

ONTARIO PROVINCIAL POLICE DISCIPLINE HEARING

**IN THE MATTER OF ONTARIO REGULATION 268/10
MADE UNDER THE *POLICE SERVICES ACT*, RSO 1990,
AND AMENDMENTS THERETO;**

AND IN THE MATTER OF

THE ONTARIO PROVINCIAL POLICE

AND PROVINCIAL CONSTABLE JASON JACKSON #13001

CHARGE: DISCREDITABLE CONDUCT

DECISION WITH REASONS

Before: Superintendent Greg Walton
Ontario Provincial Police

Counsel for the Prosecution: Inspector Charles Young
Ontario Provincial Police

Counsel for the Defence: Mr. James Girvin
Ontario Provincial Police Association

Public Complainant: Mr. Dan Leahy

Hearing Date: June 23, August 2, August 3, 2016

This decision is parsed into the following parts: Part I: OVERVIEW; Part II: THE HEARING; Part III: ANALYSIS AND FINDINGS; and, Part IV: DECISION.

PART I: OVERVIEW

Allegation of Misconduct

Provincial Constable (PC) Jason Jackson stands charged with discreditable conduct, in that he did act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Ontario Provincial Police (OPP), contrary to Section 2(1)(a)(xi) of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10, as amended. The edited particulars for PC Jackson are as follows:

On or about August 4, 2013, while on duty:

- PC Jackson unlawfully entered a private residence in order to speak to a male person, Dan Leahy.
- During his interaction with Dan Leahy, PC Jackson spoke to him in an unprofessional manner, saying something to the effect of “you’re a real fucking hero for running into the house and leaving your girlfriend to face the police alone.”

PC Jackson knew or reasonably ought to have known that his conduct was unprofessional and discreditable.

NOTE: The Notice of Hearing (NoH) was amended just prior to being read into the record; the words “real fucking” were added at the request of Prosecution.

Background

An abuse of process Motion was filed by PC Jackson and heard on September 30, 2015. That Motion was dismissed in a written ruling dated November 24, 2015. At the commencement of this Hearing, Prosecution advised A.S.¹ was not a public complainant for the purpose of this Hearing; her complaint related to another officer.

Mr. Brian Whitehead had been the assigned prosecutor for this file and was so assigned during the abuse of process Motion. Inspector (Insp.) Young assumed carriage of the role of prosecutor on behalf of the OPP for the Hearing proper.

¹ Initials utilized to protect the identity of this involved person

Plea

PC Jackson pleaded not guilty and a Hearing proceeded on June 23, August 2 and August 3, 2016.

Decision

After reviewing all the evidence and considering the submissions, I find PC Jackson not guilty. My reasons for this are as follows:

PART II: THE HEARING

Representation

In this matter, Mr. James Girvin represented PC Jackson, and Inspector (Insp.) Young represented the OPP.

Exhibits

The following exhibits were tendered during the Hearing:

- Exhibit 22 : Extract from *Statutory Powers and Procedure Act*
- Exhibit 23 : Extract from *Legal Aspects of Policing*
- Exhibit 24 : Office of the Independent Police Review Director complaint
- Exhibit 25 : Email dated January 28, 2014 from Dan Leahy
- Exhibit 26A : Photo of Leahy residence, Roadside view
- Exhibit 26B : Photo of Leahy residence, Roadside view
- Exhibit 26C : Photo of Leahy residence including deck view
- Exhibit 26D : Photo of Leahy residence, back door view
- Exhibit 26E : Photo of Leahy residence, interior from back door view
- Exhibit 26F : Photo of Leahy residence, interior kitchen
- Exhibit 27 : Floor plan as hand drawn by Dan Leahy during testimony
- Exhibit 28 : Map of Keewatin
- Exhibit 29 : Duty Report of PC Milloy
- Exhibit 30 : Notes of PC Milloy
- Exhibit 31 : Excerpts from 2013 Martin's Criminal Code
- Exhibit 32 : OPP report TP13061405
- Exhibit 33 : Notes of PC Jackson
- Exhibit 34 : *Shockness v. Peel Regional Police*, Board of Inquiry, September 27, 1994

- Exhibit 35 : *Pitts and Ministry of Community and Social Services*, [1985] Divisional Court, O.J. No. 2578
- Exhibit 36 : *Jacobs and Ottawa Police Service*, [2016] Ontario Court of Appeal, O.J. No. 2431
- Exhibit 37 : *R. v. Delong*, [1989] Ontario Court of Appeal, O.J. No. 206
- Exhibit 38 : Duty Report of PC Jackson

Evidence

Prosecution Witnesses

Dan Leahy

Examination in Chief – Prosecution

Mr. Leahy has been a police officer with the Treaty Three Police Service for nine years. While off duty on August 4, 2013 Mr. Leahy became involved in an incident at his residence with members of the OPP including PC Jackson. He subsequently filed a complaint with the Office of the Independent Police Review Director (OIPRD). Mr. Leahy reviewed the timeline involved in that process.

Mr. Leahy explained the events as they unfolded on August 4, 2013 first stating he and A.S. walked home following their attendance at the Kenora Harbourfest. They had attended a concert at the Kenora Pavilion, walked part way home, and then caught a taxi which dropped them off at his residence. They then stood out on the rear deck of his residence for approximately 30 minutes.

The Kenora Harbourfest is a social event, an outdoor concert where alcohol is served. Mr. Leahy testified he had consumed “alcohol in moderation” having three drinks over the four or five hours he was there. He stated drink tickets are sold in sets of four, he had consumed three drinks and A.S. had less than that.

Mr. Leahy stated they got in their taxicab in front of the Huskey Gas Station by the bridge on Route 17 West. He paid \$12.85 cash upon arrival at his residence. He described it as a smooth transaction which occurred at approximately 2:00 am but conceded the dates and times are “fuzzy” after three years’ time.

Exhibits 26 A-F are photographs taken by Mr. Leahy depicting his residence from various perspectives both outdoors and indoors. Mr. Leahy stated the street he resides on runs east/west and the front door of the home faces south. In his testimony, Mr. Leahy described the photographs to the Tribunal and how they each related to the

incident in question. The most significant point being that a person standing on the deck could not fully see into the kitchen area of the residence.

Mr. Leahy indicated that although he could not recall with certainty whether it was the front door or the back door he entered upon his arrival home, he was certain he went straight inside the house, checked on his dogs and then went out on the back deck for about 30 minutes. As he and A.S. were talking, they saw a police car slowing while traveling eastbound down their street. It looked like the officers were looking for someone or an address so A.S. went out front to see if she could help them. He followed her inside the house through the back door while she continued outside through the front door. Mr. Leahy observed A.S. go talk to the police officer while he remained in the kitchen and began to feed the dogs.

Mr. Leahy stated the dog food was kept in a cabinet next to the stove under a cupboard, outside of the view shown in Exhibit 26 E. There were two bags of food, a big bag and a little bag for his two dogs and he was getting water for them by the sink when his interaction with PC Jackson began. He was putting water in the dog bowl; a small little metal bowl. He was just about to run the tap water when a bright light was shone in his face. He could not tell it was a police officer, the light was too bright but he heard a man's voice state "you are a real fucking hero for running inside; your girlfriend is already under arrest." Mr. Leahy stated he had never heard anyone knocking at the door or shouting "police" and had not heard anything until PC Jackson first spoke in his kitchen; he did not even hear the door open.

Mr. Leahy stated initially, he thought it was a joke. He turned his back to the sink and faced the light held by PC Jackson. Mr. Leahy said something to the effect of "I'm kinda freaked out." He was thinking that maybe it was a practical joke but it was not.

Mr. Leahy explained there is a 90 degree turn between the kitchen area and the back door so he could not see the door from where he was standing, conversely, the sink cannot be seen from the back door; the wall and fridge block that view. PC Jackson was standing inside the kitchen just past the floor heat vent by the black mat on the floor as depicted in Exhibit 26 F. Mr. Leahy estimated it is about six feet to walk from the doorway to the kitchen area.

Mr. Leahy stated the rear door has a weather storm door and a screen door; the screen door was closed but not locked and the storm door was open. The screen door is a standard self-closing door.

Mr. Leahy explained PC Jackson was blocking the back door and held his flashlight beam on him while he spoke. Mr. Leahy said he felt he was under arrest already and that PC Jackson wanted to escalate things further and to engage him in a fight; he was caught off guard.

Fearing things would escalate further, and to see what was happening with Ms. A.S., Mr. Leahy testified he walked through the house and was escorted out the front door by PC Jackson. Mr. Leahy stated PC Jackson did not knock on the back door and he did not give permission for PC Jackson to enter his home. Mr. Leahy added that PC Jackson's notes indicate he was uncooperative but he was not saying anything. Being quiet does not equate to being uncooperative he asserted. Mr. Leahy stated PC Jackson was not in a mood to have a discussion. In his first words he was swearing at him. Mr. Leahy questioned rhetorically, "how are you supposed to respond to that kind of aggression?"

Mr. Leahy saw A.S. handcuffed and crying, seated in the back of a police car. Another officer was yelling at her about being drunk. He said he was met at the front door by a female officer.

Mr. Leahy explained the positioning of the cruisers in attendance. He stated they were parked in such a way they were blocking the road and approaching cars were told to turn around as there was insufficient space to pass.

Mr. Leahy heard A.S. telling officers to ask her questions. He believed she was trying to show she was sober by being able to answer their questions appropriately.

Mr. Leahy stated when PC Jackson told him his girlfriend was under arrest, he made him feel he was also under arrest. While he was standing out front, he felt like he was under arrest with PC Jackson standing behind him and another officer in front; he was under their control. Mr. Leahy described PC Jackson as being a bully; his demeanor was "outrageously aggressive." PC Jackson called him "a real fucking hero" again as he placed handcuffs on him. Mr. Leahy stated PC Jackson's notes show he found a rock while conducting a search him, but Mr. Leahy denied having a rock in his possession.

Mr. Leahy stated he was not advised of his rights to counsel or the reason for his arrest. PC Jackson asked him if he was cutting down road signs so he assumed someone took street signs. He stated he remained handcuffed for approximately 30 minutes but still did not know why they had been taken into custody. It was not until later in time he learned of pylons being thrown over a bridge.

Mr. Leahy stated the officers were trying to instigate conflict by making racist comments and laughing about what they were going to tell his Chief of Police. Mr. Leahy and A.S. were each given Appearance Notices for court and they then went inside to research the associated criminal code section. About one week later, one of the other officers attended his residence and advised they did not have to go to court.

Mr. Leahy stated the officers never asked him for his name and he was of the opinion they did not know who he was until after they texted other officers. In his view, this call for service was related to an earlier incident at the Kenora Harbourfest. He described the police response as being “incredibly excessive and aggressive.”

Mr. Leahy testified, asking PC Jackson why he was in his house was not an option. PC Jackson just came inside his home and said what he said; Mr. Leahy never asked him to leave or get out but he did not open the back door for him either.

Cross Examination – Defence

Mr. Leahy clarified he has been with the Treaty Three Police Service for eight years and previously worked one year with the Nishnawbe-Aski Police Service. He received his training at the Ontario Police College. He has an understanding of powers of arrest and entry into dwellings through his training and experience while working as a police officer.

Mr. Leahy has experience conducting investigations, interviewing witnesses and agreed he would not want witnesses speaking to one another or comparing statements during an investigation.

Mr. Leahy stated he did not draft any notes concerning this matter. He explained because it was such a personal event it remained vivid in his memory and notes were not required. Soon after the incident, he began drafting a complaint but it was in progress for nearly six months before he ultimately submitted it.

Mr. Girvin reviewed the section of Mr. Leahy’s OIPRD complaint which speaks to an incident with another officer at the Kenora Harbourfest earlier on August 4, 2013. He agreed it was a negative interaction with the OPP and acknowledged the complaint lodged with regards to that incident was deemed unsubstantiated.

Mr. Leahy advised that at one point he left the Harbourfest to go to an Automated Teller Machine to get money but denied the money was needed to purchase more liquor tickets.

In his complaint to the OIPRD, Mr. Leahy wrote:

I believe this incident spurred the malicious arrest and morally corrupt behaviour that continued later at my residence.

He explained that perspective, stating he doubted very much PC Jackson acted in such a manner every day unless he was dealing with people unable stand up for themselves. Therefore he felt the two were incidents were connected. It was an exaggerated response to a small call for service.

Mr. Girvin pointed out Mr. Leahy's commentary in his email to OIPRD investigators in Exhibit 25. Mr. Leahy opined the involved officers made notes together to support one another. He did not see them write their notes but he said they work together, they drove off together and determined they completed their notes together. He conceded there was no actual evidence they wrote notes together but their notes were not an accurate representation of what happened. He concluded the officers wrote what they needed to in order to avoid being in trouble.

Mr. Leahy reviewed the trip home from the Harbourfest concert with Mr. Girvin. He further advised the cruisers did not have emergency lights activated while approaching his house. He said it is not uncommon for him to feed dogs at 2:00 am. He confirmed that at no point and time was he ever in front of his house before the cruisers stopped in front of his house. Mr. Leahy confirmed he did not hear a knock on either his front or back doors and did not hear anyone call to him from the back door. He added it is a small house and he would have heard someone calling him from the back door.

It was suggested to Mr. Leahy that there was a discrepancy between his testimony and his written statement. In his statement Mr. Leahy indicated he was holding a bag of dog food when the door was pulled open but he testified he was at the sink getting water for the dogs. Mr. Leahy clarified the issue by testifying he was at the sink with dog food and water. He denied the assertion they are different things.

Mr. Leahy reiterated the rear storm door was pulled open and the screen door was closed. He advised the kitchen lights were turned on when PC Jackson walked inside. Mr. Leahy did not tell PC Jackson he was not allowed to be there because he felt saying anything like that could have resulted in him being assaulted; he did not wish to escalate PC Jackson's behaviour so he remained respectful.

Mr. Leahy testified 80 percent of communication is nonverbal and based on that, he knew he was under the control of PC Jackson. PC Jackson came toward him. Having no other option, he walked to the front of the house. He felt he was under arrest and if he walked toward PC Jackson that would have escalated things. PC Jackson escorted out him out the front door.

Mr. Girvin pointed out in his written statement, Mr. Leahy wrote:

Stunned, I walked out the front door to see if it was a prank.

Mr. Leahy testified he was under arrest whether PC Jackson said so or not; PC Jackson was inches away from him, not metres, when he walked outside. PC Jackson never said anything else to him inside the house other than that opening line and he never did tell him he was under arrest.

In his written statement, Mr. Leahy indicated the cruisers out front had their overhead lights activated. He confirmed the lights were not on initially but once parked they left the lights activated the entire time they were there.

Mr. Leahy reiterated he was handcuffed without being told he was under arrest and he was never provided his rights to counsel or cautioned by any officer. He explained that PC Jackson was being antagonistic and creating conflict; walking into his house and swearing at him meant he was looking to fight. PC Jackson walked toward him like he was being herded. Mr. Leahy showed the route taken on the floorplan marked as Exhibit 27. After several minutes outside he was handcuffed and searched. Mr. Leahy agreed he did not make mention of being searched in his written complaint.

It was suggested to Mr. Leahy anyone standing on the deck at his back door would be able to see him standing at the sink area. He denied this, stating a person would have to be inside his home to see the sink area, only the wall could be seen from outside on the deck. There was considerable dialogue examining Exhibits 26 in great detail which resulted in Mr. Leahy stating the photo of the kitchen from his deck provided a generous perspective. Although it is possible to make observations of the interior of the home, only a small area of the kitchen would be visible from the deck.

Re-examination – Prosecution

Mr. Leahy confirmed it would be unusual to make notes of an incident stemming from his personal life. He was emotionally connected to this incident hence the details being more vivid. Notes were not necessary in this instance.

Provincial Constable Keltie Milloy

Examination in Chief – Prosecution

PC Milloy was working uniform patrol on a night shift paired with PC Jackson on August 3, 2013. It was Harbourfest weekend which is a busy event each year. They were dispatched to a report of three or four people throwing pylons off a bridge adjacent to the Husky Station. PC Cain received the actual call and PC Milloy and PC Jackson were back-up officers. The call was dispatched at 2:50 am. An update was provided stating a female suspect wearing shorts and a male suspect, balding, both entered a taxi cab. PC Cain requested that the dispatcher determine where the occupants were dropped off via the taxi company. While driving to the scene, they were provided the description of a blue house with a black car parked out front in Keewatin.

A Map of Keewatin was entered as Exhibit 8 and PC Milloy provided details of the area including the location where the cruisers ended up parking.

As they arrived, PC Milloy stated a female person walked toward the driver's side of their cruiser. PC Jackson rolled down his window and PC Milloy spoke across him and told the female she should speak to PC Cain as he was the investigating officer.

The woman replied she had been yelling at two other women telling them they should be dressed more appropriately. PC Milloy was not familiar with her and did not know who she was. The female became known to her as being A.S.

In her Duty Report marked as Exhibit 29, PC Milloy noted the male entered the home once A.S. was placed into PC Cain's cruiser. PC Milloy speculated he did so because his partner was placed inside the cruiser. PC Milloy stated she did not hear any communication between Mr. Leahy and A.S. nor did she hear any conversation between A.S. and PC Cain.

PC Milloy stated she saw the male, later known to her to be Mr. Leahy, walk through the front door of the residence. She and PC Jackson went to the same front door. PC Milloy knocked on the door several times and she verbally identified herself as a police officer. She repeatedly asked for the male party to come to the door. PC Milloy was yelling loudly and knocking loudly and was of the opinion any occupant would have definitely heard her voice and the knocking. There was no reply or acknowledgment at all.

PC Milloy said her intent at that time was to speak with him to see what he knew about the pylons thrown from the bridge. She agreed that the male she had seen matched the description of somewhat balding but she had not yet formed an opinion of whether he

was the suspect or not. She testified there was not enough information to effect an arrest at that point; arresting him was not on her mind at that time. Shortly thereafter Mr. Leahy and PC Jackson walked out of the residence via the front door.

In her Duty Report, PC Milloy indicated she saw PC Jackson go beside the house and then appear at the front door with Mr. Leahy. Despite that, in her testimony, PC Milloy stated she could no longer recall observing PC Jackson going by the side of the house. She stated she was still banging on the door when the door opened.

PC Milloy testified that she did not know everything that PC Cain knew about the investigation at the time, however PC Cain did tell her Mr. Leahy was the individual who threw the cones over the bridge. PC Milloy subsequently told Mr. Leahy he was under arrest for mischief at which time PC Jackson placed handcuffs on him. Mr. Leahy was arrested at approximately 3:00 am. Her notes indicate 3:06 am but she clarified that is the time she wrote his name in her book, not the time of the arrest.

PC Milloy stated she did not enter the residence at any time nor did she check to see if the door was locked or because she had no grounds to go inside.

PC Milloy indicated she knew Mr. Leahy's name when she read him his rights to counsel and the caution. She also knew he was a Treaty Three officer by then. It was PC Milloy who verbally arrested Mr. Leahy but it was PC Jackson who handcuffed him which is why her notes say he was arrested by PC Jackson.

PC Milloy testified she read Mr. Leahy his rights to counsel from her duty card. She had to explain his rights to counsel and caution which concerned her knowing he was a police officer. PC Milloy advised him she would be telling his Police Chief he did not have a strong understanding of rights to counsel.

PC Milloy was present when Mr. Leahy was searched by PC Jackson. During that search, PC Jackson located a rock in Mr. Leahy's back right pocket. PC Jackson showed it to her in his hand and he asked Mr. Leahy why he had it but she could not recall his reply.

PC Cain released Mr. Leahy on an Appearance Notice and PC Jackson released him from his handcuffs.

PC Milloy described Mr. Leahy as being uncooperative. She asked him if he had been drinking but made no observations suggesting he was intoxicated.

PC Milloy referenced her Duty Report which suggested lights were activated and testified that meant the emergency lights. She stated she did not observe PC Jackson take photographs of Mr. Leahy nor did he show her any text messages on his cell phone.

PC Milloy said she was familiar with term “rez cop” meaning an officer who works in a First Nation Territory. She testified at no time did she use or hear anyone use that term or any other derogatory expression. PC Milloy did not call Mr. Leahy a liar and denied hearing PC Jackson say anything insulting to Mr. Leahy. PC Milloy confirmed she was unable to hear any conversation between PC Cain and A.S.

The information dispatched was that there was a male throwing pylons. PC Milloy was uncertain what further information PC Cain obtained from other sources such as A.S. He identified Mr. Leahy as the one who threw the pylons so she arrested him on the reasonable grounds provided by PC Cain.

Other than PC Jackson showing her the rock, PC Milloy could not recall any further dialogue with PC Jackson while in the front of the residence.

Examination in Chief – Public Complainant

PC Milloy confirmed the description provided by the dispatcher of the male and female party; the female wearing shorts and the male somewhat balding. PC Milloy described the streets in the area and where the residence was situated.

PC Milloy was asked to rank this call for service in terms of severity but merely stated she responds to whatever call is dispatched. PC Milloy said she was banging and yelling at the door. She stated she was there to talk but was asked if she thought that behaviour encouraged conversation? PC Milloy replied by stating she was banging and yelling to get the attention of the individual inside to ensure she could be heard.

Mr. Leahy asked PC Milloy if it was possible he didn’t answer the door because he was dealing with PC Jackson when she was knocking? She stated that was not a possibility originally but that she was not aware PC Jackson was not beside her so later, it could have been possible, yes.

Once at the front door, PC Milloy asked for Mr. Leahy to come outside to talk instead of talking in the doorway because the doorway was at a higher level making him taller; it was easier to talk face to face than at different levels.

PC Milloy stated her earlier comment that Mr. Leahy was uncooperative was based on him not providing his name when asked, refusing to answer the door and initially refusing to answer questions.

PC Milloy advised Mr. Leahy he would be going to jail because she felt it was a possibility, although she was unaware of PC Cain's intent. She testified that she continued to work on the same platoon with PC Jackson for about two years following the incident in question but never discussed the details of this matter.

PC Milloy stated she did not hear any conversation between PC Jackson and Mr. Leahy from within the residence. She could not recall what if anything PC Jackson said when he handcuffed Mr. Leahy.

Cross Examination – Defence

PC Milloy confirmed that prior to this call she was involved in a pursuit regarding an impaired driver in the same neighbourhood. Her emergency lights would have been activated but it is not her habit to make notes on occasions the lights are activated. She agreed this was a basic call for service and that it would not be consistent with her experience for the emergency lights to be activated for such a call. Although she could no longer be certain, she thought the lights were activated while they were parked, they wouldn't have had them on responding to call for service.

PC Milloy confirmed she saw Mr. Leahy and A.S. at the front of the house upon her arrival. Although PC Milloy did not observe signs of intoxication, she noted that Mr. Leahy's conduct did not seem consistent with what one would expect from a police officer.

Mr. Leahy did not verbally express any concern about the appropriateness of the arrest, or the properness of PC Jackson being in his home uninvited.

Re-examination – Public Complainant

PC Milloy stated she was not aware of what happened to the rock after it was located by PC Jackson; she did not see it again afterwards.

Provincial Constable David CAIN (retired)

Examination in Chief – Prosecution

PC Cain spent his entire 30 year career in the Kenora area with a number of assignments such as general patrol, the identification bureau, crime unit, explosive disposal unit, communications centre and community service.

On August 3, 2013 he was working uniform patrol on a night shift from 7:00 pm to 7:00 am. This call was received by him at 2:41 am on August 4, 2013. The complainant was working at the Husky Service Station and had called in saying he saw a male and female on the bridge throwing construction cones off the bridge into the water.

A few minutes later the complainant called back saying those people continued to walk past him to the flooring centre where they got into a taxi. The male was described as having a thin build with short hair if any, and a squeaky voice as if he was losing it. The female was wearing black shorts, had pale legs and darker shoulder length hair.

The complainant saw them go westbound toward Keewatin. PC Cain asked the dispatcher to call the taxi company and learned the street name where the occupants had been dropped along with a description of the house. Within seconds of his arrival there, PC Cain was approached by A.S. who had pale legs, and short hair wearing black shorts, so she matched the description provided. PC Cain stated she was intoxicated, exhibiting slurred speech and she smelled of alcohol. A.S. said she had just been dropped off by taxi. She said “Dan” was with her and she pointed toward the residence. PC Cain looked and saw a male standing out front of the house by a tree. The male was as described, and A.S. said that was Dan.

PC Cain testified he observed Mr. Leahy was standing there watching and as they were talking about the cones, he ran into the house through the front door. PC Cain said A.S. then became upset by Mr. Leahy’s actions. PC Cain then said something to the effect “there’s your hero leaving you here to deal with it.” PC Cain said she got upset about the situation, became hysterical, emphatically stating she did not have any cones. PC Cain then placed her in the rear of his cruiser.

PC Cain went up to the house and spoke with PC Jackson and PC Milloy. They said Mr. Leahy had locked himself in the house. He was not sure what they meant by this but he did not seek clarification. He did not personally make any effort to locate Mr. Leahy. PC Cain told PC Jackson and PC Milloy he would be serving Appearance Notices for the offence of mischief.

PC Cain asked the communication centre to contact the complainant again and was able to confirm the description of the suspects. The male was described as being thin, wearing a dress shirt just as Mr. Leahy was. The female description also matched that of A.S.

A.S. was in the rear of the cruiser sobbing; he tried to calm her down. At that time she said she could lose her job at the courthouse and that Mr. Leahy could lose his job with the Treaty Three Police Service. PC Cain said he was not able to hear the conversation of any others as A.S. was vocal and loud.

Around that time PC Jackson came to the cruiser, where PC Cain was completing the Appearance Notice. PC Cain asked him for the criminal code section number for mischief. While PC Jackson was searching for the number using his cell phone, A.S. blurted out the correct section number from memory. That was the only time PC Cain saw PC Jackson using his cell phone. PC Cain served the Appearance Notice to A.S. at the cruiser and then went up to the house and served Mr. Leahy.

PC Cain's investigation continued and at 3:50 am he took a formal statement from the complainant who said he saw the two individuals get into the gold coloured taxi. However, on August 9, 2013 the construction site manager advised he could not verify how many cones if any, were missing.

PC Cain subsequently determined, under the circumstances, charges were not warranted so he went to Mr. Leahy's residence and advised criminal charges would not be pursued.

PC Cain testified he did not see Mr. Leahy get out of the taxi. Mr. Leahy was on the front yard when he first saw him. PC Cain stated that it was a poor choice of words he used in his report which reads "Police attended just as the suspects were exiting the taxi." In fact the taxi was not there upon the arrival of police at all.

Examination in Chief – Public Complainant

The transcript of the conversation between the call taker and the complainant of the dispatched call as presented in Exhibit 21 reads as follows, "There are 3 or 4 people around there, I don't know which ones are doing it now." PC Cain stated it was his understanding there was a description provided of one male and one female. PC Cain reflected on his notes which also indicate one male and one female suspect. PC Cain confirmed he did not receive any witness statements prior to issuing the Appearance

Notices but was at the time, and remained confident in his testimony that Mr. Leahy was responsible for throwing cones off the bridge.

PC Cain could not recall if it was PC Milloy or PC Jackson who stated Mr. Leahy was locked inside the home. PC Cain testified that he never told the other officers to arrest anyone. Furthermore, he did not tell PC Jackson to try the back door to speak with Mr. Leahy.

Cross Examination – Defence

PC Cain stated he did not activate emergency lights when responding to this call nor did the other officers there at scene; he never saw emergency lights activated at any time during this call.

Defence Witness

Provincial Constable Jason Jackson

Examination in Chief – Defence

PC Jackson has been a police officer with the Kenora OPP since April 2009. He started his night shift on August 3, 2013 at 7:00 pm in working uniform patrol operating a fully marked cruiser accompanied by PC Milloy. That weekend was Harbourfest Festival so it was a busy time.

At approximately 3:00 am, he and PC Milloy assisted PC Cain on a mischief call. He stated they all attended at an address where a taxi had dropped off a male and a female customer who were possibly involved in the mischief.

PC Jackson and PC Milloy were in the same neighbourhood about three hours earlier for a pursuit which ended about a block away. Upon arrival at the residence, PC Jackson observed two people on the front yard. He stated it was not a big lawn and he saw the people standing to the left of the front door. PC Cain spoke to the female later identified as A.S. The male, later identified as being Mr. Leahy, stayed on the lawn initially and then turned and went into the house via the front door. PC Jackson described seeing Mr. Leahy running quickly into the house. He added that neither his nor PC Cain's emergency lights were activated.

PC Jackson stated he and PC Milloy went to the front of the house. PC Milloy knocked several times quite loudly but there was no response. PC Jackson testified he was standing to the left of PC Milloy. He could hear what sounded like the clanging of dishes

from what he believed to be the kitchen window. He used a flashlight to guide him as he walked around the side and to the back of the house. PC Jackson said he did so in case Mr. Leahy couldn't hear the knocking for some reason such as the possibility he may have walked out back.

PC Jackson reviewed Exhibits 26 A-F and identified the front door as the one PC Milloy was knocking on and the rear door as the one he entered with the consent of Mr. Leahy.

Exhibit 26 B shows the side of the house that PC Jackson walked along. He walked up the deck's stairs, pushed open an unlocked gate and then another 12-15 feet to the back door of the house. He then looked through the back door and saw Mr. Leahy standing in the kitchen. PC Jackson stated that if a person was to look straight in the door, they would see the door to another room. But he shuffled to his right and looked in on an angle into the kitchen. In doing so he saw most of Mr. Leahy's body; he could not see his right arm or what was in his left hand but the remainder of his body was clearly visible. He stated he was able to see the stove and the cupboards he was standing in front of.

PC Jackson testified he knocked on the door but he was not able to get the attention of Mr. Leahy so he shone the flashlight through the door which then stimulated Mr. Leahy to come to the door. When Mr. Leahy came to the back door, the screen door was still closed.

PC Jackson advised him to come out front and Mr. Leahy said he was "freaked out." PC Jackson testified that Mr. Leahy let him inside and then followed him out the front door. They were in the kitchen for only seconds before they exited via the front door. PC Jackson stated he went down onto the grass and stood next to PC Milloy. PC Milloy arrested him, advised him of his rights to counsel and cautioned him while it was PC Jackson who placed him in handcuffs and searched him. Prior to the search, he asked Mr. Leahy if he had anything which could be used as a weapon. Mr. Leahy said he did not and when PC Jackson located a large rock in his left rear pants pocket, Mr. Leahy said it was not his.

PC Jackson clarified that he did not know Mr. Leahy was to be arrested while he was at the back door of the residence. He did not know if there had been a conversation at all between PC Cain and PC Milloy while he was at the back of the residence. PC Jackson could not recall hearing any conversation between PC Milloy and PC Cain about whether or not Mr. Leahy was to be arrested.

PC Jackson stated it is his routine to handcuff with hands placed to the rear, to double lock the cuffs and to ask if they have anything they can use as a weapon; this was done in the same manner as always.

PC Jackson testified Mr. Leahy appeared to be intoxicated, he had an odor of alcohol and he seemed confused about why they were there to talk to him. It was post arrest that he learned Mr. Leahy's name and that he was a Treaty Three police officer. PC Jackson believed he learned his name and occupation from PC Cain.

At the time of the arrest, A.S. was in the back of PC Cain's cruiser. Although it is not captured in his notes, PC Jackson recalled PC Milloy asking how a police officer could not understand their rights to counsel when it was his duty to know. PC Milloy stated to him she was going to tell that to his Chief of police.

Mr. Leahy denied throwing pylons off the bridge. He did talk about walking from the festival then getting into a cab and he advised his girlfriend was a clerk at the courthouse. He also made reference to his dogs.

PC Jackson stated that in his opinion, Mr. Leahy was uncooperative noting that generally, cooperative people don't run into a house and then slam the door shut. He was of the opinion it was not possible that Mr. Leahy did not hear the police knocking on his door.

PC Jackson confirmed he had attended PC Cain's car and used his phone to search for the criminal code section number for him. A.S. knew the correct section number off the top of her head.

PC Jackson noted that when he went to the back deck to locate Mr. Leahy, he had no authority to enter the residence and he did not do so until Mr. Leahy asked him in.

PC Jackson denied ever making any type of disparaging comment about "rez cops" or using the term "hero." He has friends who are Treaty Three officers and he would never say such a thing. Not only did he not utter disparaging comments, he did not hear anyone else make such a statement.

PC Jackson explained his notes are not written in exact chronological order. He began making notes at 3:00 am when he said they arrived but the next line shows the name of Mr. Leahy. He would have made that entry after he came out of the house. Other things happened in between then but he had not caught up with his notes by then.

PC Jackson was shown Exhibit 27 and on it, he illustrated the path he took outside from the front of the house to the rear door and then the path they took through the kitchen to the front door.

Cross Examination – Prosecution

PC Jackson confirmed the call for service was a mischief call. All that was being alleged was the throwing of large construction cones off the bridge and some kind of altercation in the area; no one was hurt and there were no threats of any kind. PC Jackson also confirmed he had no information A.S. was responsible, just that a male and female were seen throwing cones and their brief description.

PC Jackson stated he believed they were looking in the right area but would not go so far as to say they had the right people; he believed they had two of the people who had been at the bridge at the time but there were up to four people. PC Jackson agreed that when he first arrived, he did not have grounds to arrest Mr. Leahy. It was put to PC Jackson that he knew before going to the front door, either he or PC Milloy were going to arrest Mr. Leahy but he denied that assertion.

The disparity between PC Jackson's Duty Report and his notes was highlighted by Insp. Young; the notes state "When Cain arrested female for mischief male slammed door shut and went inside" but the report states "...Cain spoke to the female. As we approached, the male turned and went inside and slammed the door shut." PC Jackson testified that although his notes include the word arrested, he did not see A.S. arrested or handcuffed he just saw PC Cain talking to her. PC Jackson denied he attributed the actions of Mr. Leahy to the arrest of A.S.

Insp. Young suggested to PC Jackson that assuming his notes are accurate and A.S. had been arrested, it would then lend credence to the fact Mr. Leahy was also to be arrested. PC Jackson stated he had no intention of arresting anyone. He stated nine times out of 10 what you are dispatched to changes upon further investigation so there was no intent to arrest at that time.

PC Jackson denied the suggestion that while knocking on the door, he was getting impatient and agitated saying he never gets agitated. Insp. Young noted that unlike PC Milloy, PC Jackson went to the back of the house.

PC Jackson confirmed he heard a noise coming from the area of a front window to the left of the front door sounding similar to dishes in a sink. Insp. Young noted on Exhibit 27 that according to the floor plan that is not the kitchen window. PC Jackson agreed

and added it would be quite the clatter to be heard from the kitchen which is why he made note of it. PC Jackson stated he traveled to the left side of the house thinking possibly Mr. Leahy couldn't hear them. He used a flashlight along the side of the house to illuminate his path to the stairs of the deck. He walked along the raised portion, took one step down to the grass and from there to the bottom of the stairs. There was a light shining through on the deck and he had his flashlight out to assist him.

When questioned about his authority to be on the property, PC Jackson stated he was only going to speak with Mr. Leahy, he was there lawfully, no one told him he couldn't be and he wasn't asked to leave. He said he was going to the back of the property to locate Mr. Leahy, to speak with him. Quite frequently in northern communities the front door is not used as an entrance, it is the back door which is the main entrance. PC Jackson stated it was not like he walked in unannounced; Mr. Leahy saw them arrive and knew the police were there to speak with him. PC Jackson felt there was a chance he could not hear them, he was not going to surmise he was ignoring them, he could have been on the back deck.

PC Jackson conceded that once he was on the deck, he knew Mr. Leahy was not but he saw him right away inside the kitchen. PC Jackson said he was looking to gain Mr. Leahy's attention by banging on the rear door.

PC Jackson explained that when at the back door, he needed to look through the door on an angle and even then he could only see a slice of the room, ultimately observing Mr. Leahy's back. He could not see Mr. Leahy's right hand until after he went inside. He had initially surmised he was standing at the sink but he wasn't able to see where the sink was situated until he was inside the room.

With the assistance of Exhibit 26 E, PC Jackson noted Mr. Leahy was standing facing the stove, if he was totally in the front of the sink he would not have seen him.

While referring to Exhibit 26 D, PC Jackson testified he knocked on the upper portion of the door, announced it was the police and asked him to come to the door. He estimated he did this three or four times and he then used his flashlight to send a beam through the room. He said he was not yelling so loudly that neighbours would hear but expected Mr. Leahy to have heard him. Once the flashlight was utilized, Mr. Leahy turned and came to the door. PC Jackson stated they talked at the door very briefly; it was a matter of seconds before he walked inside.

PC Jackson advised that his notes accurately reflect the entire conversation at the door. PC Jackson was asked about the fact his notes say Mr. Leahy told him to go to the front door but his Duty Report says he asked him to go to the front door. PC Jackson did not agree that he used the word “asking” in his report to reflect a softer tone. PC Jackson stated at no point was he in the house until Mr. Leahy gave his consent. PC Jackson told him he needed to speak to the officer out front and they were in the house no more than three or four seconds.

PC Jackson provided additional clarification about locating the rock and then leaving it behind as it held no evidentiary value and about the manner in which his notes were drafted.

PC Jackson reiterated he never made any such comment about being “a hero.” He denied the suggestion he was agitated at Mr. Leahy for not responding to the door and that he therefore went to the back door to arrest him.

PC Jackson disagreed with the assertion he was unable to see Mr. Leahy inside when standing on the deck by the back door. He denied that he did not knock or announce his presence at the back door. PC Jackson denied the assertion he entered the kitchen without consent and confronted Mr. Leahy. PC Jackson denied the suggestion that he directed Mr. Leahy to go to the front door to facilitate his arrest and that he wanted to expedite the investigation to avoid judicial authorization.

Cross Examination – Public Complainant

PC Jackson confirmed that his notebook entries are accurate. When asked why he wrote the word “arrested” concerning A.S. when his testimony was to the contrary, he stated it was not the best choice of words; he had no idea if she was under arrest at that time.

PC Jackson couldn't state with certainty how long he was at the front door before walking to the rear door. He arrived at the scene at approximately 3:00 am and by 3:08 am Mr. Leahy was under arrest. When asked to estimate, PC Jackson stated he was out front of the residence for perhaps three minutes. It would have taken another minute to walk to the back door. He was not at the back door long and then almost instantly they walked through the house to the front yard.

PC Jackson did not tell PC Milloy he was walking to back of the house. He heard noises to the left so he walked around in that direction. The banging was consistent with dishes clanging against one another.

PC Jackson added that many people do not use their front door as main doors and it is therefore not uncommon for him to check elsewhere for another entrance.

PC Jackson reviewed Exhibit 26 D and stated he shone the light through the upper part of the door which was either a screen or glass.

PC Jackson explained the basis for his comment of Mr. Leahy being uncooperative but conceded being invited inside his home was indicative of cooperation. He stated although PC Milloy did not make an observation concerning Mr. Leahy's level of intoxication, he had.

PC Jackson was asked why there was not an actual quote in his notes concerning the consent when there were other quotes included regarding less important matters of interest. PC Jackson testified that although it is not quoted, his notes clearly indicate Mr. Leahy opened the door and invited him in. He stated in his mind, opening a door for a police officer is consent to enter.

PC Jackson stated he did not speak when he cuffed Mr. Leahy, PC Milloy did the talking and affected the arrest. If the door had not been answered, PC Jackson testified he would have walked away and PC Cain could have followed up on the call at a later time.

Re-examination – Defence

PC Jackson reiterated that Mr. Leahy opened the door to talk to him. PC Jackson told him he needed to speak to the officer out front because he did not have all the necessary information, PC Cain did.

Submissions

Defence Submissions

Mr. Girvin highlighted the fact the NoH contains two particulars of allegations, the unlawful entry into a private residence and the comments uttered by PC Jackson. Regarding the unlawful entry, that point is strictly an issue of what the Tribunal accepts; if there was consent, then there is no unlawful entry. Mr. Leahy stated his position that there was no consent, that PC Jackson just walked in unannounced and proceeded to berate him stating "you are a fucking hero." Mr. Girvin noted that evidence only emanates from Mr. Leahy. PC Jackson indicated he made no such statement and that he was invited inside the home.

Mr. Girvin noted that in totality there were a number of exhibits and four witnesses who testified, but one witness not called was A.S. Mr. Girvin stated there would have been limited value in her testimony but it would have corroborated or unsubstantiated Mr. Leahy's evidence in some respects. There is no evidence that corroborates his version of the evening in question. The evidence in many points from PC Jackson, PC Milloy and PC Cain directly contradicts that of Mr. Leahy.

Mr. Girvin submitted the *Pitts* case suggesting it would be assistive as it outlines in depth some of the issues to consider when assessing credibility and reliability of witnesses.

Mr. Girvin stated one of starting points regarding credibility is the fact Mr. Leahy in his Chief Examination did not mention the cruiser emergency lights were activated. Mr. Leahy also testified he and A.S. were on their back deck upon police arrival. They both went inside and she then went out front to see the police. Mr. Leahy said he never went to the front of the house until escorted by PC Jackson.

That was contradicted by PC Cain, PC Milloy and PC Jackson. All three officers testified that shortly after their arrival, Mr. Leahy was standing out front of the house and all three indicate he went inside through the front door. Two officers indicated their emergency lights were not activated and PC Milloy could no longer be certain.

One of the interesting points about the evidence heard is an admission by PC Cain that he made a comment to A.S. about Mr. Leahy being "a real hero" running inside once the police arrived. PC Milloy and PC Jackson deny ever hearing such a statement and PC Jackson denied making such a statement.

Mr. Girvin stated there are some common threads in the evidence. Mr. Girvin suggested Mr. Leahy has taken those threads and woven his own story. Mr. Leahy testified that after PC Jackson entered his home, he described himself as being "freaked out." PC Jackson quoted in his notebook, a reference to Mr. Leahy being "freaked out." PC Jackson said that happened by the back door.

One of the other peculiar points of evidence from Mr. Leahy from his own accord, is that there was no direction from PC Jackson. Mr. Leahy decided to walk out the front door without being told to do so. It may seem like a small factor but it is contrasting to the evidence of PC Jackson. Mr. Leahy said he just naturally chose the option to walk out the front door, that there was some compulsion to do so without direction from PC Jackson.

PC Jackson testified there was conversation at the back door and they needed to go out front to speak to PC Cain. He was then invited into the home. Mr. Girvin submitted that that seems more reasonable and logical. PC Jackson's version is a more logical explanation of how Mr. Leahy went from the kitchen to the front door and then exited the home. Less consistent is the spontaneous act of Mr. Leahy walking out the front door after his own admission there was no conversation; it was strictly based on PC Jackson uttering a disparaging statement toward him.

The evidence from Mr. Leahy initially is that PC Jackson's presence may have been a joke. Mr. Leahy made no utterance, made no comments to PC Jackson about being in his home. Is it reasonable or logical that a trained police officer is not going to say anything to another police officer at this point in time? Mr. Leahy's evidence is that he did not ask a single question and said nothing to PC Jackson. Mr. Leahy raised the spectre this might be a joke. Logically one would think that if this was a joke, he would verbalize that but he said nothing at all.

Regarding the cruisers outside his home, Mr. Leahy said officers had to direct cars around the cruisers as they were blocking the street. A lay person might not bring that to the attention of the OIPRD, but a police officer seeking to have his version corroborated should have mentioned there were possible witnesses driving by the scene. Mr. Girvin stated it is interesting to note, this did not appear to be a through a street, it is not a big neighbourhood so the vehicles driving by at that hour would be considered likely to be local residents. Mr. Leahy decided they were of no apparent consequence.

Mr. Leahy testified, while out front of his residence, no one told him anything, no one arrested him yet he was handcuffed. He was never advised of his rights to counsel. This stands in sharp and direct contrast with the evidence of PC Milloy and PC Jackson. A thread taken from A.S. story and woven into Mr. Leahy's version of events is the fact PC Cain said he did not read A.S. her rights to counsel. That is the only source that type of thing happened.

Its one of the fundamental things police officers do when they arrest someone, they identify the charge and provide rights to counsel and the caution to a charged person. PC Milloy and PC Jackson testified Mr. Leahy was handcuffed and afforded his rights. Mr. Leahy said he was never given his rights to counsel, never told why he was arrested and not told about missing pylons. Mr. Leahy testified PC Jackson inquired about whether he cut down signs. PC Jackson was never asked that in his cross examination.

PC Milloy was present at all times while Mr. Leahy was situated at the front of the house. Mr. Leahy maintained he did not have a rock in his possession. PC Milloy and PC Jackson both state a rock was discovered on his person. It is a peculiar find but it is such a unique fact that it should draw the attention of the Tribunal to credibility and reliability. It does not make sense police officers would make that up. PC Jackson asked Mr. Leahy if he had anything on him that could be used as a weapon. He found it and left it there. It had no impact on the charge of mischief. It is a unique factor corroborated by two witnesses.

Another piece of one of these threads is the cell phone. Mr. Girvin submitted both PC Jackson and PC Milloy testified that at no time was PC Jackson on his phone texting and he never used it to take a photograph. PC Jackson testified he conferred with PC Cain in relation to the correct section for mischief and used an application on his phone. That is the thread of PC Jackson using his phone that Mr. Leahy used. He wove that into PC Jackson taking pictures and sending texts and PC Jackson and PC Milloy laughing about it. This was not the case according to the testimony of two officers, PC Milloy and PC Jackson. Furthermore, the report submitted by the OIPRD showed they checked phone records and that was not the case.

The Tribunal also heard reference from Mr. Leahy about whether “rez cops go to OPC.” Mr. Girvin submitted again there is a thread that seems to exist. PC Milloy said when she was going through the standard process of rights to counsel, it lead to a discussion regarding his lack of understanding. In not comprehending his rights to counsel, PC Milloy responded and conveyed to Mr. Leahy she was going to notify his Chief of Police expressing her concern about his level of knowledge. There is a reference about his training but no disparaging comments. In fact both PC Milloy and PC Jackson rejected the notion of disparaging comments. They testified they would never make such a comment. They both work with Treaty Three police officers regularly and know them personally.

Once released, Mr. Leahy stated he and A.S. went inside to look up the charge. However, A.S. is quite knowledgeable. The evidence is that off the top of her head, she knew the criminal code section for mischief and provided that correct section to the officers so why would she need to research it?

Mr. Leahy described the officers as unbelievably aggressive. That could have been covered by the testimony of A.S. but her evidence is not before the Tribunal.

Mr. Leahy did not take notes. He is a police officer, not a private citizen. This Tribunal has officer notes for the other witnesses but no such documentation from Mr. Leahy. He indicated his complaint was a product of some six months. It would be reasonable for a person trained in memorializing incidents, to make notes even though he was off duty. This too serves to call into question his reliability.

Mr. Girvin submitted that Mr. Leahy believed Exhibit 26 E assisted in painting his picture and story. It is a photograph taken by Mr. Leahy of his kitchen from his back deck and there was extensive debate and discussions including offers to have the OPP attend to take further pictures. Only after lengthy debate did Mr. Leahy finally concede that if a person was at the screen door and they put their face against that door, they could see the area of the stove and some of the cupboards. That is another example which calls in to question the reliability of Mr. Leahy's evidence.

PC Milloy and PC Jackson observed Mr. Leahy go inside the house so they loudly banged on the front door. Mr. Leahy testified his home is small. That is important because there were two sources of sound, the loud knocking and PC Jackson hearing banging pots. That noise drew him to the rear area of the house. PC Jackson said his continued knocking at the back door did not get a reply. But Mr. Leahy said he didn't hear a thing until PC Jackson entered his home and made the disparaging comment. Mr. Leahy's version is not credible and nor is it reliable. PC Milloy and PC Jackson's explanation of events should be preferred, it is credible and reliable.

The evidence from PC Cain was that A.S. was intoxicated. PC Jackson said Mr. Leahy showed signs of intoxication and he smelled of alcohol but PC Milloy did not. PC Milloy said Mr. Leahy responded to her question of whether he had been drinking by saying he didn't know. His responses and actions could be described as being uncooperative but they could also be the conduct of being slightly impaired. Intoxication is consistent with having completely different version of the interaction with the OPP officers.

In his cross examination, Mr. Leahy talked about PC Jackson's body language which prompted him to go to the front door, but he provided no specifics on how he directed him to go, he didn't even say PC Jackson pointed to the door. Mr. Leahy said going to the front door was not something PC Jackson said, but rather it was in his mind. PC Jackson said that exchange happened at the back door. That is another example of why the evidence of PC Jackson should be preferred.

PC Jackson was taken through the interaction at the back door and it was all consistent. There was no specific conversation about “do I have consent” but the testimony of PC Jackson is clear. There was implied consent based on the actions and conditions for him to walk through the house to the front door to where PC Milloy was situated.

Mr. Leahy rejected the notion he has a personal interest in the outcome of this matter but the fact remains he filed a complaint and filed legal action. It is a factor to be considered regarding his credibility.

Exhibit 21 is the OIPRD report. Mr. Girvin submitted it is dangerous for the Tribunal to read documentary evidence and rely upon it when some of the points within have not been put to witnesses. Mr. Girvin submitted, when considering the appropriate weight to apply to documentary evidence that was not put to witnesses, the Tribunal must be cautious of unchallenged versions. It should be given less weight than witness testimony. If the Tribunal is expected to rely on documentary evidence, the specifics of those details should have been put to the witnesses. Therefore it is not acceptable that the officers were not taken through their respective Duty Reports line by line and challenged on any perceived inconsistencies. Insp. Young challenged officers on some points emanating from the Duty Reports, but outside the specifics of those areas, reports such as the OIPRD report cannot receive the same weight consideration.

PC Jackson testified in a forthright manner. Any inconsistencies were explained in a logical and concise manner. He fully refuted the allegations. His testimony was credible and reliable. PC Milloy and PC Cain were also credible and reliable. The Prosecution’s case has to rise to the threshold as articulated in the *Jacobs* case. It has not met that threshold. In totality, the Prosecution has not proven its case and a finding should be made dismissing the charge.

Prosecution Submissions

Insp. Young submitted there were only two witnesses present concerning the allegations as noted on the NoH. It was PC Jackson and Mr. Leahy who were present at the back of the house where it is alleged PC Jackson entered without notice and then in the kitchen where he uttered inappropriate comments. Regarding the first particular, Mr. Leahy’s evidence described PC Jackson in his home which caught him completely off guard. PC Jackson was well into the residence when the attention of Mr. Leahy was first drawn to the beam from PC Jackson’s flashlight. PC Jackson’s comments followed shortly thereafter.

Mr. Leahy admitted saying he was “freaked out” and he also thought it was a joke but it was PC Jackson who controlled the situation. Mr. Leahy felt he was under arrest and restricted. You don’t have to be told you are under arrest to be effectively under arrest. Mr. Leahy did not hear knocking at the back door nor did he speak with PC Jackson at the back door, because it did not happen.

Mr. Leahy did not open the door for PC Jackson nor did he verbally invite PC Jackson into his home. Mr. Leahy did not ask PC Jackson if he had a warrant nor did he tell PC Jackson to get out of his home. It is not disputed PC Jackson was in the home where Mr. Leahy believed he used his size to intimidate him.

Insp. Young discussed legal authorities to search and arrest without warrant for the offence of mischief. He submitted there were no conditions to support a warrant and no exigent circumstances to support an entry without warrant. There was no chance for loss of evidence, no loss of life or fresh pursuit which suggests it comes down to consent or implied consent to enter the residence. Insp. Young submitted Mr. Leahy slammed that consent door shut.

PC Jackson’s notes state A.S. was arrested by PC Cain and then placed in his cruiser. He testified this was an error in his notes.

PC Jackson traveled across the front lawn, walked up the deck steps, opened a closed gate, walked across the deck to see if Mr. Leahy was back there but when he realized he was not outside, PC Jackson did not return to the front of the house. Instead he looked inside. The evidence is that the house is small enough that knocking could be heard from the front and back doors.

PC Jackson testified he did not attend the rear of the residence to effect an arrest but there is no other logical reason for him to go there. Within seconds of appearing at the front door, Mr. Leahy was almost immediately arrested by PC Milloy.

Insp. Young suggested PC Jackson was agitated by their knocking not being acknowledged so he went the rear of the house and entered to arrest Mr. Leahy. He had motivation and he entered unlawfully without authority to do so.

PC Jackson testified that his notes appeared disjointed and they should not have referred to the “sink area.” Exhibit 26 E shows that it was not possible for him to see Mr. Leahy standing at the sink from the deck. His explanation was that he saw the sink after he stepped inside.

Insp. Young conceded it is troubling that Mr. Leahy stated he was not on the front yard upon police arrival but three officers say they saw him enter his front door.

Being “freaked out” and uncooperative” can perhaps be attributed to an officer feeling overwhelmed by a situation that could end his career. That could explain why he wasn’t as responsive and cooperative as could be expected. It was not a level of intoxication which was the cause, rather one self assessing internally how this will impact his future.

Although Insp. Young had submitted the *Delong* case, this was not a situation with an open door and therefore not on point so that case would not be relied upon. Insp. Young agreed the matter of entering the residence comes down to credibility on the issue of consent. He submitted A.S. would not have been able to provide any valuable evidence on this issue and therefore was not called as a witness.

The issue of whether or not cruiser lights were activated remains ambiguous. PC Milloy testified that they were activated and then under cross examination said she was uncertain. There is not much to be gained on this issue in any event.

Insp. Young noted the OIPRD report includes a statement attributed to PC Jackson. When the material was reviewed, it was determined it been done so erroneously. With the consent of Counsel, three lines from Exhibit 17 were deleted. Insp. Young noted there is an onus on an officer in preparing their Duty Report to ensure they are accurate and therefore, the Tribunal can apply significant weight to their content.

Public Complainant Submissions

Mr. Leahy stated he never gave PC Jackson consent to enter his home. PC Jackson did call him “a real fucking hero” on a few occasions. Credibility has been raised quite a few times, PC Cain testified before this Hearing but he had been charged by the OIPRD however he retired before his credibility could be challenged.

PC Jackson’s notes, reports and testimony were all crafted to make his actions appear legal. To decrease Mr. Leahy’s credibility, PC Jackson said he was intoxicated but PC Milloy countered that. PC Milloy did not observe any signs of intoxication.

Mr. Leahy stated his motive for filing a complaint was nothing more than simply having his case heard. He noted it is impossible to collect evidence against police when you are the one under arrest. He stated the civil proceedings have no bearing on this matter and vice versa and the civil matter has been closed for some time. Mr. Leahy submitted he has nothing to benefit from this experience short of telling his side of the story.

Mr. Leahy highlighted what he interpreted as problematic testimony of some witnesses. PC Milloy wrote in her report the lights of her cruiser were on, contrary to what PC Jackson and PC Cain said. Although he stated he was not agitated, PC Jackson was at the front door for only a very short time before he decided to go to the back of the house without even telling his partner. They were standing next to each other yet she didn't hear what he described as the sound of dishes clanging.

Mr. Leahy continued, noting PC Jackson said the deck gate was open. This is not possible he submitted because it is a self-closing gate. Mr. Leahy stated PC Jackson entered his home unannounced and uninvited. He did not tell him to leave because he feared it would agitate him even more and he may get pepper sprayed for example. He said he was freaked out so if it was a joke they would stop.

Mr. Leahy said he was escorted through his home while being degraded without any legal grounds. PC Milloy testified the front door suddenly opened and PC Jackson was standing behind Mr. Leahy. PC Milloy said she asked Mr. Leahy to step out so she could talk to him eye to eye but that's not true, he was asked to step out so he could be arrested.

Mr. Leahy stated he had been accused of being uncooperative for not answering questions forthwith. He submitted he had been cautioned so that no longer met the definition of being uncooperative; it was his prerogative to remain quiet.

PC Jackson's notes suggested A.S. had been arrested but he then testified that is not what he meant. Mr. Leahy stated a police officer does not accidentally use the word arrested, it's a heavy word with a clear purpose. Mr. Leahy submitted written reports and notes are evidence and should be taken seriously by the Tribunal.

It is clear on the NoH, trespassing on the deck and yard is not part of the allegations, but it goes toward PC Jackson's motive of effecting an arrest for an offence that was still under investigation.

From the angle PC Jackson held while standing on the deck, it is not possible to see where Mr. Leahy was standing. PC Jackson attempted to explain this by saying he could see a hand that was stretched out into the sink but that did not make sense. His testimony was fluid as he learned more facts from the Hearing.

PC Jackson may have attended the call in good faith but in less than nine minutes he decided to take extra judicial measures to effect an arrest on a non-arrestable offence.

He entered the residence without consent and was aggressive to the point of dissuading any type of conversation including name calling.

Defence re- submissions

Mr. Girvin submitted it is important to recall that PC Jackson and PC Milloy in terms of the arrest were directed by PC Cain. There is no evidence the actions of PC Jackson or PC Milloy were based on anything other than the information that was provided by PC Cain.

Although there was some suggestion by Mr. Leahy in his testimony that PC Jackson was agitated, there is no evidence corroborating that. Mr. Leahy described PC Jackson as being aggressive and being a bully but there was no description to support this other than the alleged comment made by PC Jackson.

Mr. Leahy testified PC Jackson called him “a hero” inside his house and again while standing outside. No other officer overheard PC Jackson utter that term at any time. There were only two people inside the house at the time of the alleged comment but there were at least three people outside. Neither PC Milloy nor PC Cain corroborated Mr. Leahy which speaks to his credibility.

Duty Reports are submitted at the request of the investigator and when provided, they are in specific response to a complaint. There are different approaches an officer can take such as including all the details or just the ones they deem appropriate considering the allegation. The Tribunal must be mindful and not take them as being entirely accurate statements unless it concerns a specific issue which was brought to the officer’s attention during their testimony.

PART III: ANALYSIS AND FINDINGS

PC Jackson is alleged to have committed discreditable conduct in two ways, by unlawfully entering a private residence and then by making an utterance to the effect of “you’re a real fucking hero for running into the house and leaving your girlfriend to face the police alone.” Prosecution is not required to prove both particulars: PC Jackson can be found guilty of discreditable conduct if it has been determined he made the utterance or unlawfully entered the residence.

In May 2016, the Ontario Court of Appeal in *Jacobs* addressed the standard of proof applicable to a finding of misconduct in the *Police Services Act* (PSA) and stated:

In my view, we are bound by the Supreme Court's statement in *Penner* that the standard of proof in *PSA* hearings is a higher standard of clear and convincing evidence and not a balance of probabilities.

My understanding of clear and convincing evidence is that it is greater than a balance of probabilities but less than the threshold of beyond a reasonable doubt as defined in the Criminal Code. The evidence must be so clear, so reliable, and so convincing as to persuade me the allegations are true and the facts in issue satisfied.

In order to make such a determination in this particular matter, a credibility assessment of the witnesses is required because of the diametrically opposed stance taken concerning the facts in issue. The public complainant emphatically stated PC Jackson unlawfully entered his home without an invitation and without notice before making an inappropriate statement whereas PC Jackson stated he was invited inside the home and categorically denied making a derogatory statement. In this instance, there is no specific independent evidence to corroborate either version of events, hence the need to assess the credibility of these witnesses.

Pitts is an Ontario Divisional Court decision which quotes Sir Robert McGarry:

In order that faith may be maintained in the legal system, it is necessary that losing parties be satisfied that they have been fairly dealt with, that their position has been understood by the judge, and that it has been properly weighed and considered. It is therefore, important that the reasons for a decision be stated, and stated in language that the party who has been dealt the blow can comprehend.

It is incumbent upon me to articulate which witnesses I found to be credible or non-credible and the rationale for coming to such a conclusion. The decision in *Pitts* outlines suggestions which judges often times deliver to juries about how to assess the credibility of witnesses. While not the exhaustive list, the hypothetical suggestions in *Pitts* highlight some of the points for my consideration:

You can, if you see fit, believe one witness against many...With respect to the testimony of any witness, you can believe all that that witness has said, part of it, or you may reject it entirely...Failure of recollection is a common experience and innocent misrecollection is not uncommon...

The extent of his opportunity to observe the matter about which he testified. What opportunities of observation did he in fact have? What are his powers of perception?

It is always well to bear in mind the probability or improbability of a witness' story and to weigh it accordingly. That is a sound common sense test. Did his evidence make sense? Was it reasonable? Was it probable? Does the witness show a tendency to exaggerate in his testimony? Was the testimony of the witness contradicted by the evidence of another witness, or witnesses whom you considered more worthy?

After weighing these matters and any other matters that you believe are relevant, you will decide the credibility or truthfulness of the witness and the weight to be given to the evidence of that witness.

As noted, the allegations in this matter are straightforward and uncomplicated to comprehend. While they are separate particulars, they are joined at the hip. The allegations are that after PC Jackson unlawfully entered the residence of Mr. Leahy, he immediately made the inappropriate comment. While entirely possible, it is extremely unlikely PC Jackson was invited into the residence and then made an utterance to the effect of calling Mr. Leahy "a hero."

There are some inconsistencies in the evidence of the involved OPP officers. The issue of emergency lights could not be pinned down with absolute certainty. PC Cain and PC Jackson were convinced the lights were not activated at any time but PC Milloy was less than confident. PC Cain indicated he did not provide grounds to affect the arrest of Mr. Leahy and in fact testified he would be issuing Appearance Notices. However, PC Milloy testified it was PC Cain who provided her with the necessary grounds to effect an arrest. This incongruent understanding regarding the grounds for arrest has the potential to be a significant issue in another forum. While Mr. Leahy made the unsupported accusation that the officers falsified their notes by drafting them in unison, the inconsistencies in their testimony suggest they did not take the time to rehearse or compare their evidence.

All OPP officers agreed this was PC Cain's call for service. PC Milloy testified that when A.S. approached them, she was immediately directed to PC Cain. It seems to make the most sense then, that PC Milloy would not take it upon herself to arrest Mr. Leahy without direction from PC Cain. Whether this was specific or unintentional on PC Cain's part, I believe PC Milloy's understanding was that Mr. Leahy was to be arrested. In fact

this is consistent with the summary of PC Cain's interview with the OIPRD investigators as noted in the OIPRD report. Exhibit 21 reads:

He (PC Cain) advised Constable Milloy and Constable Jackson that Complainant 2 (Mr. Leahy) was to be arrested for Mischief.

PC Jackson and PC Milloy are unified in their understanding of the arrest of Mr. Leahy. While Mr. Leahy testified he was never told what offence he had been arrested for, nor provided his rights to counsel, the OPP officers testified about the specifics of the arrest in detail, supported by their respective notebook entries. PC Milloy provided intimate detail about how Mr. Leahy did not appear to comprehend his rights to counsel. She expected a police officer to have a better appreciation of rights to counsel and threatened to call his Chief of Police to express her concern. It is illogical to conclude Mr. Leahy did not receive his rights to counsel when you consider this specific element of PC Milloy's description surrounding the arrest. Her testimony was supported by that of PC Jackson and their explanation is holds an air of truthfulness to it.

PC Milloy corroborated the testimony of PC Jackson that he located a rock while searching Mr. Leahy. While it can be considered an insignificant point in the evidentiary scheme of things, for some reason Mr. Leahy denied this assertion. The officers had nothing to gain by falsifying this claim just like Mr. Leahy had nothing to lose by admitting the rock was in his possession. But PC Jackson made detailed notes about this incident in his notebook, notes which were made at the time, not months later in response to allegations of misconduct. Details concerning the rock were not in the notes of PC Milloy, but it was a nonconsequential event which held no evidentiary value so I am not surprised by the omission. She did have an independent recollection of it while testifying. As it was of no benefit to him, I am uncertain as to why Mr. Leahy has no recollection of this incident.

Mr. Leahy suggested the officers were using cell phones to text one another and other officers and also taking unfavourable photographs of him. All three officers in their testimony denied this allegation. Exhibit 17 is the OIPRD report which states:

The telephone records of Constable Jackson were reviewed. There was no evidence of photographs being taken or text messaging at the time of this occurrence or the earlier encounter at the Kenora Pavillion. There is no evidence that the first encounter with the police was in any way related to the second encounter with the police.

This was not an issue presented as a particular on the NoH, but this discrepancy nonetheless creates a credibility issue for Mr. Leahy.

PC Cain, PC Jackson and PC Milloy testified that they each, independently, observed Mr. Leahy standing out front of his residence upon their initial arrival. Mr. Leahy vehemently denied this assertion. I can think of no reason for any of the witnesses to fabricate this point. On its own, nothing significant hangs in the balance. Yet it becomes a significant credibility issue for the individual(s) misleading this Tribunal. Each witness testified with absolute certainty about this issue. The testimony of A.S. on this particular point may or may not have been assistive to the Tribunal.

The notes of PC Jackson state, "Male was hovering near the front door on the porch. When Cain arrests female for mischief male slammed door shut and went inside." In her notes PC Milloy wrote "Leahy had entered his house and refused to answer the door." The notes were completed at the time, unaware that a complaint was forthcoming.

The officers confirmed in their respective Duty Reports that they observed Mr. Leahy enter via the front door. The testimony of all three OPP officers was unwavering on this point.

Mr. Leahy was equally steadfast in his assertion that they were on the back deck when they observed the cruisers on the street. A.S. took the initiative to go meet the officers to provide any necessary assistance but Mr. Leahy walked through the back door and chose to remain inside his house to tend to his dogs.

I have been a police officer for 32 years. The number of occasions during my career I have made personal observations of police officers investigating a matter while I was off duty are innumerable. I can state with confidence that not once have I paid them no attention whatsoever. Perhaps it is simply ingrained in police officers to be perpetually curious or to ensure we are there to provide any necessary assistance. But whatever the reason, in each case, at the very least, I kept observation of the investigating officers. Hence my consternation that Mr. Leahy contended he paid no attention whatsoever to the officers who were on his street at 3:00 am, or to A.S. after she went out to offer assistance.

I find Mr. Leahy and A.S. were on their back deck when they saw the cruisers approach as Mr. Leahy indicated. I find it less likely Mr. Leahy entered and then remained inside his kitchen. Common sense suggests he would have followed A.S. outside to see her interaction with the officers. It is what I believe most anyone would do and what virtually every police officer known to me, would do. I find the testimony of PC Cain, PC Milloy and PC Jackson to be credible and reliable on this point.

The testimony of A.S. may have also assisted with the issue of what happened once the officers left the scene. Mr. Leahy testified they went inside to research the section number on the Appearance Notice but the evidence of PC Cain and PC Jackson is that A.S. provided them with the section number from her personal knowledge. Therefore it makes little sense that they would need to research the criminal code section. It causes me to question Mr. Leahy's claim in this regard.

The probability then that Mr. Leahy was standing out front of his residence and subsequently observed Ms. A.S.' detention in the back of a police car gives credence to another Defence theory. The testimony of PC Milloy is that she knocked and announced herself repeatedly. The evidence of PC Milloy, PC Jackson and Mr. Leahy is that the residence is small enough that they would expect someone inside to hear such a commotion. There is no reason not to believe the testimony of these three individuals on this issue and I do not dispute the efforts of PC Milloy. Therefore, I am left to question why Mr. Leahy chose not to respond. It would be sensible to conclude it was because of the observation he made of A.S. being placed in the rear of a police cruiser. This rationale would be consistent with him re-entering his residence and his decision to then ignore the police at his front door. I do not accept the testimony of Mr. Leahy when he claimed to not hear the knocking and voice of PC Milloy at his front door. Based on his own evidence his house is small. It does not make sense for PC Milloy's efforts to go unheard. If Mr. Leahy remained in his home the entire time and was oblivious to what was unfolding in front of his house one would think he would have responded to the voice and knocking of PC Milloy.

This leads to what happened next. Mr. Leahy testified he was in his kitchen tending to his dogs when he was first confronted by PC Jackson. Mr. Leahy dealing with his dogs is congruent with the testimony of PC Jackson that he could hear a noise consistent with the clanging of dishes in a sink. PC Jackson stated it was that noise, in conjunction with getting no response to PC Milloy's efforts which caused him to attend the rear of the residence. It is agreed that Mr. Leahy was inside his home at that time and that PC Jackson conversed with him inside his kitchen. At issue, is the manner in which PC Jackson entered the home and the conversation that ensued.

The first issue to be determined is whether or not PC Jackson believed he had obtained consent or implied consent to enter the home of Mr. Leahy. Independent witnesses do not exist and there is no way to corroborate their testimony. Therefore, this is an issue which comes down to the credibility of the two witnesses.

The fact that I have taken issue with other aspects of Mr. Leahy's version of events thus far does not suggest his account in this regard cannot be considered accurate.

There is a distinct possibility PC Jackson walked inside Mr. Leahy's residence uninvited. In his mind, all he was looking to accomplish was to bring Mr. Leahy to the front of the residence. It was a simple call for service. It did not necessitate an evidentiary search of the residence and once located, PC Jackson did not effect the arrest of Mr. Leahy. When he saw Mr. Leahy standing in his kitchen, he may not have considered walking inside and asking him to come out front with him as being all that intrusive considering the nature of the call. In his mind, he may have assumed that that act would not lead to a loss of evidence and therefore worth the risk.

Mr. Leahy stated PC Jackson did not knock on the back door and he did not give permission for PC Jackson to enter his home. There was considerable testimony surrounding whether PC Jackson could or could not see Mr. Leahy in the kitchen from his perspective from the deck. I did not find that significant evidentiary value hinged on this particular issue other than credibility. Whether or not PC Jackson could see Mr. Leahy from the deck is not as important as whether or not Mr. Leahy came to the door to let PC Jackson inside. That said I was troubled by the fact Mr. Leahy stated there was no chance he could be seen by PC Jackson from the deck. After considerable deliberation, Mr. Leahy later conceded he may have been able to see him but just partially. He stated Exhibit 26 E provided "a generous perspective."

PC Jackson stated he saw Mr. Leahy from his vantage on the deck by the back door but he would not acknowledge his presence until such time he shone his flashlight beam in his direction. PC Jackson testified they had a brief conversation about coming to the front door to speak to the investigating officer there and Mr. Leahy agreed to do so.

Mr. Leahy's version of how this unfolded does make sense in some regard. If PC Jackson entered the kitchen unannounced and told Mr. Leahy that his girlfriend was under arrest that could have had the effect of convincing him that he too was also under arrest. This could have resulted in Mr. Leahy acquiescing and walking to the front door under the implicit power of PC Jackson. However, I am troubled by the fact Mr. Leahy's written statement to the OIPRD contradicts his testimony slightly. Mr. Leahy wrote:

Stunned, I walked out the front door to see if it was a prank.

In his testimony, Mr. Leahy stated PC Jackson wanted to escalate things further and to engage him in a fight. Mr. Leahy testified he knew he was under the control of PC Jackson and that PC Jackson came toward him. Having no other option, he walked to the front of the house. He felt he was under arrest and if he walked toward PC Jackson that would have escalated things. PC Jackson escorted out him out the front door. He

testified that PC Jackson never said anything else to him inside the house other than that opening line of being “a hero.”

That testimony is not consistent with walking to the front door to determine if this was a prank of some sort.

Mr. Leahy also testified he feared things would escalate further. He said it was because of that fear, and to see what was happening with A.S., that he walked through his house escorted to the front door by PC Jackson. If Mr. Leahy was truly interested in knowing what was happening with A.S., he would have been paying her his attention in the first place rather than feeding his dogs.

But it seems even less likely to me that in response to PC Jackson’s utterance about being “a hero,” Mr. Leahy then instinctively walked to the front door. Mr. Leahy must have walked to the front door because he felt he needed to, either at the direction or suggestion of PC Jackson. PC Jackson’s version of events just seems to be more plausible. In my assessment, it seems more likely that Mr. Leahy opened the door for PC Jackson although he may have done so because he felt obligated to do so. I doubt there was an actual conversation where PC Jackson asked to enter the residence but he assumed he was invited when Mr. Leahy met him at the door. When asked under cross examination by Mr. Leahy, PC Jackson explained that in his mind, opening a door for a police officer is consent to enter.

On a number of occasions in his testimony, Mr. Leahy expressed his frustration and disillusionment concerning the behaviour of the OPP officers he encountered that evening. Similarly, in his written complaint, he suggested the prior incident at the Kenora Harbourfest “spurred the malicious arrest and morally corrupt behaviour that continued later at my residence.” Short of Mr. Leahy’s assertion, there is no evidence to suggest the two incidents are related. This call for service came as a result of a complaint received by the OPP; the responding officers were directed to the residence of Mr. Leahy.

Mr. Leahy said he felt PC Jackson wanted to escalate things further and to engage him in a fight. Mr. Leahy testified that while standing out front of his house, he was under their (police) control. He described PC Jackson as being a bully; his demeanor of was “outrageously aggressive.” Mr. Leahy explained that PC Jackson was being antagonistic and creating conflict. He described the police response in totality as being “incredibly excessive and aggressive.”

Mr. Leahy is not just a civilian member of the public, he is an experienced police officer. I find it surprising that he came to the conclusion the police response was “incredibly excessive and aggressive.” Also, I do not understand the basis for his determination he may be assaulted by PC Jackson and that PC Jackson was looking to escalate matters. Even if everything happened just as he has suggested, it seems to be an unrealistic interpretation of the events. I am surprised how the purported utterance of one sentence, unaccompanied by physical intimidation, could equate to aggression to this degree. While I do not doubt Mr. Leahy testified in a truthful manner concerning his feeling of disenchantment and distress, his claim that the police response was incredibly excessive and aggressive remains unsubstantiated by supporting evidence.

Mr. Leahy testified he did not tell PC Jackson he was not allowed to be in his home because he felt saying anything like that could have resulted in him being assaulted; he did not wish to escalate PC Jackson’s behaviour so he remained respectful. Mr. Leahy stated PC Jackson was not in a mood to have a discussion. He was swearing at him in his opening remarks which prompted Mr. Leahy to question rhetorically, “How are you supposed to respond to that kind of aggression?” Again, Mr. Leahy is a Treaty Three police officer not a lay-person. I am surprised by his lack of any response whatsoever to another officer unlawfully being in his home.

However, simply because I would have responded differently does not mean it did not happen as Mr. Leahy has claimed, but I have not been persuaded by the evidence presented.

I am not convinced that PC Jackson uttered the phrase “you’re a real fucking hero for running into the house and leaving your girlfriend to face the police alone.” Mr. Leahy’s testimony is that PC Jackson called him “a hero” on at least two occasions, once inside the kitchen and again while being handcuffed. PC Milloy would have heard this second utterance. She was clear in her evidence as was PC Jackson that this was never said. PC Cain admitted to making a similar comment to A.S.. Granted, PC Cain is retired and it is possible he could have decided to assume responsibility for the utterance to relieve the burden from serving officers. I have nothing to suggest that was the case however. Instead I have the testimony of two officers who state the utterance was never made.

There was no aspect of PC Milloy’s testimony which did not come across as being honest and forthright. She did not try to corroborate PC Jackson by stating she heard the noise of dishes in the home when she had not. When she was uncertain about the emergency lights being activated she said so in spite of knowing, a negative response might have been more beneficial to PC Jackson. PC Milloy did not state Mr. Leahy exhibited signs of intoxication when doing so could have discredited him. PC Milloy

conceded at some point, it was possible Mr. Leahy did not respond to her because he was dealing with PC Jackson inside the home unbeknownst to her.

While PC Milloy cannot provide evidence of the exchange between PC Jackson and Mr. Leahy inside the home, I have no reason to believe she is lying when she testified PC Jackson did not make any disparaging comments to or in front of Mr. Leahy outside.

I cannot conjure up any reason why Mr. Leahy would suggest PC Jackson entered his home unannounced and uninvited if that were not the case. It remains possible that did in fact occur but a mere possibility does not equate to clear and convincing evidence.

As stated in *Pitts*, after weighing relevant matters I must determine the credibility or truthfulness of the witnesses and the weight to be given to the evidence of those witnesses. In conducting such assessments of witness credibility, there is no way of knowing with absolute certainty who is being truthful concerning the facts in issue; it is an imperfect exercise. However, the evidence of PC Milloy was of great assistance. I could find no reason to question any aspect of PC Milloy's testimony. In many regards it corroborated the evidence of PC Cain and more importantly PC Jackson.

I am left to question Mr. Leahy's testimony concerning the following points: the officers' use of their cell phones; Mr. Leahy denying being in possession of the rock when searched by PC Jackson; Mr. Leahy denying being in the front yard initially; Mr. Leahy's assertion he was not arrested or advised of his rights to counsel; Mr. Leahy's assertion he could not hear the police knocking and calling him at his door; Mr. Leahy's assertion that PC Jackson called him "a hero" in the presence of PC Milloy. While these concerns do not automatically cause the particulars as outlined in the NoH to be fictitious, Prosecution is in an enviable position of having to prove the allegations without the benefit of corroborating evidence to support Mr. Leahy's account. That challenge is now compounded by the setback to Mr. Leahy's credibility.

As noted, the definition of clear and convincing evidence means the evidence must be so clear, so reliable and so convincing as to persuade me the allegations are true and the facts in issue satisfied. The evidence in this case has failed to meet that threshold. While there remains a possibility PC Jackson entered the residence without an open invitation, the evidence falls well short of being clear and convincing. I am even less convinced PC Jackson uttered disparaging comments to, or about Mr. Leahy.

PART IV: DECISION

I find PC Jackson not guilty of discreditable conduct.



Greg Walton
Superintendent
OPP Adjudicator

Date electronically delivered: September 20, 2016