GREATER SUDBURY POLICE SERVICE DISCIPLINE HEARING
IN THE MATTER OF ONTARIO REGULATION 268/10

MADE UNDER THE *POLICE SERVICES ACT*, RSO 1990,
AND AMENDMENTS THERETO;
AND IN THE MATTER OF
GREATER SUDBURY POLICE SERVICE
AND

CONSTABLE KYLE CARTWRIGHT #300150

CHARGES:

1. **DISCREDITABLE CONDUCT**
2. **DISCREDITABLE CONDUCT**
3. **INSUBORDINATION**

RULING ON ABUSE OF PROCESS MOTION

Before:	Superintendent (R) Greg Walton
Counsel for the Prosecution:	Mr. David Migicovsky Ms. Jessica Barrow
Counsel for the Defence:	Mr. Len Walker
Public Complainant:	Nicole Mandy Unrepresented
Motion Dates:	November 18 & 25, 2021

OVERVIEW

Parties to this Motion and Order Sought

At the time of the alleged misconduct, Constable Kyle Cartwright, #300150, was employed as a probationary constable with the Greater Sudbury Police Service. During this hearing process, Mr. Len Walker represented Constable Cartwright, hereafter referred to as the "Applicant."

Mr. David Migicovsky and Ms. Jessica Barrow represented the Greater Sudbury Police Service, hereafter referred to as the "Respondent."

Nicole Mandy is the public complainant. Ms. Mandy informed the tribunal via the prosecution's office that although she remained engaged in this process, she would not participate in this abuse of process motion due to the technical legal issues involved.

This motion involved written submissions and oral submissions during a two-day virtual hearing. Ms. Mandy did not make written submissions but was present for much of the virtual hearing observing oral submissions. The Respondent informed the tribunal that Ms. Mandy agreed with the position taken by the Respondent in answer to this motion.

The Applicant's position on the order sought varied during the course of this motion and I will delve into the specifics momentarily. Ultimately, the Applicant submitted I ought to find that an abuse of process has been established. Ordinarily, a stay of proceedings accompanies an abuse of process finding. In this case, the Applicant submitted a remedy is available and therefore, a stay of proceedings would not be warranted. The Applicant requested an order from the tribunal directing that the Respondent could not seek a sanction of dismissal if the Applicant were to be found guilty of the alleged misconduct following a hearing into the allegations.

The Respondent opposed the motion and submitted this tribunal ought to dismiss the request or defer the decision until following a hearing into the allegations.

This ruling is in response to the Applicant's motion.

Allegations of Misconduct (amended)

It is alleged that Constable Kyle Cartwright committed the following acts of misconduct contrary to section 80(1)(a) of the *Police Services Act*, R.S.O. 1990 c. P.15, as amended:

Count #1 - Discreditable Conduct

Constable Cartwright is alleged to have committed discreditable conduct in that, from November 2, 2020, and continuing to date, he acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Greater Sudbury Police Service, thereby constituting an offence against discipline, as prescribed in section 2(1)(a)(xi) of the Code of Conduct of Ontario Regulation 123/98 as amended.

Statement of Particulars:

Constable Cartwright was working in a uniform capacity on November 2, 2020. This was the fourth shift on his own without being supervised by a coach officer.

Constable Cartwright was dispatched to a call for service. The female complainant, AA[1], alleged that her spouse, AB was in violation of the conditions of his release on a prior criminal charge relating to domestic violence against AA (AB had been charged in September 2020 with threatening and criminal harassment).

AA advised Constable Cartwright that AB had contacted her contrary to the conditions of his release on the prior charges. AA advised Constable Cartwright that she was in fear for her safety. Constable Cartwright was also made aware of the circumstances of the prior criminal charges against AB on which he threatened violence against AA and had called her 38 times over the course of two minutes.

Constable Cartwright spent a considerable period of time meeting with AA. AA provided him with information regarding the alleged breach by AB of the condition of his release on the prior criminal charges. AA also provided him with information regarding her fear of AB and her personal circumstances. AA advised Constable Cartwright that she was alone in Sudbury. Constable Cartwright provided AA with information about services available to victims of domestic violence. It was evident that AA was in a vulnerable position. Constable Cartwright also provided AA with his personal cell phone number. Constable Cartwright had never previously provided his personal cell phone number to a victim.

[1] Initials used to anonymize some involved persons

Upon leaving the residence of AA, Constable Cartwright attended at another location and arrested and charged AB with breach of undertaking. AB was released on a new undertaking not to contact AA and assigned a court date for a first appearance on this new charge. Constable Cartwright advised AA of the arrest and release and reviewed safety planning with her.

Later that day, AA and Constable Cartwright commenced communicating with each other via text message on Constable Cartwright's personal cell phone. The messages did not involve work related purposes. Constable Cartwright then commenced a personal relationship with AA, which became intimate within a very short period of time thereafter. Constable Cartwright previously attended a training presentation which referenced that a relationship between a police officer and a victim could constitute misconduct.

In or about November and December 2020, Constable Cartwright began to spend time at AA's residence while on duty and off duty. During the period of November 2, 2020, to February 5, 2021, Constable Cartwright attended at AA's residence at least 24 times, reporting that he was on mobile lunch.

Constable Cartwright and AA kept their relationship secret while the criminal charges against AB were going through the court system. Constable Cartwright did not disclose the existence of his relationship with AA to the crown attorney.

The above actions of Constable Cartwright constitute discreditable conduct contrary to section 2(1)(a)(xi) of the prescribed Code of Conduct.

<u>Count #2 - Discreditable Conduct</u>

Constable Cartwright is alleged to have committed discreditable conduct in that, on or about the month of October 2020, he acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Greater Sudbury Police Service, thereby constituting an offence against discipline, as prescribed in section 2(1)(a)(xi) of the Code of Conduct of Ontario Regulation 123/98 as amended.

Statement of Particulars:

In or about October 2020, Constable Cartwright while off duty shouted obscenities and derogatory and insulting comments out of his car window at a homeless indigenous man, BB. Several individuals were in the vehicle with Constable Cartwright at this time.

Specifically, Constable Cartwright called BB “fuck face.” Constable Cartwright also used the following words or words that were similar in nature in his interaction with BB:

- Fucking loser, you shouldn’t be here;
- You can’t be begging here;
- Go get a job;
- Put some pants on;
- What are you on;
- We’ll be back for you later;
- Why are you so fucked up?

Constable Cartwright also refereed to BB as a “bum” and a “retard.” As a result of prior dealings between Constable Cartwright and BB, Constable Cartwright was aware that BB is indigenous and is homeless. Constable Cartwright was also aware that BB had a history of substance abuse and mental health issues.

The above actions of Constable Cartwright constitute discreditable conduct contrary to section 2(1)(a)(xi) of the prescribed Code of Conduct.

Count #3 - Insubordination

Constable Cartwright is alleged to have committed insubordination in that, from November 2, 2020, and continuing to February 5, 2021, he failed to comply with written procedures of the Greater Sudbury Police Service regarding officer notetaking and thereby constituting an offence against discipline, as prescribed in section 2(1)(b)(ii) of the Code of Conduct of Ontario Regulation 123/98 as amended.

Statement of Particulars:

Greater Sudbury Police Service Procedure ADM013 (ADM 013) sets out the requirements that police officers must follow in regard to their notebooks and notetaking.

Constable Cartwright had training in regard to notetaking. Moreover, as a police officer, Constable Cartwright is required to be familiar with and to comply with all Greater Sudbury Police Service Procedures.

A review of Constable Cartwright’s notebooks between the period of November 2, 2020, and February 5, 2021, establishes that Constable Cartwright did not comply with ADM 013 in at least 22 of the 39 shifts he worked.

Constable Cartwright's notes were incomplete and lacking information on many occasions. One such example occurred in regard to notes taken on December 23, 2020, in relation to a small child who had been left temporarily unattended in a vehicle. Other examples of incorrect or inaccurate notes are found in the entries on November 2, 9, and 27, 2020. These are only some of the occasions in which Constable Cartwright's notetaking did not comply with ADM 013.

The following sections of ADM 013 were not adhered to:

- Section 4(5) which states:

  No blank lines shall be left between entries except for one blank line between separate tours of duty and separate incidents.
- Section 9(5) which states:

  Officers shall complete all notes pertaining to a shift prior to going off duty.
- Section 9(6) which states:

  Officers shall ensure that their notes are complete, thorough, and accurate, and reflect the reporting requirements of the NICHE Records Management System.

The above actions of Constable Cartwright constitute insubordination, contrary to section 2(1)(b)(ii) of the prescribed Code of Conduct.

Ruling on Motion

For reasons set out in my analysis to follow, the Applicant's abuse of process motion is dismissed.

THE MOTION

A three-day hearing into these allegations was scheduled to commence on November 17, 2021. On November 8, 2021, the Applicant notified the tribunal of his intent to file an abuse of process motion. A conference call was held on November 12, 2021, during which time Counsel agreed to file their respective material expeditiously. The Applicant's Notice of Motion and supporting documents were submitted on the same date, and I received the Applicant's Factum on November 13, 2021.

I received the Respondent's material in reply on November 18, and oral submissions commenced on November 19, 2021, held virtually via Zoom. I thank Counsel for working diligently to ensure this motion was heard on the earliest possible date.

The Applicant commenced his employment with the Greater Sudbury Police Service on December 16, 2019. He completed training at the Ontario Police College and was sworn in as a police officer on April 17, 2020.

Section 44 of the *Police Services Act* states:

(1) A municipal police officer's probationary period begins on the day he or she is appointed and ends on the later of,
  (a) The first anniversary of the day of the appointment;
  (b) The first anniversary of the day the police officer completes an initial period of training at the Ontario Police College.

The offence dates particularized in the Notice of Hearing range from October 2020 to February 2021 and beyond. There is no dispute that at the time of the alleged misconduct, Constable Cartwright was a probationary constable; he was not previously employed by another police service having already completed a probationary term of employment.

Section 44 of the *Police Services Act* continues:

(2) The police officer shall complete the initial period of training within six months of the day of appointment.

(3) A board may terminate a police officer's employment at any time during his or her probationary period but, before doing so, shall give the police officer reasonable information with respect to the reasons for the termination and an opportunity to reply, orally or in writing, as the board may determine.

(3.1) Part V does not apply in the case of the termination of a police officer's employment under subsection (3) …

The Greater Sudbury Police Service was notified by the Office of the Independent Police Review Director of a complaint it had received from Ms. Mandy. On the same date, January 20, 2021, Constable Cartwright was given formal notice of the public complaint. In a report dated March 19, 2021, Greater Sudbury Police Service Chief of Police Paul Pederson, recommended to the Greater Sudbury Police Services Board (Board) that Constable Cartwright's employment be terminated under s. 44(3) of the *Police Services Act*.

The Chief of Police complied with the common law duty of fairness; he notified Constable Cartwright of his intent to seek termination of his employment and he provided legal reasons for this position. The Board provided Constable Cartwright an opportunity to respond and rendered a decision in good faith.

The Board was provided considerable material to consider. It included the investigative report, written submissions from the Greater Sudbury Police Association and submissions from Constable Cartwright in both oral and written form. On April 21, 2021, the Board concluded:

> …the Board has reviewed all material and deliberated on the Chief's Recommendation for Termination and resolved to deny the recommendation. As a result, the probationary period for Constable Cartwright concluded as of April 21, 2021, and he remains a member of the police service.

The Applicant and the Respondent agree that the Chief of Police had the authority to proceed in that manner; it was his right to make application to the Board to seek Constable Cartwright's termination of employment under s. 44(3) of the *Police Services Act*.

On April 29, 2021, the Office of the Independent Police Review Director notified the Greater Sudbury Police Service that Ms. Mandy had standing as the public complainant and therefore, it should not proceed with an internal complaint based on Constable Cartwright's alleged misconduct. The investigation continued accordingly with Ms. Mandy as the public complainant. On May 28, 2021, the Applicant was served with the Notice of Hearing related to this matter. Attached to the Notice of Hearing was a Notice of Increased Penalty informing the Applicant that his employer may be seeking demotion or dismissal if he was found guilty of the alleged misconduct.

The above information was not in dispute. As noted, the Applicant's stance and the original order sought, changed as this motion progressed. Rather than provide a comprehensive overview of the written and oral submissions, I will focus initially upon the submissions made by the Applicant and Respondent to provide context as to how this motion evolved. I will then provide an analysis of the submissions I was ultimately asked to consider.

Applicant's Initial Position

The Applicant submitted that when this matter proceeds to a hearing, the prosecution will be relying upon the same information that was presented to the Board. He submitted that it would be an abuse of process for the prosecution to seek dismissal based on the same set of facts considered by the Board, after the Board has determined dismissal is not appropriate. The Applicant advanced this motion, and initially, sought the following order:

- A stay of proceedings; or
- A setting aside or a vacating of the undated Notice of Hearing in the within proceedings;
- A declaration that Part V of the *Police Services Act* cannot be used to discipline a

police constable who has already been subject to a hearing under s. 44(3) before the Greater Sudbury Police Services Board on the same allegations as those raised in the current proceeding, following which Constable Cartwright's employment was confirmed by the Greater Sudbury Police Services Board;

- A declaration that once the subject of a probationary police officer's employment has been authoritatively dealt with by the Police Services Board on the same allegations seeking to terminate a police officer's employment, any other attempt to re-litigate the issue of the termination of Kyle Cartwright's employment is barred by the principles of cause of *action estoppel* and *res judicata* and constitutes an abuse of process.

The Applicant's Notice of Motion is marked as Exhibit #3, his Factum, Exhibit #4, the Book of Authorities is Exhibit #5 and the affidavit of Sergeant Randy Buchowski is Exhibit #6.

The Applicant submitted that the Greater Sudbury Police Service properly raised and presented their concern to the Board. The facts being relied on by the Greater Sudbury Police Service in relation to this tribunal, and the outcome sought, are based on the same set of facts considered and already determined by the Board. The Applicant submitted that the Greater Sudbury Police Service is seeking to undermine and overrule the decision of the Board by initiating a proceeding under Part V of the *Police Services Act* before this tribunal, acting under the same statute as the Board, with jurisdiction concurrent to that of the Board.

The Applicant submitted the Board declined to terminate Constable Cartwright's employment; the decision under s. 44(3) is theirs alone and it is final. He submitted that a review of the *Police Services Act* does not reveal any right of appeal from the termination or failure to terminate a probationary constable's employment as provided for in s. 44(3) of the *Police Services Act* and no appeal has been taken.

The Applicant submitted that the issue of re-litigation is well established; the applicable doctrines of collateral attack, *issue estoppel*, *res judicata* and abuse of process, all preclude a party from re-litigating an issue already decided in a proceeding in which the same parties participated. As such, the motion should be granted.

The Applicant submitted that the Board exercised a statutory power of decision as defined in s. 1 of the *Judicial Review Procedure Act* which states:

> A power or right conferred by or under a statute to make a decision deciding or prescribing,
>
> (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not, and includes the powers of an inferior court.

The Applicant submitted that such statutory power of decision by the Board is reviewable under the *Judicial Review Procedure Act* as described in section 2 of the *Act,* but the Board's decision has not been challenged through Judicial Review.

The Applicant submitted that the allegations contained in the Notice of Hearing and the associated particulars of allegations, are the same allegations that were before the Board in the application to have the Applicant dismissed. He submitted the same facts are to be re-litigated, albeit in a different forum, before this tribunal. The Applicant submitted the evidence in support of the alleged misconduct in this matter has already been considered by the Board.

The Applicant cited the text *"Administrative Law in Canada (Sixth Edition)"* by Sara Blake. At s. 4.66 the text states:

> The problem of re-litigation of decided issues is addressed by preventing a party, who is dissatisfied with a decision made by one tribunal, from re-litigating the issue before another tribunal. The applicable doctrines are collateral attack, *issue estoppel, res judicata* and abuse of process, all of which preclude a party from re-litigating a question that was finally decided in a proceeding in which that party participated. Final decisions may be challenged only by way of appeal or judicial review. An attempt to challenge them in any other proceeding is an impermissible collateral attack…
>
> The purpose of these doctrines is to strengthen confidence in the fairness and integrity of decision-making processes by ensuring that final decisions can be relied upon, by avoiding inconsistent results and duplicative proceedings, by preventing parties from circumventing the proper channels for review of final decisions and by encouraging respect among tribunals who have overlapping jurisdiction.

The Applicant submitted the Chief of Police, unsatisfied with the decision of the Board, is seeking to re-litigate the same issue already decided by the Board before this tribunal to seek a more favourable result. The Applicant submitted this ought to be deemed an abuse of process by this tribunal.

The Applicant submitted the matter of *Workers' Compensation Board of British Columbia v. Figliola et al.* [2011] 3 S.C.R. 422, wherein the Court stated:

> The three preconditions of *issue estoppel* are whether the same question has been decided; whether the earlier decision was final; and whether the parties, or their privies, were the same in both proceedings.
>
> These concepts were most recently examined by this Court in *Danyluk*, where Binnie J. emphasized the importance of finality in litigation:
>
> > A litigant ... is only entitled to one bite at the cherry... Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
>
> Parties should be able to rely particularly on the conclusive nature of administrative decisions, he noted, since administrative regimes are designed to facilitate the expeditious resolution of disputes. All of this is guided by the theory that "estoppel is a doctrine of public policy that is designed to advance the interests of justice."
>
> The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route…
>
> Administrative law…has review mechanisms in place for reducing error or injustice. Those are the mechanisms parties should use. The decision to pursue a court action instead of judicial review resulted in "an impermissible collateral attack on the Superintendent's [Ontario Superintendent of Pensions] decision."
>
> Modern adjective law and administrative law have gradually established various appeal mechanisms and sophisticated judicial review procedures, so as to reduce the chance of errors or injustice. Even so, the parties must avail themselves of those options properly and in a timely manner. Should they fail to do so, the case law does not in most situations allow collateral attacks on final decisions.
>
> In other words, the harm to the justice system lies not in challenging the correctness or fairness of a judicial or administrative decision in the proper forums, it comes from inappropriately circumventing them.

The Applicant noted that in *Figliola*, the Court summarized five principles applicable to abuse of process:

1) It is in the interests of the public and the parties that the finality of a decision can be relied on.
2) Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, re-litigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings.
3) The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature.
4) Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision.
5) Avoiding unnecessary re-litigation avoids an unnecessary expenditure of resources.

The Applicant submitted that the Court in *Figliola* dealt with the issue of which parties took part in the previous proceedings giving rise to the abuse of process argument by noting:

> The Tribunal concluded that the parties were not the same before the Workers' Compensation Board as they were before the Tribunal. This, the Tribunal held, precluded the application of the doctrine of *issue estoppel*. This too represents the strict application of *issue estoppel* rather than of the principles underlying all three common law doctrines. Moreover, it is worth noting, as Arbour J. observed in *Toronto (City),* that the absence of "mutuality" does not preclude the application of abuse of process to avoid undue multiplicity.

The Applicant submitted that by proceeding under Part *V* of the *Police Services Act* in the circumstances of this case, the commencement of this hearing violates all five of the principles enunciated by the Supreme Court of Canada in *Figliola*.

The Applicant submitted that a tribunal has the authority to grant a stay of proceedings to prevent an abuse of its processes. In *Groat and Quinte West Police Service*, 2001 CanLII 56732 (ON CPC), aff'd [2002] OJ No. 1741 (Div. Ct.), the Commission stated:

> To exercise such exceptional authority, [stay of proceedings] a tribunal must be satisfied that the conduct in question is so wrong that it would violate the conscience of the community, fundamental justice and fair play; prejudices an accused officer or the integrity of justice and that no other remedy is reasonably capable of removing that prejudice.

The Applicant submitted that this *Police Services Act* disciplinary hearing is a serious matter. In the case of the *Law Society of Upper Canada v. Hatcher* [2012] L.S.D.D. No. 28, the discipline hearing panel, affirmed the gravity of the decisions any disciplinary tribunal makes by referring to the Supreme Court of Canada's decision *in Kane v. Board of Governors of U.B.C.* [1980] 1 SCR 1105. The Applicant submitted that the hearing panel noted that one of the core principles from *Kane* is applicable in all Law Society cases where the revocation of a lawyer's licence is at issue, quoting the following excerpt:

> A high standard of justice is required when the right to continue in one's profession or employment is at stake… A disciplinary suspension can have grave and permanent consequences upon a professional career.

The nexus is obvious considering the Notice of Increased Penalty citing dismissal as a potential sanction sought in this case. The Applicant submitted that it is an abuse of process for the Greater Sudbury Police Service to take the position that dismissal could be sought in the face of the Board's decision to the contrary.

Respondent's Initial Written Submissions

The affidavit of legal assistant Monica Ptaszynski is Exbibit #7. The Respondent's Factum is marked as Exhibit #8 and their Book of Authorities is Exhibit #9.

The Respondent opposed the Applicant's initial motion request, submitting that I ought to deny the Applicant's request in full. The Respondent submitted that the Board's process involved different parties, different legal issues, and involved no findings of fact; therefore, *issue estoppel* does not apply. The Respondent added that the Applicant failed to establish that the high bar for abuse of process has been met. The Respondent submitted that it would be fundamentally unfair to the Greater Sudbury Police Service, the public, and to Ms. Mandy, for the parties to be deprived of fully participatory rights in a hearing on the merits during which an appropriate disciplinary response to the Applicant's actions could be addressed.

The Respondent noted that the Chief of Police submitted a report to the Board recommending that it exercise its authority to terminate Constable Cartwright's employment during the probationary period in accordance with section 44 (3) of the *Police Services Act*. The Chief's report which accompanied the recommendation, was submitted to assist the Board in the assessment of the Applicant's suitability. On page two of the investigative report, it stated:

> The discipline process and procedure set out in Part V of the *Police Services Act* does not apply to the termination of a probationary officer under section 44 (3).

> In addition to preparing the fact-finding report to assist the Board in determining suitability, the Professional Standards investigators had also followed the prescribed process under Part V of the *Act* to preserve the ability to proceed under that Part, if required.

The Respondent submitted that the Applicant was provided with a copy of the Chief's Report and responded accordingly. On April 4, 2021, the Sudbury Police Association sent written submissions to the Board setting out its version of the events at issue and the rationale for why the Applicant should not be terminated while on probation. The Applicant also provided written submissions to the Board on April 9, 2021, and made oral submissions on April 21, 2021.

On April 21, 2021, the Board informed the parties that it had denied the Chief's recommendation to terminate the Applicant's probationary employment. Consequently, the probationary period for the Applicant concluded on that day, April 21, 2021.

The Respondent submitted that neither the *Statutory Powers Procedure Act* nor Part V of the *Police Services Act* apply to the proceedings before the Board. The Board did not receive sworn evidence, and no cross-examination occurred. The Board is not required to provide reasons for rejecting the Chief's recommendation for termination. The Board was not asked to decide whether misconduct occurred. The Respondent submitted that the Board and the Applicant were made aware of the possibility that disciplinary proceedings under Part V of the *Police Services Act* might still occur if the Board did not terminate the Applicant's probationary employment.

The Respondent submitted that Ms. Mandy as the public complainant was not a party to the proceedings before the Board. Ms. Mandy was not given notice of the Board meeting or provided with the Chief's Report, or the submissions of the Applicant and the Police Association. In contrast to the proceedings before the Board, the parties to the present hearing are the Prosecutor, the Applicant, and Ms. Mandy.

The Respondent submitted that the issues for this tribunal to determine when considering whether the present proceedings constitute re-litigation and should be stayed, are as follows:

a) Has the Applicant satisfied this tribunal that the rigid requirements of *issue estoppel*, which are concurrent in nature, have been met and that, consequently, a stay of proceedings is warranted?
b) In the alternative, has the Applicant satisfied this tribunal that the present proceedings constitute a collateral attack on the Board's decision?
c) In the final alternative, has the Applicant satisfied this tribunal that the high bar for

abuse of process has been met on the basis of the purported re-litigation issue such that a stay of proceedings is warranted?

In the matter of *Forestall v. Toronto Police Services Board*, 2007 Carswell Ont 5073 (Div. Ct.), the Court stated:

> The Board's responsibility, as set out in s. 31(1) of the *Police Services Act*, is to exercise broad supervisory powers over the Chief and through him, the TPS [Toronto Police Service]. However, it is to act at a policy level, as s. 31(4) states that the Board "shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force." The Supreme Court of Canada observed in *Odhavji Estate v. Woodhouse*… at paragraph 64 that the Board "implements general policy and monitors the performance of the various chiefs of police," but is not involved in the day to day conduct of the police force.

The Respondent submitted there are distinct and separate roles for the Board and the Chief. The Board is responsible, as set out in section 31(1) of the *Police Services Act*, for general oversight of a police service in terms of the objectives, priorities, and policies. The Board has no jurisdiction to interfere with the operational decision-making of the Chief, or into the day-to-day conduct of police officers.

The Respondent submitted the matter of *Toronto Police Association v Toronto Police Services Board*, 2007 ONCA 742 (CanLII) wherein the Court held that police discipline falls exclusively within the jurisdictional regime set out in the *Police Services Act*. The Respondent submitted that the Board did not address the alleged misconduct of the Applicant from a disciplinary perspective because it has no jurisdiction to do so. The jurisdiction for any disciplinary response to the alleged misconduct lies solely with the Chief.

The Respondent submitted that the process in s. 44(3) of the *Police Services Act* is not a hearing, it does not involve a hearing or weighing of evidence, and it is not judicial in nature. The nature of that process was described as follows by Paul Ceyssens in the annotated *Police Services Act:*

> Two judgments in particular have now clarified the distinction between an opportunity to reply orally and a formal oral hearing. In *Payne v. Peel Regional Police Services Board*, the Divisional Court ruled that a police services board ought to provide an opportunity to reply orally, not just in writing, "once issues of credibility are raised." However, the case law did not require that a board is obliged to generally extend procedural fairness and natural justice to the point of allowing sworn evidence and cross-examination "merely because significant issues of

credibility are raised." In this case, the board was not clearly wrong or unreasonable in electing not to permit sworn evidence or cross examination "either at the time that the request was initially made or as the hearing before it unfolded." In *Grandits v. Hamilton Police Services Board,* the Divisional Court confirmed that the obligation in s. 44(3) is only an opportunity to reply, and a board does not have to hold a hearing let alone a quasi-judicial hearing to terminate a probationary officer.

The Respondent submitted the matter of *Angle v. Canada* (Minister of National Revenue – M.N.R.), 1974 CanLII 168 (SCC) and the matter of *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44 (CanLII) which confirmed the three-part test for *issue estoppel* as noted in *Angle*. The Court in *Danyluk* stated:

1) that the same question has been decided;
2) that the judicial decision which is said to create the estoppel was final; and,
3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The Respondent submitted that the Applicant failed to establish that identical parties and identical issues exists, which is required to satisfy the doctrine of *issue estoppel*.

The Respondent submitted that the purpose of the probationary period is to assess the suitability of the officer. The nature of the issue being assessed by the Board was whether the officer was able to meet the requirements of his position. The process by which this assessment is made is quite rudimentary, is not judicial in nature, and provides only for a basic level of procedural fairness for the probationary constable. There is no requirement to receive or weigh evidence, nor was this done in the present case. No reasons were provided. The Board did not consider, nor did it have the jurisdiction to consider, whether the actions of the Applicant constituted misconduct pursuant to the Code of Conduct or what the appropriate penalty should be. Ms. Mandy had no legal entitlement to participate in or be provided notice of the Board process. The nature of the process, and the nature of the issue before the Board, are highly distinguishable from the present proceedings.

The Respondent submitted this tribunal has the authority to grant a stay of proceedings on the basis of abuse of process but noted that a stay is only warranted in situations where to proceed with the hearing, would violate fundamental principles of justice and the community's sense of fair play and decency. A stay of proceedings based on an abuse of process ought to be employed only in the clearest cases of abuse; the abuse must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected. The Respondent submitted this is not one of those cases.

The Respondent submitted that the Board made a decision which is binding as it relates to the application of section 44(3) of the *Police Services Act*, it did not do so by way of a judicial process. The Board did not implement a judicial or quasi-judicial process when making a determination pursuant to section 44(3). The Board did not conduct any adjudication with respect to the facts, the application of the law to the facts, or render any reasons with respect to any such adjudication process. The Board received submissions from the Chief and the Applicant pursuant to its procedural fairness obligations and then simply declined to exercise its authority to terminate a probationary constable's employment. It was not a judicial decision and, accordingly, the concept of *issue estoppel* is inapplicable.

Applicant's Initial Oral Submissions

Following a review of the Respondent's written submissions and at the commencement of oral submissions to be heard, the Applicant amended his position on the order sought. The Applicant conceded that the issues of *issue estoppel* and collateral attack were not viable arguments based on the facts of this case and he would no longer be pursuing those avenues. However, he maintained his position that for the Greater Sudbury Police Service to seek dismissal subsequent to the Board's decision that the Applicant was a suitable candidate for promotion from probationary constable, amounts to an abuse of process.

The Applicant submitted that at the onset of the process, the Greater Sudbury Police Service attempted to preserve the right to proceed under Part V of the *Police Services Act* if their request for termination was declined by the Board. The final report states:

> The discipline process and procedure set out in Part V of the *Act* requiring public hearings for misconduct allegations does not apply to the termination of a police officer under section 44(3). The Professional Standards Branch has provided a fact-finding report to assist in the assessment of Constable Cartwright's suitability under section 44(3) of the *Act*. Professional Standards investigators also followed the prescribed process within Part V of the *Act* to preserve the ability to proceed under that Part if required.

The Applicant submitted that it is not appropriate for the employer to proceed under a different section of the same legislation to obtain a more favourable result. The Board was provided extensive material to review when considering the request for termination and they concluded that the Applicant was suitable for future employment.

The Applicant noted that the allegations before the Board are the same as the allegations particularised in the Notice of Hearing. The Board indicated they had received all material submitted by the Greater Sudbury Police Service, Constable Cartwright and the Police Association. In their correspondence dated April 21, 2021, the Board indicated they had "reviewed all material and deliberated on the Chief's Recommendation for Termination" in coming to their decision to deny the Chief's recommendation of termination.

The Applicant submitted he was no longer seeking a stay of the proceedings. He submitted that the Greater Sudbury Police Service is permitted to proceed under Part V of the *Police Services Act*, but to continue to seek termination constitutes an abuse of process. An abuse of process can result in a stay of proceedings where there is no other remedy available. In this case, the Applicant submitted there is a remedy available to the tribunal. The Applicant sought an order prohibiting the Respondent from seeking termination in the event he is found guilty of misconduct. The Applicant submitted that this issue of employment suitability has already been determined to the satisfaction of the Board and it ought not be re-litigated in this forum.

The Applicant reiterated his position related to abuse of process principles and stated it is an injustice for the employer to seek termination once the Board has already determined termination is not warranted considering the same set of alleged facts. He submitted that the remedy to defeat that injustice and to alleviate prejudice, is an order preventing the Respondent from seeking dismissal.

The Applicant cited a number of cases in support of his position. He submitted that to allow the Greater Sudbury Police Service a second shot at having the Applicant's employment terminated when this issue has already been addressed by the Board, meets the threshold of abuse of process. He sought an order to remove the dismissal wording from the increased penalty notice.

<u>Respondent's Initial Oral Submissions</u>

I heard oral submissions from the Applicant in relation to his revised position on this motion. I heard limited oral submissions from the Respondent in reply, but in fairness, the Respondent was ill prepared to respond to the revised position of the Applicant. Consequently, with the consent of the Applicant, an adjournment was granted to provide the Respondent sufficient time to answer this new aspect of the Applicant's motion.

Respondent's Oral Submissions

The Hearing reconvened virtually on November 25, 2021. The Respondent submitted that the motion should be dismissed, or the decision deferred until following a hearing into the merits of the allegations. The Respondent made comprehensive oral submissions in support of this position, but I will provide only a brief overview for the purpose of this decision. Of note, the Respondent submitted a Supplementary Factum, marked as Exhibit #10 and a Supplementary Book of Authorities marked as Exhibit #11.

The Respondent submitted that the Board had one purpose only which was to determine, based on the information provided, whether the Applicant was suitable for employment. Ms. Mandy was not involved in that process as the public complainant and in fact, was not even aware of its existence at the time. This in and of itself separates the Board's process from Part V of the *Police Services Act* which includes a hearing into the allegations, where evidence can be contested, such as *viva voce* evidence being subjected to cross examination. There is no standard to which the Board must adhere. The Board is not in the business of disciplining police officers, they do not have that power. A decision by this tribunal must be grounded in evidence with reasons provided. The Board offered no such reasons explaining its rationale. Unlike this tribunal, the Board is not guided by jurisprudence.

The Respondent submitted that common sense does not always prevail in legal matters, but it ought to in this instance; it simply does not make sense that a Chief of Police cannot seek termination if a probationary officer is found to have committed serious misconduct which warrants dismissal based on the facts and corresponding jurisprudence.

The Respondent submitted that it is inappropriate for the Applicant to seek an advisory ruling on what the penalty might be in advance of a finding of guilty. Failing to provide such a ruling does not amount to an abuse of process; it should be dealt with at the penalty phase if the officer is ultimately found guilty of misconduct.

The Respondent submitted that the tribunal should be aware of all the facts before considering such a request and there is no evidence before the tribunal at this time. The Respondent submitted that jurisprudence suggests that a decisionmaker should refrain from making preliminary rulings based on hypothetical facts, where the matter in question has not yet crystallized.

The Respondent submitted that this tribunal should not provide a ruling on a preliminary matter, where the issues raised are intertwined with evidence that will be heard with respect to the merits. The Respondent submitted that in order to make any determination

as to whether a position by the Greater Sudbury Police Service on disposition amounts to an abuse of process, it will be necessary for this tribunal to hear all of the surrounding circumstances. This includes the merits of the disciplinary charges and the manner in which the prosecution unfolds. It is only then, with a full evidentiary record that the issue of abuse of process can be properly examined by the tribunal.

The Respondent submitted that the Greater Sudbury Police Service may not even seek dismissal, that cannot be known until this tribunal makes certain findings based on a proper evidentiary foundation. The Respondent submitted an appropriate penalty is inextricably interwoven with the findings following a hearing and any consideration of the issue of abuse of process ought to be denied or deferred until a decision on the merits has been rendered and a position on penalty by the Service is finalized.

Applicant's Oral Submissions in Reply

The Applicant submitted the issue is a narrow one, whether the Greater Sudbury Police Service can seek dismissal before this tribunal following the decision of the Board to deny the Chief's request for termination. The Applicant noted that the Board considered the full investigative report submitted for their review by the Greater Sudbury Police Service; it contained the same evidence which will ultimately appear before this tribunal. The Applicant submitted it is an abuse of process to re-litigate an issue which has already been determined. The remedy is not a stay of proceedings. The Applicant conceded that the employer has the right to seek discipline, it is the potential dismissal of the Applicant which establishes an abuse of process. As such, the Applicant sought an order prohibiting the Respondent from seeking dismissal.

Analysis

Section 23(1) of the *Statutory Powers and Procedures Act* states:

> A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent an abuse of its processes.

In *Groat,* the Commission cited section 23 (1) the *Statutory Powers and Procedures Act* and stated:

> It has been established that in the "clearest of cases" this can include a stay of proceedings.
>
> To exercise such exceptional authority, a tribunal must be satisfied that the conduct in question is so wrong that it would violate the conscience of the community, fundamental justice and fair play; prejudices an accused officer or the

> integrity of justice and that no other remedy is reasonably capable of removing that prejudice. The onus is on the subject officer.

I agree with the submissions of Counsel and find that I have the authority to grant a stay of proceedings or in lieu, give orders which will prevent an abuse of the tribunal's processes. In this instance, the Applicant conceded a stay of proceedings is not warranted because a remedy, reasonably capable of removing prejudice and fundamental justice, exists. The Applicant has sought an order directing that the Respondent cannot seek dismissal as a sanction in the event the Applicant is found guilty of misconduct.

The Applicant submitted the matter of the *Ontario Provincial Police and Horton*, August 12, 2016, where the hearing officer ordered a stay of proceedings for an abuse of process. The circumstances are not akin to those in this matter, but the consideration given to the principles of abuse of process in a *Police Services Act* tribunal are similar. The hearing officer in *Horton* stated:

> The issue of re-litigation was addressed in *Toronto (City) v. C.U.P.E., Local 79*, a leading decision on abuse of process. In that case, Arbour J. wrote for a unanimous Supreme Court of Canada that abuse of process applies where proceedings are "unfair to the point that they are contrary to the interests of justice". The doctrine has been used to prevent re-litigation in circumstances where the requirements of *issue estoppel* are not met but where allowing the litigation to proceed would violate principles such as judicial economy, consistency, finality and the integrity of the administration of justice. Its primary focus is the integrity of the adjudicative functions of the court.
>
> Abuse of process is a common law doctrine which allows a proceeding to be stayed in cases when allowing the matter to proceed would be oppressive. The *Statutory Powers Procedures Act* grants administrative tribunals the discretionary remedial power to grant a stay of proceedings to remedy an abuse of process.
>
> The doctrine of abuse of process, in the administrative context, is fundamentally about protecting people from unfair treatment by administrative agencies…

It is agreed that the Applicant was a probationary constable at the time of the alleged misconduct. Therefore, the matter was properly before the Board when the Chief of Police sought the Applicant's termination under Section 44 (3) of the *Police Services Act.*

On April 21, 2021, the Board denied the Chief's recommendation that the Applicant be terminated after considering all material submitted to them for review. The Board determined that the Applicant was suitable for employment as a police officer. On May 28, 2021, the Applicant was served with a Notice of Hearing that directly related to the allegations which had been presented to the Board. The Applicant was also served notice that the Greater Sudbury Police Service could be seeking demotion or dismissal if he was found guilty of the alleged misconduct. Attached to the Notice of Hearing served upon the Applicant on May 28, 2021, was a Notice of Increased Penalty. It states:

> Take Notice that pursuant to Section 85(4) of the *Police Services Act*, the penalty of dismissal or demotion may be imposed if the misconduct or the unsatisfactory work performance with which you are charged is proved on clear and convincing evidence.

The issue concerning this motion is very specific; does the fact that the Greater Sudbury Police Service may be seeking dismissal amount to an abuse of process knowing that the Board determined the Applicant is a suitable candidate for police officer? To make such a finding, as noted in *C.U.P.E*, I would have to conclude that the serving of the Notice of Increased Penalty which includes the option of dismissal, is unfair to the point that it is contrary to the interests of justice. Furthermore, I would have to conclude that allowing the litigation to proceed with dismissal available to the Respondent following the Board's decision on suitability, would violate principles such as judicial economy, consistency, finality, and the integrity of the administration of justice.

It is the role of this tribunal to determine at hearing, whether the evidence proves that the allegations are substantiated based on clear and convincing evidence. If so, the tribunal must then determine the appropriate sanction. In both instances, a tribunal such as this must provide reasons which demonstrate justification of the decision, transparency, and intelligibility. This is a very different role than that of the Board. The Board has no authority to discipline a police officer, and therefore has no experience in this area. The Board is not guided by jurisprudence, nor must they consider the principles which govern the determination of a fitting disposition related to a police discipline matter.

The role of the Board in this case was to determine the suitability of the Applicant as a member of the Greater Sudbury Police Service. The Board did not provide reasons and was not guided by disposition factors such as consistency of penalty. The Board fulfilled its role properly and appropriately. The Board determined that the Applicant had not nullified his usefulness to the Greater Sudbury Police Service, a conclusion that was entirely permissible.

However, I do not accept that the Board's decision is binding upon this tribunal, and I do not find that having dismissal on the table as a potential disposition available to the Respondent amounts to an abuse of process. The Board's authority to determine the suitability of a probationary constable is derived from Section 44(3) of the *Police Services Act.* That section is unrelated to Part V of the *Police Services Act* which speaks to complaints and disciplinary proceedings. There is nothing in statute or common law that indicates a Chief of Police cannot initiate disciplinary proceedings following a decision of the Board to not terminate a probationary constable. The Applicant in fact conceded that it is appropriate to proceed to a hearing, he is not seeking a stay of the proceedings. But the same concept applies to the sanction which could be sought in those disciplinary proceedings.

Section 44 (3.1) of the *Police Services Act* states that Part V does not apply in the case of termination of a probationary constable by the Board. Ceyssens stated that this section denotes that the probationary constable is not afforded the greater procedural protections found in Part V. The legislation does not indicate that it is permissible to proceed to a hearing following the Board's decision not to terminate a probationary constable but not to seek dismissal. The two processes, the Board's decision on suitability and a disciplinary hearing are not intertwined, they are completely separate with disparate matters of responsibility and accountability. I find that it is perfectly reasonable for a Chief of Police to consider dismissal as an appropriate sanction in situations where an officer has been found guilty of serious misconduct and the penalty factors warrant such as a severe penalty.

Clarification was sought from the Applicant as to whether the public complainant in this matter could seek dismissal if there is a finding of guilty following a hearing. The Applicant conceded that because the public complainant has standing during the hearing, she could not be prevented from seeking termination; she was not involved in the decision to seek termination before the Board and was not responsible for serving the Notice of Increased Penalty. I agree.

Section 83 of the *Police Services Act* states:

(1) A hearing held under subsection 66(3), 68(5), 69 (8), 76(9), or 77(7) shall be conducted in accordance with the *Statutory Powers and Procedure Act*.
(2) Subsections (3), (4) …apply to any hearing held under this part.
(3) The parties to the hearing are the prosecutor, the police officer who is the subject of the hearing and, if the complaint was made by a member of the public, the complainant…

Section 83 states that the public complainant in a disciplinary proceeding such as this has standing, meaning they are permitted to call evidence, pose questions to witnesses in chief and cross examinations, and to make submissions. This applies to the hearing proper and to disposition hearings. In the event there is a finding of guilty to any of the alleged counts of misconduct, Ms. Mandy ought not be prevented from seeking whatever sanction she deems appropriate. It would be improper for this tribunal to inform Ms. Mandy that she was restricted as to what stance she could take in terms of a fitting sanction. Furthermore, Ms. Mandy should not be asked to determine what her position on penalty will be until such time that all the evidence has been heard and my findings presented in written form. I am left to ponder then, how can it be an abuse of process for the employer to seek dismissal when the public complainant with standing is permitted to take such a position? The simple answer is it cannot be considered an abuse of process; having the employer seek dismissal knowing that the public complainant already has this option available would not violate the conscience of the community, fundamental justice, or fair play. It would not prejudice the Applicant or the integrity of justice because dismissal can properly be sought by one of the parties already.

In *C.U.P.E,* the Court considered the issue of abuse of process, noting:

> Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that that are contrary to the interest of justice" and as "oppressive treatment."

This tribunal must adhere to the principle of procedural fairness which includes ensuring protection against re-litigation of a specific issue. It is the responsibility of this tribunal to maintain the integrity of the administration of justice and to not proceed in a manner that is manifestly unfair to the subject officer. I do not accept that proceeding to a hearing with the Applicant knowing that dismissal may be sought by the Respondent is unfair, contrary to the interest of justice, or oppressive treatment. On the contrary, it is the employer's right to seek demotion or dismissal in a disciplinary tribunal such as this and it is the employer's obligation to notify the Applicant whenever this is the stance they are taking on penalty.

Following the conclusion of oral submissions, I asked the Applicant whether it would be an abuse of process if the matter of dismissal was not addressed until submissions were received pertaining to sanction. The Applicant conceded it would not be an abuse of process if the matter was held down until that time. Based on this concession alone, I am unable to conclude that the serving of the Notice of Increased penalty in this matter amounts to an abuse of process. Not only is a stay of proceedings not warranted, but a remedy is not appropriate for an abuse of process that does not exist.

Conclusion

It is clear to me that the threshold amounting to an abuse of process has not been met. The Board's decision does not impact this tribunal. The Applicant conceded that the public complainant has standing and has the right to seek dismissal. To suggest then that the employer could not seek dismissal because the Board found the officer suitable for employment is illogical.

Even if there was no public complainant in this matter, I would still have difficulty finding an abuse of process resulting from re-litigation exists. While the Board's decision was determined in accordance with the *Police Services Act*, I do not find the concept of litigation applied. The Board only considered suitability for employment; this tribunal is responsible for dealing with the disciplinary hearing. There is a significant disparity in the roles of the Board and this tribunal.

This decision does not prohibit the Applicant from making submissions on penalty, if necessary, relating to why dismissal should not be considered an appropriate sanction. The Applicant's submissions as to why the Board found the Applicant suitable for employment may be relevant at that time.

Decision

The Applicant's request to have an order to have dismissal struck from the Notice of Increased Penalty is denied.

Greg Walton
Superintendent (Ret.)
Ontario Provincial Police

Date electronically delivered: December 3, 2021.