

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

BETWEEN: **THE CHIEF OF POLICE, BATHURST POLICE FORCE**

Complainant,

- and -

CONSTABLE MATHIEU BOUDREAU

Respondent.

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Complainant,

- and -

CONSTABLE PATRICK BULGER

Respondent.

DECISION

Merits

Appearances: Basile Chiasson, Q.C., for the Complainant in both matters
 Thomas J. Burke, Q.C., for the Respondent Boudreau
 Brian D. Munro, for the Respondent Bulger

Hearing (on merits): October 16, 17, 18, 21, 22, 23, 24, November 4, 22, and December 9, 2019.

Decision: December 24, 2019.

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I. **INTRODUCTION**

1. I was appointed on June 26, 2018 to arbitrate the Complaints of Chief Ernie Boudreau (Chief Boudreau) of the Bathurst Police Force against Constables Patrick Bulger (Bulger) and Mathieu Boudreau (Boudreau). Chief Boudreau's Complaints date back to December 3, 2015. The parties requested that I hear both matters at the same time, as permitted by section 15 of the *Regulation 2007-81*, under the *Police Act*, S.N.B. 1977, c. P-2 (the *Act*). I agreed. This *Regulation* is known as the *Code of Professional Conduct Regulations – Police Act*, and I will refer to it later in these reasons as "the *Code*". The parties raised a number of preliminary issues including four requiring that I provide written rulings¹. This explains the delay between my appointment and the hearing of evidence which only began in October 2019. I also issued a 14-page decision on October 28, 2019 finding that a *prima facie* case had been made out by the Complainant for purposes of sections 29 and 30 of the *Code*.

2. The charges levied against both officers are the same:

Count 1

It is alleged that you, [both constables], On or about January 12, 2015, did improperly use and carry a firearm, as per subsection 35(g), of the N.B. *Police Act (sic)* and as described in s. 42²

42 *A member of a police force improperly uses and cares for firearms if the member*
(c) fails to exercise sound judgment and restraint in respect of the use and care of a firearm.

¹ Exhibit 3, tabs 9 to 12.

² All of the references to the *Police Act* in the various counts should be to the *Code* instead. The Notices of Arbitration Hearing – found at tabs 3 and 4 of Exhibit 3 – clearly and appropriately state that the allegations are of breaches of the *Code*.

Count 2

It is alleged that you, [both constables], On or about January 12, 2015, did abuse his authority, as per subsection 35(f), of the New Brunswick *Police Act* and as described in s. 41

*41 A member of a police force abuses his or her authority if the member
(b) uses unnecessary force on a person.*

Count 3

It is alleged that you, [both constables], On or about January 12, 2015, did neglect your duty as per subsection 35(b), of the New Brunswick *Police Act* and as described in s. 37

*37 A member of a police force neglects his or her duties if the member
(b) fails to work in accordance with official police force policies and procedures.*

Count 4

It is alleged that you, [both constables], On or about January 12, 2015, acted in a discreditable manner as per subsection 35(a), of the New Brunswick *Police Act* and as described in section 36,

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

Count 5

It is alleged that you, [both constables], On or about January 12, 2015, acted in a discreditable manner as per subsection 35(a), of the New Brunswick *Police Act* and as described in section 36,

36(1) A member of a police force engages in discreditable conduct if the member

(b) while on duty, is oppressive or abusive to any person

3. These charges relate to a tragic incident which took place in the morning of January 12, 2015 at the Bathurst train station and which resulted in the death of Michel Vienneau. It is undisputed that Boudreau shot and killed Vienneau. I must decide if Boudreau and Bulger breached the *Code* on that day, and if they did, I must determine what sanction is appropriate in the circumstances³.
4. I will not to rule on the conduct of anyone other than that of Bulger and Boudreau. I state this obviosity for two reasons: First, I have to make findings on the reliability of the evidence proffered by a number of witnesses – which will entail rejecting some testimonial evidence. I also have to make findings of fact which may paint certain witnesses in a bad light. These findings are not intended to cast aspersions on the character of anyone and ought not to be interpreted as such. Second, it is not my role to make an exhaustive analysis of the factors that lead to Michel Vienneau’s untimely demise. I may consider some of these intervening factors but my goal is not to provide definite answers on anything other than the conduct of the Respondents and whether this conduct violates their obligations. In other words, this decision will not provide answers to all unanswered questions surrounding the death of Mr. Vienneau.
5. In the course of this part of the hearings, I heard evidence from 13 witnesses and received 16 exhibits⁴ comprised of hundreds of pages. I also took copious notes. Counsel also submitted Briefs on Law and copies of authorities, and I was provided with recordings of parts of the proceedings.

³ Section 32.6 of the *Act*, and section 6 of the *Code*.

⁴ Listed at the end of this Decision.

II. BACKGROUND

Introduction

6. Michel Vienneau died on January 12, 2015 as a result of being shot by Cst. Mathieu Boudreau at the Bathurst train station. Vienneau was coming back from Montreal on the train. He was accompanied by his spouse, Annick Basque. Boudreau fired his weapon four times and hit Vienneau twice. According to Boudreau, he had no choice. If he didn't stop Vienneau, Bulger would be hurt or killed. Bulger was in the area of the front of Vienneau's vehicle with his back to a snowbank when Boudreau shot Vienneau. Bulger shot at the back tire of Vienneau's vehicle, but missed.
7. Aside from Boudreau and Bulger, four other police officers were at the Bathurst train station when the shooting took place: RCMP Cst. Denis Lajoie⁵, BNPP⁶ Sgt. George Richard, Miramichi Police Force Cst. Larry Matchett, and Bathurst PF Cst. Julie Daigle. Other than Daigle, the other officers were members of the Northeast Integrated Intelligence Unit (NEIU, the Unit).

NEIU - the Unit

8. The Unit operated out of the Bathurst Police headquarters and was managed by Sgt. Ron DeSilva⁷ who was seconded to the Unit from his position in CIS (the Criminal Intelligence Section of the RCMP). Formed a few years before, the Unit's mandate was to gather intelligence, collect information, evaluate it, and hand it out to other police forces in the area. Its purposes included facilitating information sharing between the police forces with jurisdiction in the area: RCMP, BNPP, Bathurst PF, and Miramichi PF. The Unit's focus was drugs and organized crime.

⁵ Since then promoted to the rank of Sgt.

⁶ Beresford, Nigadoo, Petit-Rocher, Pointe-Verte police force.

⁷ Since then promoted to the rank of Inspector in the RCMP.

9. DeSilva was the NCO i/c⁸ of the Unit and supervised its operations. In his absence, another member of the Unit would assume these responsibilities. While working in the Unit, its members would report to DeSilva but also retained their status in their respective home force and reported to their own unit on employment-related issues. Bulger and Boudreau both came from the Drug Section in the Bathurst PF⁹ and they continued doing their “drugs work” with the Bathurst PF while assigned to the Unit, including tactical work related to warrants and acting on information on drugs.

10. Bulger was assigned to the Unit in 2013 and Boudreau in July of 2014¹⁰. According to the Project Harman Report, they “added an operational component to what had been primarily an intelligence gathering Unit”¹¹. In order to have status as a peace officer throughout Canada, which would be necessary if their work in the Unit required them to work outside of the province, they had been appointed Supernumerary Special Constables¹².

11. All members of the Unit normally reported for work at the Bathurst PF Headquarters. Their space was next to the Bathurst PF Chief’s office. They were not expected to wear a police uniform. They wore civilian clothing which enabled them to conduct surveillance covertly. The Bathurst PF members of the Unit got a

⁸ Non-commissioned officer in charge of.

⁹ Part of the GIS or General Investigation Section, now called CID or Criminal Investigation Division.

¹⁰ Bulger’s and Boudreau’s status as members of the Unit is not straightforward: Cst. Matchett stated that they weren’t part of the Unit “*but they worked out of our office*”. Sgt. George Richard said that Bulger and Boudreau were members of the Bathurst PF’s drug unit “on loan... they moved into our offices and were assisting us in investigations”. DeSilva testified that they were “*part of the Bathurst Unit*”. He added, on cross-examination by Mr. Burke that he thought they were part of the Bathurst PF Drug Unit. In redirect, he stated that Bulger and Boudreau were used as a tactical unit as needed. Finally, in his Performance & Development Evaluation of Boudreau covering the period of September 2014 to February 2015, DeSilva wrote that Boudreau had been “*transferred under my supervision in September 2014 following a decision by the Bathurst Police department to re-organize the reporting structure of the two Bathurst Police department drug members. As of July 2014, both Bathurst Drug members report to the NCO i/c of NEIU*”. (Exhibit 5, tab 28, at page 83). Bulger’s and Boudreau’s relationship with the Unit is similarly described at pages 5 and 30 of the “Project Harman” Report, found at tab 42 of Exhibit 5.

¹¹ Exhibit 5, tab 42, page 5.

¹² Exhibit 5, tabs 24 and 25.

yearly stipend for clothing. The Force provided them with a firearm, handcuffs, a badge, soft body armour, pepper spray, notepads etc. The Unit also had access to binoculars and cameras. Its members communicated with each other using a digitally encrypted system (DES) radio so that their communications would not be intercepted with scanners.

12. As members of the Drug Unit, Boudreau and Bulger were assigned a 2009 Pontiac G6 by the Bathurst PF. Boudreau drove it home at night. The vehicle was outfitted with the following emergency equipment:

- Police Radio (Bathurst PF);
- Police Light Bar;
- Blue light in passenger headlight assembly (not operational)¹³;
- “Wig wags” (alternating flashing lights) in high beams;
- Red light in the driver headlight assembly (not operational)¹⁴;
- Siren (not operational)¹⁵; and,
- P.A. system (not operational).

Cst. Bulger and Cst. Boudreau

13. Bulger joined the Bathurst PF as a casual officer in January 2006. He was appointed to a regular position in the late summer 2008. He initially worked in “general duty” – patrolling and responding to 911 calls – until 2013, when he was assigned to the Drugs section. This is also the year he was assigned to the Unit. Prior to joining the Bathurst PF, he had worked as a paramedic since 1997.

¹³ Exhibit 5, tab 42, page 43.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

14. Bulger's Performance & Development Evaluations¹⁶ show steady improvement in his work. His 2015 evaluation, completed by DeSilva on February 10, 2015, is quite complimentary:

Cst. Bulger is an asset to both the NEIU and the Bathurst Police Department. His persistence towards drug investigations and his tenacity towards the recruitment of new confidential human sources will begin to pay off in the near future as the Bathurst Police drug members along with NEIU begin to target dealers in the greater Bathurst area¹⁷.

15. Chief Ernie Boudreau himself concurred with a very positive review for 2018, writing:

Concur Cst Bulger has made big strides during such a difficult time in his career. Keep up good work¹⁸.

16. By all accounts, Bulger is a conscientious and dependable police officer. According to DeSilva, Bulger "is the consummate professional"¹⁹.

17. The same also applies to Boudreau, who joined the Bathurst PF in 2009. All of his evaluations are very positive, with his performance often rated as being excellent. His supervisor concludes, in an October 2014 evaluation, that he "*has the potential to be the future leadership of Bathurst PF.*"²⁰ This is an extremely strong endorsement for a junior officer. DeSilva stated on cross-examination that he had no concerns with Boudreau's performance in January 2015 and that he was a good officer.

¹⁶ Exhibit 5, tab 27 : evaluations for 2010-2011, 2012, 2012-2013, 2014-2015, and part of 2018 were provided.

¹⁷ *Idem*, at page

¹⁸ *Idem*, at page 77.

¹⁹ Stated not long before the end of his cross-examination by Mr. Munro.

²⁰ Exhibit 5, tab 28, at page 69.

January 12, 2015

18. All members of the Unit were at work on Monday January 12, 2015, save for Bathurst PF Sgt. Roger Melanson, who was away on training, when DeSilva read an emailed Crime Stoppers tip reporting that Michel Vienneau and Annick Basque would arrive by train in Bathurst at 8 am on January 12, 2015, and that they would be carrying drugs. The email confirmed that Vienneau drove a white 2013 Cruze. It was approximately 9:50 am. The tip was dated January 11, 2015, the previous day (a Sunday, when no one from the Unit was at work). Given that it was past 8 am, DeSilva told Bulger that he had “missed a load of drugs”. Bulger called the train station and was told the train was delayed and would arrive at approximately 10:45 am.
19. DeSilva received a second Crime Stoppers tip a few minutes later, this one dated January 12, 2015, and time-stamped 8:26 am. In it, the tipster revealed that the drugs were pills, that Vienneau was 50 years old, that Basque was 38 years old, that they were from Tracadie, and that they had been drinking²¹.
20. DeSilva assigned Bulger and Boudreau to investigate the tip and asked the “intel unit” to assist them. He ran Michel Vienneau’s name in “PROS” (Police Reporting and Occurrence System), an RCMP database of information on individuals who have criminal records or who have been documented by police. He found nothing useful.
21. Richard checked the Service NB portal where he obtained a picture of Vienneau from his driver’s licence and he was able to confirm that Vienneau was the registered owner of a white Cruze and obtain its licence plate number.

²¹ All versions of this event were pretty consistent. Additional information was found in a “Can-Say Statement” of DeSilva of January 14, 2015 found at page 33 of tab 33 of Exhibit 5.

22. Matchett left for the train station. He arrived there first and confirmed the white Cruze was in the parking lot. He reported this information back to the Unit and parked his unmarked police vehicle (a black Ford Explorer) at the corner of Thornton Avenue and Queen Street, where he could keep an eye on the Cruze.
23. In the meantime, still at the police station, Boudreau walked to the GIS section of the Bathurst PF to ask if any officers could come assist in the drug investigation or drug bust. Cst. Julie Daigle sought her supervisor's permission. Sgt. Marc Cormier gave her his blessing and the keys to his unmarked vehicle, a Chevrolet Impala. She grabbed her gear (side arm, vest, and notebook) and left shortly after. Bulger briefed then Sgt. Ernie Boudreau (he would later be promoted Chief), who was the sergeant on shift, about the situation possibly involving drugs coming to the train station from Montréal so that he would make sure no marked vehicles were in the vicinity and to advise a marked cruiser might be needed in case an arrest was made.
24. As Bulger and Boudreau were getting ready to leave, DeSilva told them not to "get into a chase" – or words to that effect. They arrived at the train station at approximately 10 am and parked one parking space away from the Cruze, facing the tracks (west).
25. Daigle arrived shortly after and parked between Bulger and Boudreau's G6 and the Cruze. Bulger, sitting in the passenger's seat, handed her a DES radio through the window, and she left to go park across the street from the train station, on the East side of Thornton Avenue.
26. Richard and Lajoie, who had difficulties starting the unmarked Dodge Caravan police vehicle they were going to use in this operation, were the last two members of the Unit to arrive at the train station. They got there approximately 15 minutes after Bulger and Boudreau. Lajoie contacted Bulger who told him to cover the northbound route, north of the train station on Thornton Avenue. Lajoie and

Richard parked facing south in a school parking lot on Duke St. They could not see the Cruze and would have to rely on updates from Bulger to know what was going on.

27. While they waited, Bulger refined his plan to intercept Vienneau and Basque.
28. The Unit was communicating using the DES system and text messages. Bulger, who was the “lead” on this operation, advised the team that they would be arresting Vienneau. If Vienneau left northbound, they would let him drive beyond the train station to give him the opportunity to pick up any luggage (drugs) he might have left at the station. Under this scenario, Lajoie and Richard would block him after he left the station, with Daigle and the others blocking a southbound escape. If he headed south, Boudreau and Bulger would block him by positioning their vehicle in front of and facing the Cruze, and Daigle would block him from behind, again with the other officers moving in.
29. The train finally arrived at approximately 11:20 am. Vienneau and Basque walked over to their vehicle. They placed a backpack and possibly another article in the trunk of the car and Vienneau brushed the snow off. He then took a few pictures or a video of the train and returned to the car.
30. Vienneau backed up in a northerly direction on Thornton Avenue, confirming his intention to head south. Bulger advised the other members of the Unit of what was happening and told Daigle to proceed (to block Vienneau from behind). At the same time, Boudreau backed the G6 on Thornton Avenue so that the cars would face each other. Boudreau activated the emergency lights on the G6 as he started backing up or while backing up.
31. Bulger got out of his vehicle first, quickly followed by Boudreau. They both yelled “Stop, Hands-up”, and according to the Respondents, “Police”. Vienneau did not stop. He pressed the gas, heading forward. The Cruze came into contact with the

G6 then headed east, in Bulger's direction. He continued yelling and backing away from the Cruze, at one point falling then getting back on his feet, always heading to the right of Vienneau's Cruze, which kept heading in his direction, motor revving and tires spinning, heading east and eventually northeast, until it drove into the snowbank on the east side of Thornton Avenue.

32. As the Cruze proceeded towards the snowbank, Boudreau, who was initially behind and then on the driver's side of the Cruze, continued yelling, eventually firing two shots through the driver's side rear window. He kept moving towards the front of the Cruze, reassessed the situation, and fired two more shots in Vienneau's direction, through the driver's door window. When these latter shots were fired, the Cruze was either stopped or about to stop in the snowbank²². At approximately the same time, Bulger, who was on his side in front or on the passenger's side of the Cruze, took a shot aimed at the back tire of the Cruze. He missed.
33. After Boudreau's last shots, the revving stopped, and Vienneau put his hands out.
34. By this time, all Unit members were close by. Vienneau was taken out of his vehicle by Lajoie and Richard. Lajoie, a former paramedic started providing medical assistance to Vienneau and was soon joined by Bulger and others. One of Boudreau's bullets had pierced both of Vienneau's lungs and his heart. He was taken away by ambulance and passed away.
35. Annick Basque was placed under arrest by Cst. Jeff Chiasson of the Bathurst PF and later released.
36. Nether Basque nor Vienneau had any drugs with them. The Crime Stoppers tips were false. There is no evidence that Michel Vienneau was ever involved in drug trafficking.

²² This is an important issue and will be discussed in more detail later in these reasons.

37. These events were witnessed by Gérald Jean who was at the train station to meet his sister and mother, and by Joseph Sutton and Wayne Coster, both locomotive engineers for VIA, who were operating the train. They had gotten off the train by the time the incidents took place. There were other non-police witnesses to the incident, but only these 3 were called to testify.

Project Harmon and the Aftermath

38. Later that day, Insp. Larry Wilson, the Officer in Charge of Major Crime for RCMP – “H” Division in Nova Scotia was directed by his superior, C/Supt. Marlene Snowman, to conduct an investigation into the events to determine if there were grounds for criminal code charges against Boudreau and Bulger. Specifically, he was required to determine if “the level of force used by the police officers was an appropriate response to their situation”. He immediately started assembling a team of 20 or so officers and experts who began arriving in Bathurst the following morning.
39. Wilson produced a detailed 52-page report in July 2015 – the “Project Harman – Assist Bathurst Police Force” report²³ to which was appended a 23-page “Use of Force Review” prepared by S/Sgt. Kevin M. Surette, RCMP.
40. Both the Report and the Review, which are generally favourable to the officers, were submitted to NB Public Prosecutions. The New Brunswick Crown laid charges against the officers on November 19, 2015, but these were dismissed on February 24, 2017 following preliminary hearing proceedings held from August to October 2016. A judicial review of this decision was dismissed on October 20, 2017. The Crown did not appeal²⁴.

²³ Exhibit 5, tab 42.

²⁴ This background information on Criminal Code charges was discussed during the hearing. More specific information is also found in the Notices of Arbitration Hearing, found at tabs 3 and 4 of Exhibit 3.

41. At one point, the officers were suspended with pay under section 26.8 of the *Act* and remain so to this day.

III. ISSUES

42. Section 32.6 of the *Act* requires that I determine whether the officers are guilty of a breach or of breaches of the *Code*, and if so, that I impose one of the sanctions listed at section 6 of the *Code*.
43. I must, for each of the counts reproduced at paragraph 2 of the decision, decide if the Respondents engaged in the alleged misconduct.

IV. ARGUMENT OF THE PARTIES

Argument on behalf of the Complainant

44. The Complainant's main theme is that the unfortunate events of January 12, 2015 are the result of an "officer-created jeopardy". In his view, the two officers decided to "effect a joint venture ... to arrest Michel Vienneau and Annick Basque on the strength only of two Crime Stoppers tips", which are unreliable. Three episodes are to be considered: 1 – at the police station, 2 – at the train station, before Vienneau and Basque arrive at their vehicle, and 3 – after the train arrived, before and after Vienneau and Basque got into their vehicle. Mr. Chiasson filed a 96-page Brief on Law outlining his main arguments and referencing relevant case law. He also commented on the evidence of all witnesses at pages 12 through to 59. Oral arguments to supplement the briefs and to respond to the opposite party's submissions were heard on December 9, 2019.
45. According to the Complainant, the mandate of the Unit, including that of the Respondents that morning, was to investigate the Crime Stopper tips – not to take tactical action (detention or arrest). That is what was expected of them by their

supervisor and by the other members of the Unit. On the way to, or at the train station, the Respondents hastily came up with a plan to arrest Vienneau and Basque, to “show their mettle”, says the Complainant. They had no right nor authority to attempt to detain or arrest Vienneau and Basque, and could not conduct an investigative detention in order to determine if they were up to no good. Instead of waiting for Vienneau and Basque to leave in their vehicle, the Respondents could have, and should have if they felt the need to confront them, do it while they were still outside of the vehicle. The Complainant argues that the Respondents did not properly identify themselves and that is why Vienneau and Basque reacted as they did. The Respondents are therefore to blame for how the events unfolded.

46. Mr. Chiasson rightly argues that much of the evidence presented was contradictory and that I will have to assess not only credibility but also reliability of the evidence. He provides a useful roadmap for this exercise at paragraphs 23 through to 42 of his Brief on Law. Citing precedent, Mr. Chiasson argues that I must be guided in this exercise by the following:

1. Not all or nothing: I can accept or reject some, none or all of the evidence of any witness: *R. v. Clark, 2012 CMAC 3 (CanLII)*;
2. Memory: I must be leery of the witness who displays “selective memory”;
3. Demeanor: the demeanour of a witness, while testifying, is revealing. I should have some concerns with the evidence of a witness who is not responsive, not straightforward in their answers, evasive, hesitant or argumentative;

4. Fantasies and Fallacies: a credible witness may provide reliable evidence, but may also provide non-reliable evidence.
 5. Personal Interest: having a personal interest in the outcome may affect impartiality: *R. v. Gobin*, 2018 CM 2007 (CanLII);
 6. No Presumption of Truth: no witness is “presumed to tell the truth”. The trier of facts must assess each witness’ testimony in light of the totality of the evidence adduced: *R. v. Thain*, 2009 ONCA 223 (CanLII), at para. 32; and,
 7. No Guarantee of Testimony Acceptance: a trier of facts is not required to accept the evidence of any witness simply because it is uncontradicted by other testimony. He or she may rely on reason, common sense and rationality to reject uncontradicted evidence: *Aquilera v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 507 (CanLII), at para. 39 and *Lubana v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 (CanLII), at paras. 9-11.
47. Mr. Chiasson submits that there are 14 critical areas²⁵ on which fundamental findings of facts are required:
- (a) whether, on a balance of probabilities, it can be concluded that Michel Vienneau and Annick Basque sincerely believed that they were not facing police officers;
 - (b) whether the operation of the motor vehicle effected by Michel Vienneau was meant to evade a perceived mortal and unacceptable threat;

²⁵ At para. 19 of his Brief.

- (c) whether Cst. Patrick Bulger properly identified himself, both in his clothing and by his demeanor as a police officer;
- (d) whether Cst. Mathieu Boudreau showed himself both in the way he was dressed and in the way he acted as an officer before taking the first of his four shots;
- (e) whether Michel Vienneau's vehicle was in motion when the first two shots were fired by Cst. Boudreau;
- (f) whether Michel Vienneau's vehicle was stopped and stuck in the snowbank at any point in time where the two last shots were fired by Cst. Boudreau;
- (g) whether Cst. Bulger acted with restraint and with good judgment when he took a shot at Mr. Vienneau's vehicle with a view to render it no longer useable, given the risk to the people attending the train station on that day;
- (h) whether Cst. Mathieu Boudreau acted out of panic and fear rather than with restraint when he took the actions he took;
- (i) whether the unmarked police vehicle used by both constables had the proper equipment to make it, when needed, an obvious police vehicle;
- (j) whether both constables acted on their own without proper orders from their superior, RCMP Ronald DeSilva;
- (k) whether both constables acted without showing proper judgment in allowing Michel Vienneau to operate his motor vehicle or to move his motor vehicle when one of the two tips received was that he and his companion, Annick Basque, were intoxicated with alcohol, thus potentially creating an

immediate and extreme danger to those who were attending the train station on that day;

- (l) whether, on the face of the record, it can be determined that there would have been less dangerous and more effective alternate ways to intercept Michel Vienneau and Annick Basque, none of which would have required an overt display of violence by both constables;
 - (m) whether the arrest of Annick Basque and her forcible detention thereafter were necessary and appropriate under the circumstances;
 - (n) whether both constables created by their actions a very dangerous situation for themselves, which then forced them to use lethal measures to escape a perceived risk of bodily injuries or death.
48. Unsurprisingly, the Complainant submits that a fair assessment of the evidence should lead to a finding against the officers, and that the only appropriate sanction, in light of the circumstances, is dismissal. The Complainant relies upon 32 decisions, each of which I have read.

Argument on behalf of the Respondents

49. The Respondents filed a 20-page joint Brief on Law. They argue that police officers are vested with the power to arrest persons without a warrant where the officer, subjectively, has reasonable and probable grounds on which to base the arrest that are justifiable from an objective perspective.
50. They posit that the evidence, viewed as a whole and properly assessed in terms of reliability, is favourable to the Respondents. They contend that the evidence of the police officers who testified is to be preferred over that of Annick Basque,

Gérald Jean, Joe Sutton, and Wayne Coster. In short, they state that the actions of the Respondents are beyond reproach.

51. The majority of their brief addresses counts 1 and 2 which deal with use of force and proper use of a firearm. Quoting from *Brown v. Haldimand-Norfolk Regional Police Force*, 1987 CanLII 6336 (ONCPC), they argue that it would be unfair or unreasonable “to examine the officers’ conduct in the atmosphere of the quiet reflection afforded in the comfort of a hearing room”.
52. Regarding count 3 (Neglect of duty), the Respondents claim that they had the authority and indeed the duty to respond to and to investigate the Crime Stoppers Tips and that their actions were proper that day. Indeed, their actions were consistent with the training they received and how the Respondent Bulger had performed previous police operations.
53. Regarding counts 4 and 5 (Discreditable conduct), the Respondents rely on the guidance provided in *Re Smith*, 2005 CanLII 77786 (NS PRB), quoted with approval by arbitrator Haines in *The Chief of Police, Fredericton Police Force v. Constable Cherie Campbell*, unreported, dated January 6, 2016²⁶:

1. The test primarily is an objective one.

2. The Board must measure the conduct of the officer by the reasonable expectations of the community.

3. In determining the reasonable expectations of the community, the Board may use its own judgment, in the absence of evidence as to what the reasonable expectations are. The Board must place itself in the position of the reasonable person in the community, dispassionate and fully apprised of the circumstances of the case.

²⁶ At para. 76.

4. In applying this standard the Board should consider not only the immediate facts surrounding the case but also any appropriate rules and regulations in force at that time.

5. Because of the objective nature of the test, the subjective element of good faith (referred to in the *Shockness* case) is an appropriate consideration where the officer is required by the circumstances to exercise his discretion.

54. The Respondents state that they were required by the circumstances to exercise their discretion and that they did so in a manner consistent with appropriate rules and regulations. In short, they state that the Complainant fails on these counts as well. The Respondents rely on 14 authorities which I have reviewed.

V. ANALYSIS

Introduction – Reliability and Credibility

55. This is an unusual case: first, the incidents took place almost 5 years ago. With the passage of time, it is normal for memories to fade. Also, most if not all of the witnesses provided statements early on either as part of an initial internal review²⁷, or as part of the Project Harman investigation²⁸. Some of the witnesses testified at the preliminary inquiry into criminal charges laid against the Respondents, which took place in the Fall of 2016. I have not seen witness statements obtained through Project Harman nor have transcripts of the preliminary inquiry been entered into evidence, although they were quoted at times during the cross-examination of witnesses, notably the cross-examination of Annick Basque. Some witnesses did not describe the events during the hearing exactly the same way as they did years ago and the versions offered by different witnesses vary considerably on key

²⁷ Bathurst Police Force General Occurrence Hardcopy – tab 33 of Exhibit 5. The statements, apparently provided days following the incidents, were not reviewed in detail with their authors during the hearing.

²⁸ Outline of interviews found at pages 24 to 38 of Project Harmon report, 42 of Exhibit 5.

elements, such as the circumstances surrounding the shooting of Vienneau. The result is an evidentiary mishmash that I am required to sort out.

56. Issues of reliability and credibility are bound to arise in this endeavour. Arbitrator Haines makes a useful review of the relevant caselaw and applicable principles in *The New Brunswick Police Commission and Constable Jeff Smiley*, unreported, December 2, 2015 which I take the liberty of quoting at length (I underline those parts which I find to be particularly relevant here):

113. In *R. v. R.W.B.* (1993), 24 B.C.A.C. 1, Rowles J.A. at paragraph 29, dealing with the reliability and credibility of witnesses in the case of inconsistencies and an absence of supporting evidence, stated as follows:

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

...

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

[80] Corroborative evidence is always helpful and does strengthen the evidence of the party relying on it as I believe Rowles J.A. was implying in her comments. However, it is not a legal requirement and indeed may not be available,

especially where the alleged incidents took place decades earlier. Incidents of sexual assault normally occur in private.

....

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

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

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

exclusion of others, but is based on all the elements by which it can be tested in the particular case.

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

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

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

- a) What were the inconsistencies and weaknesses in the witness’ evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness’ testimony, and the documentary evidence, and the testimony of other witnesses: *Re: Novak Estate*, 2008 NSSC 283 (CanLII), 2008 NSSC 283 (S.C.);
- b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
- c) Did the witness have a motive to deceive;
- d) Did the witness have the ability to observe the factual matters about which he/she testified;

e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;

f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorney*, [1952] 2 D.L.R 354;

g) Was there an internal consistency and logical flow to the evidence;

h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and

i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

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

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

57. See also: *The New Brunswick Police Commission and Constable John Morrison*, unreported, August 20th, 2014 (Arbitrator McLaughlin), at paras. 104 to 111.

58. In assessing the evidence of police officers, I was careful to take into account the following caution of Chadwick J., in *Miller v. Steward*, Ont. Gen. Div., December 12, 1991, as quoted in *Chartier v. Greaves*, [2001] O.T.C. 121 (SupCt), at para. 68:

It is much easier for police officers to appear as strong and more credible witnesses at trials, especially in view of their experience in testifying before the Courts. In civil matters such as this, extra scrutiny must be used in assessing their evidence to make sure that it has not been coloured in favor of their position.

59. Applying the above, I am satisfied that all witnesses, with the possible exception of Basque, were generally credible. The reliability of their evidence is another matter which will be discussed later in these reasons.

Standard of Proof

60. I must scrutinize the relevant evidence, orally given at the hearing, reconciling the various versions according to the above, and documents marked as exhibits, to determine if it is more likely than not that the Respondents are guilty of the alleged transgressions²⁹. “Sufficiently clear, convincing and cogent”³⁰ evidence is required to meet the onus.

Analysis

61. Counts 1 (use and care of firearm), 2 (use of unnecessary force) and 5 (oppressive or abusive to any person) in my view all relate to the shooting of Vienneau. I believe count 3 (police force policies) is also related to the shooting phase. The Respondents are alleged to have “failed to work in accordance with official police force policies and procedures”. The policy or procedure discussed at the hearing

²⁹ The Balance of Probabilities test usually applies in civil matters but the *Act* actually prescribes it, at s. 32.6(1).

³⁰ *F.H. v. McDougall*, 2008 SCC 53 (CanLII), at para. 46.

had to do with vehicle stops, being Chapter 3.6 of the Administrative Manual for Municipal/Regional Police Forces³¹. I see this allegation as an intricate part of the shooting phase.

62. Count 4 (discreditable conduct), I see as a catchall charge. The conduct of which the Respondents are accused relates to what Mr. Chiasson refers to as “officer-created jeopardy” which began at the police station and which ended with the shooting of Vienneau.
63. I believe the best way to deal with the allegations against the Respondents is to group them, somewhat as Mr. Chiasson suggested, in three phases or episodes: 1. Planning – police station, 2. Planning – train station, and 3. The Shooting. I also believe it is useful to address the 14 questions posed at paragraph 19 of Mr. Chiasson’s Brief, reproduced above, at paragraph 47, as well as a few other issues that were discussed in argument or which were raised during the testimony of the Respondents.

The planning – police station (until arrival at the train station)

64. In his outline of Bulger’s testimony, the Chief mentions in his Brief that no CPIC or PORES³² checks were done either before the Respondents left the police station or after, while they were waiting for the train to arrive. Two checks were done by other officers. The head of the Unit, DeSilva himself, checked PROS for Vienneau, not once but twice, and Richard accessed the Service NB portal where he was able to obtain a photo of Vienneau and other useful information. These two senior officers, the most senior in rank on the Unit, were obviously alive to the need for as much information as possible. With the other officers getting ready to leave for

³¹ Exhibit 4, tab 23. I note that the New Brunswick Policing Standards, Exhibit 4, tab 22, deal superficially with use of force at page 29, but it was not discussed in any detail during the hearing.

³² CPIC and PORES are databases similar to PROS. CPIC is a Federal portal whereas PORES is the Bathurst PF internal system.

the station or already on their way, why DeSilva didn't do a CPIC or a PORES check is a little difficult to understand.

65. DeSilva stated that he did not do a CPIC check and did not contact the Tracadie RCMP to check the names because he wasn't the one investigating. Similarly, he didn't run a PROS search on Annick Basque, because he wasn't the one investigating. Finally, DeSilva did not ask Richard to run a Service NB check on Basque because he didn't think of it.
66. While it seems obvious in retrospect that CPIC and PORES checks should have been made, and Basque should also have been checked, I fail to understand how it would have been the responsibility of the Respondents to do these checks or ask that they be done. This was, after all, a Unit operation, and others had taken charge on performing checks. I'm not persuaded that it fell to the Respondents to ensure all available checks were run.
67. The Chief argues that the operation was hastily organized, and that this contributed to the unfortunate outcome. I agree things happened quickly but this was through no fault of any of the officers. In my view, the circumstances required swift action. I find that the Respondent's conduct while at the police station and until their arrival at the train station is beyond reproach.
68. I would also add that it was generally agreed by all police witnesses that the tip was a credible one because a lot of the drugs coming into the Maritime Provinces originates in Montréal and that the train is a good way to transport drugs given the lax security measures in place at train stations, as compared to airports. The police officers also all acknowledged that where there are illegal drugs, there are often weapons. For this reason, it was agreed that this operation had the potential to be dangerous. It was important that enough police personnel be on site for this reason.

The planning – train station (decision to arrest)

69. The following questions posed by Mr. Chiasson in his written submission relate to this phase:
- (j) whether both constables acted on their own without proper orders from their superior, RCMP Ronald DeSilva;*
 - (k) whether both constables acted without showing proper judgment in allowing Michel Vienneau to operate his motor vehicle or to move his motor vehicle when one of the two tips received was that he and his companion, Annick Basque, were intoxicated with alcohol, thus potentially creating an immediate and extreme danger to those who were attending the train station on that day;*
 - (l) whether, on the face of the record, it can be determined that there would have been less dangerous and more effective alternate ways to intercept Michel Vienneau and Annick Basque, none of which would have required an overt display of violence by both constables;*
 - (n) whether both constables created by their actions a very dangerous situation for themselves, which then forced them to use lethal measures to escape a perceived risk of bodily injuries or death.*
70. The Complainant argues that the Respondents were not directed, authorized, nor justified to intercept or to arrest Vienneau; that they were dispatched to the train station to investigate – in essence to observe.

71. To me, this is not entirely consistent with the sequence of events. The whole thing, after all, started with DeSilva telling Bulger “you missed a load of drugs”. He then obviously gave his approval for the Respondents and other members of the Unit to continue the investigation at the train station. He agreed on cross-examination that this was a credible tip and that police had a duty to investigate it.
72. His last words to Bulger and Boudreau before they left for the train station were: “Be safe. Don’t get into a chase” – or words to this effect. He explained in his testimony that the RCMP has a “no chase” policy. Boudreau’s understanding was that they were going there to investigate and to possibly arrest Vienneau. He stated, regarding DeSilva’s comment: “*if we were only going there to observe, there would be no reason to say that*”. I agree that while DeSilva’s message was not a clear direction to make an arrest, it was certainly not incompatible with an arrest as there could obviously not be a chase if the sole purpose of attending to the train station was to observe.
73. DeSilva testified that he expected the Respondents and the Unit to “investigate the tip”, acknowledging on direct and cross-examination that an investigation can turn into an arrest (going tactical).
74. Richard testified he had been tasked to assist in surveillance at the train station but acknowledged on cross-examination that investigations can “turn tactical very quickly”.
75. Lajoie testified that he went to the train station (with Richard) “to assist them, as we always do”, but also agreed that when gathering intelligence, at a moment’s notice, the “situation can turn into a tactical situation”.
76. When he left the police station, Matchett believed he was going to investigate the Crime Stoppers tip. He agreed that any investigation can “very easily transform into a tactical” operation.

77. Daigle testified that Boudreau came into her section, explained that there were drugs possibly coming into the train station and asked if anyone in the section could go assist the Drug Section.
78. The Chief argues that there was no need to arrest or detain Vienneau; and further that it was unreasonable for them to do so on the basis of “a weak and unreliable source of information, that is the Crime Stoppers tips”³³. The Chief relies on *R. v. Debot*, 1989 CanLII 13 (SCC). *Debot* does highlight that the verifiable credibility of a tipster is an important factor in determining whether there are sufficient grounds to justify a warrantless search. The Court writes, at p. 1168:

In my view, there are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Second, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, I concur with Martin J.A.'s view that the "totality of the circumstances" must meet the standard of reasonableness. Weaknesses in one area may, to some extent, be compensated by strengths in the other two. (emphasis added)

79. The Court adds, at p. 1172:

In my opinion, it should not be necessary for the police to confirm each detail of an informant's tip so long as the sequence of events actually observed conforms sufficiently to the anticipated pattern to remove the possibility of innocent coincidence. As I noted earlier, however, the level of verification required may be higher where the police rely on an informant whose credibility cannot be assessed or

³³ Complainant's Brief, at para. 334.

where fewer details are provided and the risk of innocent coincidence is greater. (emphasis added)

80. The Complainant also relies on *R. v. Mann*, [2004] 3 R.C.S. 59, in which the Supreme Court confirmed that there exists, at common law, a police power to detain individuals for investigative purposes, but that investigative detentions must be premised upon reasonable grounds³⁴. The Complainant cites the PEI Supreme Court decision in *Doucette v. R.* 2012 PESC 26 (CanLII) where the Court summarized *Mann* in point form, at para. 35:

1. An investigative detention must be based on objectively reasonable grounds to suspect in all the circumstances that the detainee is connected to a particular crime and that such a detention is necessary;

2. A hunch is not reasonable grounds to suspect and cannot ground an investigative detention;

3. The reasonableness of the detention must be assessed against all the circumstances, notably, the extent to which the interference with liberty is necessary to perform the duty, the liberty interfered with and the nature and extent of that interference. (emphasis added)

81. The Respondents argue that a Crime Stoppers tip is akin to an anonymous 911 call, which requires a response and which may justify police officers to interfere with a person's liberty and property. They rely on *R. v. Godoy*, [1999] 1 S.C.R. 311 and *R. v. Clayton*, 2007 SCC 32 (CanLII).

82. Bulger explained that the main purpose in going to the train station was to investigate, to corroborate the information provided by the tip, but he understood there might be a detention or an arrest, depending on what could be confirmed or corroborated. Before leaving the police station, he told then Sgt. Ernie Boudreau,

³⁴ *Mann*, at p. 76.

now Chief, that he might need transportation if they made an arrest, meaning a marked police cruiser. I find this uncontradicted statement very informative on the state of mind of Bulger at the police station and on what then Sgt. Boudreau should have expected would happen. Now-Chief Boudreau did not testify.

83. At the train station, once all information had been corroborated and once he saw the vehicle, Bulger decided they would stop Vienneau. Bulger referred to the following corroborative information which justified an arrest or an investigative detention: 1-information obtained from Service NB confirmed the identity of the owner of the Cruze; 2- the fact that the vehicle as described in the tip was parked at the station; 3- that there was a light dusting of snow on it suggesting it had been there for some time; 4- the fact that the train was coming from Montreal, a known drug distribution hub for the Maritime provinces.
84. Bulger advised Boudreau of the plan and communicated this information to the other members of the Unit, all senior or very senior to him in years, and in some cases, in rank (Sgt. Richard). Not a single one of them expressed any concern or disagreed with the plan. Daigle didn't voice any objection either.
85. Did the Respondents have objectively reasonable grounds as explained in the caselaw to detain Vienneau? In my view, it was not a strong case to justify an investigative detention or an arrest. Here, the identity of the informant was unknown. In the result, and unlike in *Debot*³⁵, the Respondents could not rely on the track record of an informant having provided reliable information corroborated by police investigation in past investigations. Rather, the Respondents' conclusion that the tip was credible, as discussed above, was entirely based on corroboration on the identity of Vienneau and of Basque, on confirmation obtained respecting the vehicle and its location, and on the (justified) understanding that drugs came to the Maritime provinces through Montreal, where the train originated from. There was no corroboration of illegal activity. Without deciding the issue, which is not my

³⁵ Discussed at page 1170.

role, I believe an arrest or investigative detention on those grounds might well have been found to be unjustified by an appropriate tribunal³⁶.

86. I do not think, however, that this conclusion is determinative of whether the Respondents breached the *Code*. Knowing now that this fateful decision to detain would end up costing the life of an innocent man, and possibly result in long term trauma for his spouse, it would be too easy in my view to second-guess the officers' decision – and I find that, in reality, insofar as none of the other officers involved voiced any concern, it became a joint decision of 6 for the most part senior officers, including that of a sergeant. In these circumstances, I am not willing to re-evaluate with the benefit of hindsight. I agree with the statement of arbitrator Filliter, found at para. 154 of *Fredericton (City) Police Force v. Reilly (Conduct Issues Grievance)*, [2012] NBLAA No. 2:

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.

87. The same sentiment is expressed at para. 12 of *Brown and Haldiman-Norfolk Regional Police Force, supra*.
88. In conclusion, I find that the Respondents are not guilty of the charges alleged for decisions made and actions taken at the train station up until they attempted to detain or arrest Vienneau. In coming to this conclusion, I have considered the “discreditable conduct” criteria laid down in *Re Smith* 2005 CanLII 77786 (NS PRB), as discussed and applied by arbitrator Haines in *Chief of Police, Fredericton Police Force v. Constable Cherie Campbell, supra*, upheld: 2016 NBQB 225 (CanLII), 2018 NBCA 54 (CanLII), leave to appeal to the Supreme Court of Canada

³⁶ See *R. v. Bennett*, [1996] J.Q. no 545 (QL), and the analysis of Karakatsanis, J. in *R. v. Chehil*, 2013 SCC 49, at paras. 22 to 40.

denied: [2018] SCCA No. 485 (QL). Of note, I paid particular attention to the fact that the officers were here required to exercise a discretion and that it is appropriate in such a case for me to consider a “subjective element of good faith”. I find that they acted in good faith.

89. Returning to Mr. Chiasson’s questions outlined above, I find that,

- with respect to question (j), as discussed above, the officers did not “act on their own without proper orders”;
- with respect to question (k), I find that it was not a show of bad judgment for the Respondents to allow Vienneau to operate his vehicle while intoxicated. The Respondents testified that he did not display any of the usual signs of intoxication, which would have justified a decision not to allow him to assume care and control of his vehicle. They were there on a drug investigation and that’s what they focussed on. Again, I am not willing to second-guess their decision;
- with respect to question (l), in hindsight, a case could be made that there would have been alternate ways to intercept Michel Vienneau which might not have led to the same outcome. It would be too easy and incompatible with my role, in my view, to second-guess the Respondents on this issue. I further find that the Respondents, in deciding to confront Vienneau at the train station as they did, were not “playing up for an audience, a gallery of public spectators”, as argued at para. 348 of the Complainant’s brief; and,
- With respect to question (n), I find that the Respondents did not improperly create “a very dangerous situation”.

The shooting

90. This segment starts with Vienneau backing his vehicle up in a manner indicating he would be leaving in a southerly direction and ends with Vienneau's death and Basque being put under arrest. All witnesses, unsurprisingly, said that the incidents happened very quickly. On just about everything else, there was much disagreement. I am indebted to Mr. Chiasson for making an extensive review of the *viva voce* evidence and providing references to specific times on the recordings when key pieces of evidence were addressed. This review, along with my own notes, proved invaluable in making findings on crucial facts.
91. I return to Mr. Chiasson's "critical areas". I find I can answer some of the questions posed by Mr. Chiasson without an exhaustive review of the evidence.
- (a) whether, on a balance of probabilities, it can be concluded that Michel Vienneau and Annick Basque sincerely believed that they were not facing police officers;*
92. Basque was adamant in her testimony. When she observed Bulger and Boudreau, she was convinced that they were not police officers. She referred in her evidence to crazies, terrorists (shooting into the crowd) and druggies. This is consistent with the evidence of other witnesses who, at a distance, did not initially recognize the Respondents (or any of the other officers on site for that matter) as police officers. This evidence is also consistent with the actions of Vienneau. We now know that Vienneau 1- was not inebriated, and 2- did not carry drugs. He had no reason to make a run for it or to try to run over one of the officers, but he did.
93. I find, on a balance of probabilities, that Vienneau and Basque sincerely believed they were not facing police officers.

(b) whether the operation of the motor vehicle effected by Michel Vienneau was meant to evade a perceived mortal and unacceptable threat;

94. I will come back to this sequence of events later in these reasons in assessing the Respondents' reactions to Vienneau's maneuvers. In my view, Vienneau's intention, what he meant to do (to get away or to strike Bulger), is not critically important. What is important is what he did – and how Bulger and Boudreau reacted. The evidence of Basque on this point is, to say the least, contradictory. She stated at times that Vienneau would never hurt a fly, that he would never try to injure anyone. On the other hand, there is evidence that she twice cried for him to stop as Vienneau was driving his vehicle forward – she wanted him to go backwards. She also stated that, had she been driving, she would have tried to hit the Respondents who “were shooting in all directions”. When Vienneau accelerated forward, he pushed Basque's head down below the dash so she could not see except for glimpses when she tried to put her head up. I don't find her evidence to be reliable in this respect.
95. Other witnesses have testified as to what the car appeared to be doing, including Gérald Jean (trying to get away, to avoid Bulger), Joseph Sutton (no attempt to strike Bulger), Wayne Coster (trying to turn around, not “purposely attempting to run someone over”), Matchett (vehicle accelerating towards Bulger, Bulger backing up, pushing himself off the vehicle), and Daigle (vehicle driving purposively towards Bulger, accelerating). Both Respondents testified that Vienneau's Cruze hit their vehicle then accelerated towards, and hit, Bulger.
96. I find that Jean, Sutton, and Coster were at a disadvantage in terms of their ability to observe³⁷. They were farther from the Cruze than the other witnesses and their position may not have allowed them to have a good sense of the closing distance

³⁷ Jean estimates he was from 50' to 80' away, Coster was approximately 100' away, and Sutton within 10' of Coster.

between the Cruze and Bulger, and of the exact direction of the Cruze as it struck Bulger.

97. I find the documentary evidence (photographs³⁸) helpful. Pictures of the Cruze in the snowbank, depict the front wheels pointed straight. Going straight for Vienneau meant going into the snowbank, which was unlikely to be his ultimate objective. Something prompted him to aim in that direction. I find this corroborates the theory that Vienneau was trying to strike Bulger.
98. I am also of the view that Vienneau could have “escaped” by driving south on Thornton Avenue. Boudreau testified that there were two full lanes available for Vienneau to flee. The only vehicle coming from that direction was the Ford Explorer driven by Matchett. Matchett was initially parked on the corner of Thornton Avenue and Queen St., some 80 yards or 240’ from where the Cruze was initially parked. Matchett only brought his vehicle behind the Cruze once it was stopped in the snowbank, so before then, his vehicle was in motion, i.e. not blocking the northerly lane. The photo Exhibits 9 and 10 show that where the G6 driven by Boudreau was positioned (pointing north on the left hand side of the road) left the right southern lane clear for traffic.
99. I find that, viewed as a whole, the evidence suggests that Vienneau could have escaped if that was his goal. On a balance of probabilities, I find that the operation of his vehicle by Vienneau was not “meant to evade a perceived mortal and unacceptable threat”.

- (i) *whether the unmarked police vehicle used by both constables had the proper equipment to make it, when needed, an obvious police vehicle;*

³⁸ Exhibits 5 (tab 38, photos 28, 36, 37, 38, 39) and exhibits 11, 12 and 13.

100. I've listed the emergency features of the Pontiac G6 at paragraph 12, highlighting the equipment that was or was not operational, and I will make other comments on this issue where I address count 3 later in these reasons. I have heard no evidence on regulations or requirements respecting what equipment is required to make a ghost vehicle, when needed an obvious police vehicle. At the end of the day, the G6 was the vehicle that the Bathurst PF provided to the Respondents to enable them to do their job, which entails conducting tactical operations requiring the use of the emergency features. If the equipment was improper or insufficient or inoperational, I fail to see how that would be the responsibility of the Respondents.

(m) *whether the arrest of Annick Basque and her forcible detention thereafter were necessary and appropriate under the circumstances;*

101. Neither Boudreau nor Bulger arrested or detained Annick Basque. While their actions resulted in Basque's arrest and detention, other officers made the actual arrest. I find that the arrest and detention of Basque does not constitute a breach of the *Code* on the part of the Respondents.

102. I find it appropriate to group together the remaining "critical areas" identified by Mr. Chiasson. I have referenced the counts to which, in my view, each of these areas relate in bold characters:

(c) *whether Cst. Patrick Bulger properly identified himself, both in his clothing and by his demeanor as a police officer; (Counts 3, 4, and 5)*

(d) *whether Cst. Mathieu Boudreau showed himself both in the way he was dressed and in the way he acted as an officer before taking the first of his four shots; (Counts 3 and 4)*

- (e) *whether Michel Vienneau's vehicle was in motion when the first two shots were fired by Cst. Boudreau; (Counts 1, 2, 4 and 5)*
- (f) *whether Michel Vienneau's vehicle was stopped and stuck in the snowbank at any point in time where the two last shots were fired by Cst. Boudreau; (Counts 1, 2, 4 and 5)*
- (g) *whether Cst. Bulger acted with restraint and with good judgment when he took a shot at Mr. Vienneau's vehicle with a view to render it no longer useable, given the risk to the people attending the train station on that day; and, (Counts 1 and 4)*
- (h) *whether Cst. Mathieu Boudreau acted out of panic and fear rather than with restraint when he took the actions he took. (Counts 1, 2, 4 and 5).*

103. The Respondents (and indeed all other officers involved in the operation) were dressed in civilian clothing – which is normal for an investigation unit, and normal for drug unit personnel. Boudreau and Bulger, I find, displayed their police badges on a chain around their neck. Could they have worn or displayed clothing that made it more obvious that they were police involved in an operation? Perhaps. After the events, when Bulger was on administrative leave, he approached the Chief or Deputy Chief Bathurst PF about the possibility of purchasing “takedown vests” to use when operations turn tactical. He was told to put his request on paper and to obtain prices. Bulger stated he had recently heard that the GIS officers had received new identification clothing to be used in tactical operations.

104. So, perhaps other gear would have made it more obvious the Unit members were police officers, but the gear they displayed that day was the only gear provided to them. I find it would be inappropriate to hold this against them.

105. Regarding the issue of whether the Respondent officers (and other officers involved) identified themselves as police, Annick Basque stated:

- She never saw any indication that the officers were police; and,
- She never heard the word "Police", although she stated she could not hear what was being yelled by Bulger because she was inside the vehicle and the defrost fan was activated.

106. Gérald Jean stated:

- It was only after the shooting that he understood police were involved (flashing lights behind the Explorer); and,
- He never heard anyone yell out "Police, Police".

107. Joseph Sutton stated:

- He only understood police were involved when he saw Daigle's badge, not before the shooting; he never saw any police lights until everything was over; and,
- He heard "Stop, stop, don't move, stay right there, Hands up, Hands Up". He was adamant he never heard anyone say "Police".

108. Wayne Coster stated:

- He never saw any police badges or any sign police were involved until after the shooting;
- He remembers thinking he wished police were there; and,
- He never heard the word "police".

109. Bulger testified he yelled out: "Police, Police, Stop" as he got out of his vehicle.

110. Boudreau testified he yelled: "Police, Police" when he stepped out of his vehicle.

111. I find, based upon my examination of all of the evidence and on the probabilities that surround the currently existing conditions, that all "ghost" police vehicles involved in stopping Vienneau displayed emergency lights. I believe the evidence of Bulger, Boudreau, and of the other officers is corroborated by the following exhibits:

- Exhibit 5, tab 38, picture 9: blue light in tail light of Explorer;
- Exhibit 5, tab 38, picture 24: red flashing light at middle top of windshield of Explorer;
- Exhibit 5, tab 38, picture 27: blue flashing light at middle top of windshield of Explorer; flashing red and blue lights in back window of Impala;
- Exhibit 5, tab 38, picture 36: red flashing light at middle top of windshield of Explorer;
- Exhibit 9: blue flashing light at middle top of windshield of Explorer; blue and red light bar hanging from ceiling of G6;
- Exhibit 11: red flashing light at middle top of windshield of Explorer;
- Exhibit 13: same;
- Exhibit 17-1: same for Explorer, plus red flashing light hanging from ceiling of G6;
- Exhibit 17-2: red and blue lights in back window of Impala;
- Exhibit 17-3: blue flashing light on top of windshield of Impala; and,
- Exhibit 17-5: red flashing light hanging from ceiling of G6;

112. A comparison between exhibits 17-1 and 17-5 confirms that the wigwag lights (flashing lights using high beam) on the G6 were operating³⁹.

³⁹ The Project Harman report confirms the wigwags were working when they inspected the vehicle. (Exhibit 5, tab 42, page 43).

113. Boudreau testified that he had stopped cars hundreds of times with the lights on the G6 and that only once did a vehicle fail to stop. That was on January 12, 2015.
114. In light of the documentary evidence clearly showing emergency markers on the ghost vehicles, it is difficult to understand why the non-police witnesses did not understand this was a police operation. I will come back to the case of Basque later, but for the other witnesses, in my view, their vantage point and distance from the vehicles probably interfered with their ability to see and recognize the emergency lights for what they were – at the time of the shooting. Obviously, all of these witnesses later understood and saw the flashing lights, but things went very quickly between the revving of the engine of the Cruze, its impact with the G6, and the shooting – likely not more than 3 or 5 seconds.
115. Also, I think members of the public would expect marked cruisers to be at the scene of tactical operations. Given that there were none at the relevant time, the natural assumption would be that there are no police officers there and that there had to be another explanation for what was taking place. This would be consistent with Jean's and Coster's initial belief that a movie was being shot, or that the mafia was there (Coster).
116. I find that Bulger and Boudreau definitely yelled "Stop" repeatedly and that Boudreau yelled "hands up" – probably repeatedly. I also find it likely that Bulger and Boudreau yelled out "police", at one point or another. I make this last finding based on the evidence of the two officers and on the preponderance of probabilities "which a practical and informed person would find reasonable". I think the command "hands-up" and the word "police" go hand in hand and were yelled out prior to the shooting. I find that the witnesses who denied hearing the word "police" likely did not have the ability to hear everything that was uttered or yelled out by Bulger and Boudreau because they were too far from them or that they simply did not take this information in. There was a lot happening in a very short period of time.

117. To be clear, I am not questioning the credibility of these witnesses but have doubts as to the reliability of their evidence.
118. As for Basque, I have grave concerns with the reliability of her evidence, in general. I found that there were a number of inconsistencies in her own evidence and with the evidence of other witnesses. She testified at different points that Vienneau was trying to get away or that he had tried to run Bulger over⁴⁰. I also find that her evidence is contradicted on key points by incontrovertible evidence corroborating different versions, such as the fact that the Cruze hit the G6 (which she denied), that 5 shots were fired, not 30 or 60 (as she alleged), that the Respondents were firing in the crowd (which is false), that the police officers savagely pulled Vienneau from the car by his feet (false), that no one was helping Vienneau (false), not even the paramedics, etc. I also find it odd that Basque testified the older of the two officers, namely Bulger – which she referred to as an older gentleman even though he is much younger than she is – shot Basque (as previously stated, it was the younger officer, Boudreau, who did). She was also overly argumentative in her testimony. I understand that these events were quite traumatizing for her, but this does not explain how she could be so wrong on so many issues.
119. I do however accept her evidence that the “Charlie Hebdo” shooting of a few days before was prevalent in the media and that she and Vienneau had talked about it and exchanged messages with an acquaintance in Paris about Charlie Hebdo and terrorism over the weekend. This person, according to Basque, told them that the next attacks would take place in Canada, in big centers such as the Bell center, in airports, and train stations.
120. As part of his investigation into these events, Inspector Larry Wilson asked Cpl. Luc Côté to review the contents of Vienneau’s Cell phone manually. At page 23 of

⁴⁰ S/Sgt Surette makes reference to this version of Basque’s testimony at page 13 of his “Use of Force Review”, discussed below.

the Report⁴¹, Wilson mentions that an unopened message had been sent to Vienneau's cell at 12:47 on January 12, 2015 (less than 2 hours after Vienneau was shot and killed) saying there was a terrorist attack at the train station. I don't know if this message came from the same person who was forewarning Basque and Vienneau about this possibility over the weekend, but it is consistent with Basque's evidence.

121. We will obviously never know what was going through Vienneau's mind, but I find the evidence of Basque, somewhat corroborated by this message, suggests that Vienneau and Basque were concerned about terrorists during the weekend and when they arrived in Bathurst, and when Boudreau and Bulger blocked their way, that's what they saw. I think Vienneau acted quickly based on what he expected to see and experience, not what was actually taking place.
122. This would also explain why, instead of stopping or of backing up, or of taking some other evasive action, Vienneau pressed on the gas and hit the G6 and then twice hit Bulger with his car. The Respondents are clear in their evidence that there was such an impact, and their evidence is corroborated by a forensic examination of the Cruze and of the G6, confirming that there had been paint transfer between the vehicles⁴². It is also graphically confirmed by photos 8, 9, 10, and 11 of Exhibit 17⁴³.
123. Why is this impact noteworthy? Because, in my view, it was a clear signal to the Respondents that Vienneau was not going to stop. That's how Daigle interpreted it also. She was close to the Cruze, probably in the best position, as compared to all other witnesses other than the Respondents, to observe the events.

⁴¹ Exhibit 5, tab 42.

⁴² *Ibid.*, at pages 42-3.

⁴³ Jean also confirms he heard an impact; a car hitting another car, although he says he was able to recognize this sound of clashing steel due to his work experience as a steel fabricator. It will be recalled that only plastic was damaged in this collision. Not steel.

124. Daigle initially remained in her vehicle because she expected Vienneau would bolt.
125. The evidence is inconsistent on the issue of where the Cruze was exactly and what was going on when the Respondents fired their weapons. This is a critically important issue as police officers are only authorized to discharge a firearm with the intent to disable or cause death to protect life or prevent grievous bodily harm to themselves or to others⁴⁴. If the Cruze was stuck in the snowbank, disabled, when Boudreau and Bulger discharged their firearms, this would go a long way in establishing serious breaches of the *Code*. If, on the other hand, the purpose of the officers was consistent with the Use of Force guidelines, they would not be guilty of the charging counts related to use of force.
126. On this specific issue, I have adopted the position put forth by Mr. Chiasson that the officers have the onus of proving that the force used was not excessive in the circumstances⁴⁵.
127. S/Sgt Kevin M. Surette conducted an extensive Use of Force Review⁴⁶. He interviewed or reviewed video and audio statements of 14 witnesses and reviewed many relevant documents. He ends his 19-page report with the following conclusion:

The perceptions and actions of Cst. MATHIEU BOUDREAU in discharging his firearm at MICHEL VIENNEAU in an attempt to save the life of Cst. PATRICK BULGER were reasonable and necessary given the totality of the situation. These actions were consistent with what would be expected from a police officer of similar background and training. In addition, the actions of Cst. PATRICK BULGER in discharging his firearm in an attempt to disable the vehicle driven by MICHEL VIENNEAU to stop its progress was reasonable and necessary given the totality of the situation, and also consistent with

⁴⁴ See : Bathurst Police Force Operational Manual, Chapter 6.10 (Use of Force), Exhibit 5, tab 42, at page 3 of Use of Force Review.

⁴⁵ Argued at para. 348 of Mr. Chiasson's Brief.

⁴⁶ Appended to the Harmon Report. *Supra*.

what would be expected from a police officer of similar background and training.

128. While I cannot simply accept these conclusions without conducting my own analysis of the evidence, which I have done, I found his review, in particular his explanation of the “National Use of Force Model”, to be very helpful. This Model illustrates how an officer should react when facing risk. According to the model, which is similar to the model applied by the RCMP, the IMIM (Incident Management Intervention Model), the level of force to be used is proportional to the level of resistance. Under the model, cooperative behaviour justifies nothing more than officer presence and communication. Where there is active resistance, physical control might be justified. Where the person is assaultive, hard force (baton, and other non-lethal weapons) is acceptable. Finally, the model prescribes that only impending grievous bodily harm or death justifies lethal force.
129. The model also requires that the officer continuously assess the situation so as to ensure officer and public safety.
130. I must weigh the evidence to determine if, when Boudreau discharged his firearm, there was indeed a danger of impending grievous bodily harm or death or if the Cruze was stuck in the snow, going nowhere, having ceased to be a threat.
131. Jean could not remember what the shooter looked like, but stated he was wearing a semi long or long trench coat and got out of a black SUV. He took a shot as soon as he got out of his vehicle. Jean saw nobody getting out of the G6. He testified Vienneau’s vehicle was stuck in the snowbank when the shots were fired. He acknowledged that his eyesight is “not very good”.
132. Sutton testified that the shots were fired just before or as the Cruze was driving into the snowbank, which is consistent with the Respondents’ versions.

133. Boudreau testified that the vehicle was in continuous motion headed for Bulger and the snowbank and that he first took two shots, reassessed, advanced, and took his two other shots, one being fatal. All the while, Boudreau stated, the vehicle was still in constant motion, its tires spinning and its engine revving.
134. Bulger, for his part, said that the vehicle hit him twice. The first time, the car hit his knee. He put his hand on the hood to regain his balance. The tires were still spinning and the engine revving. He was backing up as quick as he could – trying to run away from the car. He fell in the snowbank, at which point the car hit him again, on the left knee. He was stuck under the bumper of the Cruze. He was just in front of the spinning tire. Afraid for his life, he started raising his gun toward Vienneau, but he could see Daigle in her red Canada Goose jacket in the background. That's why he shot at the tire, in the hopes that the car would stop coming at him.
135. Respecting the testimony of the Respondents on this sequence of events, Mr. Chiasson writes at para. 317 of his Brief:

It is interesting to note that both officers involved are offering drastically different versions of what the car did in the snowbank. Cst. Bulger said in (sic) move (sic) twice and Cst. Boudreau said the car was in continuous movement when he took all the shots. This has to be opposed to the civilian witness evidence on this specific point.

136. I do not accept the civilian witness evidence that Boudreau fired his weapon when the vehicle was stationary, in the snowbank. I find that Jean's testimony is not reliable on this point. His eyesight is not good, plus he was wrong on other key pieces of evidence, notably the vehicle from which came the shooter. I think the version of the two officers is more reliable. In my view, it is telling that Boudreau's shots were fired in two distinct moments⁴⁷. He took two shots, reassessed the situation, and took two more. In my view, that is consistent with the Use of Force

⁴⁷ Both Jean and Coster remembered there was a pause between the two sets of shots.

Model discussed above and consistent with an officer exercising the proper care in his decision to use deadly force.

137. What of the apparent inconsistency between Boudreau and Bulger's versions? In my view, if their recollections are indeed incompatible with one another, and I'm not convinced there is much difference between the two, I find that this inconsistency may be explained by their different vantage points: the car may well have hit Bulger twice and stop or appear to stop from his perspective. He was in a good position to assess the slowing of the movement or the absence of movement. But from Boudreau's position, the car may well have appeared not to have stopped. Boudreau was concerned not only by the movement of the car but also by its spinning tires and revving motor. When he reassessed, he concluded the threat was still live and given how quickly events were unfolding, I do not feel the discrepancy between the versions casts any doubt on the veracity of Boudreau's evidence and on what I accept as a valid assessment of the threat.
138. Similarly, having reviewed the evidence, I believe it was not inappropriate for Bulger to take a shot at the rear tire. As he explained, he feared for his life. Despite the precarious situation in which he found himself, he opted not to take a shot at Vienneau – the most obvious target - for fear of striking Daigle. These are not the actions of a careless officer; they are the actions of the type of officer DeSilva was describing when asked to assess Bulger: a consummate professional. Bulger did what he could. I find the following comments of the Ontario Civilian Police Commission in *Brown v. Haldimand-Norfolk Regional Police Force, supra, a propos*:

13. The test in our opinion is to look at the state of mind of the officer at the time he had to take action. Perhaps discharging the firearm into the car was fruitless... It was an act of panic out of fear for his life. This is the fear that anyone else in his position might reasonably experience. The fear of one's life is a basic instinct.

139. There is evidence, his own testimony, as corroborated by hospital records⁴⁸ that Bulger suffered an injury to his knee (arrachement osseux LCI – torn ligaments) during these events which required he wear a “zimmer” a leg brace that goes from the ankle to the thigh. I find that Bulger was indeed struck twice by Vienneau’s vehicle as he was running towards the snowbank. In this context, I find fear for his life is what prompted Bulger to take a shot at the back tire of the Vienneau’s vehicle.
140. Finally, with respect to Boudreau’s frame of mind – did he (inappropriately) act out of fear and panic - I find that the evidence does not support such a finding. I find, to the contrary, that Boudreau acted with restraint and that he properly assessed and reassessed the situation before using his weapon. A person acting out of fear and panic, in my view, would likely have shot multiple bullets at the perceived threat. This is not what Boudreau did. While I do not doubt he was fearful and probably extremely nervous, I think his use of force training kicked in when needed, which explains why the shots came in two bursts, punctuated by a reassessment of the situation.
141. In summary, I find:
- Bulger identified properly identified himself, both in his clothing and by his demeanor as a police officer;
 - Boudreau showed himself both in the way he was dressed and in the way he acted as an officer before taking the first of his four shots;
 - Vienneau’s vehicle was in motion when the first two shots were fired by Boudreau;
 - Vienneau’s vehicle was not stopped and stuck in the snowbank when the last two shots were fired;
 - Bulger acted with restraint and good judgment when he took a shot at Vienneau’s vehicle; and,

⁴⁸ Exhibits 14, 15 and 16.

- Boudreau did not act out of panic and fear rather than with restraint when he took the actions he took.
142. There remains to be addressed the substance of Count 3 – neglect of duty in failing to work in accordance with official police force policies and procedures.
143. The Complainant entered the Operational Manual – Bathurst Police Force Directives in evidence⁴⁹. It is a 256-page document to which no reference was made during the hearing. The Bathurst PF Use of Force policy, a 44-page document, to which I have already referred, was entered in evidence as well⁵⁰. A document entitled New Brunswick Policing Standards was also submitted but not referred to⁵¹. Finally, the Complainant relied on a portion of the the Administrative Manual – Municipal/Regional Police Forces – New Brunswick⁵² dealing with vehicle stops and cross-examined the Respondents extensively on the document and on how their intervention with Vienneau failed to comply with this policy or procedure.
144. The policy differentiates between “Unknown Risk Vehicle Stops” and “High Risk Vehicle Stops”. It states, as is relevant here:

High Risk Vehicle Stop

5. The “high risk” vehicle stops are often more easily managed in that the police officer has sometimes been forewarned is aware of imminent danger and is in a stage of full alert, e.g., stolen vehicle, vehicle suspected of being used in a major occurrence.

6. Assess the threat in order to consider what actions should be taken, such as,

⁴⁹ Exhibit 4, tab 20.

⁵⁰ Exhibit 4, tab 21.

⁵¹ Exhibit 4, tab 22.

⁵² Exhibit 4, tab 23.

- The nature of any crime which may be involved;
- The number of suspects in the vehicle, using the formula – those you can count – PLUS ONE;
- Weaponry likely to be involved;
- Type of vehicle;
- The environment, e.g., isolation, wooded area, urban area, etc.; and
- Available support, e.g., accompanied by a partner, firearms in police vehicle, approximate time for back-up to arrive etc

7. Bring the target vehicle to a stop in accordance with Section 2, Unknown Risk Vehicle Stop, and ensure that request for back-up has been acknowledged. If the driver fails to stop and normal procedures fail, a hazardous pursuit may follow and policy as outlined in Operational Manual Chapter 3.7 will be followed.

8. When the target vehicle is stopped:

- a) Position the police vehicle as described under “unknown risk” type of stop with special emphasis on stopping the police vehicle on such an angle as to obtain cover from the engine block.
- b) NEVER APPROACH the target vehicle at this stage. Give verbal commands to the occupants of the target vehicle using the P.A. system.

.....

10. There will be instances where this policy cannot be fully applied. In such cases, good judgment, common sense, experience and a sound knowledge of the law, particularly as it relates to use of force, must prevail.

145. The policy was put to Bulger and to Boudreau on cross-examination. In his Brief, here is what Mr. Chiasson writes about their testimony of on this point:

297. Cst. Bulger explained that he needed to exit his car when they came face to face with Mr. Vienneau's car because, in his words, he was a sitting duck inasmuch as the upper portion of his body was

exposed to a threat, although he did acknowledge that the engine block of his car would protect, in his mind, the lower part of his body. According to Cst. Bulger, he was safer standing from head to toe near his car than inside his car.

298. When confronted with the vehicle stop policy in effect at all times, he gave contradictory and confused explanations to explain how his actions complied with the policy.

...

349. It must be borne in mind that the Manual of Operation applicable to both Respondents clearly indicates that a vehicle stop is either an unknown risk or high-risk situation for the very simple reason that the car itself poses a danger. Cst. Larry Matchett explained, in his evidence, that he would use his car to protect himself while intercepting that vehicle because the engine block in his car would offer protection. Here, for reasons beyond reasonable understanding, both Respondents had devised a plan whereas both would jump out of their car and put themselves at extreme risk given that they had little police identification.

...

376. Both constables have failed to comply with the above when they exited their car as they did. It follows that they have failed to follow established policies.

146. Like Mr. Chiasson, I was unimpressed with the evidence of Bulger, to the effect that he would have been a sitting duck had he remained in the car with only the lower part of his body protected by the engine block. To be blunt, it didn't make sense. I find that Bulger's "interest in the outcome" and "motive to deceive"⁵³ affected his testimony on this point.

⁵³ See *Baker-Warren v. Denault*, 2009 NSSC 59 (CanLII), cited in the *Smiley* decision, mentioned at para. 56, *infra*.

147. Be that as it may, it is for the Complainant to prove the alleged breach, and I am not convinced the officers are guilty under this count.
148. First, point 8 a) of the policy dictates that the officer is to position the car as prescribed in the “unknown risk” type of stop. The “unknown risk” type of stop states that the vehicle is to be parked “approximately twenty feet behind the violator vehicle at a slight angle to the left...”. This was simply not possible in the circumstances.
149. I would add that, at this stage, the Respondents intended to detain or arrest Vienneau. They had four officers in the immediate vicinity to provide assistance. It is clear in my view that the operation that day did not lend itself to proceeding as suggested by the operational manual. The way the Respondents proceeded was consistent with their training and with how they had done things in the past. In my view, the Respondents were justified in resorting to point 10 of the manual, as they were operating in circumstances where the policy could not be fully applied.
150. Further, the Respondents would not have been able to follow the directive. While the G6 was equipped with a P.A. system, it had not been operational for months⁵⁴. Although police officers are required to inspect the vehicle assigned to them for, among other matters, unserviceable equipment, upon taking it over or “as soon as practicable”⁵⁵, the “Deputy Chief of Operations” is responsible for General Fleet Management and maintenance⁵⁶ and the “Section NCO’s and Shift Supervisors” are responsible for the day-to-day care of all vehicles assigned to their section or platoon⁵⁷. It was not the responsibility of the Respondents to have the P.A. system repaired.

⁵⁴ See Boudreau’s testimony.125

⁵⁵ Operation manual – Bathurst Police Force Directives, Exhibit 4, tab 20, page 204.

⁵⁶ *Ibid.*, at page 202.

⁵⁷ *Ibid.*

VI. **FINDINGS RESPECTING EACH COUNT**

Count 1

It is alleged that you, [both constables], On or about January 12, 2015, did improperly use and carry a firearm, as per subsection 35(g), of the N.B. *Police Act* and as described in s. 42

***42 A member of a police force improperly uses and cares for firearms if the member
(c) fails to exercise sound judgment and restraint in respect of the use and care of a firearm.***

151. For the reasons expressed above, and in particular in paragraphs 125 to 141, I find that the Respondents did not fail to exercise sound judgment and restraint in respect to the use and care of a firearm.

Count 2

It is alleged that you, [both constables], On or about January 12, 2015, did abuse his authority, as per subsection 35(f), of the New Brunswick *Police Act* and as described in s. 41

***41 A member of a police force abuses his or her authority if the member
(b) uses unnecessary force on a person.***

152. For the reasons expressed above, and in particular in paragraphs 125 to 141, I find that the Respondents did not use unnecessary force on a person.

Count 3

It is alleged that you, [both constables], On or about January 12, 2015, did neglect your duty as per subsection 35(b), of the New Brunswick *Police Act* and as described in s. 37

***37 A member of a police force neglects his or her duties if the member
(b) fails to work in accordance with official police force policies and procedures.***

153. For the reasons expressed above, and in particular in paragraphs 142 to 150, I find that the Respondents did not fail to work in accordance with official police force policies and procedures.

Count 4

It is alleged that you, [both constables], On or about January 12, 2015, acted in a discreditable manner as per subsection 35(a), of the New Brunswick *Police Act* and as described in section 36,

36(1) A member of a police force engages in discreditable conduct if the member

(a) while on duty, acts in a manner that is

(ii) likely to bring the reputation of the police force with which he or she is employed into disrepute.

154. For the reasons expressed above, and in particular in paragraphs 64 to 150; placing myself in the position of “*the reasonable person in the community, dispassionate and fully apprised of the circumstances of the case*”⁵⁸, I find that the Respondents did not act in a manner that is likely to bring the reputation of the Bathurst PF into disrepute.

Count 5

It is alleged that you, [both constables], On or about January 12, 2015, acted in a discreditable manner as per subsection 35(a), of the New Brunswick *Police Act* and as described in section 36,

36(1) A member of a police force engages in discreditable conduct if the member

(b) while on duty, is oppressive or abusive to any person

155. For the reasons expressed above, and in particular in paragraphs 125 to 141; placing myself in the position of “*the reasonable person in the community, dispassionate and fully apprised of the circumstances of the case*”⁵⁹, I find that the

⁵⁸ *Re Smith*, 2005 CanLII 77786 (NS PRB), as quoted at para. 76 of *Chief of Police, Fredericton Police Force v. Constable Cherie Campbell*, *supra*.

⁵⁹ *Ibid.*

Respondents did not engaged in discreditable conduct by being oppressive or abusive to any person.

VII. DECISION

156. For the above reasons, I find the Respondents not guilty of the alleged breaches of the *Code*. In the result, I dismiss the matters.

Dated at Fredericton, NB on December 24, 2019.



Joël Michaud
Arbitrator

**Appendix A
List of Exhibits**

- 1 Affidavit of Ernest Boudreau
- 2 Emails
- 3 Joint Book of Exhibits volume I
- 4 Joint Book of Exhibits volume II
- 5 Joint Book of Exhibits volume III
- 6 Photo (Cruze in snow)
-
- 8 Photo (aerial)
- 9 Photo (aerial -closer than Exh. 8)
- 10 Photo (Including Ambulance)
- 11 Photo (Cruze in the snow)
- 12 Photo (3 vehicles).
- 13 Photo (same, darker).
- 14 Triage Form
- 15 Emergency chart
- 16 Emergency Dept follow up
- 17 1 through to 11 (photos)