

**IN THE MATTER OF a Complaint by Christopher Hayes dated 19 September, 2002 (the “Complaint”) pursuant to Sub-section 22(1) of the *Royal Newfoundland Constabulary Act, 1992, as amended*, (the “Act”)**

**AND IN THE MATTER OF an Adjudication of the Complaint conducted pursuant to a Reference made by the Chief Adjudicator dated 16 April, 2003 pursuant to Sub-section 28(2) of the Act**

**BETWEEN:**

**ROYAL NEWFOUNDLAND CONSTABULARY  
PUBLIC COMPLAINTS COMMISSIONER**

**AND:**

**CONSTABLE PAUL DIDHAM**

**DECISION**

**INTRODUCTION**

[1] This Decision is rendered following a hearing conducted pursuant to the provisions of the *Royal Newfoundland Constabulary Act, 1992, as amended*, (the “Act”) and the *Royal Newfoundland Constabulary Public Complaints Regulations, as amended*, (the “Regulations”). The hearing was conducted following a Reference to Adjudicator made by the Chief Adjudicator, Royal Newfoundland Constabulary Public Complaints Commission, dated 16 April, 2003 concerning a

Complaint made by Christopher Hayes (“Hayes”) on 19 September, 2002 (the “Complaint”).

[2] Pursuant to the Act and the *Regulations*, Constable Paul Didham (“Didham”), a Member of the Royal Newfoundland Constabulary, bearing Regimental Number 606, is alleged to have conducted himself in a manner unbecoming a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary (“RNC”) by:

- (i) Detaining a person without good and sufficient cause, contrary to Section 3(1)(a) of the *Regulations*, thereby committing an offence under Section 3(2) of the *Regulations* (*the “First Count”*);
- (ii) Improperly using his character and position as a police officer for private advantage, contrary to Section 3(1)(h) of the *Regulations*, thereby committing an offence contrary to Section 3(2) of the *Regulations* (*the “Second Count”*);
- (iii) Carrying out his duties contrary to the Policy and Procedures Manual (the “Manual”), contrary to Section 3(1)(j) of the *Regulations*, thereby committing an offence contrary to Section 3(2) of the *Regulations* (*the “Third Count”*), and,
- (iv) Wilfully making a false, misleading or inaccurate entry in an official document, pertaining to official duties, contrary to Section 3(1)(k) of the

*Regulations*, thereby committing an offence contrary to Section 3(2) of the *Regulations (the "Fourth Count"*.

[3] The Particulars of the alleged offences are that Didham did, on 19 September, 2002, without good and sufficient cause, improperly detain Christopher Hayes ("Hayes") on the parking lot of the Village Mall on Topsail Road, St. John's, and thereafter improperly cause a summary offence ticket to be issued to Hayes in order to harass or penalize Hayes, as a result of a verbal altercation that occurred on 15 September, 2002 during a softball game, and thereby wilfully made a false, misleading or inaccurate written entry on a document pertaining to his official duties, *to wit*, the summary offence ticket to Hayes (the "Seatbelt Ticket").

[4] The function of the Particulars is to give further information to Didham about the offences charged.

[5] The relevant provisions of the *Regulations* are as follows:

*3.(1) A police officer shall not conduct himself or herself in a manner unbecoming to a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary, which shall include but not be limited to the following:*

(a) *without good and sufficient cause make an arrest or detain a person;*

...

(h) *improperly use his or her character and position as a police officer for private advantage;*

...

(i) *carry out his or her duties in a manner contrary to the Policy and Procedures Manual;*

(j) *wilfully or negligently make a false, misleading or inaccurate oral or written statement or entry in an official document or record, or otherwise pertaining to official duties;*

....

(2) *A police officer who violates the provisions of subsection (1) commits a breach of these regulations and is liable to the penalties set out in section 33 of the Act.*

## **ISSUES**

[6] The issue is whether or not Didham improperly detained Hayes on the parking lot of the Village Mall, St. John's, on 19 September, 2002 and improperly caused the Seatbelt Ticket to be issued to Hayes in order to harass or penalize Hayes following a verbal altercation which occurred on 15 September, 2002 during a softball game.

## **PRELIMINARY ISSUES**

### **Elements of the Offences Charged**

- [7] The external circumstances require proof that Didham conducted himself in a manner unbecoming a police officer and liable to bring discredit upon the RNC; that he detained Hayes; that he used his character and position as a police officer in the course of the conduct; that he carried out his duties contrary to the Manual, and that he made a false, misleading or inaccurate entry in issuing the Seatbelt Ticket.
- [8] The offences charged are specific intent offences. In relation to the mental elements of the offences charged, proof is required not only of the intention to cause the external circumstances of the offences, but also of the ulterior mental elements forming parts of the *mens rea*.
- [9] These include: (i) that Didham's character and position as a police officer were used *improperly* and *for private advantage*; (ii) that his detention was *without good and sufficient cause*, and (iii) that the false, misleading or inaccurate entry in the Seatbelt Ticket was made *wilfully*.

## 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 preponderance 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. Oakes*, [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 of 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. (4<sup>th</sup>) 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. Here, the Complaint alleges

that Didham improperly used his position as a police officer for private advantage in order to harass Hayes and thereby made a false, misleading or inaccurate entry on the Seatbelt Ticket. Where, as here, there are serious allegations, very cogent evidence is necessary to satisfy me that the allegations have been proven on a balance of probabilities.

### **Credibility of Witnesses**

[23] The determination of the Issue turns on the evidence, and in turn principally on the credibility, of each of the two principally interested persons in this proceeding, namely: the Complainant, Hayes, and the police officer, Didham.

[24] It is important for the trier of fact to assess the credibility of witnesses, and particularly of interested witnesses participating in a Public Complaints hearing such as this.

[25] This principle was set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C. C.A.), which was adopted and followed by *R. v. Neary* (2000), 187 Nfld. & P.E.I.R. 142 (Nfld. C.A.):

*“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround*

*the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.....*

*The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses.*

- [26] In *R. v. Neary*, O'Neill, J.A. after adopting the above comment from *Faryna v. Chorny*, noted a similar point having been made by Finlayson, J.A. in *R. v. Gostick* (1999), 137 C.C.C. (3d) 53 (Ont. C.A.) at 59. The latter wrote 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.

### **Prior Inconsistent Statements**

- [27] During cross-examination, use is commonly made of self-contradiction to impeach the credit of a witness. By this method, the device of a prior statement is employed. Prior to the hearing, it was written, or uttered by the witness and reduced to writing, the contents of which are inconsistent with the witness' evidence given in direct examination.

[28] In this jurisdiction, the common law rule authorizing this method has been incorporated in Section 12 of *the Evidence Act*, R.S.N.L. 1990, Ch. E-16, as amended. It provides as follows:

*12 (1) A witness may be cross-examined as to previous statements made by him or her in writing, or reduced into writing, relative to the subject matter of the cause, without that writing being shown to the witness, but where it is intended to contradict that witness by that writing, his or her attention shall, before the contradictory proof can be given, be called to those parts of the writing that are to be used for the purpose of contradicting him or her.*

*(2) A judge may, at any time during the trial, require the production of the writing for his or her inspection, and the judge may then make whatever use of it, for the purpose of the trial, that he or she thinks fit.*

[29] I find that these provisions of *the Evidence Act* are applicable to evidence adduced at hearings conducted by Adjudicators in accordance with the Public Complaints Scheme, as set out in the *Act* and in the *Regulations*.

[30] Use was made by Counsel for the purpose of attempting to impeach the credibility of interested witnesses of such statements, in particular the following:

(a) By Hayes:

(i) the Notice of Appeal dated 28 January 2003, handwritten by Hayes and signed by him;

(ii) a Second Complaint dated 27 September 2002, handwritten by Hayes and signed by him;

(b) By Didham:

- (i) a statement taken by Commission Investigator Robert Cuff on 11 February 2003 during the course of an investigation conducted by Cuff pursuant to subsection 26(2) of the *Regulations* when investigating the Complaint, containing utterances made orally by Didham to Cuff, then reduced to writing by Cuff in Cuff's handwriting and later in typewritten format;
- (ii) two typewritten report letters signed by Didham which were addressed to Staff Sergeant B. Cranford dated 13 October, 2002 and 8 January, 2003, respectively, apparently in the course of Cranford's conduct of an investigation of the Complaint pursuant to sub-section 24(4) of *the Act*.

[31] In the case of all but the latter two Didham report letters, the statements were not entered as evidence in proof of the truth of their contents, but solely for the purpose of impeaching the authors' credibility. In the case of the latter two Didham report letters, they were entered as consent exhibits at the outset of the hearings.

[32] A prior-given statement, if contradictory, serves merely to weaken the other evidence given by the witness at the hearing. It was appropriate for Counsel to employ these statements based on their inconsistency with the authors'

testimony in the hearing. In doing so, I have also directed myself as the trier of fact that the contents of those statements do not in themselves constitute evidence, unless the witnesses who made them subsequently adopted them in their evidence at the hearing. See, generally, *the Law of Evidence in Canada*, *supra* at 945ff and *Parrill v. Genge* (1994), 125 Nfld. & P.E.I.R. 27 (N.S.C., T.D.), upheld on appeal at (1997), 148 Nfld. & P.E.I.R. 91 (Nfld. C.A.).

## **BACKGROUND**

[33] During an amateur softball game on Sunday, 15 September 2002 in which Hayes, a taxi driver, was the junior umpire and Didham was a player, allegedly a verbal altercation took place between the two. According to Hayes, Didham swore, criticizing Hayes' umpiring ability; Hayes made a comment about Didham's authority as a police officer not extending to the softball game. Following this, Didham is alleged to have said that Hayes would live to regret making his comment.

[34] Four days later, on the morning of his first shift back to work, Didham, in the uniform of a police officer driving a marked police vehicle, stopped Hayes in his taxicab while Hayes was waiting to be dispatched on a call. Didham then issued Hayes the Seatbelt Ticket, a summary offence ticket for failing to wear a seatbelt while driving on a street nearby. Hayes promptly made out the Complaint.

[35] There is no dispute over the issuance by Didham to Hayes of the Seatbelt Ticket for failing to wear a seatbelt while driving on Hamlyn Road at 9:50 a.m. on Thursday, 19 September, 2002. Nor is it disputed that both had participated in the softball game four days earlier, as player and junior umpire respectively.

## **ISSUES IN DISPUTE**

### **The Softball Game**

[36] On Sunday, 15 September, 2002 Hayes was one of two umpires calling a game in the amateur CEI slow pitch softball league at Victoria Park, St. John's. Didham played with the "Janeway" team. (I take quasi-judicial notice of the facts that "Janeway" refers to a children's hospital, and "CEI" refers to the Church of England Institute.)

[37] The Janeway team occupied the dugout along the first base line behind a chain link fence separating the dugout from the playing field. George "Butch" Barron, the game's chief umpire, was positioned behind home plate. Hayes, the game's junior umpire, was assigned responsibility for calls at first and second bases. Hayes was positioned between first and second bases when Didham, the batter, hit into a double play.

[38] Hayes called another runner 'out' at second base, then he called Didham 'out' at first base.

### ***The Threat***

[39] According to Hayes, as he, Hayes, returned to take up his umpiring position at first base for the next play, Didham, about twenty feet away, exclaimed that Hayes, "...*wouldn't run a fucking bingo game*".

[40] If it was uttered as Hayes has alleged, either the utterer intended to use the word "*couldn't*", instead of "*wouldn't*", or Hayes may have repeated it slightly incorrectly. Nothing turns on the distinction. Whichever word was originally uttered, assuming it was, it is implicit that the utterer allegedly intended the comment to be mockingly derogatory of Hayes' capability as a softball umpire. The comment is reasonably capable of bearing that meaning and having that effect.

[41] Hayes was particularly upset by Didham's use of a swear word in making the comment to him as umpire. Hayes went over to the Janeway dugout, which it was implied that Didham had entered by then, and said through the chain link fence to Didham: "*Excuse me, you are not in your police car today.*"



[42] While they had had no previous encounters, Hayes had noticed Didham at an earlier game, talking to a female police officer. He had surmised that Didham too was a police officer. Didham testified that his girlfriend at the time, now his wife, is a police officer.

[43] After making his comment, Hayes then turned around and started walking back from the dugout fence towards first base. Hayes said he heard Didham then retort: "*You are going to live to regret that*" (the "*Threat*").

[44] Hayes had his back to Didham and to his team-mates in the dugout. The two were about ten feet apart. Hayes was confident it was Didham's voice, although he did not see him utter it.

[45] Didham denied having any recollection of such an altercation occurring at the game. He didn't recall making the first comment to Hayes. Didham conceded it was possible he might have said something, because he gets called out most of the time at first base. Didham denied that he heard Hayes make any comment about him not being in his police car.

[46] Didham denied making the Threat to Hayes, saying he knew he didn't say that.

***Butch Barron, Chief Umpire***

- [47] Barron, the umpire in charge of that playoff game and the CEI league's umpire-in-chief, testified that from his position behind home plate, he saw an argument taking place about 50 or 60 feet away by the first base dugout. Barron left home plate and walked to the first base dugout.
- [48] Barron couldn't make out what was being said, nor by whom, as he was "*going deaf*" at the time. Barron was not wearing a hearing aid at the game, although he did so when testifying at the hearing.
- [49] Barron perceived that not only was it Didham who had been involved in the argument with Hayes, but also one of his Janeway team-mates, referred to during the hearing as 'the other Chris'.
- [50] By his own admission, Barron's virtual deafness impaired his hearing ability that day. Also, according to Hayes' testimony, it was only the latter two comments which had been exchanged at or near the dugout. Accordingly, by the time Barron arrived there, the exchange would have terminated, had its extent been limited to the exchange recounted by Hayes.

[51] Barron's testimony proved to be of no assistance in corroboration of Hayes' version as to what was said, nor by whom. However, Barron having had sight of an argument involving at least Hayes and Didham, and the act of Barron in leaving his home plate position and intervening, serves to corroborate Hayes' version, at least to the extent that there was an occurrence involving Didham and Hayes.

### ***The Threat of Game Ejection***

[52] It was alleged that Didham was not believable, as he did not recall Barron walking from home plate to the Janeway's first base dugout. Neither did he recall Barron threatening to throw Didham and 'the other Chris' out of the playoff softball game.

[53] For Didham, who has never been ejected from a game, had Barron made a specific threat of game ejection directly to Didham in the midst of a playoff game, it should have been an event recorded in his memory.

[54] Barron testified on direct examination that he went down to the dugout and "*...asked them to be quiet out of it, or you're going...out of the game.*"

- [55] Then asked if it was Didham and ‘the other Chris’ whom he told “*to be quiet*”, Barron said, “*Well, I just don’t go down and tell one of them. I tells the whole bench to be quiet.*”
- [56] On cross-examination, Barron said he told them, referring to “*the boys*” in the dugout, i.e., the entire Janeway team, “*If you don’t be quiet...you’re getting the hell out of here.*”
- [57] Hayes testified that he saw Barron leave from behind home plate, walk up to the Janeway dugout, and say only, “*Keep it down, guys, or you’re going.*”
- [58] By any account, Barron’s comments were directed in a general way to a dugout full of Janeway players. Barron may have threatened all of them as a group with a ‘game ejection’ However, it is not reasonable for a Janeway player, such as Didham, in the midst of a playoff game, to have thought that Barron would carry out his threat by ordering ejection of the whole team for not being quiet, particularly when Barron was nearly deaf himself.
- [59] Barron’s was an idle threat, meant more to ‘quiet down’ the bench and to restore order so the game could be resumed.

[60] Despite Barron's view that his words were meant for Didham and 'the other Chris', Barron did not approach Didham face-to-face and make a pointed threat of game ejection expressly or directly to him.

### ***Other Circumstances***

[61] Accordingly, it was reasonable in the circumstances for Didham not to have remembered the events when, four days later, on the afternoon of his first day back to work, Didham was contacted by a superior officer, Sgt. Reginald Tilley. Tilley informed Didham that Hayes had called the RNC headquarters, intending to make a Public Complaint against Didham, for the reasons set out above.

[62] Didham testified that he then reflected back to the softball game, but could not think of anything outstanding.

[63] Hayes and Barron admitted, and Didham noted, that it was not uncommon for tempers to fly and heated exchanges to occur during a sporting event such as an amateur men's playoff softball game.

[64] Hayes even testified that on the following Sunday, 22 September, 2002, he was once again umpiring what proved to be the final playoff game for the Janeway

team, when another member of that team approached him after Hayes had called the last “out” of the game. According to Hayes, the unidentified player:

*“...Put out his hand and said ‘I got to shake your hand...because you blew the fucking game’.*

*“And, when he did, he struck me with his stomach.”*

[65] Hayes’ testimony as to the occurrence of this episode was intended, apparently, as further evidence of his having been harassed and penalized by others associated with Didham, for the comment Hayes made to Didham a week earlier.

[66] I don’t accept it as such in all the circumstances.

[67] Instead, the event of 22 September, 2002 serves to corroborate the evidence of both interested witnesses that tempers are prone to flare in amateur sporting events, particularly a playoff game. It serves to corroborate both Didham’s testimony that he didn’t recall any outstanding verbal exchanges having taken place in the prior game. None was so distinctive or memorable for him in all the circumstances reasonably to have recalled any. It is also corroborative of Didham’s position that it was not reasonable for him to have recalled them.

[68] This serves also to impeach Hayes’ testimony that use of a swear word by a player to an umpire at a softball game was itself a significant occasion, worthy of

sanction or apt to create an impression on the memory of a player in all the circumstances.

[69] Further, it serves to discredit Hayes, as being among several incidents which belie Hayes' suspicious nature and his tendency to attribute conspiratorial motives to persons from events which admit of other, rational explanations. Others of this ilk include the episode after the game of 15 September, 2002 when Hayes was waiting in his taxicab outside the CEI Club, and his inclusion of a reference to a "*very suspicious!*" call from a courier in the Second Complaint which was otherwise related to the circumstances surrounding the Complaint.

[70] Similarly, it was reasonable in the circumstances for Didham not to have subsequently remembered Hayes' or Didham's own utterances at the ballgame, if at the time Didham did not intend the Threat as being consequential, rather only as a passing, idle threat uttered in the intensity of the moment at a sporting event.

[71] Accordingly, in the circumstances of the game on 15 September, 2002, it was reasonable for Didham to have dismissed the events as having occurred merely in the ordinary course of such a game, and not having stood out as being particularly remarkable or memorable.

### ***Moving Away From the Fence***

- [72] Barron testified that, after he addressed the Janeway dugout, he directed Hayes to move away from the fence in front of the dugout and to take a position near first base. Hayes had no recollection that Barron had told him to do so following that altercation.
- [73] Barron said that it was Hayes' usual practice to call plays at first base from a position where he stood off first base, near the dugout fence. Barron said the better practice was for the first base umpire to be positioned close to first base, particularly when that umpire was also responsible for calling plays at second base, such as was Hayes that day.
- [74] It wasn't because of his involvement in the argument that Barron told Hayes to move away from the dugout fence. He said his purpose was to have Hayes adopt a more effective umpiring practice, so that he would have a better view for close calls at first base.
- [75] As Barron testified, it was routine for Hayes to take up the improper position nearer the fence along the first base line, saying, "*Chris mostly does stand on the fence like that.*"



[76] Accordingly, while I accept Barron's repeated testimony that he directed Hayes to re-position himself closer to first base, rather than nearer the dugout fence, I am not satisfied that Barron's direction to Hayes was so unusual in the ordinary course of the game to carry any particular significance for Hayes.

[77] It was not a memorable event for Hayes, one that he did or ought to have associated with the Threat. Hayes' credibility is not sullied on this account.

[78] Similarly, it was equally appropriate for the other events of that game, particularly the altercation involving Didham and Hayes, then Barron, and their utterances, not to stand out in Didham's memory. Accordingly, neither is Didham's credibility impeached by his failure to have memorialized those events, and to have been able to recall them, whether four days or 14 months later.

### **Ulterior Mental Elements**

[79] It is the Commissioner's position that Didham's conduct after the softball game on 15 September, 2002 serves to establish the ulterior mental elements of the offences.

[80] The theory advanced is that Didham took notice after the game that Hayes was a driver for North West Taxi; that on his first day back to work –being no mere

coincidence--, he drove his RNC Jeep directly to the area of the North West Taxi stand and sought out Hayes, then issued him the Seatbelt Ticket to harass him and penalize him for his comments at the previous softball game.

### **The Coincidence**

[81] First, there is the remarkable nature of the coincidence that the first ticket which Didham issued on the morning of his first day back to work as a police officer following the softball game, was to Hayes.

[82] Commission Counsel attempted to assail Didham's credibility by suggesting that Didham's evidence on direct examination that the day of the softball game was his last day off before returning to work on the following day Monday was an attempt to diminish the effect of the coincidence in timing.

[83] Didham maintained on direct examination that, as he worked a routine of four days on work, followed by four days off work, Sunday 15 September 2002 was his last day of work. It followed that the day on which the Seatbelt Ticket was issued to Hayes was Didham's fourth day back to work, not his first day back.

[84] In order to characterize the accuracy of his recollection as to Sunday being his last day off, Didham recounted that he had received a telephone call from and

had set a date to have lunch with his parents that Sunday following the softball game at Monty's Restaurant at Whitbourne, approximately a one hour drive from St. John's, and that he recalled having done so.

[85] Commission Counsel endeavoured to impeach Didham's credibility by reference to a prior inconsistent statement Commission Investigator Robert Cuff by Didham on 11 February, 2003 when he was next on shift following the Sunday, 15 September, 2002 softball game, he replied: "*I think Wednesday. I work four day shifts. I don't believe [the 19<sup>th</sup> was the] first day*".

[86] He was reminded that Cuff had asked him to follow up on that point; Didham had complied, advising him that Thursday the 19<sup>th</sup> was indeed his first day back on shift, rather than his second.

[87] When confronted with his statement and the oral amendment, on cross-examination, Didham readily admitted the error.

[88] The coincidental sequencing of the events, even with Didham's direct testimony about dates which may be seen as minimalizing the significance of the coincidence, are not alone satisfactory proof of Didham's intent to harass or penalize Hayes for his comments at the softball game and to make good on the Threat.

## **Outside the CEI Club**

[89] According to Hayes, after the game he went to the nearby CEI Club to receive his payment for umpiring. As he left the Club, Didham was entering it. Hayes waited for a friend in the taxicab he drove, a 1993 Chevrolet Lumina, painted a bright green, the colour being distinctive to the fleet of "North West" taxis. While so waiting, Hayes saw Didham leave the Club and go to his car.

[90] The implication is that Didham had seen Hayes sitting in his green North West taxi cab, and had then made a mental note of his occupation and employer.

[91] Didham denied that he went to the CEI Club after the softball game, even when he corrected himself on the trip to Whitbourne.

[92] By necessary implication, Hayes believed that Didham, on his first day back to work, had deliberately travelled to the principal taxi stand for North West Taxi at the Village Mall in order to seek out Hayes and make good on the Threat.

## **The Mall Parking Lots**

[93] The Particulars allege that Didham detained Hayes and issued him the Seatbelt Ticket to harass and penalize Hayes for his comments at the game. In essence, the Commissioner and Didham allege that Didham's course of conduct in uttering the Threat, and then making good on it by issuing Hayes the Seatbelt Ticket on the first day following Didham's resumption of his policing duties, constitute evidence in satisfactory proof of the offences charged, including the requisite mental elements.

[94] Four days later, on the morning of Thursday, September 19, 2002, Hayes was seated in his taxi cab, parked in an overflow area for North West taxi cabs located on the parking lot of Zellers strip mall. The Zellers mall is situate north of Topsail Road and west of the Village Mall. Hamlyn Road, which intersects Topsail Road at a "T", acts as a north-south corridor, separating the parking lots of the two Malls.

[95] The main stand for North West Taxi, which has a fleet of about 20 cabs, is situate at the Village Mall. Its dispatch office is located on the second floor, with windows looking out onto a portion of the main parking lot situate on the south side of the Village Mall. Located west-southwest of the dispatch office, adjacent to the east-west driving lanes along the southern perimeter of the Village Mall building, are

four reserved parking spaces, designated for North West taxicabs. On the north side of the building are two similar reserved spaces. Driver-occupied North West taxicabs park in these six places, waiting to be dispatched on calls by the dispatcher.

[96] As each is dispatched in turn, another taxicab waiting in the taxi overflow parking area on the Zellers lot, takes up one of the six designated positions on Village Mall lots.

[97] On the morning of 19 September, 2002, Hayes was waiting in his taxicab in the overflow area on the Zellers lot, beside another North West taxicab operated by one "Howard", as both chatted and as Hayes smoked a cigarette. Hayes' taxicab was seventh in line to be dispatched.

### **The Seatbelt Ticket**

[98] Presently, as a taxicab was dispatched from the Village Mall, Hayes drove his from the Zellers lot to the south Village Mall lot via a short distance on Hamlyn Road.

[99] In the meantime Didham, a member of the Accident Investigation Unit of the Royal Newfoundland Constabulary who was operating a white Jeep Cherokee

SUV, Unit Number 243 (the “RNC Jeep”), saw while he was driving the taxicab from one lot to the other and formed a reasonable belief that Hayes was not wearing his seatbelt at the time.

[100] Didham turned the RNC Jeep around and pursued Hayes’ taxicab, which by then was stopped at the southern parking lot of the Village Mall, where Hayes had stopped to chat with a co-worker, Paul Hussey, in another taxicab, and had slipped off his seatbelt to do so.

[101] At 9:50 a.m., after ascertaining and verifying Hayes’ identity, Didham issued Hayes the Seatbelt Ticket, a summary offence ticket for earlier not having worn his seatbelt while driving his vehicle on Hamlyn Road, from one parking lot to the other, contrary to subsection 178(3) of *the Highway Traffic Act*.

[102] Hayes successfully defended himself in Provincial Court on the alleged seatbelt offence. The charge was dismissed; he was acquitted. Didham testified at the hearing that when issuing the Seatbelt Ticket, he held a reasonable belief that Hayes was not wearing one while driving the taxicab on Hamlyn Road. Hayes testified that he had removed it after he stopped to talk to Hussey and before Didham arrived to issue the Seatbelt Ticket.

## **The Complaint**

[103] Immediately Didham departed, Hayes telephoned to the headquarters of the Royal Newfoundland Constabulary and spoke with Sergeant Reginald Tilley. He expressed his feeling that he had been harassed by Didham arising from the issuance of the ticket following Didham's threat at the 15 September softball game. At 6:09 p.m., as soon as his shift was over, Hayes attended at RNC Headquarters; gave a Statement, and made the Complaint.

## **The Harassment**

[104] The reasonableness of Hayes' perception that he was being penalized and harassed by Didham's conduct was tested on cross-examination. Hayes was of the view that the harassment included ticketing of co-workers for seatbelt offences which happened during the following ten days, although these allegations were not proven. Hayes admitted that he was not aware of any *de facto* exemption for taxi drivers from seatbelt offences, in practice exercised by RNC officers.

[105] The other element of harassment for Hayes was co-workers being asked by RNC officers to move their cabs when parked with one tire on the line of a parking space. His knowledge was based on second-hand information.



### ***The Safety Zones***

[106] Through the combined evidence of David Fleming, a co-owner of North West Taxi, and of Cst. Paul Roche, a member of the RNC's Traffic Enforcement Unit, it was established that on the day following the issuance of Hayes' seatbelt ticket, Roche had asked drivers of North West Taxi to move their cabs from places on the southern parking lot of the Village Mall marked as "safety zones" and "fire lanes". They were not designated parking spaces for North West Taxi cabs nor parking spaces for general parking. Roche freely admitted to issuing tickets more frequently than any other fellow RNC officer. However, he had not ticketed the North West taxi drivers on 20 September, 2002, hearing the insistence of some on their right to park in a certain "safety zone", and appreciating there may have been some innocent mistake about their ostensible right to do so.

[107] North West Taxi drivers had been parking their cabs in three types of locations there. There were four designated spaces marked with fading green paint and bearing the words "North West Taxi", for which payment had been made by North West Taxi to the management of the Village Mall. Taxi drivers had, improperly, formed the habit of stopping or parking in some adjacent areas. Stopping or parking was admittedly prohibited in those which bore the words "fire lane", located in driving lanes along the perimeter of the Mall.

[108] Still others were marked with yellow lines painted diagonally. These were “safety zones”, in which any parking or stopping was prohibited. They appeared at the ends of parking lanes for the safety of vehicles when making turns at right angles.

[109] On 20 September, 2002, Fleming met with senior officers of the RNC who consulted Roche and the confusion was resolved. Fleming recognized that North West Taxi was entitled to have its cabs park only in four spaces designated for his cabs. He arranged for Village Mall management to promptly have them repainted green at North West Taxi’s expense, as the existing paintwork had faded, contributing to the confusion. Cabs remained prohibited from parking in the “safety zones”.

[110] Once this was clarified by Fleming with senior officers of the RNC on 20 September, 2002, it was no longer an issue for Fleming as co-owner of North West Taxi.

[111] It was unreasonable for Hayes to continue to harbour the belief that he was suffering harassment for the softball game incident by Roche’s fire lane and safety zone incident, after it had been resolved to Fleming’s satisfaction on 20 September, 2002, and Fleming realized some of his drivers were parking in error in safety zones.

[112] Assuming the Complaint speaks however from the date of its making, 19 September, 2002, rather than any later date, then the only conduct which could constitute harassment and penalization of Hayes at the time of the making of the Complaint, was Hayes' detention and ticketing by Didham on the morning of 19 September, 2002. This eliminates the effect of the subsequent episodes on the credibility of the Complaint as made out by Hayes on 19 September, 2002.

[113] Alternatively, if the Complaint speaks from the date of his filing of the Notice of Appeal, it was unreasonable for Hayes to perceive continued harassment of himself and/or co-workers at this time, in January, 2003.

#### ***DIDHAM'S MALL PATROL***

[114] Didham testified that it was routine for him as part of his duties as an accident investigation officer, in the early morning hours after he began his working day, to check certain solitary roads, such as Redmond's Road and shopping centre parking lots, for vehicles which may have been involved in hit and run accidents overnight, including stolen vehicles, which had been abandoned on the lots.

[115] Superintendent Wayne Smith, who was then in charge of district policing including the accident investigation section with which Didham was attached as

well as a traffic enforcement unit with which Constable Roche was attached, testified that officers especially from the accident investigation unit pick up a lot of hit and run vehicles for damage in parking lot malls and do patrol parking lot malls for this purpose.

[116] Commission Counsel endeavoured to impeach Didham's credibility by taking issue with his testimony on direct that his purpose in being at the Village Mall and Zellers Mall parking lots on the morning of September 19, 2002 was to check for the presence of vehicles involved in hit and run accidents. In doing so, Commission Counsel in part endeavoured to use the 11 February, 2003 Statement by Didham to Cuff in which, in response to a question as to what his assigned duties were on that day, Didham responded:

*“Primary duties technical accident investigation-assigned to patrol division-unless no other units in the area not dispatched to call. If not otherwise occupied, patrol all malls in morning check fire lanes-not too busy in the mornings. 150 tickets this year.”*

[117] Sergeant Smith said that he had not specifically assigned Didham to patrol parking lots of malls in the morning to check fire lanes, particularly at a time before the mall was generally open to the public. Didham allowed that that was so, but he had intended to convey the information to Cuff that it was part of his routine day to go up and check around the parking lots, primarily to look for stolen vehicles or hit and run vehicles, not to check fire lanes.

[118] Didham conceded that he had omitted mention of his routine checking for stolen and hit and run vehicles in his two report letters to Staff Sergeant Cranford. However, he noted there was no questioning conducted by Cranford in his investigation; Didham was merely asked to give a report. His statements contained in the report letters to Sergeant Cranford are not inconsistent with Didham's testimony on direct examination. For instance, in the 8 January, 2003 report letter he writes: *"I was patrolling the area of the Village Mall/Topsail Road."* On direct examination, Didham used the verb "*check*" to describe his morning routine at the mall parking lots when looking for stolen or hit and run vehicles. Didham used to work in the Patrol Division.

[119] The verb "*patrol*" has definitions which both connote both concept of traveling around an area at regular intervals in order to protect it, and moving about an area for the purposes of observation, inspection or security: *The Canadian Oxford Dictionary*, (1998), Oxford University Press and "*Dictionary.com*". The term is broad enough to include what Didham says he was doing that day at the Malls, patrolling or checking them for hit and run or stolen vehicles.

### ***Hayes' own Observations***

[120] Hayes spotted the white Jeep Cherokee being operated by Didham on the parking lot of Zellers Shopping Centre about 10 or 15 minutes before he was ticketed at the southern parking lot of the Village Mall on the morning of 19 September 2002. When Hayes first saw Didham's vehicle, it was circling the parked cars over around Sobeys Supermarket, which is located the western end of the Zellers Mall parking lot furthest away from the Village Mall. Didham was seated in his taxi cab, having a cigarette and chatting with his co-worker identified only as "Howard" who was seated in a North West taxi cab adjacent to Hayes'.

[121] Hayes testified that he commented to Howard describing Didham's apparent purpose from his driving conduct on the lot at the time, saying "*Maybe he's looking for a stolen car.*"

[122] Hayes did not testify that Didham approached either of the two North West taxi cabs on Zellers Mall parking lot first thing that morning, even when Hayes was seated in one. Neither did Didham say he did; his testimony was to the contrary.

[123] Applying his own observations, Hayes' conclusion that Didham was looking for a stolen car, is consistent with a reasonable inference to be taken from the manner

in which Didham was driving the RNC Jeep. It is also consistent with Didham's testimony as to what his purpose in fact was, as well as Sergeant Smith's testimony as to what one of the normal duties of an accident investigation officer, such as Didham, is at parking lot malls.

[124] The fact that Didham didn't abandon his conduct of circling unoccupied parked cars on the Zellers lot and approach the occupied North West taxi cabs located there, in order to search out Hayes in his, is also inconsistent with a contrary mischievous purpose in Didham patrolling the two mall parking lots solely for the purpose of harassing Hayes at his first opportunity.

### ***The Taxi Dispatcher***

[125] William Peddle, the North West Taxi dispatcher on the morning of 19 September, 2002 testified as to his knowledge of the events that morning. The intended purpose of his testimony was to impeach the credibility of Didham, particularly as to patrolling the Mall.

[126] Peddle operated from an office located on the second floor of the Village Mall. His duties primarily involved answering telephone calls and dispatching taxi cabs via a microphone and radio set situated away from two windows having a

southerly view. In order to have a view out the windows, Peddle was required to move away from his desk and walk over to the windows.

[127] From Peddle's testimony and from the photographic evidence entered as exhibits by consent, I accept that Peddle had a clear view through the dispatch office windows of the south-eastern portion of the parking lot of the Village Mall south of the then-closed Wal-Mart store, the Wal-Mart store being situated immediately to the east of the dispatch office.

[128] I accept that, when Peddle was standing in front of the window and looking out them, he would have a clear view of the southeast area of the Village Mall parking lot south of the closed Wal-Mart store. It was in this area that 5 or 6 taxi cabs had been parked overnight. They were vacant and had been parked in vacant parking spaces on the mall lot by night drivers, awaiting their replacements, the day drivers, who would later in the day take them to work. A similar location of three of them is depicted in photo number 3, tab 1, exhibit consent 1 and two are depicted in photo number 1, tab 2 of exhibit consent 5. Peddle depicted five of these in his hand-drawn exhibit WP-1.

[129] Peddle testified that after an early morning busy period and looked through the dispatch office windows. As he did so, he saw a white RNC Jeep Cherokee with "Accident Investigation" marked on the side of it, circling around the five vacant



taxi cabs parked in front of these windows. Peddle said that the RNC Jeep appeared almost to stop by every unoccupied taxicab parked directly under his window, then come down around, and make another circle before going towards the back part of the Village Mall.

[130] Peddle said this occurred about 8 or 9 o'clock in the morning; later said that it was just after 9 o'clock because the Mall Security Manager who starts work at that hour was present in the dispatch office with him. Peddle said it was 20 minutes to 30 minutes later when Hayes was ticketed.

[131] Peddle testified that he did not see Hayes getting ticketed. He would not have had a clear view from the dispatch office windows, in any event, of the parking space where Hayes had stopped and parked his vehicle, as depicted in photo number 1, tab 1, exhibit consent 1, adjacent to the most westerly of the four North West taxi designated parking spaces on the south Village Mall parking lot. Peddle's view was impaired when the ticketing incident occurred as the location of Hayes' taxicab was too far to the west and at too acute an angle to fall within Peddle's view plane from the dispatch office windows. Peddle also testified that he did not have a continual opportunity to view the RNC Jeep through the dispatch office windows, as he was answering the telephone and dispatching cabs over the radio set from time to time, and it drove away out of his own sight.

[132] Peddle was inconsistent in his testimony as to the time of day when he saw the RNC Jeep, variously “*guessing*” at times from 8:00 a.m. to shortly after 9:00 a.m., then recalling it was just after 9:00 a.m. because of the presence of another person. However, this timing would not have been consistent with the testimony of Didham and Hayes both, as to the probable time lapse between Didham’s presence on the Zellers lot and the issuance of the Seatbelt Ticket.

[133] Peddle testified that it was perhaps 45 minutes, or perhaps 20 or 30, before Hayes was issued the seatbelt ticket. By contrast, Hayes’ own testimony is that it took only ten to fifteen minutes from the time when he first saw Didham’s RNC Jeep in the Zellers parking lot before it had even entered the Village Mall parking lots, until the ticket was issued, which is more reasonable in the circumstances.

[134] The further implication of Peddle’s testimony, if believed, is that Didham was spending a lengthy period of time checking North West taxi cabs on the Village Mall lot.

[135] Peddle did not testify that he saw Didham stop by the four driver-occupied taxicabs situate in the designated spaces on the south parking lot of the Village Mall, nearer the main entrance to the Mall. Nor was any other evidence called on point. Peddle’s testimony and view was limited to the five unoccupied taxicabs parked outside the dispatch office window, near the Wal-Mart Store.

[136] Didham denied circling and stopping by taxicabs, but testified he drove by other unoccupied vehicles that morning on the Village Mall and Zellers parking lots, checking them out in a routine manner to ascertain if they had been stolen or involved in hit and run accidents and abandoned there.

[137] This is similar to Didham's failure to circle and stop by Hayes and Howard's taxi cabs a few minutes earlier when they were parked on the Zeller's Mall parking lot.

[138] I find that at the time when Peddle saw Didham circling the unoccupied taxi cabs which had been parked overnight, Didham did not circle and stop the four driver-occupied taxi cabs parked in the designated parking spaces in front of the Tip Top Tailors Superstore, waiting to be dispatched.

[139] If Didham was in pursuit of Hayes, intending solely to harass and penalize him, as by ticketing him for the comments made at the softball game, there was no point to, or advantage in, Didham stopping by every unoccupied taxi cab parked overnight on the Village Mall lots. If that were his intention, it would have been reasonable for him instead to be circling and stopping by *occupied* taxicabs, such as the two on the Zellers lot, including Hayes', the two on the north lot of the Village Mall and the four on the south lot of the Village Mall, of which there is no

evidence that he did. There was no evidence that Didham's driving conduct that morning was consistent with his patrolling fire lanes in the Mall lots.

### **SUMMARY AND DETERMINATION**

[140] Hayes was cross-examined on the contents of two hand-written statements he made, a Second Complaint dated 27 September, 2002 and the Notice of Appeal of this Complaint dated 28 January, 2003. In each of these documents, he linked the softball game incident and his subsequent seatbelt ticket issued by Didham with subsequent harassment of other drivers with North West taxi during the ensuing ten days. The implication was that Hayes, without reasonable grounds, harboured a suspicion that Didham conspired with other members of the RNC to indirectly cause Hayes harm in his employment relationship with North West taxi and with his fellow drivers.

[141] There was no direct evidence called in proof of the issuance of other tickets to drivers of North West taxi. Roche denied that he had any contact with Didham during the relevant period, and that his approaching drivers of North West taxi cabs for potential parking lot offences, such as parking in fire lanes and safety zones, was not part of a conspiracy to harass drivers of North West taxi cabs.

[142] Accordingly, it was not reasonable for Hayes to continue to harbour this suspicion of deliberate harassment of North West taxi drivers by RNC Officers arising from his incidents with Didham, by 27 September 2002, let alone at a subsequent date. Indeed, Hayes persisted in holding this view during his testimony.

[143] Hayes' linkage of this supposed harassment of his co-workers at North West taxi was similar to the suspicions he had that Didham made note of the fact that Hayes was a North West taxi cab driver after seeing him outside the CEI Club following the softball game, implicitly for the purpose of subsequently carrying out the Threat.

[144] It is appropriate to consider all the evidence, particularly where the credibility and reliability of witnesses, and in particular, that of interested witnesses is at issue. I have endeavoured with each issue to set out my reasoning for preferring the evidence of one witness to that of another.

[145] I need not repeat myself on each of those points.

[146] Although discipline of a police officer is not the primary objective of the Public Complaints Scheme, that may be the ultimate result of the adjudication of a Complaint.

[147] Given the serious nature of the Complaint before me, and of the offences of which Didham stands charged, when considering the evidence as a whole, and noting at times conflicting evidence from among interested witnesses, I have borne in mind that very cogent evidence is required in order to satisfy me on the balance of probabilities that all the requisite elements of the offences charged have been proved.

[148] I am satisfied that the utterances were made at the softball game, by the persons and using the words Hayes has alleged. The Threat was made. As admitted, the detention occurred and the Seatbelt Ticket was issued by Didham.

[149] However, proof of the necessary, ultimate mental elements of the offences is repeatedly lacking. Hayes' credibility on issues related to Didham's purpose or intention rests primarily on the coincidence in time of the making of the Threat and the issuance of the Seatbelt Ticket by Didham.

[150] Didham was engaged in a routine patrol, looking for stolen vehicles, just as Hayes concluded while he observed the RNC Jeep manoeuvring on the Zellers lot that morning. The attempt to impeach Didham's testimony on the purpose of his visit to those Malls that morning on the basis of his prior statements was

inadequate. I prefer Smith's testimony, Didham's, and even Hayes' own observation and conclusion to that of Peddle.

[151] The evidence of Peddle is not credible as to the time of day or length of time spent by Didham patrolling the Village Mall. The Seatbelt Ticket speaks for itself on the former, and Hayes' own testimony on the latter contrasts with Peddle's. Given Peddle's limited opportunity to view Didham's RNC Jeep, and his receipt of unreliable, second-hand information from drivers over the radio set, inadmissible as hearsay, his testimony on the whole is sullied.

[152] Hayes was not credible on the issues related to Didham's ulterior motive and purpose, because of his tendency to find or attribute improper motives to actions which admit of more reasonable explanations. The attempted linkage of the external circumstances of the offences with the ulterior mental elements fails after the coincidental timing of the Threat at the softball game and the issuance of the Seatbelt Ticket.

[153] Nothing else serves to corroborate the allegations, particularly as very cogent evidence is required in the face of conflicting versions from the interested witnesses in order to satisfy me that the standard of proof has been met.

[154] In the final result, I must consider all the circumstances of the case and the totality of the evidence, taken as a whole, rather than dividing it into segments.

[155] On the whole of the evidence, for the reasons stated, my findings are as follows. I am satisfied that Didham uttered the Threat. However, I am not satisfied, on the balance of probabilities, that he uttered the Threat with the intention of carrying it out in order to harass or penalize Hayes.

[156] Rather, it was uttered as an empty, idle threat in the course of a heated exchange between a player, who happened to be a police officer, and an umpire following a play during a playoff game in an amateur softball league. Subsequently, the person who was the umpire was issued a ticket for a seatbelt offence by that police officer.

[157] There is the remarkable coincidence that Didham issued the ticket to Hayes on the morning of Didham's first day back to work as a police officer following the softball game. Notwithstanding such coincidence, upon scrutinizing the whole of the evidence, and bearing in mind the considerable cogency of which is required, I am not satisfied, on the balance of probabilities, that Didham detained Hayes and issued him the Seatbelt Ticket with the requisite ulterior mental elements. Didham did not do so with the intention of harassing or penalizing Hayes as a



result of the verbal altercation, including the utterance of the Threat, which occurred at the softball game.

[158] Taking the evidence as a whole, I am not reasonably satisfied according to the requisite standard that the ulterior mental elements of the offences charged have been proven, namely: (i) that Didham's character and position as a police officer were used *improperly and for private advantage*; (ii) that his detention was *without good and sufficient cause*, and (iii) that the false, misleading or inaccurate entry in the Seatbelt Ticket was made *wilfully*.

[159] Therefore, it has not been proven that Didham improperly detained Hayes on the parking lot of the Village Mall, St. John's, on 19 September, 2002 and improperly caused the Seatbelt Ticket to be issued to Hayes in order to harass or penalize him following a verbal altercation which occurred on 15 September, 2002 during the softball game. Accordingly, the charges stand not proven.

## **Disposition**

[160] In the result, I determine and order as follows:

The First Count: *Dismissed*.

The Second Count: *Dismissed*.

The Third Count: *Dismissed*.

The Fourth Count: *Dismissed.*

[161] I determine and order that the decision of the Chief of Police appealed from be and it is hereby confirmed.

[162] Constable Didham is awarded his costs as against the Commissioner on a party and party basis, to be taxed.

DATED at St. John's, Newfoundland and Labrador, this 10th day of February, 2004.

*(sgd.) Robert Sinclair*

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Robert M. Sinclair, Q.C.  
Adjudicator

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