

# **Court of Queen's Bench of Alberta**

**Citation: Morton v Calgary Police Service, 2018 ABQB 532**

**Date:** 20180718  
**Docket:** 1601 15861  
**Registry:** Calgary

Between:

**Bryan Morton**

Applicant/Plaintiff

- and -

**Chief of Police of the Calgary Police Service, Calgary Police Commission, the City of  
Calgary and Minister of Justice and Solicitor General of Alberta**

Respondents/Defendants

**Docket:** 1701 00252  
**Registry:** Calgary

Between:

**Bradford McNish**

Applicant/Plaintiff

- and -

**Chief of Police of the Calgary Police Service, Calgary Police Commission, the City of  
Calgary and Minister of Justice and Solicitor General of Alberta**

Respondents/Defendants

Between:

**Kevin Wallis Humfrey**

Applicant/Plaintiff

- and -

**Chief of Police of the Calgary Police Service, Calgary Police Commission, the City of  
Calgary and Minister of Justice and Solicitor General of Alberta**

Respondents/Defendants

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**Reasons for Judgment  
of the  
Honourable Mr. Justice W.A. Tilleman**

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**Introduction**

[1] This case is about the *vires* of the *Police Act* (RSA 2000 ch P-17) and *Police Service Regulation* (Alta Reg 356/1990) and in particular, whether the Chief of Police has valid statutory power when he relieves police officers without pay.

**Background**

[2] The Police Chief relieved Sergeant Brad McNish from duty without pay relative to bribery, breach of trust and other allegations. That case eventually went to trial and he was convicted see *R v Braile*, 2018 ABQB 361 [*“Braile”*]. He now awaits an internal disciplinary hearing and remains off duty without pay.

[3] The Police Chief relieved Constable Bryan Morton from duty without pay relative to allegations of criminal harassment, bribery, breach of trust and other allegations. Cst. Morton, also, was convicted. Again, see *Braile*. The allegations against officers McNish and Morton arise from off-duty behaviour. Cst. Morton now awaits an internal disciplinary hearing and remains off duty without pay.

[4] The Chief of Police relieved Constable Humfrey from duty without pay for deceit, discreditable conduct and unlawful or unnecessary exercise of authority. At trial, Cst. Humfrey

was acquitted *R v Othen*, 2018 ABPC 38. Allegations against him come from on-duty behaviour. He now awaits an internal disciplinary hearing and remains off duty without pay.

[5] In all three cases, the Chief is continuing with disciplinary proceedings and all three officers challenge his authority to withhold their pay. Further, now that he was found not guilty, Cst. Humfrey invokes section 9 of the *Police Service Regulation* and seeks a return of his pay and benefits immediately. Section 9 is discussed in para 15, *infra*.

[6] The Applicants were all represented by the same counsel, who made written and oral submissions, and counsel for the Chief of Police of Calgary and counsel for the Calgary Police Commission also made written and oral submissions. Two of the Respondents attended the Special Chambers hearing but made no written or oral submissions: the Minister of Justice and Solicitor General of Alberta and the City of Calgary. Finally, the Attorney General of Canada advised that it would not be intervening on the constitutional issues raised in this proceeding.

### **Legislative Background**

[7] This case involves the interpretation and interplay between various provisions in the *Police Act* (the “*Act*”) and the *Police Service Regulation* (the “*Regulation*”) relating to the administration of police duties, complaints and discipline hearings for police officers, relieving officers from duty without pay, and when and in what circumstances officers will be reinstated or reimbursed their pay.

[8] Section 41(1) gives the chief of police the following responsibilities under the *Act*:

#### 41. Duties of chiefs of police

41(1) The chief of police of a police service established under section 24 or 27 is responsible for the following:

- (a) the preservation and maintenance of the public peace and the prevention of crime within the municipality;
- (b) the maintenance of discipline and the performance of duty within the police service, subject to the regulations governing the discipline and the performance of duty of police officers;
- (c) the day to day administration of the police service;
- (d) the application of professional police procedures;
- (e) the enforcement of policies made by the commission with respect to the police service.

[9] Formal complaints regarding police officers are dealt with in sections 45(1) – (3) of the *Act* which state:

#### 45. Complaints re police officers

45(0.1) For the purposes of this section and sections 46 and 46.1, “police service” includes the Royal Canadian Mounted Police and a regional, provincial or municipal police service established under an enactment of another province or territory.

(1) Where a complaint is a complaint as to the actions of a police officer other than the chief of police, subject to sections 43 and 43.1, the chief shall cause the complaint to be investigated.

(2) If, after causing the complaint to be investigated, the chief of police is of the opinion that the actions of a police officer may constitute

(a) an offence under an Act of the Parliament of Canada or the Legislature of Alberta, the chief shall refer the matter to the Minister of Justice and Solicitor General, or

(b) a contravention of the regulations governing the discipline or the performance of duty of police officers, the chief shall cause the matter to be proceeded with under subsection (3).

(3) Where the chief of police is of the opinion that the actions of a police officer constitute a contravention of the regulations governing the discipline or the performance of duty of police officers, the chief of police, or a person designated by the chief of police who, pursuant to the regulations, is eligible to serve as the presiding officer at a hearing, shall conduct a hearing into the matter as it relates to that contravention.

[10] The procedures relating to the hearing referred to under s 45(3) are set out in section 47, including providing notice, witnesses, and evidence. Sections 47(4) and (5) relate to taking action against an officer, and providing a decision in writing:

#### Conduct of hearing

47 (1) Where a hearing is proceeded with under section 45(3) or 46(4), the following applies:

...

(4) On considering a matter that is the subject of a complaint,

(a) the chief of police or the chief's designate, in the case of a complaint under section 45, or

(b) the commission, in the case of a complaint under section 46,

may dismiss the matter or, subject to the regulations, take any action against the person in respect of whom the complaint is made that

(c) the chief of police or the chief's designate, in the case of a complaint under section 45, or

(d) the commission, in the case of a complaint under section 46,

considers proper in the circumstances.

(5) On making a decision after considering the matter in respect of which a complaint is made,

(a) the chief of police, in the case of a complaint under section 45, or

(b) the commission, in the case of a complaint under section 46,

shall in writing advise the person against whom the complaint is made and the complainant

(c) of the findings of the hearing and any action taken or to be taken under subsection (4), or ...

[11] The regulation-making authority for discipline and other activities under the *Act* is found in section 61(1), which authorizes the Lieutenant Governor in Council to make regulations. It states in part:

61(1) The Lieutenant Governor in Council may make regulations:

...

(d) governing, subject to this Act, the establishment and operation of police services;

...

(f) governing, subject to this Act, the appointment, employment, qualifications, training, duties, discipline and performance of duty of police officers;

...

(h) governing, subject to this Act, action that may be taken against police officers; ...

[12] Turning to the *Regulation*, section 8(1) provides the Chief with the authority to “... relieve from duty any officer (whom the Chief suspects on reasonable grounds)... contravene[s] section 5.”

[13] The section 5 triggering mechanisms under the *Regulation* are broken down into nine categories of misconduct:

- breach of confidence (s.5(2)(a));
- consumption of liquor or drugs prejudicial to duty (s.5(2)(b));
- corrupt practice (s.5(2)(c));
- deceit (s.5(2)(d));
- discreditable conduct (s.5(2)(e));
- improper use of firearms (s.5(2)(f));
- insubordination (s.5(2)(g));
- neglect of duty (s.5(2)(h)); and
- unlawful or unnecessary exercise of authority (s.5(2)(i))

[14] Then, returning to section 8, if the Chief forms the opinion that “exceptional circumstances” exist respecting the alleged contravention of section 5, section 8(10) of the *Regulation* allows the Chief to relieve the officer from duty without pay. Under section 8(11) the Chief’s decision to relieve an officer from duty without pay must be confirmed by the police commission. The procedure follows next:

#### 8. Relief from duty

8(1) The chief of police may relieve from duty any police officer whom the chief of police, on reasonable grounds, suspects has contravened section 5.

...

8(4) Every police officer relieved from duty shall, at the time of being relieved from duty, be informed of the reasons for his being relieved from duty.

...

8(6) If, within 7 days from the day that a police officer is relieved from duty, the police officer is not charged with a contravention of section 5, the police officer shall be returned to duty.

...

8(9) A police officer who has been relieved from duty pursuant to this section shall be returned to duty

(a) on completion of any investigation, where the chief of police is satisfied that no further disciplinary action is required to be taken under the Act against the police officer, or

(b) on the disposition of any charge, unless that disposition results in suspension, resignation or dismissal of the police officer.

8(10) Where the chief of police is of the opinion that exceptional circumstances exist respecting the alleged contravention of section 5 by a police officer, the chief of police may relieve the police officer from duty without pay.

8(11) If the chief of police relieves a police officer from duty without pay, the chief of police must have that direction confirmed by the commission within 30 days from the day that the police officer is relieved from duty without pay.

8(12) Where a police officer is relieved from duty without pay and

(a) the commission does not confirm that the police officer be relieved from duty without pay, or

(b) the police officer is not charged with a contravention of section 5,

all pay and benefits withheld from the police officer shall forthwith be returned to him.

8(13) Where a police officer is relieved from duty for a 30-day period, the chief of police shall, at the conclusion of the 30-day period and at the conclusion of any subsequent 30-day periods, report to the commission as to the status of the matter.

[15] Along with section 8(12) which contemplates reimbursement for relief from duty without pay, reimbursement and reinstatement are provided for in sections 9 and 20 of the *Regulation*:

9. Relief from duty re criminal matters, etc.

Where a police officer is relieved from duty on the basis of being charged with or convicted for a contravention of an Act of the Legislature of Alberta or the Parliament of Canada and,

(a) in respect of the charge,

(i) the charge is not proceeded with, or

(ii) the police officer is not found guilty of the charge or of an included offence,

or

(b) in respect of the conviction that is appealed, the police officer is found not guilty of the charge or of an included offence,

the police officer shall

(c) immediately be reinstated to duty, and

(d) be entitled to receive all pay, benefits and other rights and privileges to which he would have been entitled if he had not been relieved from duty or suspended.

...

20. Return of back pay, etc.

Where a police officer is charged with a contravention of section 5 and

(a) the charge is withdrawn,

(b) the police officer is found not guilty of the charge, or

(c) the police officer is found guilty but on appeal is found not guilty of the charge,

any punishment imposed on the police officer shall be rescinded and any pay, benefits or time forfeited or lost by reason of the suspension shall be returned to the cited officer.

## Issues

- 1. Does the Chief of Police have valid legislative authority to relieve officers from duty without pay?**
- 2. If an officer is acquitted of criminal charges mid-stream in the disciplinary process, does he get reinstated with pay and benefits?**

### Issue 1 – Is there legislative authority to relieve an officer from duty without pay?

#### Constitutional Challenge

[16] In oral argument, for all three officers, Mr. Shymka narrowed his challenge to: A declaration that ss. 8(10) and (11) of the *Police Service Regulation* are *ultra vires* the *Police Act*, and are therefore invalid and of no force and effect.

#### Submissions

[17] On behalf of the police officers, Mr. Shymka argues that there is no authority in the *Police Act* for the provisions in the *Regulation* that relieve an officer of duty without pay. He notes that the police chief is a police officer's superior officer, not an employer, and has no private law rights. Instead, a police chief's jurisdiction comes entirely from the public law functions which are given to him from the legislature: *R v White*, [1956] SCR 154 at p 167. In this vein, the chief must exercise his power to discipline within the terms set out in the *Act*, *Sterzik v Calgary (City) Police Service*(1985), 39 Alta LR (2nd) 375, [1985] A.J. No. 686 (ABQB), at p 379-380, varied on other grounds, 49 Alta LR (2d) 34 (ABCA):

The authority of a police force to discipline its members is statutory in origin. It has no inherent jurisdiction, and the actions of those involved in the decision making process are confined within prescribed limits. As stated in *Kupeyan v. Royal College of Dental Surgeons of Ont.* (1982), 37 O.R. (2d) 737 at 748:

The power to discipline their members, which is conferred upon the self-governing professions, is a very great one, involving as it does potential loss of professional standing, pecuniary loss and, indeed, loss of the very right to pursue practice of the profession. While reasonable latitude is to be allowed as to matters of form and procedure in the exercise of such powers by tribunals which are administrative in nature and are not courts, there must be no room for doubt that the power to discipline is exercised within the terms and upon the conditions of the statute by which it is conferred.

[18] Mr. Shymka argues that there are no provisions in the *Act* itself that authorize the chief of police to relieve officers from duty without pay. He believes that such an important provision should be in the *Act* itself, not the regulations, and points to proposed and more modern legislation in Ontario (Bill 175) which will be including similar provisions in the *Police Services Act* in that province.

[19] His position is that the *Act* sets out a comprehensive scheme, or “code”, for the handling of complaints and discipline of a police officer. Under that scheme, discipline of a police officer may only occur after a disciplinary hearing is conducted. In all three cases at bar the police officers were relieved from duty before a hearing occurred.

[20] In support of this argument, Mr. Shymka points to sections 42 through 48 of the *Act* and submits that the statutory scheme provides for the following procedure to take place in order for disciplinary action to occur:

- (a) the chief receives or brings a complaint against a police officer regarding the officer’s conduct (s 42.1, s 43);
- (b) the chief causes the complaint to be investigated (s 45(1));
- (c) the chief decides that the complaint may constitute a contravention of the regulations governing discipline or performance of duty, such as discreditable conduct (s 45(2))
- (d) the chief (or a designate) has conducted a hearing (s 47)
- (e) the chief (or a designate) considers the proper disciplinary action to take subject to the regulations (s 47(4))
- (f) disciplinary action is taken within the scope of the regulations (s 47(4)(5))

[21] Under this scheme, disciplinary action against an officer can only occur after a hearing. The disciplinary action that can be taken is set out in the *Regulation*, and includes suspension without pay as one possible punishment in s 17:

17 (1) Where at a hearing it is determined that a cited officer is guilty of contravening section 5, the presiding officer shall impose on the cited officer one or more of the following punishments:

- (a) a reprimand;
- (a.1) a course of treatment or participation in a rehabilitation program;
- (b) forfeiture of hours of work accumulated through overtime, not to exceed 40 hours;
- (c) suspension from duty without pay for a period not to exceed 80 hours of work;
- (d) reduction of seniority within a rank;
- (e) reduction in rank;
- (f) dismissal from the police service.

[22] Based on this interpretation of the *Act*, Mr. Shymka contends that there is no authority to suspend an officer without pay prior to the hearing. Ss 8(10) and (11) in the *Regulation* are therefore unauthorized and inconsistent with their governing statute, which renders them *ultra vires*.

[23] In terms of ss 61 (f) and (h) of the *Act*, which allow for the Lieutenant Governor in Council (the Cabinet) to make regulations governing discipline and action taken against police officers, Mr. Shymka notes that those provisions require the regulations be made “subject to this Act”.

61(1) The Lieutenant Governor in Council may make regulations

(f) governing, subject to this Act, the appointment, employment, qualifications, training, duties, discipline and performance of duty of police officers;

...

(h) governing, subject to this Act, action that may be taken against police officers;

[24] As a result, he argues any regulations concerning discipline under 61(f) must conform to the scheme set out in sections 42 to 47, which ss 8(10) and (11) fail to do.

[25] In terms of 61(h), Mr. Shymka’s position is that suspension without pay is an “action ... against a police officer”, and that again any such action must be in conformity with the *Act* itself. He notes that the wording of taking action against police officers is specifically mentioned in the *Act* in sections 47(4) and (5), and relates to action taken against an officer in the context of a hearing. He argues it is therefore *ultra vires* of the *Regulation* to levy such action against an officer prior to the hearing.

[26] When questioned on whether the police chief has the ability under the *Act* to suspend an officer from duty with pay pending a hearing, Mr. Shymka agreed the chief can do so. He stated that the power exists under 61(1)(f) where the Cabinet can make regulations concerning the “duties” of police officers, and argued that such action is only administrative. However when pay is also withheld, that goes further and becomes disciplinary action taken against an officer, which is subject to the scheme set out in the *Act*.

[27] Finally, Mr. Shymka also argued that the City is obligated to pay police officers pursuant to their collective agreement. He argues that ss 8(10) and (11) of the *Regulation* are in conflict with and overridden by the *Police Officers Collective Bargaining Act*, RSA 2000 c P-18, [*the “Collective Bargaining Act”*].

[28] Contrary to these assertions, Counsel for the Chief of Police argues that there is a high threshold to meet to strike down a regulation as being *ultra vires*. In order to successfully challenge a regulation, the challenger must show that the regulation is completely unrelated or inconsistent with the statutory purpose of the enabling legislation: *Katz v Ontario (Health and Long Term Care)*, 2013 SCC 64, [2013] 3 SCR 810 [“*Katz*”].

[29] Counsel for the Chief argues that the objective of the *Act* is to ensure that adequate and effective policing is maintained throughout Alberta: s 3, *Police Act*. He argues that relieving an officer from duty without pay when there are exceptional circumstances is consistent with providing effective police services. These types of provisions are expected in a regime that includes provisions for discipline within a police service and are a common feature of police services across Canada: see P. Ceysens, *Legal Aspects of Policing* (Saltspring Island: Earls court Press)(loose-leaf version update 27 – December 2014), Section 5.4.

[30] In addition, Counsel argues that the regulations at issue are consistent with the scope of the mandate given to the Cabinet in section 61 of the *Act*. Section 61(d)(f) and (h) allow Cabinet to make regulations governing a number of matters, including governing the operation of police services, the appointment, employment, duties, discipline and performance of duties of police officers, and action that may be taken against police officers. The authority to relieve a police officer from duty without pay can fit comfortably within any of these sections, and fits directly within the power to govern actions that may be taken against police (61(1)(h)).

[31] In relation to the collective bargaining argument, Counsel for the Chief argues that *Collective Bargaining Act* specifically provides that several sections of the *Police Act*, including the disciplinary sections, are not to be the subject of a collective agreement and therefore no conflict exists.

### **Analysis**

[32] The leading case on the standard to meet when challenging the *vires* of regulations is the Supreme Court’s decision in *Katz*. Writing for the Court, Abella J. set out the following principles that apply when an applicant challenges a regulation, at paras 24 – 28:

- (i) In order to challenge the *vires* of regulations the regulation must be shown to be inconsistent with the enabling statute or the scope of the statutory mandate;
- (ii) Regulations are presumed to be valid and the onus is on the challenger to prove the invalidity;
- (iii) An interpretive approach that favours reconciling the regulation with its enabling statute is preferred, where possible;
- (iv) The enabling statute and the challenged regulation should be interpreted using a broad and interpretive approach;
- (v) The policy merits of regulations are not assessed to determine if they are necessary, wise or effective in practice;
- (vi) In order to be found *ultra vires* on the basis of inconsistency with the enabling statute the regulations must be irrelevant, extraneous or completely unrelated to the statutory purpose. In other words, it takes an egregious case to strike down a regulation on the basis of inconsistency with the statutory purpose.

[33] Based on these principles, the police officers face a considerable challenge in showing that the regulations at issue are *ultra vires* the *Police Act*.

[34] Turning to the first part of the analysis, I must consider the purpose and scope of the enabling statute. The parties agree that generally the objective of the *Act* is to provide general policing services for Alberta in order to ensure the preservation of public order and the prevention of crime.

[35] Section 3 of the *Act* itself spells out the objectives of what is to follow, stating that the “Government of Alberta is responsible for ensuring that adequate and effective policing is maintained throughout Alberta.” Recently our Court of Appeal has confirmed that section expresses the objective of the *Act* in *Toy v Edmonton (City) Police Service*, 2018 ABCA 37 at para 39. Additionally, and importantly, the Court also held that a “key aspect” of that objective is the complaints and discipline scheme set out in the *Act*:

The scheme and object of the Police Act, as set out in s 2, is to ensure adequate and effective policing throughout Alberta. A key aspect of that scheme and object is set out in Part 5 of the Act, which creates a structure for complaints against, and the discipline of, police officers. If the immunity created in s 6(2) of the Alberta Evidence Act is interpreted to apply to disciplinary proceedings against police officers who lie under oath, so that such conduct can never be prosecuted or found to constitute deceit or disreputable conduct under the Police Act, the goal of achieving adequate and effective policing is thereby blunted.

[36] Dealing with complaints and disciplinary proceedings for disreputable conduct is integral to society’s trust in police officers to enforce our laws, detain and arrest, and even use deadly force where it is justified. This is a huge authority and along with it comes an enormous responsibility resting on a high bar of public expectation in the adequate and effective policing for our communities.

[37] The connection between effective policing and the power to relieve an officer from duty through a suspension is explained in the Ceyskens text. Ceyskens explains that an administrative suspension, which is a suspension that occurs prior to a disciplinary hearing, is a tool which allows a chief of police to properly administer a police force. Suspensions contribute to public order by protecting the public, and the police force’s reputation, pending a disciplinary hearing:

In the case of administrative suspension, legislation commonly permits accused police officers to be suspended from duty in a limited range of circumstances. The power to impose an administrative suspension is viewed by the courts as part of the authority conferred on the chief constable to control and administer the police force. The purpose of the power is not to punish, but rather to remove members from duty for reasons related to the protection of the public and the police force... Ceyskens, at 5-82.

[38] Considering the above, I have no trouble finding that suspensions, with or without pay, fit within the scope of the important statutory mandate of the *Police Act*.

[39] The challenge in this case however is focussed less on whether the regulation at issue falls within the scope of the *Act*, but rather whether there is an egregious inconsistency between the *Act* and the *Regulation*.

[40] Although Mr. Shymka has made some strong arguments about there being a “code” or scheme in the *Act* which excludes the possibility of relief from duty without pay, I find that to follow such a strict and narrow interpretation of the legislation would be contrary to the

principles laid out in *Katz*. It would also require enabling Legislation to spell out what is to follow in regulations in so much detail that it would clog our legislature to no end. To put it more generally, upsetting a statute on *vires* grounds is an uphill battle because Courts work to find every reasonable inference supporting legislative validity.

[41] I find that if one uses a broad and purposive approach, which favours reconciling the *Regulation* with the *Act*, ss 8 (10) and (11) of the *Regulation* is consistent with and authorized by the *Police Act*.

[42] The *Act* provides a chief of police with significant and broad responsibility for the following activities under s. 41(1):

- (a) the preservation and maintenance of the public peace and the prevention of crime within the municipality;
- (b) the maintenance of discipline and the performance of duty within the police service, subject to the regulations governing the discipline and the performance of duty of police officers;
- (c) the day to day administration of the police service;
- (d) the application of professional police procedures;
- (e) the enforcement of policies made by the commission with respect to the police service.

[43] Section 41(b) provides the chief of police with the responsibility for police officer's performance of their duties, and their discipline, subject to the regulations. Section 61(1)(f) then provides for the Cabinet to make regulations governing the discipline and performance of duty of police officers, and 61(1)(h) provides for the Cabinet to make regulations governing action that may be taken against police officers. Both of these s 61 subsections pertain to regulating police officers' duties and the disciplining of officers through regulations.

[44] I find that relieving an officer from duty without pay in ss 8(10) and (11) could fit under either of these sections without difficulty, as a suspension without pay can be construed as both regulating an officer's duties and/or taking action against an officer.

[45] I note that I find it difficult to reconcile Mr. Shymka's position that 61(f) allows for regulations that suspend an officer from duty with pay but could not also extend to suspension without pay.

[46] Therefore his argument fails on this ground.

[47] Turning to Mr. Shymka's next argument, he argues that the *Collective Bargaining Act* mandates a municipality to pay compensation to police officers and that s 45 of the *Collective Bargaining Act* states that it takes precedence over any other Act. He argues that s 8(10) of the *Regulation* conflicts with the *Collective Bargaining Act* and that that Act should prevail.

[48] Although it is true that s 45 states it takes precedence over other legislation, it also expressly states that it is subject to s 60 of the *Police Act*. Section 60 of the *Police Act* dictates that certain matters in the *Act* cannot be the subject of a collective agreement:

60 None of the matters referred to in sections 16, 20, 31, 37(1), 41 and 43 to 48 shall be the subject of a collective agreement referred to in the Police Officers Collective Bargaining Act.

[49] The enumerated sections include s 41, which is the section which deals with the responsibilities of the chief of police, including responsibility for maintaining discipline, the performance of duty, and day-to-day administration of the police service (s 41(1)). Section 41(2) provides that the chief shall issue orders and make directives as considered necessary for the purposes of s 41(1). This means that the matters enumerated in s 41(1), and the orders that follow from them, cannot be the subject of a collective agreement. The same is true for sections 43 to 48 which outline the complaint and disciplinary hearing process.

[50] I find that being relieved from duty without pay is one of the chief's duties for the administration and disciplinary process provided for in sections 41 and 43-48. Those sections are subject to and further refined in the *Regulation*, including s 8(10). As a result, relief from duty without pay pending disciplinary proceedings is not a matter that can be subject to a collective agreement, nor can the collective agreement override those provisions. Viewed in this way, there is no conflict between the *Collective Bargaining Act* and the *Police Act* and this argument also fails.

## Section 9

[51] Mr. Shymka tells the Court that section 8 disciplinary proceedings happen on strict timelines to ensure fairness to the officer and the Chief and Commission are involved in those procedures. He argues that for Constable Humfrey, who was charged and acquitted criminally, section 9's reinstatement and payback provision (on his not-guilty finding) overrides section 8 and requires immediate action to do exactly that, so that Cst. Humfrey is reinstated to duty and receives his back pay and benefits. He argues that it was the laying of the criminal charges which gave the Chief justification to relieve from duty without pay, and that the acquittal should result in reimbursement under section 9 as there is no longer justification for withholding Cst Humfrey's pay. He concedes that the Chief could now re-initiate the disciplinary proceedings and relieve from duty without pay under s 8(10) going forward, if the disciplinary charges, on their own, amount to exceptional circumstances (assuming s 8(10) is valid, which I have found it is).

[52] In contrast to Cst. Humfrey's position on section 9, the Chief's Counsel argues two different ways to validate and reconcile the Chief's position on the *Regulation*: first, it can be inferred that s 9 is meant as a stand-alone provision that can operate apart from section 8 where the Chief proceeds to criminal charges. This standalone disciplinary approach is what happens in employment law: *Cabiakman v Industrial Alliance, Life Insurance Co*, 2004 SCC 55. Second, as an alternative, section 9 can work with section 8 because, reading section 8 with subsections (10) to (12) and section 20, the *Regulation* holds together as a whole code. As an aside note, there is a standalone section 9 case, though the officer was suspended "with pay", that appears to support the Chief's first approach – it is *Strong v Calgary (Police Service)*, 2012 ABLERB 12.

[53] To the credit and honesty of Mr. Shymka, he admitted the propriety of parallel criminal and disciplinary proceedings, citing the case of *R v Wigglesworth*, [1987] 2 SCR 541 at 566 where Wilson, J, citing from the appeal court, and writing for the majority of the Supreme Court, said this at pp. 566-67

A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of duty a person owes to society, amount to a crime, for which the actor must answer to the public.... And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers. For example a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal conviction at the behest of the state; to a judgment for damages, at the instance of the patient, and to an order of discipline on the motion of the governing council of his profession. Similarly a policeman who assaults a prisoner is answerable to the state for his crime; to the victim for damage he caused; and to the police force for discipline. [emphasis added]

[54] Mr. Shymka also confirmed to the Court that in this case Mr. Humfrey raises no issue with regards to the correctness of the Chief's decision under s 8(10) and that the Chief followed due process in this case. In that sense this was certainly not a typical judicial review.

[55] The difficulty with Mr. Shymka's well-argued s 9 position on behalf of Mr. Humfrey is that it is unclear what jurisdiction I have to review this matter. If the Chief's decision not to reinstate Mr. Humfrey's pay is not being challenged in the ordinary course, (and the Chief's decision was based on his interpretation of the *Regulation*), how can this Court come to a finding that Mr. Humfrey's pay should be reinstated? I have not been asked to strike section 9 or to find it *ultra vires*. Instead, it appears that this Court is being asked to make a factual finding that Mr. Humfrey was relieved from duty without pay due to the criminal charges and that his acquittal should result in his reinstatement and the reimbursement of his pay.

[56] Based on the evidence before the Court, I have no basis for coming to such a conclusion. It is clear from the documentary evidence that the basis for Cst. Humfrey's relief from duty without pay was his suspected contraventions of section 5 of the *Regulation*, which the Chief found amounted to exceptional circumstances under s 8(10), and not because of the charges under the *Criminal Code*. This is clear from the Chief's Notice of Relief for Humfrey from Duty Without Pay:

Following consideration of all the information taken together, including the reasons and rationale from my earlier Notice of Relief from Duty With or Without Pay, I conclude there are reasonable grounds to suspect you have contravened section 5 of the Police Service Regulation and that exceptional circumstances exist respecting the alleged contravention(s).

Therefore, it is my decision to hereby relieve you from duty without pay pursuant to section 8(10) of the *Police Service Regulation*, effective immediately upon the date of service of this Notice.

[57] The evidence shows the Chief suspected that Cst. Humfrey contravened s 5 of the *Regulation* on numerous grounds, including 5(2)(i)(ii) unlawful and unnecessary exercise of authority, 5(2)(d)(ii) deceit, and 5(2)(e)(i) discreditable conduct. Only the last ground was related to a suspected contravention of the law (in this case assault, leading to the criminal charges). The other grounds relate to a concern that inappropriate force was used in an arrest and that Cst. Humfrey's notes and Will Say statement after the incident were deceitful and designed to shield him from consequences after the arrest. Deceit is taken seriously by the Chief as truthfulness and

credibility go to the core of policing and society's expectations which go to the core of the *Police Act*. See para 36 *supra*. Therefore the non-criminal allegations are very serious and can affect internal accountability and discipline within the police service. It is also the type of conduct which can affect public confidence in the police force. This is part of the Police Act's scheme and objective. See paras 35-36 *supra*.

[58] Counsel for the Chief explained at the hearing that although it may seem that the relief from duty without pay coincided with the criminal charges, that was only a coincidence because the way events unfolded. What happened in this case, and commonly occurs in these types of cases, is that when an incident occurs where there are serious injuries to a person who is arrested there is a notification to the Alberta Serious Incident Response Team (ASIRT) under s 46.1 of the *Police Act*. ASIRT conducted an investigation and at that time the Chief realized that something potentially serious occurred, but was unaware if there were 'extraordinary circumstances' under s 8(10) of the *Regulation*, so he relieved the officer with pay initially. At the conclusion of the investigation, the Chief received the fruits of the investigation and went ahead with disciplinary charges on a number of grounds. He felt that the charges were serious enough to warrant extraordinary circumstances and changed Mr. Humfrey's "relief from duty" to being without pay. At the same time, ASIRT determined that it would be laying criminal charges against Cst. Humfrey.

[59] The evidence also shows that after Mr. Humfrey was acquitted of the criminal charges and demanded to be reinstated to duty and reimbursed for the loss pay, the Chief refused this request by confirming that the relief from duty was done pursuant to s 8(10) for suspected contraventions of section 5 that amounted to exceptional circumstances, and the disciplinary proceedings regarding the s 5 contraventions were continuing.

[60] Based on these submissions, and my own reading of the evidence from the Record of Proceedings, I find that the reason for the Chief's decision for relief from duty without pay was not based solely on the criminal charges. In fact, the Chief's decision of January 25, 2017 specifically mentions the intentional misrepresentation of facts by the officer numerous times and finds that relief from duty without pay was warranted based on "all the circumstances and evidence in hand at this time".

[61] Therefore, from a strictly factual standpoint, I find that Cst. Humfrey's relief from duty without pay was done pursuant to s 8(10) of the *Regulation* for disciplinary misconduct for multiple contraventions of section 5, and was not done directly or solely because of the criminal charges. The disciplinary hearing has not yet occurred, so the relief from duty without pay persists on a valid basis. If Cst. Humfrey is found not guilty of a contravention of section 5, any pay or benefits withheld from him will be returned pursuant to section 20 of the *Regulation*.

[62] Based on this finding, I find that section 9 does not apply, nor does it punt the continuation of section 8(10)'s direction that Cst. Humfrey is relieved from duty without pay. It is also notable that while Cst. Humfrey was acquitted on the assault, it seems the trial judge did not necessarily make favourable findings on his credibility relating to the events of that day, which is an issue at the heart of the pending disciplinary proceeding.

[63] The Chief relieved under section 8 and therefore section 9 does not apply here. That said, Mr. Shymka presented a compelling argument concerning the interpretation and application of this section in the *Regulation*. He noted that practically speaking, section 8(10) is often relied on to relieve for duty without pay when criminal charges are laid against an officer, and it is unclear

in what circumstances section 9 is meant to apply. Counsel on both sides were frank in saying that the *Regulation*'s drafting is problematic which makes it difficult to interpret precisely how section 9 applies, especially in cases where an officer is relieved from duty without pay and there are parallel disciplinary and criminal proceedings. I understood from both parties that they would like some clarity in how section 9 should be interpreted and for those purposes I provide the following explanation. I note the Court of Appeal has raised this concern more broadly: *Paraniuk v Edmonton (Police Service)*, 2017 ABCA 338 at para 80.

[64] I repeat my comments that courts look to find legislative validity not ambiguity (para 40 *supra*) and remembering the principles of statutory interpretation, which is the provisions in the *Regulation* are to be read in their entire context, in their grammatical and ordinary sense, and in harmony with the scheme and purpose of the *Regulation* and the *Police Act*. See for example the problems where a Court is asked to parse words: *Saskatchewan Power Corp v Alberta (Utilities Commission)*, 2015 ABCA 183, 600 AR 337 at para 40:

This is contrary to the basic rule of statutory interpretation: "the words of an *Act* are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008) at p 1.

[65] Further, in cases of ambiguity, the interpretation that best fits with the purpose of the legislation should be adopted, *ATA v Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 SCR 654 at para 67.

[66] Based on these principles, and though it is not the case at bar (see para 57 *supra*) I find that the purpose of section 9 of the *Regulation*, when read in consort with sections 5, 8 and 20, is to reimburse an officer for the loss of pay and benefits when an officer is relieved from duty solely for a violation of s 5 (2)(e)(i). This interpretation accords the best with the ordinary wording used in the legislation and the scheme by which there can be parallel proceedings for disciplinary and criminal charges. The wording in section 9 of being charged with "a contravention of an Act of the Legislature of Alberta or the Parliament of Canada" duplicates the wording used in section 5 (2)(e)(i) as one of the bases for a disciplinary charge of "discreditable conduct". Thus in a case where the only basis for the disciplinary proceeding is a criminal charge and the officer is acquitted, section 9 applies such that the officer is reinstated and reimbursed for any losses. If at that time the Chief decided to continue with disciplinary proceedings under section 5(2)(e)(i), as it may be subject to a different standard of proof, the Chief would need to determine afresh whether to relieve the officer from duty under section 8(1) and/or without pay pursuant to 8(10).

[67] I concede that this results in a somewhat limited application of section 9; however, to find that section 9 is a standalone provision that allows for both relief from duty, and reinstatement and reimbursement of pay, would be a forced interpretation. For example, there is no wording in section 9 equivalent to that in section 8 which gives the Chief authority to relieve an officer from duty ("may relieve from duty any police officer": s 8(1)). Nor is there nor any provision in section 9 relating to when the relief from duty can be without pay (such as under "exceptional circumstances" in s 8 (10)). I do not believe that Cabinet intended to provide the many procedural protections to officers under s 8 being relieved from duty, but no procedural

protections to officers facing criminal charges and being relieved from duty (with or without pay).

[68] Nevertheless, it appears that clarification from the legislature or Cabinet on the intended interplay between sections 8, 9 and 20 in cases of parallel proceedings would be welcomed by all parties in this case.

### **Conclusion**

[69] Based on the foregoing, the Applicants' applications are denied.

Heard on the 17<sup>th</sup> and 18<sup>th</sup> day of January and 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> day of June, 2018.

**Dated** at the City of Calgary, Alberta this 18<sup>th</sup> day of July, 2018.

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**W.A. Tilleman**  
**J.C.Q.B.A.**

### **Appearances:**

James Shymka  
for the Applicants/Plaintiffs (Bryan Morton, Bradford McNish and Kevin Humfrey)

S.H.D. Bower  
for the Respondents/Defendants (Chief of Police of the Calgary Police Service)

K. Tereposky  
for the Respondents/Defendants (Calgary Police Commission)

Avril Fisher  
for the Respondents/Defendants (The City of Calgary)

Christopher Ghesquiere  
for the Respondents/Defendants (Minister of Justice and Solicitor General of Alberta)