

AND WHEREAS following an investigation under Section 24 of the Royal Newfoundland Constabulary Act, 1992, S.N. 1992, as amended (hereinafter “the Act”) the Chief of Police dismissed the said public complaint of Christina Cox-Fitzpatrick;

AND WHEREAS pursuant to the Act and the Regulations made thereunder, Constable Stephanie Motty, Regimental No. 628, is alleged to have conducted herself in a manner unbecoming a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary by:

- (i) Without good and sufficient cause, making an arrest or detaining a person, contrary to s. 3(1)(a) of the Royal Newfoundland Constabulary Public Complaints Regulations, C.N.R. 970/96 thereby committing an offence contrary to s. 3(2) of the Regulations; and/or
- (ii) neglecting or omitting to promptly and diligently perform her duties as a police officer contrary to s. 3(1)(d) of the Royal Newfoundland Constabulary Public Complaints Regulations, C.N.R. 970/96 thereby committing an offence contrary to Section 3(2) of said Regulations.

The particulars of the alleged offences are as follows:

“That Constable Motty did, between August 27th, 2002 and August 28th, 2002, at or near St. John’s, in the Province of Newfoundland and Labrador, (1) fail to properly and thoroughly investigate a complaint by Peter Fitzpatrick, prior to causing a charge of mischief to be laid against Christina Cox-Fitzpatrick and/or that Constable Motty did, on August 28th 2002, at or near St. John’s, in the Province of Newfoundland and Labrador, (2) arrest Christina Cox-Fitzpatrick unnecessarily and without good and sufficient cause and/or (3) did arrest Christina Cox-Fitzpatrick without reasonable and probable grounds, and/or that Constable Motty did, on August 28th, 2002 at or near St. John’s, in the Province of Newfoundland and Labrador (4) detain Christina Cox-Fitzpatrick without good and sufficient cause.

NOW THEREFORE pursuant to Section 28(2) of this Act this matter is referred to you to conduct a hearing pursuant to the Act and the Regulations made thereunder.

DATED at St. John's, Newfoundland and Labrador, this 11th day of October, 2004.

Signed James Kean
Chief Adjudicator"

The hearing was heard at the offices of the Commission on March 15, 16, 17, 18 & 20, 2005 and April 14, 2005 with Peter O'Flaherty LLB, Counsel for the Commission and James Martin LLB, Counsel for the Respondent.

EVIDENTIARY SOURCES

Eight (8) Exhibits of Documentary Evidence were submitted by Consent of the parties and viva voce evidence was heard from the following witness:

Jacqueline Brazil, LLB	Barrister & Solicitor
Christina Cox-Fitzpatrick	Complainant
Sergeant Kerry Swain	Royal Newfoundland Constabulary
Constable Dwight Feltham	Royal Newfoundland Constabulary
Constable Stephanie Motty	Royal Newfoundland Constabulary/Respondent

FACTUAL BACKGROUND

On August 27th, 2002, at approximately 9:15 p.m., the Complainant, Ms. Christina Cox-Fitzpatrick, confronted her husband, Peter Fitzpatrick, respecting his having given their son money and requesting the child to accompany him for a vehicle ride. The Fitzpatricks were separated at this time and Ms. Cox-Fitzpatrick was being represented by Jacqueline Brazil, LLB of the then law firm, Rose, Brazil. Ms. Fitzpatrick was living with the couple's children at 53 Chapman Crescent, while her husband resided with his girlfriend and co-worker, Kim Griffiths at 52A Frontenac Avenue, Mount Pearl, NL.

Ms. Cox-Fitzpatrick's confronting her, estranged husband, occurred at the residence of Roger Laite, 59 Chapman Crescent, where Peter Fitzpatrick had attended for a visit. A verbal argument between the Fitzpatricks occurred at the door of the Laite residence and ended by Peter Fitzpatrick closing the front door of the home. Peter Fitzpatrick then allegedly witnessed the complainant walk down the Laite driveway and scratch Kim Griffiths' two door, blue Saturn. Mr. Fitzpatrick opened the Laite front door and confronted Ms. Cox-Fitzpatrick on the matter. A heated verbal altercation resulted between Ms. Cox-Fitzpatrick and Peter Fitzpatrick which brought other residents of Chapman Crescent unto their steps of their homes or the street itself. Peter Fitzpatrick told Ms. Cox-Fitzpatrick he would be calling the police. The police were called at 21:33 (9:33 p.m.) on August 27th, 2002 thereby commencing a series of events which ultimately lead to this complaint.

DOCUMENTARY EVIDENCE

Consent #1

Tab No.

Complaint of Christina Cox-Fitzpatrick - 6 Dec 2002	1
Notice of Appeal - 5 Nov 2003	2
Dispatch ticket - 27 Aug 02	3
Statement of Peter Fitzpatrick - 27 Aug 02 (2236)	4
Statement of Roger Laite - 27 Aug 02 (2306)	5
General Occurrence (form R1) Constable. S. Motty - 27 Aug 02	6
General Occurrence (form R2) Constable. S. Motty - 27 Aug 02	7
General Occurrence (form R6) Constable. S. Motty - 27 Aug 02	8

General Occurrence (form R7) Constable. S. Motty - 27 Aug 02	9	
General Occurrence (form R8) Constable. S. Motty - 27 Aug 02	10	
Request for Identification Services - Constable. S. Motty - 28 Aug 02		11
Case Report, Identification Services - Constable. J. Smith - 28 Aug 02	12	
Recognizance - 28 Aug 02	13	
Police Notes - Constable. D. Feltham - 29 Aug 02	14	
Police Notes - Constable. S. Motty - 29 Aug 02	15	
Crown Attorney's Case Report (R9) - Constable. S. Motty (5 pages) - 29 Aug 02	16	
Summation, Provincial Court - W. Baker, J. (4 pages) - 20 Nov 02	17	
Diagram from Statement of Christina Cox-Fitzpatrick to PCC - 4 Dec 03	18	

- Consent #2** Information detailing the Criminal Code of Canada charge.
- Consent #3** Portion of August 27, 2002 notebook entry of Constable Stephanie Motty.
- Consent #4** Royal Newfoundland Constabulary Form RS dated 2003-01-29 completed by Sergeant Kerry Swain.
- Consent #5** Royal Newfoundland Constabulary Policies for "Arrest and Confinement" and "Pre-Court Release Procedures" in effect on August 28, 2002.
- Consent #6** Royal Newfoundland Constabulary Policy revisions for "Arrest and Confinement" [revised May 2, 2003] and "Warrants to Arrest" [revised August 8, 2001].
- Consent #7** Provincial Court of Newfoundland and Labrador, St. John's, Adult Court, Court Case No. 0102A-02247-01 with investigating officer Constable C. B. Matthews.
- Consent #8** "Can Say Statement" of Constable William F. James.
- KS #1** Royal Newfoundland Constabulary Policy for "Pre-Court Release Procedures as admitted into evidence via Sergeant Kerry Swain.

POSITION OF THE PARTIES

(a) Commission

Mr. Peter O’Flaherty, LLB, Counsel for the Commission argued the complainant, Ms. Christina Cox-Fitzpatrick was arrested by Constable Stephanie Motty without a warrant and in violation of the Royal Newfoundland Constabulary’s Policies and Procedures respecting “Arrest and Confinement” and “Pre-Court Release Procedures” (as of August 28, 2002). Further, the Commission’s counsel argued that Constable Stephanie Motty, in the performance of her duties as a member of the Royal Newfoundland Constabulary did not conduct a proper investigation under the circumstances and which reasonable prudence would require in the said circumstances. Mr. O’Flaherty, in his submissions, puts forward the conversation between Ms. Christina Cox-Fitzpatrick and Constable Stephanie Motty, on the door step of 53 Chapman Crescent on August 28, 2002 as the determinating factor in determining whether there was an arrest.

(b) Mr. James Martin, LLB, Counsel for Constable Stephanie Motty, argued there was no arrest of the Complainant by the Respondent and agreed with the Commission’s Counsel as to the circumstantial nature of this complaint and the determinating nature of Ms. Christina Cox-Fitzpatrick’s and Constable Stephanie Motty’s door step conversation. Mr. Martin argued the issuance of a recognizance by Constable Motty to Ms. Cox-Fitzpatrick was an organizational error done in good faith.

ORAL EVIDENCE

(a) **Jacqueline Brazil, LLB**

Ms. Jacqueline Brazil, LLB had been retained by the Complainant, Ms. Christina Cox-Fitzpatrick during the Spring of 2002, respecting the Complainant's separation from her husband, and divorce proceedings. These divorce proceedings were not settled until the Spring of 2004. Ms. Brazil confirms speaking, by telephone, with the Complainant on August 28, 2002 respecting the incident with Peter Fitzpatrick, the prior evening. The Complainant advised Ms. Brazil she had confronted her estranged husband at a neighbour's residence (Roger Laite), and there had been a heated exchange both at the door of the Laite's residence and on the lawn in front of said house. Ms. Cox-Fitzpatrick told Ms. Brazil that this confrontation had not been done discreetly, the Complainant had been accused by her husband of scratching the husband's girlfriend's car and he was going to the police.

Ms. Brazil advised the Complainant to return the August 27, 2002 telephone message of Constable Larry Hickey, by calling Constable Motty, however, Ms. Brazil wished to be present while she spoke to the police. On August 29th, 2002 the Complainant called Ms. Brazil, very upset, and indicated she had been arrested the previous evening. Ms. Cox-Fitzpatrick attended Jacqueline Brazil's law office where her counsel reviewed the documents given to the Complainant by the police on the evening of August 27, 2002 and had informed Ms. Cox-Fitzpatrick that she had been arrested and advised her not to provide the police with the names of any witnesses as they would do their own investigation.

(b) **Christina Cox-Fitzpatrick**

The Complainant, Ms. Christina Cox-Fitzpatrick, is a mother of three (3), a graduate of Memorial University, and employed as a teacher in the City of St. John's. On or about March 3, 2002 she separated from her husband, Peter Fitzpatrick and retained the legal services of Ms. Jacqueline Brazil, LLB, respecting her separation and divorce.

On August 27th, 2002 Peter Fitzpatrick made contact with his son on Chapman Crescent by providing him with money and allegedly requesting that he go for an automobile ride. Upon the Complainant becoming aware of the actions of Peter Fitzpatrick the Complainant proceeded to 59 Chapman Crescent, the home of Roger Laite, where Peter Fitzpatrick was visiting, with the intention of confronting her husband respecting him having made contact with their son. The houses on the same side of the street as the Complainant's and the Laite's residents, are duplexes. The Chapman Crescent itself is a one way street which the Complainant described as being very compacted with everybody knowing everybody. Ms. Cox-Fitzpatrick engaged in a very "heated argument" with Peter Fitzpatrick which escalated upon Peter Fitzpatrick's allegation that the Complainant had scratched his girlfriend's car. Ms. Cox-Fitzpatrick testified, a "screaming match" between herself and her husband ensued which involved the exchange of vulgarities. Peter Fitzpatrick stated to Ms. Cox-Fitzpatrick "I'm going to call the police on you". When the Complainant returned to her home she had a "bad feeling about it" referencing her husband's comments, that he was going to call the police.

Later that evening, the Complainant, while on a telephone call with her mother, received a beep on her telephone indicating an outside message. Upon completion of her telephone call with her mother, Ms. Cox-Fitzpatrick reviewed a telephone message from Constable Larry Hickey, of the Royal Newfoundland Constabulary, advising he had been on the street earlier investigating a complaint and wished to speak with Ms. Cox-Fitzpatrick. Constable Hickey's message indicated he would be off work for a couple of days, however, the Complainant could call Constable Motty at the Mount Pearl detachment after 8:00 p.m. on August 28th, 2002. The Complainant was very concerned and called her solicitor, Ms. Brazil, the next day. Ms. Brazil advised the Complainant to contact the police detachment on the night of August 28, 2002 to acknowledge receipt of the message and that Ms. Cox-Fitzpatrick was aware of the matter and was prepared to give a formal statement in the presence of her lawyer. Ms. Cox-Fitzpatrick testified she called the Mount Pearl detachment and left a message advising she would be available up to 10:30 (ish) p.m. Between 11:00 p.m. and

11:45 p.m. the Complainant was working upstairs in her home on her masters program while her three children were watching the Ms. USA pageant on TV in another bedroom. A knock was heard by a daughter who advised the Complainant of a police car being on the street in front of their residence. Ms. Cox-Fitzpatrick went to the front door of her home to meet the police.

Upon partially opening her front door (1 - 1½ inches) Ms. Cox-Fitzpatrick was met by Constable Motty who identified herself and why she was there. The Complainant acknowledged that she understood the reason for Constable Motty's attendance at her residence. Constable Motty made two requests to speak with the Complainant inside her home and on both occasions entry was denied by Ms. Cox-Fitzpatrick. The Complainant then states that Constable Motty said "you're under arrest" and the Complainant responded "for what?" Constable Motty then said "for damage done to a vehicle and you have two choices, (1) come to the car and sign a release, or (2) come downtown and your children will have to spend the night alone."

Ms. Cox-Fitzpatrick testified there had been a regular conversation between herself and Constable Motty up to the officer saying "you're under arrest". The Complainant put on her shoes and followed the police officer to the police cruiser. At the police car, Ms. Cox-Fitzpatrick entered the back seat and requested the door of the vehicle be left open. Constable Motty complied with the request and the Complainant had one leg in the vehicle and the other leg outside with her foot touching the street's pavement.

The Complainant testified she was unaware of how much was being said to her in the police vehicle as she was upset and concerned with getting back into the house with her kids. Upon exiting the police vehicle the Complainant did request and receive the names of both police officers. Ms. Cox-Fitzpatrick testified her time in the police car was very short, perhaps a couple of minutes in total. Further, she did not recall if anything was read to her in the car.

Ms. Cox-Fitzpatrick 's criminal trial was held in November, 2002 and after said trial she made her decision to make this complaint.

On cross-examination the Complainant states she had "no idea what rights and caution are" and acknowledged Constable Motty had asked her to put her shoes on before leaving her residence to go to the police vehicle. Ms. Cox-Fitzpatrick further stated on cross-examination that Constable Motty was not impolite.

(c) **Sergeant Kerry Swain**

Sergeant Kerry Swain testified that the Recognizances were used by the RNC for any charge and had indeed been used more frequently than appearance notices. In reference to Consent #1, Tab #16, Page 2, at the bottom of the page with reference to "Arresting Officer" Sergeant Swain testified that this indicates Constable Motty was the person handling the file and does not mean the person was arrested. Exhibit KS No. 1 was also entered through Sergeant Swain.

(d) **Constable Dwight Feltham**

Constable Dwight Feltham testified that he and Constable Motty arrived at the Complainant's residence on August 28th, 2002 at 11:37 p.m. Constable Feltham noticed a light on inside the residence and Constable Motty proceeded to the front door of 53 Chapman Crescent whereupon the Complainant answered the door. Constable Feltham testified, had there been no lights on in the house they would have driven on. Constable Motty did request to enter the house but the Complainant refused as there were children in the home. It is Constable Feltham's testimony that Constable Motty requested Ms. Cox-Fitzpatrick to come to the police car to speak with her. He stated that had the Complainant been arrested he would have exited the police car and assisted Constable Motty with the arrest, by searching

the Complainant and then placing her in the police car with the door close to prevent Ms. Cox-Fitzpatrick from fleeing custody.

Constable Feltham stated there was no conversation between Constable Motty and the Complainant respecting her arrest. In reference to Consent #1, Tab #16, it is his testimony that the terms “Arresting Officer” and “Investigating Officer” are used interchangeable.

Constable Feltham stated that Constable Motty gave Ms. Cox-Fitzpatrick her rights and caution in the police car and the Complainant stated she understood, however, on the advice of her lawyer she was not saying anything, but stated she had witnesses. He testified that he requested the names of Ms. Cox-Fitzpatrick’s witnesses as the police would like to speak with them. Constable Feltham asked for the Complainant’s lawyer’s name which the Complainant stated was Jacqueline Brazil and that Ms. Brazil would supply the witnesses’ names. Constable Feltham testified the Complainant stated on the advice of her lawyer she would not be providing a statement nor providing the names of her witnesses. It was at this point that Constable Motty advised Ms. Cox-Fitzpatrick that she would be charged with mischief and at 11:42 p.m. the Complainant was read her Charter rights and given the police caution and right to counsel.

Constable Feltham testified that Recognizances and Promises to Appear were used by the Royal Newfoundland Constabulary at this time verses Appearance Notices.

(e) **Constable Stephanie Motty**

_____ Constable Motty arrived at the residence of Christina Cox-Fitzpatrick on August 27th, 2002 at 11:37 p.m. accompany by Constable Feltham. Constable Motty proceeded to the front door of 53 Chapman Crescent and identified herself and the purpose of her visit to Ms. Cox-Fitzpatrick. Constable Motty requested to enter the home of the Complainant to ask her

questions pertaining to the investigation on two occasions and on both was denied by Ms. Cox-Fitzpatrick. The Complainant informed Constable Motty that on the advice of her lawyer she will not be giving a statement but had witnesses to the confrontation with her husband, Peter Fitzpatrick. Constable Motty asked the Complainant for the names of said witnesses and the Complainant refused to provide the witnesses names. Constable Motty then asked Ms. Cox-Fitzpatrick to come to the police vehicle and reassured the Complainant that she would not be going to the lock-up.

At the police vehicle, Constable Motty opened the rear door of the police vehicle, Ms. Cox-Fitzpatrick sat in the rear seat and requested the door be left open which request was complied with by Constable Motty. Constable Motty again, informed Ms. Cox-Fitzpatrick of Peter Fitzpatrick's complaint, read the Complainant her Charter Rights and caution from the police card, asked the Complainant if she understood and whether she wished to contact counsel. Ms. Cox-Fitzpatrick replied that she understood and already had counsel.

Constable Motty then asked the Complainant her witnesses' names whereupon the Complainant replied said names would be provided by her counsel, Jacqueline Brazil, LLB. At this point Constable Motty formed her opinion that she had reasonable and probable grounds to charge the Complainant and advised Ms. Cox-Fitzpatrick of same and issued a Recognizance.

Constable Motty testified that she now uses Appearance Notices and Summons, and had never seen an Appearance Notice at the Royal Newfoundland Constabulary before this date. Constable Motty stated, that prior to this matter, if you wanted to summons a person to court, you would have used a Recognizance. Constable Motty further testified that she did not state to Ms. Cox-Fitzpatrick that she was arrested, did not close the patrol car door and did not search the person of Ms. Cox-Fitzpatrick. Constable Motty stated, that had the Complainant given her the requested witnesses names, they would have been interviewed and the matter may have taken a different course.

THE LAW

Constable Stephanie Motty, Regimental Number 628 is alleged to have conducted herself in a manner unbecoming a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary by:

- (i) Without good and sufficient cause, making an arrest or detaining a person, contrary to s. 3(1)(a) of the Royal Newfoundland Constabulary Public Complaints Regulations, C.N.R. 970/96 thereby committing an offence contrary to s. 3(2) of the Regulations; and/or
- (ii) neglecting or omitting to promptly and diligently perform her duties as a police officer contrary to s. 3(1)(d) of the Royal Newfoundland Constabulary Public Complaints Regulations, C.N.R. 970/96 thereby committing an offence contrary to Section 3(2) of said Regulations.

The principle or test for proof of these allegations is on the balance of probability as stated in Section 33(1) of the Royal Newfoundland Constabulary Act, 1992 Chapter R-17, amended. The duty of a police officer not to engage in conduct unbecoming a police officer and liable to bring discredit upon the Constabulary is contained in Section 7.(1)(p) of the Royal Newfoundland Constabulary Regulations, as amended.

This Standard of Proof was thoroughly canvassed by Robert M. Sinclair, Q.C. in his decision respecting:

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Public Complaints Commission**

And: **Constable Paul Dinham**

at pages 6 to 9 and I include and adopt that review as authority for the within matter.

“ STANDARD OF PROOF ”

[10] Subsection 33(1) of the Act provides that an Adjudicator “shall make a determination on the balance of probability following a hearing.”

[11] This statutory provision renders inapplicable the standard of proof applicable to criminal proceedings, which is proof “beyond a reasonable doubt”, required for a criminal conviction.

[12] The governing statutory provision incorporates into the present proceeding the lower standard of the degree of satisfaction which governs civil actions.

[13] The test applicable to civil actions has been articulated by the Supreme Court of Canada as follows:

“That civil cases may be proved by a preponderance of evidence or that a finding in such cases may be made upon the basis of a prepondence of probability and I do not propose to attempt a more precise statement of the Rules. I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the findings”.

- Smith v. Smith, [1952] 2 S.C.R. 312, per Cartwright, J. at 331-332;
- Followed by R. v. Oake, [1986] S.C.R. 103, per Dickson, C.J.C. at 138.

[14] Where the applicable burden of proof is that on a balance of probabilities, the Supreme Court of Canada has held that where serious allegations are to be established, a trier of fact is justified in scrutinizing evidence with greater care. This does not change the burden to one of proof “beyond a reasonable doubt”, nor does it constitute a shifting standard. Rather, it is a measure of “...what evidence with what weight that is accorded to it will move the Court to conclude that proof on the balance of probabilities has been established.”

- *Dalton Cartage Ltd. v. Continental Insurance Co., [1982] 1 S.C.R. 164, per Laskin, C.J.C. at 169*

[15] Laskin, C.J.C., felt it was appropriate for a trier of fact in dealing with the burden of proof to consider the cogency of the evidence offered to support proof on the balance of probabilities, and is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered.

- *Ibid.*, at 170.

[16] In doing so Laskin, C.J.C. referred to the words of Lord Denning in *Bater v. Bater*, [1950] 2 All. E.R. 458 at 459 (C.A.):

The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

[17] As expressed in *The Law of Evidence in Canada* (Second Edition), by Sopinka, Lederman and Bryant (1999), Butterworths, at page 158:

Thus, the trier of fact will consider the nature of a fact and issue, that is, its physical, religious, moral, ethical, social or legal character, and the consequences of its decision when determining if it is satisfied on a balance of probabilities.

[18] In *Re: A Complaint by Brian Richard Nolan* (1994), Royal Newfoundland Constabulary Public Complaints Commission, Eaton as Adjudicator, at page 26, interpreted the jurisprudence as follows:

“In some cases, therefore, depending on the seriousness of the allegation, very cogent evidence may be necessary to satisfy the trier of fact.”

[19] The principle that variable degrees of proof may be required by a trier of fact in order to satisfy him or her that the burden of proof has been met on the balance of probabilities, has been applied to professional discipline matters. See *Re Bernstein and College of Physicians and Surgeons* (1977), 15 O.R. (2d) 447 (Ont. H.C.); *Snider v. Assn. Of Registered Nurses (Manitoba)* [1999], 136 Man. R. (2d) 1 (Q.B.); *Sandhu v. College of Physicians & Surgeons (Manitoba)*, [1999] 12 W.W.R. 521 (Man. Q.B.).

[20] However, it has been determined by our Court of Appeal that the primary objective of the Public Complaints Scheme, governed by the Act and the Regulations, is not discipline, although discipline may ultimately result.

[21] The reasoning is that the duties imposed by Part III of the Act, comprising the Public Complaints investigation and hearing process, are fundamentally public in nature and not focused on the private rights or individual police officers.

- *Royal Newfoundland Constabulary Public Complaints Commission v. McGrath (2002), 220 Nfld. & P.E.I.R. 282 (N.L.C.A.)*

- *Followed by Royal Newfoundland Constabulary Public Complaints Commissioner v. Oates (2003), 231 D.L.R. (4th) 648 (N.L.C.A.).*

[22] In an adjudication of a Complaint under this Public Complaints Scheme, the standard of proof is that of a balance of probability.”

Further, I adopt and include Adjudicator Sinclair’s review of “Credibility of witnesses at pages 10 & 11 of the Dinham decision by following R. v. Neary (2000), 187 Nfld. & P.E.I.R. 142 (Nfld. C.A.) In that “The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing condition. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.” O’Neill’s J.A. adoption in R. v. Neary of Finlayson’s J.A.comments in R. v. Gustick (1999), 137 C.C.C. (3d) 53 (Ont. C.A.)at 59 that the proper approach was to consider all of the evidence together and not to assess individual items of evidence in isolation, particularly where the principal issue is witnesses’ credibility and reliability are applicable to this matter.

I include and adopt the overview of the law respecting the Good Faith defence by Jane Kean, Chief Adjudicator in his December 10, 2004, A.D., decision in

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 Public Complaints Commission**

**And: Constable J. Thistle
 and
 Constable B. McGrath**

‘ **B.** DEFENCES

Good Faith - it is apparent tribunals have accepted this defence in a variety of situations especially cases inviting good faith reliance on incorrect policy. The premise is that an officer should not be held individually responsible for an organizational failing. See **Lowry v. Bowen** [2000], 8 A.L.E.R.B.J. 235 at 242; **Crockwell v. Moss**, Nfld. Adj., Nov. 17, 2000; and **Ilnicki v. Ressler** [1996], 5 A.L.E.R.B.J. 161 at 181. In **Bishop v. Buckle**, Nfld. Adj. July, 1998 - allegations of misconduct were dismissed when the officers acted reasonably in a difficult situation involving an arrest. However, it is clear that *good faith* and proper motives will not always provide the insulation of panacea from charges of abuse of authority, but where an officer has exercised his/her best judgement in potentially dangerous circumstances, the behavior must be viewed in context, and should not be subject to microscopic scrutiny or absolute perfection. See **Irvine and Peterborough Police**, [1971] 1 O.P.R. 67 at 68; and **Terrio v. Elliott**, Ont. Bd. of Inq., 4 Dec. 1995, at p.5.

In **Rabah v. Austin**, Ont. Bd. of Inq., 16 Nov. 1998, at p. 13, it was found that officers were not guilty of misconduct despite the fact that entry into the complainant’s residence was contrary to Supreme Court of Canada case law. The inquiry ruled that the officers acted in *good faith* and had not received training concerning developments in the related law - the police force “failed in its responsibility to keep its members properly informed”.’

ANALYSIS

Part I

In reviewing the oral and documentary evidence and applying the law hereinbefore recited respecting the burden of proof on a balance of probabilities, the creditability of witnesses, and the Good Faith defence for organizational failing, I am presented with the following circumstances:

- (1) Mr. Christina Cox-Fitzpatrick and her husband, Peter Fitzpatrick were separated and had both retained legal counsel for their family law litigation;
- (2) Ms. Cox-Fitzpatrick elected to confront Peter Fitzpatrick on August 27, 2002 by attending her neighbour's residence rather than first seeking advice from her retained counsel.
- (3) Ms. Cox-Fitzpatrick in her December 6th, 2002 correspondence to Police Chief Deering (c.c. Minister of Justice) and in her testimony at this hearing confirms the public exchange of unpleasantries (shouting, vulgarities) with her husband and refers to same as a "domestic disturbance".
- (4) Ms. Cox-Fitzpatrick had been told by her husband she would be hearing from the police and indeed, on August 27, 2002, she received and reviewed the telephone message of Constable Larry Hickey. Her husband's statement left Ms. Cox-Fitzpatrick with "a very strange feeling" and upon review of Constable Hickey's message she was "very concerned".
- (5) In the morning of August 28, 2002 the Complainant contacted her lawyer, Jacqueline Brazil, LLB and was told "to go ahead and contact the detachment and explain what had happened." Jacqueline Brazil advised Ms. Cox-Fitzpatrick that if the police required a formal statement then she wished to be present with the complainant (Consent #1, Tab #1). At the hearing, Ms. Brazil, LLB testified she advised Ms. Cox-Fitzpatrick that she wanted to be present if the Complainant spoke to the police;
- (6) The Complainant did call the R.N.C., Mount Pearl, the evening of August 28, 2002 leaving a message advising she would be available to speak to Constable Motty up to around 10:30ish. There was no evidence, whether oral or by document that Jacqueline Brazil, LLB would be present with the Complainant at this time.

- (7) Ms. Cox-Fitzpatrick attended Jacqueline Brazil's LLB office during the morning of August 29th, 2002 and was told "you were arrested". Jacqueline Brazil, LLB advised and the Complainant accepted the position of not providing the police with the names of witnesses as the Complainant, through her legal counsel, would conduct her own investigation.
- (8) In the 05,11,2003 Notice of Appeal (Consent #1, Tab #2) the Complainant states "I appeal Chief Deering's decision for failing to address the rude nature of Constable Motty," yet at the hearing the Complainant testifies Constable Motty was not "impolite".
- (9) As of the time and date of Constable Motty, laying the Criminal Code of Canada, Section 430(1)(a) - 430(4) charge of mischief against Ms. Cox-Fitzpatrick, Constable Motty had completed:
 - (a) Statement of Peter Fitzpatrick - Aug 27/02
 - (b) Statement of Roger Laite - Aug 27/02
 - (c) General Occurrence (Form R1) - Aug 27/02
 - (d) General Occurrence (Form R2) - Aug 27/02
 - (e) General Occurrence (Form R6) - Aug 27/02
 - (f) General Occurrence (Form R7) - Aug 27/02
 - (g) General Occurrence (Form R8) - Aug 27/02
 - (h) Request for Identification Services - Aug 28/02
and had received
 - (i) Case Report, Identification Services - Aug 28/02
- (10) General Occurrence (Form R1), Consent #1, Tab #6 had been redirected by the R.N.C. Readers office (per police officer with Regimental No. 286) with a diary date of 02-09-23 and the reason box having been ticked at "Investigation". The date the file was redirected to Constable Motty was 02-08-28. Constable Motty had the file in her possession upon commencing the night shift of 02-08-28 and completed the Crown Attorney's Case Report (R9) on August 29, 2002. Constable Motty had formed her reasonable and probable grounds to charge Ms. Cox-Fitzpatrick at 11:45 p.m. on August 28, 2002. No further witnesses to be interviewed, her investigation was complete and the Form (R9) prepared on August 29, 2002.

- (11) The evidence of Sergeant Kerry Swain, Constable Dwight Feltham and Constable Motty and the “can-say” statement of Constable William F. James states Recognizances were used by Royal Newfoundland Constabulary officers as a common practice in 2002 and several years previous and were used more frequently, if not exclusively, as opposed to Appearance Notices.

- (12) Whether an arrest or detention had been made:
 - I.
 - (a) Constable Felthman did not accompany Constable Motty to the door of 53 Chapman Crescent nor from the door of said residence to the police car;

 - (b) Ms. Christina Cox-Fitzpatrick was not “patted down” prior to being placed in the police car;

 - (c) The Complainant requested and Constable Motty complied in leaving the rear door of the police car open whereupon Ms. Cox-Fitzpatrick kept one leg outside the door with her foot on the pavement;

 - (d) Constable Motty complied with the Complainant’s two (2) refusals to permit the officer to speak with the Complainant inside of 53 Chapman Crescent;

 - (e) The Complainant, on the advice of Constable Motty, put her shoes on, prior to leaving her residence and following Constable Motty to the police car.

 - II. Constable Motty had no need to arrest the Complainant as:
 - (a) she knew her identity;
 - (b) there was no evidence to secure;
 - (c) the alleged offence was not continuing;

- (d) there were no safety issues respecting the victim or witness(es); and
 - (e) there were no reasonable grounds to believe the Complainant would not attend court.
- III. There are no references to “arrest” in either Constable Feltham or Constable Motty’s notebook entries (Consent #1, Tabs #14 and #15, respectively).
- IV. Consent #1, Tab #16 being RNC Form 9, Crown Attorney’s Case Report dated 02 08 29 contains two (2) pages of page 2 of 3. The first page contains the words “arresting officer” while the second page includes “Assist Arrest”. Sergeant Swain, Constable Feltham, and Constable Motty provided explanations of these terms which explanations preclude the use of said terms as determinative of Constable Motty having arrested the Complainant. The Commission did not call any evidence to challenge or discredit the explanations provided by these police officers. Consent #7 forms part of the hearing evidence and I have reviewed same in comparison to the evidence presented at this hearing. The materials in Consent #7 distinguish it from the present matter, as a De-Tec Security & Investigation Inc. security guard had confronted and clearly detained the male person who was subsequently charged by R.N.C. Constable C.B. Matthews with theft under \$5,000.00 (C.C.C. s. 94/334/b/ii) and released on a Recognizance.
- V. Consent #1, Tab #7 refers to the police going to 53 Chapman Crescent “... to charge” and does not state to arrest.
- VI. Consent #3 states “... went to 53 Chapman Crescent to speak with suspect”.

Part II

Both Counsel for the Commission and Constable Motty have, included in their authorities and argued at the hearing, the November 16, 2001 decision of Jean F. Myles, Adjudicator, in the Royal Newfoundland Constabulary Public Complaints Commission and Constable Donald Maloney. In that matter, the Complainant, Gregory Parsons had given Constable Mahoney name(s) of witnesses who could attest to a fight at the Corner Stone bar. Further, Constable Augustus, in an undercover assignment, had overheard a conversation between Parsons and David Woolridge which supported Parsons' innocence. Constable Mahoney failed to investigate these known sources of information.

Constable Motty did not rely only on evidence which tended to incriminate Ms. Christina Cox-Fitzpatrick rather she requested, both at the doorway of the Complainant's residence and in the police car, any of the complainant's witnesses' names so they could be interviewed. The Complainant refused, hence, Constable Motty was justified in laying the charge. Constable Motty in forming her reasonable and probable grounds took into account all of the information available to her.

Storrey v. Queen (1990), 53 C.C.C. (3d) 316 held that a police officer, prior to charging a person, must have a subjective belief that the accused is probably guilty and this must be objectively justified in all the circumstances. Constable Motty did not shut her eyes to the obvious as referenced in **Dumbell v. Roberts** (1944) ALL ER 326 at 324 (Court of Appeal). Constable Motty formed her opinion based on a detailed and thorough investigation which included the requests to the Complainant to provide the names of her witnesses which requests were refused by Ms. Cox-Fitzpatrick.

Part III

The conflicting evidence of Ms. Christina Cox-Fitzpatrick and Constable Stephanie Motty, as to their August 28, 2002 conversation on the door step of 59 Chapman Crescent and the oral and documentary evidence present at this hearing, necessitates very cogent evidence for me to find, on a balance of probabilities, the requisite elements in the charges set out in s. 3(1)(a) and s. 3(1)(d) of

the Royal Newfoundland Constabulary Public Complaints Regulations (R.N.C.P.C.R.) and section 3(2) of the Royal Newfoundland Constabulary Regulations, (R.N.C.R.).

In assessing the investigation conducted by Constable Motty, I accept the reasoning of Linda Rose, Q.C., adjudicator in **Royal Newfoundland Constable Public Complaints Commission v. Jesso and Riche** dated February 29, 2000 and cited in **RNCPC v. Mahoney** at p. 61:

“It is not for me to determine whether the conclusion reached by Constable Roche (not to lay charges) can be supported by the evidence. It is a question whether the steps he took constituted a thorough investigation.”

I have also reviewed the case law respecting reasonable and probable grounds for arrest and charge and the related duty of a police officer to perform a thorough investigation.

The authorities presented by Counsel for the Commission and Constable Motty focused on arrest/detention and investigation. I find the Complainant, Christina Cox-Fitzpatrick was not arrested nor detained by Constable Motty on August 28, 2002 and further, Constable Motty performed a thorough investigation of the complaint by Peter Fitzpatrick and properly charged Ms. Christina Cox-Fitzpatrick.

I find, on the balance of probabilities, that the words allegedly made by Constable Motty to the Complainant, on the door of 53 Chapman Crescent, were not said, and accept, on a balance of probabilities, the testimonies of Constable Dwight Feltham and Constable Motty as to Constable Motty’s request for the presence of Ms. Christina Cox-Fitzpatrick in the police car on August 28, 2002 and Ms. Cox-Fitzpatrick voluntarily attending, hence, no violation by Constable Motty of the Royal Newfoundland Constabulary “Arrest and Confinement” nor “Pre-Court Release Procedures”.

I also find, on a balance of probabilities, the organizational error by the Royal Newfoundland Constabulary on August 8, 2002 of inappropriate use of Recognizances. However, I accept the

“Good Faith” defence in **Royal Newfoundland Constabulary Public Complaints Commission v. Thistle & McGrath**, a December 10, 2004 decision of James Kean, Chief Adjudicator, presented by Counsel for Constable Motty for issuing the August 28, 2002 Recognizance to Ms. Christina Cox-Fitzpatrick. Constable Motty acted in “Good Faith” and was following the practice, as of August 28, 2002, of officers within the street division of the Royal Newfoundland Constabulary. The uncontradicted testimonies of Sergeant Kerry Swain, Constable Dwight Feltham, and Constable Motty, and the “Can-Say” statement of Constable William F. James established the organizational use of Recognizances which were in contravention of the Royal Newfoundland Constabulary’s Policies and Procedures.

DECISION

Upon consideration of all relevant and material documentary and viva voce evidence presented at the hearing of this matter, upon an extensive review of the authorities and oral submissions of counsel, both for the Commission and the Respondent, I am of the view and so find that Constable Stephanie Motty, Regimental Number 628, on a balance of probabilities, to be not guilty of:

- (i) Without good and sufficient cause, making an arrest or detaining a person, contrary to s. 3(1)(a) of the Royal Newfoundland Constabulary Public Complaints Regulations, C.N.R. 970/96 thereby committing an offence contrary to s. 3(2) of the Regulations; and/or
- (ii) neglecting or omitting to promptly and diligently perform her duties as a police officer contrary to s. 3(1)(d) of the Royal Newfoundland Constabulary Public Complaints Regulations, C.N.R. 970/96 thereby committing an offence contrary to Section 3(2) of said Regulations.

Constable Motty had reasonable and probably grounds to charge the Complainant. Further, I find on the balance of probabilities, that Constable Stephanie Motty did not conduct herself in a manner unbecoming a police officer of the Royal Newfoundland Constabulary, as specifically alleged in the Reference to Adjudicator.

DISPOSITION

In following my aforesaid decision, I determine and order:

- (i) The First Count: Dismissed
- (ii) The Second Count: Dismissed
- (iii) The decision of the Chief of Police appealed from be and is hereby confirmed.
- (iv) Constable Stephanie Motty, Regimental Number 628 of the Royal Newfoundland Constabulary, police officer, is awarded her costs as against the Commission on a party and party basis, to be taxed.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this _____ day of July, A.D., 2005.

B. John Barrett, LLB
Adjudicator

To: Peter O'Flaherty, LLB
c/o Goodland, O'Flaherty
Barristers & Solicitors
205 Water Street, 2nd Floor
St. John's, NL, A1C 1B4
Solicitor for the Commission

To: Ms. Christina Cox-Fitzpatrick
37 Densmore Lane
Kilbride, NL,
The Complainant

To: James Martin, LLB
Roebothan, McKay & Marshall
Barristers & Solicitors
209 Duckworth Street
St. John's, NL, A1C 5W1
Solicitor for Constable Stephanie Motty

July 7, 2005

By Hand

Goodland, O'Flaherty
Barristers & Solicitors
205 Water Street, 2nd Floor
St. John's, NL, A1C 1B4

Attention: Peter O'Flaherty

Dear Sir:

**Re: IN THE MATTER OF the Complaint of Christina
Cox/Fitzpatrick against Constable Stephanie Motty,
Reg. No. 628**

With respect to the above noted matter please find enclosed herewith a copy of the Decision dated July 7th, 2005.

Trusting the enclosed is found in order.

Sincerely yours,

O'DEA, EARLE

B. JOHN BARRETT

BJB:slf

Enclosure

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July 7, 2005

By Hand

Roebothan, McKay & Marshall
Barristers & Solicitors
209 Duckworth Street
St. John's, NL, A1C 5W1

Attention: James Martin, LLB

Dear Sir:

**Re: IN THE MATTER OF the Complaint of Christina
Cox/Fitzpatrick against Constable Stephanie Motty,
Reg. No. 628**

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Sincerely yours,

O'DEA, EARLE

B. JOHN BARRETT

BJB:slf

Enclosure

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July 7, 2005

By Courier

Ms. Christina Cox-Fitzpatrick
37 Densmore Lane
Kilbride, NL,
A1G 1J8

Dear Madame:

**Re: IN THE MATTER OF the Complaint of Christina
Cox/Fitzpatrick against Constable Stephanie Motty,
Reg. No. 628**

With respect to the above noted matter please find enclosed herewith a copy of the Decision dated July 7th, 2005.

Trusting the enclosed is found in order.

Sincerely yours,

O'DEA, EARLE

B. JOHN BARRETT

BJB:slf

Enclosure

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July 7, 2005

By Courier

Royal Newfoundland Constabulary
Public Complaints Commission
Suite E160, Bally Rou Place
280 Torbay Road
St. John's, NL
A1A 3W8

Attention: Lorraine Roche

Dear Ms. Roche:

**Re: IN THE MATTER OF the Complaint of Christina
Cox/Fitzpatrick against Constable Stephanie Motty,
Reg. No. 628**

With respect to the above noted matter please find enclosed herewith a copy of the Decision dated July 7th, 2005.

Trusting the enclosed is found in order.

Sincerely yours,

O'DEA, EARLE

B. JOHN BARRETT

BJB:slf

Enclosure

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