POLICE ACT REVIEW COMMITTEE
THE NEW BRUNSWICK POLICE COMMISSION

PREAMBLE

This document is the result of five days of deliberations in October and November, 2015 between members and staff of the New Brunswick Police Commission ("the Commission"), and representatives of the civic authorities, Chiefs of Police, and the Royal Canadian Mounted Police (RCMP). Representatives of the trade unions representing police officers and the Department of Public Safety were also invited, but regrettably chose not to attend. The basis for discussion was the position paper that had initially been submitted by the Commission to the Minister of Public Safety ("the Minister") on April 11, 2013, pertaining to proposed amendments to the *Police Act*, with a revised version being submitted to the above-noted stakeholders on September 28, 2015. This position paper was initially requested by the Department of Public Safety, Director of Policing Services, on February 27, 2013 in an effort to streamline the process, focus the debate and allow each of the interested parties to contribute to the discussion in an efficient and effective way.

In his letter of June 6, 2013 to the Commission and to others, Kevin Mole, the Assistant Deputy Minister of Public Security and Corrections Division, Department of Public Safety, reiterated the need to forge ahead with the process as "[…] In view of the impacts being caused by these areas of concern not being addressed, and in view that I believe the Police Act Review Committee ("PARC"/"the Committee") would be in entire agreement that it is in the public interest that we pursue appropriate resolutions to these matters, a further round of consultation would be necessary".

Our initial submission was created to reflect the past experiences and actual challenges the Commission has faced in seeking to fulfill its mandate under the *Act*. Through our discussions in October and November 2015, the Commission has been able to fine-tune its submissions and to situate them from the perspective of those *Police Act* stakeholders who participated in our round table deliberations.

The Commission is confident that if all stakeholders keep "public interest" as the touchstone for deliberations, we will better succeed in actualizing the accountability framework imbedded in the *Police Act* and its *Code of Professional Conduct Regulation*. If the intent of the Minister is to reconvene the full Police Act Review Committee ("PARC") which will include representatives from all groups with a direct interest in the legislation, there is a strong possibility that new participants who are somewhat unfamiliar with the roles and responsibilities of the Commission will join in and/or observe the discussions. We have therefore outlined, in broad strokes, the role of the Commission.

The New Brunswick Police Commission is an independent oversight body which investigates and resolves citizens' complaints relating to the conduct of police officers. It also looks into any other aspect of police services including the review of police force adequacy in New Brunswick. The Commission takes the view that its mandate includes not only the assessment of the adequacy of each police force and the receipt and oversight of complaints relating to any aspect of policing in any area of the Province, but also the maintenance of public confidence in policing services.

The Commission recognizes that, in many cases, the public interest is best served when complaints are referred to the police force concerned for investigation by an investigator, internal or external, selected by the Chief of Police, with reporting to and review by the Police Commission. There are occasions,

however, where a complaint may involve sensitive matters, touch upon an officer who works closely with the Chief in a management position, or requires particular expertise on the part of the investigator. In these situations, the Police Commission may well determine that public confidence will best be sustained by the Commission appointing its own investigator rather than referring the complaint to the board, civic authority or Chief of Police.

The role of the Commission is not to advocate for police officers, their superiors or the government, but rather to make them accountable to the public they serve, ensuring that public interest is, and remains, the cornerstone of their service delivery model. Consequently, "public interest" is the prism through which the Commission has examined the current legislation and is proposing amendments for consideration in order to ensure that the *Police Act* serves its intended purpose without procedural gaps or unnecessary hurdles.

As indicated by Mr. Kevin Mole, Assistant Deputy Minister, Public Security and Corrections Division, in his letter of June 6, 2013, "[…] procedures for addressing complaints have been part of our legislation since its inception, and appear in the policing statutes of all provinces. These legislated public complaints systems recognize the special status and powers of police officers in our justice system and the need for a formal accountability mechanism respecting the exercise of those powers." The Commission is in full agreement that any proposed amendment to the *Act* should be filtered through the lenses of public scrutiny and should seek to answer this fundamental question: *Is the treatment of this matter likely to maintain, deter or enhance public confidence in the police discipline process?*

Mr. Mole went on to say that "[T]he methodology used during this consultation process was that of 'achieving agreements by consensus' and the use of 'interest based negotiations' concepts." Although achieving agreements by consensus is a worthy endeavour, it also carries with it some inherent pitfalls if not circumvented properly at the onset. For example, in decision-making bodies that use formal consensus, the ability of individuals or small minorities to block agreement gives an enormous advantage to anyone who supports the existing *status quo*. This can mean that a specific state of affairs can continue to exist in an organization long after a majority of members would like it to change. When it comes to the *Police Act*, this would be highly undesirable and, we firmly believe, contrary to the public interests.

If consideration was ever to give the right to block proposals to all group members, it may result in the group becoming hostage to an inflexible minority or individual. As a result, consensus decision-making has the potential to reward the least accommodating group members while punishing the most accommodating. The values of consensus are also not realized if "consent" is given because participants are frustrated with the process and wanting to move on. There is an inherent benefit of establishing the parameters of the discussion well in advance of the formal meetings. Our past experiences dictate prudence in the 'agreements by consensus' approach.

A revision of any legislation of this magnitude should not occur in a vacuum where input is solicited without a robust, respectful, facilitated discussion of the pros and cons. While the Commission acknowledges that there will be many lobbyists demanding a seat at the discussions, the primary interest group in this revision is the New Brunswick public. As such, the New Brunswick Police Commission wishes to champion a forum of stakeholder deliberations with respect to the revision of the *Police Act* that is **held in public**, as are our arbitration hearings. In this manner any changes to the *Police Ac*t will benefit from a rigorous but transparent revision process.

Having participated in the previous revision of the *Police Act,* and having recently undertaken our own consultative workshops, the Commission continues to champion a consultative "round table" that will require a strong bilingual facilitation and coordination skill set to avoid any disruptive agendas that can only be found in the services of a professional accredited facilitator. The success and efficiency of this very dynamic process of interactions relies heavily on such an individual.

As to the composition of a committee to review the *Police Act*, as was the case in our workshops, the Commission wishes to again propose a structure with representation from all 9 civic authorities, all 9 Chiefs of Police, all 9 police union/association executives, one representative from the RCMP, the Commission and the Department of Public Safety. This proposed structure, that could potentially result in 30 participants, would be clearly inefficient and unruly. As such, we would propose that each of the teams of 9 representatives (civic authorities, chiefs of police, unions/associations) subsequently meet and limit their representation to two individuals, perhaps one Francophone, one Anglophone or one from the North and the other from the South of the Province. The result would then limit the committee to a group of 9 individuals; a structure more conducive to efficient and effective discussions. The Commission also recognizes that the Minister of Public Safety may wish to have lobby groups and special interest groups participate in these deliberations. We simply ask that **the sessions be held in public.**

In terms of the current round of discussions, it is worthy of noting that some of these proposed amendments are more of a "housekeeping" nature. Others address some deeper fundamental issues. They touch on some of the core values of policing such as "honesty", "integrity "and "accountability" and whether those values are reflected in the current accountability framework espoused by the *Police Act* and structured around its *Code of Professional Conduct Regulation.* The Commission has also considered whether the current provisions correspond to the public's expectations towards its police officers. A comparative review of legislations and departmental policies in various jurisdictions in Canada and abroad has found consistency in the integration of these core values to their policing philosophies and structures. For the purpose of this document and exercise, the Commission subscribes to the following definitions as reference points in the elaboration of the rationale for our proposed amendments:

Honesty

Honesty is a core value of every police officer. Honesty is defined as being truthful, upright and genuine. Honesty is expected of each individual officer. There is no basis for respect or trust without honesty. If the police force fails to demand honesty, it breaks faith with the public and its own officers. Honesty must be expected of everyone, from the Chief to the newest officer or recruit.

Integrity

Integrity means acting out of a sense of moral principle and having the courage to do the right thing. Integrity is the cornerstone of the public's trust of the Police Force and is essential to the creation of partnerships with the community. It is also the foundation for officer's belief in and respect for their Police Force.

Accountability

Accountability means accepting responsibility. Being accountable requires that an officer is answerable, to both the public and the police force with whom the officer is employed, for his or her conduct. Police officers demonstrate accountability by acknowledging their own conduct, whether good or bad, mistaken or intentional, and accepting the consequences. Being accountable also means that officers understand that their community looks to them to set a positive example in their professional and personal lives. Accountability is a major component in community confidence as well as officer confidence in their respective police force. There is no doubt that a well-structured accountability framework impregnated with strong core values fosters a work environment where the personal values and professional ethics of the men and women who have voluntarily joined organizations dedicated to "Serve and Protect" the public can flourish and be honoured.

It is also widely accepted that police officers, being public officers, and dependent on the cooperation and assistance of the public, can only provide effective police services if they have the respect of the public. It is this rationale which guides police forces in demanding a high degree of propriety in the conduct of police officers both on and off duty. Although the main purpose of discipline is to assist a police force in providing effective and efficient police services to the community, this aim can only be pursued within the context of what otherwise constitutes a just and fair disciplinary and corrective measure. What is just and fair will in turn depend upon a host of aggravating and mitigating circumstances.

Although none of these amendments detract from the obligation for discipline authorities to act fairly, both substantively and procedurally towards their members, we are of the view that when it comes to policing, the private interests of individual officers are subordinate to the greater public interests. It is of common acceptance that police officers should conduct themselves in such a manner as to maintain and enhance the integrity and professional reputation of their police force and in a manner which will enhance respect for, and confidence in, the police officer and the police force as a whole. Society expects no less.

In order to avoid redundancy in the rationale provided with each proposed amendment and given that the issue of "compellability" is at the core of some of those amendments, we have opted to address the question at the onset of our submission.

Compellability

Our proposed amendments would reform what we regard to be very unsatisfactory provisions of the *Police Act* where subject officers can **"decide"** not to participate in the settlement conference process without even the most basic courtesy of informing his/her Chief of the decision and without derivative consequences; where subject officers can **"decide"** to abstain from attending his/her arbitration hearing with minimal consequences; or where a subject officer can **"decide"** on his/her level of cooperation with an investigator mandated to investigate *Code of Professional Conduct Regulation* allegation(s) arising or not from public complaints; or where a subject officer can simply **"decide"** to refuse to answer any probing or clarifying questions from the said investigator.

Furthermore, when disciplinary proceedings flow from a *Police Act* investigation, our experience has clearly demonstrated the need for the establishment of an independent mechanism to sort out legitimate sick leave from what is perceived as coincidental 'illness of opportunity' seemingly designed

to frustrate the process and avoid being made accountable for their breach of the *Code*. The Commission is fully aware of the protections constitutionally afforded medical information and has no interest in the specifics of that information. However, it has a legitimate need to establish the subject officer's fitness for duty within the specifics of the disciplinary process and to ensure that any procedural delay is fully justified and independently validated.

We believe that the current accountability framework is inconsistent with the spirit and intent of the *Police Act* and the principles of discipline and correction outlined in the *Regulation.* Therefore, the Commission considers those provisions as contrary to public interests and detrimental to good order and discipline in the police forces. This is not unique to the New Brunswick *Police Act* and this question has been the object of discussions in other jurisdictions as well. The argument of a subject officer's protection against self-incrimination has also been the object of many arbitral decisions and judgements by the Courts, including the Supreme Court of Canada. Some of those decisions will be broached later in this document.

For example, in the process leading to the last revision of the *Police Act* of British Columbia, the Saanich Police Department put it succinctly:

> *Can police truly be accountable, and can departments endeavour to correct behaviour, if a respondent is not bound to testify? Is the concern for the right against self-incrimination greater than the right of the public to have a transparent and accountable police department and greater than the right of the department to ensure that the problem behaviour is corrected?*

It is, in our view, inappropriate for respondent subject officers to be protected from the usual obligation to provide evidence in a regulatory discipline process. It is clear that the police complaint process is not properly understood **as it is <u>not</u> a quasi-criminal proceeding**. It is an error to assume that subject officers have, or that the process requires the subject officers to have the constitutionally protected 'right to remain silent'. The discipline process is a **civil regulatory proceeding.** As with other civil proceedings and modern regulatory statutes dealing with professional conduct, the obligation to respond promptly, fully and truthfully to allegations of misconduct is a legal an ethical duty properly attached to the privilege of being a professional. This is so especially for police officers, who have a choice whether to become police officers, and who have special duty to the truth and to the rule of law. It is inappropriate for respondent police officers to be able to avoid the truth by standing behind a legally authorized wall of silence as it has currently been penned in the *Police Act*.

It is no answer to assert that this would cause police to have "lesser rights" than the criminals they investigate. If a police officer is accused of a crime, the officer will have all the rights attendant on the criminal process. The police complaint and discipline process **is not a criminal process,** and so the proper comparison is not with criminals, but with other professionals who enjoy and protect the public trust such as doctors, lawyers, dentists, accountants, etc. **All these professionals are fully accountable to their governing bodies and must account for their actions in response to complaints relative to their professional duties**.

The object of the complaints process, as with other civil or administrative processes, is to arrive at the truth and to deal with that truth in a statute designed to educate, correct and, where appropriate, to discipline. The wall of silence encouraged by those provisions of the *Police Act* undermines that object**. It is not unfair to require officers to tell the truth**. Apart from serving the narrow self-interest of certain

subject officers or their representatives whose interests might be incompatible with the truth, no valid rationale has been given to support it. The present system thus serves to create inefficiency and cost, and jeopardizes public confidence in the process. This is why, of all the reforms proposed in this paper, **compellability is foundational.**

That being said, taking a measured approach is also critical to maintain police officer's confidence in the process. To that end, the Commission believes the compellability of subject officers should of course be limited to its purpose i.e. the police complaint and discipline process. Evidence adduced in discipline proceedings should not be admissible in other administrative, civil or criminal proceedings thus ensuring that the testimony of officers in the discipline process is not used against them in other proceedings. Similar type of protection already exist in the *Police Act* which provides that no answer given or statement made by a police officer in the course of attempting to resolve a complaint informally, or during the settlement conference process may be used in any disciplinary, administrative or civil proceedings other than for the specific purpose of establishing intent to mislead. Given the Commission's position on accountability and compellability, it would be worthy of considering limiting this 'use or derivative-use immunity' to administrative or civil proceedings only. Nothing in the *Police Act* discipline process should limit the rights of any person to the protection provided by the *Canadian Charter of Rights and Freedoms* against the use of voluntary or compelled statements in criminal or quasi-criminal proceedings.

The following cites and sources are provided as self-explanatory treatment afforded to the question of police discipline and police accountability. They are provided for information and to help steer the discussions with respect to revisions to the *Police Act*.

Special Status of Police Officers and Their Ability to Perform Their Duties

Firstly and most importantly, the Supreme Court of Canada in [Trimm *v.* Durham Regional Police, [1987] 2 S.C.R. 582] has made it clear that proceedings under the various police acts, are "neither criminal in nature nor do they involve penal consequences" (i.e. imprisonment or "fine which by its magnitude would appear to be imposed for the purpose of redressing a wrong done to society at large rather than to the maintenance of internal discipline."

In [R. *v.* Wigglesworth, [1987] 2 S.C.R. 541], Wilson J., speaking for the entire Court on this point, stated that criminal or penal offences are "to be distinguished from private domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited sphere of activity."

> "It is clear that the R.C.M.P. Code of Discipline is concerned with the maintenance of discipline and integrity within the Force. It is designed to regulate conduct within a limited private sphere of activity, i.e., conduct relevant to one's position as a member of the R.C.M.P. In considering the offences set out in the *Royal Canadian Mounted Police Act* in *The Queen and Archer v. White*, [1956] S.C.R. 154, Rand J. stated at p. 158:"
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> "...the delinquencies in s. 30 [of the *Royal Canadian Mounted Police Act*] are strictly of domestic discipline, that is, the member, by joining the Force, has agreed to enter into a body of special relations, to accept certain duties and responsibilities, to submit to certain restrictions upon his freedom of action and conduct and to certain coercive and punitive measures prescribed for enforcing fulfillment of what he has undertaken. These terms are essential elements of a status voluntarily entered into which affect what, by the general law, are civil rights, that is, action and behaviour which is not forbidden him as a citizen."

In discharging their responsibilities, discipline authorities must and do take into account the special status of police officers as public office holders who must achieve and maintain the trust of the public if they are to effectively accomplish their functions and thus police officers are held to a very high standard of conduct in both their professional and private activities.

In [(*Trumbley and Fleming* 8 C.L.A.S. 35 (5 June, 1987)], Morden J.A. of the Ontario Court of Appeal observed that:

> "The police officer has voluntarily accepted a vocation entailing duties which are peculiar to it and essential to its proper performance, duties to which ordinary citizens are not subject."

In [(*Fedoriuk* v. *The Commissioner of the Royal Canadian Mounted Police*, [1989] 2 F.C. 400, 54 D.L.R. (4th) 168 (C.A.)], the then Commissioner of the RCMP expressed these sentiments as follows:

> "It is an accepted fact that society demands a much higher standard of conduct from public office holders, especially those charged with enforcement of the laws of the land, than from the public at large. Uncompromising honesty, trustworthiness and integrity are paramount, and an obvious breach such as this clearly diminishes the trust which an individual can expect, either from the public whom he serves, his department or his

> peers. Unfortunately, the public's confidence in the Force as a whole is also affected by a demonstrated lack of integrity by one of its members. From the Force's perspective, trust is imperative...
>
> **A loss of credibility in the public's view, within the Force, and before the courts will seriously impair this member's effectiveness and render him unsuitable for service in the Force".**

In [(*Re : Ville de Granby and Fratemité des policiers de Granby Inc*. (1981), 3 L.A.C. (3d) 443 (Frumkin)], the arbitrator stated :

> "The conduct of such a person, whether on or off duty, may be the subject of scrutiny. Such conduct, where it places in doubt the integrity, honesty or moral character of the police officer, may weaken his effectiveness, cause embarrassment to the police force of which he is a member, and may as such be quite incompatible with his position".

This last segment also deals with the issue of compellability of subject officers but from the perspective of applicability of the protections afforded by the *Charter of Rights and Freedom* to police officers facing disciplinary actions and how the Courts have dealt with the issue. These excerpts do not purport to be all encompassing but will serve as the baseline for discussion on the Commission's rationale for suggesting some much needed amendments to our *Police Act*.

In [*Orr and York Regional Police Service* and *Gregg and Midland Police Service* (11 December 2001, OCCPS)] the Ontario Civilian Commission on Police Services ('OCCPS') addressed the question in its review:

> "[I]f the purpose of the compulsion to answer questions serves a legitimate public purpose, then the deprivation will be found to be in accordance with fundamental justice. On the other hand, if the compulsion was not for a legitimate public purpose, then a deprivation of liberty can be established.
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> Police officers are granted extraordinary powers at law. As a result, they are subject to a strict Code and legislative regime that holds them accountable. They are obliged to obey lawful orders. To our mind there is a legitimate public purpose in requiring police officers to account for their actions while in uniform and on duty to ensure that they meet the requirements of the Code. This can include compelling and accounting by way of a written or oral statement."

Neither sections 7 or 13 permit a police officer to disobey an order to provide statements to a superior officer. As stated by Justice LaForest in the [Thomson Newspapers Ltd. *v.* Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425]:

> "[I]n cases where information of value to an investigation can most easily be obtained by asking questions of those responsible for the decisions and actions of particular business organizations, an absolute right to refuse to answer questions would represent a dangerous and unnecessary imbalance between the rights of the individual and the community's

legitimate interest in discovering the truth about the existence of practices against which 'the Act was designed to protect the public."

It is critical that police officers follow legal orders issued to them considering the special status that they have in society.

In [Trumbley and Pugh *v.* Metropolitan Toronto Police, [1987] 2 S.C.R. 577] the Supreme Court of Canada cited the Ontario Court of Appeal with approval in the following terms:

"In my view, a *Police Act* discipline proceeding is not a criminal or penal proceeding within the purview of s. 11 . The most serious consequence that can befall a police officer in such proceedings is the loss of his or her position and, while I do not minimize the seriousness of this consequence, it is a civil consequence and not punishment of a criminal nature. A police discipline matter is a purely administrative internal process. Its most serious possible consequence makes it analogous to a discipline matter in ordinary employer-employee relationships, even though the procedure governing it is clearly more formal. The basic object of dismissing an employee is not to punish him or her in the usual sense of this word (to deter or reform or, possibly, to exact some form of modern retribution) but rather**, to rid the employer of the burden of an employee who has shown that he or she is not fit to remain an employee.**

The applicable statutory provisions have been set out in the related case of *Trimm v. Durham Regional Police*, [1987] 2 S.C.R. 582. For the reasons given in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, s. 11 does not apply to police disciplinary proceedings under Regulation 791, R.R.O. 1980. The disciplinary proceedings in this case, which are identical to those employed in the related cases of *Trimm v. Durham Regional Police* and *Burnham v. Metropolitan Toronto Police*, [1987] 2 S.C.R. 572, are neither criminal in nature nor do they involve penal consequences. Unlike *Wigglesworth*, the appellant is not subject to the possibility of imprisonment under the *Police Act*, R.S.O. 1980, c. 381. I would therefore answer the first constitutional question in the negative. "

In [*Weyer v. Canada*,((1988), 83 N.R. 272 (F.C.A.)], the Federal Court of Appeal dealt with the applicability of section 7 to a proceeding under the *Public Service Employment Act*, R.S.C. 1970, c. P-32, which concerned the dismissal of an employee from his employment for alleged incompetence. The applicant there urged that the absence of provisions enabling him to subpoena witnesses to testify before the board in question was a denial of the rights guaranteed to him by section 7. In dismissing this ground of argument, Mr. Justice Mahoney wrote:

"The proceeding before the Appeal Board under subsection 31(3) of the *Public Service Employment Act* was concerned with the applicant's employment status. It appears that some courts, at least at trial level, have construed the right to liberty to embrace a right to work. A useful, current, survey of the cases may be found in *Wilson et al. v. Medical Services Commission of B.C.*, [1987] 3 W.W.R. 48 at 69 ff."

Insofar as this Court is concerned, the matter has been authoritatively determined. In *Smith, Kline & French v. A.G. of Canada*, [1987] 1 F.C. 274 at 313, Strayer, J., stated:

“In my view the concepts of "life, liberty and security of the person" take on a coloration by association with each other and have to do with the bodily well-being of a natural person. As such they are not apt to describe any rights of a corporation nor are they apt to describe purely economic interests of a natural person.”

COLLATERAL ISSUE

Consideration – New Name for the New Brunswick Police Commission

Introduction:

The title, New Brunswick Police Commission, or its acronym "NBPC", has produced confusion at times with other organizations which acronyms closely resemble that of the Commission. For example, some media reports have mistakenly identified representatives of the Commission ("NBPC") as spokespersons for the New Brunswick Police Association "NBPA". Needless to say, the legislated mandate of the Commission does not share any commonality with the NBPA, a group claiming to represent front line police officers in the Province. It is therefore of critical importance that any possible confusion from the public's perspective be avoided and that any renaming of the Commission closely reflect its role and legislated mandate.

Discussions were held with the stakeholders at the onset of the consultation process. The Commission suggested several names for consideration by the group and the group also added other additional names. Consensus was achieved on the need to forge ahead with a rebranding for the Commission and on a name that would achieve the above purpose as:

New Brunswick Independent Policing Oversight Commission

Police Act and *Code of Professional Conduct Regulation* Review

Issue #1

Amendment to Authorize the Minister to enter into Agreement

Current *Police Act*:

2(1) The Lieutenant-Governor in Council may enter into agreements with Canada for the employment of the Royal Canadian Mounted Police to enforce the law and to assist in the administration of justice within the Province.

2(1.1) The Lieutenant-Governor in Council may enter into agreements for the employment of persons to serve the Royal Canadian Mounted Police.

Proposed Amendments:

2*(1) The Lieutenant-Governor in Council may* ***authorize the Minister to*** *enter into agreements with Canada for the employment of the Royal Canadian Mounted Police to enforce the law and to assist in the administration of justice within the Province.*

2*(1.1) The Lieutenant-Governor in Council may* ***authorize the Minister to*** *enter into agreements for the employment of persons to serve the Royal Canadian Mounted Police.*

Rationale:

Self-Evident.

Position:

The Commission endorses the proposed changes.

Issue #2

Uniforms, insignias and badges worn by persons other than police officers

Currently NOT proclaimed, considering removal:

21(4) Where the Commission is of the opinion that the equipment used or the uniform or the insignia worn or displayed by any person or by the employees of any person, or used by the members or employees of any unincorporated association, is so similar to that authorized by the Commission for the use of police officers that the public may be misled, the Commission may, by order in writing served personally or by registered mail on that person or, in the case of an association, the head or apparent head of that association within the Province, require that person or that association, together with the employees of that person or association or members of that association, to desist from the use of the equipment, uniform or insignia.

21(5) Service of an order pursuant to subsection (4) shall be deemed to be notice of the order and of its contents to every person employed by the person on whom it was served, and to every person who is a member of, employed by or otherwise serving the association affected thereby.

21(6) a person who violates an order made under subsection (4) commits an offence punishable under Part II of the *Provincial Offences Procedure Act* as a category H offence.

1981, c.59, s.16; 1984, c.54, s.13; 1987, c.41, s.14; 1990, c.61, s.110.

Rationale:

This section and related subsections have never been proclaimed. There has been only one incident over the last number of years where a complainant has mistakenly identified a private security officer at the Fredericton Exhibition (FREX) for a police officer. This section was never proclaimed and the Commission never approved any of the uniforms currently worn by the police. No objection to removal from the Commission.

Note: s. 38(v) *Police Act* provides that the Lieutenant-Governor in Council may make regulations "prescribing the uniform or the insignia to be worn by members of a police force and requiring a council or board to provide and a member of a police force to wear such uniform or insignia"

Position:

The Commission endorses the repealing of this section.

Issue #3

Powers and Privileges of the Commission when Conducting Hearings

Current *Police Act*:

22(5) The Commission may, where it considers it necessary, conduct a hearing with respect to any matter that is the subject of an investigation under this section.

22(5.1) The Commission may appoint an investigator to conduct an investigation under this section.

22(5.2) The Commission may, subject to subsections (6)(7) and (11) and the regulations establish its own procedure with respect to investigations and hearings under this section.

33(1) When conducting an arbitration hearing under Part I.1, III or III.2, an arbitrator has all the powers, privileges and immunities of a commissioner under the *Inquiries Act* and regulations under that Act, except the power to punish for contempt, and may certify a contempt in accordance with section 33.05.

Proposed Amendments:

22(5.3)(a) *The Commission when conducting any hearing or investigation **under this Act** as the case may be, is vested with all the powers and privileges of commissioners under the* Inquiries Act *and regulations **thereunder** except the power to punish for contempt, and may only certify a contempt in accordance with subsection (c).*

> ***(b)*** *The procedural safeguards contained in the regulations under the* Inquiries Act *apply to any hearing or appeal conducted under this Act insofar as they are not inconsistent with the provisions of this Act or the regulations.*
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> ***(c)*** *Where so authorized under this Act, the Commission may, in conducting a hearing, find a person who*
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> > ***(i)*** *fails or refuse to attend as required by summons,*
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> > ***(ii)*** *refuses to be sworn or solemnly affirmed as a witness,*
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> > ***(iii)*** *omits or refuses without just cause to answer any relevant question or to produce any book, paper, document or digital file in his custody or control, or*
> >
> > ***(iv)*** *disrupts or otherwise obstructs the hearing,*

to be in contempt, and may certify the contempt to The Court of Queen's Bench of New Brunswick or a Judge thereof, whereupon the Court may summon the person found to be in contempt, may inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of the person found in contempt, and after hearing any statement that may be offered in defence, punish or take steps

for the punishment of that person as if he had been guilty of contempt of the Court or suspend punishment on condition that the person attends, testifies or produces as required.

Rationale:

These powers and protections under the *Inquiries Act* previously afforded to the Commission did not migrate from the old *Police Act* to the new *Police Act*. However, these protections did indeed migrate as it relates to arbitrators. Omitted as a probable oversight, otherwise the exercise is meaningless.

Position:

The Commission endorses the reinsertion of these provisions as essential in the exercise of this segment of its mandate.

Issue #4

Subject: Time limit to complete the processing of a conduct complaint

Current *Police Act*:

25.1(4) The period of time between the filing of a conduct complaint under subsection 25(1) or the commencement of an examination into the conduct of a member of a police force where no conduct complaint is filed under section 27.1 or 29.9 and the date the chief of police or civic authority serves the member of a police force with a notice of settlement conference under section 28.7 or 31.6 shall not exceed six months.

Proposed Amendments:

25.1(4)(a) Subject to subsection (b) *the period of time between the filing of a conduct complaint under subsection 25(1) or the commencement of an examination into the conduct of a member of a police force where no conduct complaint is filed under section 27.1 or 29.9 and the date the chief of police or civic authority serves the member of a police force with a notice of settlement conference under section 28.7 or 31.6 shall not exceed six months**.***

25.1(4)(b)

(b) Notwithstanding the time limit prescribed by this section, the Commission may extend the time limit as it deems necessary ***when it is satisfied that one or more of the following conditions apply****:*

> ***a) new investigative leads are discovered that could not have been revealed with reasonable care;***
>
> ***b) the case or investigation is unusually complex; and/or***
>
> ***c) an extension is in the public interest.***

Example: Police Act of British Columbia [RSBC 1996] CHAPTER 367

99(1) An investigation into the conduct of a member or former member must be completed within 6 months after the date the investigation is initiated, unless

> (a) the police complaint commissioner grants one or more extensions under this section, or
>
> (b) the discipline authority directs further investigation under section 115 [if *member's or former member's request for further investigation is accepted]* or 132 (2) [*adjournment of discipline proceeding for further investigation].*

(2) The police complaint commissioner may grant an extension under this section only if the police complaint commissioner is satisfied that one or more of the following applies:

(a) new investigative leads are discovered that could not have been revealed with reasonable care;

(b) the case or investigation is unusually complex;

(c) an extension is in the public interest

Rationale:

"Civilian oversight of our police is essential. Effective civilian oversight ensures that the community's voice will be given proper consideration when decisions on the objectives, priorities, and policies underlying the provision of adequate and effective police services are being made. It also ensures that when a police service may go wrong, it is held to account by the constituency with the greatest stake in righting that wrong. In other words, civilian oversight is the way we ensure that the public and police remain partners in the preservation of public safety." [Honorable John Morden – Independent Civilian Review into Matters Relating to the G20 Summit].

The Police Commission recognizes the importance of efficiency in investigating public complaints and the need for time limits as prescribed in the *New Brunswick Police Act* unless procedural unfairness would otherwise result to either or both the complainant or the subject officer or there is some other compelling reason.

The current inflexible time limit to complete the processing of a complaint has caused some jurisdiction to be lost on a number of files having exceeded the time limit and other significant ones were saved *in extremis* (i.e. HSBC).

This inflexible time limit impacts on the ability of the Commission, Civic Authority or Chiefs of Police to effectively carry out certain types of lengthy and complex investigations without sacrificing thoroughness for expediency (i.e. poisoned work environment complaints or harassment investigations where a large number of potential witnesses may have to be interviewed, etc.).

The impact of the mandatory time limits on the capacity of the Commission to effectively carry out its review mandate and exercise its authority to rescind decisions made by Chiefs of Police or Civic Authorities and the further processing of a conduct complaint or order a new investigation if the prescription period has already run its course (i.e. summary dismissals, decisions to take no further action or simply an inadequate investigation).

Compounding the problem is the wording of Subsection 28.1 which provides that the chief of police […] "*may appoint as an investigator".*

Current interpretation of this provision of the *Police Act* would suggest that an investigation can only be undertaken by a person specified in s. 28.1 if and only if he/she has been formally appointed and authorized to do so by the Chief of Police to conduct an investigation into a conduct complaint.

The wording of s. 28.1 is also in the singular - "**an investigator"**. The question was asked of the Policy Centre if this was intentional on the part of the drafters/legislators thereby excluding the possibility of more than one investigator being appointed to conduct the *Police Act* investigation or would the appointment of "an investigator" be considered that of a "**chief investigator**" with the statutory discretion of engaging the assistance of subordinate investigator(s) to assist him or her? In the affirmative, would the subordinate investigator(s) be required to receive his/her/their own specific appointment(s)? The practice of a lead and subordinate investigators is common in the criminal investigation environments (i.e. major case management methodology) since all police officers have a common law and statutory mandate to investigate crimes and do not require case specific mandates.

In the matter of *Police Act* investigations, however, only persons receiving a formal authorization as mentioned above are seemingly authorized to carry out such investigations. The current wording seems overly restrictive as it does not take into account the complexity of the case as it relates to the time limits to fully process the matter and the impact on the oversight mandate of the Commission thus compounding the problem identified earlier.

Response from the policy centre:

The intention was always to have a single investigator. Further compounding the problem is the outcome of a **legal opinion** from the Department of Justice requested and received by the Department of Public Safety in December 2012 in answer to the following questions which are integrally reproduced for ease of reference:

Q.1 Does the *Act* provide for the clock to be started afresh in the event that the NB Police Commission orders a new investigation under Section 28.3 and if yes, what would be an appropriate date for the clock to restart?

Q,2 Given that the *Act* already provides a mechanism under S. 27.2 whereby the Commission can suspend the processing of a conduct complaint, is the statutory time limit under S. 25.1(4) to be interpreted as encompassing any and all processes under Part III of the *Police Act* unless otherwise specified or, can the processing of a conduct complaint and the subsequent review process by the Commission be interpreted as independent processes carrying their own procedural framework and associated time line imperatives?

Q.3 Can the NB Police Commission invoke its authority under section 28.3 or s. 31.2 to order a new investigation when it receives the investigation report, the notice of settlement conference and results of the settlement conference all at the same time and determine that the investigation was inadequate? In the affirmative, does the *Act* provide for the clock to be restarted and if so, what would be the appropriate date for the clock to restart?

Q. 4 If the object of Part III of the *Police Act* is to provide, in part, effective independent oversight of the police discipline process and to ensure that the administration of the police discipline process is not brought into disrepute; and given the undue impediments that a strict interpretation of the requirements of S. 25.1(4) would place on the ability of the Commission to carry out its mandate, can S.

28.3 or s. 31.2 be interpreted, in the absence of a specific authority to do so, in such a way as to provide the implicit authority necessary that best gives effect to the object of the statute in conformity with the manifest intent of the Legislator in enacting that segment of the *Act*?

Q.5 If such implicit authority to suspend the processing of a conduct complaint to enable the Commission to adequately carry out its review mandate under the following sections of the *Police Act* namely: Sections 27.6, 27.9, 28.5, 29.5(2), 30.5(1), 30.8, 31.4 and 32.4(2) is deemed to exist, would the period of suspension of the processing of a conduct complaint be akin that provided under S. 27.2 of the *Act*, that is until the review is carries out and the investigation ordered resumed?

Q.6 In the affirmative and after the review process, the Commission orders a new investigation under S. 28.3 or s. 31.2 of the Act, is the time limit under S. 25.1(4) deemed to apply to the new investigation and if so, when would the trigger point for the clock to start?

Response to the above questions:

In general, Department of Justice (DOJ) responded that the time limit provided by S. 25.1(4) was **inclusive** of all the processes under Part III. However, **a copy of this legal opinion could not be obtained** for the purpose of an in-depth study by the Commission, the Department of Public Safety claiming Solicitor/Client privilege precluding providing a copy, notwithstanding the fact that they allowed perusal of the document by Commission personnel.

Consequences:

None of the responses in the legal opinion favor a large and liberal interpretation of the *Police Act* which would have bridged the gaps identified through the above questions. So, fundamentally, the Commission is currently strapped with a process of oversight which is at the mercy of others, for the most part, as it is the DOJ's opinion that the 6 month time limit encompasses any and all processes under the *Act*. In the absence of statutory authority to do so, it is unlikely the Commission could issue a binding directive to the Chiefs of Police to expedite the process to account for this procedural "anomaly".

Even if we were to consider soliciting the cooperation of the Chiefs to break down the process into rigid time lines, it would arguably be returning to the former *Police Act* which amendments under the new *Act* sought to correct. Clearly there appears to be an uphill battle to seek legislative amendments to correct those deficiencies. It also appears more and more that the *Police Act* requires far more than just cosmetic changes (… more like a general overhaul of Part III) to allow for the delivery of effective oversight of the discipline process.

The *status quo* has the potential to significantly erode public confidence in the police discipline process by undermining its efficiency, effectiveness and credibility by precluding the possibility of extending the time limit imposed by s. 25.1(4) without regard to exceptional circumstances.

Position:

The Commission endorses amendments to the *Police Act* that would provide for an adequate framework within which the Police Commission can properly exercise its review mandate. Providing authority for the Commission to extend the time limit to complete the investigation process is but one of the approach that could meet the stated objective.

Note: The issue of the Powers of the Investigator is the subject of a separate submission as a subsidiary to Issue # 4 and Issue # 10.

Issue #5

Service or Policy Complaints - Definition

Current *Police Act*:

1 In this Act

"service or policy complaint" means a complaint concerning the services provided by or the policies of a police force

Proposed Amendment:

1 In this Act

"service or policy complaint" means a complaint about

(a) the general direction and management or operation of a municipal/regional police force, or

(b) the inadequacy or inappropriateness of any of the following in respect of a municipal or regional police force :

(i) its staffing or resource allocation;

(ii) its training programs or resources;

(iii) its standing orders or policies;

(iv) its internal management and operational processes; and/or

(v) its ability to respond to requests for assistance from the public;

Rationale:

Division B, "Service or Policy Complaints" would benefit from clarification as what it encompasses as suggested in the proposed amendment. It could also be helpful to discuss with all stakeholders and seek to achieve agreement on what constitutes a "complaint" vs what constitutes a "citizen's concerns" that would not necessarily trigger a *Police Act* process. The development of a decision matrix has been suggested as a tool to standardize the process. Notwithstanding the assessment that is made, this is certainly an area where informal resolution would be of a certain benefit.

Position:

The Commission endorses this amendment to the definition section of the *Police Act* to clarify the reach of Service or Policy Complaints.

Note:

Subsidiary issues surrounding Service or Policy Complaints are addressed at Issue # 5.1; Issue # 5.2; Issue # 11 and Issue # 12. They respectively seek to clarify "who can file a Service or Policy Complaint,

the Time Limit for a Chief or Civic Authority to Inform of the disposition of the complaint and finally, the oversight role of the Commission within its mandate of assessing 'Adequacy' of each police force".

Issue # 5.1

Service or Policy Complaints - Who Can/Cannot File a Complaint?

Current *Police Act:*

25(2) If a person has a service or policy complaint, the person may file his or her complaint in writing with the chair of the Commission or with the appropriate chief of police or civic authority.

Proposed Amendment:

25(2) If a person has a service or policy complaint, the person may file his or her complaint in writing with the chair of the Commission or with the appropriate chief of police or civic authority.

a) A member of a police force may not make a complaint under this Division in respect of the police force with which the police officer is employed if the subject of the complaint is one to which the grievance procedure under that police force's collective agreement applies.

Rationale:

Self-explanatory.

Position:

The Commission endorses the above proposed amendment.

Issue # 5.2

Service or Policy Complaints - Time limit to inform for the disposition

Current *Police Act:*

25.6(3) If the chief of police processes a service or policy complaint under paragraph (2)(*a*), the chief of police shall **immediately** give the complainant, civic authority and Commission notice in writing of the disposition of the complaint.

25.6(4) If the civic authority, in consultation with the chief of police, processes a service or policy complaint under paragraph (2)(*b*), the civic authority shall **immediately** give the complainant and the Commission notice in writing of the disposition of the complaint.

Proposed Amendments:

25.6(3) If the chief of police processes a service or policy complaint under paragraph (2)(*a*), the chief of police shall **within 14 days** or as soon as practicable thereafter give the complainant, civic authority and Commission notice in writing of the disposition of the complaint.

25.6(4) If the civic authority, in consultation with the chief of police, processes a service or policy complaint under paragraph (2)(*b*), the civic authority shall **within 14 days** or as soon as practicable thereafter give the complainant and the Commission notice in writing of the disposition of the complaint.

Rationale:

Understanding that under certain circumstances, some types of service or policy complaints may require a period of time to sort out all of the details and determine if the current level of service or policy requires enhancement, providing the above timeline may be more realistically observed than under the current wording of the section.

The issue was discussed at a PARC meeting on April 6, 2011 and the consensus was that “As Soon as Practicable” would be an appropriate interpretation to this reporting requirement.

Position:

The Commission would endorse the proposed amendments.

Issue #6

Suspension of *Police Act* investigations pending completion of the Criminal process

Current *Police Act*:

27.2(1) Notwithstanding any other provision of this Act or the regulations, the Commission **may,** on its own motion or on the request of a chief of police, suspend the processing of a conduct complaint under this Subdivision where the processing will be or becomes an investigation into an alleged offence under an Act of the Legislature or an Act of the Parliament of Canada until such time as the Commission directs otherwise.

30(1) Notwithstanding any other provision of this Act or the regulations, the Commission **may**, on its own motion or on the request of a civic authority, suspend the processing of a conduct complaint under this Subdivision where the processing will be or becomes an investigation into an alleged offence under an Act of the Legislature or an Act of the Parliament of Canada until such time as the Commission directs otherwise.

Rationale:

Current interpretation is a suspension occurs in any case where either the police officer **(Chief or Deputy Chief)** is the subject of the complaint or the complainant is the subject of a criminal investigation. The process outlined in 30.1(1) to 30.1(3) would seem to suggest that such suspension would only occur when the **Chief** is the subject of the criminal investigation. Otherwise, why is there an obligation to notify the Minister and for the investigation to be handed over to the RCMP or to another Chief of Police? The current *Police Act* seems unclear if the investigation to be handed over to the RCMP or a chief of police of another police force is only the criminal investigation or the *Police Act* investigation, or both. As an example, the Commission has dealt with a situation where a *Police Act* investigation was suspended while the complainant went through a criminal trial, was found guilty but vanished before sentencing. A province wide Warrant of Committal was issued but the individual fled the province, thereby causing the *Police Act* investigation to remain suspended and no procedural finality for the subject officer. The matter was resolved once the Commission lifted the suspension.

Position:

Subject to exceptional circumstances dictating otherwise, the Commission is of the view that this provision of the *Police Act* should be interpreted in a way that only police officers **(Chiefs or Deputy Chiefs)** personally subject to criminal investigations would warrant the suspension of the *Police Act* investigation. Subject to different input from the other stakeholders, the current statutory framework and the language of the provision already provides the flexibility for the Commission ("may order the suspension") to make a case by case decision on a matter. In circumstances where the subject officer is not the subject of the criminal investigation, suspension of the *Police Act* could be considered where there is a nexus between the facts of the criminal investigation and the facts having given rise to the *Police Act* investigation where a judicial finding may impact the outcome.

Issue #7

No time limit for complainants to seek a review by the Commission of a decision to take no further action – s. 28.5 and s. 31.5

Current *Police Act*:

28.4(2) If the Chief of Police decides to take no further action under paragraph (1)(a), the Chief of Police shall give the police officer, complainant and Commission notice in writing of his or her decision and shall give the complainant notice in writing that he or she may request the Commission to review the decision.

31.3(2) If the civic authority decides to take no further action under paragraph (1)(*a*), the civic authority shall give the chief of police, complainant and Commission notice in writing of the decision of the civic authority and shall give the complainant notice in writing that he or she may request the Commission to review the decision.

28.5 The Commission may, on its own motion, and shall, on the request of the complainant, review the decision of the Chief of Police to take no further action under paragraph 28.4(1)(a) and shall,

(a) confirm the decision and give the complainant, police officer, and Chief of Police notice in writing of its decision, or

(b) rescind the decision and order the Chief of Police to conduct a settlement conference.

31.4 The Commission may, on its own motion, and shall, on the request of the complainant, review the decision of the civic authority to take no further action under paragraph 31.3(1)(a) and shall

(a) confirm the decision and give the complainant, chief of police and civic authority notice in writing of its decision, or

(b) rescind the decision and order the civic authority to conduct a settlement conference.

28.6 If the Chief of police decides to take no further action or where the Commission confirms the decision of the chief of police to take no further action, no further action shall be taken against the police officer and the conduct complaint shall not be entered in the service record of discipline or personnel file of the police officer.

31.5 If the Civic Authority decides to take no further action or where the Commission confirms the decision of the Civic Authority to take no further action, no further action shall be taken against the Chief of Police and the conduct complaint shall not be entered in the service record of discipline or personnel file of the Chief of Police.

Proposed Amendments:

28.4(2) If the Chief of Police decides to take no further action under paragraph (1)(a), the Chief of Police shall give the police officer, complainant and Commission notice in writing of his or her decision and

shall give the complainant notice in writing that he or she may request the Commission to review the decision.

(a) Within fourteen days after receiving the notice in writing from the Chief of Police, the complainant may request the Commission to review the decision.

31.3(2) If the civic authority decides to take no further action under paragraph (1)(*a*), the civic authority shall give the chief of police, complainant and Commission notice in writing of the decision of the civic authority and shall give the complainant notice in writing that he or she may request the Commission to review the decision.

(a) Within fourteen days after receiving the notice in writing from the Civic Authority, the complainant may request the Commission to review the decision.

Rationale:

In the absence of statutory time limit for the complainant to seek a review of the decision by the Commission, it becomes challenging for the Commission to give effect to S. 28.6 and 31.5 of the *Act* in a timely manner.

Position:

The Commission endorses amendments to the *Police Act* which would place a **14 day** time limit be included in the section. This is the same time limit provided for in other sections of the *Act* where complainants may request the Commission to review a decision.

Note: The 14 days for review of informal resolutions and 30 days for a review of settlement conferences could provide some indication in that regard.

After that, the Commission could confirm the decision of the Chief or the civic authority on that basis to enable them to close their file and remove any mention of the complaint in accordance with s. 28.6 and s. 31.5.

Issue #8

Time Limits to Conduct an Arbitration Hearing - Lack of Flexibility

Current *Code of Professional Conduct Regulation* 2007-81 – *Police Act:*

11 The arbitrator shall, within 30 days after the arbitrator is appointed, conduct an arbitration hearing.

Proposed Amendment:

11 The arbitrator shall, within 30 days after the arbitrator is appointed, commence, by telephone conference call or otherwise, an arbitration hearing.

Rationale:

The current wording of this provision does not seem to take into account the realities and challenges for the appointed arbitrator in attempting to align his/her schedule with those of senior counsels representing civic authorities, chiefs of police or the Commission and the subject officers and their representatives, and allow adequate time for the subject officers to prepare representations for the hearing**.**

Position:

The Commission endorses amendments to the *Code of Professional Conduct Regulation - Police Act* that would provide authority for the arbitrator to initiate the arbitration hearing process as proposed in the above amendment.

A subsidiary issue to the above is the time limit imposed on Arbitrators to issue their written decisions. It is addressed at issue # 15.

Issue #9

"New Investigation" under s. 28.3 and s. 31.2 - Wording should be clarified to account, where circumstances so warrant, to seek a "supplementary" investigation

Current *Police Act*:

28.3 The Commission may, if, in the opinion of the Commission the investigation was inadequate, order a new investigation by the chief of police or a chief of police of another police force.

31.2 The Commission may, if, in the opinion of the Commission the investigation was inadequate, order a new investigation by the civic authority.

Proposed Amendments:

28.3(a) The Commission may, if, in the opinion of the Commission the investigation was inadequate, order a new or supplementary investigation by the chief of police, a chief of police of another police force, or an investigator from the list of investigators established and maintained by the Commission;

31.2(a) The Commission may, if, in the opinion of the Commission the investigation was inadequate, order a new or supplementary investigation by the civic authority, or an investigator from the list of investigators established and maintained by the Commission;

Position:

The Commission endorses the above amendments as it provides the necessary flexibility to complete its review of a *Police Act* investigation and order a supplementary investigation when so required to bridge gaps in the investigation without the requirement to start afresh. Efficiency and time constraints militate in favour of that amendment.

Issue # 10

Appointment of Investigator(s)

Current *Police Act*

22(5.1) The Commission may appoint an investigator to conduct an investigation under this section.

28.1(1) If the chief of police conducts an investigation into a conduct complaint, the chief of police may

(a) appoint as an investigator a member of a police force to which the police officer being investigated belongs and who is of a higher rank than the police officer being investigated,

(b) appoint as an investigator a member of another police force who is of a higher rank than the police officer being investigated, or

(c) appoint an investigator from the list established and maintained under section 26.2.

28.1(2) Notwithstanding subsection (1), the chief of police shall, if he or she determines an external investigation is necessary in order to preserve public confidence in the complaint process or, if the Commission orders it,

(a) appoint as an investigator a member of another police force who is of a higher rank than the police officer being investigated, or

(b) appoint an investigator from the list established and maintained under section 26.2.

31(1) If the civic authority conducts an investigation into a conduct complaint, the civic authority shall appoint an investigator from the list established and maintained under section 26.2.

28.1(3) If the Commission processes a conduct complaint or takes over from a chief of police the processing of a conduct complaint under section 26.1, it shall appoint as an investigator a police officer of another police force who is of a higher rank than the police officer being investigated, or appoint an investigator from the list it establishes and maintains under section 26.2.

31(2) If the Commission processes conduct complaint or takes over a civic authority the processing of a conduct complaint under section 26.1, it shall appoint an investigator from the list it establishes and maintains under section 26.2.

Powers of the Investigator(s)

26.3 When conducting an investigation into a conduct complaint, the investigator may

(a) question witnesses,

(b) take statements, and

(c) obtain documents and physical objects.

Proposed Amendments:

Powers of Investigator

26.3 When conducting an investigation into a conduct complaint, the investigator may

(a) question witnesses
(b) take statements
(c) obtain documents and physical objects, and
(d) retain a peace officer or any other person who has special, expert or professional knowledge to accompany and assist the investigating officer in the exercise of powers or performance of duties under this Part.

Note: The definitions section of the Act should include an amendment to the definitions of "police officer" and "police force" to include members of the RCMP and the RCMP respectively.

Rationale:

Under the current legislative scheme and in accordance with the interpretation of the Department of Justice alluded to in Issue #4, the current inflexible time limit to conclude an investigation and the apparent inability to appoint multiple investigators to handle complex investigations needs to be addressed. The current system not only has the potential to jeopardize the quality of the investigations, it may also impair the development of impartial and appropriate factual records to allow a reasonable fact finder to draw conclusions as to whether an alleged Code of Conduct breach has been established based on the balance of probabilities standard of proof. Other jurisdictions have enacted similar provisions.

Example: British Columbia *Police Act*

Investigation powers in relation to municipal police departments

100(3) On request by an investigating officer, a peace officer or any other person who has special, expert or professional knowledge may accompany and **assist the investigating officer** in the exercise of powers or performance of duties under this Part.

Position:

The Commission endorses amendments to the *Police Act* that would allow, when appropriate, the flexibility for an investigator to seek the necessary resources to properly carry on his/her mandate. It also endorses changes to the definitions of "police officer" and "police force" to include members of the RCMP and the RCMP respectively.

Issue # 11

Service or Policy Complaints - The New Brunswick Police Commission Oversight Role

Current *Police Act*:

25.6(3) If the chief of police processes a service or policy complaint under paragraph (2)(a), the chief of police shall immediately give the complainant, civic authority and Commission **notice in writing of the disposition of the complaint.**

25.6(4) If the civic authority, in consultation with the chief of police, processes a service or policy complaint under paragraph (2)(b), the civic authority shall immediately give the complainant and the Commission **notice in writing of the disposition of the complaint.**

20 The Commission may **assess the adequacy** of each police force and the Royal Canadian Mounted Police and whether each municipality and the Province is discharging its responsibility for the maintenance of an adequate level of policing.

Q. Should Division B of the *Police Act,* "Service or Policy Complaints" be amended to include a better defined oversight role for the Police Commission?

Currently, the Commission has no oversight authority once a Chief and/or Civic Authority makes a decision with respect to Service or Policy Complaints. There is no mechanism for neither the complainant to seek a review of the decision or for the Commission to undertake such a review. The only obligation is to advise the Commission and the complainant of the disposition of the complaint.

Q. Short of triggering a review process under s. 20 to assess the adequacy of policing of a particular police force, would it be advisable for the Commission to intervene in service or policy matters that might be linked to budgetary decisions or other managerial imperatives?

3(1) Subject to subsection (1.1), every municipality shall be responsible for providing and maintaining adequate police services within the municipality.

3(1.1) A rural community shall be responsible for providing and maintaining adequate police services

3.1(2) A civic authority

(*a*) …

(*b*) shall establish policies for the police force in accordance with this Act and the regulations,

(*c*) …

(*d*) shall ensure that the chief of police carries out his or her duties in accordance with this Act and the regulations and with the priorities, objectives and policies established by the civic authority under this Act.

3.1(3) A chief of police

(*a*) …

(*b*) shall have all of the powers necessary to manage and direct the police force so as to fulfill the responsibility of the civic authority to provide and maintain an adequate police force in the municipality or the region, as the case may be, in accordance with this Act and the regulations,

(*c*) …

(*d*) …

(*e*) shall report directly to the civic authority in respect of the operation of the police force and the manner in which the chief of police carries out his or her responsibilities under this Act and the regulations, and

(*f*) shall obey the lawful instructions of the civic authority.

Rationale:

The concept of what constitutes a service or policy complaint can be somewhat nebulous at times and the Commission believes that the *Police Act* and the proposed amendment outlined at Issue # 5 would certainly bring clarity to the parameters of what constitutes such a complaint.

Under the current legislative scheme, once the disposition of a complaint is received, the Commission is seemingly limited, where appropriate, to expressing comments or concerns to the Chief of Police or Civic Authority with regards to the disposition of the complaint. However, the *Police Act* also currently appears to suggest the Commission can examine any activity that appears to reduce the adequacy of policing (see issue # 12) if it was to determine that the resolution of a service or policy complaint was inadequate. However**,** what constitutes "adequate" policing remains elusive and is currently being explored by the Commission.

Proposed Amendment:

Issue held in abeyance pending further discussions on the merit of enhancing the role of the Commission to better serve public interests in dealing with service or policy complaints.

Position:

The Commission will await discussions on this issue before firming up a position on any amendment relative to the oversight role of the Commission as it relates to Service or Policy Complaints.

Issue #12

Service or Policy Complaints - Adequacy of Policing – Role of the Commission

Current *Police Act*:

20 The Commission may assess the adequacy of each police force and the Royal Canadian Mounted Police and whether each municipality and the Province is discharging its responsibility for the maintenance of an adequate level of policing.

3.1(2) A civic authority

(*a*) …

(*b*) shall establish policies for the police force in accordance with this Act and the regulations,

(*c*) …

(*d*) shall ensure that the chief of police carries out his or her duties in accordance with this Act and the regulations and with the priorities, objectives and policies established by the civic authority under this Act.

3.1(3) A chief of police

(*a*) …

(*b*) shall have all of the powers necessary to manage and direct the police force so as to fulfill the responsibility of the civic authority to provide and maintain an adequate police force in the municipality or the region, as the case may be, in accordance with this Act and the regulations,

(*c*) …

(*d*) …

(*e*) shall report directly to the civic authority in respect of the operation of the police force and the manner in which the chief of police carries out his or her responsibilities under this Act and the regulations, and

(*f*) shall obey the lawful instructions of the civic authority.

5(1) Where the Lieutenant-Governor in Council determines that

(*a*) a municipality is not discharging its obligations under section 3,

(*b*) a board is not discharging its obligations under section 7, or

(*c*) for any reason, the police services provided within a municipality are inadequate,

the Lieutenant-Governor in Council, upon the recommendation of the Commission, may take action to provide what the Lieutenant-Governor in Council considers to be adequate police services within that municipality, and the cost of providing such police services is a debt owed to Her Majesty that shall be charged to the municipality and may be deducted from any funds payable from the Province to the municipality or may be recovered by action in any court of competent jurisdiction.

5(3) Where an area has been designated under subsection 3(3) and the person who is required to enter into an agreement fails to enter into such agreement, or where, in the opinion of the Lieutenant-Governor in Council, an agreement entered into fails to provide adequate police services to the area, the Lieutenant-Governor in Council, after obtaining the advice of the Commission, may take action to provide what he considers to be adequate police services within that area, and the cost of providing such police services is a debt owed to Her Majesty that shall be charged to the person and may be recovered from the person by action in any court of competent jurisdiction.

17.07(1) Where the Lieutenant-Governor in Council determines that a regional policing authority is not discharging its obligations pursuant to the agreement establishing the same or that, for any reason, the police services provided within a region are inadequate, the Lieutenant-Governor in Council, upon the recommendation of the Commission, may take action to provide what it considers to be adequate police services within that region and the cost of providing such police services is a debt owed to Her Majesty that shall be charged to the parties to the agreement, for which they are liable jointly and severally, and may be deducted from any funds payable from the Province to the parties to the agreement or may be recovered by action in any court of competent jurisdiction.

Proposed Amendment:

Matter held in abeyance pending discussions with all stakeholders on the merit of incorporating an appropriate definition of "adequacy" in the *Police Act* under Section 1 and/or providing within the Statute itself the necessary parameters of interpretation. No specific language to capture the essence of this amendment is proposed at this time given that the Commission is currently researching an appropriate interpretation.

Rationale:

The objects of *the Police Act* can be inferred from section 1.1 and are broadly premised upon the promotion the preservation of peace, the efficiency of police services and the development of effective policing. It is incumbent upon the Minister to provide to boards, councils, police forces, regional policing authorities and the Royal Canadian Mounted Police information and advice respecting the management of those police forces. The Minister is also responsible for establishing a system of inspection and review of police forces and issue guidelines and directives to any police force within the Province for the attainment of the purposes of subsection (1).

The responsibilities of the Commission in regards to "adequacy of policing" are clearly laid out in the preceding portion of this text. However, in the absence of a clear definition of what constitutes "adequate policing" or a well defined evaluation matrix, the notion of "adequacy" remains somewhat of an abstract and intangible concept upon which it is challenging for the Commission to exercise its legislated mandate. Furthermore, even if an evaluation matrix was in existence, the Commission lacks the auditing capabilities to give it substantive meaning.

In Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, the Supreme Court provided some insight on statutory interpretation in those terms:

> "The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

ADEQUACY (Vocabulary.com)

Adequacy is the state of being sufficient for the purpose concerned. The meaning does not suggest abundance or excellence, or even more than what is absolutely necessary. *Adequacy* is simply the state of sufficiency - the quality of being sufficient for the end in view.

There is a current of equality running through the noun *adequacy*. The Latin word from which it is derived is ***adaequare***, "to make something equal to something else". The English word made its appearance in the early 1800's as a derivative of the adjective *adequate*. Adequacy means being equal to the requirements of the situation – no more, no less. Theater critic Walter Kerr once wrote this scathing review of an actor: "He has delusions of adequacy".

The undertone of the above dictionary definition of adequacy, in the absence of a statutory definition, is that for as long as a police force in New Brunswick hovers on the edge of "inadequacy", it is deemed to be "adequate". One could hardly imagine such a low threshold was intended by the Legislator. However, in the absence of statutory direction, the Commission lacks the appropriate tools or framework to exercise its mandate objectively.

Position:

As indicated above, the Commission believes that the enactment of a new Regulation is required to clarify the mandate of the Commission under s. 20 of the *Police Act.* To accomplish this, significant effort is required to properly research and finesse the definition of adequacy in policing which the Commission is currently championing in partnership with the New Brunswick Social Policy Research Network and the Minister of Public Safety.

Issue #13

Sections 28.7(1)(c) and 28.9(2) – (Settlement Conferences) Invitation of Complainant to participate, may attend and make representations – Objectives and Intent of the Legislator

Current *Police Act*:

28.7(1)(c) If the chief of police decides to proceed to a settlement conference under paragraph 28.4(1)(b), or if the Commission orders the chief of police to conduct a settlement conference under paragraph 28.5(b), the chief of police shall:

(c) give the complainant notice in writing of the settlement conference and invite the complainant to attend

28.9(2) The complainant may attend and make representations at a settlement conference.

Q. Does the complainant attend the settlement conferences in whole or in part?

Q. What is envisioned by the wording […] "*may attend and make representations*"? Is this akin to a victim impact statement at the onset of the settlement conference or punctually as the settlement conference unfolds? Was the intention to mirror a Restorative Justice type dynamic or, otherwise, what was the intent of the Legislator?

Rationale:

If the objective of transparency and accountability is to be met, it would seem more sensible for Chiefs of Police and Subject Officers to adopt a course of conduct that is more likely to yield a satisfactory outcome and minimizes the often cited public lack of confidence in the police policing themselves.

Outcome at PARC of April 6, 2011:

- Labour representative reiterated the fact that the parties to a settlement conference are limited to the Chief and the subject officer.
- There seemed to be consensus that having the complainant's presence throughout the whole process, up to and including discussions on disciplinary measures, could curtail the ability of the parties to reach a successful settlement.
- The Commission expressed the view that a balance had to be struck between the intended objectives of the Legislators in establishing the participation of the complainant in the discipline process and the benefits of achieving the desired outcome by avoiding lengthy and costly arbitrations.

Example: *Police Act* of British Columbia [RSBC 1996] CHAPTER 367

Complainant's right to make submissions

113 (1) At any time after receiving a copy of the investigating officer's final investigation report under section 112 (1) (b) (i) or a supplementary report under section 116 (1) (b) (i), but at least 10 business days before the date of the discipline proceeding specified in the notice under section 123 (1) (b), the complainant may make written or oral submissions, or both, to the discipline authority in relation to one or more of the following matters:

(a) the complaint;

(b) the adequacy of the investigation;

(c) the disciplinary or corrective measures that would be appropriate.

(2) Subsection (1) does not apply if

(a) a discipline authority decides under section 112 (4) or 116 (4) that the conduct of the member or former member concerned does not constitute misconduct, and

(b) the decision is final and conclusive under section 112 (5) or 116 (5)

(3) If oral submissions are made under subsection (1), the discipline authority must have a transcript of those submissions made.

(4) On receiving written submissions or having a transcript made under this section, the discipline authority must provide each of the following with a copy of those written submissions and any transcripts:

(a) the complainant;

(b) the member or former member whose conduct is the subject of the complaint;

(c) the investigating officer;

(d) the police complaint commissioner.

(5) Written submissions and transcripts made under this section form part of the record of proceedings under this Part that may be held in relation to the conduct that is the subject of the complainant's complaint.

Position:

The Commission endorses amendments to the *Police Act* that would ensure an equitable and consistent framework for complainants to make meaningful representations during the discipline process or, in the absence of such amendments, that the Commission be granted the necessary authority to issue directives to circumvent the question and provide consistency of application of the *Police Act* for all municipal and regional police forces.

An amendment to the *Police Act* similar to the British Columbia Police Act could be envisioned with the necessary modifications to respect the provisions of paragraph 28.2(2) with regards to documents a complainant is entitled to receive.

The Commission would further endorse amendments to the *Police Act* that would allow a complainant to file a written submission to be read into the record in lieu of attending and make *viva voce* representations during settlement conferences.

Note: The subsidiary issue of "Policy Making Authority" is hereunder addressed at Issue # 14.

Issue #14

Policy Making Authority by the Police Commissiobn – A Comparative View

Background:

Under the current legislation, there is no authority for the Commission to issue policies or directives to municipal or regional police forces which could assist them in interpreting and applying certain provisions of the *Police Act* in a consistent fashion throughout the Province. Areas such as the participation of complainants at Settlement Conferences (Issue # 13) or establishing criteria for suitability or unsuitability of certain complaints for informal resolution etc. are but some examples where the Police Commission, in consultation with all stakeholders, could provide the necessary guidance when so required.

The ability of civilian oversight bodies to impact on activities of police services is found in provincial legislation across Canada. The following is a summary of some of the authority given by most provinces. All of these provisions contemplate that civilian oversight bodies have authority to create policies that will enhance the public accountability of Police Chiefs. Some provinces allow greater regulation of police services than others.

The Use of Policy making Authorities by Civilian Oversight Bodies in Canada

New Brunswick:

Under s. 3.1(2) of the New Brunswick *Police Act*, a civic authority or a board of police commissioners shall:

> "… establish policies for the police force…"

Under s. 38, "the Lieutenant-Governor in Council may make regulations"

> "(*w*) respecting any matter that the Lieutenant-Governor in Council considers necessary or advisable to carry out effectively the purposes of this Act."

Alberta:

The *Police Act* of Alberta outlines the responsibility of a police commission in s. 31.1 which states as follows:

> "31(1) … the commission shall, in carrying out of its responsibilities, oversee the police service and for that purpose shall do the following:
>
> a) …
> b) Establish policies providing for efficient and effective policing;
> c) Issue instructions, as necessary, to the Chief of Police in respect of the policies referred in clause b)"

British Columbia:

The *Police Act* in British Columbia gives a Municipal Police Board policy making authority as follows:

"28(1) a municipal police board must make rules consistent with this Act and the regulations respecting the following:

a) The standards, guidelines and policies for the administration of the municipal police department;
b) The prevention of neglect and abuse by its municipal constables;
c) The efficient discharge of duties and functions by the municipal police department and the municipal constables"

Saskatchewan:

The Saskatchewan Police Commission has policy making powers pursuant to s. 19 of the Police Act which states as follows:

"19(1) the commission shall promote:

a) Adequate and effective policing throughout Saskatchewan;
b) The preservation of peace, the prevention of crime, the efficiency of police services and the improvement of police relationships with communities within Saskatchewan;

(2) in fulfilling its responsibilities pursuant to subsection (1), the commission may:

- Compile and distribute to boards, chiefs and police services a policy and procedure instruction manual;"

Newfoundland:

The Royal Newfoundland Constabulary Public Complaints Commissioner may, pursuant to s. 19(3), make recommendations to the police service respecting "matters of concern or interest to the public relating to police services."

19. (3) The commissioner may make recommendations respecting matters of concern or interest to the public relating to police services by sending the recommendations, with supporting documents, to the chief and a copy to the minister.

Nova Scotia:

Where a municipal board of police commissioners is appointed pursuant to the Police Act in Nova Scotia "… the function of any board shall primarily relate to the administrative direction, organization and policy required to maintain an efficient and adequate police force….".

Ontario:

The Ontario Police Services Act prescribes that a municipal police services board has the authority to "establish policies for the effective management of the police force"

31. (1) A board is responsible for the provision of adequate and effective police services in the municipality and shall,

(a) …
(b) …
(c) establish policies for the effective management of the police force;

Quebec:

Under the Police Act of Quebec, a public security committee appointed under s. 78 of that Act shall: "establish priorities for the police force". It also participates in the preparation of a semi-annual plan of action of the Sûreté du Québec.

Position:

The Commission endorses amendments to the *Police Act* that would provide policy making authority. Policies created in this fashion should be binding on police forces and civic authorities.

As to the binding nature of any policy or guideline issued by the Commission, it would stand to reason that it be *de facto* binding on police forces as it relates to issues for which the Commission has oversight role. Effectively, any course of action undertaken by a police force that would be contrary to what the Commission considers appropriate (i.e. matters going for informal resolution), could be overturned by the Commission with an order issued to adopt an alternative course of action. It would therefore provide some advantages for police forces to have these roadmaps ahead of time.

Issue # 15

Time Limits for an Arbitrator to Issue Decision – Insufficiency

Current *Police Act*:

32.6(6) The arbitrator shall give the parties, the Commission and the complainant, if any, notice in writing of his or her decision within **fifteen days** after the completion of the arbitration hearing.

Proposed Amendment:

32.6(6) The arbitrator shall give the parties, the Commission and the complainant, if any, notice in writing of his or her decision within **thirty days** after the completion of the arbitration hearing.

Rationale:

This constricted timeline for arbitrator's to issue notice in writing in conformity with s. 32.6(6) has been identified as problematic by the arbitrators appointed under the *Act*. This is especially significant when arbitration proceedings involve complex matters and/or a significant number of witnesses. Procedural fairness and the principles of discipline and correction outlined in s. 3 of the *Code of Professional Conduct Regulation* demand that arbitral decision be well framed and thoroughly explained.

Although the Commission recognizes the benefits of an expedient process for all involved, it is also very much aware of the challenges or reconciling the arbitrators' responsibilities under the *Police Act* and the realities of their private law practices (which impacts most, if not all, the arbitrators on the list the Commission establishes and maintains under the *Act).*

Position:

The Commission supports the above proposed amendment to the *Police Act.*

Note: The issue of Cost Sharing for Arbitration Hearings (Issue # 16), Representation (Issue # 17) and Remuneration for Arbitrators (Issue # 18) are addressed hereunder as subsidiary issues.

Issue #16

Arbitration Hearings - Cost Sharing

Current *Code of Professional Conduct Regulation* 2007-81 – *Police Act:*

Costs of arbitration hearing:

33(1) If the chief of police or civic authority serves a notice of arbitration hearing under Part I.1 [Unsatisfactory Work Performance - Seeking Dismissal] of the *Act*, the chief of police or civic authority, as the case may be, shall pay the costs of the arbitration hearing.

33(2) If the chief of police or civic authority, as the case may be, serves a notice of arbitration hearing under Part III [Discipline] of the *Act*, the costs of the arbitration hearing shall be shared equally by the parties to the arbitration hearing.

33(3) If the Commission serves a notice of arbitration hearing under Part III or III.2 of the Act, the Commission shall pay the costs of the arbitration hearing.

Proposed Amendments:

33(2) If the chief of police, civic authority or the Commission, as the case may be, serves a notice of arbitration hearing under Part III [Discipline] of the *Act*, the costs of the arbitration hearing shall be shared equally by the parties to the arbitration hearing.

33(3) For the purposes of subsection (2), the costs of arbitration hearing shall be inclusive of all costs incurred by the parties to the arbitration hearing.

Rationale:

Section 38(i) of the *Police Act* provides that:

38 The Lieutenant-Governor in Council may make regulations

(*i*) establishing the payment of costs, fees and expenses associated with investigations, settlement conferences and arbitration hearings under Parts I.1, III, III.1 and III.2;

The thought process and discussions which led to the current regulatory framework relative to cost sharing of arbitration hearings is unclear.

What is clear, however, is that under the current system, there is an inherent risk that the overall objectives of the police discipline process be perverted by a deliberate avoidance of the settlement conference procedures and the resulting abusive use of arbitration. The realities and challenges of fiscal

pressures confronting public administrations and their responsibilities as fiduciaries of the public purse can easily be brought into contradiction with the fair and just treatment of public complaints and breaches of *the Code of Professional Conduct Regulation.* The local trade unions representing subject officers may not have the same budgetary inflexibility either locally or at their national/international union affiliates level. The system should be geared so that its integrity is protected from potential abuses or where a discipline authority could attempt to settle for the lowest common denominator as an agreed disciplinary measure, regardless of the fact situation, to avoid the costs of an arbitration hearing. This would be highly undesirable and totally contrary to the public interest.

Effectively, the Commission has observed a trend developing over the past few years where the collaborative problem solving and accountability framework espoused by s. 3 of the *Regulation* (Education and Correction rather than Punishment and Blame) and the Settlement Conference process have given way to a more adversarial approach. This attitude change seems to be motivated by what the Commission has interpreted as "tactical" reasons where the subject officer refuses to even participate at a Settlement Conference. When this occurs, the public interest often succumbs to the private interests of the individual subject officer(s) and/or his or her representatives.

The Commission believes that subjecting all parties to equal fiscal pressures would provide the necessary incentives to take a meaningful part to settlement conference procedures and encourage active participation in the informal resolution process. This would undoubtedly inject some vigor to the process for the benefits of all.

The same holds true for the Commission when it determines that it is in the public interest, to process a conduct complaint or takes over from a Chief of Police the processing of a conduct complaint. The Commission, as a public institution, is also accountable for its management of public funds and its limited budget. Our examination of the question has failed to establish a sound rationale driven by public interest which led to the enactment of s. 33(3) as the operating budget of the Commission is constituted of public funds.

Position:

The Commission endorses amendments to the *Police Act* that would serve to restore balance in the cost sharing for arbitration procedures and support the above amendments to the *Act*.

However, the Commission recognizes that arbitration hearings conducted under Part I.1 as currently provided for in s. 33(1) of the *Act* should remain unchanged. Although the rationale for the payment of arbitration costs by the Chief or Civic Authority in circumstances outlined in s. 33(1) is unclear, it may be that since the burden of proof to demonstrate that reasonable assistance, guidance and supervision has failed to bring the work performance of the member to a satisfactory level rests squarely on the shoulder of the administration seeking a dismissal, the intent of the Legislator has clearly been articulated and the resulting costs of arbitration are currently to be borne by the administration. Any proposed amendment would be subject to further discussion by the appropriate stakeholders.

Arbitration Costs –Potential responsibilities – FOR CONSIDERATION

Scenario 1

- At Chief level: Costs split 50-50 between Chief and Member

Scenario 2

- At NBPC level: Costs split 50-50 between Chief and Member
  If NBPC takes it on Request from Chief

Scenario 3

- At NBPC level: Costs split 50-50 between NBPC and Member
  If NBPC takes it unilaterally from Chief

Scenario 4

- NBPC level: Cost split 50-50 between Chief and Member, because the Chief still holds carriage of the original file.
  If NBPC refuses to ratify a settlement made by Chief and Member at Settlement Conference

  "Costs of arbitration" refer to costs associated with the running of the arbitration itself, not with solicitor costs borne by each party.

Issue # 17

Arbitration Hearing – Representation - Defined

Current *Police Act*:

1 In this Act

"representative"

(a) a lawyer who is a member of the Law Society of New Brunswick entitled to practise law in the courts of New Brunswick,

(b) the president of the police officer's local trade union, or his or her designate, or

(c) if the member of a police force is not a member of a local trade union, a member of a police force designated by the member of a police force to represent him or her;

Proposed Amendments:

1 In this Act

"representative"

(a) a lawyer who is a member of the Law Society of New Brunswick entitled to practise law in the courts of New Brunswick,

(b) the president of the police officer's local trade union, or his or her designate within the police officer's trade union, or

(c) if the member of a police force is not a member of a local trade union, a member of a police force within the police officer's police force designated by the member of a police force to represent him or her;

Rationale:

In assessing what was seemingly the intent of the Legislator in defining "representative" in section 1, the Commission has concluded that it appears to convey a double intent/objective in the selection of persons to act as representatives of the parties:

Firstly, at subsection (a) it appears clearly that the Legislator was targeting legal competence as only lawyers who are members of the Law Society of New Brunswick entitled to practice law in the Courts of New Brunswick can act as representatives. This would seemingly exclude even lawyers who are not in good standing with the Law Society of New Brunswick or lawyers who have been disbarred.

Secondly, at subsection (b), the *Act* defines "Representative" as the president of the police officer's trade union or his designate. One can infer that the Legislator intended to authorize a person with a vested interest in the welfare of their member and a vested interest in the good order and discipline of their police force in a process which can have direct or indirect link to their collective agreement; and

Thirdly, at subsection (c), the "representative" can be a member of a police force designated by the member of a police force to represent him or her if the member is not a member of a local trade union. Given the parameters of subsections (a) and (b) and the principles of interpretation in *Rizzo*, the Commission is of the view that the Legislator intended to circumvent "representation" and limit it to either competent lawyers or to colleagues of the police officer facing disciplinary action or dismissal having a vested interest in the welfare of their members and the orderly functioning of their departments within their collective agreements.

The Legislator has also perhaps intended to cover any liability issues arising from an inadequate representation. The Commission enjoys the protections of Section 33.1 of the Act which states:

33.1 No action lies for damages or otherwise against any of the following persons in relation to anything done or purported to be done in good faith, or in relation to anything omitted in good faith, under this *Act* by the person:

(*a*) the Commission;
(*b*) the chair or a former chair of the Commission;
(*c*) the vice-chair or a former vice-chair of the Commission;
(*d*) any other member or former member of the Commission;
(*e*) any employee or former employee of the Commission; and
(*f*) an investigator appointed to investigate a conduct complaint under Division C of Part III or Division B of Part III.1.

Lawyers meeting the criteria of the *Act* have professional insurance coverage and are protected through the Law Society Act of New Brunswick which states as follows:

(Law Society Act, 1996, S.N.B. 1996, chapter 89)

110(1) No action lies against a member of the Society, a Member of Council, a committee, a member of a committee, an officer, an employee or an agent of the Society, a custodian or anyone acting on behalf of a custodian under Part 12, or a director or any person acting on behalf of the New Brunswick Law Foundation under Part 15, for anything done or not done by that person in good faith under the provisions if this Act or the rules.

110(2) The Society shall indemnify any person referred to in subsection (1), (1.1) or (1.2) for any costs or expenses incurred in any legal proceeding taken against that person for anything done or not done by that person in good faith under the provisions of this Act or the rules.

The presidents of local trade unions or their representatives within the local trade union would probably enjoy the protections of their collective agreements or other enabling legislation.

Notwithstanding the above, having the subject officer properly and competently represented at arbitration hearings would ensure that proper decorum is maintained and that questioning of witnesses and subsequent legal arguments are presented in a professional, coherent and effective way thus minimizing undue delays and costs while ensuring fair and just treatment of the matter for all parties.

Position:

The Commission supports the above amendment that would serve to better define the parameters of representation at the exclusion of all others.

The intent of the Legislator is key in interpreting this section and it appears that attention was given to have persons who are accountable to either their professional body or to their peers within the trade union to act as representative.

Issue # 18

Arbitration Hearings – Remuneration of Arbitrators

Current *Police Act*:

Section 38(i) of the *Police Act* provides that:

38 The Lieutenant-Governor in Council may make regulations

(*i*) establishing the payment of costs, fees and expenses associated with investigations, settlement conferences and arbitration hearings under Parts I.1, III, III.1 and III.2;

Proposed Amendment:

The Commission proposes that the Lieutenant-Governor in Council make a regulation that would address the question.

Rationale:

Currently, the fee schedule for arbitrators is governed by the "Arbitrator's Guidelines" produced and managed by the Department of Public Safety. It has seemingly not been updated in many years and the Commission's consultation with the arbitrators on the list the Commission establishes and maintains under the *Act* clearly points to a need for either modernizing the "Arbitrator's Guidelines" or establishing the fee schedule in the Regulation.

Currently, arbitrators are **not compensated for writing their decisions** as outlined in Issue # 15. This is both time consuming and essential to the process. However, the current compensation scheme does not recognize the challenges faced by arbitrators who must reconcile their willingness to act as such under the *Police Act* and the realities of their private law practices which does have an incidence on most, if not all, the arbitrators on the list the Commission establishes and maintains under the *Act*.

Adapting the guidelines and fee schedules to the contemporaneous realities of law practices will serve to ensure the quality of the people willing to act as arbitrators and bring their invaluable expertise to the administration of the *Police Act*.

Position:

As a starting point for the review, some arbitrators have suggested to reduce the daily per diem to $750 or so and include the time to prepare their decisions. The Commission would support any enhancement to the Arbitrator's Guidelines or the enactment of a Regulation to address it so that Arbitrators receive fair and just financial remuneration for their services.

Issue #19

Section 32 of the *Code of Professional Conduct Regulation* – Destruction of Evidence after an Arbitration Hearing

Current *Code of Professional Conduct Regulation 2007-81 - Police Act*:

32 The evidence or any part of the evidence of the arbitration hearing shall not be destroyed until:

(a) at least 3 months have elapsed since the arbitrator gave the parties to an arbitration hearing, the Commission and the complainant notice in writing of his or her decision, **and**

(b) the consent of the Commission, the arbitrator and the member of the police force who is found guilty of a breach of the code under section 35 has been obtained.

Proposed Amendment:

32 The evidence or any part of the evidence of the arbitration hearing shall not be destroyed until:

(a) at least 3 months have elapsed since the arbitrator gave the parties to an arbitration hearing, the Commission and the complainant notice in writing of his or her decision, and no request for judicial review of the decision has been filed, **or**

(b) the consent of the Commission, the arbitrator and the member of the police force who is found guilty of a breach of the code under section 35 has been obtained.

Rationale:

As an arbitrator's ruling is deemed "final", the 3 month specified in s. 32 seemingly follows from Rule 69 of the Rules of the Court dealing with Proceedings for Judicial Review and more specifically Rule 69.03 which states:

> **"69.03** When Proceedings Commence
>
> Subject to any Act, an application under this rule shall be commenced within 3 months from the date of the order, conviction, commitment, warrant, decision, award or refusal to act which is complained of but the Court may,
>
> (a) on appropriate terms,
> (b) either before or after the expiration of the time limited herein, and
> (c) if a delay will not cause substantial prejudice to anyone,
>
> extend the time for commencing the application."

Position:

The Commission endorses amendments to repeal subsection (b) which is unnecessarily redundant and confusing as the same purpose is achieved by simply letting the clock run out after 3 months.

Issue #20

Application of information obtained under the authority of Subsection 26.4(1) [Witness Officers compellability] and subsequent proceedings under Section 47 of the *Code of Professional Conduct Regulation* [Party to a Breach of the *Code*]

Background:

As way of an example to detail this issue, a subject officer is alleged to have committed a breach of the Code for which he/she also stands charged in Criminal Court. The *Police Act* investigation is suspended pending completion of the criminal process. The subject officer and witness officers testify at trial. The subject officer is ultimately found guilty of serious offences under the *Criminal Code*. The *Police Act* investigation was suspended pending completion of the criminal process and the Commission later directed that it be resumed.

The witness officers who testified under oath at trial were also questioned as compellable witnesses during the *Police Act* investigation of the principal subject officer [s.26.4(1)].

The *Police Act* investigation was completed and report submitted. The Chief concurred with the investigator's findings and conclusions that the allegations against the principal officer were sustained. A notice of settlement conference was served on the member who failed to attend the settlement conference. A disciplinary measure of dismissal was considered in this case. A notice of arbitration was then served on the member. The arbitration hearing has yet to take place as an appeal of both the verdict and sentence has been filed by the subject officer. It is unclear exactly what evidence an arbitrator would consider as there is jurisprudence by the Supreme Court of Canada (SCC) which seems to preclude an arbitrator from considering evidence which has already been adjudicated upon by a higher Court. (However, this is an issue not directly related to this particular question and reserved for further discussion).

The evidence at trial showed that the witness officers had a part to play in the unfolding of events which led to criminal charges against the principal subject officer. No criminal charges arising from their role was seemingly considered by either the Chief or the Crown although the trial judge alluded somewhat to their contributing role during the proceedings.

Now that the *Police Act* investigation is complete and the allegations concerning the conduct of the principal subject officer are deemed sustained, further consideration of allegations under Section 47 are being considered against these other witness officers. Given that a determination on *the Code of Professional Conduct* allegations against the principal subject officer could only be done once the investigation was completed and all witnesses have been questioned and the report received, it would seemingly have been premature to consider allegations under s. 47 against those witness officers (now becoming subject officers) before concluding the matter based on the evidence. Thus the following questions:

Questions:

Q.1 If a Witness Officer becomes a Subject Officer arising from the same set of circumstances, how can their obligations under Subsection 26.4(1) and their rights under Paragraph 26.4(2)(a) of the *Act* be reconciled?

Q. 2 What procedural framework, if any, was considered by the drafters to address that question?

Q. 3 If **no** such procedural framework was ever contemplated, what could be envisioned to ensure procedural fairness and effectiveness of the police discipline process while at the same time, ensuring that the rights of the subject officers as contemplated under s. 26.4(2)(a) are respected?

[Note: This only addresses a portion of the fundamental question on the treatment of the compellable information obtained from a witness officer who later becomes a subject officer. There are cases on file where witness officers became subject officers at the Commission's investigation review stage and NOT at the initial investigation stage.]

Taking into consideration the spirit and intent of the *Police Act* and the necessity to maintain or enhance public confidence in the police discipline process, it is essential that appropriate discipline authorities be provided with **all** the information required to render a decision in a fair and impartial way. The compellability of witness officers seemed crucial in the pursuit of that objective. Nevertheless, the principles of natural justice could also be argued to militate in favor of the subject officers being given the option to participate or not to participate in the investigation process and/or, in so doing, incriminate themselves.

Consideration may be given to modeling a process similar to what is outlined in Subsection 27.8(1), with the necessary modifications, where answers or statements made by a police officer in the course of attempting to resolve a conduct complaint informally are deemed inadmissible in any disciplinary, administrative or civil proceedings, other than a hearing or proceeding in respect of an allegation that, with intent to mislead, the police officer gave an answer or made a statement knowing it to be false.

(See Use and/or Derivative-Use Immunity Principles)

The other dimension also worthy of consideration is the link between compellable evidence provided under oath at a criminal trial by witness officers and the ability/appropriateness of an investigator under the *Police Act* to shore up his evidence by obtaining a transcript of their testimony even though, under normal circumstances, the witness/subject officers would not be compellable under s. 26.4(2)(a).

Q. Should all police officers be compelled to answer questions relevant to the discharge of their duties?

Focus of Discussion:

Q. Should the principle of protection against self-incrimination long established under Common Law and seemingly entrenched in section 7 of the Charter also afford the same protection to subject officers in *Police Act* investigations?

Section 7 of the Charter of Rights and Freedom provides:

> "**7** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

In [Precious v. Hamilton Police Services, November 6, 2001 Ontario Civilian Commission on Police Services ("OCCPS") at pp. 10-11] the question was addressed as follows:

> "The Supreme Court of Canada has held that a statutory compulsion to testify in a criminal proceeding can constitute a deprivation of "liberty" within the meaning of this provision. See R v. S. (R.J.) (1995), 96 C.C.C. (3d) 1 (S.C.C.) at page 24.
>
> To our mind, a requirement to produce a statement for the expressed purposes of a disciplinary investigation is not the same thing as a compulsion to testify in a criminal proceeding with potential penal consequences. Further, disciplinary proceedings are not criminal in nature, not do they involve penal consequences.
>
> Leaving this aside, when you analyze section 7, there are two clear parts to be explored, namely, whether a person's right to life, liberty or security is affected and if so determined whether this deprivation is in accordance with the principles of fundamental justice.
>
> If the purpose of the compulsion to answer questions serves a legitimate public purpose, then the deprivation will be found to be in accordance with fundamental justice. On the other hand, if the compulsion was not for a legitimate public purpose, then a deprivation of liberty can be established.
>
> Police officers are granted extraordinary powers at law. As a result, they are subject to a strict Code and legislative regime that holds them accountable. They are obliged to obey lawful orders. "To our mind there is a legitimate public purpose in requiring police officers to account for their actions while in uniform and on duty to ensure that they meet the requirements of the Code. This can include compelling and accounting by way of a written or oral statement." See Orr and York Regional Police Service and Gregg and Midland Police Service (11 December 2001, O.C.C.P.S.)"

Also please refer to *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, cited in the preamble of this document.

Rationale:

The discipline system as set out in the New Brunswick *Police Act* aims to correct the behavior of those few police officers whose actions fall below the standards set out in the *Code of Professional Conduct Regulation*. Timely and corrective action is of paramount importance as it sends a clear message to all members that any behavior not conforming to the *Code of Professional Conduct Regulation* is unacceptable. When the same message is received by the public, it serves to preserve and restore public trust.

The public has a strong interest in an open and transparent judicial determination because of the nature of a police officer's duties and the broad powers given by law to a police officer. Only full and transparent accountability under the *Police Act* can maintain the trust of the public in its police forces.

The Commission subscribes to the position expressed by the Supreme Court in *Wigglesworth* that upon entering the police profession, a person *"[…] has agreed to enter into a body of special relations, to accept certain duties and responsibilities, to submit to certain restrictions upon his freedom of action and conduct and to certain coercive and punitive measures prescribed for enforcing fulfillment of what he has undertaken."*

Furthermore, the circumstances described above seem to point to some internal incoherence in the *Act* as we cannot reconcile the compellability and non-compellability of the same police officer arising from the same set of circumstances. For a breach of the Code involving several officers, it can be said that every participating officer is a compellable 'witness officer' to the actions of the others while being a 'non-compellable' subject officer for all the others who then become witness officers...This leads to some rather unique circular reasoning.

However, the Supreme Court of Canada addressed the question of statutory interpretation in Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27], as follows:

> "[I]t is a well-established principle of statutory Interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations 432) which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88). "

Position:

Subject to the general principle of administrative law that provides that discipline authorities have a "duty to act fairly" both procedurally and substantively, the Commission recognizes the need to adopt amendments to the *Act* that would serve to actualize the accountability framework espoused by the *Code of Professional Conduct* and especially section 34 of the *Regulation*.

The Commission therefore endorses amendments to the *Police Act* that would compel subject officers to account for their actions while on duty thereby resolving the apparent incongruity in trying to reconcile the obligations of witness officers under Subsection 26.4(1) and their rights under Paragraph 26.4(2)(a) of the *Act* when witness officers become subject officers in code of conduct investigations arising out of the same set of circumstances.

Issue #20 will become a non-issue if Issue #26 includes "compellability".

Issue #21

Suitability for Continued Employment – Police Officer Convicted/Found Guilty of Criminal Act - Expedited Process

Current *Qualifications Regulation 91-119 - Police Act*:

Under section 38 of the *Police Act*, the Lieutenant-Governor in Council makes the following Regulation:

1 This Regulation may be cited as the *Qualifications Regulation - Police Act*.

APPOINTMENT OF MEMBERS
OF A POLICE FORCE

2 To qualify for appointment as a member of a police force, other than as an auxiliary police officer, a person shall

(a) have reached the full age of nineteen years,

(b) be a Canadian citizen or a permanent resident of Canada,

(c) subject to sections 4, 5 and 6, be a graduate of the Police Science Program at the Atlantic Police Academy or a graduate of a comparable training course offered at a police training institute approved by the Minister,

(d) not have been convicted of an offence under the *Criminal Code* (Canada), the *Narcotic Control Act* (Canada) or the *Food and Drugs Act* (Canada) or if convicted shall have received a pardon, and

(e) be of good character and habits.

3 To qualify for appointment as an auxiliary police officer a person shall

(a) meet the requirements set out in paragraphs 2(a), (b), (d) and (e),

(b) be physically fit and free from any serious illness or injury,

(c) have a valid driver's licence, and

(d) be willing to undergo in-service training.

4 Notwithstanding paragraph 2(c), a person may be appointed as a member of a police force if the person has a minimum of three years of satisfactory full time service as a member of any police force in Canada.

5 Notwithstanding paragraph 2(c), a cadet undergoing training while registered at an institution referred to in paragraph 2(c) may undergo job training not exceeding four months on a police force.

6 Notwithstanding paragraph 2(c), a student may be employed by a police force for a period of service not exceeding four months in any twelve month period.

Proposed Amendments (Modeled on Québec Police Act, RSQ, c P-13.1 - Sections 115, 119 and 120)

Add the following sections to the Regulation

7 Any police officer who is found guilty, in any place, of an act or omission referred to in section 2 (d) of this regulation that is triable only on indictment, shall, once the judgment has become *res judicata*, be automatically dismissed.

8 A disciplinary sanction of dismissal must, once the judgement concerned has become *res judicata*, be imposed on any police officer who is found guilty, in any place, of such an act or omission punishable on summary conviction or by indictment, unless the police officer shows that specific circumstances justify another sanction.

9 Any police officer who is found guilty of an act or omission referred to in section 2(d) must inform the Chief of Police or civic authority of the conviction.

Rationale:

In *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, the Supreme Court of Canada has clearly outlined the conditions upon which a person freely chooses to become a police officer and the acceptance of certain restrictions upon his/her freedom of action and conduct. It stands to reasons that if a person convicted of a criminal offence, or for any other reasons, would be precluded from joining a police force, the same conditions could arguably be invoked for preventing him or her to continue employment as a police officer. This is what the *Police Act* of Québec seems to address.

> "...the delinquencies in s. 30 [of the *Royal Canadian Mounted Police Act*] are strictly of domestic discipline, that is, the member, by joining the Force, has agreed to enter into a body of special relations, to accept certain duties and responsibilities, to submit to certain restrictions upon his freedom of action and conduct and to certain coercive and punitive measures prescribed for enforcing fulfillment of what he has undertaken. These terms are essential elements of a status voluntarily entered into which affect what, by the general law, are civil rights, that is, action and behaviour which is not forbidden him as a citizen. [*R. v. Wigglesworth*, [1987] 2 S.C.R. 541,]."

The Doctrine of Res Judicata (2nd ed. 1969), Spencer Bower and Turner state at p. 279:

> "An example is readily found in an inquiry instituted by the disciplinary authority of a professional body, with a view to the expulsion of one against whom conduct infamous in a professional respect is alleged. In such a case it may be that the conduct alleged is no more and no less than conduct in respect of which the accused person has already been acquitted by a criminal court on a criminal charge. Neither a conviction nor an acquittal before a criminal court on a criminal charge will bar the use of the same conduct before such a tribunal on an application to suspend or expel; for the purpose of the proceeding is not to punish the practitioner for the commission of an offence as such, but to exercise disciplinary power over the members of a profession so as to ensure that their conduct conforms to the standards of the profession."

The law has seemingly long recognized the necessity for public office holders such as police officers to adopt and exemplify such important characteristics as honesty, integrity and trustworthiness, characteristics which are reflected in the qualifications for appointment as a member of a police force in New Brunswick and which are also reflected in the *Code of Professional Conduct* – Standards at Section 34 of the *Regulation*.

Public and internal trust is paramount to the organizational success of a police force. This requires that all members of municipal and regional police forces in the province undertake and perform their duties and responsibilities with the highest level of integrity. The resulting level of confidence then enables police forces to deliver a level of service that is not only expected but deserved. Without public trust, police forces cannot successfully fulfill their mandates.

To illustrate the point, the current procedural framework under the *Police Act* has no mechanism whereby a police officer, even convicted of the most egregious offence under the *Criminal Code of Canada* and for which continued employment as a police officer is deemed contrary to public interest, could be dismissed without going through the process of Notice of Settlement Conference and subsequent arbitration should the Settlement Conference be unsuccessful.

Furthermore, once all avenues of the criminal process have been exhausted and the conviction upheld, the scope of the matter that could be considered by an arbitrator is unclear. As reported by Arbitrator Paula Knopf in the matter of Louis Ellis – Termination, (Toronto Police Services Board and Toronto Police Association):

> "[S]ince the decision of the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79,* [2003] 3 S.C.R.77, 2003 SCC63, the labour relations community has been made aware that a conviction in a criminal court for actions which form the basis for a decision to discharge or discipline cannot be re-litigated at arbitration. Therefore, a finding of guilt can obviate the necessity of calling evidence about the actions that gave rise to the discharge. This may not completely dispose of a grievance because an arbitrator still remains the authority to

> substitute a different result if discharge was inappropriate in all the circumstances. However, a finding of guilt does bring with it a potential of a shortened and more focused arbitration hearing.
>
> On the other hand, if a griever is acquitted by a criminal court, that result does not have any effect on the arbitration because it leaves open all the allegations to be litigated, proven or discredited."

Position:

The Commission endorses the proposed amendments as it would streamline the discipline process and provide a procedural framework that is more susceptible to maintain or enhance public trust and public confidence in the police discipline process.

Issue # 22

Informal Resolutions – Public Conduct Complaints

Current *Police Act*:

27.7(1) Subject to section 27.5, if the Commission refers a conduct complaint to a chief of police to process the complaint, the chief of police shall determine whether the conduct complaint can be resolved informally.

27.7(2) If the chief of police decides to attempt to resolve the conduct complaint informally, the chief of police shall give the complainant and the police officer notice in writing of his or her decision to attempt to resolve the complaint informally.

27.7(3) Where a complaint is resolved informally,

(*a*) the details of the results of the informal resolution shall be set out in writing, and

(*b*) the chief of police shall give the complainant and the Commission notice in writing of the results of the informal resolution.

Proposed Amendments:

[Modeled after the BC Police Act RSBC Chapter 367 reproduced hereunder – with the necessary modifications to adapt it to our own *Police Act*]

Guidelines for resolution of suitable admissible complaints

156(1) The police complaint commissioner may issue guidelines providing for the resolution, by mediation or other informal means, of admissible complaints under Division 3 [*Process Respecting Alleged Misconduct]* other than the following:

(a) Complaints concerning the death or the suffering of serious harm or a reportable injury described in section 89(1) [*reporting of death, serious harm and reportable injury, and mandatory external investigation in cases of death and serious harm]*;

(b) Complaints determined in accordance with the guidelines not to be suitable for resolution by mediation or other informal means.

(2) Subject to this Division, the guidelines

(a) Must establish the criteria to be applied in determining whether resolution under this Division is suitable, and

(b) May provide for the following:

(i) a determination to be made by the police complaint commissioner about whether a complaint is suitable for resolution by mediation or other informal means;
(ii) a roster, or the selection and identification, of those persons who may attempt to mediate or otherwise resolve a complaint;
(iii) timelines in respect of which mediation or other informal means of resolution must be conducted or concluded;
(iv) forms and procedures that may or must be used or followed before, during or after a mediation or other informal means of resolution under this Division;
(v) the manner and form of recording a resolution under this Division.

157(1) If, at any time before or during an investigation into a complaint concerning the conduct of a member or former member, the complaint appears to the discipline authority to be such that, under the guidelines, the matter is suitable for resolution by informal means other than mediation, the discipline authority may resolve the matter informally, if the complainant and the member or former member agree in writing to the proposed resolution.

Rationale:

Informal resolution has been imbedded in most, if not all, public complaint processes, including that of the New Brunswick *Police Act*. Legislators and others have long recognized its many benefits as it saves time and money, it mitigates the emotional repercussions often associated with a more formal approach in complaint resolution and it empowers parties to the process.

It is widely believed that having complainants and subject officer(s) and/or the Chief of Police discuss their concerns through an informal resolution effort provides an opportunity to strengthen community relationships in fostering open, honest bilateral communications. This is but one of the essential ingredients to an effective "Community Based Policing" strategy. For this process to be successful however, the commitment of the police, individually and organizationally is essential so long as any measures agreed upon by the parties to an informal resolution do meet the principles of discipline and correction outlined in Section 3 of the *Code of Professional Conduct Regulation – Police Act* and do not impede a Chief of Police from discharging his or her responsibilities pursuant to Subsection 3.1(3) of the Act.

There are no guidelines of what types of complaints can be resolved informally other than the general principles outlined above making it difficult to achieve the required level of consistency.

Even though Subsection 27.7(1) of the *Police Act* creates a positive obligation on the Chief of Police to consider the appropriateness of informal resolution in all circumstances where a conduct complaint is to be investigated, a cursory look at pertinent statistics show that municipal and regional police forces in

New Brunswick have one of the lowest rates in Canada of resolving *Police Act* conduct complaints in this fashion.

Many contributing factors may play a part in this low rate of implementation/acceptance; it can seemingly be attributed, in part to the reluctance of some Chiefs to embark on a process that would amputate their ability to utilize information arising from conduct complaints so resolved to address performance related issues within the parameters of Part I.1 of the *Police Act* – Unsatisfactory Work Performance or for other human resources processes not related to discipline.

Although Paragraph 27.7(3) establishes a requirement of writing in setting out the details of the informal resolution of a complaint, it is unclear what treatment is to be afforded to this record when one considers the preclusions of Subsection 27.7(5) which state:

> S. 27.7(5) a conduct complaint that is resolved by informal resolution shall not be entered in a service record of discipline or **personnel file** of a police officer. ***(Emphasis ours)***

Arguably, where a complaint into the conduct of a member that is resolved informally but that also resulted in disciplinary or corrective measures being taken, some Chiefs believe that a strict interpretation of Subsection 27.7(5) would seemingly preclude them from considering these matters in deciding whether a subsequent attempt at informal resolution is appropriate or for other personnel matters not necessarily related to discipline such as:

- Personal /Professional Development Plans
- Annual Performance Development Reviews
- Suitability for Promotion or, in worst case scenarios,
- As an integral part of progressive discipline for a consideration under Subsections 17.91(1) and 17.92(2) which provide as follows:

> **S.17.91 (1)** notwithstanding any other remedial measure that may be imposed, a police officer shall not be dismissed or demoted for unsatisfactory work performance except in accordance with the provisions of this part.
>
> **S. 17.92(1)** a chief of police may recommend to an arbitrator the dismissal or demotion of a police officer for unsatisfactory work performance.

UNRESOLVED QUESTIONS

1. Having regard to the foregoing and understanding that in much respect, there is an obvious crossover between conduct and performance, "Neglect of Duty" being but one example, what approach in statutory interpretation of Subsection 27.7(5) is to be deemed more susceptible to give effect to the overall spirit and intent of the *Police Act*?
2. Having regard to the principle of internal statutory coherence, how do the provisions of Subsection 27.7(3) and its requirement of writing and Subsection 27.7(5) relate to one another in the treatment and disposition of the written record so created?

Position:

The Commission endorses amendments to the *Police Act* that would allow for the Commission to issue guidelines with regard to the informal resolution of complaints and for other *Police Act* matters to ensure consistency of application throughout all municipal and regional police forces. (**As per Issue #14)**

Issue # 23

Informal Resolutions – Personnel & Service Record of Discipline Files

Current *Police Act*:

27.7(5) A conduct complaint that is resolved by informal resolution shall not be entered in a service record of discipline or personnel file of a police officer.

Proposed Amendments:

[Modeled after the BC Police Act RSBC Chapter 367 reproduced hereunder – with the necessary modifications to adapt it to our own *Police Act*]

167(1) if a resolution is final and binding under section 157(7) or 163(5) and no disciplinary or corrective measures are taken against the member or former member concerned in relation to the complaint, the record of the complaint must not be entered in the service record of discipline of the member or former member concerned, but it may be entered in that member's or former member's personnel file.

(2) A record of complaint in a member's or former member's personnel file under subjection (1) may be opened only

(a) for the purposes of deciding whether a subsequent attempt at informal resolution or mediation is appropriate, or

(b) for personnel matters unrelated to discipline.

Members' service records of discipline

180 (1) Subject to this section and section 167 *[if complaint is resolved and no disciplinary or corrective measures are taken]*, the service record of discipline of a member or former member must include the following records:

(a) a record of each complaint against the member or former member that is determined by the police complaint commissioner to be an admissible complaint under section 82 *[determination of whether complaint is admissible]*;

(b) a record of each investigation that is initiated under section 93 *[independent power to order investigation]* in respect of the member or former member;

(c) a record of each disciplinary or corrective measure that is

(i) taken in respect of the member or former member as a result of a finding of misconduct,

(ii) accepted by the member under section 120 *[prehearing conference- akin Settlement Conferences under NB Police Act]* or under Division 4 *[Resolution of Complaints by Mediation or Other Informal Means]*, or

(iii) determined by an adjudicator to be appropriate under section 141 (10) *[review on the record]* or 143 (9) *[public hearing]*;

(c.1) a record of each complaint against the member or former member that is withdrawn by the complainant under section 94 *[withdrawal of complaint by complainant]*, noting whether the police complaint commissioner has ordered or continued an investigation into the matter under that section;

(c.2) a record of each investigation initiated in respect of the member or former member, or each complaint against the member or former member, in respect of which the police complaint commissioner issues a direction under section 109 (1) *[power to discontinue investigation]*;

(d) a record of each of the following:

(i) every decision in respect of the member or former member that is final and conclusive under section 112 (5) *[discipline authority to review final investigation report and give early notice of next steps]* or 116 (5) *[discipline authority to review supplementary report and give notice of next steps]*;

(ii) every resolution in respect of the member or former member that is final and conclusive under section 120 (16) *[prehearing conference]*;

(iii) every finding or determination in respect of the member or former member that is final and conclusive under section 133 (6) *[review of discipline proceedings]*;

(e) a record of each adjudicator decision made in respect of the member or former member under section 141 (10) *[review on the record]* or 143 (9) *[public hearing]*;

(f) a record of discipline taken in respect of the member in an internal disciplinary proceeding.

(2) The board of a municipal police department must ensure that

(a) the service records of discipline of its members and former members are

(i) kept in a secure place, separate from the personnel files of the members and former members, and

(ii) maintained and updated in accordance with subsections (1) and (8), and

(b) members of the municipal police department comply with the provisions of this section.

(3) The service record of discipline of a member or former member of a municipal police department may be disclosed only as follows:

(a) to the member or former member;

(b) in relation to a complaint or an investigation under Division 3 concerning the conduct of the member or former member, to the discipline authority;

(c) in circumstances where the member or former member accepts an offer for a prehearing conference under section 120 *[prehearing conference]*, to the prehearing conference authority;

(d) in the case of a member and in relation to an internal discipline matter concerning the conduct of the member, to the internal discipline authority as defined in Division 6 *[Internal Discipline Matters]*;

(e) to a chief constable of the member or, in relation to a former member, to a chief constable of the municipal police department with which the former member was employed at the time of the conduct of concern;

(f) to the chair of the board of that municipal police department;

(g) in circumstances where the conduct of the member or former member is the subject of an investigation under Division 3, to the investigating officer;

(h) to the police complaint commissioner;

(i) in circumstances where the police complaint commissioner arranges a public hearing or review on the record in respect of a disciplinary decision, as defined in section 141, concerning the conduct of the member or former member, to the adjudicator appointed for that proceeding under section 142 *[appointment of adjudicator for public hearing or review on the record]*;

(j) in the case of a member who is a member of a police union and in relation to an internal discipline matter concerning the conduct of that member that is before an arbitrator appointed under the collective agreement, to that arbitrator;

(k) in circumstances set out in subsection (4), to the persons referred to in that subsection.

(4) The service record of discipline of a member or former member may be disclosed to a senior officer or board of another police force or law enforcement agency or to the commissioner of the Royal Canadian Mounted Police, but only on their written request and only in respect of potential employment with the other police force or law enforcement agency or the Royal Canadian Mounted Police.

(5) Disclosure of a member's or former member's service record of discipline to persons other than those referred to in subsection (3) requires both

(a) authorization by a chief constable of the municipal police department with which the member is employed or, in the case of a former member, a chief constable of the municipal police department with which the former member was employed at the time of the conduct of concern, and

(b) consent of the member.

(6) If a disciplinary or corrective measure is imposed in relation to, or agreed to by, a member or former member, and the measure includes treatment, counselling or some other program, the member's or former member's service record of discipline must be updated to indicate whether the counselling, treatment or other program was completed.

(7) Nothing in this section precludes the internal use of a member's service record of discipline for non-disciplinary action, including, without limitation, promotion, transfer and reassignment, within the municipal police department with which the member is employed.

(8) Records referred to in subsection (1) (a) to (f) in relation to a member must be expunged from the member's service record of discipline if any of the following apply:

(a) subject to subsection (9), no other complaint made against the member is determined to be admissible under section 82 and no other investigation has been initiated concerning the conduct of the member under this Part within the 2-year period immediately following the last disciplinary or corrective measures recorded in the service record of discipline in respect of the member, and those measures consist of nothing more than a written or verbal reprimand or advice as to future conduct;

(b) subject to subsection (9), no other complaint made against the member is determined to be admissible under section 82 and no other investigation has been initiated concerning the conduct of the member under this Part within the 3-year period immediately following the last disciplinary or corrective measures recorded in the service record of discipline in respect of the member, and those measures

(i) consist of one or more directions to work under close supervision, to undertake specified training or retraining, to undertake counselling or treatment, or to participate in a program or activity, and

(ii) do not include dismissal, reduction in rank, suspension or transfer or reassignment;

(c) subject to subsection (9), no other complaint made against the member is determined to be admissible under section 82 and no other investigation has been initiated concerning the conduct of the member under this Part within the 5-year period immediately following the last disciplinary or corrective measures recorded in the service record of discipline in respect of the member, and those measures

(i) consist of one or more of
  (A) reduction in rank,
  (B) suspension, or
  (C) transfer or reassignment, and
(ii) do not include dismissal;

(d) the records are, or relate to, a recorded complaint or investigation that has been concluded and no disciplinary or corrective measures are recorded in relation to the complaint or investigation because one of the following has occurred:

(i) the complaint has been withdrawn by the complainant under section 94 *[withdrawal of complaint by complainant]* and the police complaint commissioner has not ordered or continued an investigation into the matter;

(ii) the police complaint commissioner has issued a direction under section 109 (1) *[power to discontinue investigation]* to discontinue the investigation into the matter;

(iii) the matter has been finally determined and, in that final determination, no disciplinary or corrective measures are imposed in relation to, or accepted by, the member.

(9) An admissible complaint or any investigation of a matter is irrelevant and not to be considered for the purposes of subsection (8) (a), (b) or (c) when one of the following occurs:

(a) the complaint is withdrawn by the complainant under section 94 *[withdrawal of complaint by complainant]* and the police complaint commissioner does not order or continue an investigation into the matter;

(b) the police complaint commissioner issues a direction under section 109 (1) *[power to discontinue investigation]* to discontinue the investigation into the matter;

(c) the matter is finally determined and, in that final determination, no disciplinary or corrective measures are imposed in relation to, or accepted by, the member.

Rationale:

Subject to subsection 3.1(b) providing that "A chief of police shall have all of the powers necessary to manage and direct the police force […]" these proposed amendments should overcome the stated reluctance of some police chiefs in attempting informal resolutions on account of the apparent restrictions imposed by s. 27.7(5).

Position:

The Commission would endorse any amendments that would enhance and promote the use of informal resolutions in the management of the public complaint process while, at the same time, providing balance with the obligations of the Chief of Police to manage his/her police force.

Issue # 24

Informal Resolutions – Complainant's Participation

Current *Police Act*:

27.7(2) If the chief of police decides to attempt to resolve the conduct complaint informally, the chief of police shall give the complainant and the police officer notice in writing of his or her decision to attempt to resolve the complaint informally.

27.7(3) Where a complaint is resolved informally,

(*a*) the details of the results of the informal resolution shall be set out in writing, and

(*b*) the chief of police shall give the complainant and the Commission notice in writing of the results of the informal resolution.

27.7(4) Within fourteen days after receiving the results of the informal resolution under paragraph (3)(*b*), the complainant may request the Commission to review the results of the informal resolution.

Proposed Amendments:

27.7(2) If the chief of police decides to attempt to resolve the conduct complaint informally, the chief of police shall give the complainant and the police officer notice in writing of his or her decision to attempt to resolve the complaint informally.

27.7(3) At any time, before or during an investigation, if the Chief determines that the matter is suitable for informal resolution and the Commission concurs, the Discipline Authority may resolve the complaint informally – with written consent of the parties.

27.7(4) The parties to an informal resolution of a complaint are the police officer, the Chief of police and the complainant.

27.7(5) The Chief, when attempting to resolve the complaint informally, may appoint a facilitator to assist the parties in reaching a settlement.

27.7(6) The complainant may attend and make representations.

27.7(7) Where a complaint is resolved informally,

(*a*) the details of the results of the informal resolution shall be set out in writing, and

(*b*) the chief of police shall give the complainant and the Commission notice in writing of the results of the informal resolution.

Rationale:

Under the current legislative scheme, the complainant is relegated to have but a mere spectator status in the resolution of his/her complaint. One can hardly reconcile the principles of alternative dispute resolution seemingly envisioned by the *Police Act* through the informal resolution process and the reaching of a satisfactory outcome for all parties.

For the purposes of the discussion, the Commission has outlined, in point form, some of the key underpinnings of an effective informal resolution process.

What is suitable for informal resolution?

Generally:

- Less serious allegations
- Less complicated matters
- Where both parties communicate well

What **is not** suitable for informal resolution?

Complaints concerning:

- Death, serious harm or reportable injury (*Police Act*)
- Bodily harm, endangerment of life or deceit (Guidelines)

Benefits for Members

- Opportunity to understand and appreciate the perspective of the complaint.
- Opportunity to explain their own perspective and action.
- Efficient and less stressful process.
- Avoid the potential for a substantiated complaint on a Service Record (McNeil and promotion considerations)
- Catalyst for a change in terms of future behaviour and reduced likelihood of future complaints.

Benefits for Complainants

- Participation towards a resolution early in the process.
- Allows the complainant to voice their opinion, feel heard in the process, and participation in a solution.

Mutual Benefits

- Improving the relationship between police officers and members of the community and re-establish trust one relationship at a time.
- Allows for a better understanding between the two parties through a meaningful process.

What constitutes a meaningful resolution?

- Resolving disputes through communication, understanding and reconciliation generally results in a more meaningful resolution for both parties.
- An agreement between the complainant and the member that recognizes the concerns of both parties.
- Acknowledging the different perspectives will likely modify future behaviour.
- May also include training and education to improve performance.

Position:

The Commission would endorse any amendments to the *Act* that would enhance the informal resolution process and encourage a meaningful participation of complainants to the informal resolution process.

Issue # 25

Informal Resolutions – Apology

Current *Code of Professional Conduct Regulation* 2007-81 – *Police Act:*

Other measures

7 A chief of police or civic authority, as the case may be, may

(*a*) issue an apology on behalf of the police force or, with the consent of the member of the police force who is alleged to have committed a breach of the code under section 35, on behalf of the police force and the member.

Proposed Amendments:

Incorporate a clear definition of what constitutes an "apology" under Section 1 of the *Act* or elaborate under section 7 of the Regulation so that the concept is better understood and accepted by police officers being the object of a complaint.

The proposed definition is taken from the Ontario *Apology Act* [2009] but is also found in many other similar legislation in Canada and in the United States. It reads as follows:

> *"an expression of sympathy or regret, a statement that a person is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit fault or liability or imply an admission of fault or liability in connection with the matter to which the words or actions relates."*

Rationale:

To date, eight Canadian Provinces and one Territory (British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, Prince-Edward-Island, Newfoundland and Labrador and Nunavut) and more than 30 States in the USA have adopted "apology legislation". The Uniform Law Conference of Canada and many regulatory organizations have encouraged all provinces and territories to enact apology legislation.

One of the stated objectives of apology legislation is to reduce the concerns about legal implications of making an apology. The protection afforded by the apology legislation is substantially similar from province to province. It typically provides that an apology:

- Does not constitute an admission of fault or liability
- Must not be taken into consideration in determination of fault or liability
- Is not admissible as evidence of fault or liability.

Although the effects of apology legislation has been mainly intended to afford statutory protection to professionals such as physicians, that any apology they make to a patient cannot be used against them in subsequent court proceedings as evidence of fault or liability, the Police Commission believes that expressions of regret ("I'm sorry this has happened") will be appreciated by all members of the public who feel having been mistreated by the police.

An apology may sometimes include an acknowledgement of responsibility if such responsibility has been determined. It is clear that at the post-investigation stage, after the analysis of the adverse event is complete and it is clear that a police officer or police force is responsible for, or has contributed to, the harm from an adverse event, it is appropriate to acknowledge responsibility and to apologize.

In the jurisdictions where apology legislation was enacted, apologies were found to have a beneficial and indeed essential place in moral life generally, and in personal reconciliation in particular. They also have a potential place in the resolution of legal disputes.

What ought to be the place of apologies as a means of reconciling people and resolving disputes?

The British Columbia Discussion Paper on Apology Legislation summarized these reasons as follows:

a) To avoid litigation and encourage the early and cost-effective resolution of disputes;
b) To encourage natural, open and direct dialogue between people after injuries; and
c) To encourage people in the moral and humane act of apologizing after having injured another and to take responsibility for their actions.

These three reasons are of course interrelated in a practical sense, in that encouraging people to take responsibility and to apologize encourages people to be reconciled with one another, which in turn encourages people to resolve their disputes, which lessens litigation.

The first point in support of apology legislation is that people naturally often want to apologize and to receive apologies, and that the law should support that, rather than frustrate, this very human inclination, need, and moral responsibility.

It has been observed that a sincerely offered apology will often satisfy a person who has a complaint… An "expression of sympathy" can also be offered without any acknowledgement of fault.

The British Columbia, for example, is in the form of a standalone statute, the *Apology Act*, whereas the Saskatchewan legislation is in the form of an amendment to the *Saskatchewan Evidence Act*.

The benefits of apology legislation in improving the satisfaction of injured parties, and of wrongdoers who are more able to do the right thing has been demonstrated.

Position:

The Commission would support any amendments that would reflect the above philosophy and public service orientation. This would include a definition of 'apology' in the *Act,* as well as Commission-issued Guidelines/Policies that would flow from the definition.

Issue #26

***Police Act* Investigations – Duty to Cooperate [Subject Officers]**
Sections 26.4(2) and 27.4 of the *Police Act*

Issue:

A trend has been observed in a number of *Police Act* investigations where the subject officer(s) limited their cooperation with the appointed investigator to providing a typed prepared statement outlining their version of the facts leading up to the complaint while categorically refusing to answer any questions deemed necessary by the investigator to probe aspects of the statement or establish its reliability. Albeit that the typed statements are signed by the subject officer(s), the shadow of doubt has often been casted upon its authorship, authenticity and trustworthiness which, in turn, impacts on its probative value. Accepting those statements unchallenged exposes the discipline authority to a narrative of events where there is a potential for the subject officer to make an attempt at recasting evidence to suit a particular exculpatory goal without providing the discipline authority with an appropriate factual basis upon which to accept the findings and conclusions of the investigator and move forward in the process.

Unchallenged statements also stymie the investigator's ability to detect contradictory or corroborative evidence between witnesses or assess the partiality of witnesses due to hostility, self-interest or any other motive to favour or injure the subject officer. It also lends itself to rhetorical manipulation. The same would hold true for complainants or any other witnesses not covered under the obligations of subsection 26.4(1).

Consideration should be given to automatically exclude any statement, document or other evidence voluntarily tendered by the subject officer to the investigator where its reliability or corroboration cannot be established at the discretion of the investigator.

Current *Police Act:*

Assistance to investigator

26.4(1) Where an investigation into a conduct complaint is conducted, every member of a police force, including an auxiliary police officer, shall provide the investigator with any information and assistance requested by the investigator.

26.4(2) Subsection (1) does not apply to

(a) the member of the police force being investigated, or
(b) the representative of the member of a police force who comes into possession of information relating to the complaint by virtue of his or her capacity as representative.

Proposed Amendments: (Option # 1 if compellability is affirmed)

Example: *Police Act* of British Columbia [RSBC 1996] CHAPTER 367

Members' duty to cooperate with investigating officer, answer questions and provide written statements

101 (1) A member must cooperate fully with an investigating officer conducting an investigation under this Part.

(2) Without limiting subsection (1), at any time during an investigation under this Part and as often as the investigating officer considers necessary, the investigating officer may request a member to do one or more of the following, and the member must fully comply with the request:

(a) answer questions in respect of matters relevant to the investigation and attend at a place specified by the investigating officer to answer those questions;
(b) provide the investigating officer with a written statement in respect of matters relevant to the investigation;
(c) maintain confidentiality with respect to any aspect of an investigation, including the fact of being questioned under paragraph (a) or being asked to provide a written statement under paragraph (b).

(3) A member requested to attend before an investigating officer must, if so requested by the investigating officer, confirm in writing that all answers and written statements provided by the member under subsection (2) are true and complete.

(4) Unless the discipline authority grants an extension under subsection (5), the member must comply with any request under subsection (2) within 5 business days after it is made.

(5) If satisfied that special circumstances exist, the discipline authority may extend the period within which the member must comply with a request under subsection (2).

Use of statements made to investigating officer by members and former members

102 (1) A statement provided or an answer given during an investigation under this Part by a member or former member is inadmissible in evidence in court or in any other proceeding, except

(a) in a discipline proceeding, public hearing or review on the record concerning the conduct under investigation,(b) in a prosecution for perjury in respect of sworn testimony,(c) in a prosecution for an offence under this Act, or(d) in an application for judicial review or an appeal from a decision with respect to that application.

(2) Subsection (1) applies also in respect of evidence of the existence of a request to make a statement under section 101.

OR

Proposed Amendments: (Option # 2 if non-compellability is maintained)

Assistance to investigator

26.4(1) Where an investigation into a conduct complaint is conducted, every member of a police force, including an auxiliary police officer, shall provide the investigator with any information and assistance requested by the investigator.

26.4(2) Subsection (1) does not apply to

(a) The member of the police force being investigated, or
(b) The representative of the member of a police force who comes into possession of information relating to the complaint by virtue of his or her capacity as representative.
(c) Should the member of a police force being investigated expressly waive that right, the provisions of Subsection (1) will apply with the necessary modifications.
(d) Should the representative of the member of a police force who comes into possession of information relating to the complaint by virtue of his or her capacity as representative expressly waive that right, the member of the police force being investigated shall be advised by his or her representative and the provisions of subsection (1) will apply with the necessary modifications.

Consider also: "Use and Derivative Use Immunity" as envisioned and applied in section 27.8(1) and section 29.3 of the *Police Act* as well as section 30.7(1) and 32.2 of the *Police Act.*

ITEM FOR CONSIDERATION:

Inclusion of the following warning Notice given to the subject officer under subsection 27.4 of the substance of the conduct complaint being investigated under the *Police Act*:

Notice concerning the obligations of police officers under subsection 26.4 of the Police Act

Where an investigation into a conduct complaint is conducted, every member of a police force, including an auxiliary police officer, shall provide the investigator with any information and assistance requested by the investigator. This obligation ***does not apply*** *to a member of a police force being investigated or the representative of the member of the police force who comes in possession of information relating to the complaint by virtue of his or her capacity as representative.*

However, should you waive that right, the provisions of Subsection 26.4(1) shall apply and any statement, document or information provided to the investigator shall be the subject of any measures, questions or validation deemed necessary by the investigator to establish the reliability of the statement, document or information so provided voluntarily by you or your representative. Furthermore, should you elect to waive that right in any fashion under Subsection 26.4(1), your decision is irrevocable and you will be expected to provide any information or assistance required by the investigator.

Failure to do so will (could) result in the automatic exclusion by the Chief of Police, Civic Authority or the Commission of any tendered statement, document or information provided by you or your representative where the indicia of credibility and reliability has not been clearly established by the fact finder.

Rationale:

The purpose of a *Police Act* investigation is to develop impartial and factual records upon which to make findings and conclusions on the claims raised by a complainant in his/her written complaint. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether an alleged *Code of Professional Conduct Regulation* breach has been established based on the balance of probabilities standard of proof and if one has been established, to have a sufficient factual basis from which to fashion an appropriate remedy.

Applying the principles of procedural fairness, the Commission/Society expects that the investigator would have interviewed the parties as well as any pertinent witnesses with respect to each allegation to ascertain all relevant facts relating to the complaint and to explore any inconsistencies in their testimony. The Commission expects that the investigator would have reached his findings and conclusions on the basis of the following questions:

> Are the facts plausible? Do the facts flow logically? Are the facts well explained? Are the facts sufficiently detailed? Is there consistency or contradictions in testimony? Are there factors impacting reliability of the evidence such as witnesses or subject officers having a vested interest in the outcome of the complaint or are otherwise biased?

The investigation process is non-adversarial. That means that the investigator is obligated to collect the evidence regardless of the parties' position with respect to the items of evidence. The investigation is a non-adversarial process and must be unbiased and objective. The investigator <u>is not</u> an advocate for any of the parties or interests. That means that the investigator must be thorough and is obligated to collect evidence regardless of the parties' positions with respect to the items of the evidence.

Our proposed amendments would impose upon police an enforceable statutory duty to cooperate with the discipline authority and with any complaints investigation and demonstrate accountability and honesty in their interaction with the investigator. We have already expounded on these core values in the preamble to this position paper. It is worthy however to restate that no complaint can be fully investigated, no finding can be legitimately reached and no discipline can be fairly imposed without

honesty. Honesty is expected of each individual officer. Avoiding deception, misrepresentation or omission or relevant facts and telling the complete truth are necessary to ensure honesty in each municipal and regional police force in the Province.

The Commission can assert that an effective discipline system is one that is fair, rational, efficient and consistent, reflects the values of each police force, protects the rights of officers and citizens, promotes respect and trust within the police force and with the community and results in a culture of public accountability, individual responsibility and maintenance of the highest standards of professionalism.

The Commission believes that truthfulness is vital to the investigation and review process and shall be expected and demanded of all subject officers, witness officers, complainants, other witnesses, and all persons involved in the investigation and review of allegations of misconduct.

Position:

The Commission supports amendments to the *Police Act* that would affirm the obligation of the subject officer to cooperate with the *Police Act* investigator. Wording similar to the *Police Act* of British Columbia would achieve that goal. This would be the Commission's preferred option. The Commission views the issues of subject officer compellability and the categorization of police officers as 'professionals' to be inextricably linked – if police officers are 'professional', they should be held to standards akin to other professions, and be compellable to cooperate with investigating officers, answer questions, and provide written statements .

Conversely, should the decision be to maintain the non-compellability of subject officers be re-affirmed, Option #2 would preclude subject officers from tendering a prepared statement with a refusal to further cooperate with the investigator without running the risk of the statement being rejected in its entirety as unreliable and deficient in probative value.

Issue #27

Section 45 *Code of Professional Conduct Regulation* (Conduct Constituting an Offence)

Vs

Criminal Code of Canada – Absolute and Conditional Discharges – Sec. 730 CCC

Issue:

The current wording of the *Code of Professional Conduct Regulation* would ostensibly preclude an examination of the conduct of a member under section 45 where an absolute or conditional discharge was granted by the Court.

The wording of this breach of the *Code of Professional Conduct Regulation* requires a three (3) parts test:

1) On the one hand, the member needs to have been **convicted** of an offence; and
2) That conviction must render the member unfit to perform his or her duties as a member; or
3) That the conviction be likely to bring the reputation of the police force into disrepute.

Question 1: What was envisioned by the Legislator as rendering the member unfit to perform his or her duties as a member – the fact of having been convicted of an offence or the fact situation leading up to the member pleading guilty to the charge or being found guilty of the offence(s)?

Question 2: What was envisioned by the Legislator as likely to bring the reputation of the police force into disrepute – the conviction **OR** the fact situation leading up to the conviction?

Question 3: How can the competing public interest and private interests sought to be preserve under the *Police Act* and the *Criminal Code of Canada* be reconciled?

Current *Code of Professional Conduct Regulation* 2007-81 – *Police Act:*

45 A member of a police force is guilty of a breach of the Code if the member is convicted of an offence under an Act of the Legislature, an Act of another province or territory of Canada or an Act of the Parliament of Canada that renders the member unfit to perform his or her duties or that is likely to bring the reputation of the police force with which the member is employed into disrepute.

Proposed Amendment

45 A member of a police force is guilty of a breach of the Code if the member **pleads guilty or is found guilty** of an offence under an *Act* of the Legislature, an *Act* of another province or territory of Canada or an *Act* of the Parliament of Canada that renders the member unfit to perform his or her duties or that is likely to bring the reputation of the police force with which the member is employed into disrepute.

Rationale:

The criteria for a Court to consider an absolute discharge are fundamentally different than what is seemingly envisioned by the *Code of Professional Conduct Regulation*. The object of section 45 seems to be constructed in such a way as to first and foremost serve the **PUBLIC INTEREST** and preserve **PUBLIC CONFIDENCE** in both the police and the police discipline process.

The principles upon which a Court considers and imposes an absolute or a conditional discharge seems to have for object to serve the **PRIVATE INTERESTS** of the accused person (… unless demonstrated that it would be contrary to the public interest). In these cases, the ingredients of the offence have been made out and the net effect of ordering a discharge results in the accused not having a criminal record in connection with the offence in question. The section (s. 730 CCC) contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation. (See Martin's Annotations below).

Those considerations are foreign to the *Code of Professional Conduct Regulation* which seeks to preserve and enforce the Standards outlined in section 34 while ensuring that individuals entrusted with the powers of a police officer do not engage in a course of conduct that would blatantly offend those standards.

Therefore, under the current wording of the *Police Act*, it is unclear how these private interests of the member and the public interests it aims to preserve can be reconciled.

Furthermore, a conditional discharge assorted to a period of probation for a certain length of time, usually at least one year, leaves the door open for the Court to review the matter in light of any breach of conditions.

In those cases, it is open to the Court to revoke the discharge and convict the offender. It is unclear if a breach of section 45 would automatically be triggered from that conviction if the facts having given rise to the conviction occurred or were known to the Chief and the examination into the conduct of the member occurred outside the 6 months' time limit [s. 25.1(4)].

Position:

The wording of section 45 should be amended to reflect the spirit and intent of the *Police Act* and its *Code of Professional Conduct Regulation.*

Reference:

Absolute and Conditional Discharges – section 730 CCC

(Martin's Annual Annotated Criminal Code – Police Edition 2014)

Conditional and absolute discharge – s. 730(1)

730(1) Where an accused, other than an organisation, pleads guilty to or is found guilty of an offence other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

Period for which appearance notice, etc., continues in force – s. 730(2)

(2) Subject to Part XV!, where an accused who has not been taken into custody or who has been released from custody under or by virtue of any provision of Part XVI pleads guilty of or is found guilty of an offence but is not convicted, the appearance notice, promise to appear, summons, undertaking or recognizance issued to or given or entered into by the accused continues in force, subject to its terms, until a disposition in respect of the accused is made under subjection (1) unless, at the time the accused pleads guilty or is found guilty, the court, judge or justice orders that the accused by taken into custody pending such a disposition.

Effect of discharge – s. 730(3)

(3) Where a court directs under subsection (1) that an officer be discharged of an offence, the offender shall be deemed not to have been convicted of the offence except that

(a) The offender may appeal from the determination of guilt as if it were a conviction in respect of the offence;

(b) The Attorney General and, in the case of a summary conviction proceedings, the informant or the informant's agent may appeal from the decision of the court not to convict the offender of the offence as if that decision were a judgment or verdict of acquittal of the offence or a dismissal of the information against the offender; and

(c) The offender may plead autrefois convict in respect of any subsequent charge relating to the offence.

Where person bound by probation order convicted of offence – s. 730(4)

(4) Where an offender who is bound by the conditions of a probation order made at a time when the offender was directed to be discharged under this section is convicted of an offence, including an offence under section 733.1, the court that made the probation order may, in addition to or in lieu of exercising its authority under subsection 732.2(5), at any time when it may take action under that subsection, revoke the discharge, convict the offender of the offence to which the discharge relates and impose any sentence that could have been imposed if the offender had been convicted at the time of discharge, and no appeal lies from a conviction under this subsection where an appeal was taken from the order directing that the offender be discharged.

SYNOPSIS

This section provides the court with a sentencing option which results in the accused not having a criminal record in connection with the offence in question.

An absolute discharge takes effect immediately and the accused is deemed not to have been convicted. A conditional discharge requires that the accused enter into a probation order for a period of time and does not become absolute until that time has passed. If the accused breaches the terms of the probation order he or she may be brought back before the court which can then formally enter a conviction and impose sentence (subsecs. (3), (4). Such a conviction may not be appealed if an appeal has already been taken from the order directing a discharge (subsec. (4))

ANNOTATIONS

In R. v. Fallofield (1973), 13 C.C.C. (2nd) 450, 1973 CLB 235 (B.C. C. A.), the court draws the following conclusions as to the application of this section:

(1) The section may be used in respect of any offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years of for life or by death.

(2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.

(3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is

the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.

(4) The second condition precedent is that the court must consider that a grant of a discharge is not contrary to public interest.

Issue #28

Optional participation of a subject officer to the Settlement Conference – Paragraph 28.7(2)(d) or 31.6(2)(d)

Current *Police Act*:

28.7(2) The notice of settlement conference shall contain:

(*d*) a statement that, if the police officer does not attend the settlement conference, the chief of police shall serve a notice of arbitration hearing on the police officer.

31.6(2) The notice of settlement conference shall contain:

(d) a statement that, if the Chief of police does not attend the settlement conference, the civic authority shall serve a notice of arbitration hearing on the chief of police.

Proposed Amendment:

28.7(2) The notice of settlement conference shall contain:

~~(*d*) a statement that, if the police officer does not attend the settlement conference, the chief of police shall serve a notice of arbitration hearing on the police officer.~~

Strike out paragraph (d) as it serves no useful purpose in the process.

OR

28.7(2) The notice of settlement conference shall **be served by the Chief of Police or designate as an Order and** contain:

a statement that, if the police officer does not attend the settlement conference, he or she may be the subject of further disciplinary **or correctives measures.**

31.6(2) The notice of settlement conference shall contain:

(d) a statement that, if the Chief of police does not attend the settlement conference, he or she may be the subject of further disciplinary or corrective measures.

Rationale:

Given the principles of discipline and correction outlined in the Regulation and the legislative scheme providing a forum where the parties to the settlement conference can have a productive discussion relative to the conduct of the subject officer, it seems inconceivable that the current legislation would permit the unilateral "opting out" of the settlement conference process without any consequences. This is certainly contrary to the spirit and intent of the *Police Act* and should be corrected.

Although the Commission is unclear on what could motivate a subject officer to refuse to even participate in a settlement conference process, what is clear is that the fall-out is the triggering of an arbitration hearing with its inherent costs and delays. This is a counterproductive and a highly undesirable situation that should be corrected. For the sake of expediency, the pertinent sections of the *Act* are included hereunder.

Purpose of settlement conference

28.8 The purpose of a settlement conference is to provide the police officer with an opportunity to respond to the alleged breach of the code and to reach an agreement with the chief of police concerning disciplinary and corrective measures.

31.7 The purpose of a settlement conference is to provide the chief of police with an opportunity to respond to the alleged breach of the code and to reach an agreement with the civic authority concerning disciplinary and corrective measures.

The purpose of the settlement conference is to actualize the provisions of s. 3 of the Regulation which states:

Principles of discipline and correction

3 The disciplinary and corrective measures agreed to by the parties to a settlement conference or imposed by an arbitrator shall seek to correct and educate the member of a police force who is alleged to have committed a breach of the code under section 35 rather than to blame and punish the member unless

(*a*) the disciplinary and corrective measures would bring the administration of police discipline into disrepute,

(*b*) the disciplinary and corrective measures would bring the reputation of the police force with which the member is employed into disrepute, or

(*c*) the circumstances make it impractical for the parties to a settlement conference to agree to, or the arbitrator to impose, disciplinary and corrective measures that seek to correct and educate the member.

Position:

The Commission endorses the proposed amendments that would compel the subject officer/chief to attend the settlement conference and attempt to achieve an agreement. In situations where a perceived power imbalance may be the impediment to participating in the process, the provisions of the *Act* whereby the parties may appoint a facilitator (read: independent mediator) to assist them in reaching a settlement should be reinforced.

Issue #29

Conduct Constituting an Offence- Section 45 of the *Code of Professional Conduct Regulation*

Current *Code of Professional Conduct Regulation* 2007-81 – *Police Act:*

45 A member of a police force is guilty of a breach of the code if the member is convicted of an offence under an Act of the Legislature, an Act of another province or territory of Canada or an Act of the Parliament of Canada that renders the member unfit to perform his or her duties or that is likely to bring the reputation of the police force with which the member is employed into disrepute.

Proposed Amendment:

45 A member of a police force is guilty of a breach of the code if the member pleads guilty or is found guilty of an offence under an Act of the Legislature, an Act of another province or territory of Canada, an Act of the Parliament of Canada, or if committed outside of Canada the act or omission constitutes an offence if committed in Canada, that renders the member unfit to perform his or her duties or that is likely to bring the reputation of the police force with which the member is employed into disrepute.

Rationale:

This proposed amendment incorporates the spirit and intent of s. 481.2 of the Criminal Code of Canada which addresses this issue which is seemingly designed to prevent accused persons from being shielded from prosecution on account of territorial jurisdiction.

This amendment proposes to make the subject officer accountable for his or her actions notwithstanding the territorial jurisdiction where the conviction occurred. This is consistent with the position of the Commission on compellability and accountability outlined in this document.

Offence outside Canada (Criminal Code of Canada)

481.2 Subject to this or any other Act of Parliament, where an act or omission is committed outside Canada and the act or omission is an offence when committed outside Canada under this or any other Act of Parliament, proceedings in respect of the offence may, whether or not the accused is in Canada, be commenced, and an accused may be charged, tried and punished within any territorial division in Canada in the same manner as if the offence had been committed in that territorial division.

Position:

The Commission endorses any amendment to the *Act* that would make the police officers accountable for their actions, regardless of where these actions occurred.

Issue #30

Administrative Suspension – Police Officer Facing Criminal Charges or Serious Misconduct Conduct Paid or Unpaid?

Introduction:

The New Brunswick Police Commission recognizes that policing requirements, both administrative and operational, have evolved over time, and greater demands have been placed on policing organizations to be accountable for the effective stewardship of their financial and human resources, as well as the provision of police services. Members of a police force may face suspension for a number of reasons arising from conduct either in the course or outside a member's duties. The difficulty arises in cases of major offences sufficiently serious to preclude the police officer from returning to full duty. The conduct may also give rise to criminal charges and possible conviction. It is at this juncture that the police force's managers, its members, and the public have a significant interest and concerns regarding this matter.

In dealing with such a case, the police force usually takes all reasonable steps to reassure the public of the appropriateness of its response while at the same time being fair to the membership, and more directly, the members involved. As with other proposed amendments to our *Police Act*, there is an overwhelming necessity to revisit the parameters under which a suspension of pay and benefits can be imposed by police Chiefs, some of whom have expressed concerns and have called for reforms to strengthen accountability, transparency and the delivery of services.

The public also seeks the reassurance that the quality of policing is not diluted by persons who may not be totally trustworthy, and who might be tempted to tamper with justice. Public and internal trust is paramount to the organizational success of every municipal and regional police force in the Province. This requires police officers and employees of those police services to undertake and perform their duties and responsibilities with the highest level of integrity. This is foundational of every police force. Without public trust, police forces cannot successfully fulfill their mandates.

For a long time, there hasn't been any debate about an employer's right to use temporary suspension without pay as a disciplinary measure such as what is found in our *Code of Professional Conduct Regulation* [s. 6(f)]. However, the issue that is now confronting many Chiefs of Police across the country relates to their inability to reconcile society's expectations that police officers are accountable and must bear the consequences of their actions and the narrow scope of a Chief's ability, as it is the case in New Brunswick, allowing for the administrative suspension without pay of subject officers if deemed necessary to protect the integrity of the police force and the public. Under the current legislation, a subject officer's pay can only be suspended if convicted of an offence under an *Act* of the Legislature or an *Act* of the Parliament of Canada even if the conviction or sentence is under appeal. There is currently no mechanism to suspend the pay and benefits of a member facing criminal charges until a verdict is rendered. This can take months and sometimes years.

It is commonly believed that many officers facing criminal or *Police Act* charges remain suspended for years, using loopholes and stall tactics to stay on the payroll as long as possible before resigning or retiring. This is a resulting consequence of the unsatisfactory provision of the *Police Act* which does not allow for a measured response to serious contraventions of the *Code of Professional Conduct Regulation* or of an *Act* of Parliament or of the Legislature of the Province. Some Chiefs of Police and civic authorities are demanding a broadening of the Chief's authority in that regard.

Police unions/Associations, on the other hand, have advanced the argument that police officers, like civilians, are innocent until proven guilty and should continue to be paid while awaiting a trial or a hearing. However police discipline cases are civil cases, in which the ultimate penalty is dismissal of the subject officer. The disciplinary and corrective measures are administrative and relate to employment matters. The "Balance of Probabilities" is the standard for police discipline cases. In criminal cases there is a presumption of innocence. In civil cases, such as *Police Act* arbitration hearings, there is no presumption of innocence but an expectation that the standard of proof is a balance of probabilities. This balance of probabilities test simply means that the more improbable the event that is alleged against the officer, the stronger the evidence is needed for both sides, the officer and the Chief of Police (or the Commission), to prove their case. The proof must <u>not</u> be beyond a reasonable doubt. It simply means that the probability that the event occurred must be 50 plus one percent.

Having said that, it cannot be lost on the vast majority of ethically driven police officers represented by these same police unions/associations, that the conduct of a few can easily tarnish the reputation of them all! The fundamental question is reduced to the issue of whether, through their conduct, members have rendered themselves unable to pursue their assigned duties.

As an example widely reported in the media, four years after one of Hamilton's highest-ranking police officers was suspended with pay, he has collected more than half a million dollars in salary and benefits and was eligible to retire, and did so, without ever answering the 13 charges he faced, including having pornography on his police computer, having sex on duty and using police equipment to spy on an alleged former lover. This case is but an example of similar situations which have occurred elsewhere in the country involving members of regional and municipal forces as well as members of the RCMP.

Such incidents invariably give rise to wide media coverage and have consistently generated strong public condemnation and expressions of disbelief when police officers suspected of having committed very serious contraventions of the *Code of Conduct* or are facing criminal charges are allowed to draw full salary and benefits while the process unfolds. Arguably, as taxpayers, members of the public have reasons to be appalled at the situation. Judging by the content of the vast majority of related blogposts, it is clear that the subtleties of the legal system often yield to emotional knee-jerk reactions deeply corrosive to public trust. Allowing subject officers to draw their full salary while being suspended from duty, especially considering some of the behaviours, appears disturbing to most reasonable-minded Canadian as it is seen as adding insult to injury.

This segment does not seek to resolve the issue but rather to circulate and discuss the various arguments and determine if legislative amendments are required in this portion of the *Police Act*. If it is determined that broadening the Chief's authority in imposing suspension without pay is a function of public interest, these discussions should provide useful benchmarks for articulating policies and developing process maps, guidebooks and training material.

There is also a benefit for police officers at large as all too often, the absence of a clearly-defined suspension policy and its standard application have led to uncertainty, confusion and frustration; employees unable to anticipate the circumstances that can result in a suspension with or without pay, whether their own or that of a fellow police officer, may perceive such action by the employer to be unfair or discriminatory.

Therefore, the Commission will not be advancing a position on possible amendments to our *Police Act* but will be an active participant in subsequent stakeholder's discussions to consider the following questions:

a) Should the authority conferred upon a Chief of Police under section 26.9(1) of the *Police Act* to "[…] suspend without pay a police officer who is **found guilty** of an offence under an *Act* of the Legislature or an *Act* of the Parliament of Canada…" (See item #27 on *Convicted* vs *Found Guilty*) be expanded to include circumstances where there is **clear** and **cogent** evidence the subject officer has contravened the *Code,* is found contravening the *Code*, or is suspected of contravening a provision of the *Code of Professional Conduct Regulation*, an *Act* of Parliament or an *Act* of the Legislature of the Province?

b) In the affirmative, under what exceptional circumstances and evidentiary threshold should the suspension of pay and benefits be triggered? For example, what elements should form the basis for a determination, having regard to the overall circumstances, that the impugned misconduct is likely to have a highly detrimental impact on the integrity or operations of the police force or on the subject officer's ability to perform his/her duties pending the outcome of the *Code of Professional Conduct Regulation* or court procedures up to a verdict?

c) Having regard to the overall circumstances of the case, should the fact that a police officer is accused of crimes involving actions taken in the performance of his or her duties be considered as mitigating or aggravating factor and, if so, under what circumstances for each of the categories?

d) Should suspension, with or without pay, be considered only when the Chief of Police is of the opinion that other interim administrative measures such as temporary reassignment, etc. would be inappropriate and the nature of the misconduct does not call for the subject officer to perform other duties?

Note: *Before deciding on the reassignment of an officer being investigated or being charged with a criminal offence, the Chief of Police must conclude that the subject officer's overall past behaviour is not incompatible with a healthy workplace.*

e) Should loss of basic requirements automatically lead to suspension without pay?
Generally, there are four basic requirements that police officers must possess for the carrying out of their duties:
- The legal authorization to possess a firearm;
- The requirement to hold a license issued in Canada to operate a motor vehicle;
- The possession of the required reliability status or security clearance; and
- The absence of any order issued by a court of justice prohibiting or restricting entry into any place within a member's policing jurisdiction for which a member is responsible.

f) Given the obligation of discipline authorities to act fairly, both substantively and procedurally, what statutory safeguards and appeal mechanism could be envisioned to ensure procedural fairness to subject officers faced with suspension of pay and benefits?

The Legal Framework

The position advanced by some Chiefs of Police is that stoppage of pay and allowances is an essential administrative process created to protect the integrity of police forces in cases where the allegations of misconduct are so outrageous that they require a greater response than suspension alone. It would normally be invoked when paying a member pending the outcome of the disciplinary process would seemingly be inappropriate.

The Commission has done a cursory review of various provincial legislations, including the *RCMP Act,* to get a sense of what mechanisms are provided to police administrators in dealing with serious misconduct. Although none of those pieces of legislation can boast perfection in the handling of these sensitive issues, they are certainly a fertile ground for the emergence of consensus on what could constitute "best practices" coherent with the accountability framework espoused by the *Police Act* and its *Code of Professional Conduct Regulation* and therefore more susceptible to enhance public trust and public confidence in the police and the police discipline process. A summary of those legislations is provided hereunder.

The Commission has also looked at how the Courts have considered the issue of suspension without pay and has found few decisions providing guidance on the right of an employer to impose an administrative suspension without pay to protect its business interest.

In *Cabiakman v. Industrial Alliance Life Insurance Co., [2004] SCC 55,* ('Cabiakman') the Supreme Court of Canada ("SCC") addressed if/when an employer can impose an administrative suspension on a (non-

unionized) employee facing criminal charges. Although the employer and employee were located in Québec thus governed by the Quebec Civil Code, the principles enunciated by the *Court* provide a useful beacon to guide employers in other Canadian jurisdictions.

In *Cabiakman*, the SCC reaffirmed that:

> "[T]he power to impose a disciplinary suspension is generally recognized. As for the power to suspend for administrative reasons, it is a necessary component of the power of direction the employee has accepted if the performance of his or her work should compromise the business interest. This residual power to suspend for administrative reasons because of acts of which the employee has been accused is thus an integral part of any contract of employment, but it must be exercised in accordance with certain requirements."

The Supreme Court went on to elaborate on the pre-requisite requirements:

First**,** the action taken must be necessary to protect the legitimate business interests. In that regard, the employer has the burden to show that its decision is fair and reasonable having regards to the circumstances which prevailed at the time of the suspension.

Second**,** the employer must be guided by good faith and the duty to act fairly in deciding to impose an administrative suspension. Although an employer does not have to make its own enquiries […] to ensure that the charges are well founded, it does have the obligation to allow the employee to provide his or her version of the facts.

Third, temporary interruption of the employee's performance of the work must be imposed for a relatively short period of time that is or can be fixed, or else it would be little different from a resiliation or dismissal pure and simple.

Finally, the suspension must, other than in exceptional circumstances, be with pay. (The SCC did not elaborate on what could constitute "exceptional circumstances")

Some of those principles were again evoked by the SCC in *Potter v. New Brunswick Legal Aid Services Commission, 2015 SCC 10* where the Court held there is an implied term in every contract that an employer will not withhold work from an employee "in bad faith or without justification". As a result, an administrative suspension will constitute a breach of the employment contract unless the employer is able to demonstrate the suspension was reasonable and justified.

The SCC stated that the following factors will always be relevant when determining whether a suspension is reasonable and justified: the duration of the suspension; whether the suspension is with pay; and good faith on the employer's part, including the demonstration of legitimate business reason.

In a recent decision, *(Fraternité des policiers de Lévis c Lévis (Ville de), 2014 QCCA 1453)* the Québec Court of Appeal determined that the administrative suspension without pay of a police officer accused of a criminal offence committed in the performance of his duties had to be changed to a suspension with pay. The police investigation culminated in charges of obstruction of justice, falsification and use of falsified documents. To preserve public trust, the subject officer was suspended by the employer until a final judgment was reached on the criminal charges. The officer grieved the decision to suspend his pay and the arbitrator allowed the grievance, maintaining that she was not in the presence of exceptional circumstances that might preclude the conditions set forth by the Supreme Court of Canada in *Cabiakman v Industrielle Alliance Life Insurance Co., [2004] 3 SCR 195, 2004 SCC 55 ("Cabiakman")* which establishes that suspensions are imposed, in principle, with pay, except in exceptional circumstances. In the case at issue, the duration of the suspension (20 months) was too long to be without pay.

Loss of Basic Requirement – Reliability Status

In a decision of the Public Service Labour Relations Board *[Braun v. DH (Royal Canadian Mounted Police2010 PSLRB 63 (June 9, 2010)*], - Loss of Reliability Status, Suspension Without Pay and Dismissal.

Mr Braun was apprehended at a local grocery store on suspicion of shoplifting. When confronted, Braun stated that he was an undercover RCMP officer and that he was undergoing extreme stress as a result of his work. However, he was actually a senior public servant with no status as a police officer. Braun was later charged under the *Criminal Code* for theft and impersonating a police officer.

At the outset of the RCMP investigation, the Director General (DG) of Security suspended his reliability status, which resulted in Mr. Braun being suspended without pay. Part of the letter of suspension read as follows: "An RCMP Reliability Status is based upon the honesty, trustworthiness, reliability of an individual … effective this date, you are now prohibited from any unescorted access to RCMP facilities". Following completion of the investigation, the DG revoked Mr. Braun's reliability status and his employment was consequently terminated.

The adjudicator concluded that the employer's decision was motivated by real security concerns rather than disciplinary considerations or ulterior motives.

As mentioned above, the SCC did not elaborate, in *Cabiakman* or in other decisions on what could be construed as "exceptional circumstances" warranting the suspension of pay and benefits. However, findings of the RCMP External Review Committee in its processing of grievances related to stoppage of pay and allowances may provide an appropriate interpretation framework or at least some guidance on the issue.

Grievance G-342 (Summary)

The assistant Chief Human Resources Officer ordered a member stop receiving his pay and allowances as a result of an allegation that he had created and passed false documents in an effort to prove that a

vehicle that was involved in an accident was insured at the time. The incident resulted in the member being charged with a violation of a provincial statute but no criminal charge was laid. The Force also launched a disciplinary investigation.

The ERC found that the Treasury Board of Canada had left it to the RCMP to establish the criteria under which stoppage of pay and allowances may be ordered. The ERC found that the order to stop his pay and allowances violated the Force's criteria because he was not charged with any criminal offence. The fact that he was made the subject of disciplinary proceedings was deemed not be an adequate justification for the order.

The Commissioner decided on the matter on the merits and referred to policy at AM X.II.5.D.9 which states that *"[s]toppage of pay and allowances will only be invoked in extreme circumstances when it would be inappropriate to pay the member"* and the grievance was upheld because the circumstances of this case were not so extreme as to justify the decision to stop the member's pay and allowances.

Grievance G-549 (Summary)
In 2009, while off-duty, the Grievor drove a vehicle while impaired, and was involved in a collision. Two occupants who had been present in the vehicle were slightly injured. The Grievor was served with a Notice of Driving Prohibition. One month later, the Grievor was again arrested while driving with his blood alcohol level exceeding the legal limit. Shortly thereafter, the Grievor entered a treatment program for alcohol addiction, which he completed. In June 2010, the Respondent issued a Stoppage of Pay and Allowances Order ('SPAO').

The Grievor argued that given his alcohol addiction, his conduct could not be seen as extreme and outrageous, which was the standard required by policy for a SPAO be ordered. The Level 1 Adjudicator rejected the Grievor's argument that his alcohol addiction was a disability that needed to be taken into account. He resigned from the Force before the decision being issued. With respect to the issuance of the SPAO itself, the ERC emphasized that the outrageous threshold required by policy could be described in terms such as '*shocking'*, *'atrocious'* and '*grossly immoral'* or *'offensive'.*

On the merit of this case, the Acting Commissioner agreed with the respondent and found that the circumstances in this case were indeed outrageous. He found that impaired driving was not a minor criminal offence. He noted that "[…] considering the extreme dangers involved, driving while impaired is inexcusable and is not tolerated for any member of society, and even less so for member of the Force. The repetition of this conduct is even more appalling. In this case, the member's alleged conduct was particularly egregious since the first incident of impaired driving involved a collision which caused injuries to passengers in the Grievor's vehicle, and the second incident occurred only a short time later and while the Grievor was prohibited from driving. The Acting Commissioner noted that the Grievor had time to reflect on his actions and realize the seriousness of his situation over the course of a month, yet, he did it again. The grievance was denied.

Administrative Suspension – With or Without Pay?

Having regard to the foregoing, Chiefs of Police should consider the following questions when looking to place employees on administrative suspension pending the outcome of an investigation:

1. Is the suspension necessary to protect legitimate business interests? Presumably, a suspension pending the outcome of a legitimate investigation into workplace misconduct would be justifiable and reasonable. Although the allegations remain unproven before the conclusion of the investigation, it is important to at least anticipate the possibility that the allegations could be true, and ensure that all employees are not put at further risk while the investigation proceeds.

2. How can the suspension be imposed in good faith? At minimum, acting in good faith means being honest, reasonable, candid, and forthright. Failing to give an employee a reason for the suspension would not be forthright. The suspension cannot be the result of an *"ad hoc/knee jerk reaction"* by an angered chief of police nor should it be perceived as such.

3. Will the suspension be paid? Administrative suspensions should be granted with pay. Given that the SCC gave no example of circumstances which would justify an administrative suspension without pay, such suspensions will only be justified in very rare circumstances.

4. Have alternatives to suspension been considered? One can conclude that the power to suspend an employee does not, necessarily and in all cases, give rise to the right to suspend an employee's pay. Quite the opposite: it appears that since administrative suspension is a preventive measure, it may not always give rise to the suspension of pay until completion of the required investigation or the handing down of the expected decision. It is also important to distinguish between suspension without pay during a short internal investigation leading to possible dismissal (retroactive to the date of the suspension) and the (often much longer) suspension that takes place when criminal charges have been laid.

Provincial Legislations

For ease of reference, the pertinent provisions of provincial legislations have been included leaving it to the reader to evaluate which provisions, or combination thereof, are more amenable to meeting the objectives of this issue.

New Brunswick Police Act

Temporary reassignment and suspension

26.8 Notwithstanding any other provision of this *Act,* a chief of police may reassign or suspend with pay a police officer, pending the completion of the processing of a conduct complaint, if the chief of police has reason to believe that the police officer has committed an offence under an Act of the Legislature or an Act of the Parliament of Canada, or has committed a breach of the code, if the chief of police determines that there is no reasonable alternative and if one of the following conditions has been met:

(a) Reassignment or suspension is required to protect a member of a police force or other person;

(b) Failure to reassign or suspend the police officer is likely to bring the reputation of the police force into disrepute;

(c) There are reasonable grounds to believe that the offence or breach, if proven, would undermine public confidence in the police force; or

(d) There are reasonable grounds to believe that the police officer is incapable of carrying out his or her regular duties.

Suspension without pay

26.9(1) Pending the outcome of proceedings taken under this Part and notwithstanding any other provision of this Act or the regulations, a chief of police may suspend without pay a police officer who is convicted [See issue # 27 “found guilty” vs convicted”] of an offence under an Act of the Legislature or an Act of the Parliament of Canada even if the conviction or sentence is under appeal.

26.9(2**)** Where a police officer is acquitted following an appeal, the police officer shall receive all of the pay, remuneration, benefits and seniority to which the police officer would have been entitled but for the suspension.

26.9**(3)** After the conclusion of proceedings taken under this Part, the police officer shall receive all the pay, remuneration, benefits and seniority to which the police officer would have been entitled but for the suspension less any pay, remuneration, benefits or seniority the police officer is not entitled to as a result of a disciplinary or corrective measure imposed by an arbitrator or agreed to by the parties to a settlement conference.

26.9(**4)** Subsection (3) does not apply if the police officer is dismissed.

Alberta Police Act Police Service Regulation 356/90

Misconduct of a police officer

5(1) A police officer shall not engage in any action that constitutes one or more of the following: Misconduct of a police officer 5(1) A police officer shall not engage in any action that constitutes one or more of the following:

(a) breach of confidence;
(b) consumption or use of liquor or drugs in a manner that is prejudicial to duty;
(c) corrupt practice;
(d) deceit;
(e) discreditable conduct;
(f) improper use of firearms;
(g) insubordination;
(h) neglect of duty;
(i) unlawful or unnecessary exercise of authority.

5(2) For the purposes of subsection (1),

(a) "breach of confidence" consists of one or more of the following:

(i) divulging any matter that it is his duty to keep in confidence;

(ii) giving notice, directly or indirectly, to any person against whom any warrant or summons has been or is about to be issued, except in the lawful execution of the warrant or service of the summons;

(iii) without proper authorization from a superior police officer or in contravention of any rules of the police service of which he is a member, communicating to the news media or to any unauthorized person any matter connected with the police service;

(iv) without proper authorization from a superior police officer showing to any person who is not a member of the police service, or any unauthorized member of the police service, any record that is the property of or in the custody of the police service;

(v) signing or circulating a petition or statement in respect of a matter concerning the police service, except through the proper official channel or correspondence or established grievance procedure;

(b) "consumption or use of liquor or drugs in a manner that is prejudicial to duty" consists of one or more of the following:

(i) consuming liquor while on duty unless otherwise authorized to do so by a superior police officer;

(ii) consuming or otherwise using drugs that are prohibited by law from being in his possession;

(iii) reporting for duty, being on duty or standing by for duty while unfit to do so by reason of the use of alcohol or a drug;

(iv) demanding, persuading or attempting to persuade another person to give, purchase or obtain any liquor for a police officer who is on duty;

(c) "corrupt practice" consists of one or more of the following:

(i) failing to account for or to make a prompt and true return of money or property that the police officer received in his capacity as a police officer;

(ii) directly or indirectly soliciting or receiving a payment, gift, pass, subscription, testimonial or favour without the consent of the chief of police;

(iii) placing himself under a financial, contractual or other obligation to a person in respect of whom the police officer could reasonably expect he may be required to report or give evidence;

(iv) without adequate reason, using his position as a police officer for his personal or another person's advantage;

(d) "deceit" consists of one or more of the following:

(i) wilfully or negligently making or signing a false, misleading or inaccurate statement or entry in an official document or record;

(ii) wilfully or negligently making or signing a false, misleading or inaccurate statement pertaining to the police officer's official duties;

(iii) without a lawful excuse, destroying, mutilating or concealing an official document or record, or altering or erasing an entry in an official document or record;

(e) "discreditable conduct" consists of one or more of the following:

(i) contravening an Act of the Parliament of Canada, an Act of the Legislature of Alberta, or any regulation made under an Act of either the Parliament of Canada or the Legislature of Alberta, where the contravention is of such a character that it would be prejudicial to discipline or likely to bring discredit on the reputation of the police service;

(ii) using oppressive or tyrannical conduct towards a subordinate;

(iii) using profane, abusive or insulting language to any member of a police service or to any member of the general public;

(iv) wilfully or negligently making a false complaint or statement against any member of a police service;

(v) withholding or suppressing a complaint against or a report made in respect of a peace officer or a police service;

(vi) abetting in or knowingly being an accessory to a contravention of this section by another peace officer;

(vii) differentially applying the law or exercising authority on the basis of race, colour, religion, sex, physical disability, mental disability, marital status, age, ancestry or place of origin;

(viii) doing anything prejudicial to discipline or likely to bring discredit on the reputation of the police service;

(f) “improper use of firearms” consists of one or more of the following:

(i) when on duty, having in his possession any firearm other than one that is issued to the police officer by the police service;

(ii) when on duty, other than when on a firearm training exercise, discharging a firearm, whether intentionally or by accident, and not reporting the discharge of the firearm as soon as practicable to his superior officer;

(iii) failing to exercise sound judgment and restraint in respect of the use and care of a firearm;

(g) “insubordination” consists of one or both of the following:

(i) being insubordinate to a superior police officer by word or action;

(ii) omitting or neglecting, without adequate reason, to carry out a lawful order, directive, rule or policy of the commission, the chief of police or other person who has the authority to issue or make that order, directive, rule or policy;

(h) “neglect of duty” consists of one or more of the following:

(i) neglecting, without a lawful excuse, to promptly and diligently perform his duties as a police officer;

(ii) failing to work in accordance with orders or leaving an area, detail or other place of duty without due permission or sufficient cause;

(iii) permitting a prisoner to escape on account of the police officer being careless or negligent;

(iv) failing, when knowing where an offender is to be found, to report him or to make reasonable efforts to bring him to justice;

(v) failing to report a matter that it is his duty to report;

(vi) failing to report anything that he knows concerning a criminal or other charge;

(vii) failing to disclose any evidence that he, or any other person to his knowledge, can give for or against any prisoner or defendant;

(i) “unlawful or unnecessary exercise of authority” consists of one or both of the following:

(i) exercising his authority as a police officer when it is unlawful or unnecessary to do so;

(ii) applying inappropriate force in circumstances in which force is used.

9 Where a police officer is relieved from duty on the basis of being charged with or convicted for a contravention of an Act of the Legislature of Alberta or the Parliament of Canada and,

(a) in respect of the charge,

(i) the charge is not proceeded with, or

(ii) the police officer is not found guilty of the charge or of an included offence, or

(b) in respect of the conviction that is appealed, the police officer is found not guilty of the charge or of an included offence, the police officer shall

(c) immediately be reinstated to duty, and

(d) be entitled to receive all pay, benefits and other rights and privileges to which he would have been entitled if he had not been relieved from duty or suspended.

10 Where the chief of police is of the opinion that exceptional circumstances exist respecting the alleged contravention of section 5 by a police officer, the chief of police may relieve the police officer from duty without pay.

11 If the chief of police relieves a police officer from duty without pay, the chief of police must have that direction confirmed by the commission within 30 days from the day that the police officer is relieved from duty without pay.

12 Where a police officer is relieved from duty without pay and
(a) the commission does not confirm that the police officer be relieved from duty without pay, or
(b) the police officer is not charged with a contravention of section 5, all pay and benefits withheld from the police officer shall forthwith be returned to him.

13 Where a police officer is relieved from duty for a 30-day period, the chief of police shall, at the conclusion of the 30-day period and at the conclusion of any subsequent 30-day periods, report to the commission as to the status of the matter.

British Columbia Police Act – Chapter 367

56.2 (1) If a municipal constable, chief constable or deputy chief constable is being investigated as a result of an allegation that that person committed an offence under a federal or provincial enactment or as a result of a complaint against that person under this Act, the discipline authority for that person may, until the completion of that investigation, reassign or suspend the person with his or her pay, if

(a) the discipline authority considers that

(i) reassignment or suspension of the person is needed to protect municipal constables or other persons from the risk of harm,

(ii) failure to reassign or suspend the person is likely to bring the reputation of the municipal police department as a whole into disrepute, or

(iii) there are grounds to believe that the person is incapable of carrying out his or her regular duties as a constable, and

(b) the discipline authority considers that there is no reasonable alternative available.

56.2(3) At the earliest opportunity, and in any event within 10 business days after the suspension, the discipline authority must decide whether the suspension is to continue in effect or is to be rescinded with or without conditions.

56.2(4) Unless subsection (5) applies, a municipal constable, chief constable or deputy chief constable under suspension for a period within which that person, if not suspended, would have worked one or more days

(a) must receive his or her pay and allowances for the number of days, up to 30, that he or she could have worked during the period of suspension had the suspension not been imposed, and

(b) may, at the discretion of the board, receive his or her pay for any day that he or she could worked during the period of suspension, after the 30 days referred to in paragraph (a), had the suspension not been imposed.

56.2(5) The board may, at any time, discontinue the pay and allowances of a municipal constable, chief constable or deputy chief constable who is under suspension if the allegation in response to which the suspension was imposed would, if proved, constitute a criminal offence.

56.2(6) Written notice of a decision by the board to discontinue the pay and allowances of a municipal constable, chief constable or deputy chief constable must be given promptly to the municipal constable, chief constable or deputy chief constable, as the case may be, and that person may, within 10 business days after receipt, request a hearing before the board.

56.2(7) Within 30 days after receiving a request under subsection (6), the board must hold a hearing to review the decision to discontinue pay and allowances.

56.2(8) The person who requests a hearing under subsection (6) may appear at the hearing personally or by counsel or agent.

56.2(9) A municipal constable, chief constable or deputy chief constable must receive his or her full pay and allowances for any unpaid period of suspension if

(a) the suspension related to an investigation resulting from an allegation that he or she committed an offence under a federal or provincial enactment,

(b) he or she is acquitted of all charges in proceedings before a criminal court or the charges are withdrawn, stayed or otherwise not proceeded with, and

(c) no disciplinary or corrective measures are imposed on him or her for the acts or omissions that constituted the alleged offence.

Manitoba Law Enforcement Review Act

Penalties

30(1) A member who admits having committed or is found to have committed a disciplinary default is liable to one or more of the following penalties set out in diminishing order of seriousness:

(a) dismissal;

(b) permission to resign, and in default of resignation within seven days, summary dismissal;

(c) reduction in rank;

(d) suspension without pay up to a maximum of 30 days;

(e) forfeiture of pay up to a maximum of 10 days' pay;

(f) orfeiture of leave or days off not to exceed 10 days;

(g) a written reprimand;

(h) a verbal reprimand;

(i) an admonition.

Expunging service record

32(5) Upon application by a member whose service record contains an entry for a disciplinary default under this Act, the member's Chief of Police shall expunge the entry

(a) where a reprimand was imposed, after two years have expired from the date of disciplining;

(b) where a forfeiture of pay, leave, or days off was imposed, after three years have expired from the date of disciplining; or

(c) where reduction in rank or suspension without pay was imposed, after five years have expired from the date of disciplining;

but only if in each case the member has committed no further disciplinary defaults under this Act since the date of disciplining

Newfoundland Royal Newfoundland Constabulary Public Complaints Regulation – CNLR 970/96

Suspension

14 The chief at his or her discretion may suspend with or without pay a police officer in respect of whose conduct a complaint has been received and

(a) a notice has been issued; or

(b) a criminal investigation has commenced,

until that time as the matter has been dealt with and the notice of suspension shall be in the form prescribed by the minister.

Nova Scotia Police Regulations made under subsection 97(1) of the Police Act S.N.S. 2004, c. 31

Suspending member from duty

63(1) Despite any provision of these regulations, a chief officer may suspend a member other than a chief officer from duty if

> (a) the chief officer believes on reasonable grounds that the member has committed an indictable offence, an offence punishable on summary conviction under an enactment of the Province, a province or territory of Canada or the Government of Canada, or a disciplinary default and, in the chief officer's opinion, the member is unfit for duty as a result;
>
> (b) the chief officer has received
>
> (i) evidence that substantiates intentional misrepresentation or fraudulent information about the member's qualifications on appointment, or
>
> (ii) information or evaluation results that substantiate that the member does not meet the qualification requirements specified in Section 4.

63(2) A member of a rank equal to or higher than non-commissioned officer in charge, delegated by the chief officer for the purpose, may exercise the power of suspension exercisable by the chief officer under subsection (1).

63(3) A member must inform the chief officer immediately after taking action under subsection (2)

63(4) A suspension under subsection (2) is conditional on confirmation by the chief officer no later than 24 hours after the suspension takes effect.

63(5) A chief officer may, at any time, revoke a suspension and order that the member be returned to duty, and in that case the chief officer must notify the Complaints Commissioner that the member has been returned to duty.

63(6) The chair of a board must exercise the authority of a chief officer in respect of the suspension of a chief officer.

Deciding whether to continue suspension

64(1) No later than 72 hours after the time a member's suspension takes effect, the chief officer or, if the member is a chief officer, the chair of the board must decide whether the suspension is to continue in effect or be rescinded with or without conditions.

64(2) A chief officer or, if applicable, a chair of a board must immediately inform the Complaints Commissioner of a decision to continue a suspension.

64(3) Continuation of a suspension of a chief officer is conditional on confirmation by the board no later than 72 hours after the decision to continue is made.

64(4) If the chair of a board has suspended a chief officer from duty, the chair must not participate in a decision to confirm the continuation of the chief officer's suspension under subsection (3).

Pay and allowances during suspension

67(1) A member who is suspended under Section 63 or 64 must receive pay and allowances for at least 60 days during the suspension, or for a longer period as determined by the disciplinary authority.

67(2) The pay and allowances received by a member during a suspension must be reduced by the amount that the member earns from other employment during the suspension**.**

67(3) Written notice of a decision by the disciplinary authority to discontinue a member's pay and allowances at the end of the first 60 days of the suspension must be given immediately to the member.

67(4) On receipt of a notice under subsection (3), a member whose pay and allowances are discontinued may appear personally or be represented by counsel or a member of the police department before the disciplinary authority for a review of the decision.

67(5) No later than 60 days after the receipt date of a notice under subsection (3), a member may initiate a review of the decision by filing a notice of review with the Complaints Commissioner in the prescribed form.

67(6) On receiving a notice of review filed under subsection (5), the Complaints Commissioner must

(a) forward a copy of the notice to the disciplinary authority; and

(b) immediately notify each of the following of the date, time and place of the hearing of the review:

(i) the member on suspension,

(ii) the disciplinary authority.

67(7) A member who is acquitted of all charges and proceedings before a criminal court and against whom no disciplinary proceedings are taken arising out of the same facts and circumstances must receive full pay and allowances for any period of suspension for which the member was not given full pay and allowances.

67(8) A member who has been suspended during an investigation that results in no disciplinary action or criminal proceedings must receive full pay and allowances for any period of the suspension for which the member was not given full pay and allowances.

67(9) At a hearing in a complaint or internal discipline matter held under these regulations, a Review Board

(a) may, if it finds that a disciplinary default that resulted in the decision to suspend the member has been proved, make any order that the Review Board considers proper for full or partial pay and any allowances for any unpaid period of suspension; or

(b) must, if the Review Board dismisses all of the alleged disciplinary defaults that caused the decision to suspend the member, order that the member receive full pay and allowances for any period of the suspension for which the member was not given full pay and allowances.

67(10) Subsection (9) does not apply to earnings from other employment that was commenced before the period of suspension.

No permanent suspension without internal discipline proceedings

68(1) taken under Section 63 or 64 must not result in the permanent suspension of a member unless the disciplinary authority first complies with the provisions in these regulations respecting internal disciplinary proceedings.

68(2) For the purpose of these regulations, permanent suspension is deemed to be dismissal.

Ontario Police Services Act – R.S.O. 1990, c. P.15

Suspension

89(1) If a police officer, other than a chief of police or deputy chief of police, is suspected of or charged with an offence under a law of Canada or of a province or territory or is suspected of misconduct as defined in section 80, the chief of police may suspend him or her from duty with pay.

Same

89(2) If a chief of police or deputy chief of police is suspected of or charged with an offence under a law of Canada or of a province or territory or is suspected of misconduct as defined in section 80, the board may suspend him or her from duty with pay.

Revocation and reimposition of suspension

89(3) The chief of police or board may revoke the suspension and later reimpose it, repeatedly if necessary, as the chief of police or board, as the case may be, considers appropriate.

Duration of suspension

89(4) Unless the chief of police or board revokes the suspension, it shall continue until the final disposition of the proceeding in which the chief of police's, deputy chief of police's or other police officer's conduct is at issue.

Suspension without pay

89(6) If a chief of police, deputy chief of police or other police officer is convicted of an offence and sentenced to a term of imprisonment, the chief of police or board, as the case may be, may suspend him or her without pay, even if the conviction or sentence is under appeal. 2007, c. 5, s. 10.

Earnings from other employment

89(7) If a chief of police, deputy chief of police or other police officer is suspended with pay, the pay for the period of suspension shall be reduced by the amount that he or she earns from other employment during that period.

Exception

89(8) Subsection (7) does not apply to earnings from other employment that was commenced before the period of suspension.

Prince-Edward-Island Police Act – Chapter P-11.1

10(1) The chief officer of a police department shall

(a) appoint the police officers of the police department;
(b) appoint the civilian employees of the police department; and
(c) subject to the Code and to any collective agreement binding on the members of the police department, promote, discipline, including suspend or dismiss, or reinstate such officers and employees.

Code of Professional Conduct and Discipline Regulations, PEI Reg. EC142/10

Disciplinary And Corrective Measures

16 If a disciplinary authority considers that one or more disciplinary or corrective measures are necessary in respect of the conduct of a police officer or security officer, the disciplinary authority shall impose on the police officer or security officer a disciplinary or corrective measure listed in section 17 that seeks to correct or educate the police officer or security police officer rather than one that seeks to blame and punish, unless the imposition of a disciplinary or corrective measure that seeks to correct or educate the officer is unworkable or would bring the administration of police discipline into disrepute.

17 A disciplinary authority may impose any one or more of the following disciplinary and corrective measures on a police officer or security officer:

g) A suspension without pay for a specified period of time not exceeding 160 working hours;

Quebec Police Act CQLR c P-13.1

64 The Director General shall investigate the conduct of any member of the Sûreté du Québec where the Director General has reasonable grounds to believe that the member's conduct may compromise the exercise of the duties of the member's functions. For the purposes of the investigation, the Director General shall have the powers and immunity of a commissioner appointed under the Act respecting public inquiry commissions (chapter C-37), except the power to order imprisonment.

The Director General may, for cause, suspend the member concerned with or without pay, provided the Minister is notified without delay. If the member is a junior officer, constable or auxiliary constable, the Director General may, for serious cause, dismiss the member subject to the authorization of the Minister.

235 In determining the penalty, the ethics committee shall take into account the gravity of the misconduct having regard to all the circumstances, and the ethical record of the police officer.

In fixing the duration of the suspension without salary of a police officer, the committee shall also take into account any period during which the police officer was, in respect of the same facts**,** provisionally relieved of his duties without salary by the director of the police force to which he belongs. Where applicable, the committee may order that the police officer be paid the salary and other benefits attaching to the position that he did not receive for the period during which he was provisionally relieved of his duties which exceeds the duration of the suspension without salary imposed on him by the committee. Upon its filing in the office of the competent court by any interested person, a decision

ordering the back payment of salary becomes executory as if it were a judgment of that court and has all the effects thereof.

286 The director of a police force must notify the Minister, without delay, of any allegation against a police officer concerning a criminal offence, unless the director considers, after consulting the Director of Criminal and Penal Prosecutions, that the allegation is frivolous or unfounded.

R.C.M.P. Stoppage of Pay and Allowances Regulations - SOR/84-886

2 The Commissioner, a Deputy Commissioner or an Assistant Commissioner may order the stoppage of pay and allowances of a member who is suspended from duty pursuant to section 13.1 of the *Royal Canadian Mounted Police Act*.

Royal Canadian Mounted Police Act - R.S.C., 1985, c. R-10

Suspension

12 Every member who has contravened, is found contravening or is suspected of contravening any provision of the Code of Conduct or of an Act of Parliament, or of the legislature of a province, may be suspended from duty by the Commissioner.

PAY AND ALLOWANCES

22(1) The Treasury Board shall establish the pay and allowances to be paid to members.

22(2) The Commissioner may direct that a member's pay and allowances be stopped if

(*a*) the Commissioner is of the opinion that the member

(i) is unable to perform their duties as the result of the loss of a basic requirement, as set out in the rules, for the carrying out of a member's duties,

(ii) is absent from duty without authorization, or

(iii) has left any assigned duty without authorization;

(*b*) the Commissioner has suspended the member from duty under section 12; or

(*c*) the member is a Deputy Commissioner who is the subject of a recommendation made under paragraph 20.2(1)(*d*), (*f*), (*h*) or (*j*).

22(3) For the purpose of paragraph (2)(*a*), being absent from duty without authorization includes being detained in custody or serving a period of imprisonment.

Models and Options

As stated by the Honourable René Marin, Chairman of the RCMP External Review Committee (1988),

> "[I]t may be said that whatever method is used to suspend an employee, the main criteria to be considered are: maintaining a balance between an employee's right to a fair treatment and the employer's right to withhold the pay of individuals who are not performing their duties or pose a threat to the co-workers and the employer."

How to achieve this delicate balance and the employer's options regarding suspensions and the extent to which reconciliation of the competing interests is achieved should be the focus of our discussions. Models such as temporary reassignment, suspension with pay, suspension without pay, suspension with pay with statutory limits or suspension with partial pay or benefits have been noted in various jurisdictions in Canada and South of the border.

Chairman Marin further observed that

> "[…]While none of these models may achieve the perfect balance, they attempt, some more successfully than others depending on circumstances, to treat the interested parties according to the general principles of justice in a free and democratic society. It is the extent to which that balance is achieved which, in final instance, is of interest to employers and employees alike. Also, the presence of clearly defined suspension policy, its widespread communication amongst employees, and its standard application by employer are important determinants in the perception and ultimate decision regarding fair treatment."

Position:

The Commission has specifically chosen not to render a position on this particular issue. Given the public outcry over issues of police misconduct and suspensions with pay, the Commission believes that it is more beneficial to provide all stakeholders with a detailed overview and to let them form their own opinions. By doing so, the Commission hopes to elevate the level of discourse, so that decisions can be made in light of all relevant information being made available to the decision makers.
