SUPREME COURT OF NOVA SCOTIA
Citation: *O'Brien v. LeRue*, 2022 NSSC 379

Date: 20221230
Docket: Hfx No. 507904
Registry: Halifax

Between:

Cst. Kenneth O'Brien

Applicant

and

Adam LeRue, Kerry Morris, Nova Scotia Police Review Board, Attorney General of Nova Scotia, Cst. Brent Woodworth and Halifax Regional Police

Respondents

LIBRARY HEADING

Judge:	The Honourable Justice Mona Lynch
Heard:	December 6, 2022, in Halifax, Nova Scotia
Written Decision:	December 29, 2022
Subject:	Judicial Review, Police Public Complaints Process
Summary:	As a result of an interaction with two HRP officers, the complainants appealed a finding by the HRP disciplinary authority that their complaint was unfounded. The Nova Scotia Police Review Board released two decisions, one in relation to the question of loss of jurisdiction as a result of a timeline missed by HRP and another on the merits of the complaints. The Board found that they had not lost jurisdiction and found that one police officer breached the code of conduct in dealing with the complainants. The police officer requested a judicial review of the decisions.

Issues: (1) Is the Board's decision finding that jurisdiction was not lost reasonable?

(2) Is the Board's decision that Constable O'Brien breached the Code of Conduct reasonable?

Result: Under the *Vavilov* analysis both decisions of the Nova Scotia Police Review Board are reasonable. The motion for Judicial Review is dismissed.

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DECISION

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Heard: December 6, 2022, in Halifax, Nova Scotia

Counsel:
James Giacomantonio, for the Applicant
Jason Cooke and Ashley Hamp-Gonsalves, for the Respondents – Adam LeRue and Kerry Morris
Jack Townsend, for the Respondents – The Nova Scotia Police Review Board and Attorney General of Nova Scotia
Kelly McMillan, for the Respondent – Cst. Brent Woodworth
Andrew Gough, for the Respondent – Halifax Regional Police

By the Court:

Background:

[1] Constable Kenneth O'Brien has requested a judicial review of a decision of the Nova Scotia Police Review Board (Board) dated June 18, 2021. The Respondents all filed notices of participation. Although the decision requested to be reviewed was the Board's decision on the merits of the complaint (merits decision), dated June 18, 2021, all parties also provided submissions on the Board's decision, dated September 11, 2020, in relation to jurisdiction (jurisdiction decision). I will deal with both the jurisdiction decision and the merits decision.

[2] Adam LeRue and Kerry Morris filed complaints against two Halifax Regional Police (HRP) constables Kenneth O'Brien and Brent Woodworth. A handwritten complaint in Form 5 was filed on February 13, 2018, and a later complaint in Form 5 signed by both complainants was filed on August 10, 2018. In the merits decision at paragraph 51, the Board outlines the 30 grounds for the complaint as:

-systemic discrimination

-false statements, report

-selective enforcement

-willful misconduct

-discrimination

-collusion

-violation of charter rights

-failure of duty

-cruel mistreatment,

-duress, stress

-unlawful, wrongful imprisonment, arrest, detention

-illegal search seizure

-bodily harm

-malice prosecution

-bodily harm

-loss of freedom, dignity, amenities of life

-invasion of privacy

-assault/battery

-humiliation

-neglect of life, conflict of interest

-bad faith, injury to reputation

-sworn false affidavit

-abuse of processing-

-bad faith

-tickets not served properly

[3] The complaints arose from the interaction of Constables O'Brien and Woodworth with the complainants on the evening of February 12, 2018, into the morning of February 13, 2018.

[4] In their merits decision, the Board provided an overview of the facts from paragraphs 1 to 53. I will not repeat them here.

[5] A brief outline of the facts is that the complainants, Adam LeRue and Kerry Morris, were parked in their vehicle in a parking lot in Dingle Park after 10 p.m. on February 12, 2018. Constable O'Brien approached the LeRue/Morris vehicle and asked Adam LeRue for identification. Adam LeRue questioned why he had to provide identification. From the events that followed that initial encounter, Adam LeRue received a by-law ticket, a *Motor Vehicle Act* (*MVA*) ticket, a charge of obstruction under the *Criminal Code* and he spent approximately 15 hours in cells until his release the following day after a court appearance.

[6] The complaints were investigated by the HRP. The investigator's report was sent to the disciplinary authority for HRP on April 3, 2019. The disciplinary authority for HRP decided that the complaint did not establish a disciplinary default and dismissed the complaint on June 19, 2019, 77 days after the investigative report was received. Section 44 of the *Police Regulations* (*Regulations*) states that the decision must be made no later than 30 days after the disciplinary authority receives the investigator's report.

[7] Adam LeRue and Kerry Morris filed an appeal to the Board. The Board held an initial hearing on the issue of jurisdiction and released a decision on October 1, 2020, finding that they did have jurisdiction in relation to the complaint and a hearing on the merits took place before the Board in October and December of 2020.

[8] In their merits decision of June 18, 2021, the Board found Constable O'Brien was in breach of the Code of Conduct contrary to s. 24(1)(a) and 24(7)(a) and (c). The allegations against Constable Woodworth were dismissed by the Board. The Board was not satisfied that Constable O'Brien's conduct was triggered by race (para. 109 merits decision).

[9] Constable O'Brien filed a Notice of Judicial Review on July 26, 2021. The matter was adjourned from the original hearing date in April of 2022 and was heard on December 6, 2022.

Issues:

[10] In the Notice of Judicial Review, Constable O'Brien set out the grounds as the Decision under review was unreasonable. I would reframe the issues as they were argued and presented on the Judicial Review to be:

1. Was the decision of the Board, dated July 15, 2020, in relation to jurisdiction, reasonable?
2. Was the decision of the Board, dated June 18, 2021, finding that Constable O'Brien was in breach of the Code of Conduct, reasonable?

Standard of Review:

[11] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Court stated that the starting point for the analysis of an administrative decision is reasonableness (para. 23). None of the exceptions to the reasonableness standard set out in *Vavilov* apply in this case.

[12] The burden is on the constables to show that the jurisdiction decision was unreasonable. *Vavilov* directs that a reasonableness review means that the Court intervene only when it is truly necessary, but it is not a rubber-stamping process (para. 13). The decision as a whole should be transparent, intelligible, and justified (para. 15). The focus is on the decision actually made and not on what I would have decided in the Board's place (para. 15). It is not enough that the outcome is justifiable, the decision must also be justified, and the decision must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (para. 86). Perfection is not the standard (para. 91). There is a need for internally coherent reasoning to be reasonable and justified in relation to the constellation of law and facts relevant to the decision (para. 105). The Board's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome (para. 121).

Analysis:

1. Was the decision of the Board, dated July 15, 2020, in relation to jurisdiction, reasonable?

[13] Constables O'Brien and Woodworth submit that the Board did not have jurisdiction to review the complaint because of the failure of HRP to adhere to the

timeline in s. 44(1) of the *Regulations*. Adam LeRue and Kerry Morris submit that the decision of the Board finding that they did not lose jurisdiction are reasonable and should be upheld. Counsel on behalf of the Board submits that there was no loss of jurisdiction, and the decision of the Board was reasonable. Quite surprisingly, HRP took a strong position before the Board that there was no loss of jurisdiction but decided to take "no position" on the question of jurisdiction on the Judicial Review.

[14] The constables submit that the same wording in the *Regulations* has to be read in a consistent manner, which was not done here, and that the Board's decision was not justified in relation to the constellation of law and facts that are relevant to the decision as set out in para. 105 of *Vavilov*. They also argue that the Board did not offer reasonable justification for departing from judicial precedent and past board decisions which have consistently interpreted timelines in the complaints procedures as mandatory. The constables submit that the Board's decision is untenable under accepted principles of statutory interpretation and does not give enough weight to what they say is the primary purpose of the *Police Act* and *Regulations*, which they say is officer focused. The constables submit that the Board's interpretation of the word "must" is inferior. They also argue that the Board's reasoning regarding meaning and legislative intent was "reverse-engineered" to achieve a desired outcome (para. 121 *Vavilov*).

[15] The reasons of the Board are the starting point for the analysis of whether the decision is reasonable, and the reasons are the primary mechanism by which the Board shows that their decision was reasonable (para. 81 *Vavilov*).

[16] The issue of jurisdiction arises because the decision of the disciplinary authority for HRP was outside of the timeline set out in s. 44(1) of the *Regulations*:

> **44 (1)** No later than 30 days after the date a disciplinary authority receives an investigator's report on a complaint against a member, the disciplinary authority must
>
> (a) decide whether the evidence gathered in the investigation shows that the member may have committed a disciplinary default; and
>
> (b) take action in accordance with subsection (2) or (3).

[17] In their jurisdiction decision the Board found that the timelines in the complaint process pursuant to the *Police Act* were similar to limitations period and are designed to move complaints through the system without undue delay (para. 2).

The Board reviewed some of the timelines in the complaint process and noted that some of the timelines set out consequences for failure to meet a procedural deadline, however, s. 44(1) contains no express consequence (paras. 7-8).

[18] The Board noted that there was no dispute that the decision by the HRP disciplinary authority was outside of the timeline set out in s. 44(1) of the *Regulations* (para. 9 jurisdiction decision).

[19] The Board then went on to deal with the submission on behalf of Constables O'Brien and Woodworth that the failure to adhere to the regulatory timelines resulted in a loss of jurisdiction by the disciplinary authority and the Board.

[20] The Board considered that the *Interpretation Act* of Nova Scotia provides that the word "shall" is imperative and "may" is permissive. They also noted that the *Interpretation Act* of British Columbia provides that both "shall" and "must" are imperative.

[21] The Board then reviewed authorities which dealt with timelines under the police complaints procedures in Nova Scotia. The Board distinguished cases which were dealing with internal complaints from public complaints. They considered cases such as *Narain (Re)*, 1983 CanLII 403 (BC SC), which contrasted the object of internal disciplinary proceedings – the discipline of members of the police force, with the object of public complaints – to provide means by the which the public may lodge and pursue complaints against the police (para. 24 jurisdiction decision). The Board found that all of the decisions they reviewed were dealing with the old wording of the complaints procedure which used "shall" rather than "must".

[22] The Board considered cases dealing with statutory interpretation where seemingly imperative words such as "shall" were found to be directory where they related to a public duty and finding the duty mandatory would work serious injustice or inconvenience to persons who have no control over the process and would not promote the main objective of the Legislature (para. 35 jurisdiction decision). The Board considered case law from the Nova Scotia Court of Appeal noting the object of the complaint procedures and the dual rights and interests involved, those of complainants and the subject police officers.

[23] The Board considered other authorities where timelines for reaching decisions were not complied with as well as authorities from other jurisdictions where timelines were found to be directory (paras. 39-43 jurisdiction decision).

[24] While acknowledging the importance of timelines to all parties, the Board held that "the purpose of the legislation is defeated, if the very department in receipt of the complaint can terminate the complaint by failing to decide" (para. 44 jurisdiction decision). They note that finding the Board had lost jurisdiction to hear the complaints due to a procedural deficiency for which the complainants had no role would have a chilling effect on public confidence in the oversight of police officers in Nova Scotia (paras. 45-46 jurisdiction decision).

[25] The Board did not unreasonably depart from binding precedent and decisions of its predecessor boards on the issue or on a similar issue as the constables suggest. The prior Review Board decisions which were cited by the constables were not considering s. 44 of the *Regulations*. The Board distinguished the *Ans v. Paul*, 1980, 41 N.S.R. (2d) 256 (NSSCTD) as dealing with different provisions of the discipline process. Other cases cited by the constables such as *Woolridge v. Halifax (Police Service)*, 1999 NSSC 80 and *Reid v. Rushton*, 2002 NSSC 55, were also dealing with different provisions or were dealing with internal discipline which has a different object than public complaints. Cases were also distinguished, such as *Heighton v. Kingsbury*, 2003 NSCA 80, as being under the former *Police Act*. *Heighton* was also in relation to an internal disciplinary matter.

[26] The constables also submit that the board did not give enough weight to the legislative purpose which they submit is to protect police officers from unwarranted disciplinary action. The constables go so far as to suggest that the Board, at para. 24, found that there was a singular overarching purpose – providing a full and fair evaluation of a complaint. This ignores the Board's clear consideration of the purpose or object of the *de novo* hearing in *Burt v. Kelly*, 2006 NSCA 27 (para. 36 jurisdiction decision) which includes the complainant's "opportunity to present his or her complaint" (para. 27 *Burt*). It also ignores the Board's articulation at para. 46 of what is included in a "full and fair evaluation of the complaint" which they held included the right of the officer to an "unfettered right of review by an independent, entirely civilian, Board." The Board also note the need to ensure transparency and enhance public confidence in the process.

[27] The constables also cite *Symington v. Halifax (Regional Municipality) Police Service*, 2002 NSSC 69, where dual purposes of the disciplinary provisions of the *Police Act* were set out as:

> [9] … In that regard, I am assisted by *White* and by *Wilms* which identified the dichotomous purpose of the disciplinary provisions of the *Police Act* and

> regulations. Its purpose encompasses "public protection from the abuse of police power and the protection of police officers from unwarranted disciplinary action" according to Justice Saunders in *White*, and this includes "maintaining public confidence in the police force through a disciplinary process that involves sanctions against those members of the police force who engage in discreditable conduct" but balanced against "the protection of police officers against unwarranted disciplinary action" … [Emphasis added]

The Board was aware of the balance that needed to be struck between the rights of subject police officers, the rights of complainants, and the interests of the public.

[28] As the Board noted, a finding that s. 44(1) of the *Regulations* is directory does not result in a finding that an officer breached the Code of Conduct. The officer and the complainant still have the right to a *de novo* hearing, including the right to call witnesses and cross-examine other parties' witnesses.

[29] The constables complain the Board failed to use the statutory interpretation principles set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 271:

> 21 … the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

They say that it was unreasonable to distinguish between internal and public complaints. The Board followed cases such as *Narain*, supra., *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, and *McGrath v. Newfoundland (Royal Constabulary Public Complaints Commission)*, 2002 NLCA 74 in distinguishing between internal disciplinary proceedings and public complaints. The Board quoted these cases in relation to the public duty owed by the police service and disciplinary authority who control the disciplinary process whether the complaint is internal or public. These cases emphasize that the complainant has no control over the process or the people who exercise the public duty, but can suffer injustice if the public duty is not discharged. Internal disciplinary proceedings have a different objective, the discipline of police officers, and are disciplinary and penal in nature.

[30] I do not find the distinction made by the Board between public and internal complaints is unreasonable. As counsel for the Board pointed out, the *Police Act* and *Regulations* differentiate between internal and public complaints because there are different considerations. Public complaints are held in public, internal

complaints are presumptively held in private. Even if the wording in the *Regulations* is the same or similar, the purpose or object of the internal complaint procedures and the public complaint procedures are different. The prejudice is also different. If s. 44(1) is mandatory, the complainant, through a process they have no control over or input into, loses their right to pursue a complaint. If s. 44(1) is directory, the police officer still has the opportunity to fully and fairly present their case and test the complainant's case at a *de novo* hearing before the Board. The constables have not suggested that they suffered any prejudice from the delay of 47 days past the 30 days set out s. 44 of the *Regulations.*

[31] The constables point to s. 80 of the *Police Act* as evidence that the legislature intended strict compliance with the statutory discipline process. Section 80 protects police officers from being disciplined for a perceived breach of the Code of Conduct without having the safeguards in the proceedings set out in the *Police Act* and *Regulations*. It does not require that every failure to comply with a provision or timeline results in a loss of jurisdiction.

[32] The constables complain that the Board's distinction between the use of the words "shall" and "must" is unreasonable. The Board noted the difference and quoted authorities which found that "shall" can be directory or mandatory and found that "must" can also be either depending on the context and circumstances. The Board's interpretation of "must" was not inferior or unreasonable, it was consistent with the text, context, and purpose of the legislation the Board was interpreting.

[33] The constables suggest that the Board wanted the provision to be directory not mandatory and they "reverse-engineered" their reasoning to achieve that outcome. I don't find that the Board started from the position that the s. 44 timeline was directory and tailored their reasons to achieve that outcome. They reviewed authorities, other sections of the *Regulations*, the purpose and object of the legislation, and the consequences of the two possible interpretations of s. 44. They considered the text, context, and purpose of the legislation and arrived at a reasonable interpretation.

[34] The Board's decision on jurisdiction is, as a whole, transparent, intelligible, and justified. They were justified in saying that a finding the Board had lost jurisdiction to hear the complaints due to a procedural deficiency would have a chilling effect on public confidence in the oversight of police officers in Nova Scotia. The loss of confidence would be particularly acute, given that it is the same police service for whom the police officers work that controls the process and that failed to fulfill their

public duty to make a decision within the timelines in the *Regulations.* Many in the public could perceive the situation as police officers covering for other police officers.

2. Was the decision of the Board, dated June 18, 2021, finding that Constable O'Brien was in breach of the Code of Conduct, reasonable?

[35] The same reasonableness analysis must be conducted in relation to the merits decision finding that Constable O'Brien was in breach of the Code of Conduct.

[36] The burden is on Constable O'Brien to show that the merits decision of the Board is unreasonable (para. 100 *Vavilov*). A reasonableness review is not a "line - by-line treasure hunt for error" (para. 102 *Vavilov*). I must be attentive to the Board's specialized knowledge and expertise in relation to the *Police Act* and *Regulations.*

[37] Constable O'Brien's position is that the merits decision is not reasonable. That position is shared by HRP. The complainants' position is that the merits decision is reasonable. The Board did not take a position on the merits.

[38] I must consider the decision of the Board as a whole. The Board heard the witnesses. The Board made findings of fact. The Board begins their 2021 decision on the merits by setting out the facts and noted when the evidence from the witnesses was contradictory and when it was in agreement. The Board also noted when records were not placed in evidence, such as the Versadex entry which recorded Adam LeRue's weight to be 130 lbs, and a number of dispatch records.

[39] The Board outlined the facts and noted that up until Constable Woodworth's arrival there had been no mention of a *MVA* ticket or a criminal charge of obstruction (para. 26 merits decision). Constable O'Brien submits that the Board erroneously determined that Constable O'Brien was only enforcing the park by-law. The Board found, as a fact, that the *MVA* ticket and the criminal charge of obstruction were not considered until later in the encounter. The Board did not limit Constable O'Brien's authority to the by-law, they found, based on the evidence, the by-law infraction was the only consideration until Constable O'Brien contacted someone in booking.

[40] The Board analyzed the arrest of Adam LeRue and found that even if there was legal authority to arrest, they had to go on and consider whether the arrest was made without "good or sufficient cause" (paras. 66 and 78 merits decision). The

Board found that the arrest of Kerry Morris was unauthorized and unjustified (para. 87 merits decision).

[41] The Board goes on to analyze Constable O'Brien's exercise of his discretion. The Board notes that even if the by-law ticket, *MVA* ticket, vehicle search, and obstruction arrests were lawful, the conduct of Constable O'Brien breached the standard of conduct expected (para. 88 merits decision). The Board found that Constable O'Brien said several times that he "had the authority" but held that officers have a duty to professionally and intelligently exercise discretion and a duty to de-escalate (para. 88 merits decision). The Board goes on to outline the points in the interaction with Adam LeRue and Kerry Morris when Constable O'Brien could have and should have exercised his discretion differently and de-escalated rather than escalated the situation.

[42] The Board found that Constable O'Brien saw his authority as being challenged and decided to exercise his authority and his powers (para. 94 merits decision). The Board's finding is well grounded in the evidence. For example, Constable O'Brien testified "I had the right to ask for it" (p. 504, line 18 of the record), and he testified that he had the "lawful authority" to "ask and demand that licence" and "there's consequences and that this is where a lesson can be learned … he's not understanding it from me so maybe a judge can explain it to him" (p. 58, lines 16-21). The Board found that "it was a poor exercise of discretion" but not at that point misconduct (para. 94 merits decision).

[43] Constable O'Brien asserts that he needed the "ID" to write the by-law ticket. The Board found that Constable O'Brien knew Adam LeRue's name and address from running the license plate and Adam LeRue had indicated that he was Adam LeRue.

[44] The Board also discusses the exercise of discretion in relation to the seriousness of the infraction.

[45] The Board describes Constable O'Brien's next opportunity to exercise his discretion and de-escalate the situation when there was an offer by Adam LeRue, through Constable Woodworth, to provide his identification if the ticket was dropped. But Constable O'Brien testified that they were "past that point" (p. 506, line 18 of the record). The Board found this not to be the conduct that the public would expect from a trained, experienced police officer dealing with a technical,

very minor breach of a municipal by-law, and he was stubbornly and unnecessarily exercising what he saw was his authority (para. 97 merits decision).

[46] The Board found that Constable O'Brien then further inflamed the situation by arresting Adam LeRue on the obstruction charge which they found could "hardly be seen as a reasonable exercise of discretion" (para. 98 merits decision). The Board found that Constable O'Brien further escalated the situation by a full search of the vehicle and arresting Kerry Morris, both of which the Board found were hardly consistent with a professional exercise of discretion (paras. 99-100 merits decision).

[47] In the Summary section (para. 101 merits decision) the Board takes what it calls a "high level" view where they describe how two individuals go from eating pizza and talking on the phone in their car to both being arrested, a full vehicle search, a by-law ticket, a *MVA* ticket, and a *Criminal Code* charge. They find that this cannot be justified by officer discretion.

[48] The Board goes on to find that Constable O'Brien's conduct was not triggered by race, but more likely by the questioning of his authority. They find it likely that the initial discussion triggered "the escalating and unprofessional response of Constable O'Brien" (para. 109 merits decision).

[49] The Board dismisses the allegations against Constable Woodworth and find that Constable O'Brien was in breach of the Code of Conduct contrary to s. 24(1)(a) and 24(7)(a) and (c).

[50] Constable O'Brien submits that the Board's merits decision is unintelligible, unjustified, and opaque. He accuses the Board of failing to engage in meaningful analysis. He says the Board ignored the evidence of Sgt. Palmeter relating to training and professional standards of practice enforcing the by-law. Constable O'Brien suggests that it was reasonable for him to seek advice from a booking officer in relation to charging Adam LeRue. They also say that the Board has failed to explain what Constable O'Brien did wrong or what section of the Code of Conduct he offended.

[51] In reading the decision of the Board, I can clearly understand their reasoning process. They outlined the facts, made findings of fact and found that Constable O'Brien improperly and unreasonably exercised his discretion. They noted that police officers have discretion, but the discretion must be exercised in a professional and reasonable manner. In the circumstances of Constable O'Brien's encounter with

Adam LeRue and Kerry Morris, they found that was not done. The Board outlined the decision points Constable O'Brien came to along the way, and the instances where Constable O'Brien exercised his discretion in a manner to escalate rather than de-escalate the situation.

[52] Constable O'Brien suggests that the Board failed to consider his seeking advice from a booking officer. It is not clear how a highly trained police officer seeking advice from a civilian employee of the police service would assist Constable O'Brien to show he exercised his discretion in a reasonable and appropriate manner.

[53] The Code of Conduct sections that the Board found Constable O'Brien breached are set out in the Board's decision. The Board has specialized knowledge and expertise in relation to complaints against police officers. Finding that Constable O'Brien acted in a manner that is reasonably likely to bring discredit on the reputation of the police department (24(1) of the *Regulations*) is reasonable and justified as outlined in the merits decision, as are the findings in relation to s. 24(7)(a) and (c). The reasons of the board are internally coherent.

[54] Racism and the conduct of Constable Woodworth have not been argued on this review. Bearing in mind that *Vavilov* says that I am not to ask myself what decision I would have made, I will not comment on those two aspects of the merits decision.

[55] Constable O'Brien's justification for not releasing Adam LeRue was that Adam LeRue refused to sign the appearance notice. The *Criminal Code* specifically states that the lack of signature does not invalidate the appearance notice (s. 501(4) in 2018 and s. 500(4) in 2022).

[56] Constable O'Brien argues that the Board materially misapprehended the evidence in relation to the request for "ID" or driver's license. This misapprehension, it is submitted, is illustrated at para. 29 of the merits decision, where the Board says, "he completed the Motor Vehicle office tickets 'to justify my grounds for obstruction'". While the parties agree that they were unable to locate that exact quote in the decision, Constable O'Brien does testify "… I guess the reasoning for giving the two tickets were those offences formulated, I guess, my grounds for the obstruction…" (p. 525, lines 17-19). While the words the Board quoted may not have been exact, I don't find that the Board can be said to have materially misapprehended Constable O'Brien's evidence on that point. The Board specifically rejected Constable O'Brien's evidence that he was seeking an "ID" or

driver's license pursuant to the *MVA* and find that he was seeking "ID" for a possible infraction of a municipal by-law (para. 73 merits decision). They also find that Constable O'Brien's request throughout was for "ID" and not a driver's license (para. 74 merits decision). There were numerous places in the merits decision where the Board was sceptical of Constable O'Brien's evidence.

[57] The hinge issue, it is submitted, is whether the use of police discretion can be an abuse of authority. Constable O'Brien's position is that the Board found that there were no lawful grounds to arrest Adam LeRue and that was unreasonable. The Board analyzes the authority to arrest for a by-law infraction (paras. 62-66 merits decision). They accept that Constable O'Brien believed he had authority to lay the charges he did but find that does not mean that under the Code of Conduct, there was good and sufficient cause to make the arrests (para. 66 merits decision). The Board goes on to look at the penalty under the *Motor Vehicle Act* for failure to produce a driver's license "to demonstrate the minor nature of Adam LeRue's conduct and the enforcement options available to Constable O'Brien that night" (para. 71 merits decision).

[58] The fault the Board found is in the exercise of discretion. Constable O'Brien asserts that the Board failed to explain how a lawful use of discretion amount to a disciplinary default. The Board found that Constable O'Brien did not exercise his discretion in a reasonable and professional manner. Constable O'Brien asks the Court to find that the Board erred in determining that Constable O'Brien was only enforcing the park by-law. The Board found that Constable O'Brien was only enforcing the park by-law up to a certain point, not during the whole encounter. The Board's decision is clear that what Constable O'Brien did wrong was to exercise his discretion unprofessionally and unreasonably.

[59] What Constable O'Brien complains of was dealt with by the Supreme Court of Canada in *R. v. Beaudry*, 2007 SCC 5, where the Court was dealing with the exercise of discretion by a police officer for failing to gather evidence necessary to lay criminal charges against another police officer. The accused contended that his decision was a proper exercise of his discretion. The Court discusses police discretion and notes that there is no question that police officers have a duty to enforce the law and investigate crimes (para. 35). The Court discussed the question of police discretion and the need, as described by the Board in the merits decision, to adapt to the circumstances with which police officers are presented:

37 … Applying the letter of the law to the practical, real-life situations faced by police officers in performing their everyday duties requires that certain adjustments be made. Although these adjustments may sometimes appear to deviate from the letter of the law, they are crucial and are part of the very essence of the proper administration of the criminal justice system, or to use the words of s. 139(2), are perfectly consistent with the "course of justice". The ability — indeed the duty — to use one's judgment to adapt the process of law enforcement to individual circumstances and to the real-life demands of justice is in fact the basis of police discretion. What La Forest J. said in *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 410, is directly on point here:

> Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid.

Thus, a police officer who has reasonable grounds to believe that an offence has been committed, or that a more thorough investigation might produce evidence that could form the basis of a criminal charge, may exercise his or her discretion to decide not to engage the judicial process. But this discretion is not absolute. Far from having *carte blanche*, police officers must justify their decisions rationally.

38 The required justification is essentially twofold. First, the exercise of the discretion must be justified subjectively, that is, the discretion must have been exercised honestly and transparently, and on the basis of valid and reasonable grounds (reasons of Chamberland J.A., at para. 41). Thus, a decision based on favouritism, or on cultural, social or racial stereotypes, cannot constitute a proper exercise of police discretion. However, the officer's sincere belief that he properly exercised his discretion is not sufficient to justify his decision.

39 Hence, the exercise of police discretion must also be justified on the basis of objective factors. I agree with Doyon J.A. that in determining whether a decision resulting from an exercise of police discretion is proper, it is important to consider the material circumstances in which the discretion was exercised. However, I do not agree with him on the importance of the factors he regarded as part of the legal context, that is, the administrative directives and the administration of justice in the province.

4.1.1 Material Circumstances

40 First, it is self-evident that the material circumstances are an important factor in the assessment of a police officer's decision: the discretion will certainly not be exercised in the same way in a case of shoplifting by a teenager as one involving a robbery. In the first case, the interests of justice may very well be served if the officer gives the young offender a stern warning and alerts his or her parents. However, this does not mean that the police have no discretion left when

> the degree of seriousness reaches a certain level. In the case of a robbery, or an even more serious offence, the discretion can be exercised to decide not to arrest a suspect or not to pursue an investigation. However, the justification offered must be proportionate to the seriousness of the conduct and it must be clear that the discretion was exercised in the public interest. Thus, while some exercises of discretion are almost routine and are clearly justified, others are truly exceptional and will require that the police officer explain his or her decision in greater detail. [Emphasis added]

The Supreme Court of Canada is clear that police discretion is to be adjusted to the circumstances. The Board found that the exercise of discretion in an unreasonable and unprofessional manner can be a breach of the Code of Conduct. The Board emphasizes the minor nature of the infraction, or infractions, that Adam LeRue was accused of committing. As the Supreme Court of Canada said, police discretion will certainly not be exercised in the same way for minor offences, such as by-law infractions, as for serious offences. However, Constable O'Brien, and to some extent Sgt. Palmeter, suggested more of a cookie-cutter approach to police discretion, where in every case of a suspected by-law infraction that the person must be identified, a check must be made for outstanding warrants, a check for any release conditions, and that for every arrest a search of a vehicle must be carried out for "officer safety" regardless of the circumstances. The Supreme Court of Canada also makes it clear that Constable O'Brien's belief that he properly exercised his discretion does not make it true.

[60] Constable O'Brien asserts that the Board looked at the facts and reverse engineered their decision to find fault. He suggests that the Board's "high-level" view in the Summary portion of the merits decision is illustrative of this reverse engineering where they found:

> [101] Even without walking through the minute detail of this matter, it is clear from a "high level" view, that this matter begins with two individuals, sitting quietly in a parked vehicle, eating pizza and talking on the phone. Even with a by-law infraction, a ticket would hardly be expected in the circumstances. But it ends with two arrests, a full vehicle search, a ticket for a minor bylaw violation, a *Motor Vehicle Act* ticket, and a serious criminal charge. The result has had a considerable financial and social impact on Mr. LeRue and Ms. Morris. It cannot be justified as "officer discretion".

I would add Adam LeRue being held in the HRP cells overnight to the Board's paragraph above. Paragraph 101 summarizes the Board's findings regarding

Constable O'Brien's unreasonable exercise of discretion, it is not a reverse engineering of a desired outcome.

[61] The Board's decision is not unintelligible, unjustified, or opaque. Their reasoning process is clear. The merits decision of the Board is reasonable.

Conclusion

[62] Constables O'Brien and Woodworth have failed to show that the jurisdiction decision of the Board, dated July 15, 2020, was unreasonable. Constable O'Brien and HRP have failed to show that the merits decision of the Board, dated June 18, 2021, was unreasonable. Both decisions fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. The motion for Judicial Review is dismissed.

Lynch, J.