

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

AND IN THE MATTER OF A NOTICE OF ARBITRATION HEARING DATED FEBRUARY 7, 2013

AND IN THE MATTER OF A CONDUCT COMPLAINT OF BRETT MCADAM DATED SEPTEMBER 13, 2010

BETWEEN:

THE CHIEF OF POLICE, CITY OF SAINT JOHN POLICE FORCE

- and -

CONSTABLE CHRISTOPHER MESSER

Decision on Complaint of Brett McAdam

Appearances: For the Chief of Police, City of Saint John Police Force – *James Lemesurier, Q.C.*

For Constable Christopher Messer – Robert Davidson and Jamie Hachey

Hearing Dates August 13 to 15 and 29, 2013

Decision Date September 11, 2013

Before George P. L. Filliter

DECISION

I Introduction.

1. Brett McAdam (McAdam) complained the conduct of Constable Christopher Messer (Messer) on September 7, 2010 was inappropriate.
2. The Chief of Police, City of the Saint John Police Department (Chief) after the completion of an investigation considered the conduct to be discreditable. The Chief is a party to the proceeding pursuant to the *Police Act (Act)* and asks that I order the termination of Messer.
3. This is a decision respecting the allegations of McAdam concerning the conduct of Messer.

II. Preliminary matters.

4. On June 18, 2013 I rendered a decision respecting a preliminary objection raised by Messer (*Saint John Police Force v. Messer*, 2013 CanLII 34289 (NB LA) (*Messer*)).
5. The decision reviewed the basis of my jurisdiction.
6. I am dealing only with respect to the complaint of McAdam. The New Brunswick Court of Appeal (*Messer v. R.*, 2013 NBCA 39 (*Messer*, CA)) quashed the conviction of Messer respecting the allegations made by McAdam. As a result there were no criminal proceedings and the hearing of this complaint could proceed.
7. The hearing of the complaint of Randy King (King) was adjourned to February 18, 2014. The court (*Messer*, CA) ordered a new trial with respect to his allegations. Therefore pursuant to section 21(2) of the *Act* I had no alternative but to adjourn the complaint to allow the criminal proceedings to continue.

III. Background

8. In 2005 the *Act* was revised. The *Code of Professional Conduct – Regulation 2007-81 (Code)* established a process for dealing with complaints.
9. I reviewed the legislative scheme (*Chief of Police, Fredericton Police Force v. Corporal Randy Reilly*, 2012 CanLII 85155 (NB LA) (*Reilly*)). There is nothing to add.
10. Messer is a member of the City of Saint John Police Force (Force). McAdam filed his conduct complaint on September 13, 2010. It is useful to reproduce the complaint of McAdam so I have attached a copy as Appendix A.
11. The Chief characterized the complaint as a “conduct complaint” pursuant to the provisions of the *Act*. This is evidenced in his correspondence to the Chairman of the New Brunswick Police Commission (Chairman) dated September 23, 2010 in which he asked for the Commission to review his categorization.
12. Sergeant Brian Cummings (Cummings) of the Miramichi Police Force was appointed as the investigator to conduct an investigation into the McAdam complaint under both the provisions of the *Act* and the *Criminal Code*. Cummings was not called as a witness.

13. Messer received a Notification of Substance of Conduct Complaint dated September 23, 2010.
14. Messer was served with the Notice of Settlement Conference, which was scheduled for February 1, 2013. Messer, through his representative, advised the Chief he would not attend.
15. On February 11, 2013 Messer was served with a Notice of Arbitration Hearing.
16. At the hearing the Chief advised he was only proceeding on grounds 1 and 2 as set out in the Notice of Arbitration Hearing and ground 3 was withdrawn. Messer did not object.
17. It is useful to reproduce the grounds upon which the Chief relied to support his request for the termination of Messer.

Count 1 – Discreditable Conduct

On or about the 7th day of September, 2010, at or near the City of Saint John in the County of Saint John and Province of New Brunswick, you were, while on duty, abusive or oppressive toward Brett McAdam: 1) by uttering threats to cause death or bodily harm to him; 2) by uttering threats toward his daughter, contrary to and in violation of section 36(1)(b) of the Code. This constitutes a breach of the Code under section 35(a) of the Code.

Count 2 – Discreditable Conduct

On or about the 7th day of September, 2010, at or near the City of Saint John in the County of Saint John and Province of New Brunswick, while on duty, you acted in a manner that is likely to bring the reputation of the Saint John Police Force into disrepute by: 1) by uttering threats to cause death or bodily harm to Brett McAdam; 2) by uttering threats toward Brett McAdam's daughter; and, 3) by aggressively questioning Brett McAdam regarding a break-in at your residence, all of which conduct related to a break-in at your residence and with respect to which you should have recused yourself due to conflict of interest, contrary to and in violation of section 36(1)(a)(ii) of the Code. This constitutes a breach of the Code under section 35(a) of the Code.

IV. Procedure

18. A court reporter (Peggy Blackwell) was sworn to impartially record the proceedings.
19. The Chief called 4 witnesses. Messer testified and he called Mike King (M. King) as a witness. In addition to the oral testimony, the parties introduced 42 exhibits (see list at end of decision).
20. Oral arguments were presented on August 29, 2013
21. The *Act* imposes a time limit of 15 days to render a decision. Both parties waived the strict application of the time limits set out in the *Act*.

V. Issues

22. The issue can be succinctly stated. Did the conduct of Constable Christopher Messer on September 7, 2010 violate the *Code*?

23. If Messer did breach the *Code* I then must address the appropriate “Disciplinary and Corrective Measure”.

VI. Credibility and Standard of Proof

24. The evidence of McAdam and Messer varied substantially respecting what happened on September 7, 2010. As such credibility is a factor.
25. In considering this issue I am guided by *Faryna v. Chorney*, [1952] 2 D.L.R. 354 (B.C. C.A.) (quoted with approval by the Ontario Court of Appeal in *Phillips v. Ford Motor Co.*, [1971] 2 O.R. 637):

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

26. Courts and administrative tribunals in Canada have adopted the test in *Faryna v. Chorney*.
27. The legislation has defined standard of proof required.

32.6(1)If the arbitrator finds on a balance of probabilities that a member of a police force is guilty of a breach of the code, the arbitrator may impose any disciplinary or corrective measure prescribed by regulation.

28. As noted by the representative of Messer in his able argument, a line of cases suggest the civil standard of proof (balance of probabilities) may require a higher quality of proof in cases where the allegations or the potential consequences are serious.
29. This line of reasoning contemplates evidence must be “clear and convincing” or “weighty, cogent and reliable” (**Legal Aspects of Policing**, Ceysens, EarlsCourt Legal Press Inc. paragraph 5.9(a) and *Police Constable Dean Secord and Sergeant David Arseneault v. Saint John Police Force*, 2007 decision of Board of Arbitration, unreported).
30. Counsel for the Chief acknowledged this line of reasoning, but argued the Supreme Court of Canada had clarified the issue of the quality of proof (*F.H. v. McDougall and The Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2008 SCC 53).
31. The Supreme Court reviewed many of the cases, which adopted “degrees of probability” within the (civil) standard. It also noted the “shifting standard” was not universally accepted. Finally, the Supreme Court reviewed the issue as it has unfolded in the UK.

32. The Supreme Court opined as follows:

[40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives listed above should be rejected for the reasons that follow.

....

[45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

[46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

33. In my view only one standard of proof at common law exists and that is the balance of probabilities. However, as noted by the Supreme Court, the evidence must be “clear, convincing and cogent” to satisfy the balance of probabilities test.

34. Was the evidence of the complainant “clear, convincing and cogent” enough to convince me that on a balance of probabilities the allegations were proven?

VII. Analysis

1. Credibility of witnesses

35. Given the nature of the allegations and the fact the alleged incidents took place in a police car the occupants of which were McAdam and Messer, their evidence is more critical than the evidence of the others.

Brett McAdam

36. My overall impression of McAdam was not favourable. For many reasons I found his testimony to be incredible and unbelievable.

37. Even if I did not conclude that McAdam was incredible I would not have found his evidence to be “clear, convincing and cogent”.

38. McAdam provided a written complaint dated September 13, 2010. His testimony varied substantially from his written statement. These discrepancies go both to his credibility and to the quality of his evidence. The following discrepancies are some of the more obvious:

1. During his testimony McAdam made no mention the police officer who pulled him over (not Messer) “freaked out” when McAdam responded to a question concerning the road side breathalyzer. Nor did he testify the officer agreed he would apologize when he passed the test. These statements are found in his written complaint.
2. McAdam did not testify to the discussion concerning the damage to his car yet he felt it was important enough to put into his complaint.
3. In his written statement he indicated he was pulled over for a half hour before another officer (Messer) arrived, but during his testimony he testified it was a few minutes. The discrepancy in time is of significance.
4. In his written statement McAdam says Messer had a “pissed of [sic] look on his face”. This was not mentioned his testimony.
5. McAdam wrote that Messer was angry when he asked him questions about what he was doing on Westfield Road and at the Saint John Marina. McAdam did not testify in the same way.
6. According to his statement the conversation noted in paragraph 5 was while he was in his own car and before he went to the police cruiser with Messer. In his testimony he testified Messer said nothing to him while he was in his car. His evidence was Messer “told me to get out of the car and get into the back of the police car”.
7. In his statement McAdam alleged Messer stated he “threaten[ed] my life”, “[would]have me disappear”, “has friends in low places, scum he called them that 3 or 4 of them would come to my place and I would end up crippled of have no fingers”, “it would be him that was there to do it him self”, “would blow my head off”, “cut off my head with a large butcher knife he has in his house” and “there are a hundred and some cops in this city and every one of them would turn there [sic] back if he wanted me to disappear”. According to the written statement these words were said while the police cruiser was parked in the parking lot close to the vehicle owned by McAdam. Although these statements would certainly be relevant to his complaint and germane to the allegations against Messer, McAdam’s testimony was significantly different. First of all, McAdam did not repeat the allegations found in his written statement when he testified in this matter. There was reference during his testimony to low life scum, broken fingers, blow my head off and a butcher knife, but his testimony was significantly different from the very detailed allegations set forth in the written document. Also, during direct testimony McAdam often stated he did not remember what Messer said. Furthermore, in his testimony he stated these comments occurred after Messer drove the police cruiser behind the Canadian Tire store.
8. In his direct evidence he testified Messer said “he would send 4-5 low life scum to my house and I had better hope my daughter was not there”. This is different than his written statement in which he wrote “for my sake that if he sent people to my home I wana [sic] hope that she was not there”.
9. In his written complaint McAdam stated that when the police car got to the back of the Canadian Tire store Messer started threatening him again. However, in his direct evidence McAdam testified it was hard to remember what was said behind the store.

10. McAdam alleged in his written statement that Messer had told him “he knows every thing about me, were [sic] I live what I drive and that I am not hard to find, and when he finds out I was involved I would wish that I never heard his name”. During his testimony McAdam did not give evidence of this nature.
39. Some of the discrepancies considered individually might have been expected or explicable. However, when considered in their entirety they call into question the credibility of McAdam and the clarity, convincing nature and cogency of his evidence.
40. Of note are the significant variances between the statement and the evidence of McAdam relating to matters germane to issues before me and as set forth specifically in Count 1. In my view it is not reasonable to conclude McAdam would have forgotten the details of these conversations if they had occurred in the first place.
41. In further support of my determination of the lack of “clear, convincing and cogent” nature of the evidence of McAdam I observed that he would often answer that he did “not remember” or he “could not recall”. This occurred even after I asked him to think carefully in responding to questions, as his evidence was important.
42. Given all of this I conclude McAdam did not provide “clear, convincing and cogent” evidence that would allow me, on a balance of probabilities, to conclude he and his daughter were threatened.
43. Further as to the credibility of McAdam he provided the written complaint, he testified before me and before the Court of Queen’s Bench during the criminal trial of Messer and after the conviction of Messer McAdam provided a Victim Impact Statement a portion of which is set out in the decision of McLellan, J. at paragraph 6 (exhibit 21).
44. I would have expected some inconsistencies, but I note, many times during crucial points the evidence of McAdam was inconsistent and he even admitted to not telling the truth before the Court and before me.
45. Some of the more obvious areas of inconsistent statements are as follows:
 1. First and foremost I note Mr. Justice McLellan had “real concerns” about the credibility of McAdam (exhibit 22 paragraph 54).
 2. In his victim impact statement and in direct evidence before me McAdam testified he had to leave his job at the Saint John Marina because he felt threatened by Messer. However, during cross examination he acknowledged, only when shown the payroll records from the Saint John Marina, that he had continued to work there until November at which time he was laid off for lack of work. This point is significant and when presented with the facts McAdam admitted his testimony before me in direct evidence and his Victim Impact Statement were false.
 3. In his victim impact statement McAdam said as a result of the threats “I moved to another province”. On cross examination he acknowledged this was intended to be misleading as the reason he moved in 2012 to Alberta was to obtain work.
 4. Roy testified McAdam had told him he had been recently laid off from the Saint John Marina. McAdam was unresponsive to questions in cross

examination. He certainly did not deny saying this to Roy. As noted the evidence was McAdam was not laid off in September.

46. McAdam acknowledged he was convicted of public mischief in 1986. He agreed this was for providing a false statement to police. But, despite questioning, McAdam could not or would not remember the circumstances surrounding this conviction. It is incredible a person would not recall the factual details leading to a conviction of this nature.
47. McAdam admitted to making false statements to me and to the judge during his testimony.
48. Finally, I am left with the undisputed fact that after McAdam had spent some period of time in the police vehicle with Messer he departed from the vehicle and said to Messer "if I hear anything I will call you". This statement goes to the credibility of McAdam as in my view it is entirely inconsistent with the behaviour expected of an individual whose life was threatened and who was scared for his life.
49. Would someone who was "shaking bad", as McAdam described himself, offer to help the very person who threatened him? The answer to this rhetorical question is of course no.
50. Also, would someone who was "shaking bad" go to his car, pick up his cell phone and go into a store to shop? Again, the answer to this rhetorical question is of course no.
51. For all of these reasons I do not find McAdam to be a credible witness and what evidence he did provide was did not clear, cogent and convincing.

Constable Nicholas Roy

52. Roy was summonsed and upon review of my notes I am satisfied he was a credible witness with nothing to gain or lose. That said, he was not a witness to the critical incidents.

Constable Scott Boyles

53. Boyles was summonsed and upon review of my notes I am satisfied he was a credible witness with nothing to gain or lose. That said, he was not a witness to the critical incidents.

Constable Neal Fowler

54. Fowler was summonsed and upon review of my notes I am satisfied he was a credible witness with nothing to gain or lose. That said, he was not a witness to the critical incidents.

Mike King

55. M. King was summonsed and upon review of my notes I am satisfied he was a credible witness with nothing to gain or lose. That said, he was not a witness to the critical incidents.

Constable Christopher Messer

56. I am concerned with respect to the evidence of Messer. His memory was lacking and he admitted to testifying in a different way during his trial than he did before me. For a professional police officer not to have a better recollection of what occurred is disturbing.

57. I understand Messer may not have taken notes coincidentally with the events that occurred on September 7, 2010, but this was not a normal run of the mill incident and I would have expected a better recall.
58. I also would have expected his testimony to compare more closely with his recollections both in his written statement and during his testimony at trial.
59. As a result of my observations I do not consider Messer to be a fully reliable witness. I do not however find him to be incredible.

2. What occurred on September 7, 2010?

60. These findings of fact are based upon a complete review of the evidence provided by all witnesses and the documentary evidence introduced as exhibits. Of course I have considered my conclusions concerning the credibility of the witnesses, in particular McAdam and Messer.
61. The Force hired Messer on May 14, 2001.
62. Messer worked 4 days on and 4 days off. During his shift rotation he would work 2 night shifts of 12 hours followed by 2 day shifts of 12 hours.
63. Between August 31 and September 3, 2010 the home owned by Messer and his fiancé was broken into and property was stolen. The goods were valued by Messer at \$14,000 and included his laptop computer with pictures of his family.
64. Having discovered the break and enter, Messer spoke with his neighbour and friend M. King. Although the evidence respecting this conversation is not entirely consistent nothing really turns on the differences between the testimony of M. King and Messer.
65. I conclude M. King advised Messer he had observed an older blue Chrysler Dynasty with damage parked in his driveway and noted the driver was looking in his front window.
66. There was some confusion as to whether the driver was out of the car or sitting in the car, but this was not important. M. King's evidence respecting the fact there was a suspicious incident and the driver of the car was looking in his front window at his TV screen was indisputable.
67. In an email sent to all members of the Force early in the morning on September 7, 2010, Messer described the possible suspect vehicle as a "blue Chrysler dynasty [sic] with damage to the driver side and possibly a smashed back window on the driver side" (exhibit 15). The damage described in the email coincided to what was related to Messer by M. King.
68. Messer testified the purpose of the email was to advise his fellow police officers of the incident and to ask for assistance.
69. Later in that same day Messer sent a follow up email (exhibit 16). This email confirmed Messer had been doing his own investigation into the break in at his home. The email indicates "two pond [sic] shop owners" had advised him of the movement of stolen electronic equipment.
70. Messer worked the night shift on September 7, 2010. He was assigned to the north end station and his hours of work were 1800 to 0600 on September 8, 2010.

71. On that day Roy and Fowler worked together in east Saint John on the night shift. At about 6:30 pm they observed a vehicle matching the description in the email from Messer. They described this vehicle as a "blue Dynasty with the back passenger door window broken".
72. Roy and Fowler followed this car in their police cruiser. The car entered the Canadian Tire store parking lot located in east Saint John. Roy and Fowler engaged the emergency lights on their police cruiser and pulled over the suspicious vehicle. Roy and Fowler approached the vehicle and asked for the license, proof of insurance and registration from the driver. The driver was McAdam.
73. During this exchange the two officers asked McAdam if he had been drinking. In this exchange McAdam denied he was drinking and in response to a question said he should be successful if the road-side sobriety test was administered. Fowler testified he could smell alcohol on the breath of McAdam. However, Roy testified he did not suspect McAdam of drinking.
74. Roy and Fowler later advised McAdam the vehicle was stopped because it matched the description of a car which had been involved in a break and enter on the west side of Saint John. McAdam agreed to allow his vehicle to be searched and in fact he opened the trunk.
75. Roy gave the documents obtained from McAdam to Fowler who returned to the police cruiser. Roy stayed and searched the vehicle. In his conversation it was determined by Roy that McAdam used marijuana on a daily basis.
76. Fowler determined McAdam had a criminal record and there were no outstanding warrants. Fowler called Messer on his cell phone and advised him a car meeting the description in the email (exhibit 15) had been stopped. Fowler did not ask Messer to come to the scene, and he made this call for the sole purpose of advising his fellow officer.
77. After receiving the call Messer spoke with Boyles who was also working in north Saint John. Boyles offered to drive Messer to the location where the suspicious vehicle had been stopped.
78. Boyles and Messer arrived at the scene. According to the testimony of both officers they did not have a conversation during this trip.
79. When they arrived Boyles observed Roy searching the trunk of the car. Messer got out of the police vehicle and approached the car. Boyles observed Messer speak briefly with the driver who he later identified as McAdam.
80. Messer took a photograph of McAdam while he was still sitting in the vehicle. Messer requested that McAdam join him in the police cruiser. The conversations between Messer and McAdam were not overheard by any of the other officers.
81. McAdam does not dispute he agreed and voluntarily entered the back of the police cruiser.
82. Messer spoke with McAdam. Messer was sitting in the driver's seat of the police cruiser and McAdam was in the back seat on the right hand side of the cruiser.
83. After a period of about 5 minutes Messer left McAdam in the police cruiser and spoke with Roy. They agreed because McAdam was a drug user it was best to drive the police cruiser to the side

of the Canadian Tire store. This was out of sight of all the witnesses and was for the apparent protection of McAdam.

84. I conclude Messer and McAdam were out of sight for about 5 to 10 minutes. During this time Roy and Fowler continued to search the vehicle driven by McAdam. A notebook was found containing names of individuals who were considered by the police to be involved in illegal drug trafficking in Saint John. Some of these names appear as friends of McAdam on his Facebook page.
85. The evidence of Messer and McAdam concerning what occurred when they were in the police cruiser together was different. As noted I am of the view McAdam was not a credible witness, but I have also concluded Messer was not the most reliable of witnesses. Despite the inconsistencies, on a balance of probabilities I conclude the following occurred.
86. Messer questioned McAdam about the break and enter into his home. Messer was upset about losing the pictures of his family stored on the computer and thought McAdam was the perpetrator.
87. At one point Messer advised McAdam that his vehicle was sighted in west Saint John and was suspected of being involved in break and enters including the one at his home.
88. Messer did raise his voice in an aggressive manner when he concluded McAdam was not being truthful in his answers about where he was employed, where he lived and whether or not he frequented areas close to his home. This is a tactic used by police officers and on its own would not have caused me any concern. However, because Messer referred to what had occurred at his own home, it is of more significance.
89. McAdam and Messer talked about the use of marijuana, specifically that McAdam used it on a daily basis. It was in light of this discussion McAdam confessed to owing some people money for drugs.
90. They also spoke about the fact McAdam had a daughter. I accept the testimony of Messer over McAdam. Messer said to McAdam it would be very embarrassing if McAdam were arrested for drug use while his daughter was at his home.
91. McAdam at no time objected to either being in the police car with Messer or to the behaviour of Messer.
92. When Messer drove back from the side of the store he left McAdam in the police vehicle and went to speak to Roy. Roy showed Messer the notebook. Messer in turn showed the notebook to McAdam and asked him more questions about the amount of money he may owe to drug dealers.
93. When McAdam asked Messer to be let out of the police vehicle the request was granted. There was no evidence to suggest Messer kept McAdam against his will.
94. The evidence of all witnesses, except for McAdam, was that when he did exit from the police cruiser he was not "shaking bad" as, described by McAdam. The evidence of all the officers was

McAdam got out of the car, walked to his own vehicle where he picked up his cell phone and went into the Canadian Tire store.

95. Also, Fowler and Messer heard McAdam tell Messer if he heard anything he would let Messer know. Fowler concluded McAdam had gone from being a suspect to a potential informant and he did not issue him a ticket he was preparing.
96. Messer testified about an event later in the evening of September 7, 2010. Apparently, the police received a tip that stolen goods may be transferred at a location in the north of Saint John. Messer, believing the goods may include his own wanted to be involved in the operation. Sergeant Cowan instructed Messer to “stay away” as this involved his own goods.
97. Cummings investigated the complaint of McAdam. Although he was not called as a witness, I am of the view he did a thorough investigation.

3. Did Constable Christopher breach the Code?

98. Because there was no “clear, convincing and cogent” evidence to convince me Messer uttered threats to McAdam and his daughter as set out in Count 1, I dismiss the allegations set forth therein.
99. Something may have occurred, but on a balance of probabilities I am unable to determine what happened. McAdam may have felt threatened, but I am not able to conclude Messer uttered any threat towards McAdam or his daughter.
100. As for Count 2, I am of the view Messer was investigating the break and enter into his own home. He admitted this during his direct evidence. Also, Roy, Fowler and Boyles all referred to Messer as the investigating officer. Messer had formed an opinion the car driven by McAdam met the description of the car described to him by M. King. As a result, Messer had concluded McAdam was the perpetrator of this offence.
101. Given my findings with respect to the credibility of McAdam I cannot conclude the questioning of McAdam was aggressive to the point of violating the *Code*. But as will be seen this does not answer the question in its entirety.
102. Messer tried to explain his interview of McAdam by suggesting he was investigating many break and enters, but the evidence is clear, the only specific incident raised by Messer with McAdam was that of his own home.
103. In my view, the fact Messer discussed the break in at his home put him in a conflict of interest. This is especially so given the fact he considered himself, as did the other officers, to be the investigating officer. The court noted at paragraph 8 of the decision (exhibit 22):

With such heavy responsibilities on a police officer, especially when he is working on the street and dealing with people, police officers must avoid any potential conflicts of interest and duty. If they see a potential conflict of interest or duty involving themselves or their family, their duty is to advise their supervisor, “I cannot deal with this because it involves a family member or myself.” It is not rocket science. It is plain and simple. Police officers must avoid any potential conflicts of interest or duty. For a police officer to act in a conflict of

interest is a breach of trust reposed in him or her and likely to bring the administration of justice into disrepute. It is also profoundly unprofessional.

104. Although the court was not mandated with determining a breach of the *Code* I accept and adopt these words.

105. The community must have trust in an unbiased justice system of which the police are an integral part. When a police officer is involved in a matter in which he or she has personal interest this trust will be eroded (Ceysenns paragraph 6.2(b)). As noted by the Ontario Divisional Court

Save for the most exceptional circumstances, a police officer should not pursue, in his capacity as a police officer, any matter in which she or he has a personal interest. (*Hampel v. Toronto Police Service*, [2009] OJ 1463 (QL), 248 OAC 241 at paragraph 26).

106. Messer was charged with a violation of section 36(1)(a)(ii) of the *Code*. This section states:

36(1)A member of a police force engages in discreditable conduct if
(a) the member, while on duty, acts in a manner that is

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

107. The *Code* requires all police officers to avoid any actual, apparent or potential conflict of interests (section 34(d)).

108. Neither party referred me to case law and I was unable to find any, however, in my view Messer was acting in conflict of interest when he spoke with McAdam about the break and enter into his own house. This act was unprofessional, had the potential of bringing the administration of justice into disrepute and I consider it to be significant.

109. If the administration of justice could be brought into disrepute so could the reputation of the Force.

110. Accordingly, I conclude Messer was guilty of acting in a manner, which brought the reputation of the Force into disrepute contrary to section 36(1)(a)(ii) of the *Code*.

111. This conclusion ought not to come as a surprise to Messer. Sergeant Cowan told him that very night he should stay away from this investigation. Furthermore, on September 23, 2010 he was admonished in writing that to be “involved, directly or indirectly, in the investigation” of the reported break and enter into his home was a conflict of interest.

112. The representative for Messer argued section 34(d) of the *Code* was obscure. He also adduced evidence to establish Messer did not receive training with respect to conflict of interest. In my view this is not an answer. It is not difficult for even the untrained to realize Messer acted in conflict of interest when he questioned McAdam about the break in at his home. He did not need training, Ignorance of law no defense

113. I was disappointed Messer showed no remorse over the fact he was acting in conflict of interest. His testimony showed a disregard of any problems associated with his questioning of McAdam.

Despite what he and his representative argued, he did do something wrong, it was significant and when provided the opportunity to at least admit his error he did not.

VIII. Remedy

114. The purpose of discipline under the *Act* is articulated in sections 3 and 6 of the *Code*. The legislature has identified that corrective measures may be a component to be considered.

115. The case of *Constable Bowes-Aybar*, OCCPS # 03-05 (unreported) was referred Treasury Board by me (*Reilly*). In my view this case outlines various aspects of sentencing that should be considered. The non inclusive list is as follows:

- Public Interest
- Seriousness of the Misconduct
- The Seriousness of the Continuum
- Recognition of the Seriousness/Remorse
- Employment History
- Ability to Reform or Rehabilitate the Police Officer
- Need for Deterrence
- Damage to the reputation of the Police Force
- Handicap and Other Relevant Personal Circumstances
- Effect on the Police Officer and his Family
- Management Approach to Misconduct in Question
- Consistency of the Penalty
- Effect of Publicity

116. I am of the view this violation of the *Code* is significant, especially given the lack of remorse or recognition by Messer. I note that none of the other officers called as witnesses admitted to any concern with respect to the actions of Messer. In my view this raises the need for deterrence, which can be accomplished in a variety of ways.

117. There was no evidence of the employment history of Messer. I draw an inference from this that he has a clean record with no previous disciplinary actions.

118. Therefore, I am of the view he can be rehabilitated. He has an honours degree in criminology and sociology from St. Thomas University. He graduated in 2001 with a journeyman policing degree. He was hired on May 14, 2001 and has been a member of the Force since then. It would be unfortunate to both Messer and the Force to lose his services because of this incident.

119. There was no evidence offered respecting any of Messer's personal circumstances or indeed the effect on his family. Any conclusion I reach in this regard would be speculative at best. That said I can take notice of the fact Messer has been suspended without pay for some time, he served 30 days in jail for his convictions which were eventually quashed, he is awaiting another criminal trial with respect to the King allegations and as a result he will most likely remain suspended. The situation must be very difficult on Messer and his family.
120. As for the conduct of management, Messer took no issue with this, other than arguing they should not have based their case on the evidence of McAdam who had a past history of being dishonest. On the face of this and having made my findings respecting the lack of credibility of McAdam I can understand the frustration. That said, the Chief was faced with a complaint, which was investigated and worked its way through the process both criminally and under the *Act*. A decision was made and neither the Chief nor counsel could have done anything to make McAdam more credible.
121. I do not fault the Chief for this decision.
122. As for the penalty I am guided by the following provision of the *Code*:
- 6The parties to a settlement conference may agree to or an arbitrator may impose one of the following disciplinary and corrective measures or any combination of the following disciplinary and corrective measures:
- (a)a verbal reprimand;
- (b)a written reprimand;
- (c)a direction to undertake professional counselling or a treatment program;
- (d)a direction to undertake special training or retraining;
- (e)a direction to work under close supervision;
- (f)a suspension without pay for a specified period of time;
- (g)a reduction in rank; or
- (h)dismissal.
- Other measures**
- 7A chief of police or civic authority, as the case may be, may
- a)issue an apology on behalf of the police force or, with the consent of the member of the police force who is alleged to have committed a breach of the code under [section 35](#), on behalf of the police force and the member, or
- (b)change a policy of the police force in order to prevent a recurrence of the breach of the code under [section 35](#).
123. The parties presented me with some cases. One case referred to me involved a police officer terminated for being convicted of threatening to harm an individual (*Wilson and the Gloucester Police Force*, 1980 an unreported decision of the Ontario Police Commission). This case was not helpful in my deliberations.
124. Another case involved an officer terminated for disreputable conduct (*Quintieri and Toronto Police Service*, 2001 an unreported decision of the Ontario Civilian Commission on Police Services). The officer in this case had been convicted of uttering death threats to his wife in the presence of his children. The sentence included a prohibition from "owning, possessing or carrying" a firearm. This case was not helpful in my deliberations.

125. In yet another case the officer was involved in a night of drinking resulting in him acting in discreditable conduct including urinating on a fellow officer (*Furlong and Chief of Police*, 2011 CanLii 48817 (AB LERB)). The officer was terminated and I did not find this case to be of much assistance in my deliberations.
126. The most comparable case involved an officer whose home was broken into and who communicated with the person he thought was involved. The officer did not interview the suspect but rather sent him a Christmas card and wrote comments on a wall. The communication was considered to be threatening. The decision maker found this action to be disreputable conduct (*Burdett and the Guelph Police Service*, 1999 an unreported decision of the Ontario Civilian Commission on Police Services). The officer involved received a suspension amounting to 7 days.
127. At page 10 of the *Burdett* decision the tribunal made comments with which I agree. It said:

As a police officer, he ought to have known that there is a process to be followed in an investigation and he should not have attempted to take the matter into his own hands. Moreover, we agree with Counsel for the Respondent that Constable Burdett EP's address because of his connection with the police service. By using his position as a police officer to allow him to resort to self-help, we find, is sufficient to constitute discreditable conduct.
128. The action of Messer was a significant breach of the *Code*, which was likely to bring the reputation of the Force into disrepute; therefore a suspension without pay is in order. In comparing the actions of Messer to those reported in *Burdett*, I am of the view the conduct of Messer was more serious.
129. In the case before me Messer involved himself directly with the investigation, whereas in *Burdett* the officer did not. Furthermore, Messer at no time acknowledged he had done anything wrong.
130. Taking into account all of the factors noted above, I have concluded a relatively lengthy suspension without pay of 10 days is in order.
131. In order to ensure it does not happen again Messer will be required to learn about the meaning of conflict of interest.
132. Although I cannot order Messer to write a letter of apology to McAdam, I am going to recommend this.
133. Finally, none of the four officers who testified, spoke of any concerns with respect to the action of Messer, it is my view the members of the Force may not have a clear understanding of conflict of issue. Accordingly, given the significant nature of this issue, I recommend the Chief take measures to ensure his members are advised.

IX. Order

134. For all of the reasons noted above I conclude the following:

1. Messer will be suspended without pay for a period of 10 shifts of 12 hours.
2. In order to train Messer, he will certify in writing that he has read chapter 6 of **Legal Aspects of Policing**, Ceysenns, which chapter deals with the requirement of impartiality and conflict of interest. If the Chief deems it appropriate he can test Messer to ensure he has learned his lesson.
3. If there is a course or training available respecting the issues of conflict of interest and the Chief deems it appropriate Messer will take whatever course is identified.
4. It is recommended that Messer write a letter of apology to McAdam admitting he should not have questioned him with respect to the break and enter into his own home.
5. It is recommended the Chief of Police or his delegate send a clearly worded memorandum to all police officers employed by the Saint John Police Force reminding them of the need to be aware of acting in an impartial manner in the execution of their duties.

Dated at Fredericton this 11th day of September, 2013

George P. L. Filliter

Arbitrator

List of Exhibits

Police Act Complaint (Brett McAdam) - Cst. Christopher Messer and Saint John Police Force

1. List of cases from NBCA case # 11 is Cst. Messer
2. May 6, 2013 correspondence from Davidson to Lemesurier (LeMeasure)
3. Book of documents respecting the King complaint (tabs 1 to 15, 27A and 31)
4. Book of documents respecting McAdam complaint (tabs 1 to 16, 18, 19, 26, 28, 31)
5. Correspondence from Chief to Police Commission of September 14, 2012
6. Correspondence from Police Commission to the Chief September 24, 2012 received September 28, 2012
7. Correspondence from Police Commission to the Chief September 24, 2012 received October 19, 2012
8. Correspondence from Chief to Cst. Messer dated October 9, 2012
9. Correspondence from Police Commission to Chief November 8, 2012 received November 15, 2012
10. Emails to and from Hachey and Chief January 29 to February 1, 2013 (pertains to both complaints)
11. Correspondence from Chief to Police Commission September 14, 2012
12. Correspondence from Police Commission to Chief September 25, 2012 received September 28, 2012
13. Correspondence from Police Commission to Chief September 25, 2012 received October 19, 2012
14. Summons to Chief William Reid dated August 8, 2013
15. September 7, 2010 @5:26 am email from Cst. Messer to Police Force
16. September 7, 2010 @ 5:33 am from Cst. Messer to Police Force
17. Criminal Record Check – CPIC
18. Handwritten complaint of McAdam received by Hayward on September 13, 2010
19. Payroll records of McAdam at the Saint John Marina until November 4, 2010
20. List of Friends from Facebook page of Brett McAdam
21. Sentencing Decision September 7, 2012
22. Decision on Charges August 15, 2012
23. Cummings Report of Interview with McAdam
24. Summary of Record of McAdam
25. Police Report of McAdam for case 2-10-008865
26. Police Report of McAdam for case 2-02-004150
27. Police Report of McAdam for case 2-96-004664
28. Police report of McAdam for case 1-92-007585
29. Martin's Annual Criminal Code 1984 section 128
30. Sgt. Cummings Report dated October 29, 2010 @ 1600 - Roy
31. Sgt. Cummings Report dated November 2, 2010 @ 2100 - Roy
32. Letter of Settlement, Letter of Reprimand and Letter of Apology - Roy
33. Sgt. Cummings Report dated October 29, 2010 @ 1520 - Boyles
34. Sgt. Cummings Report dated November 2, 2010 @ 2125 - Boyles
35. Letter of Settlement, Letter of Reprimand and Letter of Apology - Fowler
36. Letter of Settlement - Boyles

37. Sgt. Cummings Report dated October 29, 2010 @ 1146 – Fowler
38. Sgt. Cummings Report dated November 2, 2010 @ 2035 – Fowler
39. Picture of the driveway, house and where the vehicle is parked – drawn by Mike King on August 15, 2013
40. Statement of Cst. Messer faxed to Sgt Cummings on December 14, 2010
41. Copy of Facebook conversation on September 6, 2010 with Joshua Guimond
42. Memorandum to Constable Messer from Sergeant Hayward dated September 23, 2010