

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

AND IN THE MATTER OF TWO NOTICES OF ARBITRATION HEARING DATED FEBRUARY 7, 2013

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

AND IN THE MATTER OF A CONDUCT COMPLAINT OF RANDY KING DATED OCTOBER 5, 2010

BETWEEN:

THE CHIEF OF POLICE, CITY OF SAINT JOHN POLICE FORCE

- and -

CONSTABLE CHRISTOPHER MESSER

Decision on Preliminary Objection of Constable Christopher Messer

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

For Constable Christopher Messer – Robert Davidson and Jamie Hachey

Hearing Dates March 11 and May 21, 2013

Decision Date June 18, 2013

Before George P. L. Filliter, Arbitrator

DECISION

I The basis of my jurisdiction.

1. This is an arbitration hearing respecting complaints filed by Randy King (King) and Brett McAdam (McAdam) concerning the conduct of Constable Christopher Messer (Messer). The Chief of Police of the Saint John City Police Department (Chief) commenced the process pursuant to the *Police Act (Act)*.
2. In 2005 the province of New Brunswick amended the *Act*. In so doing the province developed a process for dealing with allegations of breaches of the *Code of Professional Conduct – Regulation 2007-81 (Code)*. The relevant portions of the *Act* are as follows:

25.7 Notwithstanding any other Act, including the *Industrial Relations Act*, where a member of a police force is alleged to have committed a breach of the code or is found guilty of a breach of the code, the matter shall be dealt with in accordance with the provisions of this Division and the regulations.

....

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.

32.6(2) When imposing disciplinary or corrective measures, an arbitrator may have access to the service record of discipline of the member of a police force.

32.6(3) Where the arbitrator finds that the member of a police force is not guilty of a breach of the code, the arbitrator shall dismiss the matter.

32.6(4) Where the arbitrator dismisses the matter, no entry shall be made in the service record of discipline or personnel file of the member of a police force.

32.6(5) The decision of the arbitrator is final and binding on the parties.

32.6(6) The arbitrator shall give the parties, the Commission and the complainant, if any, notice in writing of his or her decision within fifteen days after the completion of the arbitration hearing.

2. Procedure.

3. The parties acknowledged Messer had received two Notices of Arbitration Hearing on February 11, 2013 and these Notices were in accordance with sections 28.7(2)(d) and 29.4(4) of the *Act*, as well as section 9(1)(b) of the *Code*.
4. The parties agreed to my appointment as Arbitrator pursuant to section 33.02(1) of the *Act* by letter dated February 26, 2013. The hearing commenced by way of teleconference on February 28, 2013 with representatives of both parties. The parties acknowledged the teleconference was sufficient to comply with the statutory time limit for the conduct of a hearing established in section 11 of the *Code*.

5. The parties agreed to adjourn the hearing until March 11, 2013 and I sent a Notice of Hearing by email on February 28, 2013. It is useful to reproduce the Notice of Hearing.

It was understood the purpose of the hearing was to deal with a preliminary matter raised by Constable Messer's representative concerning production. In this regard the member's representative indicated he would send a letter to counsel for the Chief outlining his request and the nature of any preliminary objections which may arise.

As neither party would be calling evidence on this day there was no objection to there not being a stenographer present. The parties recognized the intent of section 23(3) of the *Code of Professional Conduct Regulation* passed pursuant to the *Police Act* would be complied with.

After hearing submissions on the preliminary disclosure matters raised by the member, the parties indicated they would address the issue of whether or not section 21(2) of the *Code of Professional Conduct Regulation* passed pursuant to the *Police Act* would apply under the circumstances. I was advised it was a matter of public record the member has appealed his two convictions both of which form part of the Notices. Section 21(2) states:

21(2)The arbitrator shall adjourn an arbitration hearing to a specified date if criminal proceedings arise out of the subject matter of the arbitration hearing.

This email will also serve as the Notice of the Hearing for the above noted matter. The hearing is scheduled for Monday, March 11, 2013 and will be held in the Manchester Room in the Delta Brunswick Hotel located on King Street in Saint John, New Brunswick. The room will be open at 0930, but the hearing will start at 1000 and go until 1400. It is the responsibility of counsel for each party or the party themselves to ensure that their clients and any witnesses required are advised of the date, location and time of the hearing.

Would you please confirm receipt of this notice? Also if this notice does not reflect the recollection of either party please advise. [sic throughout]

6. Additionally, during the teleconference it was agreed there would be no need to record the proceedings as contemplated by section 23(3) of the *Code* as neither party was intending to call evidence on March 11, 2013.
7. On March 11, 2013 the parties attended before me and reconfirmed the hearing had commenced within the time limit established in section 11 of the *Code* and there was no objection to the absence of a court stenographer as envisioned in section 23(3) of the *Code*.
8. As required by section 26(1) to (3) of the *Code*, I read the "the alleged breach or breaches of the code contained in the notice of the hearing" with respect to both the McAdam and the King complaints. Constable Messer, who identified himself, denied the allegations.
9. The parties agreed the necessary procedural matters set out in legislation had been completed and as such I was duly seized with the powers to hear both matters and render a decision.

10. The representative for Messer indicated he had received further documents from the Chief and based on them he wished to make a preliminary objection.
11. Counsel for the Chief indicated this was the first he had heard of an objection. He further noted Messer had been convicted of criminal offences, which were the subject of an appeal before the New Brunswick Court of Appeal. He advised the appeal was scheduled for hearing on May 14, 2013.
12. The parties agreed the facts upon which Messer had been convicted arose out of the subject matter of the complaints before me.
13. After canvassing the issue, both parties acknowledged the appeal of the convictions of Messer amounted to "criminal proceedings".
14. Section 21(1) and (2) of the *Code* state:
 - 21(1) Subject to subsection (2), the arbitrator may, in his or her own discretion, adjourn an arbitration hearing from time to time to a specified date.
 - 21(2) The arbitrator shall adjourn an arbitration hearing to a specified date if criminal proceedings arise out of the subject matter of the arbitration hearing.
15. After considering the matter I erred on the side of caution and adjourned the matter to May 21, 2014 being a specified date as required by the *Act*.
16. On March 11, 2013 I sent by email the following Notice of Hearing:

This email will serve as the Notice of the continuation of the Hearing for the above noted matter which commenced on March 11, 2013 and was adjourned as required by section 21(2) of the Code of Professional Conduct under the Police Act. As the appeal of the convictions of Constable Messer are scheduled to be heard by the New Brunswick court of Appeal on May 14, 2013, the matter was adjourned to a specified date. The hearing is scheduled for Tuesday, May 21, 2013 and will be held in the Manchester Room in the Delta Brunswick Hotel located on King Street in Saint John, New Brunswick. The room will be open at 0930, but the hearing will start at 1000 and go until 1400. It is the responsibility of counsel for each party or the party themselves to ensure that their clients and any witnesses required are advised of the date, location and time of the hearing.

I wish to confirm my instruction to the representative of Constable Messer that counsel for the Chief of Police be advised in writing at least two (2) weeks prior to scheduled hearing the statutory basis for the preliminary objection alluded to on March 11, 2013. I also urged the representative for Constable Messer, in the interests of time, to fully disclose the essence of his argument so the Chief can be prepared to address it on May 21, 2013 without the possibility of requesting and adjournment.

Would you please confirm receipt of this notice? Also if this notice does not reflect the recollection of either party please advise. [sic throughout]

17. On May 6, 2013 Mr. Davidson, on behalf of Messer wrote to counsel for the Chief. This is his letter.

Further to the hearing on March 11th./13 involving Constable Chris Messer and the Saint John Police Force, we herein outline our preliminary objections in this matter. Our preliminary objections apply to both the King and McAdam complaints.

Our first preliminary objection is as follows:

- In accordance with Sections 25.1(4) and 25.1 (5), a notice of Settlement Conference must be served on the member within 6 months of the complaint. The complaints were filed on Oct. 5th./10 and Sept. 13th. /10. Therefore the 6 months lapsed on April 5th./11 and March 13th. /11 respectively. The Notice of Settlement Conference dated Jan. 23rd./12 was not served on Constable Messer until Jan. 24th./13.

The Police Act defines Commission under Sections 1 and 18 (1) as:

“There shall be a NB Police Commission appointed by the Lieutenant in Council composed of a chair, vice-chair and such other members as the Lieutenant in Council sees fit to appoint....”.

There is no correspondence on record of the Commission exercising their legislative authority under Section 27.2 (1) to suspend /extend the 6 month limitation requirement to serve a Settlement Conference notice.

Our second preliminary objection is:

- Regardless of our first objection, under no circumstances is the Notice of Settlement Conference dated Jan. 23rd./12 and received Jan. 24th./13 within the 6 months required in Section 25.1 (4) and 25.1 (5).

Our third preliminary objection is:

- No legal Notice of Settlement Conference has ever been properly served on Constable Messer.

Therefore in accordance with Section 25.1(5) the complaints must be dismissed and all lost pay and benefits restored to Constable Messer.

We herein request your client, the Chief of Police for the Saint John Police Force to act in accordance with the Police Act and reinstate Constable Messer with all lost pay and benefits.

Thank you and if you require any further clarification please contact the undersigned.

18. The matter reconvened on May 21, 2013 and in accordance with section 23(3) of the *Code* a court stenographer was present and was sworn to “truly and faithfully report and transcribe the evidence” the proceeding commenced.
19. At the beginning of the proceedings on May 21, 2013 I was advised the New Brunswick Court of Appeal from the bench indicated Messer had been successful in his appeal. However the Court of

Appeal had not rendered its final written decision and thus the same criminal proceedings, which resulted in the adjournment of the March 11, 2013 hearing, were not finalized.

20. Regardless, the representative for Messer wished to proceed with his submissions on the preliminary objection. Counsel for the Chief did not object and I allowed this portion of the hearing to proceed on the basis there would be no prejudice to Messer, even if a new trial were to be ordered by the New Brunswick Court of Appeal.
21. It is my view, in considering section 21(2) of the *Code*, “the subject matter of the arbitration hearing”, at this stage, that being the officer raising preliminary objections cannot be considered the subject matter of the criminal proceedings and vice versa, the criminal proceedings cannot be considered the subject matter of the arbitration hearing.
22. More specifically, as a result of the objection by Messer I was not asked to delve into the merits of the complaints, which I would have determined to be the subject matter of the criminal proceedings. Rather I was requested to rule on the preliminary objection being raised by Messer. To come to a conclusion on this issue did not require me to make a finding as to the merits of either complaint.

3. Facts

23. There was no oral evidence adduced on May 21, 2013, however a number of exhibits were introduced by consent. It is noted Messer objected to the relevance of the documents produced by the Chief. As will be seen by this decision I concluded these documents were relevant to the issues before me and relied on them in my analysis.
24. Messer is a member of the City of Saint John Police Force and was the subject of two conduct complaints. McAdam filed his complaint on September 13, 2010 and King on October 5, 2010.
25. The Chief characterized these complaints as “conduct complaints” pursuant to the provisions of the *Act*. This is evidenced in his correspondence to the Chairman of the New Brunswick Police Commission (Chairman) dated respectively September 23, 2010 (McAdam) and October 8, 2010 (King). Both letters asked for the review of the Commission.
26. Sergeant Brian Cummings (Cummings) of the Miramichi Police Force was appointed as an investigator by the Chief to conduct an investigation into the respective complaints under both the provisions of the *Act* and the *Criminal Code*.
27. In accordance with the provisions of the *Act* Messer was provided with two Notifications of Substance of Conduct Complaint. With respect to the McAdam matter the notification was dated September 23, 2010 and with respect to the King matter it was dated October 8, 2010.
28. As there is a divergence in the facts from this point forward I will address each complaint separately.

King Complaint

29. On October 8, 2010 the Chief wrote to the Chairman and requested the investigation of the conduct of Messer pursuant to the *Act* be suspended.

30. The Chairman answered this request on November 2, 2010 and it is helpful to reproduce the letter in its entirety.

I acknowledge receipt of your letter of October 8, 2010 informing the Commission that you have characterized Mr. King's complaint as a conduct complaint. I also take note of your request to have the *Police Act* investigation suspended, this matter having become an investigation into an alleged offence under the Criminal Code of Canada.

The New Brunswick Police Commission concurs with your decision to characterize this as a **conduct complaint** and further directs that the processing of this Police Act complaint be suspended effective **November 1, 2010** and until such time as the criminal code investigation has been completed, pursuant to section 27.2(1) of the *Act*.

31. On November 9, 2010 Messer was advised by the Chief of the suspension of the investigation into his conduct pursuant to the *Act*.
32. In response to a request from the Chairman the Chief wrote on February 16, 2011 as follows:

In response to your letter of February 4, 2011, requesting an update on the current status of the Randy King file, the investigating officer, Sgt. Brian Cummings of the Miramichi Police Force, has completed his criminal investigation and forwarded it on to the Special Prosecutions branch of the Attorney General's office in Fredericton. As yet, no decision has been rendered as to whether or not charges will be laid.

Your office will be notified as soon as we hear from the Crown on this matter.

33. In response to a further request from the Chairman the Chief wrote on July 11, 2012 as follows:

In response to your letter of June 29, 2012, requesting an update on the current status of the Randy King file, August 13-17, 2012 has been set aside for the criminal trial related to this complaint.

Your office will be notified as soon as criminal proceedings are complete.

34. On September 14, 2012 the Chief again corresponded with the Chairman. The purpose of this letter was to provide an update and to request the suspension of the investigation into the conduct of Messer pursuant to the *Act* be lifted. The contents of this letter are important and as such it is useful to reproduce it.

We refer to our previous correspondence regarding the suspension of the *Police Act* investigation of the above-noted complaint pending the completion of the *Criminal Code* investigation arising from the same circumstances. In particular, I refer to my letter of October 8, 2010, requesting the suspension of the investigation and your response of November 2, 2010 suspending the investigation pursuant to Section 27.2(1) of the *Police Act*.

On August 15, 2012, Constable Messer was found guilty of two charges under the *Criminal Code* and, on September 7, 2012 sentenced to a total of three months in jail.

On September 11, 2012, Constable Messer was notified of his suspension without pay pursuant to Section 26.9 of the *Police Act*. A copy of the Notice of Suspension is enclosed for your information.

I understand that an appeal has been filed with the New Brunswick Court of Appeal on Constable Messer's behalf, both with respect to the conviction and sentence referenced above. It is my further understanding that Constable Messer has successfully applied to be released from custody pending the hearing of his appeal.

Given that the criminal investigation has now been completed, and the charges arising therefrom have been adjudicated (at least at the trial level), please confirm whether the *Police Act* investigation of this complaint may resume or whether the suspension of such investigation remains in place pending the outcome of Constable Messer's appeal.

Thank you for your early attention to this request.

35. The Vice Chair of the Commission signed two letters dated September 24, 2012. The Chief received one on September 28, 2012 and the second one on October 19, 2012. There are very minor differences between the letters and there was no explanation as to why two were signed.
36. In any event, both letters indicate the New Brunswick Police Commission (Commission), after considering various factors, lifted the suspension of the conduct investigation as of September 25, 2012. The most relevant portion of the letters state as follows:

...

Therefore, pursuant to Subsection 27.2(1), the Commission hereby directs that the suspension of the *Police Act* investigation be lifted effective **September 25, 2012**.

This *Police Act* investigation having been suspended after a period of **27 days** had elapsed, the deadline to have the member served with a Notice of Settlement Conference is now **February 26, 2013**. Pursuant to Subsection 29.4(4) of the Act, if in the opinion of the Chief of police, the parties to the settlement conference fail to reach a settlement within a reasonable period of time, the Chief of Police shall serve a Notice of Arbitration Hearing on the subject police officer.

...

37. Messer was advised of the lifting of the suspension and on January 24, 2013 was served with the Notice of Settlement Conference, which was scheduled for February 1, 2013 at 1000 hours. On the face of the document the date of January 23, 2012 appears. His representative advised the Chief that Messer would not attend the conference on February 1, 2013 at 0948 hours.
38. On February 11, 2013 at 1205 hours, Messer was served with a Notice of Arbitration Hearing.

McAdam Complaint

39. On September 23, 2010 the Chief wrote to the Chairman and requested to suspend the investigation of the conduct of Messer pursuant to the *Act*.

40. The Chairman answered this request on October 1, 2010 and it is helpful to reproduce the letter in its entirety.

I acknowledge receipt of your letter dated September 23, 2010 in which you inform the Commission of the receipt and characterization of the above complaint.

The New Brunswick Police Commission concurs with your decision to characterize this complaint as a conduct complaint and I hereby authorize the suspension of the *Police Act* investigation as of October 1, 2010 until completion of all criminal proceedings in this matter.

Please ensure that the officer(s) is/are made aware in writing of the allegation(s) against him/her.

Once the criminal investigation is complete we will await your request for the resumption of the *Police Act* investigation as well as the appointment of an investigator and his/her subsequent report with its summary and recommendations.

41. On October 26, 2010 Messer was advised of the suspension of the investigation his conduct, pursuant to the *Act*.
42. On September 14, 2012 the Chief corresponded with the Chairman. The purpose of this letter was to provide an update and to request the suspension of the suspension of the investigation into the conduct of Messer pursuant to the *Act* be lifted. Except for the dates the contents of this letter are the same as the one written with respect to the King complaint and which is found at paragraph 34 above.
43. The Vice Chair of the Commission signed two letters dated September 25, 2012. The Chief received one on September 28, 2012 and the second one on October 19, 2012. There are very minor differences between the letters and there was no explanation as to why two were signed.
44. In any event, both letters indicated the Commission, after considering various factors, lifted the suspension of the conduct investigation as of September 25, 2012. The most relevant portion of the letters stated the same as the letter issued with respect to the King complaint and which is found at paragraph 36 above.
45. Messer was advised of the lifting of the suspension and on January 24, 2013 was served with the Notice of Settlement Conference, which was scheduled for February 1, 2013 at 1030 hours. On the face of the document the date of January 23, 2012 appears. His representative advised the Chief Messer would not attend the conference on February 1, 2013 at 0948 hours.
46. On February 11, 2013 at 1205 hours, Messer was served with a Notice of Arbitration Hearing.

4. Analysis

1. Authority of Chair to suspend the Police Act investigations

47. Messer argues this objection was with respect to both the King complaint and the McAdam complaint. He submitted the letter from the Chairman suspending the investigation under the

Act was without authority as it was written in the first person and the Chairman has no statutory authority to make this decision.

48. Counsel for the Chief accepted the position of Messer who argued section 27.2(1) & (2) of the *Act* provides the Commission with the legislative authority to suspend the “processing of a conduct complaint by a chief of police”.
49. Counsel for the Chief also accepted the position of Messer who submitted the Commission is defined in the *Act* and includes a chair a vice chair and such other members as may be appointed by the Lieutenant-Governor in council (section 18(1)).
50. Furthermore counsel for the Chief acknowledged for the Commission to make a decision, there must be a meeting of a quorum of the Commission, which consists of at least two members (section 19(2)).
51. Messer argued based upon his reading of the correspondence on October 1, 2010 (McAdam) found at paragraph 40 and November 2, 2010 (King) found at paragraph 30, one must conclude the Chairman was not writing on behalf of the Commission, but rather on his own accord and as such was without jurisdiction.
52. Messer also submitted the disclosure from the Chief provided no evidence of a meeting of the Commission. He submitted I should find the Chief is obliged to submit proof of such a meeting and draw a negative inference from the lack of this evidence.
53. I reject this position for the following reasons.
54. First of all, a reading of the second paragraph of the November 2, 2010 letter (King) in my view confirms without a doubt the Chairman was speaking on behalf of the Commission and not unilaterally. The Chairman states “The New Brunswick Police Commission concurs and futher directs”. In my view these words are clear and unambiguous. I conclude the Chairman is speaking on behalf of the Commission.
55. The wording in the second paragraph of the October 1, 2010 (McAdam) letter is somewhat troublesome as the Chairman states “... I hereby authorize the suspension ...”. That said, these words must be read in the context of the entire paragraph. In fact, these words are in the same sentence, which begin with the words “The New Brunswick Police Commission concurs ...”.
56. Although I would advise the Chairman to more careful with his use of words, I conclude he was speaking on behalf of the Commission and not unilaterally.
57. Secondly, in response to the submission of Messer that the Chief bears the onus of proof to establish the meeting of the Commission occurred, it is my view this is not supportable. The long held tenet “He who alleges must prove” is applicable in this case.
58. The Commission is a separate body. If Messer felt the Chairman was acting unilaterally, he was free to ask for disclosure of these records, call the Chairman as a witness or submit whatever evidence he felt necessary to establish the allegation. In my view it is not incumbent upon the Chief to call evidence to rebut an allegation that a third party did not act within its legislative authority, even if the authority of the third party is intrinsically tied to a process as it is here.

59. In support of this conclusion I rely on the Supreme Court of Canada who spoke about the rebuttable presumption of regularity (*Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 SCR 221). Binnie, J. in his dissent confirmed the extent of evidence necessary to rebut the presumption varies from case to case.
60. Counsel for the Chief noted courts and tribunals alike have adopted the rebuttable presumption. For instance, the New Brunswick Court of Queen's Bench approved the application of this rebuttable presumption (*R v. Maclean*, 1995 CanLii 4105) wherein Russell, J. referred to an earlier decision of the New Brunswick Court of Appeal (*The Queen v. Shaw*, 1983, 45 N.B.R. (2d) 21).
61. In this case, as noted above, the extent of proof, which would be required, was to adduce evidence as to whether or not a quorum of the Commission had met and whether they decided to suspend the "processing of a conduct complaint by a chief of police".
62. This evidence was absent and I am not prepared to draw an adverse inference as submitted by Messer. As a consequence I am of the view, based on the evidence before me the Chairman acted with the authority of the Commission when he sent the two letters which suspended the investigations into the conduct of Messer pursuant to the provisions of the *Act* (October 1, 2010 (McAdam) and November 2, 2010 (King)).

2. Timeliness of the Notice of Settlement Conference

63. As an alternative argument Messer submitted the statutory time limits for serving the Notice of Settlement Conference in the King complaint were exceeded and as a result the process is fatally flawed.
64. The relevant sections of the *Act* are:

25.1(4) The period of time between the filing of a conduct complaint under [subsection 25\(1\)](#) or the commencement of an examination into the conduct of a member of a police force where no conduct complaint is filed under [section 27.1](#) or [29.9](#) and the date the chief of police or civic authority serves the member of a police force with a notice of settlement conference under [section 28.7](#) or [31.6](#) shall not exceed six months.

25.1(5) If a conduct complaint is not processed or an examination into the conduct of a member of a police force where no conduct complaint is filed is not completed within the period of time prescribed in subsection (4), no further action shall be taken against the affected member of a police force and no entry shall be made in the service record of discipline or personnel file of the member of a police force.

27.2(1) Notwithstanding any other provision of this Act or the regulations, the Commission may, on its own motion or on the request of a chief of police, suspend the processing of a conduct complaint under this Subdivision where the processing will be or becomes an investigation into an alleged offence under an Act of the Legislature or an Act of the Parliament of Canada until such time as the Commission directs otherwise.

27.2(2) If the Commission suspends the processing of a conduct complaint by a chief of police, the period of time prescribed in subsection 25.1(4) is suspended

during the period of suspension and resumes on the completion of the period of suspension.

65. Messer submitted this argument does not apply to the McAdam given the choice of words by the Chairman (“completion of all criminal proceedings”). However, with respect to the King complaint the Chairman used the words “until such time as the criminal code investigation has been completed” in suspending the conduct investigation of his complaint. It is these words, which Messer argues flaws the process.
66. I repeat my suggestion to the Chairman to be careful in his choice of words. I extend this same suggestion to the Chief who also used the impugned words in his request and in his notice to Messer. In saying this I agree with Messer, the words “criminal proceedings” (used in McAdam complaint) would, on their face, mean something different than “criminal code investigation” (used in King complaint). But, in my view that does not answer the question entirely.
67. Messer referred me to the notice he received from the Chief on November 9, 2010, which utilizes the words “criminal proceedings”. This notification related to the King complaint.
68. Messer relied heavily on the correspondence from the Chief dated February 16, 2011 (paragraph 32). It was his submission this letter confirmed the “criminal investigation” concluded at least as of this date.
69. It was his submission the fact the words “criminal proceedings” were only used in correspondence from the Chairman to the Chief dated July 11, 2012 established the Chief and Chairman became aware of the error respecting the use of the word “investigation” and attempted to correct this.
70. I find there was no evidence adduced to support this contention.
71. Regardless, Messer submitted the Chairman suspended the conduct investigation from November 1, 2010 to a date when the “criminal investigation” was completed. Messer’s argument was this date was no later than February 16, 2011.
72. So according to his submission the 6 months period in which the Notice of Settlement Conference was to be served was 6 months less 27 days from February 16, 2011. The 27 days reflected the date on which the conduct investigation commenced (October 8, 2010) until it was suspended (November 1, 2010) and are not in dispute in this matter.
73. In the view of Messer he should have been served with the Notice of Settlement Conference no later than mid July 2011. The evidence was he was only served on January 24, 2013. Therefore he submitted the process is flawed and I should find the Notice of Settlement Conference was invalid.
74. Although I agree there is a degree of logic to the submission of Messer, I do not accept it for the reasons to follow.
75. First, I do not agree the “criminal investigation” concluded on February 16, 2011. The letter must be read in its entirety. The Chief said the criminal investigation of the investigating officer has concluded, but it goes farther and stated

... forwarded it on to the Special Prosecutions branch of the Attorney General's office in Fredericton. As yet, no decision has been rendered as to whether or not charges will be laid.

Your office will be notified as soon as we hear from the Crown on this matter.

76. Furthermore, on September 14, 2012 the Chief again wrote to the Chairman and advised

Given that the criminal investigation has now been completed, and the charges arising therefrom have been adjudicated (at least at the trial level), please confirm whether the *Police Act* investigation of this complaint may resume or whether the suspension of such investigation remains in place pending the outcome of Constable Messer's appeal.

77. So, even if I were to accept the position of Messer in which he submitted the use of the words "criminal investigation" were very important, the letter of September 14, 2012 would appear to define the date of termination of the criminal investigation as being between the date of conviction (August 11, 2012), the date of sentencing (September 7, 2012). This is a different date than the February 16, 2011 Messer states was the termination of the criminal investigation.
78. I accept "criminal investigation" were still ongoing as of February 16, 2011 and continued at least until September 14, 2012. As any police officer would know, the investigation of criminal charges oft times continue until a trial commences and even afterwards. For this reason I do not accept the submission of Messer the criminal investigation concluded on February 16, 2011.
79. As noted the Chief wrote to the Chairman asking if the suspension of the conduct investigation could be lifted. The evidence is the Chairman did lift the investigation effective September 25, 2012 and determined the end of the period of 6 months to be February 26, 2013. The calculation of the time period accounted for the 27 days noted above, which as stated is not in dispute.
80. Even if I may be in error in coming to the conclusion as to when the "criminal investigation" concluded, I would also reject the submission of Messer on the basis the Chairman, on behalf of the Commission was completing the exercise of the discretion by lifting the suspension as of September 25, 2012.
81. Section 27.2(1) of the *Act* contemplates two separate decisions the Commission must make. The first one is to suspend the conduct investigation. This is not in contention in this case as it occurred effective November 1, 2010.
82. The second element of the decision of the Commission is to lift the suspension, as the *Act* says, "until such time as the Commission directs otherwise". I find the mandates of the Commission require two separate acts. I do not accept the contention of Messer the letter from the Chairman dated November 2, 2010, suspending the conduct investigation "until such time as the criminal code investigation has been completed, pursuant to section 27.2(1) of the *Act*" did both.
83. In my view, the lifting of the suspension can only be completed after being notified by the Chief of the status of the criminal matters. In the circumstances of this case, it would not be a correct or reasonable interpretation of section 27.2(1) of the *Act* to find the Commission could decide to

both suspend the conduct investigation and direct the lifting of it at the same time. These are separate decisions and each must be made based on the appropriate information available at the time.

84. In my view, for the Commission to lift the suspension of an investigation is a decision of its own which needs to be considered in light of all the circumstances at the time. In this case the circumstances considered were outlined in the letter from the Chief dated September 14, 2012.
85. Finally, even if I am in error in this interpretation, the Commission is an administrative power created by legislation with specific defined authority. If the Commission exceeds its authority or otherwise acts in contravention of the legislation, an arbitrator appointed or selected under the *Act* is not the proper forum to raise these concerns. In my view, if Messer thought the Commission exceeded or otherwise failed to adhere to their legislative authority, the appropriate avenue of challenge would have been to the courts by way of a judicial review.

3. Validity of Notice of Settlement Conference

86. The third plank to the preliminary challenge of Messer was the Notices of Settlement Conferences (both with respect to the McAdam and the King complaints) were invalid.
87. Messer of course submitted the notices were invalid because they were out of time and this argument was canvassed above.
88. Secondly, Messer notes the date on the Notices of Settlement Conference are January 23, 2012 and there was no explanation as to why they were only served on January 24, 2013.
89. I do not accept this submission.
90. If Messer felt this to be the case he ought not to have remained silent after being served. The evidence before me established the representative of Messer, Mr. Hachey, did not raise this issue when he wrote to advise Messer would not be attending the conferences on January 25, 2013. It would not be appropriate for a police officer in circumstances such as these to remain silent and only raise the issue of a wrong date before the arbitrator who has his/her own legislative mandate.
91. Furthermore, as to the date being correct, if one reviews the Notices of Settlement Conference fully it is clear the 2012 was a typographical error and of no import. I draw this conclusion after noting each Notice makes reference to the fact Messer was convicted of a criminal offence on August 15, 2012. If they were dated in January 2012 reference could not have been made to a conviction 7 months later.
92. In my view this is all that is required to convince me the date of the Notices of Settlement Conference should have been January 23, 2013, not 2012.
93. Similar tribunals and courts have considered the consequence of obvious typographical errors. In one case the Nova Scotia Supreme Court – Trial Division concluded a Board appointed under the Police Act of Nova Scotia was within their authority to substitute the proper section number and find the police officer guilty of conduct warranting discipline (*White v. Dartmouth (City)*, [1991] N.S.J. No. 337, Saunders, J.).

94. In more general terms a leading text in the subject of policing reviewed the case law and concluded

Courts of law and appeal tribunals have ruled that various forms of procedural errors do not result in loss of jurisdiction: omission of required warning that hearing may proceed if respondent police officer does not appear; reference to a “major offence” when legislation had abolished the distinction between major and minor discipline offences; mistakes in the particulars; and omitting or adding certain words, or omitting the title of the offence.

(Legal Aspects of Policing, Paul Ceyessens, B.A., LL.B. Volume 1, pages 5-121 to 5-124, Earls court Legal Press Inc.)

95. In my view an improper date which when considered along with the remainder of the document is typographical is the type of error which ought not be fatal to the proceedings. In this case I will read the Notice of Settlement Conference as being issued on January 23, 2013.

5. Conclusion

96. For all of the reasons noted above I dismiss the preliminary jurisdictional argument and find I do have the jurisdiction to deal with the merits of the matters before me.
97. The matters stand adjourned until August 13 to 15, 2013. At the resumption of the hearing I will first consider whether I can proceed to hear this matter or if criminal proceedings are still pending. Specifically, I will look at section 21 of the *Code* and determine if an adjournment is required.

Dated at Fredericton this 18th day of June, 2013

George P. L. Filliter

Arbitrator

List of Exhibits

13-029 Police Act Complaint - 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