or a potential proceeding under Part III, III.1 or III.2 of the Act.

36(2) Notwithstanding subparagraph (1)(d)(v), a member of a police force who is being investigated or who acts as a representative of a member of a police force who is being investigated does not engage in discreditable conduct if he or she fails to provide the investigator with any information or assistance requested by the investigator.

### **Improper use and care of firearms**

- 42 A member of a police force improperly uses and cares for firearms if the member
- (a) when on duty, has in his or her 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.

### **Party to a breach of the code**

47A member of a police force is a party to a breach of the code if the member aids, abets, counsels or procures another member of the police force to which he or she belongs to commit a breach of the code or is an accessory after the fact to a breach of the code.

7. As a result of the response of Constable Smiley to each of the alleged breaches of the *Code of Professional Conduct* contained in the Notice of Arbitration Hearing I then

requested legal counsel for the New Brunswick Police Commission to proceed to the proof of these allegations.

8. The standard of proof in these proceedings, it is to be noted, is that of the “balance of probabilities”.<sup>3</sup>
9. I also take note that as an Arbitrator I am allowed by law to “hear and accept any relevant evidence even though it is not admissible under the rules applying to trials in The Court of Queen's Bench of New Brunswick”.<sup>4</sup>
10. A number of witnesses were called upon by the Commission to testify at the hearing of this matter.
11. At the conclusion of the presentation of evidence by the Commission, having determined that a *prima facie* case has been made out by the Commission, I provided Constable Smiley with an opportunity to call evidence.
12. Constable Smiley called on one person to testify.
13. Constable Smiley did not testify. Under section 19 of the *Code of Professional Conduct Regulation*, as the member of a police force who is alleged to have committed breaches of the *Code* under section 35, he is not compelled to testify at the arbitration hearing.
14. All oral evidence at the hearing of this matter was given under oath or affirmation.<sup>5</sup>

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<sup>3</sup> *Police Act*, subsection 32.6(1).

<sup>4</sup> *Inquiries Act*, R.S.N.B. 1973, c. 1-11.

<sup>5</sup> Corporal Dwight Doyle, Corporal Ross Chandler, Constable Karla Forsythe, detective Samantha McInnis, Staff Sergeant Matthew Myers, Mr. Derek Eardley, Constable Jennifer Simon, Constable David Penney, Sergeant Paul Battiste and Ms. Kimberly Burnett were called to testify by Commission counsel. Constable Michael Fox was called on to testify by counsel for Constable Smiley.

**B. FACTS***The evidence of Corporal Dwight Doyle*

15. Corporal Dwight Doyle is a member of the Fredericton Police Force. He and Constable Smiley were at one time close friends and shared a bond arising from a perilous winter river rescue some years ago in which they, along with two other police officers, saved the life of an elderly woman whose car was partially submerged in the waters of the Saint John River.
16. Doyle's involvement in the present matter started in the early evening of February 26, 2014, when at approximately 6:50 p.m. while on his way to the Police Station locker room he was called into an office by Corporal Ross Chandler. Corporal Chandler was on the phone speaking to Police Chief Leanne Fitch. Chandler informed Doyle that the call was about an alleged domestic incident at the residence of Constable Smiley.
17. Corporal Doyle testified that he had missed a call from Kimberly Burnett that evening. He had known Ms. Burnett for some time and that she was cohabiting with Constable Smiley. He eventually did have a telephone conversation with Ms. Burnett and he testified that she sounded upset and wanted to talk. Corporal Doyle testified that he "asked" Ms. Burnett to come to the Police Station if she wanted to speak with him. He told her that he was on duty and could not leave the Station.
18. Ms. Burnett eventually made her way to the Police Station. Corporal Doyle informed her that if the matter which she wished to discuss with him involved an allegation of criminal activity on the part of Constable Smiley, his friendship with Smiley would preclude any further involvement by him in the matter and that she would be referred to Corporal Ross Chandler. A conversation between Corporal Doyle and Ms. Burnett then took place and it rapidly became obvious to Corporal Doyle that the subject matter of the conversation was not one in which he should be involved when Ms. Burnett told him that Corporal Smiley had "grabbed" her head. He so advised Ms.

Burnett and arranged for her to meet with Corporal Chandler.

19. Corporal Doyle gave Corporal Chandler a brief summary of his discussion with Ms. Burnett and he then withdrew. Corporal Chandler then proceeded with the interview of Ms. Burnett. Corporal Doyle was not present in the interview room. At one point Corporal Chandler exited the room and Corporal Doyle relayed to him the comment made by Ms. Burnett that Constable Smiley had “grabbed” her head.
20. After Ms. Burnett had given her statement to Corporal Chandler, Corporal Doyle, Corporal Chandler and Inspector Brian Ford met, discussed the matter and decided that an assault had taken place and that Constable Smiley was to be arrested and then released on a Promise to Appear and an Undertaking.
21. Corporal Doyle then proceeded to call Constable Smiley and inform him of his impending arrest. Constable Smiley, in the very early hours of February 27, 2014, attended at the Fredericton Police Station, where he was met by Corporal Doyle and Corporal Chandler, who escorted him to the booking area. Corporal Chandler then proceeded to arrest Constable Smiley for assault and the usual cautions were read to Constable Smiley. Following his arrest, Constable Smiley signed a Promise to Appear and an Undertaking.<sup>6</sup>
22. The Undertaking signed by Constable Smiley contained a number of conditions, including the following:
  - ... (e) abstain from possessing a firearm and to surrender to Fredericton Police Force any firearm in my possession ...
23. Constable Smiley took very strong objection to the inclusion of the possession of firearms prohibition in the Undertaking. He apparently has a sentimental attachment to his firearms and feared that they would not be properly taken care of, lost or damaged if they were turned over to the Fredericton City Police. Constable Smiley

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<sup>6</sup> Exhibit C-3.



then told Corporal Chandler, in the presence of Corporal Doyle, that his firearms were at his father's home in the Province of Nova Scotia.

24. Corporal Doyle testified that at some point in time he became aware of some mental health issues with Ms. Burnett, including anxiety and depression. He did not recall however if he learned of these issues before or after February 26, 2014.

*The evidence of Corporal Ross Chandler*

25. Corporal Ross Chandler is a member of the Fredericton Police Force.
26. While on duty on the evening of February 26, 2014 he received a call from Chief Leanne Fitch. Chief Fitch relayed to him information about a domestic dispute between Constable Smiley and Ms. Kimberly Burnett.
27. Following his introduction to Ms. Burnett by Corporal Doyle, Corporal Chandler then proceeded to interview Ms. Burnett. A standard form K.G.B. warning was read to Ms. Burnett in its entirety and was signed and sworn to by Ms. Burnett.<sup>7</sup> The statement made by Ms. Burnett was, so thought Corporal Chandler, videotaped with a sound recording. I will refer to this statement as "K.G.B. # 1". During the course of her interview by Corporal Chandler, Ms. Burnett related incidents and gave physical demonstrations which led Corporal Chandler to conclude that Constable Smiley had assaulted Ms. Burnett on one or more occasions. Corporal Chandler testified that Ms. Burnett told him of being grabbed by the shoulders by Constable Smiley on perhaps as many as twenty occasions and having his hands placed on her neck. She did not however recall how many times Constable Smiley would have placed his hands on her neck.
28. Corporal Chandler testified that during the course of the K.G.B. # 1 interview and statement Ms. Burnett exhibited no sign of impairment or disability which would have caused him not to proceed with the interview and obtain a statement from her.

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<sup>7</sup> Exhibit C-2.

He thought she was being truthful and accurate in her statement. As to her demeanor, she was upset and crying at the beginning and at the end of the interview and during the middle portion of the interview she showed signs of being upset.

29. On the basis of the K.G.B. # 1 statement received from Ms. Burnett, Corporal Chandler concluded that one or more assaults had taken place, which he referred to as “minor” on the scale of assaults.
30. Following the interview and receipt of Ms. Burnett’s statement, and in view of Corporal Chandler’s conclusions, arrangements were made to arrest Constable Smiley.
31. Constable Smiley, after having been contacted, drove himself to the Police Station in his personal vehicle, a vehicle to which Corporal Chandler referred to as a Jeep.
32. Shortly after 2:00 a.m. on February 27, 2014, Constable Smiley was arrested by Corporal Chandler for an assault on Ms. Burnett. At 3:26 a.m. Constable Smiley was released on a Promise to Appear and an Undertaking which contained a number of conditions, including one that he abstain from possessing a firearm and to surrender to the Fredericton Police Force any firearm in his possession. Constable Smiley questioned the need for such a condition on such a minor assault. He informed Corporal Chandler that his firearms were at his father’s home in Nova Scotia.
33. Corporal Chandler phoned Ms. Burnett, who informed him that Constable Smiley’s firearms were not at the place where they were usually stored in the home they both occupied.
34. On cross-examination Corporal Chandler testified that to his belief no assault of Ms. Burnett had taken place on February 26, 2014. The specific incident of assault to which Ms. Burnett had referred during her interview had occurred on February 17, 2014. She did refer to similar events having occurred on perhaps twenty occasions in the past.

35. At a point in time around 5:00 a.m. or 6:00 a.m. of February 27, 2014, Corporal Chandler checked the recording of the K.G.B. # 1 statement and to his dismay found that the sound recording had not functioned. He reported this to his superior, finished his shift and then left for a scheduled twelve days off work.

*The evidence of Constable Karla Forsythe*

36. Constable Karla Forsythe is a member of the Fredericton Police Force.
37. Shortly after 11:00 a.m. on February 27, 2014, Constable Forsythe was tasked with re-interviewing Ms. Kimberly Burnett.
38. The standard form K.G.B. warning was read to Ms. Burnett in its entirety and was signed and sworn to by Ms. Burnett.<sup>8</sup> The statement made by Ms. Burnett was videotaped with a sound recording. I will refer to this statement as “K.G.B. # 2”.
39. Constable Forsythe testified that following her February 27, 2014 interview of Ms. Burnett she concluded that a “minor” assault had occurred. She testified that her conclusion was based on Ms. Burnett’s description of her relationship with Constable Smiley and her description of events arising during the course of that relationship.

*The evidence of Detective Constable Samantha McInnis*

40. Detective Constable Samantha McInnis is a member of the Fredericton Police Force.
41. She and Constable Smiley were at one time very close friends and shared a bond arising from a past winter river rescue in which they, along with two other police officers, saved the life of an elderly woman whose car was partially submerged in the

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<sup>8</sup> Exhibit C-6.

waters of the Saint John River.

42. In the evening of February 26, 2014 Detective Constable McInnis was contacted by Constable Smiley. Smiley informed her of the breakup of his relationship with Ms. Burnett. McInnis informed Smiley that she would come over to his home and support him.
43. On arriving at Constable Smiley's home, Detective Constable McInnis was told by Smiley that had not touched Ms. Burnett. Smiley also informed McInnis of his intention to go to Nova Scotia. They then went upstairs, where Smiley began packing some of his personal effects. One of the items she noticed being packed was a green metal gun locker on which a silver outline of a deer head appeared. She saw Smiley unlock the case with a key and she took note of two long guns, one with a wooden stock and the other with a camouflage stock. Constable Smiley put a blanket in the gun case. Detective Constable McInnis left Smiley's home at approximately 10:00 p.m. on February 26, 2014.
44. Shortly after 2:00 a.m. on February 27, 2014 Detective Constable McInnis received a phone call from Constable Smiley who told her that he was turning himself in to be arrested. He asked her if he could come to her house after he was done speaking to the police as he had nowhere else to go. She agreed. Constable Smiley arrived at her house a few hours later. Smiley was upset and told her that he had been released on conditions. He made no reference however to the firearms condition contained in the Undertaking which he had signed on his release from custody.
45. A few minutes past 5:00 a.m. on February 27, 2014 Constable Smiley woke Detective Constable McInnis from her sleep. He told her how much his firearms meant to him and that they were safely locked in his vehicle and that he would be taking them to Nova Scotia. Constable Smiley, during the course of this early morning conversation, told her that if she was asked if she saw firearms or had any knowledge of him being in possession of firearms she should say that she never saw

firearms. She then told Constable Smiley that if asked about firearms she would not lie and would tell the truth if asked about the guns.

46. Detective Constable McInnis testified that she only learned about the possession of firearms prohibition in the Undertaking signed by Constable Smiley when she spoke with Staff Sergeant Matt Myers at approximately 3:00 p.m. on February 27, 2014, at which time she was informed that Constable Smiley had been re-arrested for breaching the firearms condition in his Undertaking.
47. Detective Constable McInnis said she was shocked when she found out in the mid-afternoon of February 27, 2014 that the Undertaking which Constable Smiley had signed contained a condition prohibiting him from possessing firearms and requiring of him that he surrender any firearms in his possession to the Fredericton Police Force. She informed her superiors at the Fredericton Police Force of the details of her interactions with Constable Smiley during the previous twenty-four hours.

*The evidence of Staff Sergeant Matthew Myers*

47. Staff Sergeant Matthew Myers is a member of the Fredericton Police Force.
48. He became aware of the events relating to the arrest of Constable Jeff Smiley when he came in for work on February 27, 2014. Staff Sergeant Myers testified that Corporal Ross Chandler had made him aware of the arrest of Constable Smiley for a series of assaults, somewhere in the range of twenty, on Ms. Kimberly Burnett over a time span of a year or two. After being made aware of the events, and in particular the failure to record the audio portion of Ms. Burnett's K.G.B #1 statement, he decided that a second K.G.B. statement should be obtained from Ms. Burnett.
49. At a point in time between 9:00 a.m. and 9:30 a.m. on February 27, 2014, Staff Sergeant Myers was told by Sergeant Paul Battiste of the Fredericton Police Force that Constable Smiley was heading to Nova Scotia, where his firearms were located. Staff Sergeant Myers was at that time aware that the surrender of firearms condition

in the Undertaking signed by Constable Smiley had not been enforced since the firearms were, according to statements made by Constable Smiley to Corporal Chandler, not in his possession and that they were at his father's home in Nova Scotia. Staff Sergeant Myers testified that he was concerned at this turn of events and that he did not want Constable Smiley to be in possession of any firearms.

50. Steps were then taken by Staff Sergeant Myers to gain control of the firearms which Constable Smiley had stated were at his father's home in Nova Scotia. On conducting a search of firearms records to which police forces have access, it was discovered that Constable Smiley's Possession and Acquisition License (PAL) had expired.
51. Inspector Martin Gaudet of the Fredericton Police Force contacted Constable Smiley and requested that he attend at the Fredericton Police Station.
52. Upon arrival at the Fredericton Police Station, Constable Smiley was advised that the surrender of firearms condition in his Undertaking would be strictly enforced. In the presence of Staff Sergeant Myers, Inspector Martin Gaudet and Sergeant Paul Battiste, Constable Smiley stated that he was not in possession of firearms.
53. Constable Smiley then indicated that he wanted to speak with his lawyer. He received a text message from his lawyer.
54. Constable Smiley then asked to speak to Sergeant Battiste in private.
55. Staff Sergeant Myers, Inspector Gaudet, Sergeant Battiste and Constable Smiley then proceeded to the booking area of the Police Station. Constable Smiley and Sergeant Battiste met in private in a room reserved for legal counsel to meet with clients. After this private conversation, Constable Smiley and Sergeant Battiste rejoined Staff Sergeant Myers and Inspector Gaudet, who had been waiting in the booking area. Constable Smiley then asked Staff Sergeant Myers and Inspector Gaudet if he could speak to them off camera. This was agreed to and the four of them went up to a

conference room located in the Police Station.

56. On arrival at the conference room, Constable Smiley told Staff Sergeant Myers, Inspector Gaudet and Sergeant Battiste that he had been advised by his lawyer to surrender his firearms to the Fredericton Police. He told them that his firearms were in his vehicle, which was parked outside the Police Station. Staff Sergeant Myers then arrested Constable Smiley for a breach of his Undertaking and seized the keys to Smiley's vehicle. The usual cautions and offers on the arrest of a person were read to Constable Smiley. Sometime after 1:30 p.m. on February 27, 2014, Constable Smiley was placed in an interview room, where he was detained.
57. In the afternoon of February 27, 2014 Constable Smiley's vehicle was brought in to the underground parking garage of the Police Station. No search of the vehicle was conducted at that time.
58. In the afternoon of February 27, 2014 a decision was made by the Fredericton Chief of Police and the Deputy Chief of Police to have the Royal Canadian Mounted Police investigate the matter and at 4:30 p.m. Staff Sergeant Myers met with two RCMP offices and conveyed to them the background information that they needed to take over the investigation into the assault and breach of undertakings involving Constable Smiley.

*The evidence of Paul Derek Eardley*

59. Paul Derek Eardley is employed by the Province of New Brunswick, Department of Public Safety, and holds the position of Chief Firearms Officer with the New Brunswick Firearms Office. He was designated as acting Chief Firearms Officer for the Province of New Brunswick in August of 2014.
60. In October 2014, staff of the New Brunswick Firearms Office, at the request of Mr. Eardley, conducted a search of available records and determined that the firearms Possession and Acquisition Licence issued to Constable Jeff Smiley on May 30,

2008 had expired on December 24, 2013. Mr. Eardley further testified that as of the date of the present arbitration proceedings under the *Police Act* there had not been a renewal of the firearms Possession and Acquisition Licence previously held by Constable Smiley, nor had a new firearms Possession and Acquisition Licence been issued to Constable Smiley.

*The evidence of Constable Jennifer Simon*

61. Constable Jennifer Simon is a member of the Royal Canadian Mounted Police. Her involvement in this matter concerning Constable Smiley was as an exhibits officer. She was present at the Fredericton Police Station on February 28, 2014 when the RCMP, acting under the authority of a search warrant, conducted a search of Constable Smiley's vehicle and seized a number of items. As the exhibits officer, she photographed and catalogued the seized items.<sup>9</sup> Among the items seized were a "Metal box full of various ammunition", a "Metal safe containing towels / bedding / 7 long guns" and a "Cardboard box containing various ammunition / firearm parts". Constable Simon also testified that some of the guns that were seized were later found to be unassembled.

*The evidence of Constable David Penney*

62. Constable David Penney is a member of the Royal Canadian Mounted Police.
63. Constable Penney testified that shortly after the seizure of the guns, ammunition and other items seized by the RCMP from the Smiley vehicle on February 28, 2014, he examined the firearms and took steps to ensure that they were made safe for storage. One of the firearms, a pump-action shotgun, had two rounds in it. He removed these two shells from the firearm. He testified that the firearms appeared to him to be normal firearms and that the actions were intact. He did not however test the firearms, nor did he inspect them to see if the firing

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<sup>9</sup> Exhibits C-9 and C-10.



pins were still in them.

*The evidence of Sergeant Paul Battiste*

64. Sergeant Paul Battiste is a member of the Fredericton Police Force.
65. Sergeant Battiste testified that after coming in to the Police Station at approximately 6:00 a.m. on February 27, 2014 he was made aware that Constable Smiley had been arrested and then released on an Undertaking, one of the conditions of which was that he not be in possession of firearms. He was also made aware that the condition in the Undertaking respecting the surrender of firearms by Constable Smiley was not enforced because, according to Smiley, his firearms were in Nova Scotia.
66. At a point in time between 6:00 a.m. and 8:30 a.m. on February 27, 2014, Sergeant Battiste had a telephone conversation with Constable Smiley. Sergeant Battiste testified that he was concerned about Constable Smiley's well-being. Comments made to Battiste by Smiley led him to conclude that the situation was difficult for him, that he wanted to get some sleep, spend some time with his daughter and go to Nova Scotia.
67. Out of a concern for Constable Smiley's well-being and in view of Smiley's statement to him that he intended to go to Nova Scotia, where the firearms were located, Sergeant Battiste passed this information on to Staff Sergeant Mike Hudson, who directed him to speak to staff Sergeant Matthey Myers.
68. During the afternoon of February 27, 2014, Sergeant Battiste was informed that Constable Smiley would be coming to the Police Station to surrender his Use of Force Kit and that the possession of firearms condition of his Undertaking would be discussed with him. Sergeant Battiste met Constable Smiley at the door to the Police Station and brought him to the locker room, where Constable Smiley surrendered his Use of Force Kit and identification.

69. Following the surrender of his Use of Force Kit Sergeant Battiste and Constable Smiley went to a conference room in the Police Station, where they were joined by Staff Sergeant Myers and Inspector Gaudet. Myers requested of Smiley that he facilitate the surrender of his firearms. Smiley was not receptive to the request referring to the sentimental value, to him, of his firearms and his fear that they would be lost or damaged if they were surrendered. Smiley said that his firearms were in Nova Scotia. Smiley said that he wanted to call his lawyer, which he was allowed to do.
70. Constable Smiley then asked to speak to Sergeant Battiste in private. In the course of his private meeting with Battiste, Smiley informed him that he was in possession of firearms and that they were in his vehicle in the Police Station parking lot. Following this private meeting, Smiley and Battiste met with Myers and Gaudet, at which point Smiley informed them that he was in possession of firearms and that they were in his vehicle in the Police Station parking lot. According to Sergeant Battiste, Myers and Gaudet were taken aback by Smiley's revelation that he was in possession of firearms and he was asked to repeat the statement which he had just made. Staff Sergeant Myers then arrested Constable Smiley for a breach of his Undertaking and seized the keys to Smiley's vehicle.

*The evidence of Kimberly Burnett on direct examination*

71. Ms. Kimberly Burnett testified that she first met Constable Smiley in the summer of 2011. In the fall of 2011 she began a relationship with Smiley and in the spring of 2012 he moved into the house which she owned in the City of Fredericton, New Brunswick. The relationship continued until February 2014. Both Ms. Burnett and Constable Smiley have daughters from previous relationships.
72. Ms. Burnett is a university graduate, having received a bachelor's degree with double honours in psychology and gerontology in 2000. Following completion of her university studies, she attended the New Brunswick Community College, where she completed an outdoor recreation and tourism program in 2002.

73. In 2003 Ms. Burnett commenced employment as a teller with a chartered bank in Fredericton. She eventually attained the position of branch manager with her employer. In May 2015 she ceased employment with the chartered bank by which she had been employed. The position which she had held with her employer had been eliminated as part of a staff reduction program.
74. The relationship which Ms. Burnett had with Constable Smiley deteriorated over time, to the point where in very early 2014 she had decided to put it to an end and she had so informed him. By that time, unpleasant text messages and heated arguments were commonplace in the relationship.
75. Ms. Burnett, in her testimony, confirmed the sequence of her interactions with the Fredericton City Police, and its members, regarding the events of February 26 and 27, 2014: a February 26, 2014 conversation with Corporal Dwight Doyle; her attendance at the Fredericton Police Station, where she met with Corporal Doyle; her introduction by Corporal Doyle to Corporal Ross Chandler; her first KGB statement; and her second KGB statement.
76. Ms. Burnett testified to having been diagnosed with a “major depressive disorder” before she started her relationship with Constable Smiley and that she had been prescribed medication to deal with her depression. As a result of this disorder, she testified, she would at times become very “agitated” and “irrational”. She also testified that she is obsessive-compulsive.
77. Ms. Burnett’s home is her most significant asset. She testified that when she first discussed putting an end to her relationship with Constable Smiley he told her that he, as a result of their co-habitation for the past few years, might have a claim with respect to the home. This assertion by Constable Smiley caused her a great deal of concern. Not only did she want Constable Smiley out of the house but she also wanted to ensure that she retained ownership of the home. She called Constable Michael Fox of the Fredericton Police Force, a person whom she knew and from

whom she thought she might receive some advice, to discuss the matter. From her conversation with Constable Fox she concluded that an allegation of assault by her against Constable Smiley would no doubt result in him having to remove himself from the home.

78. Ms. Burnett testified that she gave two KGB statements regarding her interactions with Constable Smiley; one to Corporal Ross Chandler and another to Constable Karla Forsythe, both under oath.
79. Ms. Burnett testified that her final decision to terminate her relationship with Constable Smiley was made on February 17, 2014, although she had discussed the matter with him prior to that date.
80. During the course of giving her KGB statement to Corporal Ross Chandler she recounted to him events which occurred on February 17, 2014 at which time she and Constable Smiley had an argument. She told Corporal Chandler of physical contact by Smiley and referred to the incident as “hugs gone wrong”. She testified that she told Corporal Chandler that on some occasions when she was having an argument with Smiley she would want to leave and that Smiley would put his hands on her shoulders or arms to continue the conversation, even though she did not wish to continue the conversation. She told Corporal Chandler that the type of event that she had described had occurred more than once during her relationship with Smiley, perhaps as many as twenty times. As she gave her KGB #1 statement, Ms. Burnett was asked by Corporal Chandler if he could see her phone, to which she agreed. One of the text messages that she had sent to Constable Smiley that day stated “I am tired of your anger”.
81. A video and sound recording of her KGB statement to Constable Karla Forsythe was tendered into evidence during the course of these proceedings, as was a transcript of the sound recording of that statement. The following excerpts of the transcript of the sound recording of KGB statement #2 are reflective of her statement:

[Ms. Burnett's statements at p. 4 and 30 that what had happened was not "okay".]

*I do love him and I don't want anything to happen to him. But I know the things that happened aren't okay.*

\*\*\*\*\*

*To me, it just doesn't seem like it, you know, it's not okay, but it doesn't seem like, I mean, certainly, it's not bad in comparison to all this other things.*

[The incident which took place on February 26, 2014 where Ms. Burnett had told Constable Smiley not to come to her daughter's Tae Kwon Do class, but he kept calling her and then came anyway; Transcript pp. 9-11. In particular, Ms. Burnett's comment (at p. 11)]

*And I didn't want to talk again. And I said Jeff, you know, this is harassment. Like, I've already said I don't want to talk today.*

[Ms. Burnett's description of incidents (at p. 12) where Constable Smiley would not let her leave an argument or conversation.]

*KB: And then I get in a corner. And then, you know, he's not forcibly pushing me in a corner. He's not pinning me in a corner.*

*KF: Right.*

*KB: But, he, he, he'll just put his hands on my shoulders to kind of make me stay there and have a conversation.*

*KF: Okay.*

*KB: And I can't necessarily get free.*

[She goes on to say (at pp. 12-13) that these incident are like hugs, but are unwanted.]

*KB: Or get out. Sometimes it's probably my doing because I get so upset and I kind of, I feel like a tornado and I just kind of panic. And I'm just waving my hands around so, I'd say sometimes it's like a hug gone back [sic]. Because he's trying to help me calm down. And he's hugging me to hold me. But I don't want to be held.*

*KF: Okay.*

*KB: So I'm trying to, trying to get out.*

[Ms. Burnett's description (at pp. 13-14; 19-21; 31) of Constable Smiley's

controlling and constant questioning of her actions, which left her socially isolated.]

*KB: Um, now, I don't really go anywhere or do anything without him.*

*KF: Right.*

*KB: Um, because it involves too many questions.*

\*\*\*\*\*

*KF: Right. Okay um, so you talk about him asking like, a bunch of questions and stuff like, if you were to go anywhere. Like, what's that about?*

*KB: Um, normally the only, like, I've never gone to a bar. I've never gone anywhere in our entire relationship.*

*KF: Right.*

*KB: Like anywhere like that.*

\*\*\*\*\*

*KB: Um, you know, he looks through my phone every day.*

*KF: Does he?*

*KB: Maybe not every day but a lot of the time. It's open. He can, I...*

*KF: Yup.*

*KB: ...have nothing to hide.*

[Ms. Burnett confirms her description of the incidents where Constable Smiley would restrain her at pp. 16 and 32.]

*KF: But the extent, I guess, of the assault that we're investigating would be that if you tried to walk away he would grab your shoulders and restrain you from leaving so he could continue talking to you?*

*KB: Yes.*

\*\*\*\*\*

*KF: Okay. So it says here, like on times when he would grab you by the shoulders, you would try to push him away but he, but you couldn't cause he'd continue to hold onto you. Is that correct?*

*KB: Yes.*

[Ms. Burnett confirmed at p. 16 that such incidents occurred approximately 20 times during the course of their relationship.]

*KF: And how many times though, in the last two and a half, three years, how many times would you say, that the arguments would have escalated to that point where it would have gotten physical? To...*

*KB: Like.*

*KF: ...him grabbing your shoulders?*

*KB: Like, you know, like, twenty times maybe. KF: Okay.*

*KB: In the entirety. This isn't something that happens all the time.*

[Ms. Burnett stated (at pp. 16-17) that she does not like to be confined, that she wanted to be able to walk away from an argument or conversation when she chose to, and that when she said that she didn't wish to touched, she did not want touching to persist.]

*KB: And unfortunately, you know, I, I don't like to be confined. KF: Right.*

*KB: Like I said, I don't feel I'm assaulted. I just, I want to be able to walk away.*

*KF: Right.*

*KB: When I say, don't touch me...*

*KF: Yeah.*

*KB: ... I just want you not to touch me.*

[Ms. Burnett made similar comments about being hugged at p. 24.]

*KB: Like he's trying to say that he loves me and giving me a hug. KF: Right.*

*KB: But sometimes I don't want to be hugged. I don't want to be held onto that long. I need to be able to walk away.*

[At pp. 24-26 Ms. Burnett gives a detailed description of an incident which occurred on February 17, 2014 which was witnessed in part by her daughter. She described her attempt to leave the conversation at p 25.]

*KB: And, I got kind backed myself, like I don't know where to go. Like I can't get anywhere else. And he's trying to talk to me. And I'm trying to not talk and have the conversation. And, you know, it was the same kind of trying to hold me in one place.*

*KF: Right.*

*KB: It's not hurting. KF: Right.*

*KB: It's just agress-, not aggressive but enough, and you know, I just wanted out. And I finally was able to, you know, to push him away.*

*KF: Right.*

*KB: You know. And I did push. KF: Yup.*

*KB: And then, you know, he kind of came back and was still trying to finish the conversation and what have you.*

[Ms. Burnett described other incidents where Constable Smiley placed his hands on the nape of her neck in an effort to force her to engage in conversation at pp. 26 and 36.]

*KB: What did I say? Um, the only other thing I can think of is, one, just one time, um, and, again, it was intended to be a loving kind of thing, um, instead of, you know, it being my shoulders, it was, you know, my hair would have been down and you could have grabbed, almost if like I had ponytails and you could have grabbed someone kind of by the hair.*

*KF: Yeah. Yeah.*

*KB: To have that same conversation. So it was a head more than a shoulder.*

*KF: Okay.*

*KB: Kind of conversation. I had told Jill about that one because I was like, like, you know...*

*KF: Did it scare?*

*KB: It was kind of crazy that it happened.*

*KF: Did it scare you at the time, I guess, when he grabbed ... KB: At the time.*



*KF: ...when he grabbed onto you like that?*

*KB: Yeah. Like and it wasn't like he jumped over and.. KF: Right.*

\*\*\*\*\*

*KF: ...either. So I think I understand. And I think that's the way, I'll read you what um, Ross Chandler said just so, ah, um, so you know that that's how he understood it too. Um, I went back in and asked her if he had ever held her with hi-, ah, held her head with his hands. She said something, sometimes he would hold the nape of her neck so he could force her to look at him.*

*KB: Yeah.*

*KF: Look at you and talk. KB: Exactly.*

[When asked if she was fearful of Constable Smiley, Ms. Burnett expressed her fear of things escalating (at p. 35) or that he might hit her or grab her too hard (at p. 36)

*KF: Okay. Okay. Um, Burnett said that Smiley has never hurt but she is fearful of what he might do to her.*

*KB: I, I'm scared it will escalate. KF: Okay.*

*KB: Like, I'm not afraid of him but I'm, but I don't want it to escalate.*

*KF: Okay.*

\*\*\*\*\*

*KB: I'm just nervous that you know, maybe he'd hit me or grab me too hard.*

[On at least two occasions during the course of her KGB interview (at pp. 5, 37), Ms. Burnett expressed concern about Constable Smiley's anger and what he would do once he found out she had made statements to the police.]

*KB: And he's angry. And he'll never forgive me. And, you know, how dare I do this?*

\*\*\*\*\*

*KB: And I know that he, you know, and he'll find out I was back in here today and he'll be more angry with me. And, you know, cause I, like he had mentioned, I can't believe you would, as he said, make a false statement. Well I didn't make a false statement.*

82. Ms. Burnett testified that her relationship with Constable Smiley resumed after the condition in his Undertaking prohibiting him from having any contact with her was lifted. She was not sure, she testified, that her relationship with Smiley had ever been interrupted. She testified that she and Constable Smiley have since on many occasions discussed the events of which she has testified.

*The evidence of Kimberly Burnett on cross-examination*

83. On cross examination by legal counsel for Constable Smiley, Ms. Burnett testified that in February 2014 she was struggling to find a correct balance of medications, some of which she had stopped taking. What she referred to as “outside stressors”, such as an audit carried out at the branch of the chartered bank where she was employed, would prompt episodes of depression and obsessive-compulsive behavior. She denied ever having been touched by Constable Smiley in any other than a loving, caring way.
84. Ms. Burnett testified that she would not have gone to the Fredericton Police Station on February 26, 2014 had it not been for Corporal Dwight Doyle telling her that she had to come in and that he had some questions to ask her. At her meeting with Doyle, she testified, he informed her that if there was any indication of an assault by Constable Smiley he would have to remove himself from the discussion and pass her on to another police officer. By the time she was introduced to Corporal Ross Chandler, panic had set in.
85. Ms. Burnett, in her cross-examination, denied ever having been bruised, threatened, harassed, or been physically or psychologically restrained by Constable Smiley. She said she could always get away when she wanted to and that the purpose of Constable Smiley, when he did put his hands on her arms, shoulders or the nape of her neck was to comfort her and not to confine her. She said that Constable Smiley could be an “angry guy”, that he could be “overbearing”, that he could be

“inquisitive” and that he had “trust issues”. She testified that she had on occasion given Constable Smiley cause not to trust her; an example of which was going over to the neighbours and having a drink of alcohol.

86. Ms. Burnett testified that Constable Smiley likes to hunt and fish. She said that Constable Smiley’s firearms were kept in a safe place in her home and that he was the only one who had a key to access the firearms. Constable Smiley, she testified, had been given a shotgun by his father, together with some “dummy rounds”.
87. Ms. Burnett testified that in the early spring of 2014 Constable Smiley’s Undertaking was varied, allowing him to “come home”, at which time the relationship which she had had with him resumed.

*The evidence of Constable Michael Fox*

88. Constable Michael Fox is a member of the Fredericton Police Force.
89. Constable Fox testified that in the afternoon of February 26, 2014 he received a phone call from Ms. Kimberly Burnett. She was looking for advice regarding her right to have Constable Smiley remove himself from her home and whether or not Smiley had acquired any rights to ownership of the home. Fox told Burnett that since they were living in a common-law relationship they both had an equal right to the home. He also told her that when police respond to a call where arguments are taking place they would try to convince one party to leave the residence of their own accord, unless there was violence involved. When he asked Ms. Burnett if there was any violence involved in her case, she responded that there was not.

**C. THE ARGUMENTS OF THE PARTIES**

90. No oral arguments were made at the conclusion of this matter. The parties did however did make extensive written submissions.

*The Arguments on behalf of the Commission*

91. Legal counsel for the Commission, in their submission, reviewed the procedural background of this matter and a summary of the evidence at the hearing. They then followed with arguments in support of their position on each of the counts.
92. With respect to Count 1 a comprehensive analysis of the expression “domestic violence” and the evidence of “domestic violence” tendered at the hearing was undertaken, all in support of their submission that there was a pattern of emotional, psychological, physical and social control exercised by Constable Smiley over Ms. Kimberly Burnett.
93. The same process was followed with respect to Counts 2, 3 and 4, and references were made to the evidence, case law, the *Police Act* and the *Code of Professional Conduct*.
94. A Reply Brief was submitted by legal counsel for the Commission.

*The Arguments on behalf of Constable Smiley*

95. Legal counsel for Constable Smiley, in his written submission, argued that the arbitration was conducted without proper jurisdiction and was procedurally flawed, in that the Commission did not have the statutory authority to be a party in this matter.
96. With respect to Count 1, he argued that “domestic violence” is not an act proscribed by the *Police Act* or the *Code of Professional Conduct*, nor is it an offence under the *Criminal Code of Canada*.
97. Legal counsel for Constable Smiley addressed the issues of “domestic violence” and “assault” as follows in paragraphs 31 to 40 of his submission:

31. "Domestic violence" is defined broadly in New Brunswick. The definition used by the New Brunswick's Department of Public Safety in its 2012 Crime

Prevention and Reduction Strategy, and known to all police officers, defines "domestic violence" as follows:

Domestic and intimate partner violence occurs when a person who is currently or previously in an intimate personal relationship uses abusive, threatening, harassing or violent behavior as a means to psychologically, physically, sexually or financially coerce, dominate and control the other member of the relationship.

32. On cross-examination, Ms. Burnett adamantly testified the alleged acts perpetrated by Cst. Smiley did not meet the elements of "domestic violence" as per the above definition. **Specifically, Ms. Burnett testified that, "I did not object to the manner in which he touched me."**

33. Based on Ms. Burnett's evidence, the allegation that Cst. Smiley committed domestic violence cannot stand.

34. The evidence and testimony at the arbitration does not support a claim that Cst. Smiley committed an assault. The New Brunswick Court of Appeal in *R. v. Horncastle* [1972] N.B.J. No. 87 determined that an assault is committed when a person occasions the actual "act" or "threat" to apply force and has the ability to do so. Specifically, the Court of Appeal stated at paras. 35:

The trial judge acquitted the accused saying: ". . . I don't believe that the accused had the intention, an essential element of the offence . . . to assault her. He had the opportunity but didn't take it. It was not his intention to do so." In this he erred in law. It is not necessary to constitute the offence of assault that the accused actually apply force or even intend to do so. It is sufficient if he threatens to do so and has the present ability to do so. **Mens rea lies in the intention to threaten not in the intention to carry out that threat.**

35. More recently, in *R. v. Jobidon*, [1991] 2 S.C.R. 714, the Supreme Court of Canada described the history of the offence of assault and noted at p. 731 that **the absence of consent to intentionally applied force was a material component of the offence of assault. In other words, an assault is only committed on a person when he or she does not consent to the application of force by the other.**

36. Ms. Burnett testified at the arbitration that she did not object to the way Cst. Smiley "touched her", and in fact, stated that it was her belief that any "touching" was done in a loving manner. The element of intention to commit an assault is not present.

37. Ms. Burnett also testified that Cst. Smiley would only place his hands on her as an attempt to help her calm down with minimal application. His action[s] were not carried out in a manner without consent, did not [leave] marks or bruising, or used to control or harm her.

38. It is our contention that Ms. Burnett's testimony illustrates that Cst. Smiley's actions throughout the course of their relationship do not amount to an assaultive behaviour because she did not believe he intended to threaten or assault her. Although her testimony at the hearing appeared contradictory to her KGB statement, the Respondent submits that Ms. Burnett's testimony places context and meaning behind her words and are best described by her sworn testimony heard at this arbitration.

39. Evidence was given by Ms. Burnett that she required a reason or cause to have Cst. Smiley removed from her home in order to preserve her "only asset"- to wit: her marital home. This is supported by objective *viva voce* evidence given by Constable Michael Fox, who confirmed that prior to any police interaction with Cst. Smiley on February 26, 2014, he and Ms. Burnett discussed on the telephone how common law partners may divide assets upon separation and what policing process is involved when a domestic disturbance call is made concerning the removal of a particular party. We submit that it follows, that at the time, Ms. Burnett was acting out of "desperation and would do anything she could to keep her home for myself and daughter".

40. In essence, we submit there is no clear, convincing or cogent evidence that can allow for a reasonable conclusion to believe such acts of assault or domestic violence occurred on a balance of probabilities.

[Emphasis added by legal counsel for Constable Smiley]

98. With respect to the expression "discreditable conduct", legal counsel for Constable Smiley, in paragraph 41 of his submission, commented as follows:

41. Police Commissions of other jurisdictions have adopted an objective test for determining whether an act of an officer constitutes "discreditable conduct". The Nova Scotia Police Review Board in *Re Smith*, 2005 CanLII 77786 (NS PRB) set out the test at pp. 12-13 of the decision as follows:

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.

99. With respect to Counts 2, 3 and 4, legal counsel for Constable Smiley submits that the Counts constitute an abuse of process on the part of Commission since it purports to be re-litigating issues already decided by a Judge of the Provincial Court of New Brunswick.
100. A Reply Brief was submitted by legal counsel for Constable Smiley.

#### **D. ANALYSIS AND DECISION**

##### *The standing of the New Brunswick Police Commission*

101. On November 5, 2015, on conclusion of the Commission's case, I asked counsel for the parties to address the wording of sections 29 and 30 of the *Code of Professional Conduct*, in which it is stated:

29 If, at the conclusion of the evidence submitted by the chief of police or civic authority, as the case may be, the arbitrator determines a prima facie case has not been made out, the arbitrator shall dismiss the matter.

30 If, at the conclusion of the evidence submitted by the chief of police or civic authority, as the case may be, the arbitrator determines a prima facie case has been made out, the arbitrator shall provide the member of a police force who is alleged to have committed a breach of the code under section 35 with an opportunity to call evidence.

[emphasis added]

102. In his post-hearing submissions, legal counsel for Constable Smiley argues that the entire arbitration hearing was procedurally flawed and without jurisdiction, and that the New Brunswick Police Commission does not have the statutory power to be a party to this matter.

103. Legal counsel for the Commission take a contrary view. First, they argue that such a jurisdictional challenge should have been made at the outset of the proceedings and that by participating in the hearing without raising this issue, Constable Smiley is deemed to have waived any such objection. Second, it ignores a key provision of the *Police Act*, which is a complete answer to procedural objection which has been raised.
104. Commission counsel acknowledge that parties cannot confer by consent jurisdiction on a court or tribunal where jurisdiction does not lie. However, where a party knowingly participates in a hearing, without raising any objection, they may be estopped from raising the objection.
105. In *Baker v. Dumaresq*, [1934] SCR 665, 1934 CanLII 11 (SCC), Hughes J. cited the decision *In re Prat* at p. 763:

In *Re Prat*, Bowen, L.J., said:

There is a good old-fashioned rule that no one has a right so to conduct himself before a tribunal as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him, to turn round and say, "You have no jurisdiction." You ought not to lead a tribunal to exercise jurisdiction wrongfully.

106. The Notice of Arbitration Hearing which initiated these proceedings recited the procedural history of this matter and noted:

On December 17, 2014, considering it in the public interest to do so, pursuant to section 26.1(1) of the *Police Act* the New Brunswick Police Commission (the "NBPC") took over the processing of the Complaint from Chief Fitch.

107. I also take note of section 26.1(1) and section 26.1(2) of the *Police Act*, which provides as follows:

26.1(1) Notwithstanding any other provision of this Division, if the Commission considers it to be in the public interest, it may, at any time before an arbitrator has been appointed, process a conduct complaint or take over from a chief of police or civic authority the processing of a conduct complaint.

26.1(2) The provisions of this Act that apply to the powers that a chief of police or civic authority may exercise when processing a conduct complaint also



apply with the necessary modifications to the Commission when it processes a conduct complaint or takes over from a chief of police or civic authority the processing of a conduct complaint.

108. I therefore conclude that the Commission is a proper party to these proceedings.

*The standard of proof*

109. The *Police Act*, at subsection 32.6(1), provides that the standard of proof in arbitration matters under the *Act* is the following:

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 disciplinary or corrective measure prescribed by regulation.

110. Legal counsel for Constable Smiley, in his post-hearing submission, posits that "clear, convincing and cogent" evidence is required in order to sustain a breach of the *Code of Professional Conduct*. Counsel for the Commission do not dispute this; but note that this standard is no different than in any civil case where the balance of probabilities standard applies. They refer to the decision of the Supreme Court of Canada in *F.H. v. McDougall*, [2008] 3 SCR 41, 2008 SCC 53 (CanLII) in which Rothstein J. stated at paragraphs 40, 45 and 46:

[40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

...

[45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

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

111. The law requires that I scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred and base my findings on clear, convincing and cogent evidence to satisfy the balance of probabilities test.

*Reliability and credibility of witnesses in the case of inconsistencies and an absence of supporting evidence*

112. This is not quite the typical he-said-she-said case where two parties present opposing evidence.
113. In *R. v. R.W.B.* (1993), 24 B.C.A.C. 1, Rowles J.A. at paragraph 29, dealing with the reliability and credibility of witnesses in the case of inconsistencies and an absence of supporting evidence, stated as follows:

In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here.

114. Rothstein J. in *F.H. v. McDougall*, *supra*, said in paragraph 57 of the decision of the

Supreme Court of Canada that although *R.W.B.*, *supra*, was a criminal case, the words of Rowles J.A. were apt for the purposes of a civil case in which allegations of sexual assault were being made. Even though the present matter does not deal with allegations of sexual assault, I do find the words of Rowles J.A. apt for the purpose of this matter.

115. I also take note of the following statements made by Rothstein J. at paragraphs 80 and 81 of the decision of the Supreme Court of Canada *F.H. v. McDougall*, *supra*:

[80] Corroborative evidence is always helpful and does strengthen the evidence of the party relying on it as I believe Rowles J.A. was implying in her comments. However, it is not a legal requirement and indeed may not be available, especially where the alleged incidents took place decades earlier. Incidents of sexual assault normally occur in private.

[81] Requiring corroboration would elevate the evidentiary requirement in a civil case above that in a criminal case. Modern criminal law has rejected the previous common law and later statutory requirement that allegations of sexual assault be corroborated in order to lead to a conviction (see *Criminal Code*, R.S.C. 1970, c. C-34, s. 139(1), mandating the need for corroboration and its subsequent amendments removing this requirement (*Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125), as well as the current *Criminal Code*, R.S.C. 1985, c. C-46, s. 274, stipulating that no corroboration is required for convictions in sexual assault cases). Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration.

116. In considering the question of credibility I would refer to the British Columbia Court of Appeal case, *Faryna v. Chorney*, [1952] 2 D.L.R. 354 (B.C. C.A.) (which was quoted with approval by the Ontario Court of Appeal in *Phillips v. Ford Motor Co.*, [1971] 2 O.R. 637): as follows:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

117. In *Baker-Warren v. Denault*, 2009 NSSC 59 (CanLII), Forgeron J. reviewed the factors to be considered when making credibility determinations. She stated at paragraphs 18 to 20 of her decision:

[18] For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. v. Gagnon*, 2006 SCC 17 (CanLII), para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. R. E. M.*, 2008 SCC 51, para. 49.

[19] With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:

- a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent

statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: *Re: Novak Estate*, 2008 NSSC 283 (CanLII), 2008 NSSC 283 (S.C.);

- b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
- c) Did the witness have a motive to deceive;
- d) Did the witness have the ability to observe the factual matters about which he/she testified;
- e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
- f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorney*, [1952] 2 D.L.R 354;
- g) Was there an internal consistency and logical flow to the evidence;
- h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and
- i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[20] I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: *R v. Norman* (1993) 1993 CanLII 3387 (ON CA), 16 O.R. (3d) 295 (C.A.) at para. 55. In addition, I have also adopted the following rule, succinctly paraphrased by Warner J. in *Re: Novak Estate*, *supra*, at para 37:

There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.*, [1966] 2 S.C.R. 291 at 93 and *R. v. J.H. supra*).

### *The abuse of process argument*

118. Counsel for Constable Smiley argues that Counts 2, 3 and 4 constitute an abuse of process on the part of the Commission since it purports to be re-litigating issues

already decided by a Judge of the Provincial Court of New Brunswick in a different forum, namely, in a hearing under the *Police Act*.

119. In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 SCR 77, 2003 SCC 63 (CanLII), Arbour J., writing for the majority of the Supreme Court of Canada, stated at paragraph 35 of the reported decision:

35. Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, 1990 CanLII 27 (SCC), [1990] 3 S.C.R. 979, at p. 1007:

. . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

120. This case comes within the scope of the decision of the Supreme Court of Canada in *R. v. Wigglesworth*, [1987] 2 SCR 541, 1987 CanLII 41 (CanLII), where an RCMP officer committed a common assault, as defined in the Criminal Code, which was also a "major service offence" under the *Royal Canadian Mounted Police Act*. The major service offence was dealt with first. The trial judge quashed the information for the charge of common assault under s. 24(1) of the *Canadian Charter of Rights and Freedoms* on the ground that the accused was being tried twice for the same misconduct contrary to s. 11 of the *Charter*. In holding that the fact that the officer had already been disciplined for the same conduct was no impediment to the criminal proceeding, Wilson J. (speaking for the majority) held at para. 28:

28. I would hold that the appellant in this case is not being tried and punished for the same offence. The "offences" are quite different. One is an internal disciplinary matter. The accused has been found guilty of a major service offence and has, therefore, accounted to his profession. The other offence is the

criminal offence of assault. The accused must now account to society at large for his conduct. He cannot complain, as a member of a special group of individuals subject to private internal discipline, that he ought not to account to society for his wrongdoing. His conduct has a double aspect as a member of the R.C.M.P. and as a member of the public at large. To borrow from the words of the Chief Justice quoted above, I am of the view that the two offences were "two different 'matters: totally separate one from the other and not alternative one to the other". While there was only one act of assault there were two distinct delicts, causes or matters which would sustain separate convictions. I would respectfully adopt the following passage from the reasons of Cameron J.A. in the court below:

A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public.... And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers. For example a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal conviction at the behest of the state; to a judgment for damages, at the instance of the patient, and to an order of discipline on the motion of the governing council of his profession. Similarly a policeman who assaults a prisoner is answerable to the state for his crime; to the victim for damage he caused; and to the police force for discipline.

121. The decision of the New Brunswick Court of Appeal in *Belong v. Her Majesty the Queen in Right of the Attorney General of Canada and Timothy Quigley*, 2013 NBCA 68 (CanLII), is also applicable. In that case, an RCMP officer had been acquitted of several charges of domestic violence, but in spite of the acquittals disciplinary proceedings continued. He subsequently commenced a civil action for abuse of process which was dismissed, and subsequently appealed. In addressing the issue of abuse of process, Bell J.A. held at paragraphs 14 to 18:

[14] In pleading this ground of appeal, Cst. Belong appears to confuse the concept of the doctrine of abuse of process, with its roots in the doctrine of *res judicata* and issue estoppel, with the tort of abuse of process. The doctrine of abuse of process is concerned with maintaining the integrity of the judicial process by, for example, preventing the same issue from being litigated in multiple forums. This avoids the risk of inconsistent results which would bring the administration of justice into disrepute. The tort, on the other hand, is meant to address situations in which a person uses the processes of the court for an improper purpose. The trial judge articulated that the tort of abuse of process requires the establishment of the following two essential elements: 1. the misuse of process for any purpose other than that which it was designed to

serve; and 2. some overt act or threat, distinct from the proceedings themselves, in furtherance of the improper purpose.

[15] Cst. Belong failed to establish these elements. No evidence was led at trial to demonstrate the existence of a collateral or improper purpose behind the RCMP's decision to proceed with the disciplinary charges. Furthermore, Cst. Belong led no evidence of a definite act or threat in furtherance of such a purpose. Instead, Cst. Belong's focus at trial was, and on appeal continues to be, that the disciplinary proceedings became an abuse of process by virtue of his acquittal on the criminal charges. He contends the trial judge ignored the decision of the Court in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77, and the observations of Cromwell, J.A. (as he then was) in *Haché v. Lunenburg County District School Board*, 2004 NSCA 46 (CanLII), [2004] N.S.J. No. 120 (QL). Neither of those cases considered the tort of abuse of process. Rather, they were administrative law cases in which the integrity of the adjudicative process was called into question because of the possibility of conflicting outcomes on the same issue by different adjudicative bodies. The Courts concluded that, in such cases, the potential for different outcomes on the credibility issue, and hence the ultimate decision, would bring the administration of justice into disrepute. Parenthetically, even though Haché is not applicable, it is interesting to note Cromwell J.A.'s statement with respect to criminal and civil proceedings that arise out of the same factual circumstances:

[. ..] generally speaking, acquittal at a criminal trial does not foreclose relitigation of the same allegations in the employment context. One reason for this is that there is no inconsistency between an acquittal, which reflects the Crown's inability to establish its case beyond a reasonable doubt, and a finding in the employment context of just cause for discharge arising from the same facts, which need not be proved to the criminal standard. [para. 55]

[16] This is not a situation akin to Haché where the doctrine of abuse of process was applied to prevent a disciplinary proceeding from continuing after the accused was acquitted at trial on the basis that no weight could be given to the complainant's evidence. In the present case, there was no retrial of the criminal charges and, hence, no negative credibility findings. C. U.P.E. is also distinguishable. In C.U.P.E. the grievor, who was found guilty in the criminal context, was later found not to have committed the offence in the context of an administrative proceeding regarding his employment. The Court concluded that in the absence of new evidence demonstrating innocence, it was not open to the grievor (offender) to relitigate his innocence on a lower standard. To permit him to do so would have called into question the trustworthiness of the guilty verdict.

[17] In summary, the facts and the law at issue in the present case are not at all



similar to those in Haché and C.U.P.E. First, as already mentioned, they were not cases in which the tort of abuse of process had been pleaded. Second, in the present case there was no adjudication of Cst. Belong's guilt or innocence based upon the testimony of Cst. Haywood. The determination of innocence was based solely upon the Crown decision to offer no evidence. Third, the trial judge acknowledged the equivocal recantation of the sexual assault by Cst. Haywood, but concluded that recantation could not be used to invalidate the RCMP decision to proceed with disciplinary charges founded on other allegations.

[18] Applying *R. v. Wigglesworth*, 1987 CanLII 41 (SCC), [1987] 2 S.C.R. 541, [1987] S.C.J. No. 71 (QL), the trial judge correctly acknowledged that criminal and disciplinary proceedings can flow from the same facts and, given the different standards of proof, disciplinary proceedings can proceed even if the criminal proceedings have resulted in an acquittal.

122. I accept and apply the conclusions of Bell J.A. in *Belong* to the effect that "criminal and disciplinary proceedings can flow from the same facts and, given the different standards of proof, disciplinary proceedings can proceed even if the criminal proceedings have resulted in an acquittal.

Domestic violence

123. Numerous behaviours or actions may fall under the head of "domestic violence". This was noted by MacDonald J. in *L. (N.D.) v. L. (M.S.)*, 2010 NSSC 68, 2010 CarswellNS 107 [L.(N.D.)] at paragraph 34:

34 ...Unfortunately the words "domestic violence" do and have defined a number of behaviours including isolated or rare incidents in a relationship - a push, a shove, rudeness, disrespect, and name calling all of which are unpleasant to those on the receiving end of these behaviours....In this decision I use the term only to refer to violence against an intimate partner which has as its purpose coercive control over that partner.

124. The Supreme Court of Canada has found social science information to be helpful in defining domestic violence as well as understanding the tendency on the part of the victim to minimize or internalize the abuse. In *R v Lavallee*, 1990 CanLII 95 (SCC), [1990] 1 S.C.R. 852, Wilson J., writing for the majority, recognized *that* "the tragedy

of domestic violence cannot be overstated". She further noted that domestic violence is perpetual in nature and it is important to understand that it can be difficult for a victim to leave an abusive relationship due to the cycle of violence.

125. MacDonald J. in *L. (N.D.) v. L. (M.S.)*, *supra*, quoted extensively from Wilson J's decision in *Lavallee*, *supra*, in Schedule "A" to her decision. She provided the following helpful framework:

Wilson J., writing for the majority of the Supreme Court of Canada in *R v. Lavallee*, 1990 CanLII 95 (SCC), [1990] 1 S. C. R. 852 (1. CanLII), recognized the following as central elements of domestic violence in a criminal law context.

- The imbalance of power "wherein the maltreated person perceives himself or herself to be subjugated or dominated by the other".
- The dependency and lowered self esteem of the less powerful person.
- The periodic, intermittent nature of the associated abuse.
- The clear power differential between battered women and batterers that combine with the intermittent nature of physical and psychological abuse to produce cumulative consequences.

126. Although useful, the framework in *Lavallee*, *supra*, is somewhat limited as that case dealt with the criminal law context where a battered woman killed her spouse. Behaviours considered to be "domestic violence" do not always constitute criminal acts contrary to the *Criminal Code of Canada*.

127. To determine if there is domestic violence in a relationship the decision-maker should consider the whole context of the relationship and the partner's behaviours. If, in the opinion of the decision-maker, the actions constitute "an unhealthy and worrisome relationship featuring elements of violence and coercive control" then domestic violence exists regardless of the perception of the victim; see *Newfoundland & Labrador (Child, Youth & Family Services) v. C. (A.)* 2012 NLTD(F) 7, 2012 CarswellNfld 55 where Fry J provided useful comments on the specific issue of evaluating incidences of domestic violence in the family and civil

context even when "assault" or other *Criminal Code* charge have not necessarily been made out by the actions/behaviours. In that case, counsel for both the parties stated the relationship was one where there was some "marital conflict".

128. At paragraph 46 Fry J noted:

46 Definitions of domestic violence are found in social science literature as well as case law. I provided counsel with citations to some cases where judicial consideration had been given to both the definition of domestic violence as well as the impact on children. The cases referred to were instructive with respect to the judicial commentary noting however, that the factual situations differed. As well I provided references to social science literature including materials funded by the Public Health Agency of Canada, such as: Allison Cunningham & Linda Baker, "Little Eyes, Little Ears: How Violence Against a Mother Shapes Children as They Grow" (2007) Centre for Children and Families in the Justice System, (London Family Court Clinic Inc.) available from the National Clearing House on Family Violence, Public Health Agency of Canada. Some cases provided were: *Children's Aid Society of Algoma v. P. (0.)*, 2006 ONCJ 170 (Ont. C.J.); *Children's Aid Society of Toronto v. C. (S.A.)*, [2005] O.J. No. 2154 (Ont. C.J.), aff'd [2005] O.J. No. 4718 (Ont. S.C.J.), aff'd 2007 ONCA 474 (Ont. C.A.), leave to appeal denied [2007] S.C. C.A. No. 462 (S.C. C.); *L. (N.D.) v. L. (M.S.)*, 2010 NSSC 68 (N.S. S.C.)

129. At paragraph 48 she quoted from the literature:

48 In the article, Little Eyes, Little Ears the glossary of terms defines coercive control and domestic violence as follows:

Coercive control: an ongoing pattern of domination using strategies that include irrational demands, surveillance, isolation and the realistic threat of negative consequences, such as physical harm. The power and control wheel... shows the spectrum of tactics used against women such as threats, intimidation, emotional abuse, isolation, minimization and denial of harm.

Domestic violence: the abuse, assault, or systematic control of someone by an intimate partner, usually but not always a pattern of behaviour used by men against women.

130. Fry J, in finding there was domestic violence, considered the mother's testimony as a whole. The mother described the father's behaviour as "not really violent" but she

also spoke about "trying not to 'trigger' him out of concern about what might happen, of him calling her demeaning names, accusing her of cheating on him, trying to control who she talked to and trying to prevent her from leaving the home" ( at paragraph 57).

131. The mother had also reported several incidences of physical violence to social workers, police and counselors but had recanted before the criminal trial or during the criminal hearings.
132. Justice Fry further indicated that "it is possible that Ms. Cy may not have recognized or named this behavior as inappropriate or domestic abuse..." (at paragraph 60).
133. In *L. (N.D.) v. L. (M.S.)*, *supra*, the abusive behaviours included not only incidents of physical abuse by the husband but also moments when the partners would argue and the husband would prevent the wife from leaving the argument by blocking her path. The husband stated that during these arguments he wanted his wife to listen to him and not walk away from him when they were arguing.
134. Thus, domestic violence occurs not only when there is a physical assault such as hitting or commission of another *Criminal Code* offense such as threats of violence, but also occurs when there is coercive conduct such as preventing a partner from visiting friends and family or from leaving an argument if in so doing the partner exerts control and dominance.
135. Rates of victim recant are extremely high in criminal domestic violence cases. L'Heureux-Dube J. recognized this issue almost two decades ago in *R. v. Marquard*, 1993 CanLII 37 (S.C.C.), [1993] 4 S.C.R. 223, (1993), 108 D.L.R. (4th) 47, (1993), 25 C.R. (4th) 1:

"it is information which can be compared to such well-recognized phenomena among victims of sexual abuse or domestic violence as recantation of the reported assaults and delay in reporting which also, if weighed without knowledge of the particular context in which they occur, reflect negatively on the credibility of the witness."

*The Standards Applicable to Police Officers*

136. The following provision respecting the standards applicable to police officers is found in section 34 of the *Code of Conduct*:

34. It is incumbent upon every member of a police force:

- (a) to respect the rights of all persons;
- (b) to maintain the integrity of the law, law enforcement and the administration of justice;
- (c) to perform his or her duties promptly, impartially and diligently, in accordance with the law and without abusing his or her authority;
- (d) to avoid any actual, apparent or potential conflict of interests;
- (e) to ensure that any improper or unlawful conduct of any member of a police force is not concealed or permitted to continue;
- (f) to be incorruptible, never accepting or seeking special privilege in the performance of his or her duties or otherwise placing himself or herself under any obligation that may prejudice the proper performance of his or her duties;
- (g) 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; and
- (h) to treat all persons or classes of persons equally, regardless of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition, political belief or activity.

137. In *New Brunswick Police Commission v. Constable John Morrison* (August 20, 2014, unreported, found on the New Brunswick Police Commission web-site) Arbitrator McLaughlin, at paragraph 97 of his decision, adopted the following statement made by Christopher John McNeil in an investigation report on the matter heard by Arbitrator McLaughlin:

97. At page 12 of the investigation report Mr. McNeil describes role and status of police officers which I adopt as follows:

“Police Officers hold one of most trusted positions in the public service because they have significant authority over the lives of members of the public. Their authority is both specific and general in nature. Legislated powers of arrest are an example of specific authority. The status of a police officer also includes significant public esteem and influence which leads to a more subtle general authority. Citizens expect that police will act with integrity at all times, and, as such in all circumstances, police officers are

afforded an elevated level of trust. That trust is fundamental to law enforcement in a democratic society. The Code of Professional Conduct is intended to protect that trust.”

138. As did Arbitrator McLaughlin in *New Brunswick Police Commission v. Constable John Morrison, supra*, I accept the statement of Christopher John McNeil as a relevant and applicable explanation of the role and status of police officers in our society.

*Findings and conclusions on the Counts*

139. On Count One, with respect to discreditable conduct, I find that Constable Jeff Smiley of the Fredericton Police Force, engaged in discreditable conduct by committing domestic violence upon his common law partner, Kimberly Burnett, on a number of occasions over the period of their relationship, contrary to and in violation of section 36(1)(d)(i) of the *Code of Professional Conduct* thereby breaching section 35(a) thereof.
140. My reasons for so concluding on Count One are:
- The evidence before me establishes on a balance of probabilities that on numerous occasions Constable Jeff Smiley did commit acts of domestic violence upon Ms. Kimberly Burnett.
  - The actions of Constable Smiley are inconsistent with what Ms. Burnett described in her cross-examination as having been done in a loving and caring way.
  - The actions of Constable Smiley in restraining Ms. Burnett were on more than one occasion unwanted and unsolicited by her and continued despite her requesting that they cease. These actions, when viewed in the context of all of the evidence of his relationship with Ms. Burnett, amount to attempts by Constable Smiley to dominate and control Ms. Burnett and constitute domestic assault.
  - The statements made by Ms. Burnett to Corporal Dwight Doyle were such

as to have him conclude that an assault had taken place.

- The statements made by Ms. Burnett to Corporal Ross Chandler during her KGB # 1 statement were such as to have him conclude that a number of assaults had taken place.
- The statements made by Ms. Burnett to Constable Karla Forsythe during her KGB # 2 statement, which I have viewed and listed to, lead me to conclude that acts of domestic violence were committed by Constable Jeff Smiley on Ms. Burnett.
- Having resumed her relationship with Constable Smiley, Ms. Burnett has an interest in the outcome of these proceedings.
- The testimony of Ms. Burnett at the hearing of this matter is was not in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions of the matter before me.

141. On Count Two, with respect to counselling Constable Samantha McInnis of the Fredericton Police Force on February 27, 2014 to not disclose that he had firearms in his possession while bound by an Undertaking to turn over any firearms in his possession, I find that Constable Jeff Smiley did in fact so counsel Constable Samantha McInnis and in so doing acted in violation of and contrary to section 47 of the *Code of Professional Conduct*. This constitutes a breach of the *Code of Professional Conduct* under section 35(1) thereof.

142. My reasons for so concluding on Count Two are:

- Constable McInnis did observe firearms in the possession of Constable Jeff Smiley.
- The evidence at the hearing of this matter established that Constable McInnis' observations were made after Constable Smiley signed an Undertaking which prohibited him from possessing firearms.
- On February 27, 2014, Constable Smiley told Constable McInnis that if she was asked if she saw firearms or had any knowledge of him being in possession of

firearms she should say that she never saw firearms.

143. On Count Three, with respect to the improper use and care of firearms between December 24, 2013 and February 27, 2014 by failing to exercise sound judgment and restraint in respect to the use and care of firearms in that his Possession and Acquisition License (PAL) expired on December 24, 2013, contrary to and in violation of section 42(c) of the *Code of Professional Conduct*, I find that Constable Jeff Smiley did in fact breach section 35(g) of the *Code of Professional Conduct*.
144. My reasons for so concluding on Count Three are:
- Constable Smiley's firearms Possession and Acquisition License (PAL) expired on December 24, 2013.
  - During the period from December 24, 2013 and February 27, 2014, Constable Smiley's firearms Possession and Acquisition License (PAL) had not been extended or renewed.
  - During the period from December 24, 2013 and February 27, 2014, Constable Smiley was in the possession of firearms.
145. On Count Four, with respect to the improper use and care of firearms on February 27, 2014 in that he was in possession of a Lakefield Mossberg 12 gauge pump action shotgun loaded with two shells in the magazine, contrary to and in violation of section 42(c) of the *Code of Professional Conduct*, I find that Constable Jeff Smiley did in fact breach section 35(g) of the *Code of Professional Conduct*.
146. My reasons for so concluding on Count Four are:
- On February 27, 2014, Constable Smiley was in possession of a Lakefield Mossberg 12 gauge pump action shotgun loaded with two shells in the magazine.
  - I do not accept the evidence of Ms. Burnett that the two shells in the magazine



of the shotgun were “dummy shells”. The issue of “dummy” shells was testified to as a mere possibility and her lack of knowledge of firearms and their operation leads me to discount this mere possibility.

*Disciplinary and corrective measures*

147. The *Code of Professional Conduct* provides for a range of disciplinary and corrective measures that may be applied in appropriate circumstances:

6 The parties to a settlement conference may agree to or an arbitrator may impose one of the following disciplinary and corrective measures or any combination of the following disciplinary and corrective 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.

148. I note that the range of disciplinary and corrective measures provided for in the *Code of Professional Conduct* is such as to allow the imposition of measures which would allow a police officer to be reinstated to his or her former position, or even a lesser position, with or without directions.

149. The present matter is not one which I view as warranting a lesser disciplinary or corrective measure than dismissal.

150. In arriving at this conclusion in this matter, I am satisfied that I have done so on clear, convincing and cogent evidence, that I have considered the evidence before me on the whole, that the difficult task of addressing the evidence of Ms. Burnett has been undertaken by me with a view to determining this matter on a balance of probabilities and that the evidence presented to me supports my conclusions.

**E. ORDER**

151. I impose the following discipline in accordance with the relevant regulation:

**Constable Jeff Smiley is hereby dismissed from his employment with the  
Fredericton Police Force.**

Dated at Fredericton, N.B. this 2<sup>nd</sup> day of December, 2015.

A handwritten signature in blue ink, appearing to read "C. L. Haines".

Cedric L. Haines, Q.C.  
Arbitrator

**LIST OF EXHIBITS**

<u>Exhibit</u>	<u>Document</u>
C-1	Notice of Arbitration Hearing
C-2	KGB Warning (No. 1)
C-3	Promise to Appear and Undertaking
C-4	B-Safer Worksheet
C-5	Report, Karla Forsythe
C-6	KGB Warning (No. 2)
C-7	Report, S. McInnis
C-8	Affidavit, Paul Eardley
C-9	RCMP, Exhibit Control Ledger
C-10	RCMP, Photographs
C-11	Transcript, KGB #2 Statement
C-12	Video and Sound Recording of KGB #2 Statement
M-1	E-Mail, Steve Roberge to Chief Leanne Fitch, January 16, 2015
M-2	Report, M. Fox
M-3	Statement, M. Fox