

Review of the New Brunswick Police Commission

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Part 1 - Introduction

On December 27, 2018 allegations were made by the New Brunswick Police Association (NBPA) during a press conference held in Saint John, New Brunswick, questioning the fairness and impartiality of the New Brunswick Police Commission's (NBPC), handling of complaints against police officers, and specifically the closed file of retired Deputy Chief Glen McCloskey of the Saint John Police Force.

On December 29, 2018 the Acting Chair of the NBPC requested assistance from New Brunswick's Minister of Public Safety, the Honorable Carl Urquhart, in appointing an independent third party to review concerns raised by the NBPA, including a review of the Commission's investigative processes and procedures.

A Terms of Reference was developed that set out two main objectives 1. To ensure the NBPC has in place policies, procedures and practices that ensure its handling of all complaints is impartial and fair to all involved and 2. To improve confidence in the impartiality and fairness of the NBPC.

The Minister engaged Alphonse MacNeil, from Alphonse MacNeil Consulting Inc. to conduct the review with the direction that the reviewer would report to the Minister and the Chair of the NBPC on any variances between NBPC policies, procedures and practices and "best practices" in the field of responding to complaints about police officer conduct. For clarity, it was noted that the review of the NBPC policies and practices will include all those related to the processing of complaints that are received after the deadline for complaints under the *Police Act*. The review will make recommendations on any changes required, with rationale.

The Terms of Reference went on to add that given the scope of the subject matter, the tight timelines and the need to respect the independence of the Commission in managing cases still open before the Commission, the reviewer will focus on the McCloskey file, and on the policies and procedures of the Commission. The complete Terms of Reference is attached as Appendix A.

Within this report please note that references to the New Brunswick Police Commission will appear as *NBPC* or the *Commission*. The term *Staff* will refer to the fulltime staff that occupy the three positions of Executive Director, Associate Director and Administrative Assistant. The four appointed members of the Commission, including the Chair and Vice-Chair, may be referred to on occasion as the *Board* as a reference to the Board of Directors of the Commission or simply the *Commission*. It is also important to be aware that the current Board and Staff identify themselves as one team that represents the Commission.

This report is divided into four parts. Part 1 covers the introduction, methodology and limitations. Part 2 describes how policing is structured in the Province of New Brunswick and the role of civilian police oversight. The NBPC was examined in detail including its policies practices and procedures and the complaint and investigation process was explained. Part 3 of the report focuses on 14 areas of concern that were identified by the reviewer through consultation with stakeholders. Each area was addressed, and recommendations were made with the objective of ensuring the NBPC has in place

policies, procedures and practices that will ensure its handling of complaints is impartial and fair to all involved as well as improving confidence in the NBPC and strengthening the Commission. Part 4 of the report focused on Mr. McCloskey's file and the practices the NBPC relied on to process the conduct complaint.

The topics described and recommendations made will assist in supporting the organizational structure and procedures of the Commission. One of the most important issues identified has to do with relationships. The NBPC is without a doubt an independent civilian oversight body that has an arm's length relationship with government, however, it should not be conducting business in isolation. It is critically important for the Commission to build a strong reputation through strengthened relationships with all stakeholders. Trust, fairness and consistency will only be achieved through communication and that has been missing in recent years between the NBPC and stakeholders.

Organizations learn from after action reports and the retrospective analysis of the actions taken in the McCloskey case can assist the NBPC in developing strong and effective policies practices and procedures moving forward.

The reviewer acknowledges that the Commission is taking a new direction, and it is reflected in their recently developed strategic plan, the development of policy documents and outreach to stakeholders that focuses on the objectives of improving the foundation, improving partnerships and improving internal processes and decision making.

1.1 The Reviewer

Alphonse MacNeil was a member of the Royal Canadian Mounted Police for 38 years and retired at the rank of Assistant Commissioner in April of 2014. Upon retirement he became a private consultant specializing in policing, major event security, leadership training, threat risk assessments and organizational reviews.

His law enforcement career includes working at the municipal, provincial, national and international levels. He has extensive frontline policing experience in General duty, Drug Investigations, Major Crime investigations, Federal Enforcement and Protective Policing. As a senior manager within the RCMP he has led the National Traffic Services Program and was an Operational Commander for the first fully integrated policing unit in Canada. He was also the Officer in Charge of the Canadian Air Carrier Protective Program (Canada's Air Marshalls) and in that role was elected as Chair of the International Air Marshall Committee.

Between 2008 and 2010 he was responsible for the provision of security to the leaders of the world as he led the Integrated Security Unit for the 2010 G8-G20. This remains the largest deployment of security personnel in Canadian history with in excess of 20,000 police officers and private security deployed. Since 2009, at the request of local police, he has travelled to the United States, South Korea, Australia, Singapore and Northern Ireland to analyze security plans, examine sites and provide advice to police and governments on security for gatherings of world leaders. Between 2010 and 2014 Alphonse was the Commanding Officer of the RCMP in the Province of Nova Scotia.

Following his retirement, in 2014, the Commissioner of the RCMP appointed Alphonse to conduct a review of the murder of three RCMP members in the line of duty in Moncton, New Brunswick. He provided the Commissioner with a report that included 64 recommendations that resulted in operational and tactical changes that would contribute to the safety of RCMP members across the country.

Since 2015 Alphonse has conducted organizational reviews for non-police agencies and has worked with multiple police forces in Canada as well as the Patrol Police in Ukraine. In addition, he has recently provided leadership and conflict management training to police services throughout the Maritimes and conducted a review of a New Brunswick Police Service.

1.2 Review Methodology

The Methodology for this review focuses on four main activities:

- a) Interviews – conducting interviews with NBPC personnel and multiple stakeholders to identify information that can be used to inform the review;
- b) Research – conducting research to identify best practices and background information to develop recommendations;
- c) Collection and Analysis – collection and analysis of data from documentation received, interviews conducted and research to develop recommendations; ‘and’
- d) Recommendations – identification of recommendations to ensure the NBPC has in place policies, procedures and practices that will assist in handling complaints in an impartial and professional manner to improve relationships with stakeholders and to build confidence in the impartiality and fairness of the NBPC.

1.3 Review Limitations

The reviewer was provided access to all available information relevant to the scope of work. This included documents in the possession of NBPC and the Department of Public Safety (DPS). Persons interviewed including Mr. McCloskey, Civic Authorities, members of the NBPA and others provided documentation in their possession to assist in informing the review. There were however some limitations that are noted below:

- a) Mr. Staphan Roberge, the Executive Director of the NBPC from August 2014 to December 2018, declined an opportunity to be interviewed by the reviewer. As a result, the reviewer was unable to obtain Mr. Roberge’s position regarding the allegations made by the NBPA and Mr. McCloskey or the opinions of other interview subjects on his term as Executive Director;

- b) The timeline provided to conduct the review did not permit the opportunity to conduct public consultation with residents of the province of New Brunswick on the topic of police oversight and specifically the work of the NBPC;
- c) The NBPC possesses a vast number of documents and does not have an electronic records management system. In addition, many of the interviewees provided documents to the reviewer for consideration in conducting the review. The timeline allotted would not permit the opportunity for the reviewer to read each document in its entirety, however, the reviewer made every effort to examine all documents that appeared to have relevance to this review;
- d) There has been frequent turnover in the Executive Director position and some of the permanent staff and members of the Board of the NBPC have three years or less in their role. For that reason, corporate knowledge is somewhat limited particularly in relation to the origins of the Commission; however, the NBPC made a concerted effort to obtain the information requested.

PART 2: Policies Practices and Procedures of the New Brunswick Police Commission

2.1 Background

The province of New Brunswick currently has seven municipal police forces serving Edmundston, Grand Falls, Woodstock, Fredericton, Saint John, Miramichi and Bathurst, and two regional police forces — Kennebecasis Regional Police Force, which services Rothesay and Quispamsis, and the BNPP Regional Police covering Beresford, Nigadoo, Petit-Rocher and Pointe-Verte.

The Royal Canadian Mounted Police services nine municipalities through direct agreements with the federal government while New Brunswick's remaining 76 municipalities and local service districts are policed by the RCMP through the Provincial Police Services Agreement, where the provincial government pays the federal government for the RCMP's regional services and then bills the municipalities quarterly.

To demonstrate how the structure of policing has changed in New Brunswick, the first annual report of the NBPC was produced in 1981. The report indicated that at that time there were 28 municipal police forces, one regional police force, the New Brunswick Highway Patrol and the Royal Canadian Mounted Police responsible for policing within the Province.

Since the NBPC addresses complaints regarding the conduct of members of municipal or regional police forces the focus will be placed there and not on the RCMP, however, it is recognized that Section 20 of the *Police Act* states that the Commission may assess the adequacy of each police force and the RCMP. The issue of adequacy will be addressed later in this review.

The responsibilities of the police are multi-faceted and include the following: ensuring public safety, maintaining order, enforcing laws and regulations, as well as preventing, detecting, and investigating criminal activity. They are also responsible for road safety/traffic enforcement and community policing activities which include community engagement and presentations to groups ranging from young people to senior citizens. In addition, today's police services are called upon to respond to a wide range of challenging social issues. These issues include intimate partner violence, sexual assault, organized crime, human trafficking, child exploitation, guns and gang related crimes, and intervention in mental health crisis situations.

The job of a police officer is a difficult one that on occasion places the officer in a position where he or she must make an immediate decision that could result in the death or serious injury of a member of the public or a police officer. Even when the situation does not involve life or death decisions, police officers on a regular basis are confronting hostile or emotionally charged situations with limited information. This can place additional stress on an officer to take action that could possibly lead to a public complaint, or in more serious instances, a criminal investigation. In addition, there are occasions where officers without provocation take actions that appear to be inappropriate.

It is critically important that when such events occur there is a well-established system in place that permits a member of the public to file a complaint against a police officer with confidence that it will be acted upon in a fair and timely manner without bias and that there will be no retribution by the police as a result of the complaint being made. Police officers must also have the same confidence that the system in place will ensure they are treated fairly and impartially in any investigation that is pursued against them. They cannot effectively do their jobs without the confidence that any allegations against them will be competently investigated and the totality of the situation will be examined.

During the 1960s and 1970s, civilian oversight of policing was the subject of increased public interest. A series of reviews at the time called for a greater civilian component in the public complaints system against police. The public were concerned about police investigating police and the implied bias that existed in that type of arrangement.

The Honourable Michael H. Tulloch in his 2016 review of Police Oversight for the Province of Ontario noted the following:

One of the cornerstones of modern policing is that “the police are the public and the public are the police.” This principle, associated with Sir Robert Peel, recognizes the indivisibility of the interests of the police and the public. It also underlies the basis for public confidence in the police. It recognizes that the special authority bestowed on the police is at the behest of the public and is to be exercised in the public interest. This is generally referred to as “policing by consent.”

Policing by consent involves giving considerable authority to police officers with the consent of the public, thereby providing officers with powers and legal defences unavailable to other citizens. In essence, the police are simply citizens in uniform who ensure the welfare of the community. Thus, the role of the police is not simply to prevent crime, but to serve and protect members of the community. To Sir Robert Peel, this was seen as preferable to maintaining order through military force.

Policing by consent recognizes that the exercise of special powers by the police depends on public approval, also known as legitimacy. The public's acceptance of the police's role in society as legitimate is based on public trust and requires the respect and cooperation of the public.

Sometimes, however, the police find themselves in circumstances requiring the use of force, which may result in the death or serious injury of a civilian. Other times, police contact with members of the public may result in situations in which a person feels that an officer was rude or behaved in a manner that was below the expected standard of professionalism.

For the public to have confidence that the police will be held accountable for any wrongdoing, the investigation and resolution of potential police misconduct often requires the involvement of an outside investigative body”.

It is within this context that civilian police oversight bodies were created. The NBPC being one of them, was established by the Legislative Assembly in 1977 when it enacted the *Police Act*. That Act provided the Commission's mandate as:

The investigation and determination of complaints by any person relating to the conduct of a member of a Municipal or Regional police force;

The investigation and determination of any matter relating to any aspect of policing in any area of the province, either on its own motion, or at the direction of the Solicitor General; and

The determination of the adequacy of Municipal, Regional and Royal Canadian Mounted Police Forces within the Province.

The NBPC has evolved through several configurations since 1977 when it had just two members, to the structure that exists today with three full time staff and four Commission Board members. The organizational chart for the current Commission is attached as Appendix B.

This report will include recommendations that are intended to build confidence with the public and police that:

1. complaints against the police will be properly and fairly investigated without bias or predetermination;
2. the rights and interests of the public and the police officer will be respected and there will be consistency in approach.

2.2 Interviews

Interviews with NBPC personnel and former personnel as well as multiple stakeholders were conducted between May 13 and June 27, 2019. Interviews included current and former NBPC staff, current and former NBPC Board members, a representative of DPS, current and former Chiefs of Police, current and former NBPA Executive, a member of a

Civic Authority, investigators, the Director of the Serious Incident Response Team of Nova Scotia and the Commissioner of the Office of the Police Complaints Commissioner of Nova Scotia. The reviewer also spoke to police officers in the province of New Brunswick who did not wish to be named in the review but provided their thoughts on the NBPC and police representation on committees making decisions on police oversight.

The interviews consisted of gleaning information from the interviewees on their experience with the NBPC and the complaints system and seeking their thoughts on how the policies, procedures and practices of the NBPC could be improved or enhanced. Much of the discussion surrounded the relationship and level of respect that must exist between the NBPC and stakeholders and how critical a solid relationship is to the success of police oversight. This will be discussed in detail throughout the report.

#	INTERVIEWEE	TITLE/POSITION
1	John Jurcina	Assistant Deputy Minister – DPS
2	Jennifer Smith	Executive Director NBPC
3	Jill Whalen	Associate Director NBPC
4	Lynn Chaplin	Acting Chair NBPC
5	Ron Cormier	Former Chair NBPC
6	Marc Léger	Board Member NBPC
7	Ernie Boudreau	Chief of Police, Bathurst Police Force
8	Bob Eckstein	Board Member NBPC
9	Barry MacKnight	Investigator appointed by NBPC for the Glen McCloskey <i>Police Act</i> matter.
10	John Foran	Board Member NBPC
11	Gord Vail	Investigator – Nova Scotia Serious Incident Response Team
12	Judith McPhee	Commissioner, Nova Scotia Office of Police Complaints
13	Leanne Fitch	Chief of Police, Fredericton Police Force
14	Wayne Gallant	Chief of Police, Kennebecasis Regional Police Force
15	Paul Fiander	Chief of Police, Miramichi Police Force
16	Charles Comeau	Chief of Police, BNPP Regional Police Force
17	Mitch MacMillan	Chief of Police, Woodstock Police Force
18	Suzanne Themens	Chief of Police, Grand Falls Police Force
19	Glen McCloskey	Former Deputy Chief Saint John Police Force
20	Rose McCloskey	Wife of Glen McCloskey
21	Steve Palmer	Former Chief of Police, Kennebecasis Regional Police Force
22	David Emerson	Former Board Member NBPC
23	Bob Davidson	Labour Analyst NBPA
24	Dean Secord	Former President NBPA
25	Duane Squires	General Vice President NBPA
26	John Foster	Former Chief of Police, Woodstock Police Force
27	Matt Alexander	Former Chair, Kennebecasis Regional Joint Board of Police Commissioners
28	Pierre Beaudoin	Former Executive Director NBPC

#	INTERVIEWEE	TITLE/POSITION
29	Robert Stoney	Former Acting Chair NBPC
30	Felix Cacchione	Director Serious Incident Response Team
31	Robert Basque	Legal Counsel NBPC

2.3 Police Oversight – Province of New Brunswick

Effective police oversight promotes accountable policing within communities and enhances public confidence in law enforcement through the impartial review of police activities and transparent reporting of outcomes.

Police oversight can come in many forms and multiple organizations in Canada play a role in the civilian oversight of police forces. Civilian oversight of police can simply be defined as the oversight of police activities by people who aren't active members of the police force. This can include Canadian courts, since judges comment frequently on the actions of police officers during criminal trials and when someone sues the police. Civilian oversight can also extend to politicians, the media, public interest groups and any person commenting on the actions of the police online or through social media.

For the purpose of this review the focus will be on the formalized or legislated aspect of police governance and oversight in the Province of New Brunswick. There are various levels of governance and oversight as listed below:

The Minister of Public Safety - the *Police Act* states that the Minister will promote the preservation of peace, the prevention of crime, the efficiency of police services and the development of effective policing. The Minister may consult and advise boards, councils, police forces and regional policing authorities, as well as provide information and advice respecting the management and operation of police forces. The Minister may also establish a system of inspection and review of police forces and this exists with the Quality Assurance Process delivered by DPS to all police forces. DPS conducts on site reviews based on risk ranking which helps to ensure the quality of policing services.

Civic Authorities - Civic authority means a board, a joint board or where a board or joint board has not been established, a council. In New Brunswick, St. John has the only board with Kennebecasis and BNPP maintaining the two joint boards. The remaining police forces have their Council as the civic authority. A civic authority in consultation with the chief of police shall establish the policies, priorities and objectives of the police force, shall issue instructions as necessary to the chief of police and shall ensure that the chief carries out his or her duties in accordance with the *Police Act* and Regulations.

Chief of Police - The police chief shall lead the police force and oversee the operation in accordance with the *Act* and the Regulations and the priorities, objectives and policies established by the civic authority. Shall have the powers necessary to manage and direct the police force, shall apply professional police procedures and ensure the members of the police force carry out their duties in accordance with the *Act* and Regulations. The police chief shall report directly to the civic authority in respect of the operation of the police force.

New Brunswick Police Commission – The NBPC is the independent civilian oversight body that safeguards the public interest in policing in New Brunswick. As the subject of this review the NBPC will be described in detail in section 2.4 of this report.

2.4. New Brunswick Police Commission

2.4.1 Governance

Part II, Section 18(1) of the New Brunswick *Police Act* states that there shall be a New Brunswick Police Commission appointed by the Lieutenant-Governor in Council composed of a chair, a vice-chair and such other members as the Lieutenant-Governor in Council sees fit to appoint, each to be appointed for a term not to exceed ten years.

The Commission shall submit an annual report to the Minister of Public Safety. The Minister of Public Safety will table the Annual Report in the Legislative Assembly after which the Commission will distribute the Annual Report to stakeholders.

Appointment of members to the Commission shall be coordinated by the Minister of Public Safety, in consultation with the Commission, considering specific criteria.

Meetings of the Commission will be open to the public unless there are matters of a confidential nature to be discussed. All decisions of the Commission will be made through the process of using motions and resolutions.

2.4.2 Establishment

The current establishment of the NBPC consists of three full time employees in the positions of Executive Director, Associate Director and Administrative Assistant. The Board is made up of a Chair (currently vacant), Vice-Chair (currently acting Chair) and three additional Board members. These are part time positions that meet on a monthly basis. The Board attempts to meet in person when possible; however, when necessary the Board or a member of the Board may connect via teleconference.

2.4.3 Vision

The Vision of the NBPC has evolved with a turnover in personnel. The Board members and new Executive Director and staff developed a Strategic Plan and Vision for the NBPC. The Vision focuses on fair, independent and trusted civilian oversight of policing in New Brunswick. Their Vision is driven by the values of Quality Service, Integrity, Accountability, Objectivity and Transparency.

2.4.4 Strategic Plan 2019-2021

The NBPC Strategic Plan sets out Goals, Objectives and Action Items that will guide the Commission through the coming three years. The plan is attached as Appendix C and the goals and objectives are listed below:

1) Goal – Improve foundation

Objective – Ensure the basic functions of the NBPC are the highest standard in the country;

2) Goal - Improve partnerships

Objective – Establish and maintain effective and collaborative working relationships with the Commission’s key partners;

3) Goal – Improve internal processes and decision making.

Objectives – Create a clear understanding by all staff and members of operations and the decision-making process of the Commission.

Create a positive organizational culture.

2.4.5 Mandate

The NBPC is an independent civilian oversight body that safeguards the public interest in policing by:

- Addressing complaints regarding the conduct of members of municipal and regional police forces and ensuring independent investigations;
- Ensuring consistency in disciplinary and corrective measures imposed in response to *Police Act* violations;
- Investigating matters relating to policing in New Brunswick.

2.4.6 Responsibilities of the Commission

It is the intention of the new Board of Directors and permanent staff members to work as a team and share responsibility for the work of the Commission. Those responsibilities include:

- Setting the strategic direction and ensure implementation;
- Promoting a corporate culture committed to excellence and innovation;
- Building and maintaining positive relationships with the organization and with stakeholders and the public;
- Measuring and reporting on performance;
- Managing change;
- Communicating with stakeholders;
- Providing direction, evaluation and feedback mechanisms to staff. In addition, ensuring appropriate systems are in place for executive development, compensation, evaluation and succession planning;
- Adopting and ensuring excellence in governance;
- Managing risk.

2.4.7 Role of the Chair

The Chair of the Commission is appointed by Order-in-Council. A Vice-Chair is appointed in the same manner and acts for the Chair when he or she is unable to act. The Chair has a specific role to play in leading the board to sound and productive oversight and decision making. While the Chair’s most visible tasks are signing off on final decisions of the Commission regarding complaints and the running of meetings, his or her role involves providing overall leadership, ensuring the Commission’s agenda moves forward in a positive manner, building common understanding and awareness, rallying the Board to

acceptable solutions and facilitating the making of difficult and well thought out decisions. The Chair may also be assigned as the primary public face of the Commission.

2.4.8 Role of the Commission member

An individual is appointed to the Commission because he or she has expressed an interest in contributing to the Commission's vision: fair, independent and trusted civilian oversight of policing in New Brunswick.

New Commission members must be willing to inform themselves about the relevant legislation and regulations, the Commission's structure, their responsibilities as Commission members, the Commission's strategic plan, among other aspects of the organization. Throughout their terms, Commission members must ensure they have sufficient information to make wise and informed decisions. There is an ongoing need to be aware and informed of developments in policing and activities of the Commission. Commission members should be comfortable in speaking to the Executive Director and/or the Associate Director if they need information or want explanations.

The Commission is responsible and held accountable for the success or failure of the organization and it is the Commission member's responsibility to contribute to its success and progress. The Executive Director and Associate Director can help support Commission members in this regard by ensuring appropriate information is readily available.

In addition to the above noted, specific roles also include the following:

- Reviewing agenda materials and participating in Commission meetings;
- Participating in the Commission's various organizational planning activities (e.g., setting the vision, developing the strategic plan, establishing the Commission's major priorities, etc.);
- Sitting on various committees as assigned;
- Participating in the performance evaluation of the Executive Director;
- Declaring a conflict of interest;
- Conducting settlement conferences; and
- Adhering to the Team Charter.

2.4.9 Role of the Executive Director

The Executive Director is the Chief Executive Officer and has full authority and powers for the day to day management of the organization. The Executive Director is accountable to the Board for the performance of the organization, the success in meeting the business objectives, and the financial and resource management of the Commission. The Executive Director and his or her staff are responsible for carrying out the directions of the Board. A critically important aspect of the Executive Director's role is the development of relationships with the Commission's stakeholders.

2.5 Complaint Process

Since the NBPC is responsible to safeguard the public interest by 1) addressing complaints regarding the conduct of members of municipal and regional police forces and ensuring independent investigations; 2) ensuring consistency in disciplinary and corrective measures imposed in response to *Police Act* violations; 3) investigating matters relating to policing in New Brunswick, it is important to understand the process prescribed by the *Police Act* for managing complaints. On average, over the past five years the NBPC received and monitored 68 files per year.

2.5.1 Categories of Complaint

Complaints are characterized into three categories 1) a service or policy complaint, 2) a conduct complaint, 3) a combination of the service or policy complaint and a conduct complaint. Process maps indicating in detail how each complaint is managed are included in Appendix D.

2.5.2 Processing of the Complaint

If a conduct complaint (which must be in writing) is received directly by the NBPC the NBPC will categorize the complaint as noted above and pass it along to the chief of police at the police force where the complaint originated. If the chief receives the complaint directly, he/she will categorize the complaint and advise the NBPC. The NBPC can accept the categorization or change it.

The chief will notify the subject officer and based on the nature of the complaint may dismiss it summarily or attempt an informal resolution. If the chief dismisses the complaint summarily, he/she must notify the NBPC and the complainant of the decision. The NBPC will review the decision and confirm it and close the file or rescind the decision and order the chief to process the complaint. The NBPC notifies the complainant and subject officer of the decision and the matter will either be dealt with through informal resolution or go to investigation.

If the chief determines the conduct complaint can be resolved informally, he/she gives notice in writing to the complainant and subject officer of the decision to attempt informal resolution. If the complaint is resolved informally the chief gives the complainant and NBPC notice in writing of the results. If no consensus reached the chief moves to investigation. If there was an informal resolution, within 14 days the complainant can request the NBPC to review the decision. Following a review, the NBPC can confirm the results and close the file or rescind and order an investigation.

Once the decision is made to move to an investigation, an investigator is appointed. If there is not sufficient evidence of a breach of the code, then no further action is taken. If there is evidence of a breach of the code, then the chief moves to a settlement conference.

If no further action the chief notifies the subject officer, complainant and NBPC of the decision to take no further action. The complainant has the option to request the NBPC to

review the decision. The NBPC can confirm the decision and close the file or rescind the decision and order a settlement conference.

If the decision is made to proceed to a settlement conference the subject officer must be served with Notice of the Settlement Conference and provided access to documents. The complainant is notified of the Settlement Conference and invited to attend. If settlement is reached, then immediately the NBPC is served with a letter of settlement with a copy to the complainant and subject officer. If settlement is not reached the subject officer is served with a notice of arbitration hearing. If there is a settlement reached agreed disciplinary and corrective measures are stayed for 30 days. Within 14 days the complainant can request the NBPC review the settlement. The NBPC can confirm the settlement and close the file or rescind the settlement and refer the matter back to the chief for settlement with recommendations or serve notice of Arbitration Hearing on the chief and subject officer.

If the Conduct complaint is against the chief or deputy chief the process is the same with the exception that now the Civic Authority takes the place of the chief in the process.

If the complaint is Service/Policy complaint and it is received by the NBPC, the NBPC categorizes the complaint as a service/policy and refers it to the chief or civic authority for processing. If it is categorized as a conduct, service and/or policy complaint refer to the process for conduct above.

If the Service/Policy complaint is received by the chief and or civic authority, they categorize the complaint. The Civic Authority refers the complaint to the Chief for processing and the chief gives notice to the complainant, civic authority and NBPC on the disposition and the file is closed.

The civic authority may process the complaint in consultation with the chief in which case the civic authority gives notice to the complainant and the NBPC on disposition and closes the file.

It is important to note that in addition to this process the NBPC may, at any time, before an arbitrator has been appointed, process a conduct complaint or take over from a chief of police or civic authority the processing of a complaint.

2.5.3 Time Limits

Time limits exist in the *Police Act* for the processing of complaints. A complaint shall be filed within one year after the date of the incident or omission or occurrence of the conduct that is the subject of the complaint. The Commission may, however, extend the time for filing of the complaint where in the opinion of the Commission circumstances so warrant. In addition, a chief of police or civic authority shall commence an examination into the conduct of a member of a police force where no conduct complaint is filed within one year after the day on which the chief of police or civic authority becomes aware of an alleged breach of the code.

As noted, the Commission may extend the one-year time limit where circumstances warrant. Although those circumstances are not specifically documented in the *Police Act*

the Commission has recently created and approved policy and a public guideline, which articulates their discretion for extending the time limit. The guideline is as follows:

Commission's Discretion under subsection 25.1(2) of the *Police Act*

The Commission may extend the one-year time limit for making a complaint under subsection 25.1(1), by taking into consideration the following:

a) a continuing intention to pursue the complaint:

It should be evident that the complainant has always intended to pursue the complaint despite the delay in filing. If the complainant seeks an extension of time to file a complaint where it is clear the complainant was previously fully aware of the relevant facts, and yet had no intention to pursue the substance of the complaint, this should weigh towards denying an extension;

b) the merit of the complaint:

The complaint should be reviewed simply to determine whether the complaint is or may be credible. The purpose at this stage is not to judge whether the complaint will be successful, or that the substance of the complaint is true, but to eliminate obviously frivolous complaints;

c) the respondent will not be unduly prejudiced by the extension:

The Commission should consider whether the delay in filing the complaint will prejudice the respondent and means an actual loss of evidentiary position as a result of the disappearance of a witness, document or other evidence;

d) there is a reasonable explanation for the delay:

If there is a reasonable explanation for the delay, then this should weigh towards granting an extension. Examples of reasonable explanation include not learning of the act(s) complained of until near or after the time-limit and/or special circumstances which prevented a complainant from filing the complaint within the prescribed time-limit, for example:

- mental or physical disability;
- the exercise of a statutory or other applicable appeal or review right in a timely and appropriate fashion; and
- internal complaint with respondent employer;
- a grievance procedure;
- an appeal in the courts; or
- an appeal of a WorkSafeNB decision.
- any other justified reason as determined by the Commission.

The Commission may also consider whether there is some overriding factor that necessitates an extension be granted. "The ultimate question is always whether, in all the circumstances and considering the factors referred to above, the justice of the case requires that an extension of time be granted".

The Commission has recently put in place procedures that guide the process to review a request for an extension and a formalized response that provides their rationale for approving or denying the request. The purpose of this policy is to ensure that the provision of subsection 25.1(1) of the *Police Act* is administered in a fair, consistent and equitable manner.

In addition to the one-year time limit to file a complaint, subsection 25.1 (4) of the *Police Act* states the period of time between filing a conduct complaint or the commencement of

an examination into the conduct of a member of a police force where no conduct complaint is filed and the date the chief of police or civic authority serves the member of the police force with a notice of settlement conference shall not exceed six months. Subsection 25.1(5) goes on to state if the conduct complaint is not processed or an examination into the conduct of the member of a police force where no conduct complaint is filed is not completed within the six months no further action shall be taken against the affected member of a police force and no entry shall be made in the service record of discipline or personnel file of the member of a police force.

An exception to the six-month rule can be found in subsection 27.2(1) of the *Police Act* that indicates the Commission may suspend the processing of a conduct complaint where the processing will be or becomes an investigation into an alleged offence under an act of the legislature or an Act of the Parliament of Canada until such time as the Commission directs otherwise. This circumstance arises for example when a conduct complaint is made and a criminal investigation that impacts that conduct investigation is ongoing. The conduct investigation is suspended until the criminal investigation, which takes precedence, is completed. The conduct investigation may then be reinstated bearing in mind the total time for the investigation and service of documents cannot exceed six months. There is currently no option to extend the six-month time period.

2.5.4 Investigators

Under section 26.2 of the *Police Act* the Commission shall establish and maintain a list of persons who are knowledgeable in investigative techniques and procedures and have indicated a willingness to act as an investigator. When conducting an investigation into a conduct complaint the investigator may question witnesses, take statements and obtain documents and physical objects. The investigator may also seek assistance and information from any member of a police force.

2.5.5 Notification of the Police Officer

The chief of police shall give the police officer notice in writing of the substance of the conduct complaint immediately after he or she receives the conduct complaint. *Some of the chiefs that were interviewed interpret “immediately” as being after the complaint is categorized under subsection 27.3(1).*

The chief of police may withhold notification of the police officer if the chief of police determines that notification may jeopardize the processing of the conduct complaint.

If the chief of police decides to withhold notification under subsection (2), the chief of police shall immediately give the Commission notice in writing of such decision.

The Commission may order the chief of police to give the police officer notice in writing of the substance of the conduct complaint and the chief of police shall comply immediately with the order.

2.5.6 Appointment of an Investigator

The appointment of an investigator is detailed under Section 28 of the *Police Act* and is summarized below:

If the chief of police conducts an investigation into a conduct complaint, the chief of police may

- (a) appoint as an investigator a member of a police force to which the police officer being investigated belongs and who is of a higher rank than the police officer being investigated;
- (b) appoint as an investigator a member of another police force who is of a higher rank than the police officer being investigated; or
- (c) appoint an investigator from the list established and maintained by the Commission.

The chief of police shall, if he or she determines an external investigation is necessary in order to preserve public confidence in the complaint process or, if the Commission orders it,

- (a) appoint as an investigator a member of another police force who is of a higher rank than the police officer being investigated; or
- (b) appoint an investigator from the list established and maintained by the Commission.

If the Commission processes a conduct complaint or takes over from a chief of police the processing of a conduct complaint as a matter of public interest, it shall appoint as an investigator a police officer of another police force who is of a higher rank than the police officer being investigated or appoint an investigator from the list it establishes and maintains.

2.5.7 Investigation Report

Upon completion of an investigation, the investigator shall provide the chief of police with the full details of the investigation, including:

- (a) a true copy of the investigation report;
- (b) a true copy of all statements taken during the course of the investigation;
- (c) a true copy of documents removed;
- (d) a list of physical objects removed; and
- (e) a summary of the investigator's findings and conclusions.

Upon receipt of the documents listed the chief of police shall:

- (a) provide a copy of the documents to the Commission, or, if the Commission agrees, make the documents available for viewing during normal business hours; and
- (b) provide a summary of the investigator's findings and conclusions to the police officer and the complainant.

2.5.8 Investigation of a Serious Incident

On occasion the actions of a police officer may result in a serious injury or death to a member of the public. There are also occasions when the actions of an officer even if they did not cause a specific injury or death may be such that they generate significant public interest. It is important to note that in these situations there does not have to be an allegation of wrongdoing; however, the seriousness of the case requires an investigation be conducted by an outside agency in order to maintain the confidence of the public in the police force. This is a time when the local police force investigating one of its own officers would not be perceived as acceptable.

Currently when this occurs a police force in New Brunswick will seek the assistance of the RCMP or the chief of police of another police force within New Brunswick or outside of the province. On occasion a police force, through the Minister of Public Safety, will call upon Nova Scotia's Serious Incident Response Team (SIRT).

Six provinces in Canada have dedicated fulltime teams to handle serious incident investigations: British Columbia, Alberta, Manitoba, Ontario, Quebec, and Nova Scotia. This will be commented on further in the analysis section of this review.

Part 3: Areas of Examination, Analysis and Recommendations

Results of a General Social Survey on Social Identity released in 2015 indicated 76% of Canadians have either a great deal or some confidence in the police, making it the institution with the highest level of public confidence. Communities understand the importance of the police in keeping communities safe and upholding the law and are generally supportive of the role of the police and the practices utilized to ensure community safety. However, when a police officer is believed to have committed a violation of the code of conduct or has been involved in a serious incident that requires investigation there is a growing concern for the practice of the police investigating the police even if the police officer conducting the investigation is from another police service.

Vocal opponents of the police investigating the police point to their belief that a police force investigating the behavior of other officers is always influenced by "police culture". There is a belief that the police will protect each other at all cost and that is driven by the mentality of facing danger together. These comments no doubt influence public opinion and can cast doubt on the legitimacy of a police force investigating the actions of its own members or the actions of a member of another police force.

These beliefs accentuate the requirement for civilian oversight which is now a common feature of policing in Canada. There is a need to uphold public confidence in police and maintain the rule of law by keeping police accountable for their actions. Every province in Canada maintains its own unique civilian oversight body that strives for a fair, accessible and transparent means to address complaints against police. In New Brunswick this responsibility falls to the NBPC. It is critically important that the NBPC be recognized as a fair, independent civilian oversight body that can be trusted by the public and the police to provide services that are dependable and consistent and to act with honesty and professionalism in making balanced and unbiased decisions. The public must be aware of the existence of the NBPC, what it stands for and how it can support them. Police officers must be confident that the NBPC has the processes in place to ensure the officers rights are respected, that competent investigations will be conducted, and that they will be treated fairly.

This part of the review will examine current practices of the NBPC and issues that were raised during interviews and the document review. Where applicable, recommendations for improvement are made to assist the NBPC in positioning itself to provide the best possible service moving forward.

3.1 Relationships

During the interview process for this review, many of the interviewees commented on personalities and to the extent that personalities impacted relationships those comments were relative to the analysis of the practices of the NBPC. The issue of the relationship between the NBPC and those that have a stake in police officer conduct or police oversight accounted for more discussion than any other topic. It was clearly evident that in recent years there was a fractured relationship between stakeholders and the NBPC that led to a very strained environment.

The stakeholders respected the independence of the Commission and the requirement for an arm's length relationship with government; however, they believed that independence would not be undermined by partaking in dialogue with stakeholders. They felt a professional working relationship where issues could be discussed would not interfere with the Commission's independent right and responsibility to have the final say in decisions regarding police oversight.

In particular, the relationship between the former Executive Director, Mr. Roberge, and the stakeholder group including Chiefs of Police, the NBPA, the Department of Public Safety and Civic Authorities was described as adversarial and lacking trust. In addition, the internal relationship between the Commission Board members appointed since 2017 and the former Executive Director was also oppositional, and they expressed a feeling that the former Executive Director not only ignored their position on the Board but made them feel he didn't trust them to be part of the decision-making process and he advanced serious matters without the input of the Board. Interviews indicated that Mr. Roberge took the position that he was in charge of operations and the Board was there just to provide strategic direction. He also felt his only responsibility was to the Chair of the Board and had no requirement to consult with or share documents with the other Board members. Board members cited examples of requesting documents from Mr. Roberge and he advised them he shared it with the Chair and that fulfilled his responsibility. This created some serious concern for Board members who were appointed to the Commission and took their obligations very seriously, particularly their need to account to the public for the work of the Commission. They believed that the public expected the appointed Commission to be responsible for the major decisions made by the Commission and the Chair should also be the primary public contact when dealing with issues such as media engagement. They were concerned about the tone taken by Mr. Roberge in written correspondence to stakeholders and with the media and wanted more of a say in any correspondence that represented the Commission. This led to conflict and the reviewer read correspondence exchanged between Mr. Roberge and Board members that displayed a broken relationship and a clear lack of respect by Mr. Roberge for the positions held by the Board members.

The job description for the current Executive Director distinctly states that he or she will be responsible for the day to day operations of the NBPC, however, is accountable to the Board and acts as an advisor and support resource to the Chair. The Board is responsible for significant decision making.

The stakeholders had very strong opinions regarding the former Executive Director. They noted the relationship between the NBPC and the stakeholder group deteriorated during

Mr. Roberge's tenure as Executive Director. They felt the NBPC was a valuable entity with a significant role to play in police oversight, but that Mr. Roberge displayed very little respect for their roles and talked down to them utilizing an autocratic approach. His reputation was that of a bully who wanted to "clean things up" and that led police officers to be concerned about fairness in dealing with complaints made against them. The general feeling expressed by those who commented on the performance of Mr. Roberge was that his aggressive approach and apparent belief that he did not have to participate in dialogue with anyone other than the Chair of the Board created a lack of trust in the work of the Commission. At one point Mr. Roberge was forced to make a public apology regarding accusations he made about an ongoing criminal investigation associated to the NBPA which was incorrect.

One former Chief of Police did comment that Mr. Roberge and former acting Chair Mr. Robert Stoney had been very helpful in making a presentation to the City Council on the *Police Act* on behalf of the chief. This chief provided the only positive reference relating to Mr. Roberge's performance that the reviewer discovered in conducting interviews with external stakeholders.

Police oversight bodies are created by legislation, but they are run by people. The need for the public and the police to have confidence in the people in charge of the oversight body is vital to its success. Fairness and consistency are the key elements and individual attitudes play a significant role in shaping what the police and public will view as fair and consistent.

As noted in the limitations section of this review, Mr. Roberge was not open to meeting with the reviewer therefore the reviewer was unable to provide him the opportunity to respond to any of the comments made regarding his performance as Executive Director.

The current Board of the NBPC and staff have developed a Strategic Plan, which focuses on three main goals. The second is "Improving partnership" with the objective of "establish and maintain effective and collaborative working relationships with the Commission's key partners". They also developed a draft Team Charter for Members and Staff of the Commission. It is intended that the Commission personnel will adhere to the principles and behaviors articulated in the Team Charter in interactions among themselves and with their partners and the public. When conducting interviews with current chiefs of police they acknowledged that they have detected a noticeable change for the better in their relationship with the NBPC since 2019. The draft Team Charter is attached as Appendix E.

3.1.1 Recommendations

- a) It is recommended that the Commission identify the key stakeholders and develop an engagement strategy in an effort to rebuild relationships and develop confidence and trust in the work of the Commission.
- b) It is recommended that in identifying the key stakeholders the Commission should determine who will officially represent the interests of police officers in meetings with the NBPC. Each police force has an association and there is the NBPA at the provincial level.

3.2 Roles and Responsibilities

Section 3.1 speaks to relationships and touches on the challenge within the Commission to clearly define roles and responsibilities. The Commission relies heavily on the *Police Act* to guide its work. Part II, Section 18(1) states there shall be a Police Commission composed of a Chair and a Vice-Chair and such other members as the Lieutenant-Governor in Council sees fit to appoint. The *Act* speaks to remuneration and the requirement for meetings and provides authorities but does not specify the roles and responsibilities of the Chair and Vice-Chair and does not speak to the composition of the remainder of the Commission including the roles and responsibilities of the Executive Director, Associate Director, Administrative Assistant or other Board members.

The Commission did not have a well-defined roles and responsibilities document that clearly detailed what each member of the Commission was responsible and accountable for. The reviewer located three PowerPoint slides created in 2017 by the former Executive Director that spoke to the roles of the Board, the chairperson and the Executive Director, however, it did not address all members of the Commission including all staff and didn't expand on responsibility and accountability. There was also no indication of what consultation went into the development of the slides.

This gap would allow for individual interpretation of the roles and potentially lead to the challenges observed in Section 3.1 where the former Executive Director and the most recent Board had significant differences of opinion relating to roles, responsibility and accountability.

The members recognized as early as December 2018 the need to define the roles and responsibilities of the Commission members and staff which evolved into an action plan item in the strategic plan. Staff began working on a document referred to as the NBPC Handbook and in April 2019 the first draft was complete. Part 3 of that document refers to Roles, Responsibilities and Relationships and it breaks out the responsibilities of the Commission, individual Commission members and specifically the role of the Chair and the Executive Director. They describe the Executive Director as the CEO responsible for day to day management of the organization, accountable to the Board and responsible to implement the Board's directions. This document will set the direction for the Commission and provides a comprehensive reference document that can be utilized in conjunction with the strategic plan. Included in the handbook is a table of authorities and responsibilities that details what each person is responsible for from the Lieutenant-Governor to the Administrative Assistant at the Commission. This is particularly important in an organization like the NBPC where members of the Board can be rotating as often as every two to three years.

3.2.1 Recommendations

- a) It is recommended that the Commission complete and refine the NBPC Handbook and that it becomes the reference manual for all members of the Commission to ensure a clear understanding of roles and responsibilities. For clarity, the Commission should share the document with stakeholders.

- b) It is recommended that an orientation package be developed based on the NBPC Handbook and that a structured orientation be provided to all Board members before they take their position on the Board of the Commission.

3.3 Policies and Procedures

The reviewer was asked, through the Terms of Reference, to review the policies, procedures and practices of the NBPC. The review revealed that the NBPC was relying upon the *Police Act* to guide its actions or practices and in fact did not have any policies or standard operating procedures in place. The lack of formalized policies and procedures created a significant gap in the efficient functioning of the Commission and greatly increased the potential for inconsistency in dealing with matters. This inconsistency could lead to questioning of the actions of the Commission from stakeholders who are constantly in contact with one another and could result in a lack of confidence in the Commission.

Since the review commenced the NBPC has started working on formalized policy and procedure documents as well as guidelines. An example of this can be observed in the Time Limit Extension (TLE) guideline which is attached as Appendix F. The Commission will consider a time limit extension if the matter falls into one of four categories. These categories were familiar to Commission members but the procedure to receive, review and approve a request had not been documented and shared with stakeholders. This is but one example of why policy, procedure and guideline documents are important to guide the work of the Commission and also to provide a rationale or justification for actions taken by the Commission when decisions are challenged. Formalized documented procedures are essential for the consistent application of operations.

3.3.1 Recommendation

- a) It is recommended that the Commission develop policy and procedure documents for all aspects of their operation thereby providing a roadmap for day to day operations.

3.4 Records Management System

The NBPC does not have a records management system (RMS) that would provide the electronic means to track workflow, provide direction or capture activity on a file. The system required a member of the Commission to complete a “Note to File” which was attached manually to a paper file. The Executive Director has recently introduced a complaint activity log, consisting of a Word document saved to a shared drive, however, this would still be very difficult if attempting a search function. There is currently no ability to scan and maintain documents electronically. The Commission is the repository for police discipline cases which can be very helpful to provide consistency in sanctions. Having them filed electronically would make research and reference much easier. In order to provide an efficient and effective service the Commission requires an RMS. All police services in the Province have records management systems.

3.4.1 Recommendation

- a) It is recommended that the NBPC be equipped with an electronic records management system.

3.5 Investigators

Section 26.2 of the *Police Act* mandates that the Commission shall “establish and maintain a list of persons who are knowledgeable in investigative techniques and procedures and have indicated a willingness to act as an investigator”. This section sets the bar low by requiring only knowledge of investigative techniques and procedures. The choice of an investigator is very important to the success of the investigation and to instill confidence in the complainant and the subject officer being investigated. Many of the investigators occupying positions on the list are former police officers who are well known to the police community in New Brunswick.

Currently there are no competency-based criteria utilized to make the selection. The Commission should develop a list of competencies they require in an investigator which could include extensive experience as an investigator, recent experience conducting investigations, proven track record, strong reputation, interpersonal skills, knowledge of the *Police Act*, bilingual capability, to name a few.

Finding a competent investigator who is respected by the public and police will enhance the reputation of the Commission and provide access to quality investigators for chiefs of police when they require outside assistance.

The reviewer would suggest that a new list of investigators, based on competency requirements, be developed and the former list rescinded. This is not intended as a comment on the ability of anyone on the former list and in fact investigators from the former list may carry over to the new list, but the Commission should qualify all investigators so they can justify their selection if challenged.

The Commission should review the hourly rate being paid to *Police Act* investigators. The rate provided to a general investigator by the Commission exceeds the rate charged by some credible private investigation firms utilizing ex-police officers and far exceeds the rate paid for an investigator by the Office of the Police Complaints Commissioner in Nova Scotia.

Another option for consideration would be to hire a full-time investigator or two investigators who would be available to the Chiefs of Police across the province or for cases where the Commission takes the lead. These investigators would only take cases that met a certain criterion. The reviewer had a brief conversation with chiefs of police on this topic and they were interested in the idea and believed it had merit. They also felt there may be an option to cost share the position or positions between the province and the municipalities since they would not have to tie up investigators conducting *Police Act* investigations. They recognized they would continue to manage minor matters but could seek experts to handle the matters that exceeded a certain threshold, which could be established through consultation. The advantage of full-time investigators would be a

consistent approach to all *Police Act* investigations, investigators who are very familiar with the *Police Act* and legislated timelines and are not learning the process each time they are called upon. The investigators would have this as their full-time job and be able to dedicate time to the investigation. In addition, the general public would not see the “police investigating police”, it would be investigators who are employees of the Commission, who may or may not be former police officers. There is also an option to utilize these investigators for education and presentation purposes, when not otherwise engaged, to assist in informing the public and police of the work of the Commission and potentially play a preventative role. These investigators could call on other investigators for assistance when specific expertise is involved, however, they would remain the primary investigator and carry the file. Although there would be an upfront cost associated with this type of arrangement, many of the *Police Act* investigations are costly both from a monetary perspective and from a loss of resource perspective when officers are removed from their regular duties to conduct *Police Act* investigations.

3.5.1 Recommendations

- a) It is recommended the Commission develop a list of competencies for investigators that will be utilized to select investigators to populate the Commission’s investigators list.
- b) It is recommended the Commission rescind the established list and repopulate it with investigators chosen through the competency screening process.
- c) It is recommended the Commission reevaluate the hourly rate paid to part-time investigators to determine whether it is in line with industry norms.
- d) It is recommended the Commission study the feasibility of hiring a full-time investigator(s) as part of the Commission staff.

3.6 Cost of Investigations

The question of who pays for an investigation and how that is determined was a topic of discussion with several chiefs of police and a civic authority. There is no formal policy or standard operating procedure in place at the Commission to speak to this issue which leaves the matter open for debate. A commonly held belief is, if the chief of police or civic authority takes responsibility for a conduct investigation, they are responsible for the costs. If the chief of police or civic authority requests the assistance of the Commission to conduct the investigation the chief of police or civic authority will still bear the cost of the investigation. There have been occasions when it appears in this circumstance there was a cost sharing arrangement between the Commission and the Municipality. In the third scenario, if the Commission takes over an investigation from the chief of police or civic authority the Commission will be responsible for the cost of the investigation. This scenario is not completely understood either as there is a belief that the cost of the investigation could be transferred to the municipality or cost shared depending on the rationale for the Commission taking over the investigation. It is necessary for the Commission to clear up any confusion around this topic by developing a clear policy statement that articulates each of the possible scenarios. The policy would be shared with stakeholders to alleviate uncertainty and assist in the decision-making process.

Ensuring an investigation is conducted properly has to be the first priority and making a decision solely based on cost can lead to long term challenges. The reviewer was made aware of one such investigation where the chief of police believed the NBPC should have taken the lead on the file, however, a disagreement over cost sharing ensued and the matter was not ultimately managed by the NBPC where the chief felt it should have been due to the high public profile. A clear policy statement in this regard from the NBPC would mitigate the risk in future.

3.6.1 Recommendation

- a) It is recommended the NBPC develop a policy statement and standard operating procedure that clearly articulates who will be responsible for the cost of conduct investigations, in each scenario. This policy should be shared with chiefs of police and civic authorities to confirm everyone's understanding of the process and ensure consistency.

3.7 Arbitrators

Section 33.01 of the *Police Act* states the Commission shall, in accordance with the regulations, establish and maintain a list of persons who have indicated a willingness to act as an arbitrator. Section 33.02(1) states the parties shall, within ten days after the chief of police or civic authority serves a notice of arbitration hearing under Part I.1 or III, appoint an arbitrator from the list established.

Subsection 33.02(2) states if the parties fail to appoint an arbitrator with the time prescribed in subsection (1), the Commission shall appoint an arbitrator from the list.

Section 33.03 states if the Commission serves a notice of arbitration hearing under Part III or III.2, it shall appoint an arbitrator from the list it establishes.

Arbitration is very serious as it represents the final stage in the process when informal resolution and a settlement conference have not been successful or were not options. Choosing an arbitrator that is perceived as fair to both sides is critical to the success of the process. When the reviewer met with the NBPA the issue of the selection of an arbitrator was very high on their list of priorities for discussion.

The NBPA made reference to the *Police Act* Review Committee (PARC) that existed prior to 2012 that was made up of the Chiefs of Police, NBPA, NBPC, DPS, Municipalities, and others. An arbitrator's appointment sub-committee was created from the PARC group to establish criteria for selecting arbitrators and they eventually selected a group of arbitrators that formed the list maintained by the Commission. The NBPA noted that once all parties agreed to the list it made the selection process very simple when the time came to appoint an arbitrator since all stakeholders had agreed. NBPA representatives pointed out this agreement was not honoured post 2012 and the Commission unilaterally made the selections for the arbitrators list. The NBPA would like to see a return to the process where the committee agreed unanimously to both the list and a consistent fee schedule as the fees for arbitration can vary greatly. Replicating the committee and reaching unanimous consensus may be very challenging, however, the reviewer believes the current

Commission is receptive to reopening lines of communication and dealing with topics that are causing concern for stakeholders.

3.7.1 Recommendation

- a) It is recommended that the Commission consider meeting with stakeholders to review the process of developing the arbitrator list and the fee schedule.

3.8 Public, Police and Civic Authority Awareness

The 2016 public apology made to the NBPA by the Executive Director of the Commission and the press conference held by the NBPA in December 2018 calling for the dismissal of the Executive Director and being highly critical of the work of the Commission cannot be disregarded in terms of the negative impression of the NBPC it may have left on the general public, civic authorities, police chiefs and front-line police officers. It is incumbent upon the Commission to proactively deal with this matter. The reviewer is aware the current Executive Director is travelling the province making contact with agencies to introduce herself and make them aware of her role and the role of the commission. The Commission also has an online presence that includes introducing the Commission members, explaining the work of the Commission, detailing how to make a complaint and the steps in the process, as well as publishing a list of the annual reports. The Commission has developed a coordinated communication strategy in an effort to reestablish credibility and trust in the Commission with the public, police and civic authorities. A respected police oversight program is critical to the success of policing and necessary for the public and police to have confidence in the system. The Commission is moving in the right direction and that message must be conveyed in a planned and structured approach.

3.9 Police Act

During the course of the review a consistent theme surfaced with many of the stakeholders relating to the need to make revisions to the *Police Act*. In 2016, DPS brought together all stakeholders in an effort to find common ground and although it is estimated that eight-five percent of the revisions were acceptable to everyone, personalities and entrenched positions resulted in a failure to get an agreement to move forward with the revisions. The NBPC developed a position paper for that process that is very informative and should be given consideration along with any other position papers developed by stakeholders. The Act is the foundation for policing in the province and is relied upon, therefore, should be as concise as possible. Some sections are very open to interpretation and definitions for terms such as “immediately” or “adequacy” are not available and have caused significant consternation on some fronts.

Legislation relating to police oversight is so important that some reviews of police oversight in Canada have suggested that civilian police oversight bodies should have their own legislation, separate from the *Police Act*. Separate legislation would make it easier for people to understand how the oversight bodies work. Also, it would confirm their importance and independence.

This review is not recommending separate legislation at this time for civilian police oversight in the Province of New Brunswick as it felt a more important first step is to move forward on the work that was started on amending the Police Act. The reviewer believes that the NBPC should take a leadership role along with DPS to bring together the stakeholders in an effort to make the necessary changes to the Act through a collaborative process. This meshes with NBPC's goal to assist in improving the quality of policing services provided to the public through the systematic review of legislation, policies and services. This would require a commitment from all those involved to come to the table with an open mind and a willingness to make constructive change. It will also be critically important for organizers to ensure the appropriate representation is at the table from stakeholder groups.

The reviewer would suggest that before another attempt is made to bring stakeholders together to review the *Act* and agree to amendments, that a lawyer be retained to conduct a complete review of the *Act* to identify the areas of concern, the need for definitions and apparent omissions. This would definitely assist in informing any further attempts to review the *Act* with stakeholders and potentially aide in focusing the discussion. In addition, it could assist the NBPC who are regularly seeking legal opinions, many of which originate due to a lack of clarity in the *Act*.

3.9.1 Recommendation

- a) It is recommended that the NBPC work collaboratively with DPS to bring together stakeholder groups to reactivate discussion on revisions to the *Police Act*.

3.10 Adequacy of Policing

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

Adequacy is not defined which has led to this section creating conflict and concern between the NBPC and DPS as well as with the chiefs of police and civic authorities.

The issue of adequacy and the absolute jurisdiction of the Commission to pursue adequacy investigations on their own initiative is an inflammatory issue for many of the chiefs of police who do not agree that this should be the jurisdiction of the NBPC. They feel that since DPS sets the standards for policing in the province of New Brunswick and conducts Quality Assurance Reviews in conjunction with each police service that they should be responsible for any assessment of the adequacy of policing and not NBPC.

The Minister of Public Safety also took exception in 2017 to a self-initiated "review of investigation into New Brunswick unfounded files" originating from the NBPC. The review was generated by the former Executive Director based on a newspaper article, without a public complaint being filed. The Department of Public Safety intervened and took carriage of the review.

Paragraph 1.1(1)(a) of the *Police Act* states the Minister shall promote the preservation of peace, the prevention of crime, the efficiency of police services and the development of effective policing and (b) co-ordinate the work and efforts of police forces and the Royal Canadian Mounted Police.

A review of other jurisdictions reveals that the majority of provinces in Canada rely on their Minister of Public Safety to ensure adequate and effective levels of policing and law enforcement.

If there is a public complaint made about police conduct or a failure of a police force to deliver a service, the matter is clearly within the jurisdiction of the NBPC. There may be an opportunity for the NBPC and DPS to collaborate and come to an understanding on how matters of adequacy will be managed until the next review of the *Police Act* proposes clarity in this area. The reviewer does not believe this would negatively impact or infringe upon the civilian police oversight responsibilities of the NBPC. There is also an opportunity for the NBPC to be involved in the DPS Quality Assurance process with police forces by supplying DPS information relating to trends in conduct complaints that could assist when evaluating areas for auditing.

What remains clear is that the NBPC does not have the resources to do a large-scale review of police adequacy without bringing in outside assistance.

3.10.1 Recommendations

- a) It is recommended that any future review of the *Police Act* include an evaluation of Section 20 and provide clarity regarding the definition of adequacy.
- b) It is recommended that NBPC and DPS meet to discuss their individual roles in relation to the adequacy of policing.

3.11 Six-month Time Limit for Investigation

Section 2.5.3 of this report goes into detail on the one-year time limit to file a complaint and the six month time period between filing a conduct complaint or the commencement of an examination into the conduct of a member of a police force, where no conduct complaint is filed and the date the chief of police or civic authority serves the member of the police force with a notice of settlement conference.

As noted in 3.1.3, there are specific provisions in exceptional circumstances for the extension of the one-year timeline, however, there is no option to extend the six-month period to conduct the investigation. It is understood a police officer must have the right to have the matter dealt with as quickly as possible as a *Police Act* investigation can place a huge burden on the officer and his or her family. The complainant also has the right to have the matter resolved as quickly as possible to ensure confidence in the system and to observe that action will be taken to deal with the alleged misconduct of the officer.

There are occasions, however, when investigations can be particularly complicated and may require the use of experts who are not readily available, or a witness or subject officer

is not available to be interviewed or served documents due to a wide variety of factors including things such as illness or geographic location.

To ensure fairness in the process there should not be a rush to conclude an investigation or make a hasty judgement on sustaining or dismissing an allegation based on an impending deadline. That type of decision making can lead to unfair treatment of the police officer and or the complainant.

A review of the procedures conducted in nine other provinces and the RCMP revealed that some provinces have even shorter timelines than six months, however, there are extensions granted in several provinces including the province of Nova Scotia which has a sixty-day timeline. The Nova Scotia Act states that “the complaints Commissioner may, on request before or after the time limit has expired extend the time to complete the investigation if the Complaints Commissioner is satisfied that there are reasonable grounds for granting the extension and the extension will not unduly prejudice any member”. The province of Prince Edward Island allows ninety days to complete an investigation and submit a report to the Chief officer. However, there is no time limit on the overall process and an extension may be granted by the Chief officer.

3.11.1 Recommendation

- a) It is recommended that during the next review of the *Police Act*, the NBPC develop a submission that would articulate the rationale and process for an extension of the six-month period for the service of the notice of settlement conference where exceptional circumstances existed. The merits of the submission could be discussed by all stakeholders.

3.12 Professional Standards Coordinator

New Brunswick forces have officers, other than the chief, assigned to the professional standards function, but it is in addition to their other duties. Through interviews with the current Executive Director she raised the possibility of having an officer at each police force assigned as the officer in charge of professional standards for the police force. This would not be a full-time position but rather a coordinator who managed this duty in addition to their day-to-day police functions. It would not release the chief from his or her responsibilities as currently stated in the *Police Act*. It would be a coordinator position identified by the chief who could sit on a working group with the NBPC to assist with standardization of the investigation process, including the development of needed policy and form development. There would also be an opportunity for professional development for the officers assigned to this duty. In addition, it would provide the NBPC with a contact person at each police service to share information with and develop as a Subject Matter Expert in the area. This member would act as a support person to the chief for questions related to professional standards, keep track of the cases managed by the police service and provide advice to local investigators where required. Having an SME at each police service would permit officers to become more familiar with the administration of the *Police Act* and assist in standardization and consistency in the system.

3.12.1 Recommendation

- a) It is recommended that the NBPC submit a proposal to the chiefs of police to consider developing a position in each police force that would act as a coordinator for professional standards.

3.13 Serious Incident Response Team (SIRT)

Although a review of the role of SIRT in New Brunswick was not part of the Terms of Reference for the review of the NBPC, SIRT is a critical component of civilian police oversight and the reviewer does not believe the topic can be adequately discussed without considering the role of a SIRT function in New Brunswick and how it would co-exist with the Police Commission. SIRT was also a topic of conversation when interviewing chiefs of police.

The province of New Brunswick does not currently have in place a Serious Incident Response Team. There are six provinces that have teams; Nova Scotia, Quebec, Ontario, Manitoba, Alberta and British Columbia. Although their mandates vary slightly, they all investigate incidents of death or serious injury involving police officers. It is important to note that their involvement in a matter does not mean there is an allegation of wrongdoing on the part of the police officer. The Nova Scotia SIRT, which has been called upon to assist in New Brunswick with serious matters, is also mandated in Nova Scotia to investigate domestic and sexual assaults involving police officers and matters of significant public interest.

SIRT is independent of government and police and the establishment of SIRT varies from province to province based on case criteria, caseload and the requirements for investigators. The name assigned to the team is also different in each province and some provinces insist that members of their teams cannot be current police officers. In Nova Scotia, as an example, the team is made up of a civilian director and four investigators. The current Director is a retired Nova Scotia Supreme Court Justice who is responsible for the general direction of all investigations, this is the key component in the civilian oversight of the SIRT unit. One of the SIRT investigators when interviewed put it this way “our Director reviews everything and makes the final decision, that’s what makes the public in Nova Scotia confident that former or current police officers can make fair and independent decisions regarding the actions of police”. The Nova Scotia investigators are represented by two serving officers who are seconded to SIRT fulltime but cannot investigate matters involving their own police service and two investigators who are retired police officers.

In Nova Scotia, civilian oversight of police conduct is shared by the Serious Incident Response Team, which investigates serious incidents that may result in criminal charges, and the Office of Police Complaints Commissioner which handles all other allegations of police misconduct. This model is a best practice and chiefs of police in New Brunswick, who were consulted by the reviewer, are very supportive of this approach and believe that New Brunswick requires a SIRT type unit to manage the serious incidents, with the NBPC handling allegations of police misconduct.

The reviewer interviewed the Director of SIRT in Nova Scotia to determine the feasibility of SIRT responding to calls for service in New Brunswick. The Director indicated his team

has done their best to support New Brunswick and will continue to do so where possible, however, the current resources would not permit SIRT to be available to respond to New Brunswick as they do in Nova Scotia and Nova Scotia must be their priority.

One of the greatest challenges relates to the distance required for investigators to travel to points in New Brunswick to conduct an investigation. SIRT investigators must have scenes secured and delays in attending a scene can impact the investigation negatively or unreasonably inconvenience the public. There is also the issue of the requirement for bilingual investigators and the appointment of officers from Nova Scotia as peace officers in New Brunswick. In addition, SIRT has legislated authorities in the province of Nova Scotia that do not exist when they work in New Brunswick. The reality is they do not have adequate resources at this time to ensure they would be available if called upon by New Brunswick or any of the other Atlantic Provinces. It's possible that consideration could be given to developing a two-person team in New Brunswick that would work under the direction of the Nova Scotia Director of SIRT. This may be an option for New Brunswick rather than creating an individual SIRT.

3.13.1 Recommendation

- a) It is recommended that consideration be given to developing a SIRT entity in New Brunswick to manage serious incidents involving police officers.

3.14 Structure, Function and Selection of the Commission

Section 18(1) of the *Police Act* sets out that there shall be a New Brunswick Police Commission appointed by the Lieutenant-Governor in Council composed of a Chair a Vice-Chair and such other members as the Lieutenant-Governor sees fit to appoint, each will be appointed for a term not to exceed ten years. Section 18(2) states the Lieutenant-Governor may designate a member of the Commission to serve either as a full-time member or a part-time member. The NBPC is divided into two groups full-time Staff members and appointed part-time Commission members.

Currently the Commission is comprised of four members, although that number has fluctuated over the years. The current Commission members feel that four is an efficient number to achieve the goals of the Commission and ensure a quorum of two members for meetings and decision making. One of the challenges pointed out by the most recently appointed Commission members is that their appointment is for a period of only two years. The member just starts to feel comfortable and effective in the role as their term is nearing the end. There is a chance that the Minister will renew the term of a Commission member, however, it is felt the initial term should be three years. The terms of service should also be staggered to ensure that not more than one member is completing a term at the same time. In recent years, due to departures of Commission members, a situation occurred where the Commission only had two members for a period of 4 months.

The *Police Act* does not specify qualifications for the chair, vice-chair or other members of the Commission. The current process for selecting the Chair and Commission members is through a published provincial government advertisement seeking applicants for

Agencies, Boards and Commissions. The NBPC ad continues to be refined but currently lists the Qualifications and Commitments as:

Members of the Commission must be of good character and have the ability to apply discretion. Members should collectively possess experience in a broad range of matters related to the Commission's function such as policing or legal, managerial, arbitration tribunals, human resources, military discipline boards, collective decision making, board experience and public policy work or involvement.

In addition to the above qualifications, the Chair must demonstrate honesty, integrity and high ethical standards while remaining impartial and objective. The chair must act independently and cannot be influenced by partisan interest, public opinion and fear of criticism.

Candidates expressing interest should demonstrate their experience in one or more of the functions above as well as their track record of success in dealing with challenging personalities and making difficult decisions. The composition of the Commission must reflect the gender and linguistic representation, as well as the cultural and geographic diversity of the province.

The intention is to have a Commission that collectively possesses the skills listed above and can work as a team to conduct the business of the Commission and make the challenging decisions that are required when dealing with matters pertaining to police oversight. From interviews conducted with the current Board, the reviewer is confident they have extensive experience and as a group more than meet the listed criteria.

The Commission is a part-time appointment and members can be appointed to the Commission from any part of the Province. This can prove challenging as the NBPC is located in Fredericton and full-time staff require consultation with the Commission members and sign off on documents on a regular basis. Commission members travel to Fredericton when possible for monthly meetings and are paid a per diem rate for their services. If the Chair is not from the Fredericton area it can result in the Chair having to travel on a weekly basis to meet with the Staff and deal with the business of the Commission. More frequent trips may be required when there are particularly challenging, or time sensitive cases being dealt with. The practice of using a signature stamp or electronic signature requires diligent note keeping ensuring the credibility of the process but it cannot replace the value gained when staff can consult in person with the Chair who is ultimately the decision maker in significant matters.

If the current format for the Commission is maintained it would be advisable to give consideration to the Chair being appointed from the Fredericton area to reduce some of the potential challenges noted above.

As noted above, the reviewer is confident that the collective skill set and experience of the current Commission members and their desire to make change and do the right thing speaks well for decisions entrusted to the Commission in the near future. It is the opinion of the reviewer that due to the significant responsibility placed on the Commission and the public profile, consideration should be given to a competency-based selection process, including an interview, that is specific to the role and not as generalized as the current selection

criteria. For example, it would be beneficial to maintain at least one member of the Commission who is legally trained with a background in administrative law or a background in the judiciary. When that member's term is up every effort should be made to replace this skill set to maintain a highly functioning team. The same criteria should be applied to language skills and diversity to ensure that the citizens of New Brunswick see themselves reflected in the Commission and ultimately have faith in their ability to maintain police oversight. The most critical aspect of the selection process is to ensure the reputation of the Commission members can withstand any challenge to their character, their honesty and their courage to make difficult decisions.

The recently developed NBPC Handbook actually lists criteria and background for members of the Commission that the reviewer believes are directly in line with the competency-based process being recommended here and it would be advisable for the Department creating the bulletin and reviewing the applications to be familiar with this document in developing the requirements.

Another option for the Commission is to completely change the structure and create the position of Commissioner. The Commissioner would work with the three current staff members and be responsible for the major decisions made by the Commission. Six of the ten provinces in Canada have a Commissioner role. As an example, the Office of the Police Complaints Commissioner in Nova Scotia has one Commissioner who is permanent part-time. The Nova Scotia Commissioner works 80 hours per month which permits her to spend time in her office every week where she is available to staff.

Having a permanent presence as Commissioner would ensure ownership and allow the person to be on top of all matters impacting the Commission. The Commissioner would have a close working relationship with the Executive Director and would be onsite to answer questions and consult on a regular basis as opposed to relying on a multi-person Commission that meets at best once per month and may have a difficult time to stay informed on the issues.

The Commissioner would be the face of the Commission and would develop an identity with the public and police. The selection of a Commissioner who has a reputation for fairness and impartiality would instill faith and confidence in all stakeholders. The Commissioner should be legally trained with a background in administrative law or potentially a former member of the judiciary who has an analytical skill set, is a good communicator and has the ability to professionally articulate the decisions of the Commission.

3.14.1 Recommendations

- a) It is recommended that the minimum term for a member of the Commission should be increased to three years.
- b) It is recommended a review of the requirements for members of the Commission should be undertaken to focus on specific competencies and the selection process should involve an interview.
- c) It is recommended that consideration be given to restricting the selection of Chair of the Board to someone who resides in close proximity to Fredericton.

d) It is recommended that a study should be undertaken to review the possibility of restructuring the Commission to create a full-time paid Commissioner to replace the part-time Commission.

A list of all recommendations is included as Appendix G.

PART 4: The McCloskey File and the Policies and Procedures of the Commission

4.1 Introduction

As requested in the Terms of Reference, this part of the report will focus on the McCloskey file, and will look at the policies and procedures of the Commission in relationship to the handling of the case involving former Deputy Chief Glen McCloskey. With the assistance of the current Executive Director of the NBPC and staff, a search was conducted of NBPC operational files to locate entries referencing Mr. McCloskey's case. In addition, Mr. McCloskey provided the reviewer numerous documents relating to his involvement with the NBPC.

As identified in Section 1 of the report the NBPC did not have documented, formalized policies and procedures and therefore relied on the *Police Act* and the acquisition of legal opinions to guide their decisions.

It should be noted the reviewer was not mandated to conduct a review of the Halifax Regional Police criminal investigation or the *Police Act* investigation conducted by Mr. Barry MacKnight. Therefore, the reviewer will comment only on aspects of the *Police Act* investigation that related to the policies and procedures of the NBPC.

4.2 The Investigations

The Criminal and *Police Act* investigations were initiated as the result of circumstances arising from the investigation into the highly publicized murder trial of Dennis Oland. Mr. McCloskey was alleged to have made a comment to another member of the Saint John Police Force that could have been interpreted as suggesting that the officer did not have to acknowledge his presence at the Oland murder scene. Mr. McCloskey denied making this comment and the Halifax Regional Police criminal investigation concluded, through consultation with independent crown Special Prosecutions in Nova Scotia, that there was not enough evidence for perjury or obstruction charges. Following the conclusion of the criminal investigation Mr. MacKnight was advised by the NBPC to continue his *Police Act* investigation and he sustained five of the six allegations against Mr. McCloskey. Two of the allegations involved discreditable conduct under subparagraphs 36(1)(a)(ii) and 36(1)(d)(i) of the Code of Professional Conduct, *Police Act*. Two allegations were for Neglect of Duty under subparagraph 37(a)(ii) of the Code of Professional Conduct, *Police Act*. One allegation of Deceitful Behaviour under subsection 38(b) of the Code of Professional Conduct, *Police Act* and one allegation of a Party to a Breach of the Code under section 47 of the Code of Professional Conduct, *Police Act*. Mr. MacKnight

sustained all allegations with the exception of one of the Neglect of Duty allegations that had accused then Deputy Chief McCloskey of failing to work in accordance with official police force policies and procedures. The *Police Act* investigation commenced on December 14, 2015 and was concluded on December 21, 2016 with two suspensions permitted during the course of the investigation due to the commencement of the Halifax Regional Police criminal investigation and concerns associated to impacting the Oland Trial process. Mr. McCloskey was served with a Notice of Settlement Conference on December 22, 2016 and the process began to organize a Settlement Conference. Mr. McCloskey retired from the Saint John Police Force in April of 2018 before the matter reached the arbitration hearing. His retirement resulted in all *Police Act* matters relating to him being terminated.

4.3 Mr. McCloskey's Complaint

Mr. McCloskey wrote to the former Minister of Public Safety, the Honorable Denis Landry on August 21, 2018 and to the current Minister of Public Safety the Honorable Carl Urquhart on December 3, 2018 to register formal complaints against the NBPC. The substance of his complaints focused on his allegation that he was treated unfairly by the NBPC and was not afforded the benefit of the procedural protections provided to a police officer, under the *Police Act* and its regulations and at common law.

The reviewer had the opportunity to interview Mr. McCloskey at length to obtain his thoughts on how he was treated by the NBPC throughout this process and he provided volumes of material that he felt supported his case against the Commission. He also provided a statement of claim he filed against the New Brunswick Police Commission and Mr. Staphan Roberge.

As a result of the interview with Mr. McCloskey, reviewing his letters to the Ministers and his Statement of Claim the following were determined, by the reviewer, as the major areas of concern for Mr. McCloskey:

- 1) Timing of the complaint;
- 2) Written notice of the complaint to Mr. McCloskey;
- 3) *Police Act* Investigation;
- 4) Settlement Conference – Arbitration Hearing;
- 5) Selection of the arbitrator;
- 6) Release of the NBPC file to the Oland defense team – disclosure of personal information.

The reviewer conducted an analysis of these specific topics and the results of that analysis are noted below under the relevant headings:

4.4 Timing of the Complaint

There was definite uncertainty as to when the alleged conversation occurred between Mr. McCloskey and Mr. King that led to the *Police Act* investigation. Mr. MacKnight, the *Police Act* investigator, recorded the incident date on his report as occurring between April

1, 2014 and September 16, 2014. Mr. King in his statement estimated it was in August or September 2014.

Nevertheless, it appears Chief Bates of Saint John Police Force found out about the allegation on October 5, 2015 after receiving a timeline from Sgt. Lori Magee. Chief Bates then had a conversation with former Executive Director Staphan Roberge on October 6, 2015 in which he explained the circumstances of the allegation. The chief did not feel a *Police Act* process was warranted and Mr. Roberge agreed that the chief was in best position to evaluate the matter. This would have been a reasonable response from Mr. Roberge at this point with limited knowledge of the circumstances.

On October 13 and 14, 2015 Mr. King made the allegations in open court which led Chief Bates on October 15 to launch a conduct complaint with the Chief as the complainant. On October 19, 2015 Chief Bates wrote to Robert Stoney, the Acting Chair of the NBPC asking that NBPC assume the complaint for reasons of public interest and the Saint John Board of Police Commissioners agreed to pay for the cost of the investigation. The Chief cited Section 27.1 of the *Police Act* which enables a Chief of Police on his or her own motion or on the request of the Commission, to examine the conduct of a police officer, whether or not a conduct complaint is filed.

On October 28, 2015 Mr. Stoney wrote to Chief Bates characterizing the complaint as a conduct complaint and advised the NBPC would assume carriage of the complaint and that Mr. MacKnight would be appointed as the investigator.

Section 25.1(1) states the complaint shall be filed within one year after the date of the incident. Although the date was not absolutely established, it is agreed by everyone that the alleged incident occurred more than a year prior to October of 2015 when Chief Bates advised the NBPC therefore would be outside the one-year requirement stated in Section 25.1(1).

Section 25.1(2), however, states the Commission may where in the opinion of the Commission circumstances so warrant, extend the time for the filing of the complaint. The rationale for making that decision is not articulated in the Act, however, the NBPC obtained a legal opinion in 2009 that provided the following possible reasons for an extension. The rationale is expanded on in section 3.1.3 of this report:

- a) a continuing intention to pursue the complaint;
- b) the merit of the complaint;
- c) the respondent will not be unduly prejudiced by the extension;
- d) there is a reasonable explanation for the delay.

The Commission may also consider whether there is some overriding factor that necessitates an extension be granted. The ultimate question is always whether, in all the circumstances and considering the factors referred to above, the justice of the case requires that an extension of time be granted.

Section 25.1(3) states that a chief of police or civic authority, as the case may be, shall commence an examination into the conduct of a member of a police force where no conduct

complaint is filed, within one year after the day on which the chief of police or civic authority becomes aware of the alleged breach of the code.

Based on the above, it would appear this section would have permitted the chief of police to examine the conduct of Mr. McCloskey even though a conduct complaint had not been filed within a year of the alleged incident. This was not the path taken in this case. On January 6, 2017 after the investigation was completed on Mr. McCloskey and he was served with a Notice of Settlement Conference, there is an email entry from Mr. Roberge to NBPC members regarding the time limit for the complaint initiation. Mr. Roberge states that the alleged conversation between Mr. King and Mr. McCloskey occurred in August 2014 and the complaint from chief was in October 2015 beyond the one-year time limit. Mr. Roberge states that NBPC can extend the time, which he feels this file warrants and asks the Board to formalize the exception at their next meeting. Mr. Roberge also discusses adding more allegations against Mr. McCloskey.

It is very likely that the nature of this complaint and the attention it had garnered with the public, through its connection to the Oland case, would have led the NBPC to consider it an “overriding factor” that necessitated an extension being granted.

Section 25.1(2) does not specify at what point in the process the Commission may extend the time for filing of the complaint but it is the opinion of the reviewer that in a case where the NBPC has taken carriage of an investigation that the NBPC and the assigned investigator should be identifying any time limit challenges at the commencement of the process and seeking an extension from the Commission at that time . It should be the role of the Commission to make a decision of that nature and to provide a rational for an extension that can be explained if challenged. The current Executive Director of the NBPC in conjunction with the Board has drafted a policy document that once approved will put in place a standard procedure for receipt of extension requests and processing the requests that will require a rational for approval. Recommendations 3.3.1 and 3.11.1 relate to this issue.

In this case the extension wasn't sought until over a year after the investigation began and a settlement conference notice was served. Although not contrary to the *Police Act*, as it currently reads, it is not a reasonable practice and in addition to the NBPC policy change, consideration should be given to an amendment in this area of the *Act* when the *Act* is open for review.

An additional area of concern in relation to the timing of this complaint relates to Mr. King. He was a senior police officer at the time of the alleged comment by Mr. McCloskey and should have been aware of the provisions of the *Police Act* in relation to making a complaint. Mr. King would have had ample opportunity to make the complaint to former Chief Reid during the year following the alleged incident, yet he chose not to. This brings into question the first factor the NBPC must consider in granting an extension “a continuing intention to pursue the complaint”.

4.5 Written Notice of the Complaint to Mr. McCloskey

On October 19, 2015 Chief Bates wrote to the NBPC on behalf of the Civic Authority asking the NBPC to take carriage of the complaint for public interest reasons. On October 28, 2015 Mr. Stoney wrote to the Chief and characterized the complaint as a conduct complaint confirming the NBPC would assume responsibility for the complaint and naming the investigator as Mr. MacKnight. On December 14, 2015 the *Police Act* investigation began as there had been a verdict in the Oland case which triggered the commencement of the investigation.

In addition, on December 14, 2015 a Notification of Substance of Conduct Complaint was sent to Chief Bates by the NBPC to serve on Mr. McCloskey. It was served on December 15, 2015.

Section 30.3(1) of the *Police Act* states the Civic Authority shall give the chief of police (deputy chief has the same entitlements under the Act) notice in writing of the substance of the conduct complaint immediately after the Civic Authority receives the complaint. In this case the civic authority sought the assistance of the NBPC in handling this complaint against the deputy.

The term “immediately” is not defined in the *Act* therefore is open to interpretation. The reviewer asked a group of chiefs to explain their practice around the term immediately. The Chiefs indicated in most cases they serve the Notice as soon as the characterization of the complaint has been confirmed by the NBPC. In this case that was done on October 28, 2015 and Mr. McCloskey was not notified until December 15, 2015. This represents a delay of 48 days from the time of characterization of the complaint and 60 days from the time the chief was made aware. The reviewer would agree with Mr. McCloskey that this is an unreasonable delay in being served notice and would in no way meet the definition of immediately.

As noted previously in this report in section 3.9, when the *Police Act* review is conducted definitions such as “immediately” should be refined to provide more clarity.

The NBPC has recently developed a quality control list that will be included on the file jackets as a reference document to ensure the mandatory requirements are met in a timely manner on every file regardless of who is responsible for the file (the chief, the civic authority or the NBPC).

4.6 *Police Act* Investigation

The Halifax Regional Police (HRP) concluded their investigation on September 29, 2016 stating there was not enough evidence for perjury or obstruction charges. Mr. McCloskey was concerned that despite that determination by HRP the NBPC reactivated the *Police Act* investigation on October 3, 2016. Mr. McCloskey believed that if HRP concluded there were no grounds for charges then the *Police Act* investigation should have been withdrawn.

The test in a *Police Act* matter is not the same as a criminal prosecution that assesses the likelihood of conviction in a criminal court. The fact that a matter is investigated, and no criminal charges are recommended does not preclude the NBPC from proceeding with a

Police Act investigation. In fact, it is a common practice to commence *Police Act* investigations when no criminal charges have been recommended due to the test being quite different than in the criminal process. The fact that the *Police Act* investigation was pursued should not on its own be considered an example of unfair or prejudicial treatment against Mr. McCloskey by the NBPC.

Mr. McCloskey eventually gained access to the NBPC file and as a result was provided disclosure on all information related to the investigation against him including email exchanges between members of the NBPC. Some of the documented comments particularly attributed to Mr. Roberge were very concerning to Mr. McCloskey and led him to believe that the *Police Act* investigation was not carried out competently or fairly and that the NBPC was out to get him and had predetermined the results of the investigation.

One of the most concerning email exchanges occurred between Mr. Roberge and Ms. Chaplin, a Police Commission member. On November 21, 2016 Mr. Roberge emailed Ms. Chaplin and stated “Just spoke to Barry MacKnight. He is going to sustain the allegations”. The concern here is that Mr. MacKnight had not yet interviewed anyone and in fact didn’t conduct his first interviews until November 22, 2016. Mr. MacKnight did have access to the HRP investigation file and had knowledge of the incident but had not proceeded to conduct an interview at this point.

The reviewer interviewed Mr. MacKnight on the content of this email comment by Mr. Roberge and he is adamant that he did not tell Mr. Roberge in the meeting on November 21, 2016 that he would be sustaining the allegations. He indicated Mr. Roberge somehow came to that conclusion on his own. He further articulated very clearly that his investigation was not being directed by Mr. Roberge and that his decision to sustain the allegations was completely his own.

Mr. Roberge also indicated that during the same meeting on November 21, 2016, Mr. MacKnight said he was troubled that there were no criminal charges laid by HRP as he believed there were grounds to do so. Mr. MacKnight was also asked by the reviewer if this was the case and he stated he could not remember saying he was troubled but that he did feel the HRP investigation was lacking. This notation by Mr. Roberge of his conversation with Mr. MacKnight left Mr. McCloskey feeling that Mr. MacKnight and Mr. Roberge had predetermined the result of the *Police Act* investigation and therefore did not conduct a proper investigation and did not treat him fairly. He believed Mr. Roberge and Mr. MacKnight were approaching the investigation from the point of view that he was guilty until proven innocent.

On November 21, 2016 in the same email exchange with Ms. Chaplin, Mr. Roberge asked her when she would be available to conduct a Settlement Conference for Mr. McCloskey in January of 2017. Ms. Chaplin’s response was “Hahaaa”. Mr. McCloskey had two major concerns with this. The first was the apparent lack of respect shown for him and his case by Ms. Chaplin’s comment and secondly that Mr. Roberge was trying to arrange a settlement conference before Mr. MacKnight had conducted his first interview, again indicating a predetermination in relation to sustaining the allegations before the investigation had even proceeded to the interview phase. The reviewer interviewed Ms. Chaplin on her comment, and she was extremely concerned and stated this was taken out

of context. She explained that she takes vacation during the winter and is away from the province and at this particular time she was also caring for her mother and was very busy leading up to her departure. She had explained those realities to Mr. Roberge so when he suggested she be prepared to do a settlement conference by January 12 she responded Hahaaa in reference to the fact that he had to be kidding based on her previous commitments that Mr. Roberge was aware of. She is adamant that this comment was in no way intended to disrespect Mr. McCloskey or the process and was completely misinterpreted but she can see how Mr. McCloskey could perceive it that way and she felt very badly about this.

On December 20, 2016 there is an email exchange between Mr. MacKnight and Mr. Roberge in which Mr. MacKnight notes “I have reviewed the summary sent by Jill and have decided to submit a similar summary. I would like to meet with you to discuss the file and some of the issues that have come up. Have a look at the summary and I will be in touch in the morning”.

Mr. McCloskey had a serious concern that this email may have been an indication that Mr. MacKnight was being directed to submit a report that was influenced by the NBPC. When the reviewer interviewed Mr. MacKnight, he explained that the NBPC advised him just the day before he was going to submit his report that he was also required to submit a summary document. To expedite matters he asked if they had a summary document from another investigation that they could provide him to utilize as a guide. Jill Whalen, the Associate Director of the NBPC, forwarded the example document to him for his reference. Mr. MacKnight stated this in no way influenced what he was going to say in his report it was simply a matter of needing a framework document to guide his summary.

In his full report Mr. MacKnight commented on two occasions on what he referred to as “collateral issues”. He made the statement that there were “numerous examples of willful and negligent disregard to the following sections of the *Police Act*” and he named Section 34 (e) that states it is incumbent upon every member of the police force: to ensure that any improper or unlawful conduct of any member of a police force is not concealed or permitted to continue. He also noted section 36(1)(d)(iii) - fails to report to a member of a police force whose duty it is to receive the report, or to Crown Counsel, any information or evidence, either for or against any prisoner or defendant, that is material to an alleged offence under an Act of the Legislature, an Act of another province or territory of Canada or an Act of the Parliament of Canada.

These references were noted by the Oland defense team and highlighted in their request for disclosure from the NBPC. Mr. McCloskey felt that by not providing any context to these comments it left the reader with the impression that Mr. McCloskey was the subject of these additional allegations. The reviewer asked Mr. MacKnight about the collateral issues and he was clear it did not involve Mr. McCloskey but rather other members of the Saint John Police Force but since it was out of scope for his investigation he did not comment further. Mr. McCloskey felt the comments were prejudicial to him as they were made directly after Mr. MacKnight described his findings on the allegations against Mr. McCloskey. This was a reasonable concern raised by Mr. McCloskey and should be evaluated by the NBPC when formatting reports. Comments of this nature that are made and unsubstantiated have the potential to be very damaging.

On December 21, 2016 Mr. MacKnight delivered his completed investigation report to Mr. Roberge at the NBPC. The main body of the report consisted of 28 pages plus 4 pages of summary and 31 tabs in total, with audio files included. According to Mr. MacKnight there was no draft copy forwarded to the NBPC for review in advance of the final copy on December 21.

On December 22, 2016 Mr. Roberge served Mr. McCloskey with a Notice of Settlement Conference and a copy of the investigation.

The reviewer interviewed Mr. Ron Cormier who occupied the position of Chair of the NBPC at the time of the notice being served and he advised he did not review the investigation report and did not place his original signature on the notice. He cannot recall speaking to Mr. Roberge but has expense claim notes that indicate he spoke to the NBPC office on December 21 and 22, 2016 and he believes those calls would have been to speak to Mr. Roberge about the McCloskey file and to authorize using his signature stamp on the notice as he was not available to travel to Fredericton to sign it in person.

The concern raised by Mr. McCloskey relates to the fact that only Mr. Roberge, the Executive Director, saw the report prepared by Mr. MacKnight. The appointed Board including the Chair, Mr. Cormier and two members did not see the report but the NBPC nevertheless served a notice of settlement conference. The reviewer is in agreement with Mr. McCloskey that the notice of settlement conference should not have been served without the Board reviewing the investigation report and making a recommendation on the direction to be taken. This decision should not rest with the Executive Director. It is incumbent upon the NBPC to create policy and procedures to ensure that the Board is responsible for the review of investigation reports. The NBPC may determine if that review procedure may consist of the Chair in consultation with the other Board members, however, a policy needs to be enacted to ensure consistency in the processing of the files requiring investigation.

The reviewer believes Mr. Roberge was feeling pressure to advance to the notice of settlement conference as the six-month limitation to serve notice was coming up on December 26. Factoring in Christmas Eve and Christmas Day it only allowed Mr. Roberge a few days to serve the notice and maintain jurisdiction on the file under the *Police Act*. This is an example of why the reviewer believes the six-month time limit should be considered for amendment in the next review of the *Police Act*. This is covered in more detail in Section 3.11 of this report.

On December 16, 2016 there is an email between NBPC staff member Lisa-Marie Walton and Mr. McCloskey with Ms. Walton attempting to schedule a meeting between Mr. Roberge and Mr. McCloskey for December 22, 2016 at 09:30. The purpose of meeting was for Mr. Roberge to provide the investigation report to Mr. McCloskey and to discuss the NBPC and Mr. McCloskey's intentions in this matter. Mr. Roberge is attempting to set up a meeting to serve the notice of Settlement Conference before he has even received Mr. MacKnight's report. The reviewer believes this is another example of attempting to ensure service of the document with time running out in the six-months. There needs to be a process that would allow for the Board of the NBPC to consider an application to extend

the six-month period under exceptional circumstances. This is referenced in Recommendation 3.11.1 of this report.

4.7 Settlement Conference – Arbitration Hearing

Section 31.3(1) states that upon review of the investigation report the NBPC had two options. One option was to take no further action where the Commission determines that there is insufficient evidence that the Deputy Chief committed a breach of the code. The second option was to proceed to a settlement conference where the Commission determines that there is sufficient evidence that the Deputy Chief committed a breach of the code.

The following is an overview by dates, of the interactions that took place regarding the settlement conference and arbitration hearing:

Notations on the NBPC file indicated on November 21, 2016 before Mr. MacKnight began conducting interviews that Mr. Roberge was preparing to conduct a settlement conference.

Mr. MacKnight advised that he believed he could get the report to NBPC by December 10, 2016 and Mr. Roberge asked Mr. MacKnight to ensure it was completed no later than a week before the 26 of December so as to allow for the service of the Notice of Settlement conference.

In addition, on November 21, 2016 Mr. Roberge contacted Lynn Chaplin to determine if she could conduct a settlement conference with Mr. McCloskey in January of 2017. It was clear Mr. Roberge was preparing for a settlement conference prior to receiving the investigation report from Mr. MacKnight.

On December 16, 2016 Mr. Roberge advised Mr. MacKnight to continue with the investigation and Mr. MacKnight advised his investigation report would be completed by December 21. Mr. Roberge stated he will attempt to meet with Mr. McCloskey on December 22 to serve him the notice of settlement conference.

On December 22, 2016 Mr. McCloskey was served the notice of settlement conference by Mr. Roberge and a letter was sent to the Chief of Police by Ron Cormier inviting him to attend when the settlement conference date was set.

On December 23, 2016 Mr. Roberge communicated with Robert Basque, counsel for the NBPC, to advise he had forwarded him the investigation report in anticipation that this file may proceed to an arbitration hearing. He also advised to expect a settlement conference to take place in March or April and Mr. Basque confirmed he would represent the NBPC.

There is a notation on the NBPC file between February 3-6, 2017 that new dates for the settlement conference were sent to the parties.

On April 25, 2017 Nathalie Godbout, counsel for Mr. McCloskey, requests an adjournment and on April 28, 2017 Mr. Cormier agrees to the adjourn until June 8 or 9 and asks for their preferred date by May 10, 2017.

On May 4, 2017 additional disclosure is sent to Ms. Godbout.

On May 10, 2017 Ms. Godbout made a submission that the *Act* wasn't complied with as the complaint should have been processed by the civic authority. She was also seeking a suspension of process due to the pending Oland trial.

On May 17, 2017 Mr. Roberge contacted Mr. Basque to indicate time is a significant constraint on the NBPC and only one member of the Board is trained to conduct settlement conferences. He went on to write that if Ms. Godbout "is not prepared to undertake a settlement conference then we will proceed to an arbitration hearing as we did with Deputy Chief Comeau in Bathurst". Mr. Roberge asks Mr. Basque to prepare a reply to Ms. Godbout stating the NBPC would like to proceed to Settlement Conference on June 8 and they were prepared to proceed to an arbitration if need be.

On May 25, 2017 Mr. Roberge emailed the Chair of the Saint John Board of Police Commissioners to advise them Ms. Godbout has until May 31 to confirm their attendance at the Settlement Conference on June 8 or 9. Mr. Roberge further indicates the NBPC is preparing materials to proceed to an arbitration hearing and have tentatively identified an arbitrator. He further added once notice of an arbitration hearing is served the arbitration must begin within 30 days and the hearing will appear on the NBPC website.

May 31, 2017 Ms. Godbout wrote to Mr. Basque to say she disagreed with his assessment on disclosure but confirmed they would be attending the settlement conference.

May 31, 2017 Mr. Roberge advises the Chair of the Saint John Board of Police Commissioners that the NBPC would be appointing an arbitrator from Ottawa as he has no conflicts and less knowledge of the Oland trial.

Also, on May 31 there is an exchange between Mr. Roberge and Mr. Basque where Mr. Roberge stated, "this is another delay tactic, we are prepared to go to arbitration".

On June 1, 2017 Mr. Basque sent a letter to Ms. Godbout asking for confirmation of her client's attendance at the settlement conference by the end of business on June 2, 2017, otherwise NBPC will proceed to an arbitration hearing. He confirmed the settlement conference would be on June 9, 2019 at 9:30 am in the Boardroom of the NBPC. This eliminated any confusion over whether the settlement conference was on the 8 or 9.

On June 1, 2017 Mr. Roberge emailed the Chair of the NBPC stating "They have until Friday to confirm attendance. All materials for arbitration are in the hands of appropriate parties awaiting word from us on Monday as if we are going to an arbitration or conference".

On June 2, 2017 Ms. Godbout sent a letter, as requested stating "If the Police Commission insists on this path into these important discussions, then Deputy Chief McCloskey and his legal counsel will attend for a Settlement Conference, this without waiving the procedural and other objections that have been made, should the matter proceed further. We will discuss with our client his availability for June 9, 2017. Please advise of the identity of the individuals who will be in attendance at the settlement conference."

On Monday June 5, 2017 there were a series of communications driven by the belief that Ms. Godbout had not responded by Friday, June 2. Mr. Basque indicated at first that he did not get the fax from Ms. Godbout in his email system, but later realized it had been received and made the NBPC aware of the technical error. The communications are noted below:

- A letter from Mr. Cormier to Robert Lewis of Ottawa appointing him as arbitrator.
- Mr. Roberge to Mr. Basque stating since there was no reply on the 2nd the process server has been authorized to proceed with service of the arbitration hearing notice on Mr. McCloskey.
- An exchange occurred between Mr. Roberge and Mr. Basque (unclear what it was, presumably some kind of attachment). Mr. Roberge writes that NBPC position is that there was no reply confirmation by June 2. Mr. Roberge states that he will delay publishing the arbitration information on the NBPC website for 48 hours.
- Mr. Basque suggests to Mr. Roberge that if he can resolve at a settlement conference he should.
- Mr. Roberge states “As do we. Except what we are witnessing is continued delayed tactics (which we have seen in the past from others) with little appetite to resolve the issue. Perhaps service of a notice will move things along. If Ms. Godbout contacts you, discussions as to resolution should involve our Vice Chair, Lynn Chaplin (copied), who is very well versed with the file and was going to “chair” the settlement conference.”
- Mr. Basque asks, “So you are serving the Notice of Hearing but will do a Settlement Conference on June 9 if they want it?”
- Mr. Roberge responds “Sir, we are serving the notice and we can meet on June 9 to attend a resolution that will be presented to the arbitrator. The Settlement Conference died on Friday afternoon.” (June 2nd).
- The Chair of the NBPC concurred with Mr. Roberge’s decision.
- Email from Mr. Roberge to the Chair Saint John Board of Police Commissioners that a process server is tracking Mr. McCloskey down to serve a Notice of arbitration hearing and that Mr. Lewis has been appointed as arbitrator. Mr. Roberge adds that this will be a media story.
- Notice of arbitration hearing served on Mr. McCloskey.
- Email from Chief Bates to Mr. Roberge stating that Mr. McCloskey was very surprised as he thought there was a settlement conference this week on June 8 or 9.
- Mr. Roberge responds to the Chief that’s not what Mr. McCloskey’s lawyer indicated when asked to formally confirm their attendance by Friday June 2.

On June 6, 2017 Ms. Godbout wrote to Mr. Cormier stating that they did not waive their right to a settlement conference and asking for the arbitration hearing notice to be withdrawn. She also explained that she did in fact reply on June 2 that they would attend the settlement conference and asked to confirm who would be in attendance. Mr. Roberge emailed Mr. Basque to say that “nowhere in her correspondence does she state her “client will attend” as per your request, as such, this matter now resides in the hands of Mr. Lewis. If they wish to meet with Ms. Chaplin on Friday June 9 at 09:30 to discuss a letter of agreement to the arbitrator, then I will attempt to confirm Ms. Chaplin is still available. Mr. Basque confirmed that Ms. Godbout said they would be there on June 9.

On June 8th Mr. Roberge sent an email to Mr. Basque stating, “Would you impress on Ms. Godbout that tomorrow’s meeting is NOT a Settlement Conference but simply a meeting to discuss the matter prior to proceeding to the arbitration hearing. She just attempted to confirm their attendance at the “settlement conference” with my assistant who transferred the call to me. She asked me what time the “meeting” was at tomorrow, and I replied 09:30hrs.”

- Mr. Basque replied to Mr. Roberge “Godbout is upset by this. Why not have a settlement conference? They want protection of the legislation”. No response to this from Mr. Roberge could be found in the file.
- Later on, June 8 Mr. Basque wrote to Ms. Godbout and copied to Mr. Roberge regarding the NBPC’s position that the arbitrator is seized with jurisdiction. The parties can agree to a joint recommendation to the arbitrator.

On June 9, 2017 Ms. Chaplin attended the meeting and considerable time was spent debating email correspondence with Mr. Basque. Ms. Chaplin showed Ms. Godbout the correspondence regarding checking Mr. McCloskey’s availability and Ms. Godbout replied that the report was flawed and the NBPC process was “murky”. In an email dated June 9, 2017, from Lynn Chaplin to NBPC Legal Counsel Robert Basque, she writes that Ms. Godbout and her client asked about the possibility of acknowledging other errors he made during the Oland investigation in place of the ones the Commission investigated. Mr. McCloskey indicated he would never admit to the allegations being true and had no interest in retirement or adjudication and felt the NBPC was being punitive rather than corrective. No agreement was reached for arbitrator.

On July 25, 2017 Mr. Basque advises Mr. Roberge that Ms. Godbout is questioning the arbitrator jurisdiction when no settlement conference was held.

On August 31, 2017 there is a letter from Ms. Godbout to the arbitrator regarding her request for disclosure many times; she learned that Oland defense requested 3rd party disclosure which was given, however Mr. McCloskey and Ms. Godbout were not notified. Crown told Ms. Godbout that there were additional documents sent to defense over what was provided to Mr. McCloskey and that these were highly relevant to the *Police Act* process.

September 01, 2017 Mr. Basque seeks Mr. Roberge’s ok to send a letter to Ms. Godbout. He does not believe he should send her the file he sent the defense unless the arbitrator orders it. He wrote to Ms. Godbout to say he feels the NBPC complied with full disclosure and the O’Connor application is different.

September 7, 2017 Mr. Roberge emails NBPC members regarding affidavits and NBPC brief are ready for the arbitrator. Affidavits from Mr. McCloskey, Ms. Godbout and Chief Bates have been received and read. Mr. Roberge notes a *Right to Information and Protection of Privacy Act* (RTIPPA) request from Ms. Godbout (after disclosure to Oland defense), however Mr. Roberge is not releasing anything.

September 12, 2017 a note to file – Mr. Roberge writes that there are concerns from the Crown that arbitration will hurt Oland proceedings Mr. Basques says not to adjourn Ms Godbout’s motion to adjourn the arbitration hearing. Chair and members of NBPC agree.

Mr. Roberge contacted Saint John Board of Police Commissioners who are concerned about delay. Mr. Roberge advised not to give Saint John Board of Police Commissioners Crown info but to just tell them that arbitrator agreed to motion.

September 13, 2017 emails between Ms. Godbout, Mr. Basque agreeing to an adjournment for arbitration.

September 14, 2017 arbitrator emails counsel and Mr. Roberge and agrees to adjourn until October 2, 2018.

April 30, 2018 Mr. McCloskey retired from the Saint John Police Force and asked for confirmation that the *Police Act* proceedings would be terminated.

June 12, 2018 a letter from Ron Cormier to the Chair of the Saint John Board of Police Commissioners confirmed closure of the NBPC file.

Taking into consideration all of the above notations the reviewer's analysis of the settlement conference and arbitration hearing process in this case is as follows:

Paragraph 31.3 (1) (b) references proceeding to a settlement conference where the civic authority determines that there is sufficient evidence that the Chief of police committed a breach of the code. In this case the Saint John Board of Police Commissioners is the Civic Authority and requested that the NBPC take carriage of this matter which they did.

Subsections 27.3(2) & (3) provides for a conduct complaint against a Deputy Chief to be handled in the same manner as a Chief of Police.

Mr. MacKnight completed an investigation within the six-month timeline (with two suspensions) and turned it over to the NBPC. The investigation sustained five of the six allegations and it was reviewed by Mr. Roberge, the Executive Director of the NBPC. It is the reviewer's opinion that before taking any action on the investigation report the Board should have been engaged and permitted to make a recommendation. In this case, the Chair, Mr. Cormier, cannot specifically recall being contacted by Mr. Roberge, however, he does have notes that indicate he spoke to the NBPC office by telephone on December 21 and 22, 2016 and feels it is very possible that he spoke to Mr. Roberge about this case and gave him direction. His signature stamp was utilized on the notice of settlement conference document.

Between December 2016 and May 2017 there were multiple communications between Ms. Godbout representing Mr. McCloskey and Mr. Basque representing the NBPC. Mr. Roberge and Mr. Cormier were also engaged in the exchange of documents. Correspondence dealt with several issues but mainly focused on requests for disclosure and setting dates for the settlement conference.

Although the notice served on December 22, 2016 was for a settlement conference, Mr. Roberge began discussing the possibility of an arbitration hearing as early as December 23, 2016 when he communicated with the Saint John Board of Police Commissioners and

Mr. Basque. He also advised the Saint John Board of Police Commissioners on May 25, that he was preparing for an arbitration and had tentatively identified an arbitrator.

On June 1, 2017 Mr. Basque sent a letter to Ms. Godbout clearly indicating the settlement conference had been set for June 9, 2017 at 9:30 am in the boardroom of the NBPC building in Fredericton. He also stated he required her confirmation that her client would attend by close of business on June 2, 2019 or the Commission would move to arbitration. The reviewer discussed this letter with Mr. Basque for confirmation and it was agreed that although it would be courteous of Ms. Godbout to respond and advise whether her client would be there on June 9th there is in fact no provision in the Act to demand confirmation of attendance once a date is set and certainly no provision to move directly to arbitration based on not confirming attendance.

The subject officer has the right to either attend the settlement conference or not. If the subject officer does not attend the settlement conference, then the next step is to move to arbitration.

In this case Ms. Godbout did respond to Mr. Basque by close of business on June 2 stating "then Deputy Chief McCloskey and his legal counsel will attend for a Settlement Conference, this without waiving the procedural and other objections that have been made, should the matter proceed further. We will discuss with our client his availability for June 9, 2017. Please advise of the identity of the individuals who will be in attendance at the settlement conference." It is her position that Mr. McCloskey did not waive his right to attend the settlement conference and the reviewer would agree with that assessment. If the NBPC still had a question around whether Mr. McCloskey would attend they could have sought clarification as opposed to moving immediately to arbitration.

Mr. Basque was able to confirm with the NBPC on June 5 that he had in fact received Ms. Godbout's fax on June 2 but due to a technical complication it didn't show up in his email inbox as expected.

Mr. Basque's advice to Mr. Roberge was to solve the matter at a settlement conference if possible. He further asked Mr. Roberge why he would not have a settlement conference.

Mr. Roberge's comments indicated he felt there were stall tactics being applied and there was a notice of arbitration hearing served on June 5 and it would have to proceed.

In this case Mr. McCloskey was assigned a date for a settlement conference and had a right to attend to be given an opportunity to respond to the alleged breach of the code and to reach an agreement concerning disciplinary and corrective measures. There is no provision to require him or his counsel to confirm their attendance at the settlement conference once a date is set, therefore the decision to serve Mr. McCloskey with a notice of arbitration hearing on June 5, four days before he was supposed to attend the settlement conference was without authority and should not have occurred. Mr. Roberge disregarded the advice of counsel for the NBPC to solve the matter at a settlement conference if possible. The reviewer believes the advice was appropriate in suggesting the matter should have been allowed to proceed to the Settlement Conference which was the next step in the administrative process. Recommendation 3.3.1 suggests developing policy and procedure

documents to be used as a roadmap to mitigate the risk of a misstep in the process. Had Mr. McCloskey not attended the settlement conference or attended and failed to reach a settlement then the NBPC would have been in a position to serve a notice of arbitration hearing.

4.8 Selection of the Arbitrator

Mr. McCloskey raised the issue that the NBPC unilaterally appointed an arbitrator, Mr. Robert Lewis of Ottawa. Mr. McCloskey felt this was a violation of Section 33.02(1) of the *Police Act* which states that the parties shall within 10 days after the chief of police or civic authority serves a notice of arbitration hearing under Part I.1 or III, appoint an arbitrator from the list established and maintained under section 33.01.

While the reviewer would agree that it is beneficial to the process to obtain agreement from the parties on the selection of an arbitrator, Section 33.03 of the *Act* states if the Commission serves a notice of arbitration hearing under Part III or III.2, it shall appoint an arbitrator from the list it establishes and maintains under Section 33.01. In this instance the Commission served the notice as noted in 33.03.

Section 33.01 states that the Commission shall in accordance with the regulations, establish and maintain a list of persons who have indicated a willingness to act as an arbitrator.

The regulations set the criteria for an arbitrator and one of the criteria is “a lawyer who is a member in good standing of the governing body of the legal profession in another province or territory of Canada”. Mr. Lewis is a lawyer in Ontario and would qualify. The section doesn’t specify how long someone has to be on the list before they can be chosen.

In this situation, the reviewer believes the NBPC acted within the accepted parameters outlined in the *Act* in making the decision to select an arbitrator without consulting Mr. McCloskey.

4.9 Release of the NBPC file to the Oland Defence Team – Disclosure of Personal Information

Mr. McCloskey expressed significant concern that the NBPC had disclosed his personal information while not authorized to do so under the *Police Act*. The NBPC had received a request from the Oland Defence team through Crown Counsel to obtain access to the entire file it held in relation to the *Police Act* complaint against Mr. McCloskey. Mr. McCloskey believed his personal information had been disclosed twice to the defence team, on July 12, 2017 and December 4, 2017.

In addition, Mr. McCloskey complained that the NBPC had failed to notify him of the request pursuant to Section 34 of RTIPPA, which calls for a public body to provide notice to third party where a request for his or her personal information has been made. Mr. McCloskey alleged the NBPC was not authorized to disclose this information pursuant to subsections 21(2)(b) and (h) of the *Act*. Mr. McCloskey’s counsel made the complaint under RTIPPA to the office of the Integrity Commissioner on August 31, 2018. As a result,

the Integrity Commissioner accepted the complaint as being a privacy complaint, with allegations that the NBPC breached Mr. McCloskey's privacy by disclosing information to third parties without authorization and without his consent.

The Honorable Alexander J. Deschenes, Integrity Commissioner, released his decision on this matter on December 13, 2018. In that decision the Integrity Commissioner concluded that the NBPC was not authorized to disclose Mr. McCloskey's personal information to either the Crown Prosecutors or the Oland Defence team on July 7, 12 and December 4, 2017. The Integrity Commissioner's decision in this matter is attached as Appendix H, therefore the reviewer will not comment further on this complaint.

During the reviewer's interview with Mr. McCloskey he conveyed a significant lack of trust in the Commission and specifically in Mr. Roberge and he expressed a feeling of being "targeted" and treated unfairly.

It should be noted the release of the NBPC file including Mr. McCloskey's personal information was done following the NBPC obtaining a legal opinion which supported the release of the information. The Commission will be developing policy on the release of third-party information to ensure further breaches do not occur as recommended in Recommendation 3.3.1.

PART 5: Conclusion

The documented mandate of the New Brunswick Police Commission states that it is an independent civilian oversight body that safeguards the public interest in policing by:

- Addressing complaints regarding the conduct of members of municipal or regional police forces and ensuring independent investigations;
- Ensuring consistency in disciplinary and corrective measures imposed in response to *Police Act* violations;
- Investigating matters relating to policing in New Brunswick.

A search through mission statements of other Police Commissions across Canada reveals consistent messaging relating to maintaining public confidence in police agencies by delivering timely, impartial and client-centered service to the public, to police services and to individual police officers.

The news conference on December 27, 2018 conducted by the New Brunswick Police Association and former Deputy Chief Glen McCloskey questioned the fairness and impartiality of the New Brunswick Police Commission in handling complaints against police officers. It's links to the very public Oland trial resulted in this news conference gaining an extraordinary level of press coverage across the Province of New Brunswick and would no doubt have had an impact on public and police confidence in the Police Commission. Public and police confidence are critical to the success of any Police Commission, as noted in their Mission Statements.

On December 29, 2018 the Acting Chair of the Police Commission requested assistance from New Brunswick's Minister of Public Safety, the Honorable Carl Urquhart, in appointing an independent third party to review concerns raised by the NBPA, including a review of the Commission's investigative processes and procedures.

The review identified key themes that are listed in Part 3 and made 22 recommendations to strengthen the structure, policies and procedures of the Police Commission, to improve strained relationships with stakeholders and regain the confidence of the public in this very critical police oversight body.

While conducting the review the reviewer had the opportunity to meet with the current members of the Police Commission and Staff and was very impressed with their integrity and determination to make the NBPC an organization that both the public and police can have faith in to ensure consistency and impartiality in all matters relating to police oversight.

The Board, Executive Director and Staff have already developed a strategic plan, a roles and responsibilities document as well as creating policy and procedural documents to ensure consistency in the delivery of service. In addition, they created a unit charter that acts as a roadmap for how they will conduct themselves internally and with outside agencies to guarantee that respect for one another, the public and the police is at the core of all they do.

The Executive Director has been visiting Police Services across the Province and the Board and Staff are making inroads with stakeholders.

There was no doubt that circumstances noted in this review led to the requirement for a reset in the way the NBPC conducted business. Although the NBPC is without question an independent entity the need to nurture and build relationships as well as engage stakeholders is critical to their success and to build confidence in the public and police in their work. The Reviewer is confident the current Board and Staff are headed in the right direction and will gain the confidence of the public and police and those who represent them.

Appendix A

Terms of Reference

BACKGROUND

On December 27, 2018 allegations were made by the New Brunswick Police Association (NBPA) during a press conference held in Saint John, NB, questioning the fairness and impartiality of Police Commission handling of complaints against police officers, and specifically the closed file of retired D/Chief McCloskey. The Commission has requested assistance from the Minister of Public Safety via appointment of an independent third party to review concerns raised by the NBPA, including a review of the Commission's investigative process and procedures.

OBJECTIVE

The objectives of the review are (1) to ensure the New Brunswick Police Commission has in place policies, procedures and practices that ensure its handling of all complaints is impartial and fair to all involved and (2) to improve confidence in the impartiality and fairness of the Commission.

MANDATE

The Independent Reviewer will report to the Minister and the Chair of the Commission on any variances between New Brunswick Police Commission policies, procedures and practices and “best practices” in the field of responding to complaints about police officer conduct. For greater clarity, the review of Commission policies and practices will include all those speaking to the processing of complaints that are received after the deadline for complaints under the Act. The report will make recommendations on any changes required, with rationale.

Given the scope of the subject matter, the tight timelines and the need to respect the independence of the Commission in managing cases still open before the Commission, the Reviewer will focus on the McCloskey file, and on the policies and procedures of the Commission.

The Reviewer will provide by June 30, 2019 to the Minister and the Chair a draft of his or her report, and then provide by July 31, 2019 a final report. The Reviewer acknowledges that the purposes of the draft report is to allow the Minister and Chair to ask questions about and/or to challenge any findings and/or recommendations, for the purposes of improving the clarity of the final version and the practicability of its recommendations. The Minister and Chair acknowledge that the Reviewer will determine him or herself whether the feedback received from the Minister and/or Chair justifies any changes to the draft report.

All parties acknowledge the draft and final report are confidential advice to the Minister of Public Safety upon delivery, but that the Minister will release to the public the final report, with the response of the Commission and Minister to its recommendations, within 90 days of receipt of the final report. (Release will be

subject to any redactions that may be required by the provisions of the *Right to Information and Protection of Privacy Act*.)

ACCESS TO INFORMATION

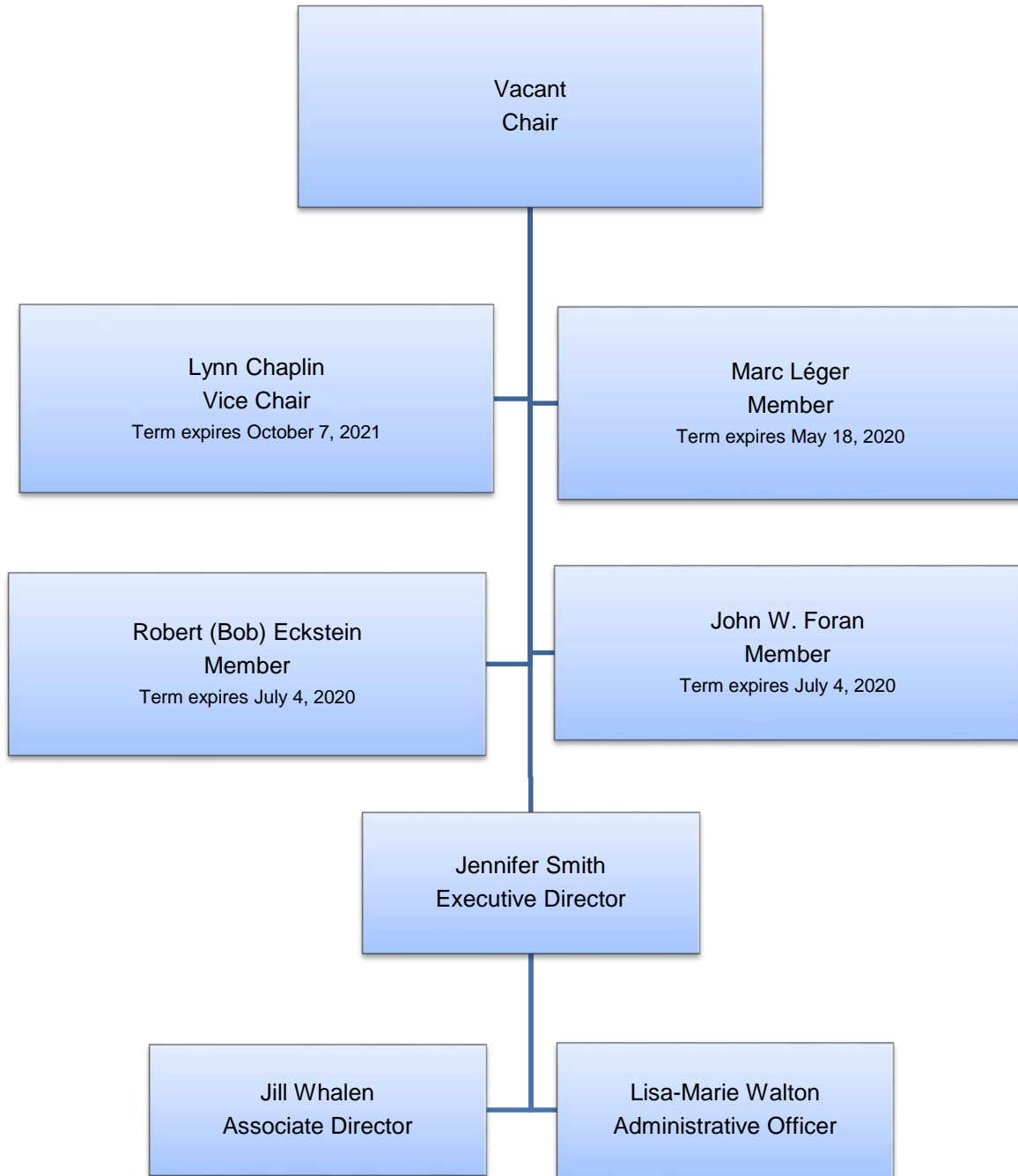
The Minister and Chair will ensure the Reviewer has access to any information relevant to the scope of this work. This includes access to any relevant documents in the possession of the New Brunswick Police Commission or of the Department of Public Safety, and access to employees for interviews.

The Executive Director (for the Commission) and the Assistant Deputy Minister of Inspections and Law Enforcement (for the Department) will serve as the Reviewer's liaison to their respective organization and will facilitate timely and full access as requested.

The Independent Reviewer shall maintain document security as provided by the *Government of New Brunswick Security Policy*, AM1951, and will respect the provisions of the *Right to Information and Protection of Privacy Act* as they relate to personal information.

Appendix B

Organizational Chart



New Brunswick
Police Commission



Commission de police
du Nouveau-Brunswick

NEW BRUNSWICK POLICE COMMISSION

STRATEGIC PLAN 2019-2021

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VISION

Fair and independent civilian oversight of policing in New Brunswick trusted by all.

VALUES

<i>Quality Service</i>	We provide services that are dependable and consistent.
<i>Integrity</i>	We act with honesty and fairness.
<i>Accountability</i>	We take responsibility for our policies, decisions, actions and products.
<i>Objectivity</i>	We make balanced and unbiased decisions.
<i>Transparency</i>	We foster a structure and culture that encourage access to information within the law.

MANDATE

The New Brunswick Police Commission is an independent civilian oversight body that safeguards the public interest in policing by:

- Addressing complaints regarding the conduct of members of municipal or regional police forces and ensuring independent investigations;
- Ensuring consistency in disciplinary and corrective measures imposed in response to *Police Act* violations;
- Investigating matters relating to policing in New Brunswick.

GOALS, OBJECTIVES, ACTION ITEMS, PRIORITIES AND TIMELINE

Goals	Objectives	Action Items
1. Improve foundation	1.1. Ensure the basic functions of the New Brunswick Police Commission are the highest standard in the country	1.1.1. Complaints and investigations <ul style="list-style-type: none"> a. Develop a policy on investigators b. Update the Investigator’s Manual c. Create a quality control process d. Track investigations and trends e. Track all service complaints in the Province f. Implement a recruitment, retention and remuneration strategy for arbitrators and investigators
		1.1.2. Receive and implement the findings of the independent third-party review <ul style="list-style-type: none"> a. Develop a plan to address resulting recommendations
		1.1.3. Develop a consensus on Policing Standards Reviews <ul style="list-style-type: none"> a. Meet with DPS to determine our role and identify trends
		1.1.4. Finances <ul style="list-style-type: none"> a. Analyze spending patterns with a breakdown of top items (investigations, arbitrations, translation) of the past five years b. Look at our best practices and those of other similar Commissions c. Determine models for expenditures
		1.1.5. Establish Standard Operating Procedures manual based on best practices on the following: <ul style="list-style-type: none"> a. Decision making guidelines, processes and legal interpretations b. Legal counsel and legal opinions c. Policy for extending deadlines for filing a complaint d. Third-party anonymous complaints e. Form and content of minutes f. Board members claim forms g. Continuous improvement process

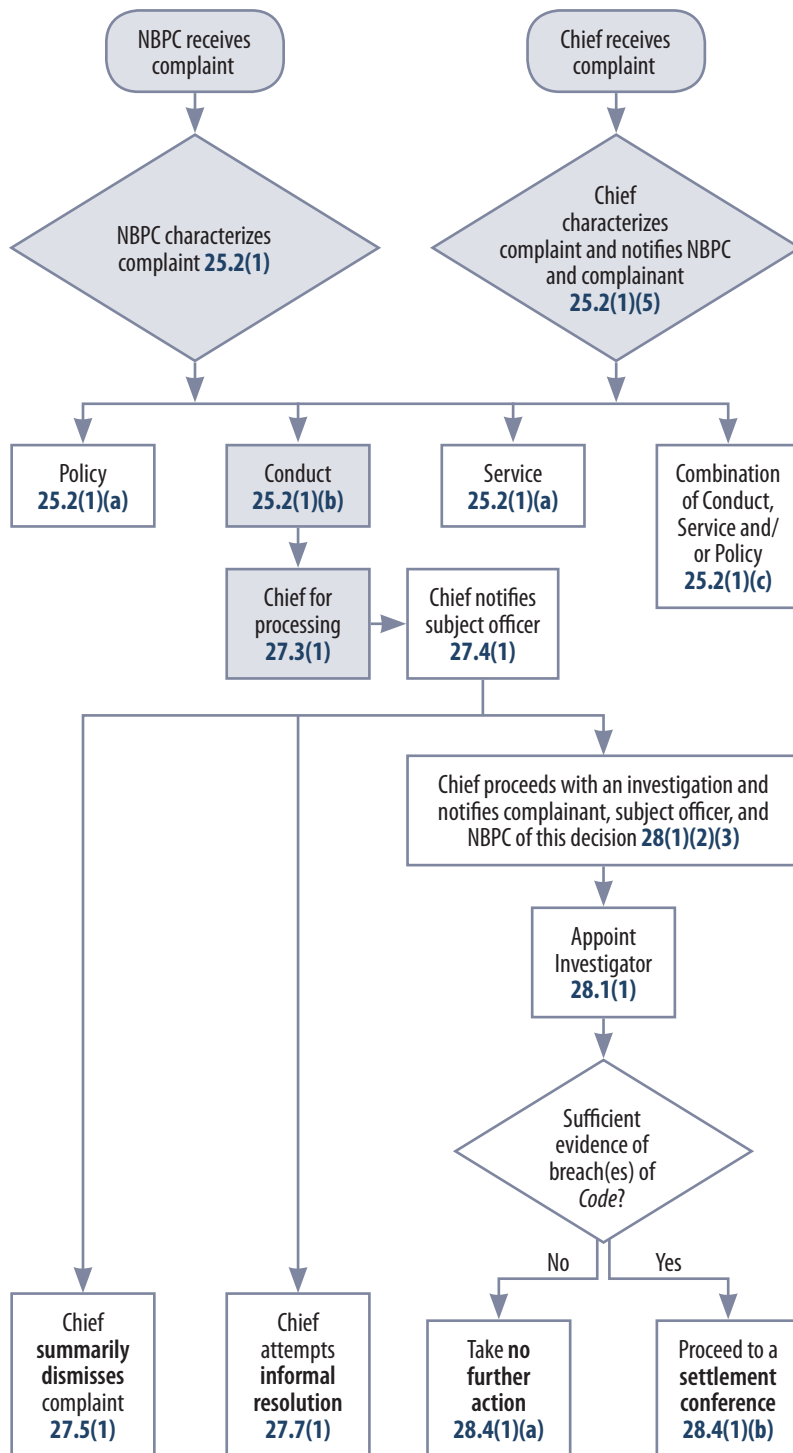
		<ul style="list-style-type: none"> h. Signing authorities i. Complaint intake process j. Suspension of Police Act investigations
2. Improve partnership	2.1. Establish and maintain effective and collaborative working relationships with the Commission's key partners	2.1.1. Create a stakeholder map <ul style="list-style-type: none"> a. Determine who the partners are b. Develop an engagement strategy with the identified partners
		2.1.2. Develop a strategy to be a productive participant in the Police Act review process <ul style="list-style-type: none"> a. Do fact finding - Obtain briefings from DPS, consult staff, lawyers, etc. b. Develop a position paper
		2.1.3. Develop a communication strategy (external) <ul style="list-style-type: none"> a. Review website <ul style="list-style-type: none"> • Work in partnership with SNB to update content and format • Migrate website to SNB • Analyze statistics b. Maintain and update website c. Develop a media strategy <ul style="list-style-type: none"> • Provide media training in mid-April 2019 • Develop a policy on media relations • Dedicate support to communications (hire or develop within) d. Public engagement strategy <ul style="list-style-type: none"> • Develop a strategy that includes the use of social media to raise awareness of the Commission • Revise pamphlet and establish a distribution plan
3. Improve internal processes and decision making	3.1. Create a clear understanding by all staff and members of operations and the decision-making process of the Commission	3.1.1. For staff, develop: <ul style="list-style-type: none"> a. Clear statements of roles and responsibilities based on the December 2018 session b. Orientation plan for new ED (Welcome, train and assess) c. Workplans for ED and senior staff d. Appraisal system (utilizing the GNB employee system) e. Training and development plan f. Clear statement on what requires Commission members approval
	3.2. Create a positive organizational culture	3.1.2. For board members, develop: <ul style="list-style-type: none"> a. Terms of Reference with: <ul style="list-style-type: none"> • Clear statements of roles, responsibilities and expectations

		<ul style="list-style-type: none">• A code of conduct• How information flows• How the board deals with disagreements <p>b. Orientation plan for new members</p> <p>c. Standard training plan</p>
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Process maps

All sections/subsections/paragraphs referenced are from the New Brunswick *Police Act*.

Conduct Complaint against Police Officer

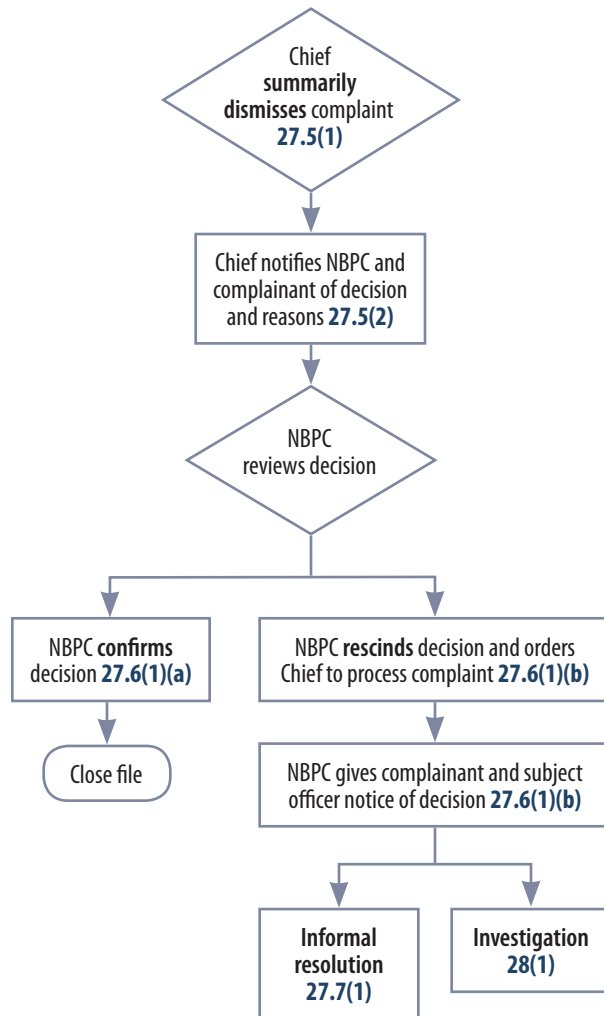


Pursuant to section 26.1(1) "... the Commission... may, at any time before an arbitrator has been appointed, process a conduct complaint or take over from a chief of police or civic authority the processing of a conduct complaint."

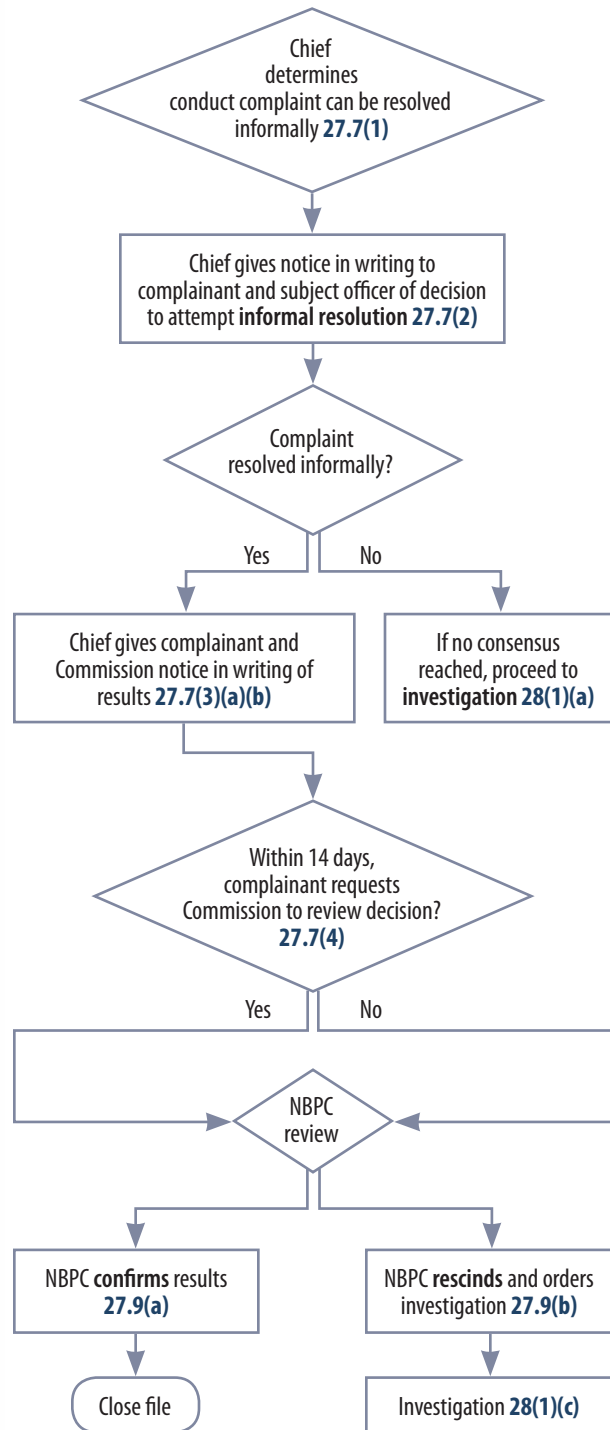
Pursuant to section 26.1(2) "The provisions of this Act that apply to the powers that a chief of police or civic authority may exercise when processing a conduct complaint also apply with the necessary modifications to the Commission..."

Pursuant to section 27.2(1) "... the Commission may... suspend the processing of a conduct complaint... where the processing will be or becomes an investigation into an alleged offence under an Act of the Legislature or an Act of the Parliament of Canada until such time as the Commission directs otherwise."

Summarily Dismiss (Police Officer)

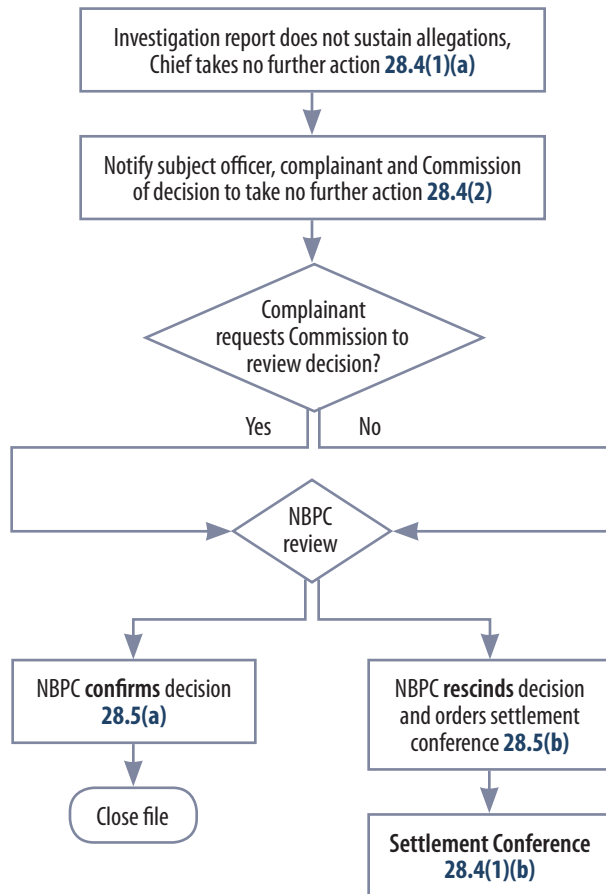


Informal Resolution (Police Officer)

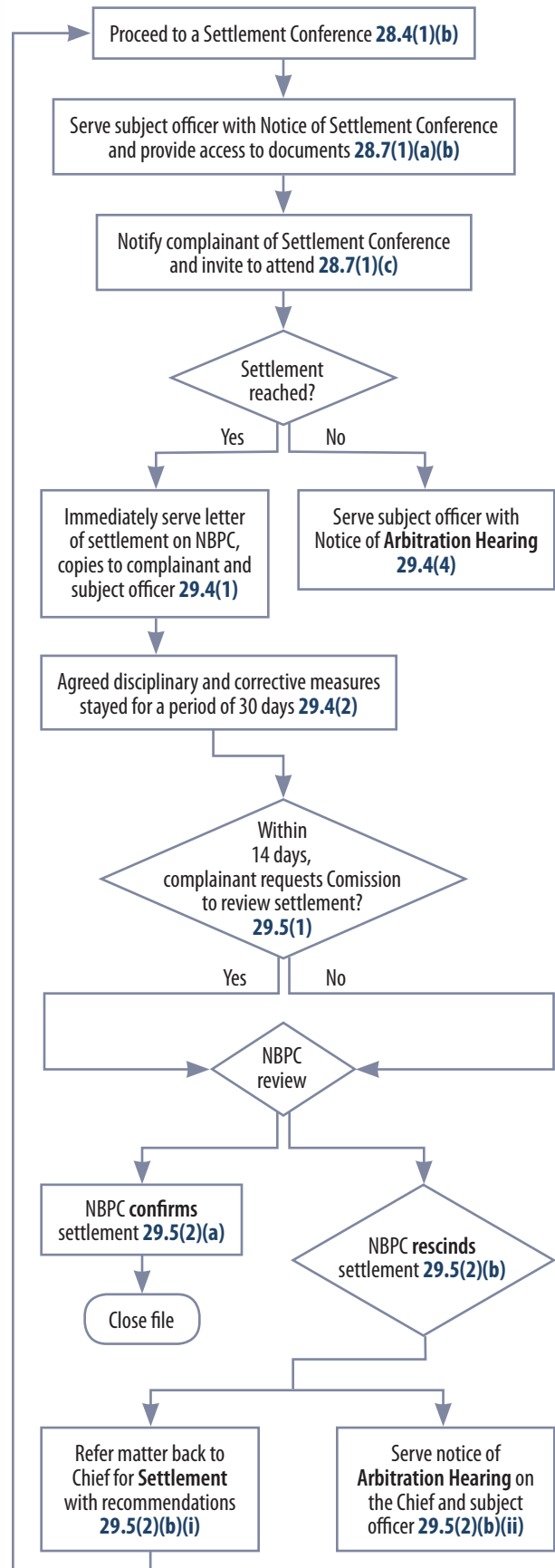


27.5(1) The chief of police may summarily dismiss a conduct complaint, in whole or in part if, in the opinion of the chief of police, the complaint or part of the complaint is frivolous, vexatious or not made in good faith.

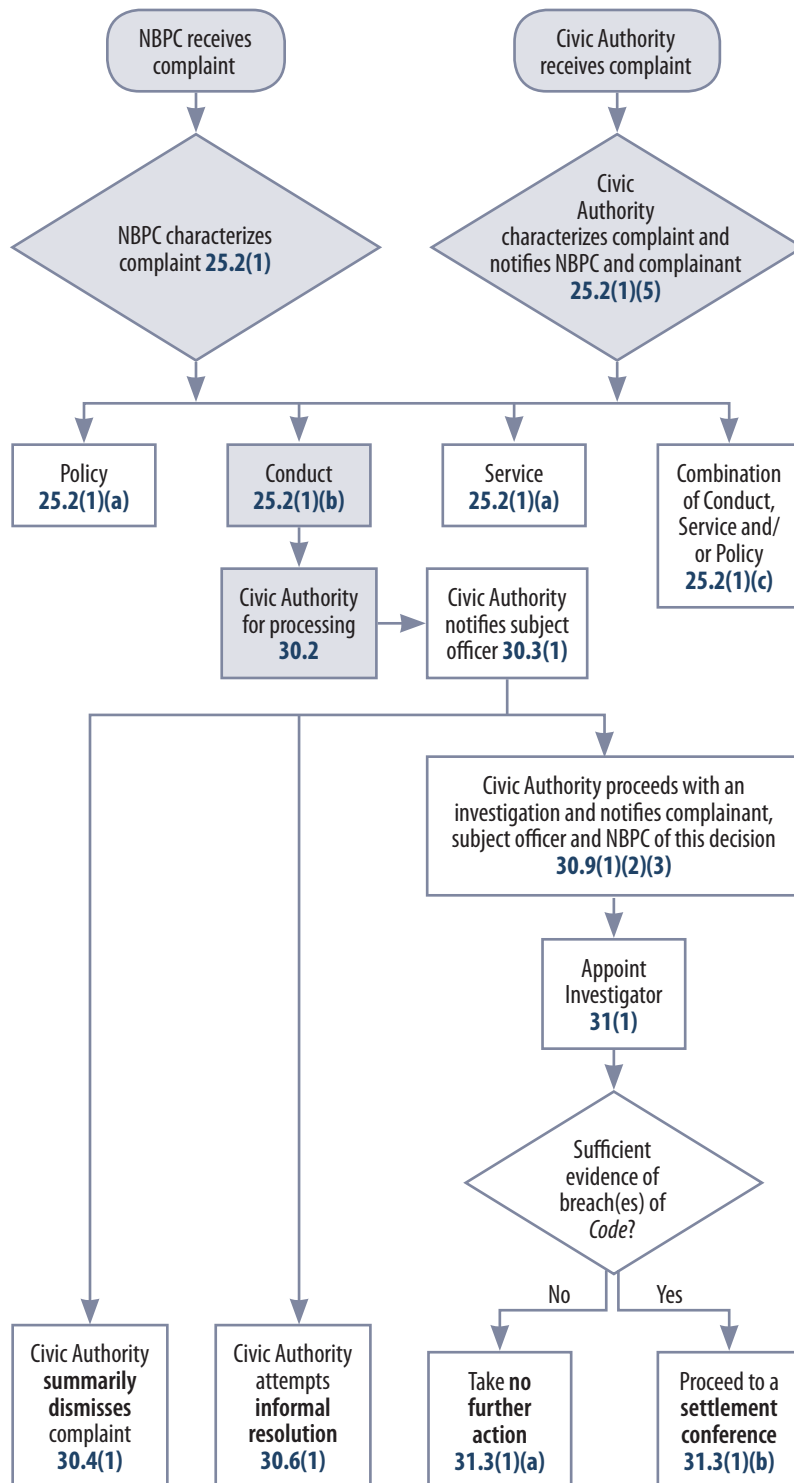
No Further Action (Police Officer)



Settlement Conference (Police Officer)



Conduct Complaint against Chief or Deputy Chief

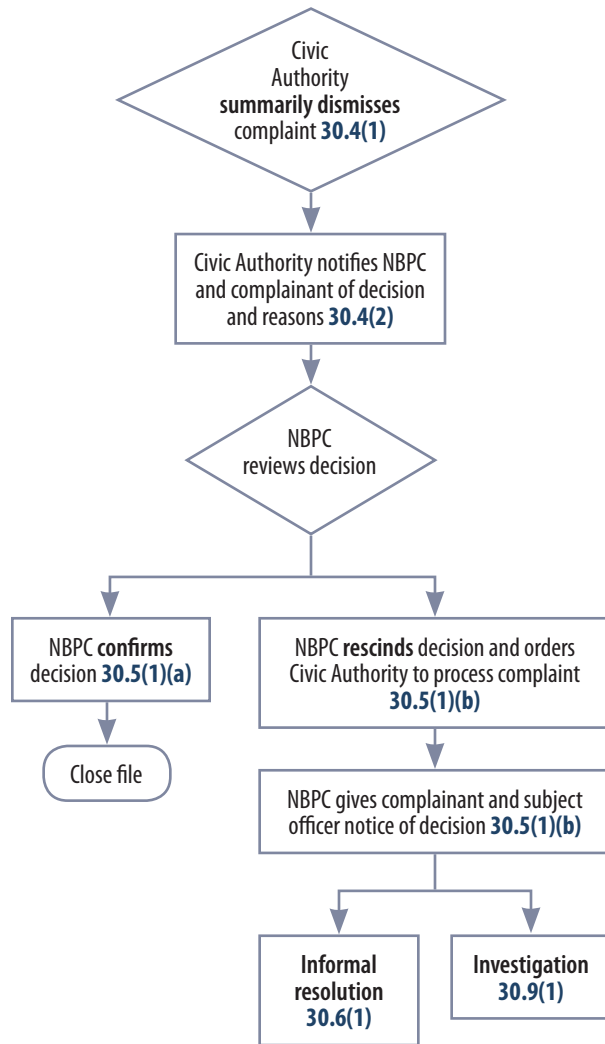


Pursuant to section 26.1(1) "...the Commission... may, at any time before an arbitrator has been appointed, process a conduct complaint or take over from a chief of police or civic authority the processing of a conduct complaint."

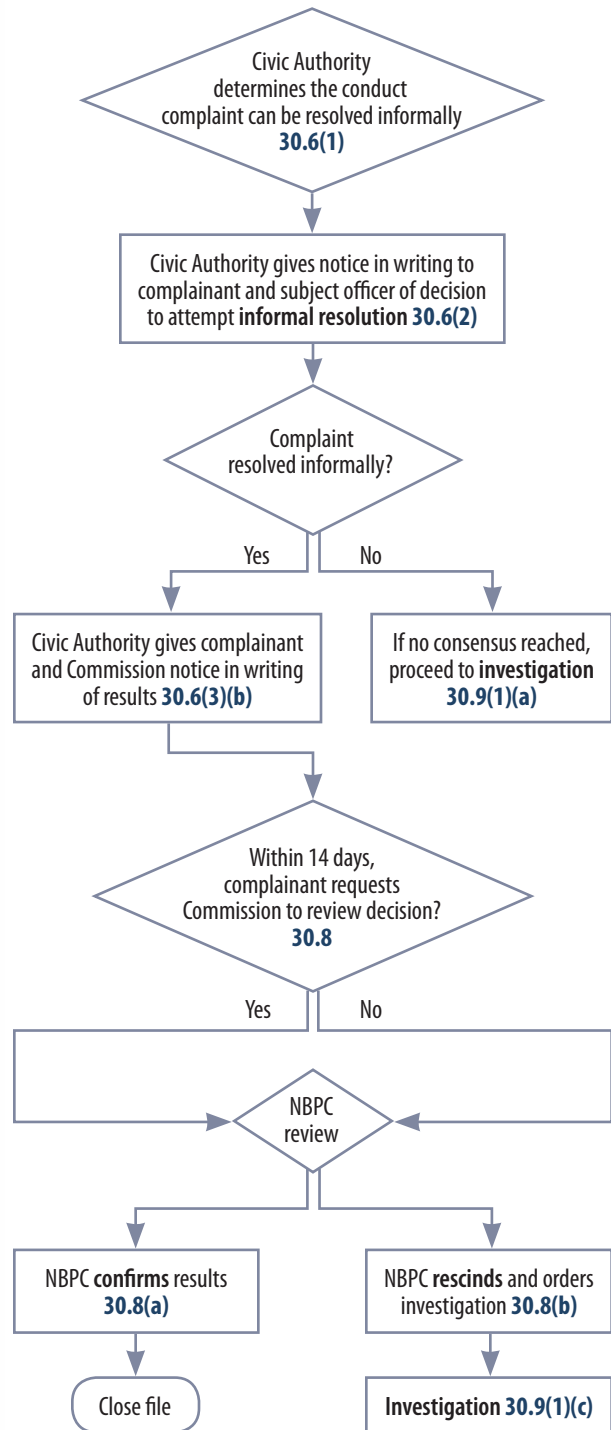
Pursuant to section 26.1(2) "The provisions of this Act that apply to the powers that a chief of police or civic authority may exercise when processing a conduct complaint also apply with the necessary modifications to the Commission..."

Pursuant to section 30(1) "...the Commission may... suspend the processing of a conduct complaint...where the processing will be or becomes an investigation into an alleged offence under an Act of the Legislature or an Act of the Parliament of Canada until such time as the Commission directs otherwise."

Summarily Dismiss (Chief or D/Chief)

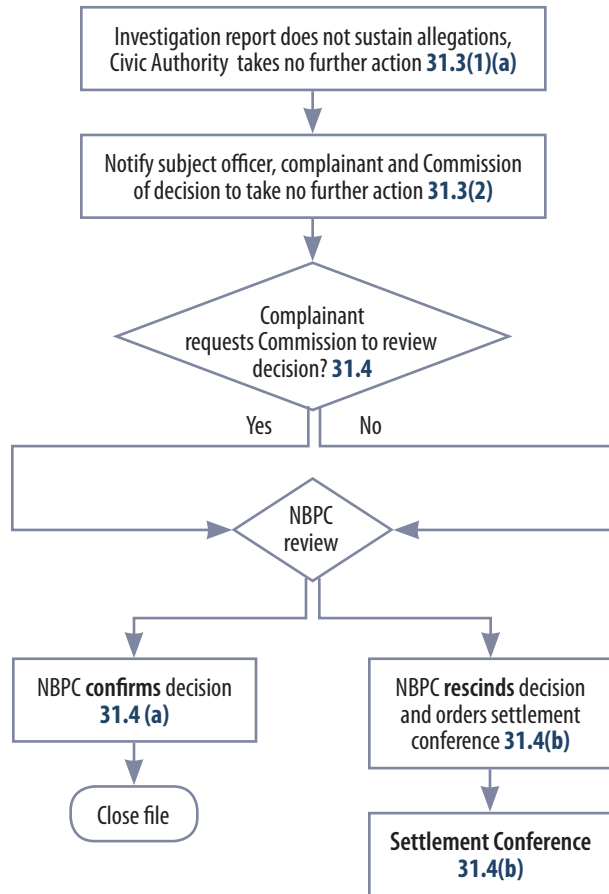


Informal Resolution (Chief or D/Chief)

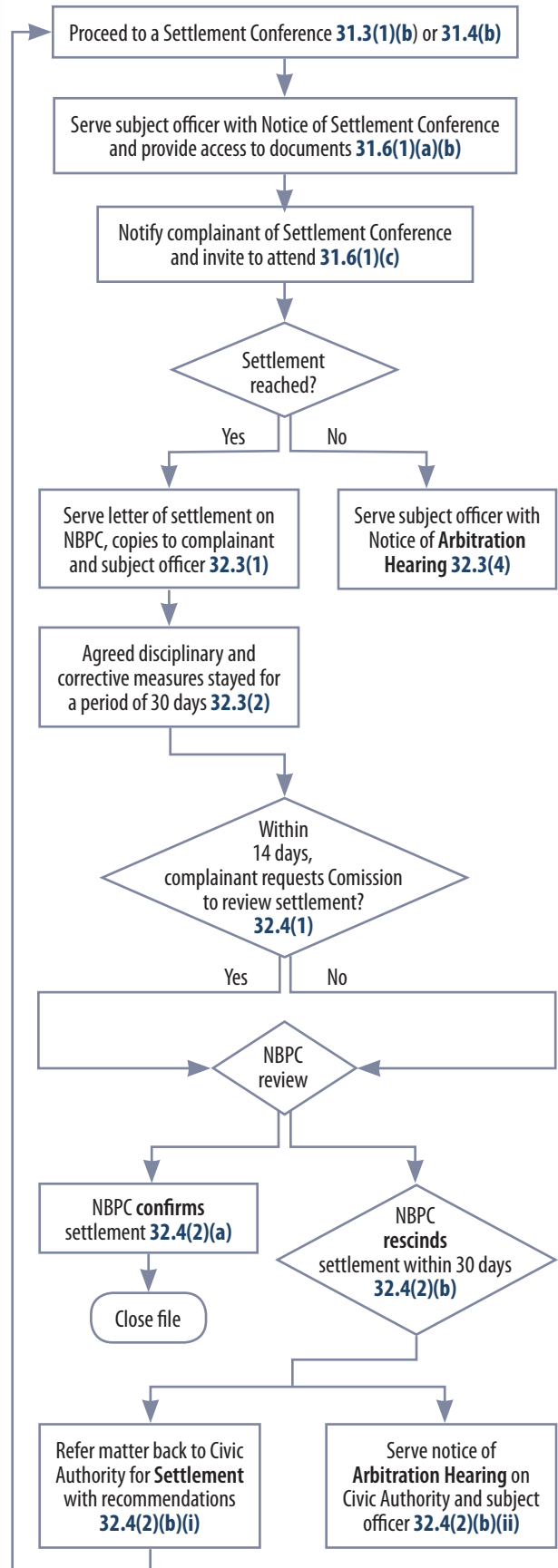


30.4(1) The civic authority may summarily dismiss a conduct complaint, in whole or in part if, in the opinion of the civic authority, the complaint or part of the complaint is frivolous, vexatious or not made in good faith.

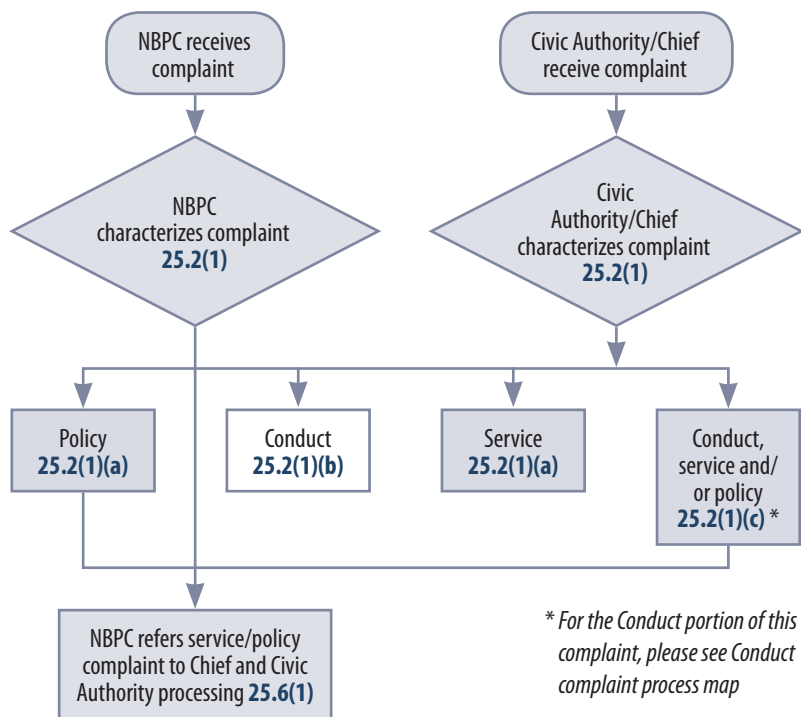
No Further Action (Chief or D/Chief)



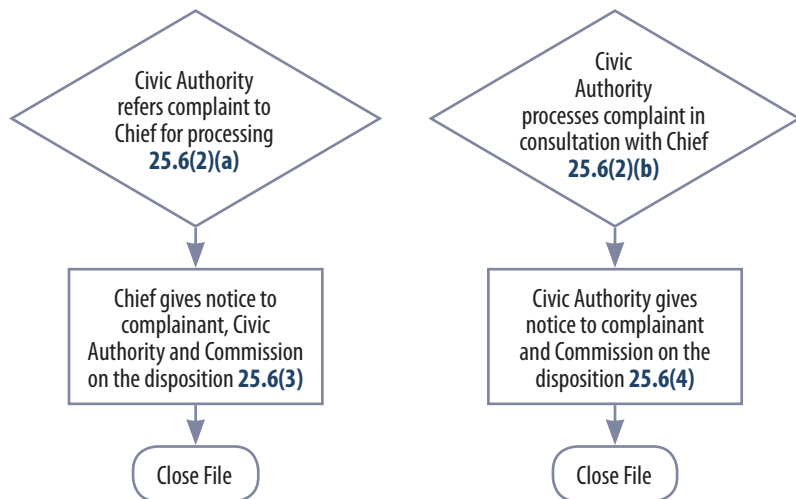
Settlement Conference (Chief or D/Chief)



Service/Policy Complaint



Service and/or Policy Complaint



Appendix E

Team Charter for Commission Members and Employees

Members and employees will adhere to the following principles and behaviours in our interactions among ourselves, with our partners and with the public:

- Our actions and behaviour are guided by what is in the public interest;
 - Our decisions respect the intent and spirit of the New Brunswick *Police Act* and Regulations, and other relevant legislation or policy;
 - We listen and respect the views of others;
 - We are open and transparent with one another; all relevant information is shared openly and with everyone;
 - We are open to compromise;
 - Sufficient time is allocated for a full discussion and airing of issues;
 - We identify common interests and potential options to address challenges;
 - We provide constructive criticism and look for positive solutions;
 - Sensitive items are discussed in person or on the telephone. We do not engage in email debates on sensitive matters;
 - We strive for consensus whenever possible. Consensus does not imply everyone fully agrees with all aspects of a decision, but that they can “live with” the outcome;
 - We support and respect the final decisions of the Commission;
 - We respect the confidentiality requirements of the work we do;
 - We respect the line between governance and administration and strive for a shared model of decision making;
 - We foster relationships between the Commission and Staff that are sound, open, and trusting;
 - We will be diplomatic, organized, flexible and collaborative.
- Note: The Team Charter applies to all forms of communication, whether written or verbal.

Guideline on Time Limit Extension for Making a Complaint



1. Policy Statement

The New Brunswick Police Commission (the “Commission”) is committed to providing exemplary service to all members of the public. The Commission aims to address *Police Act* complaints equitably, comprehensively, and in a timely manner in accordance with the law and the principles of natural justice. The Commission has a duty of procedural fairness in applying statutory provisions and when making decisions which will affect the rights, privileges or interests of an individual.

2. Purpose

The purpose of this policy is to ensure that the provision of subsection 25.1(1) of the *Police Act* (the *Act*) is administered in a fair, consistent and equitable manner; i.e. that the one-year time limit imposed by subsection 25.1(1) is extended by the Commission under subsection 25.1(2) in appropriate and defensible circumstances.

This policy is to be considered in conjunction with any other policies and/or legislation that apply to each situation and this policy will not be unreasonably applied.

3. Definitions

Complainant – means a person who files a service or policy complaint or a conduct complaint.

Respondent – means the person who the complaint is against.

4. Legislative provision

Time limits, section 25 of the *Act* provides that:

25.1(1) Subject to subsection (2), a complaint shall be filed within one year after the date of the incident or omission, or occurrence of the conduct that is the subject of the complaint.

25.1(2) The Commission may, where in the opinion of the Commission circumstances so warrant, extend the time for the filing of the complaint.

5. Continuing violations

For allegations to constitute a continuing violation there must be a succession or repetition of separate breaches of the *Code of Conduct* of the same or similar character. These must be breaches which could be considered as separate contraventions of the *Act*, and not merely one breach which may have continuing effects or consequences¹.

Further, the allegations must occur with sufficient frequency². If a continuing violation of the *Act* is alleged in a complaint, only the last alleged instance of the violation must fall within the one-year time limit. In such complaints, a time limit extension (TLE) under subsection 25.1(2) is unnecessary for alleged acts outside the one-year time limit if they are part of the alleged continuing violation.

However, if the Commission is of the view that the alleged acts that are outside the one-year time limit do not constitute a continuing violation, the Commission may require a complainant to seek a TLE under subsection 25.1(2) in order for those alleged acts to be considered as part of the complaint.

6. Commission’s Discretion under subsection 25.1(2) of the *Police Act*

The Commission may extend the one-year time limit for making a complaint under subsection 25.1(1), by taking into consideration the following:

a. continuing intention to pursue the complaint:

It should be evident that the complainant has always intended to pursue the complaint despite the delay in filing. If the complainant seeks an extension of time to file a complaint where it is clear the complainant was previously fully aware of the relevant facts, and yet had no intention to pursue the substance of the complaint, this should weigh towards denying an extension.

1 Manitoba v. Manitoba (Human Rights Commission), [1983] M.J. No. 223 at para. 19.

2 A.B. v. Brunswick News Inc. (No.4), (2009) 69 CHRR D/246 (NB BdInq) at para. 115.

b. the merit of the complaint:

The complaint should be reviewed simply to determine whether the complaint is or may be credible. The purpose at this stage is not to judge whether the complaint will be successful, or that the substance of the complaint is true, but to eliminate obviously frivolous complaints.

c. the respondent will not be unduly prejudiced by the extension:

The Commission should consider whether the delay in filing the complaint will prejudice the respondent and means an actual loss of evidentiary position as a result of the disappearance of a witness, document or other evidence.

d. there is a reasonable explanation for the delay:

If there is a reasonable explanation for the delay, then this should weigh towards granting an extension. Examples of reasonable explanation include not learning of the act(s) complained of until near or after the time-limit and/or special circumstances which prevented a complainant from filing the complaint within the prescribed time-limit, for example:

- mental or physical disability;
- the exercise of a statutory or other applicable appeal or review right in a timely and appropriate fashion; and
 - internal complaint with respondent employer;
 - a grievance procedure;
 - an appeal in the courts; or
 - an appeal of a WorkSafeNB decision.
- any other justified reason as determined by the Commission.

The Commission may also consider whether there is some overriding factor that necessitates an extension be granted. *“The ultimate question is always whether, in all the circumstances and considering the factors referred to above, the justice of the case requires that an extension of time be granted”*.³

7. TLE request process

If the complaint or part of the complaint is outside of the one-year time limit for making a complaint, the complainant is required to submit a completed *Time limit extension request* within 15 business days to the Commission. The complainant’s submission, including the complaint form, will be sent to the respondent for response who will also be provided 15 business days to submit the completed *Response to time limit extension* to the Commission.

The Commission members will consider all the documentation in determining whether the circumstances warrant an extension of the time limit to make a complaint.

The parties to the complaint will be advised in writing of the Commission’s determination.

8. For more information

Further information about the *Act* or this guideline may be obtained by contacting the Commission at 506-453-2069 or by visiting the Commission’s website at <https://www.nbpolicemission.ca/en/> or email us at nbpc@gnb.ca.

New Brunswick Police Commission
435 King Street, Suite 202
Fredericton, NB E3B 1E5
Fax: 506-457-3542

Appendix G

Recommendations

3.1.1 Recommendations

- a) It is recommended that the Commission identify the key stakeholders and develop an engagement strategy in an effort to rebuild relationships and develop confidence and trust in the work of the Commission.
- b) It is recommended that in identifying the key stakeholders the Commission should determine who will officially represent the interests of police officers in meetings with the NBPC. Each police force has an association and there is the NBPA at the provincial level.

3.2.1 Recommendations

- a) It is recommended that the Commission complete and refine the NBPC Handbook and that it becomes the reference manual for all members of the Commission to ensure a clear understanding of roles and responsibilities. For clarity, the Commission should share the document with stakeholders.
- b) It is recommended that an orientation package be developed based on the NBPC Handbook and that a structured orientation be provided to all Board members before they take their position on the Board of the Commission.

3.3.1 Recommendation

- a) It is recommended that the Commission develop policy and procedure documents for all aspects of their operation thereby providing a roadmap for day to day operations.

3.4.1 Recommendation

- a) It is recommended that the NBPC be equipped with an electronic records management system.

3.5.1 Recommendations

- a) It is recommended the Commission develop a list of competencies for investigators that will be utilized to select investigators to populate the Commission's investigators list.
- b) It is recommended the Commission rescind the established list and repopulate it with investigators chosen through the competency screening process.
- c) It is recommended the Commission reevaluate the hourly rate paid to part-time investigators to determine whether it is in line with industry norms.
- d) It is recommended the Commission study the feasibility of hiring a full-time investigator(s) as part of the Commission staff.

3.6.1 Recommendation

- a) It is recommended the NBPC develop a policy statement and standard operating procedure that clearly articulates who will be responsible for the cost of conduct investigations, in each scenario. This policy should be shared with chiefs of police and civic authorities to confirm everyone's understanding of the process and ensure consistency.

3.7.1 Recommendation

- a) It is recommended that the Commission consider meeting with stakeholders to review the process of developing the arbitrator list and the fee schedule.

3.9.1 Recommendation

- a) It is recommended that the NBPC work collaboratively with DPS to bring together stakeholder groups to reactivate discussion on revisions to the Police Act.

3.10.1 Recommendations

- a) It is recommended that any future review of the Police Act include an evaluation of Section 20 and provide clarity regarding the definition of adequacy.
- b) It is recommended that NBPC and DPS meet to discuss their individual roles in relation to the adequacy of policing.

3.11.1 Recommendation

- a) It is recommended that during the next review of the Police Act, the NBPC develop a submission that would articulate the rationale and process for an extension of the six-month period for the service of the notice of settlement conference where exceptional circumstances existed. The merits of the submission could be discussed by all stakeholders.

3.12.1 Recommendation

- a) It is recommended that the NBPC submit a proposal to the chiefs of police to consider developing a position in each police force that would act as a coordinator for professional standards.

3.13.1 Recommendation

- a) It is recommended that consideration be given to developing a SIRT entity in New Brunswick to manage serious incidents involving police officers and share civilian oversight of police with the NBPC.

3.14.1 Recommendations

- a) The minimum term for a member of the Commission should be increased to three years
- b) A review of the requirements for members of the Commission should be undertaken to focus on specific competencies and the selection process should involve an interview.
- c) Consideration be given to restricting the selection of Chair of the Board to someone who resides in close proximity to Fredericton.
- d) Consideration be given to restructuring the Commission to create a full-time paid Commissioner to replace the part-time Commissioner.

Office of the
**INTEGRITY
COMMISSIONER**



Bureau du
**COMMISSAIRE
À L'INTÉGRITÉ**

December 13, 2018

Mr. Ron Cormier, Chair
NB Police Commission
435 King St., Suite 202
Fredericton, NB E3B 1E5

Dear Mr. Cormier,

**Re: Privacy complaint under the *Right to Information and Protection of Privacy Act (the Act)*
Applicant: Glen McCloskey (GM) (rep. by Godbout Fawcett)**

This letter is to inform you that this privacy complaint matter was remitted to me by Senior Legal Counsel Ms. Gionet-Bergeron for my formal review and in which I now present with my findings.

BACKGROUND

The complaint stemmed from the fact that GM believed the NB Police Commission had disclosed his personal information in a manner not authorized under the *Act*, when it received a request from the Oland Defence team to obtain access to the entire file it held in relation to the *Police Act* complaint against GM. According to GM, his personal information was disclosed twice to the Defence Team, being on July 12, 2017 and December 4, 2017.

While GM's original complaint was that the NBPC had failed to notify him of the request pursuant to s. 34 of the *Right to Information and Protection of Privacy Act*, which calls for a public body to provide notice to a third party where a request for his or her personal information has been made. In fact, GM alleges that NBPC was not authorized disclose this information pursuant to s. 21(2)(b), (e) and (h) of that *Act*, as explained by my Senior Legal Counsel in previous correspondence. As a result, we accepted the complaint as being a privacy complaint, with allegations that the NBPC breached GM's privacy by disclosing information to third parties without authorization and without GM's consent.

INFORMAL REVIEW OF MATTER

Upon receiving the complaint, my Senior Legal Counsel notified the NBPC of it and asked for its representations regarding the alleged privacy breach of unauthorized disclosure.

Based on the NBPC's submissions to our Office, my Senior Legal Counsel deducted that the NBPC did not receive an access request as is contemplated by Part 2 of the *Act*; rather, it had received a request for disclosure pursuant to disclosure requirements in criminal proceedings. In particular, the NBPC indicated that, on June 15, 2017, it received a request from Crown Prosecutors pursuant to its disclosure obligations to the Defence Team under *Stinchcombe*. As the Crown was not in possession of the materials requested by the Defence Team, it informed the NBPC of the request for the records, which were disclosed on July 12 and December 4, 2017. Additionally, the NBPC also disclosed GM's information pursuant to an *O'Connor* application before the court.



Based on her review of both the NBPC and GM's submission, my Senior Legal Counsel provided her preliminary findings, in which she believed the NBPC was authorized to disclose GM's information to the Defence Team and to the Court, as per s. 46(1)(b) and (l) of the *Act*. My Senior Legal Counsel then invited GM to provide comments as to whether her preliminary findings were a satisfactory resolution to the complaint.

GM responded by providing additional submissions, in which he indicated that the events as described by the NBPC were not accurate, as he states that the disclosures made on July 12 and December 4, 2017 by the NBPC were done in the absence of a court order. In support of his position, GM described the details surrounding the events that led to the unauthorized disclosure of his information in four separate instances, to either the Defence Team or to Crown Prosecutors. Essentially, GM alleges the four unauthorized disclosures are as follows:

1. July 4, 2017: NBPC discloses GM's complete investigation file to Crown Prosecutors, after receiving a request for same;
2. July 12, 2017: NBPC discloses GM's complete investigation file to the Defence Team and to Crown Prosecutors;
3. December 4, 2017: NBPC discloses GM's personal information contained in additional documents to the Defence Team; and,
4. March 21, 2018: NBPC discloses GM's information in an Affidavit to the Court of Queen's Bench.

My Senior Legal Counsel subsequently shared these additional comments with the NBPC, and asking it to indicate whether it agrees with the facts as presented by GM. The NBPC responded by stating that it did not agree with the alleged additional facts presented by GM, and submits that the facts of the matter are accurately set out in its original response to our Office.

Given that there appeared to be two very completely different versions of events regarding the disclosure of GM's information to third parties, my Senior Legal Counsel was of the view that the matter would not be able to be informally resolved, and therefore remitted the matter to me for my formal review and final disposition.

MY FORMAL REVIEW AND ANALYSIS

Upon receiving a complaint matter for my review, I would review the entire file, including the informal work done by my staff to date, so as to decide whether or not to launch a formal investigation. In this matter, given the different versions of events leading to the disclosure of GM's personal information at different times, I believed a formal investigation was warranted. Where such occurs, I normally would invite the parties to present additional representations, if they so wished, for my consideration; however, given the lengthy representations both parties have already shared with this office, I do not find this to be necessary in this case.

As such, I present my findings as to whether a breach of GM's privacy by the NBPC did in fact occur in this matter. To do so, I will analyze each alleged privacy breach as raised by GM in its latest submissions to our Office, as presented above. In summary, I find that the NBPC breached GM's privacy on two instances by disclosing his personal information to the Crown Prosecutors and the Defence Team on July 4 and 12, 2017.

July 4 and 12, 2017 disclosures to Crown Prosecutors and Defence Team

GM states that the first disclosure occurred as a result of NBPC receiving a letter from Crown Prosecutors on June 15, 2017, in which Crown Prosecutors indicate having received a request from the Defence Team for its complete investigation file into the action of GM. While the Crown Prosecutors indicated in its letter that it did not have the records, nor were they entitled to them as the NBPC is a third party to the Crown and therefore disclosure of these records was outside of the



Crown's obligation to disclose them, the Crown nevertheless made the request to the NBPC as a matter of courtesy to the Defence Team. In response to this, the NBPC disclosed the requested documents to the Crown Prosecutors, without advising GM.

According to GM, this was recognized by the Crown Prosecutors as being a breach of GM's privacy, as by letter dated July 6, 2017, the Crown returned the records to NBPC and stated that there was a misunderstanding, and that it was simply passing on the Defence Team's request for those records; however, it was the Crown's position that the requested material was third party information and should thus be provided directly to the Defence Team should the third party (GM) not object. In the event of a refusal, the Crown indicated that the Defence Team would then have to entertain an O'Connor application before the Court; however, if the NBPC was amenable to disclosing the information to the Defence Team, the Crown asked that it also be provided a copy.

It was further to this additional letter that the NBPC disclosed GM's information directly to the Defence Team on July 12, 2017, with a copy to the Crown Prosecutors, again, as argued by GM, without authorization and without a court order or subpoena.

As for the NBPC, it did not provide additional explanations regarding these two alleged breaches in its November 1, 2018 response to our Office, apart from stating that the facts are accurately reflected in its June 29, 2018 submissions. Having read these submissions, I do not see any specific reference to the disclosure that occurred on these dates in question; instead, the NBPC talks generally about disclosure that occurred during the summer of 2017.

In its submissions, the NBPC indicated that GM wrote to the NBPC in August 2017 to claim that it had not given him notice of disclosure to the Crown of his personal information in the *Police Act* investigation. In response, the NBPC indicated that the records could have been the subject of an O'Connor application before the Court by the Defence Team (which they later were) and likely would have been successful, as the test for disclosure is whether the information is "likely relevant" to the criminal proceedings. According to the NBPC, the records were clearly relevant and would have to be disclosed. In NBPC's view (and I agree) there are no privacy interests with respect to the information and documentation which outweighs an accused's interest in obtaining disclosure for the purpose of making full answer and defence, and GM was well aware of the disclosure of the information since the summer of 2017.

In light of the above, I must first consider is whether the NBPC was authorized under any provisions of s. 46(1) of the Act to disclose GM's information to the Crown. S. 46(1) stipulates the instances where a public body is authorized to disclose personal information. In this matter, I have considered several provisions that may be relevant to these matters, and I provide my analysis and findings in respect to each of them, as follows.

(a) if the individual the information is about has consented to the disclosure;

In this instance, both parties agree that GM's consent was never sought prior to any disclosure of his information by the NBPC, therefore, I find that the NBPC could not rely on s. 46(1)(a) to justify the disclosure.

Hence, when the NBPC disclosed its report to the Crown, albeit pursuant to a misunderstanding, the disclosure was not justified under s. 46(1)(a) of the Act.

(b) for the purpose of complying with an Act of the Legislature or an Act of the Parliament of Canada;



Furthermore, with regards to paragraph (b), there is no indication that the disclosure was made pursuant to an Act of the Legislature or an Act of the Parliament of Canada. There are, of course, provisions in the Criminal Code that set out the procedure to use in order to obtain an order compelling production of documents in the custody of a third party; however, the Criminal Code does not provide that information which is “likely relevant” to the defence in the custody of a third party (such as NBPC in this case) must be provided to the defence on the basis of a request for the accused.

The disclosure of the information at issue to the Defense Team (and to Crown Prosecutors) in these instances was therefore not for the purpose of complying with an Act of Parliament, as no proceedings under the Code had been engaged and no production order issued against the NBPC at this time.

Additionally, it goes without saying that the *Right to Information and Protection of Privacy Act* is an Act that must be complied with regarding disclosure of the information at issue here. As such, only where a provision of this Act authorizes the disclosure can the NBPC say the disclosure was for the purpose of complying with an Act. For the reasons explained below, I do not find that the Act authorized the disclosure of GM’s information in these two instances, and therefore, the NBPC cannot rely on s. 46(1)(b) as authority for having disclosed his information.

(d) for law enforcement purposes; and (e) If the public body is a law enforcement agency and the information is disclosed to (i) another law enforcement agency in Canada;

Paragraphs (d) and (e) refer to law enforcement, in that the disclosure was for law enforcement purposes or the disclosure was from one law enforcement agency to another. While law enforcement agency is not defined in the Act, the term “law enforcement” is, as follows:

“law enforcement” means

(a) policing, including criminal and security intelligence operations,

(b) a police, security intelligence or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, and

(c) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred. (*exécution de la loi*)

In my view, the disclosure by NBPC was not made for law enforcement purposes. While the NBPC’s investigation under the *Police Act* into the conduct of GM qualifies as an administrative investigation that leads or could lead to a penalty or sanction, that was not the purpose of the disclosure in these two instances. Instead, the disclosure was for the purpose of providing information to the Defence Team, in its preparation for the upcoming trial.

Furthermore, I do not find that the NBPC is a law enforcement agency for the purpose of the Act, as Black’s Law Dictionary defines, as “law enforcement” inter alia, police officers and other members of the executive branch of government charged with carrying out and enforcing the criminal law. This is not the role of the NBPC. Therefore, the NBPC did not have authority under ss. 46(1)(d) or (e) to disclose the information to Crown Prosecutors or the Defence Team in these two instances.



(l) for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of information or with a rule of court that relates to the production of information;

Paragraph (l) allows for disclosure of personal information for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of information or with a rule of court that relates to the production of information. Based on my review of both parties' representations, while I agree that the records at issue were later the subject of an *O'Connor* application before the Court, and that the Court would have likely ordered its production, at the relevant times (July 2017), such an application did not exist, nor did any order, subpoena or other rule that compelled the records to be disclosed at that time.

(n) for use in existing or anticipated legal proceedings in which the Province of New Brunswick or the public is a party;

Finally, with regards to this provision, I again find that the disclosure was not authorized as the NBPC is not the Province of New Brunswick, but a public body of the Province of New Brunswick, for the purposes of the Act, and it was not a party to any anticipated or ongoing legal proceeding at the relevant times. The court proceeding re: *Crown vs. Oland*, in my view, does not include the NBPC, and therefore, it could not rely on this provision to justify its disclosure of GM's information in these two instances.

December 4, 2017 disclosure to Defence Team.

According to GM, the NBPC disclosed additional records to the Defence Team on December 4, 2017, without authority under the Act, even though he states that the NBPC was well aware that, if the Defence Team required this production, there were legal proceedings that the Defence Team could avail itself of (being an *O'Connor* application); however, instead of requiring that process to be utilized, the NBPC made its own determination that such an application "would surely have led to an Order against the Commission that it disclose all non-privileged documents to the (Defence Team)."

On this point, the NBPC has not commented, nor has it provided specific details surrounding the disclosure of the information. As such, I have no choice but to accept the facts as presented by GM regarding this disclosure. If I understand correctly, although the Defence Team did file an *O'Connor* application with the Court in regards to the production of records from the NBPC, I see from the supporting documentations that this was only done in February 2018. Therefore, I again find that no court proceeding had been undertaken on December 4, 2017 when additional disclosure of GM's information was made by the NBPC to the Defence Team, without authority under the Act.

March 21, 2018 disclosure to the Court

With regards to this alleged disclosure, I wish to inform the parties that the fact that the NBPC complied with a Court subpoena by filing an Affidavit in response to an *O'Connor* application that contained your personal information is out of my purview regarding this privacy complaint. As such, I am not making a finding regarding this allegation.

CONCLUSION AND RECOMMENDATION

In light of the above, I find that the NBPC was not authorized to disclose GM's personal information to either the Crown Prosecutors, or to the Defence Team on July 7, 12 and December 4, 2017. Although both parties presented a different version of events that occurred surrounding the disclosures at issue, I have based my findings on the representations made and supporting documents presented in this matter.



As with any case of a violation of privacy, we, unfortunately, cannot turn back the clock to prevent the breach from occurring. My role, as Integrity Commissioner, is to provide guidance, and recommendations, where warranted, to the public body who caused the breach in order to prevent such breaches from recurring.

Considering the criminal proceedings now before the Court in the Denis Oland murder trial, it is my view that the issuance of recommendations is not necessary, nor would it be wise. In my opinion, the future course of conduct of the NB Police Commission in matters raising the kind of issues dealt with in this reporting letter is clear and I have no reason to believe that the NB Police Commission would not comply.

Sincerely,


The Hon. Alexandre J. Deschênes, Q.C.
Integrity Commissioner

cc: Glen McCloskey, c/o Nathalie L. Godbout, Q.C., Godbout Fawcett