

NOVA SCOTIA POLICE REVIEW BOARD

IN THE MATTER OF: The *Police Act*, R.S.N.S. 1989, Chapter 348 and the Regulations made pursuant thereto

- and -

IN THE MATTER OF: The public complaint of Mr. Robert A'Court against Constable Colin Charlesworth of the Truro Police Service

BEFORE: Marion Ferguson, Chair
Lester Jesudason, Alternate Chair
Peter James, Member

COUNSEL: Jennifer Biernaskie and Amanda Carew
on behalf of the Complainant Robert A'Court

David Fisher on behalf of Constable Colin Charlesworth,
of the Truro Police Service

John T. Rafferty, Q.C. on behalf of Chief Kenneth
MacLean of the Truro Police Service

**REASONS FOR PENALTY
PHASE DECISION:**

May 10, 2007

Background

On June 24, 2005, the Review Board found that Constable Charlesworth had contravened section 5(i)(g)(ii) of the Police Act Code of Conduct and Discipline, in a May 31, 2003 incident involving Robert A'Court . Counsel for Mr. A' Court and Constable Charlesworth both agreed that the penalty stage of the hearing would proceed by way of written submissions. These representations were carefully reviewed and considered by the Review Board and on November 27, 2005, the Board ordered that Constable Charlesworth be given a reprimand. The reasons for that decision follow.

Submissions of Counsel for Robert A'Court

Referencing Paul Ceysens, Legal Aspects of Policing, as a guide in sentencing disciplinary defaults, Ms. Biernaskie submitted that a three day suspension without pay be imposed on the officer, along with a requirement that he write a letter of apology to the Complainant. Quoting from the Board's decision in Johnson (April 29, 2003), where the importance of public confidence in the integrity of police officers was an issue, counsel wrote that "it is in the public interest to ensure police officers act reasonably in all situations.....The public expects police officers to respond appropriately to the level of actual or apprehended resistance."

In counsel's view, by using pepper spray to allegedly subdue her client who, at that moment, was immobilized on the hood of a parked car by Constable Charlesworth and three fellow officers, in the midst of an unstable and volatile circumstance (a parking lot crowded with dozens of exiting

bar patrons late at night), the officer had acted unreasonably. In her words, pepper spray is not to be used "just because an officer might find it "convenient or comforting'" and she went on to outline the serious immediate and short term health consequences the irritant carries for people, such as her client, an asthma sufferer.

She submitted that the Constable's efforts "to minimize and justify his actions in his testimony", and his failure to acknowledge the seriousness nature of his actions, should be factored into the Board's decision. The difference in the officer's testimony during the Complainant's criminal trial, when he was acquitted of resisting arrest, and Constable Charlesworth's evidence before the Board, should be also be considered.

It was counsel's view that the need to deter police officers from following this example was "imperative" as police must be "reminded that they do not have unlimited power to use force on members of the public". She argued that this use of force, pepper spraying her client while he was being restrained by four officers, was excessive and "could damage how the public perceive Truro Police Force." However, at the same time, it was her position that, the effect of negative media coverage of the event and its sequelae, specifically on Constable Charlesworth, was of minor consequence, as the initial coverage on the arrest, focused mainly on her client and that subsequent press coverage of the 2005 Board finding against the individual officer, "was not significant and minimized (his) actions". The arrest, the manner of the arrest, the use of the spray, all combined to cause a "significant impact" on her client's reputation and a "great deal of psychological stress" for him.

She cited the Board decision in *MacDougall v. Somerton* (November 14, 2001) involving a handcuffed youth who was pepper sprayed while he was preparing to exit from a police van. In that case, the Board imposed a three suspension without pay on the officer, holding that the use of pepper spray was "unnecessary" in the circumstances as, at the time; the young man was sufficiently restrained. Counsel noted that unlike her client, Mr. MacDougall had actively resisted his arrest in that case. She also drew the Board's attention to the decision reported as D-046 of the RCMP External Review Committee, involving an officer pepper spraying a woman who was "hog-tied" while in a cell and the resultant imposition of seven days without pay.

Finally, in rebuttal, counsel referred to the case of Constable Todd Taylor (November 2002), which dealt with a junior officer's insubordination and tangentially with the issue of pepper spray, causing the Board to refer the matter to the Chief, to ensure that his officers were "properly trained in the limitations in the use of pepper spray". Counsel was using this precedent to support her thesis that the Truro Police Service has a general problem with the use of pepper spray.

Submission of Counsel for Constable Charlesworth:

While Mr. Fisher, like opposing counsel, acknowledged that public interest is best served by police officers acting reasonably in all circumstances, in his view, that interest must be balanced with fairness to officers who place themselves at "great personal risk" responding to dangerous and emergent situations such as in the present case, a late night fight at a busy bar.

Counsel submitted that it is relevant to the Board's deliberations to consider all circumstances of the call, along with the officer's perception of what was taking place. His client was required to take a "quick read of a situation" that was unfolding "very quickly" and make a judgment call as to appropriate response. He rejected the submission that the officer had not recognized the seriousness of his decision and its potential consequences for the Complainant. The short reaction time based on his perception of the events, "as they were unfolding", his client's view that he was acting in accordance with the law and in order to reduce the risk to himself and his fellow officers, in his client's mind, justified his actions. He submitted the Complainant's own evidence before the Board had acknowledged the potential for random violence that night. Counsel argued this case contrasted markedly from cases where an officer has time to consider his actions and "maliciously abuses his authority". In this way he distinguished the MacDougall decision (*supra*), pointing out there was no evidence that Mr. MacDougall was doing anything more than waiting for someone to drive him home, when he was illegally arrested and "thrown in the back of a squad car and handcuffed".

He argued that a reprimand is appropriate penalty in the instant case, citing the Board decision in *Powell v. Calder, Conrad and Falkenham* (November 1994), which involved a high school dance where there had been "various skirmishes and a couple of fights" among the crowd of up to 300 students. The officer who was found to have made excessive use of his night stick while subduing one of the attendees was reprimanded by the Board.

In his view, a letter of apology was inappropriate as there was ongoing civil litigation initiated by the Complainant.

Submission of Counsel for Chief MacLean

Mr. Rafferty, Q.C. limited his submission to objecting to Complainant's counsel's reference to the Taylor decision (*supra*, to support her statement that "the Truro Police Service (has) a general problem with the use of pepper spray". He produced an August 18, 2003 report from Roy Kennedy of the provincial Department of Justice Policing and Victim Services Division that had apparently been produced as a consequence of the Board's direction in Taylor for the Chief to initiate a review of the use of pepper spray in his force. Mr. Kennedy wrote that "I am confident that members of the Truro Police Service are properly trained and have adequate knowledge of the use of the appropriate use of pepper spray".

Mr. Rafferty's argument was endorsed by Mr. Fisher who noted the decision in *McDonough v. Perrier* 1993 N.S.J. No. 378, which stated that "side commentaries by the Police Review Board

should not be considered unless they have been fully examined with all the necessary procedural protections". Mr. Fisher writes:

"In conclusion, we maintain our position there is no evidence of problems with the use of pepper spray within the Truro Police Service. This particular incident referred to in the Todd Taylor decision was not fully examined by the Police Review Board and is not one that should be taken into consideration with respect to this decision."

Reasons

28H (1) At a hearing, the Review Board may

- (a) make findings of fact;
- (b) dismiss the matter;
- (c) find that the matter under review has validity and recommend to the body responsible for the member of the police force what should be done in the circumstances;
- (d) vary any penalty imposed including, notwithstanding any contract or collective agreement to the contrary, the dismissal of the member of the police force or the suspension of the member with or without pay;
- (e) affirm the penalty imposed;
- (f) substitute a finding that in its opinion should have been reached;
- (g) award or fix costs where appropriate;
- (h) supersede a disciplinary procedure or provision in a contract or collective agreement.

In the context of the use of pepper spray, which the Board described in its principal decision in this matter, as a "non-lethal, relatively low risk" instrument, there is substantial risk that police officers can underrate the significance of its use and apply it, as we have found here, carelessly or unthinkingly of its consequences. The use of the spray, in the instant case, where a presumed suspect had already been subdued and was effectively being held and controlled by several officers cannot be excused. In fashioning a penalty, the Board is not prepared to lightly regard the outcome of its use, in circumstances such as these. The public interest would not support this. In doing so the Board has given full consideration to the negative consequence and substantial difficulties this inappropriate use of force had on the Complainant.

Equally, in this case, the Board was especially troubled by the officer's apparent lack of insight into the circumstances of the application and use in this case. The Board concluded that in some measure, Constable Charlesworth individually exhibited signs of an attitudinal shortcoming that requires redress.

The appropriate use and exercise of force and the maintenance of public confidence in the legitimacy of the use of police power within the community are central to sustaining the effectiveness and legitimacy of police authority. The exercise of police power requires an understanding that it is to be exercised mindful not only of the realities of the circumstances in which it is applied, but also the consequences.

The Board was satisfied in this hearing that, through lack of this insight, Constable Charlesworth subordinated his own training as well as the public interest, to the exigencies of the moment as he saw them. His evidence at the hearing conveyed a certain refusal at least to understand and perhaps even to accept the line over which his conduct passed on this occasion. In doing so, he forewent not only his own obligation to police professionalism but also his obligation to be alert to the overarching context in which his actions could, and did on this occasion, reflect on the Truro Police Service itself.

Based on the evidence at hearing, the Board is satisfied that this breach of the Code of Conduct and Discipline involves an individual officer's mistake and does not lead to the oversimplistic conclusion that the Truro Police Service has a problem with the use of pepper spray. Consequently, the Board rejects this submission by Ms. Biernaskie.

In finding that Constable Charlesworth had abused his authority by using unnecessary force, the Board therefore sought a mechanism to, ensure that the gravity of the event is clearly and individually, brought home to the officer but was, as well, cognizant of the circumstances in which it happened; a crowded parking lot where substantial members appeared or could have been presumed to have been under the influence of alcohol.

This factor, that the event did not occur when a prisoner was wholly under restraint and control (D-046 RCMP External Review Committee) or a person in custody who was handcuffed and taken entirely under control by the police, in the Board's view, separated this case from those precedents cited by counsel.

Consequently, the panel concluded that the instant case of an officer, who the Board found, was prepared to under-weigh the gravity of his use of the spray and to sublimate the importance of ensuring that its use is properly considered and measured before being employed, the penalty imposed is a reprimand.

There will be no costs to either party.

Dated at Halifax, Nova Scotia this 10th day of May, 2007.

MARION FERGUSON
Chair

LESTER JESUDASON
Alternate Chair

PETER JAMES
Member

Distribution List

Mr. Robert A'Court - Complainant
Ms. Jennifer Biernaskie - Solicitor on behalf of Complainant
Mr. David Fisher - Solicitor for the named officer
Mr. John Rafferty - Solicitor on behalf of Chief K.C. MacLean
Constable Colin Charlesworth - Truro Police Service
Chief K.C. MacLean - Truro Police Service
Chief Lorne Smith - New Glasgow Police
Marion Ferguson - Chair, NS Police Review Board
Peter James - Member, NS Police Review Board
Lester Jesudason- Alternate Chair, NS Police Review Board

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