

**IN THE MATTER OF A PROCEEDING UNDER THE *POLICE ACT*, S.N.B., 1977 C. P-9.2**

**AND IN THE MATTER OF A NOTICE OF ARBITRATION HEARING DATED OCTOBER 25, 2010**

**AND IN THE MATTER OF A NOTIFICATION OF SUBSTANCE OF CONDUCT COMPLAINT DATED AUGUST 19, 2009**

**BETWEEN:**

**THE CHIEF OF POLICE, FREDERICTON POLICE FORCE**

- and -

**CORPORAL RANDY REILLY**

Appearances: For the Chief of Police, Fredericton Police Force – *Jamie Eddy, Esq.*

For Corporal Randy Reilly – *David Mombourquette, Esq.*

Hearing Dates May 30 and 31, 2011, October 4 to 7 and 26 to 28, 2011, November 24, 2011 and December 3, 2011

Decision Date January 3, 2012

Before George P. L. Filliter, Arbitrator

## DECISION

### I What is the basis of my jurisdiction?

1. In 2005 the province of New Brunswick amended its *Police Act* (“*Act*”) to include a process for dealing with allegations of breaches of the code, otherwise referred to as “conduct issues”. The code refers to the Code of Conduct, a Regulation passed pursuant to the *Act* in 2007. The relevant portions of the *Act* are as follows:

#### General application

**25.7**Notwithstanding any other Act, including the *Industrial Relations Act*, where a member of a police force is alleged to have committed a breach of the code or is found guilty of a breach of the code, the matter shall be dealt with in accordance with the provisions of this Division and the regulations.

....

#### Decision of the arbitrator

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

**32.6(2)** When imposing disciplinary or corrective measures, an arbitrator may have access to the service record of discipline of the member of a police force.

**32.6(3)** Where the arbitrator finds that the member of a police force is not guilty of a breach of the code, the arbitrator shall dismiss the matter.

**32.6(4)** Where the arbitrator dismisses the matter, no entry shall be made in the service record of discipline or personnel file of the member of a police force.

**32.6(5)** The decision of the arbitrator is final and binding on the parties.

**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.

### II Overview of the case

2. On the 25<sup>th</sup> day of May, 2009 Megan Marten filed a complaint concerning the conduct of Corporal Randy Reilly. Specifically she referred to an incident that occurred in the early morning of May 23, 2009 at 14 Gregory Avenue.
3. It is important to reproduce her complaint in its entirety.

On May the 23, early morning I arrived at the residence on Gregory Avn. I had nothing to drink (Alcohol) and I was there about half hour and the employer police arrived. They were speaking with the home owner

about the music and then the home owner started to walk away and the Officer Rillie ran up behind him with his back turned and Rillie grabbed a hold of the Homeowner and smased Him into the pavement in the driveway of the Homeowners. I Megan Marten then pulled out my cell phone and began recording the incident. All of the officers were wearing name tags all except for one officer, I went up to the officer and said "Officer I would like to know your name" He wouldnt answer me, so I asked again and then one of the other officers(that I'm not shore of the officers name) He said to me "if you don't put that phone away I will be taking it and he tried to grad the phone out of my hand and I said to him "it is not aginest the law to record an incident." After everyone started to calm down I went back to the officer who had no name tag and I asked him again "Officer could I please knew your name" and that's when Rillie look over at me and said "I have enough of your mouth, your being charged for disturbing the peace" I said to him "How am i disturbing the peace" and he wouldnt answer me. As he grabbed me from behind he twisted my hand half way back and I have repeatly said to him "I am not resisting arrest" I said that 4 times and he contuined to use unnessary force. When I was in the back of the police car, the women who transported me to the police station read me half my rights due to me stopping her halfway when she asked me about wanting to call a layer and I said to her "Can we finish at the station when I am more aware of whats going to go on and if I need a layer due to any reason I will answer yes " she said "OK" and off to the station we went When I arrived there they didnt dead me my rights, noar did they ask if I wanted a layer called, and they didnt ask if I had any medical problem.

While I was in the cell there was a man in the other cell was uttering death threats at me because I was trying to call the officers. He was saying "Im going to kill you when you get out" "I'll be waiting outside for you" and he said a few other things. And I called for the officers in the cell block and not one office all night would come to my attention excet for the comminisher.

The next morning when I seen the officer who was wearing no name tag, I said to him "Are you going to tell me your name"" and the officer said to me "I will put u back into the cell if I feel you are disturbing anyone." (spelling errors not corrected) (Exhibit 10)

4. As a result of the nature of the complaint Sergeant Brian Ford was mandated to conduct an investigation into possible charges under the Criminal Code. The criminal investigation resulted in no charges being laid against Corporal Randy Reilly.
5. In the course of conducting his criminal investigation Sergeant Brian Ford took a statement from the owner of 14 Gregory Avenue, Peter Estabrooks on July 21, 2009. It is important to reproduce this statement.

I Peter Frederick Estabrooks of 14 Gregory Av Fredericton New Brunswick E3A4B5 on the question of May 23 on about midnight I was

entertaining a few friends and my tow girls with a BBQ and a few drinks when all of a sudden 4 Fredericton Police Crusers landed at my 14 Gregory Av residence telling us to turn down the music Down there was no music going when they got here. I myself went to the front yard and asked them to leave that there was no music loud here. They refused so said again to get off my property. I walked back under my car port I was grabbed by Conts Randy Riely and tow other officers and thrown two the ground cuffed and told me I was under a rest. They took me and stood me againts the police car they walked away from me and went over to another person they were a resting I stepped away from the car two officer grabed me in a head lock I told them I was off work for 3 weeks with back shoulder injuries they didn't care. They took banged my head on door frame of the car they were putting me in At this time I get mad for the way they were using me so I refused to ge in the car Because I refused I was punched in the right side of my kidneys wich made it hard to work for a couple of weeks. I beleave my rights were violated I did not threaten these officers in any way at all I just asked them to leave my yard. I was not drunk at the time yes I was drinking but was nowher drunk. (spelling errors are not corrected)

6. Staff Sergeant Daniel Copp was assigned by the Chief of Police, Fredericton Police Force to conduct an investigation into the alleged conduct pursuant to the provisions of the *Act*. Corporal Randy Reilly was served with a Notification of Substance of Conduct Complaint and a Notice of Investigation on August 19, 2009, pursuant to sections 27.4(1) and 28(3) of the *Act*.
7. It is useful to reproduce both the Notification of Substance of Conduct Complaint and the Notice of Investigation:

#### **NOTIFICATION OF SUBSTANCE OF CONDUCT COMPLAINT**

Pursuant to s. 27.4(1) *New Brunswick Police Act*, you are hereby notified of the receipt of a conduct complaint against you, to wit:

The complainant Megan Marten regarding the conduct of Cpl. Randy Reilly and other unidentified members of the Fredericton Police Force.

A copy of the complaint of Megan Marten is attached hereto.

Section 36 of the *Code of Professional Conduct Regulation – Police Act*, reads, in part, as follows:

- (1) A member of a police force engages in discreditable conduct if
  - (a) the member, while on duty, acts in a manner that is (ii) likely to bring the reputation of the police force with which he is employer into disrepute
  - (b) the member, while on duty, is oppressive or abusive to any person

Section 41 Code of Professional Conduct Regulation – Police Act, reads, in part, as follows:

A member of a police force abuses his authority if the member

- (a) without lawful authority, detains, arrests or searches a person,
- (b) uses unnecessary forces on a person,
- (c) while on duty, uses language or acts in a manner that is discourteous, uncivil, abusive or insulting to a person

#### **NOTIFICATION OF INVESTIGATION**

Pursuant to s. 28(3) *New Brunswick Police Act*, you are hereby notified that I will be proceeding with an investigation into the above complaint.

You may seek advice from a Fredericton Police Association representative.

8. This matter comes before me as a result of a Notice of Arbitration served on Corporal Randy Reilly by the Chief of Police, Fredericton Police Force on October 25, 2010. The said Notice reads as follows:

#### **Notice of Arbitration Hearing**

Cpl. Randy Reilly

Pursuant to s. 29.4(4) *New Brunswick Police Act*, you are hereby notified of my decision to proceed with an arbitration hearing in regards to a conduct complaint against you, to wit:

#### Particulars:

The complaint of Megan Marten against Cpl Randy Reilly, a member of the Fredericton Police Force. A copy of the complaint of Megan Marten is included with the disclosure package.

It is alleged that you have violated the following provisions of the *Code of Professional Conduct Regulation – Police Act*:

#### *Discreditable conduct*

Section 36 of the *Code of Professional Conduct Regulation – Police Act* reads, in part, as follows:

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

1(b) A member of a police force engages in discreditable conduct if the member, while on duty, is oppressive or abusive to any person

*Abuse of authority*

Section 41 *Code of Professional Conduct Regulation – Police Act*, reads in part, as follows:

(a) A member of a police force abuses his authority if the member without lawful authority, detains, arrests or searches a person

(b) A member of a police force abuses his authority if the member uses unnecessary force on a person

Disclosure

s. 9(1) A copy of the documents listed in subsection 28.2(1) has previously been provided. If you wish to access any physical objects removed, you may do so by contacting S/Sgt. D. Copp.

Notice

If the parties fail to appoint an arbitrator within 10 days after the chief of police serves this notice of arbitration hearing, the Commission shall appoint an arbitrator.

If a party to an arbitration hearing who has been duly notified does not attend at the arbitration hearing, the arbitrator may proceed in the party's absence and the party is not entitled to notice of any further proceedings.

**III Which party has the onus and what is the standard of proof?**

9. In amending the *Act*, the province defined the standard of proof required.

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

10. At the outset of this matter the Chief indicated that he assumed the onus of establishing the breach of the Code as alleged.

**IV Procedure adopted.**

11. At the outset of this hearing I was advised that this was the first matter to go to hearing under the "conduct" provisions of the *Act*. Apparently other disciplinary

matters have been resolved by way of agreement, but this case is the first to be heard by an arbitrator.

12. A court reporter (Peggy Blackwell) recorded the proceedings. This satisfied the requirements of the regulations passed pursuant to the *Act*.
13. There were 8 days of hearings in which evidence was adduced from the following witnesses: Peter Estabrooks, Gerald Mullally, Megan Marten, Staff Sergeant Daniel Copp, Constable Jennifer Kelly, Constable Stephen Stafford and Corporal Randy Reilly. In addition to the oral testimony, the parties introduced 47 exhibits (see list at end of decision).
14. The Chief presented his oral submissions on November 24, 2011 and concluded his argument on December 3, 2011. During the submission of the Chief he made reference to 80 cases, statutory provisions or articles. He also filed a summary of cases and submitted briefs on “Principles of Police Discipline, Discreditable Conduct and Abuse of Authority” and “Entry onto Private Property, Breach of the Peace, Detention”.
15. Corporal Randy Reilly presented his oral submissions on December 3, 2011. In his submission, he referred me to a further 13 cases.
16. At the conclusion of the evidence I asked if either party had any concerns with respect to the procedure and both indicated that they did not.
17. The *Act* requires an arbitrator to render a decision within 15 days of the completion of the hearing. Given the amount of evidence and argument presented I requested the consent of both parties, through their respective counsel, for a short extension to this time limit. Both parties waived the strict application of the time limits set out in the *Act* and gave me their permission to take a little longer than the 15 days defined in the *Act*. I made the commitment to release my decision within 30 days of the date of the closing argument.

## **V Issues**

18. The issue can be succinctly stated. Did the conduct of Corporal Randy Reilly on May 23, 2009 violate the Code? And if so, what is the appropriate “Disciplinary and Corrective Measure” taking into account all of the circumstances.
19. That said, the Chief in his submission submitted that under the circumstances of this case I must consider, amongst other things, if Corporal Randy Reilly unlawfully entered onto 14 Gregory Avenue, whether he unlawfully arrested, searched and detained Megan Marten and Peter Estabrooks and finally if he abused his authority.

## **VI Who gave the most reliable evidence?**

20. Although the complaint and the Notice of Arbitration Hearing does not mention “falsifying reports” in the Chief’s opening statement he submitted that Corporal Randy Reilly had indeed done just that. He suggested that Corporal Randy Reilly

had done this to justify his entry onto the premises at 14 Gregory Avenue and further to justify the arrest of Megan Marten.

21. In making this submission the Chief did submit that these were not further grounds for discipline, but rather this should be a factor that I consider in determining the severity of the disciplinary and corrective action.
22. During the direct examinations of the witnesses for the Chief, in particular Peter Estabrooks and Megan Marten, these witnesses were referred to portions of the report written by Corporal Randy Reilly and asked if his report was accurate. Furthermore, a significant portion of the cross examination of Corporal Randy Reilly was with respect to the accuracy or inaccuracy of his written report.
23. Staff Sergeant Daniel Copp, was called as a witness for Corporal Randy Reilly thus providing counsel for the Chief the extraordinary opportunity to cross examine the very person from whom he was taking instructions throughout the proceeding. Staff Sergeant Daniel Copp testified as to his belief respecting the issues of credibility. During the testimony of Staff Sergeant Daniel Copp he stated that he did not believe Corporal Randy Reilly was fearful for his safety when it came to Peter Estabrooks and furthermore he concluded that certain portions of the report of Corporal Randy Reilly were inaccurate.
24. In direct examination Staff Sergeant Daniel Copp admitted that he reported his belief that the report of Corporal Randy Reilly was not accurate to the Chief, but he, Staff Sergeant Daniel Copp was firm that he did not use the word "fabricated" or "falsified" in his discussions with the Chief.
25. At the very least, I conclude that the reliability of Corporal Randy Reilly was in question and this played a large part in this matter going so far. Accordingly, I have decided that I will address the issue of reliability first and foremost.
26. For the reasons outlined below, having considered all of the evidence before me, I am of the belief that the most reliable witness of all that were called was Corporal Randy Reilly. In saying this I am referring to the witnesses called to give evidence with respect to the incident that occurred at 14 Gregory Avenue on May 23, 2009, not Staff Sergeant Daniel Copp who was most credible and forthright, but who had no direct knowledge of the events of May 23, 2009.
27. In my view, Corporal Randy Reilly appeared to me to be forthright and consistent in his testimony. He also gave what I consider to be the most probable explanation of what occurred on the night in question. Accordingly, where the evidence of the other witnesses differ from that of Corporal Randy Reilly, I will accept his account as the more probable or reasonable.
28. It is important to articulate why I have come to that conclusion, and to do so I have determined that it is best to review the evidence of all of the witnesses and articulate why I find their evidence to be less reliable than that of Corporal Randy Reilly.



29. In considering this issue I am guided by oft cited British Columbia Court of Appeal case, *Faryna v. Chorney*, [1952] 2 D.L.R. 354 (B.C. C.A.) (which was quoted with approval by the Ontario Court of Appeal in *Phillips v. Ford Motor Co.*, [1971] 2 O.R. 637):

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

**i. Peter Estabrooks**

30. Peter Estabrooks is the owner of the residence where the incident occurred, that being at the civic address of 14 Gregory Avenue, in Fredericton, New Brunswick.
31. There were many inconsistencies in the testimony of Peter Estabrooks. First of all in his statement he refers to being thrown to the ground and in his testimony he testified to being taken "hard to the ground" when being arrested by Corporal Randy Reilly. In fact Peter Estabrooks testified to having his head hit the driveway. But when asked if there was any injury to his head he confirmed that there was not. In my view it is improbable that Peter Estabrooks would not have suffered an injury to his face if he was "taken to the ground" in the manner he described.
32. Furthermore, he made mention in his statement and in his testimony that his head was banged against the door frame of the police car. There was no evidence of physical injury. Again I find the suggestion that Peter Estabrooks suffered no injury to be improbable if his head was banged against the car door frame as indicated by Peter Estabrooks.
33. In this regard, in his statement Peter Estabrooks notes that he was punched in the kidneys, but during his testimony before me he specifically remembered being punched three (3) times. I find it improbable that the memory of Peter Estabrooks improved to the extent that he could now remember the number of times he was hit.

34. In his statement and testimony he also testified to being put in a headlock, by two officers when he moved away from the police cruiser. There was no independent evidence from the other witnesses of this occurring. In my view, if this had occurred as testified to by Peter Estabrooks, other persons would have witnessed it. I therefore conclude that it did not occur, and even if it did, Corporal Randy Reilly was not identified by Peter Estabrooks as one of the two officers involved in this alleged transgression.
35. Furthermore, in his statement Peter Estabrooks alleges that four (4) police cruisers arrived at his property and yet during his evidence he remembered that there were only two (2) cruisers. In fact, at one point in his testimony Peter Estabrooks stated that he saw three (3) cruisers. To me this establishes that Peter Estabrooks was clearly confused about what happened on that evening.
36. As a result of hearing this evidence it was apparent to me that at times Peter Estabrooks memory seemed to be better in 2009 when he gave his statement to Sergeant Brian Ford and at times he seemed to suggest that his memory was better while on the stand in 2011.
37. Finally, it cannot be forgotten that Peter Estabrooks admitted to having consumed about 12 beers in a 6 hour period. Despite this Peter Estabrooks was adamant that he was not "drunk", in his words "I can drink a lot of beer." While I accept that each person has their own individual capacity when it comes to consuming alcohol, I am not convinced that the powers of recall of Peter Estabrooks would not have been somewhat diminished as a result of this alcohol consumption.
38. For all of these reasons I find that Peter Estabrooks is a less than reliable witness and where his evidence varies from that of Corporal Randy Reilly, I will accept the testimony of Corporal Randy Reilly.

**ii. Gerald Mullally**

39. The evidence of Gerald Mullally must be considered in light of a number of factors.
40. First and perhaps foremost, I conclude that his powers of observation were lacking. I come to this conclusion based upon the significant and important differences between the statement that he gave to Sergeant Brian Ford and his testimony before me. The differences that I refer to are with respect to otherwise unimportant evidence.
41. For instance, in his written statement given to Sergeant Brian Ford on July 21, 2009, he stated that there were four (4) police officers that arrived at 14 Gregory Avenue. Yet, during his testimony he corrected this and stated that he "must have thought that there were four (4)" but in reality he now remembered there were only three (3). He even stated that his recollection at the time of giving his testimony was better than when he gave his statement.

42. Also, in his statement he does not refer to Peter Estabrooks being at all loud, rude and obnoxious. In fact, his statement simply says that Peter Estabrooks told them to leave. And during direct examination he described Peter Estabrooks as “happy go lucky” and not at all aggressive. Yet after being cross examined for some time on this point he finally did admit that at the very least he, Gerald Mullally, would have handled it differently than Peter Estabrooks.
43. Gerald Mullally also stated, both in his statement and during his testimony that Peter Estabrooks was shoved to the ground when he was first arrested and that he was dragged to the police car. He also said that he observed the police officers banging the head of Peter Estabrooks into the car three (3) times. Yet, there was no evidence of Peter Estabrooks having suffered any injuries or marks to the face. Additionally, Peter Estabrooks himself testified that he walked to the police car.
44. In his statement he also alleges that the police officers pushed Megan Marten into a pile of debris, yet even Megan Marten in her statement and during her testimony does not make this allegation.
45. Furthermore, I cannot overlook three other facts. First of all, Gerald Mullally is a friend of Peter Estabrooks. Secondly, the statement taken by Sergeant Brian Ford was done at the home of Peter Estabrooks and in his presence. And finally, Gerald Mullally acknowledged that in his opinion Corporal Randy Reilly was responsible for getting his son fired from a job.
46. For all of these reasons I find that Gerald Mullally is an unreliable witness and where his evidence varies from that of Corporal Randy Reilly, I will accept the testimony of Corporal Randy Reilly.

**iii. Megan Marten**

47. Megan Marten was the complainant that was responsible for this process beginning in the first place. Her evidence was, in my view, crucial to the position of the Chief of Police.
48. Megan Marten provided two statements to the police, one on May 25, 2009 (exhibit 10 – reproduced in paragraph 3 above) and a statement given to Sergeant Brian Ford on August 5, 2009 (exhibit 11 – not reproduced).
49. In my view, it is important to note that Megan Marten has known Peter Estabrooks for quite some time and went to school with two of his daughters. Furthermore, her powers of observation were not very good.
50. For instance, when one reads her first statement she makes no reference to the demeanour of Peter Estabrooks. Yet, in her statement given to Sergeant Brian Ford she writes that “... Peter walked up to them and said “Want do you want, you better have a warrant, get the hell out of my yard ...” And in her direct testimony the story changed again. In direct evidence she acknowledged that Peter Estabrooks was upset and he was hollering “Get the fuck out of here”. Yet, on cross examination she

testified that she would not have changed anything in either of her written statements.

51. She also testified that Corporal Randy Reilly put Peter Estabrooks to the ground when he was arrested. Again this evidence is not probable, as in my view, if this had occurred there would have been some physical injury to Peter Estabrooks.
52. She also testified that her rights were not read to her, but this contradicts the evidence of Constable Jennifer Kelly as corroborated on the video (exhibit 40) where Corporal Randy Reilly is seen communicating with Constable Jennifer Kelly and asking her if she had read Megan Marten her rights. Simply put, this evidence of Megan Marten in my view is inaccurate at best.
53. There were other inconsistencies between her statement and her evidence. For instance Megan Marten stated in her written statement that she was not given the chance to call a lawyer. But when pressed on cross-examination and shown the video recording of the booking area (exhibit 40) she admitted that she must have been mistaken.
54. In her statement provided to Sergeant Brian Ford she notes that Corporal Randy Reilly threw Peter Estabrooks up against the car "with lots of force", yet again I note that there was no medical evidence of any injury, which would have established this.
55. Finally, and perhaps most importantly, in her statement given to Sergeant Brian Ford she says "I seen the officers arm move really fast and then Peter hollering saying he punched him and while the officer was walking away form the car he was laughing". This serious allegation was without any merit whatsoever, and in fact was in no way pursued by the Chief. And the evidence of Peter Estabrooks made no reference to this occurring.
56. Throughout her testimony she exaggerated her evidence and when asked simple questions on cross-examination she was unable to recall. She continued to say that this was her complaint, yet even then I conclude that her evidence, be it by way of her written statements or her oral evidence was unreliable.
57. For all of these reasons I find that Megan Marten is an unreliable witness and where her evidence varies from that of Corporal Randy Reilly, I will accept the testimony of Corporal Randy Reilly.

**iv. Staff Sergeant Daniel Copp**

58. Staff Sergeant Daniel Copp, as noted above, was not called as a witness for the Chief, but rather was called as part of the evidence for Corporal Randy Reilly.
59. While I accept him as a most credible witness, even though I may or may not agree with his conclusions, his evidence is of little use to me in determining what occurred on May 23, 2009. I say this because of course he was not at 14 Gregory Avenue on the date in question.

**v. Constable Jennifer Kelly**

60. The evidence of Constable Jennifer Kelly related only to whether or not she read Megan Marten her rights. As such, I found her evidence both reliable and probable. However, as she was not present at 14 Gregory Avenue she was not able to provide evidence that assisted me in determining what happened that evening at 14 Gregory Avenue.

**vi. Constable Stephen Stafford**

61. The evidence of Constable Stephen Stafford was to a large extent similar to that of Corporal Randy Reilly, but Constable Stephen Stafford testified that he had a memory block with respect to some of the incident.
62. In my view the evidence of Constable Stephen Stafford, where he had a clear memory was credible and of assistance to me in my determination.

**vii. My conclusion with respect to reliability.**

63. For the reasons noted above, I conclude that the most reliable rendition of the events of May 23, 2009 is that of Corporal Randy Reilly. In saying this I wish to reiterate that I found both his written report and his oral evidence to be the most reliable, complete and probable of all the witnesses that testified.
64. It is important for me to also note that I conclude that Corporal Randy Reilly did not falsify his written report as suggested by the Chief. In saying this, I was particularly impressed by the fact that this report was written by Corporal Randy Reilly under the assumption that Megan Marten had videotaped the entire episode on May 23, 2009. I ask rhetorically, would it be reasonable to conclude that a police officer with the experience of Corporal Randy Reilly would risk his career by falsifying a report, when he was under the impression that the entire event had been video taped? I think not.
65. I also note that in the Criminal Code investigation conducted by Sergeant Brian Ford, and the January 18, 2010 report of Inspector Brent Blackmore to the Chief of Police (Exhibit 17) both refer to credibility issues, especially with respect to Megan Marten, but Staff Sergeant Daniel Copp has a different view.
66. I wish to add, that had I determined that Corporal Randy Reilly had indeed falsified his incident report, I would have considered this to be very serious. As he was not accused of this insofar as the Code is concerned, I would have considered this as a factor when determining discipline, if in fact I were to determine that discipline was warranted.
67. All of this said, the conclusion that Corporal Randy Reilly did not falsify his report does not address the issues before me. As argued by the Chief, even if I accept the evidence of Corporal Randy Reilly as being the most reliable, which I have done, I still must consider if there has been a violation of the Code.

## **VII Conclusions on the issues before me.**

68. As a consequence, I will now outline the chain of events that occurred as testified to be Corporal Randy Reilly.

### **i. What actually occurred on May 23, 2009?**

69. Corporal Randy Reilly is member of the Fredericton Police Force and was promoted to the rank of Corporal in early 1999. He joined the force on December 16, 1988 having been trained at what was then called the Atlantic Police Academy.

70. During his career with the force Corporal Randy Reilly has had experience in the Patrol Response Division, Criminal Investigation Division (CID), Street Crime Division and in 1998 he returned to the patrols as a supervisor.

71. Constable Stephen Stafford, Constable McIntyre and Corporal Randy Reilly were all on duty in the evening of May 22, 2009 and their shifts were scheduled to continue until the morning of May 23, 2009. Constable McIntyre was an Auxiliary Police Officer and was "riding" with Constable Stephen Stafford in the same police cruiser.

72. Corporal Randy Reilly was the senior ranking non-commissioned officer (NCO) on the shift that night and was assigned his own police cruiser. His actual title was Road Supervisor.

73. In the early morning hours of May 23, 2009 Constable Stephen Stafford and Constable McIntyre were dispatched to investigate a noise complaint at 14 Gregory Avenue in the city of Fredericton. Specifically, the dispatch was to investigate a disturbance and a loud party.

74. Corporal Randy Reilly had never been to 14 Gregory Avenue; was unaware of who the owner of 14 Gregory Avenue was and he had never met Peter Estabrooks. Corporal Randy Reilly decided to "back up" the call and actually arrived at 14 Gregory Avenue before Constable Stephen Stafford and Constable McIntyre.

75. When Corporal Randy Reilly arrived he had his car window down and he was able to hear hollering, screaming and generally loud party noises coming from the back yard. Corporal Randy Reilly did not recall any music being played.

76. As Corporal Randy Reilly drove past the driveway, to park his cruiser, he could see a fire in the back yard. Almost immediately after parking the cruiser Constable Stephen Stafford and Constable McIntyre arrived at 14 Gregory Avenue.

77. As soon as Corporal Randy Reilly turned off his vehicle he heard a female shout in a very loud voice "It is the fucking cops." Corporal Randy Reilly was not able to identify this individual.

78. Corporal Randy Reilly, Constable Stephen Stafford and Constable McIntyre got out of their respective cruisers and made their way towards the driveway. Constable Stephen Stafford and Corporal Randy Reilly met at the bottom of the driveway and

were approached by a large male coming from the back of the property. He was later identified as Peter Estabrooks.

79. Peter Estabrooks was yelling in what Corporal Randy Reilly described as an agitated voice "This is my fucking land there is no nuisance here." At this point in time neither Corporal Randy Reilly nor Constable Stephen Stafford had entered onto the property, but were standing on the road next the curb.
80. Peter Estabrooks continued to walk towards the entrance of his driveway as Constable Stephen Stafford and Corporal Randy Reilly were standing on the road. As he approached, Peter Estabrooks continued to use abusive and vulgar language. Corporal Randy Reilly described Peter Estabrooks as being belligerent and intoxicated.
81. Corporal Randy Reilly described his reaction as one of shock in that he did not expect to encounter someone exhibiting the behaviour of Peter Estabrooks. Peter Estabrooks was in a rage, not coherent and not willing to engage in discussion.
82. In an attempt to calm Peter Estabrooks down Corporal Randy Reilly raised his hands in front of him and told Peter Estabrooks that he needed to calm down. According to Corporal Randy Reilly, this did nothing and Peter Estabrooks continued to approach Corporal Randy Reilly.
83. Peter Estabrooks stopped just outside of what Corporal Randy Reilly described as his "safety zone". Corporal Randy Reilly described this as the distance or zone where from a tactical standpoint he felt that he was able to react or respond in a safe fashion. For Corporal Randy Reilly this zone is about 10 feet (3 meters).
84. At this time Peter Estabrooks was still yelling and flailing his arms in what Corporal Randy Reilly considered a threatening fashion. Some of the comments made by Peter Estabrooks that Corporal Randy Reilly testified to were as follows "You got no fucking warrant."; "You got no business being here." and "You cocksuckers get off my property."
85. Corporal Randy Reilly testified that Peter Estabrooks appeared fixated on the lack of warrant and that there was no music playing. In response to the action of Peter Estabrooks Corporal Randy Reilly advised Peter Estabrooks that the reason he was there was to investigate a noise complaint. Corporal Randy Reilly continued to attempt to calm the situation by dialoging with Peter Estabrooks, but it did not work. Peter Estabrooks continued to demand that Corporal Randy Reilly and Constable Stephen Stafford leave and get off his land.
86. Based upon the evidence before me I conclude that Corporal Randy Reilly and Constable Stephen Stafford had not yet entered the property of Peter Estabrooks and that Peter Estabrooks had remained upon his own property.
87. At one point Peter Estabrooks turned around and Corporal Randy Reilly and Constable Stephen Stafford started to approach the driveway. Peter Estabrooks

turned around suddenly and with clenched fists lunged towards Corporal Randy Reilly and Constable Stephen Stafford. Corporal Randy Reilly testified that he thought that it was going to end up in a physical altercation.

88. It is my conclusion that at this point in time Corporal Randy Reilly and Constable Stephen Stafford had most likely crossed the property line and entered the property owned by Peter Estabrooks.
89. According to the evidence of Corporal Randy Reilly, which in fairness was not reflected in the evidence of the other witnesses, several people rushed to restrain Peter Estabrooks. As noted above I accept the evidence of Corporal Randy Reilly in this regard. Peter Estabrooks was, based upon the observations of Corporal Randy Reilly not calming down.
90. Constable Stephen Stafford and Corporal Randy Reilly looked at one another and came to the same conclusion, that being that Peter Estabrooks had to be restrained. Both officers approached Peter Estabrooks as he was returning towards his home and arrested him for Breach of Peace.
91. In so doing, I find that despite the unreliable evidence of other witnesses, Corporal Randy Reilly and Constable Stephen Stafford did not shove Peter Estabrooks to the ground. I also conclude that the explanation of Corporal Randy Reilly that taking a person to the ground would actually endanger the police officer and therefore in a situation as this is not the preferred method of restraining an individual.
92. In any event, Constable Stephen Stafford advised Peter Estabrooks that he was being arrested for Breach of Peace and Corporal Randy Reilly and Constable Stephen Stafford each took one of the arms of Peter Estabrooks and walked him towards the cruiser.
93. Corporal Randy Reilly testified that Peter Estabrooks was only hand cuffed when the officers got him to the cruiser. Corporal Randy Reilly attempted to put Peter Estabrooks into the police cruiser but was not successful.
94. At this point in time, in the words of Corporal Randy Reilly, "All hell broke lose." Megan Marten and Melissa Doiron, the daughter of Peter Estabrooks, led the persons in attendance at the party. Megan Marten and Melissa Doiron were instigators and the partygoers charged towards the police officers demanding the release of Peter Estabrooks.
95. Megan Marten was purportedly videotaping the entire encounter. She let it be known to Corporal Randy Reilly, Constable Stephen Stafford and all others that she was doing this. Corporal Randy Reilly testified that he was actually quite pleased that this was being done. He explained this comment in terms of the fact that he felt that the video would confirm the chaotic nature of the situation.
96. Although no evidence was adduced to explain what was done to recover the video from the cell phone the evidence was that only a short video clip was recovered



(exhibit 38). Regardless, this video clip demonstrated to me in a clear and cogent manner the chaotic situation that was developing on the road in front of 14 Gregory Avenue.

97. Corporal Randy Reilly described the group as extremely aggressive and that the “pack mentality”, often attributed to riots quickly took hold of these people. It was clear to the police officers that the leaders of this group dynamic were Megan Marten and Melissa Doiron.
98. As a result the attentions of Constable Stephen Stafford and Corporal Randy Reilly were directed from Peter Estabrooks to the rest of the group. By that time the people had surrounded the two police officers.
99. Melissa Doiron grabbed at Constable Stephen Stafford’s utility belt (which holds many dangerous defense weapons including, of course his gun). In fact his baton was disengaged from the belt and fell to the ground. Constable Stephen Stafford acted by kicking at Melissa Doiron.
100. Additionally, Megan Marten or perhaps some other female grabbed Corporal Randy Reilly. Corporal Randy Reilly was unable to identify this person, but he did say that he pushed this person back.
101. Megan Marten and Melissa Doiron encouraged Peter Estabrooks to get away as soon as Corporal Randy Reilly and Constable Stephen Stafford had turned from Peter Estabrooks to face the group. Constable Stephen Stafford moved to secure the arrest of Peter Estabrooks and subsequently arrested Melissa Doiron. Each was put in separate vehicles.
102. Corporal Randy Reilly testified that once Peter Estabrooks and Melissa Doiron were in the vehicles the group dispersed into the back yard. However, in the view of Corporal Randy Reilly they were still noisy. Constable Stephen Stafford, Corporal Randy Reilly and Constable McIntyre determined to approach the people who had now gathered in the back of the yard.
103. Upon arrival in the back of the yard Corporal Randy Reilly made certain that someone doused the fire in the fire pit and he spoke with those who were there. Corporal Randy Reilly suggested that the people in the back yard “Put the fire out and call it a night.”
104. He then stated that this entire incident could have “gone down” much differently. As soon as Corporal Randy Reilly started to speak Megan Marten again began to incite the people in the back yard in much the same fashion as she had done on the street. In this case Megan Marten told Gerald Mullally that he did not have to put out the fire and in the view of Corporal Randy Reilly the crowd was once again getting agitated.
105. Corporal Randy Reilly decided that rather than have the situation deteriorate again that he would arrest Megan Marten for Breach of Peace. As he approached her,

Megan Marten threw her phone to a male and started in a tirade. Specifically, Corporal Randy Reilly remembered Megan Marten said “You’re going to fucking regret this. I am going to have your fucking job.”

106. Corporal Randy Reilly then escorted Megan Marten to the street and called for Constable Jennifer Kelly to come in order to transport Megan Marten to the police station.
107. What occurred at the police station was videotaped and presented as exhibits. There is no question that Corporal Randy Reilly did not follow some of the standing orders, such as reading the “blue sign” to Megan Marten, but the evidence of what occurred at the station is not relevant to the issues of whether or not the complaint of Megan Marten is well founded.
108. Suffice to say, that if the arrests of Peter Estabrooks and Megan Marten were unlawful, it would be a logical conclusion that the subsequent detention of both of these persons at the station would also be unlawful. As a consequence, there is very little to be gained to articulate my findings in this regard.
109. That said, I do conclude that Corporal Randy Reilly detained both Megan Marten and Peter Estabrooks for arbitrary times.

**ii. Unlawful Entry onto 14 Gregory Avenue**

110. Both parties agreed that the law is clear. The courts of our land have, over the years, upheld the right of a citizen to control his or her own property. One of the aspects tied to this control is the right to determine who shall or shall not be permitted to enter the property (*R. v. Colet*, [1981] 2 S.C.C. 2).
111. When it comes police entering or invading a persons property thus interfering in the landowners right to control his or her property there are two sources of protection that the courts have consistently relied upon. One is sections 8 and 9 of the *Canadian Charter of Rights and Freedoms* and the second is the common law principle of trespass stemming originally from the *Semayne’s Case* [1558-1774] All E.R. Rep. 62 (1604). The Supreme Court of Canada discussed this in 1990 (*R. v. Kokesch*, [1990] 3 S.C.R. 3).
112. As a result of this line of reasoning the courts have rendered many decisions that have in effect limited the right of police officers to enter upon private property. In essence the police officer must either have the permission, in the words of the court a licence, given by the owner or alternatively legal authority provided by statute or granted by the courts.
113. The following represents a list of some of the situations where it has been determined that a police officer had the right to be on the property of a landowner.

- a) Where a property owner gives his or her consent for entry. (*Berketa v. Niagara (Regional Municipality) Police Services Board*, [2008] O.J. No. 260).
- b) The courts have concluded that there is an implied licence to communicate, so this allows the police officer the right to enter the property for this purpose. (*R. v. Evans*, [1996] 1 S.C.R. 8).
- c) Where a valid search warrant has been issued. (*R. v. Cote*, 2011 SCC 46).
- d) There is a duty on police officers to preserve life, protect against serious injury and protect property. (*R. v. Godoy*, [1999] 1 S.C.R. 311).
- e) Where there is a valid arrest warrant and there exists reasonable grounds to conclude that the person to be arrested is present on the property. (section 529 **Criminal Code**, RSC 1985, c C-46).
- f) Without an arrest warrant, if there are reasonable grounds that the person to be arrested is present and there are “exigent” circumstances that it would be impractical to obtain a warrant. (section 529.3(1) Criminal Code)
- g) Where “exigent” circumstances exist that harm will be prevented or reasonable grounds that there is evidence relating to an indictable offence that may be destroyed. (section 529.3(2) Criminal Code).
- h) Where the police officer is in fresh pursuit. (*R. v. Feeney*, [1997] 2 S.C.R. 13).
- i) Where the arrest is for an indictable offence. (*R. Feeney, supra*).

114. There is legal precedent that suggests entry on private property to enforce a municipal By-law is only allowed where there is a licence given by the property owner (*R. v. Ryan*, [1956] B.C.J. No. 98 (BCCA)). Furthermore there appears to be a prohibition on police officers from entering a property once the property owner revokes the licence (*R. v. Thomas*, [1989] N.J. No. 45 (NLSC), affirmed at [1991] N.J. No. 152 (NLCA) and [1993] S.C.J. No. 27 (SCC)).

115. In my view one cannot forget that Corporal Randy Reilly and Constable Stephen Stafford arrived at 14 Gregory Avenue because of a complaint under the Noise By-law. Specifically the complaint was that of a loud party. Furthermore, upon arrival Corporal Randy Reilly and Constable Stephen Stafford noted a fire in the back yard. At best this observation may have led to further investigation under the Fire Prevention By-law.

116. The city of Fredericton passed By-law No. S-13 “A By-Law Respecting Disturbance by Noise” (exhibit 13). The penalty section of this By-law provides for prosecution by way of summary conviction with the maximum penalty of \$500.00.
117. Similarly, the city of Fredericton passed By-law S-2 “A By-Law Respecting Fire Prevention” (exhibit 14). This By-law provides for the appointment of Fire Prevention Officers, who are responsible for the enforcement of the provisions of this By-law.
118. During the testimony of Staff Sergeant Daniel Copp he suggested that police officers, specifically Corporal Randy Reilly in this case, had no authority to enforce the provision of the fire prevention By-law. The Chief argued that the By-law creates the position of Fire Prevention Officer and only duly appointed persons can enforce the By-law.
119. I am not swayed by the able argument of the Chief. Under section 12(1) of the *Act*, police officers are charged with the overriding responsibility to maintain law and order and to prevent “offences” against the law.
120. Under the *Provincial Offences Procedure Act* (“*POPA*”) an “offence” is defined as “means an offence created by an Act or by any regulation or by-law made under an Act.” (section 1(1) of *POPA*).
121. The powers of the city of Fredericton are set out in the provisions of the *Municipalities Act* (“*MA*”). Specifically, section 11(1) of the *MA* provides the city the city of Fredericton the general power to make by-laws. Later, in section 109(1) the *MA* provides that municipalities, in this cases the city of Fredericton, the power to make by-laws for the purpose of preventing, extinguishing fires and protecting property.
122. It is my view that police officers have a general power to enforce any By-law made by a municipality, unless there is a specific provision that prohibits the officer from performing his duties. I conclude that the creation of the position of Fire Prevention Officer in the city of Fredericton’s Fire Prevention By-law does not create such a prohibition.
123. In any event, the dispatch in this case was pursuant to a complaint from a citizen under the Noise By-law. I will deal later in the decision with the Fire Prevention By-law.
124. When Corporal Randy Reilly and Constable Stephen Stafford arrived it was not long before Peter Estabrooks instructed these officers, in a not to polite fashion, not to enter his property. Yet, Corporal Randy Reilly and Constable Stephen Stafford decided to do so because of the actions of Peter Estabrooks.
125. The Chief conceded that the actions of Peter Estabrooks would have been considered Breach of Peace had they occurred in the public. But, it is submitted that

Peter Estabrooks had the right to act that way on his own property and that the entry onto his property was unlawful.

126. As such, the Chief submitted that the first entry of Corporal Randy Reilly and Constable Stephen Stafford onto 14 Gregory Avenue was unlawful.
127. I agree with the position articulated by the Chief. Although Corporal Randy Reilly and Constable Stephen Stafford could have arrested Peter Estabrooks for Breach of Peace had he left his own property they should not have in these circumstances.
128. The circumstances of this case were that the police officers were called to investigate a noise complaint. When they arrived Peter Estabrooks, the ostensible and indeed actual owner of the property told them that he was revoking his licence to enter his property. He certainly did not do it in a reasonable fashion, but at the same time none of the criteria as outlined in paragraph 114 above, that would otherwise allow Corporal Randy Reilly and Constable Stephen Stafford to enter the property, existed.
129. Corporal Randy Reilly and Constable Stephen Stafford, both seasoned and experienced officers should not have entered the property for any reason. And certainly not to arrest Peter Estabrooks for Breach of Peace. Peter Estabrooks had turned around, was according to the evidence of Corporal Randy Reilly being restrained by other people at the party and there was no immediate danger to either of the officers or indeed any other person.
130. Furthermore, it is my conclusion that Peter Estabrooks had never left his own property.
131. I will deal with the effect that this unlawful entry had with respect to the arrest of Peter Estabrooks below.
132. Insofar as the second entry onto 14 Gregory Avenue is concerned a different set of circumstances existed. Peter Estabrooks, the owner was now detained in the police cruiser. Corporal Randy Reilly and Constable Stephen Stafford noted an open fire in the back yard and they were not able to assess the size of the fire and were therefore unable to determine if there was any danger to the property.
133. The Chief submitted that as the police officers were not appointed as Fire Prevention Officers under the Fire Prevention By-law they had no authority to enforce its provisions. As noted above I reject this submission. If the Chief is correct in his proposal then a police officer would have to watch a burning fire and call a duly appointed Fire Prevention Officer whether or not the fire presents a danger to the public. In my view not only would this be illogical, it flies in the face of what I believe is the duty of a police officer as set forth clearly in the *Act*, *POPA* and *MA*. Additionally it would fly in the face of the duty of police officers to protect and preserve the safety of the public as enunciated in *R. v. Godoy, supra*.

134. That said, given the fact that I have found that Peter Estabrooks had “revoked” the licence to enter 14 Gregory Avenue, it would have been the prudent thing for Corporal Randy Reilly or Constable Stephen Stafford to ask Peter Estabrooks for permission to enter the property to make certain that the fire was not a danger. This is particularly so given that Corporal Randy Reilly did not describe the fire as he observed it as being an obvious danger.
135. In any event, Corporal Randy Reilly and Constable Stephen Stafford went to the back yard for the stated purpose of determining if the fire was safe. I conclude that the second entry of Corporal Randy Reilly and Constable Stephen Stafford onto the land was technically unlawful, but I accept that their intent was proper.

### **iii. Unlawful Arrest, Search and Detention**

136. The Chief acknowledges that the actions of Peter Estabrooks would be considered Breach of Peace in public and therefore his arrest would have been lawful. However, he submitted that the arrest was not lawful on the private property of Peter Estabrooks, especially when the licence to enter had been revoked.
137. In my view the position of the Chief is correct. The law appears to be eminently clear that where a police officer is not acting in lawful execution of his or her duty (i.e. when trespassing) an arrest made is similarly unlawful (see *R. v. Thomas*, [1989] N.J. No. 45 (NLSC); affirmed at [1991] N.J. No. 152 (NLCA) and [1993] S.C.J. No. 27 (SCC); *R. v. Caissie*, [1999] N.B.J. No. 254 (NBCA); *R. v. Brownrigg* 2009 ONCJ 558 and *R. v. Turner*, 2004 ABPC 124).
138. Therefore, I conclude that the arrest of Peter Estabrooks was unlawful.
139. As for Megan Marten, she could have been and perhaps should have been arrested on the street for obstruction and certainly for Breach of Peace. This did not occur due to the lack of officers present at the scene. But, she was not arrested then. Had she been I would not have found that Corporal Randy Reilly had in any way acted unlawfully with respect to Megan Marten.
140. As noted above, Corporal Randy Reilly unlawfully entered the back yard of 14 Gregory Avenue, albeit for the right reasons. However, when he arrived in the back yard he asked that some one douse the fire. He did not determine if there was a permit. Nor did Corporal Randy Reilly describe what he saw as being dangerous.
141. Furthermore, Corporal Randy Reilly insisted on talking with the group about what had occurred with Peter Estabrooks and Melissa Doiron. This approach resulted in a verbal attack by Megan Marten that resulted in her eventual arrest for Breach of Peace.
142. I have no doubt that Megan Marten was a difficult person to deal with, especially that evening. However, her arrest and subsequent search and detention for Breach of Peace in my view was unlawful.

143. I conclude that under the circumstances the concerns of Corporal Randy Reilly that Megan Marten would again incite the crowd would have been equally, if not better addressed by simply removing himself and the other police officers from the scene once they had determined that the fire presented no immediate danger to person or property.
144. Finally, insofar as the detention of Megan Marten and Peter Estabrooks is concerned, the Chief submitted that the arbitrary nature of the length of detention was also unlawful I do not agree with this position.
145. Corporal Randy Reilly testified as to the reason he kept Peter Estabrooks and Megan Marten for different times. Specifically he did not want them released at the same time for fear that they would both return to the same party and this would result in an identical incident occurring.
146. In my view this approach is consistent with the protections provided individuals under section 9 of the *Canadian Charter of Rights and Freedoms*. Neither Peter Estabrooks or Megan Marten were being detained for lengthy periods of time nor they were so advised.
147. As to the requirement to explain the purpose of the detention, I agree that this should be done, however, it is my conclusion that first of all Peter Estabrooks was in no state to understand anything that was being said to him. When I watched the video at the jail he was clearly in an intoxicated state.
148. As for Megan Marten, I have watched the video of this person while in the jail many times. In my view she was loud, aggressive and unwilling to listen to anyone or anything. Every time that Corporal Randy Reilly or someone would speak to her she would interrupt, change the subject and generally interfere in the ability of the officer to exercise his or her duty. For instance she would suggest that her rights had not been read to her or that she wondered why she had not been offered a lawyer every time Corporal Randy Reilly attempted to speak to her.
149. In conclusion, Corporal Randy Reilly would have been wise to have ensured that he complied with the requirements of the police force insofar as the detention of these two were concerned, but I do not conclude that he violated the rights of Megan Marten or Peter Estabrooks.

### **VIII Conclusions**

150. I conclude first and foremost that the first entry of Corporal Randy Reilly and Constable Stephen Stafford onto 14 Gregory Avenue, after being specifically told not to, was unlawful.
151. As noted above, I conclude therefore that the arrest, search and subsequent detention of Peter Estabrooks was also unlawful. I would note that had Corporal Randy Reilly and Constable Stephen Stafford arrested Peter Estabrooks when he had entered the "safe zone" of Corporal Randy Reilly I would have found the arrest

lawful, as according to the evidence of Corporal Randy Reilly the officers were on the street.

152. As for the second entry of Corporal Randy Reilly and Constable Stephen Stafford on to 14 Gregory Avenue, I conclude that technically it was unlawful. But, I want to reiterate that I find that the reason for this entry was well intentioned.
153. I also conclude that the arrest, search and subsequent detention of Megan Marten, which would have been lawful had it been conducted on the street was unlawful in the backyard of 14 Gregory Avenue.

## **IX Remedy**

154. It is so easy to sit back and second guess a police officer. These persons are vested with the responsibility of protecting us and enforcing many laws. And they do this in some of the most stressful and uncomfortable situations imaginable. They make split second decisions that may or may not result in the desired outcome.
155. This situation is a case in point. I am certain that when Corporal Randy Reilly and Constable Stephen Stafford arrived at 14 Gregory Avenue they had no idea that they were going to be faced with the unreasonable and aggressive approach of Peter Estabrooks. However, they did and they reacted.
156. One of the complicating factors that police officers face in performing their duties is the evolving development of criminal laws. It must be an almost impossible task to keep abreast of the considerations of the courts insofar as they may impact upon the roles, responsibilities and duties of a police officer.
157. I was surprised that there was no evidence called as to the training programs offered to police officers employed by the Fredericton Police Force. As I have noted, criminal law is ever evolving in Canada. The conflicting rights of individuals and the duties and powers of peace officers are constantly being reviewed by the courts. This can be seen by the plethora of cases offered in submission by the Chief.
158. I would have thought that police officers would have been offered regular and relevant training to ensure that they were kept abreast of the recent developments. If such training was indeed provided to police officers in the Fredericton Police Force, no evidence was adduced as to its contents and regularity.
159. I conclude that either no training of this nature was offered, or alternatively it was not of much assistance. I say this, because Corporal Randy Reilly submitted that if Corporal Randy Reilly and Constable Stephen Stafford entered 14 Gregory Avenue unlawfully and therefore arrested Peter Estabrooks and others unlawfully, it was not only Corporal Randy Reilly who was in error. In fact the only police officer who I heard testify to the unlawful nature of such entry was Staff Sergeant Daniel Copp.
160. Consequently, although this is not before me, I would recommend that the Chief of Police at the Fredericton Police Force implement regular and relevant training



programs for all members of the Force so that they all will approach incidents such as this with some degree of consistency and a clearer and more full understanding of the developments in the law.

161. The above recommendation however does not address the matter before me, that being, given the findings above, what is the appropriate level of discipline for Corporal Randy Reilly?
162. First of all, I would order that Corporal Randy Reilly be provided to take training with respect to the changing and evolving law as it applies to the lawful entry onto property where the complaint is that of an alleged By-law infraction.
163. During his submission, the Chief of Police stated that the normal level of discipline would be a one (1) to three (3) day suspension without pay. However, under the circumstances of this case, particularly with respect to the allegation of falsifying his police report, the Chief submitted that a ten (10) day suspension would be more appropriate.
164. Corporal Randy Reilly on the other hand submitted that given his long and clean record, if I were to determine, as I have, that he had violated the Code, that a one (1) to three (3) suspension was appropriate.
165. The purpose of discipline under the *Act* is defined in sections 3 and 6 of the *Code*. Without reproducing these subsections, it is clear that the legislature has identified that corrective measures is a component to be considered. That is unless the “administration of police discipline” or the “reputation of the police force” would be brought into disrepute. In my view no evidence was adduced to allow me to conclude that corrective measures would do either. In fact, the Chief submitted that even the ten (10) day suspension was corrective in nature, so I take from this that the Chief agrees with the corrective nature of the discipline being important.
166. Both counsel referred me to the case of *Constable Bowes-Aybar*, OCCPS # 03-05 (unreported). This case outlines various aspects of sentencing that should be considered. The non inclusive list is as follows:
  - Public Interest
  - Seriousness of the Misconduct
  - The Seriousness of the Continuum
  - Recognition of the Seriousness/Remorse
  - Employment History
  - Ability to Reform or Rehabilitate the Police Officer
  - Need for Deterence
  - Damage to the reputation of the Police Force

- Handicap and Other Relevant Personal Circumstances
- Effect on the Police Officer and his Family
- Management Approach to Misconduct in Question
- Consistency of the Penalty
- Effect of Publicity

167. As I look at the above list, points 1, 3, 7, 8, 9, 10, 12 and 13 do not apply to this case. I draw this conclusion based upon the fact that either the point is clearly inapplicable under the circumstances (3, 7, 9, 10, 13) or no evidence was called to allow me to come to a conclusion (1, 8, 12).
168. Having considered the remaining points I conclude first that Corporal Randy Reilly had a long and clean employment record. The Chief, who in reality acknowledged that Corporal Randy Reilly could be rehabilitated did not pursue the issue of rehabilitation. And finally, although Corporal Randy Reilly did not express any form of remorse or indeed understanding of his wrongdoing, this is understandable given his mistaken belief that he was acting lawfully.
169. I also want to take some time to discuss the approach to discipline taken by management in this case. In my view, raising the element of Corporal Randy Reilly falsifying his report, if for no other reason than to argue for an increased disciplinary sanction caused this hearing to take much longer than it should have.
170. I find it interesting to note that Sergeant Brian Ford in conducting his Criminal Code investigation interviewed three of the witnesses and noted that there were credibility issues. However, Staff Sergeant Daniel Copp who conducted the Code investigation did not interview any of the witnesses and even with the benefit of the report of Sergeant Brian Ford did not question the reliability of the complainant, Megan Marten, Peter Estabrooks or Gerald Mullally.
171. Finally, I am of the opinion that only Corporal Randy Reilly is a party to this proceeding is a factor I should take into account. As you can see from my findings, it is my view that Corporal Randy Reilly and Constable Stephen Stafford worked in concert in this situation. If the Chief felt that Corporal Randy Reilly should be the subject of the process I would have expected an explanation as to why Constable Stephen Stafford was not also included.
172. Accordingly, I think that the appropriate "Disciplinary and Corrective Measure" would be a one (1) day suspension without pay. If Corporal Randy Reilly had not been the senior NCO that night I would have concluded that a reprimand would be appropriate, but given the added responsibility of Corporal Randy Reilly, the suspension sends a clear message to members of the Force, to Corporal Randy Reilly and to the public that more was expected of him on that night. At the same time the penalty cannot be said to be contrary to the prevailing theory of corrective measures.

**X Order**

173. Corporal Randy Reilly will;

- Take training offered to him by the Fredericton Police Force with respect to the changing and evolving law as it applies to the lawful entry onto property where the complaint is that of an alleged By-law infraction.
- Serve a one (1) day suspension without pay.
- This decision will form a part of the employment record of Corporal Randy Reilly for as long as the collective agreement allows.

Dated at Fredericton this day of January 3, 2012

George P. L. Filliter, Arbitrator

## List of Exhibits

1. Notice of Arbitration
2. Disclosure Package
3. Occurrence Report Stephen Stafford
4. Occurrence Report of Randy Reilly
5. Handwritten Statement
6. Statement of Cst. McIntyre
7. Handwritten Statement of Gerald Mallaley
8. Copy of Two Photographs of Carport at 14 Gregory Avenue
9. Copy of Two Photographs of Back Yard at 14 Gregory Avenue
10. Statement of Megan Marten dated May 25, 2009
11. Statement of Megan Marten dated August 5, 2009
12. Copy of Two Photographs of 14 Gregory Avenue
13. By-law No. S-13, A By-law Respecting Disturbance by Noise
14. By-law No. S-2, A By-law Respecting Fire Prevention
15. Appointment of Investigator
16. Copy of Record Management System File
17. Report of Insp. Blackmore dated January 18, 2010
18. Spreadsheet Completed by Staff Sgt. Ford
19. Letter from Chief of Police to Cst. Stephen Stafford dated December 14, 2010
20. Copy of Municipal By-law Infractions Ticket
21. Arrest Booking Sheet dated May 23, 2009 for Megan Marten
22. Arrest Booking Sheet dated May 23, 2009 for Peter Estabrooks
23. Standing Order #2007-027 - Parading Detainees
24. Standing Order # 1995-006 - Photo Copying Police Notes dated April 7, 1995
25. Operational Manual Investigation Guidelines Notebook
26. Routine Order # 2003-167 - Police Notes
27. Operational Manual - Operational Guidelines, Operational Records
28. 2 emails and Notices of Substance of Conduct Complaint, 8 pages
29. Portion of the Police Act
30. Portions of the Provincial Offences Procedure Act
31. Excerpt from the Municipalities Act
32. Fire Prevention Act
33. Notice to Person Charged with an Offence
34. Administration Manual, Organization & Function; Functions & Descriptions of Police Force
35. Standing Order # 2006-018, Policy and Procedure on the issue of noise by-law
36. Excerpt of Cst. Jen Kelly's Notebook
37. Copy of "Municipal By-Law Penalties" printed on December 22, 2010
38. DVD of Megan Marten's Cellphone video
39. DVD video of underground parking at the police station on May 23, 2009
40. DVD video of the booking area at the police station on May 23, 2009
41. DVD video of the booking area at the police station on May 23, 2009 with Peter Estabrooks

42. DVD video of the booking area at the police station on May 23, 2009 when Melissa Doiron and Megan Marten are released
43. DVD videon of the interview of Peter Estabrooks
44. Copy of the "cheat sheet" used by officers to read rights to accused
45. Standing Order with respect to the wearing of badges and insignia
46. Standing Order with respect to Section 31 Criminal Code – Breach of Peace
47. Hard Copy of the incident at 14 Gregory Avenue