

**IN THE MATTER OF** a public  
hearing of the complaint of  
Allan Maxwell Martin

**BETWEEN:           THE ROYAL NEWFOUNDLAND CONSTABULARY  
PUBLIC COMPLAINTS COMMISSION**

**COMMISSION**

**AND:                CONSTABLE DONALD MALONEY**

**RESPONDENT**

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**DECISION**

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**IAN F. KELLY, Q.C.**  
Adjudicator  
P. O. Box 337  
St. John's, NL  
A1C 5J9

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## **Introduction**

This Decision relates to a complaint against Constable Donald Maloney of the Royal Newfoundland Constabulary alleging conduct unbecoming of a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary. The matter was referred to me as Adjudicator on June 11, 2003 to conduct a public hearing pursuant to the Act and the Regulations.

The allegations against Constable Maloney as set forth in the Reference are as follows:

Pursuant to the Act and the regulations made thereunder, Constable Donald Maloney, Regimental No. 473, is alleged to have conducted himself in a manner unbecoming of a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary by:

- (i) carrying out his duties contrary to the Policy and Procedures Manual, contrary to Section 3(1)(j) of the *Royal Newfoundland Constabulary Public Complaints Regulations*, C.N.R. 970/96, thereby committing an offence contrary to Section 3(2) of the said Regulations; and,
- (ii) neglecting or omitting to promptly and diligently perform his or her duties as a police officer, contrary to Section 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 the said Regulations.

The particulars of the alleged offence are as follows:

That Constable Donald Maloney, while the acting NCO in charge of the Street Drug Team, failed to ensure that an adequate investigation was conducted by the Street Drug Team prior to a drug search being conducted of the Complainant's residence on August 21, 2001.

Constable Maloney initially denied each allegation set forth in the Reference. However, after a lengthy procedural history (summarized later in this Decision) including several days of testimony, counsel for the Public Complaints Commission and Constable Maloney entered a Joint Submission, including a statement of agreed facts. Constable Maloney then changed his plea and admitted the allegations set forth in the Reference.

The complaint relates to events which occurred on August 21, 2001. The Royal Newfoundland Constabulary Street Drug Team sought and obtained a search warrant for premises at 78 Carter's Hill and 81 Carter's Hill, St. John's, NL in relation to suspected marijuana grow operations allegedly being conducted in those properties. 78 Carter's Hill is the home of Allan and Audrey Martin, an elderly couple. Searches of the properties were conducted on August 21, 2001 pursuant to the search warrant. No drugs were found in either property. The information which had been used to obtain the search warrant had been provided by a confidential informant. The information provided by the informant was false.

Mr. Peter O'Flaherty represented the Commission. Mr. Randolph Piercey represented Constable Maloney. Mr. John Lavers represented Allan and Audrey Martin. During the course of the hearing, I permitted two witnesses to be represented by counsel. Mr. David Day represented RCMP Constable Stephen Conohan. Mr. Jerome Kennedy represented RNC Constable Joseph Boland.

***Procedural History***

As previously noted, the events, including the search of the Martin residence, occurred on August 21, 2001. Mr. Martin filed a complaint with the RNC Public Complaints Commission on August 22, 2001.

At the time of the incident, the Street Drug Team was a joint operation of the RNC and the RCMP. The Street Drug Team normally consisted of three RNC members and one RCMP member.

On August 21, 2001, the RNC officer who was the permanent supervisor of the Street Drug Team had been seconded to other duties. Constable Donald Maloney was the acting NCO in charge of the Street Drug Team on that date.

It is not disputed that the investigating member of the Street Drug Team in relation to the alleged marijuana grow operations at 78 and 81 Carter's Hill was RCMP Constable Stephen Conohan. The RNC Public Complaints Commission does not have jurisdiction over members of the RCMP. RCMP members are subject to separate complaint and disciplinary procedures. Consequently, the Commission had jurisdiction only in so far as the complaint related to the conduct of members of the Royal Newfoundland Constabulary.

Ultimately, the only charge referred for adjudication against any of the RNC officers is the charge against Constable Maloney. The matter was referred to me by Reference dated June 11, 2003.

On July 8, 2003, I gave notice of public hearing to commence on December 16, 2003 and to continue on January 19 to January 28, 2004. The hearing for December 16, 2003 was scheduled to deal with procedural matters and preliminary objections. At that stage, the Commission, Constable Maloney and the Martins were represented by counsel.

On December 16, 2003, counsel for Constable Maloney made application to me to decline jurisdiction in relation to the alleged offence as particularized. In summary, counsel's position was that I did not have jurisdiction to review the issuance of a search warrant since in law any search authorized by a search warrant is a reasonable search. The search warrant has never been quashed or set aside by a court of competent jurisdiction. Counsel therefore argued that I was not entitled to determine whether or not an adequate investigation had been performed. After having heard all counsel, I denied the application made on behalf of Constable Maloney. I delivered oral reasons, which have now been transcribed and are attached hereto as Appendix "A".

On December 16, 2003, Mr. Lavers also gave notice on behalf of the Martins that he wished to seek an adjournment of the hearing scheduled for January 19, 2004 in order to bring an application to either the Commissioner or the Supreme Court of Newfoundland and Labrador to have the scope of the Reference expanded. In summary, Mr. Lavers wanted the scope of the charge expanded to include not only the adequacy of the investigation, but also the

manner in which the search warrant was executed. I set January 6, 2004 for a hearing of Mr. Lavers adjournment application.

Mr. Lavers subsequently applied to the Supreme Court of Newfoundland and Labrador pursuant to Section 36(1) of the *Royal Newfoundland Constabulary Act, 1992*, SNL 1992, c. R-17 for leave to appeal the Commissioner's decision. Orsborn, J. granted leave to appeal. The appeal was subsequently heard by Mr. Justice Hall who dismissed the appeal and confirmed the decision of the Commissioner in a written decision filed on June 28, 2004.

As a result of the proceedings in the Supreme Court of Newfoundland and Labrador, the hearing before me was adjourned to various dates from time to time, pending the decision of Mr. Justice Hall.

Subsequent to the decision of Mr. Justice Hall, I set new hearing dates.

On April 20, 2005, I gave directions with respect to the filing of material in relation to a proposed application by Mr. Day on behalf of RCMP Constable Conohan. Mr. Day's application was heard on August 23, 2005. The application sought various orders, the nature of which I summarize as follows:

- a) that Constable Conohan be permitted to testify in a manner that shields his physical identity;



- b) that Constable Conohan be permitted to testify in camera if required to testify with respect to:
- i) particulars of police investigations;
  - ii) particulars of police investigative measures; or
  - iii) particulars of the identities of police informants;
- c) that Constable Conohan be permitted standing at the hearing, during his testimony, represented by legal counsel; and
- d) on testifying, Constable Conohan be given the protection of Section 13 of the *Canadian Charter of Rights and Freedoms*, Section 5 of the *Canada Evidence Act* and Section 5 of the *Newfoundland and Labrador Evidence Act*.

After having heard evidence from Constable Conohan and submissions of counsel, I

- a) denied Constable Conohan's application to shield his physical identity;
  - b) deferred to the actual hearing any ruling with respect to in camera testimony;
  - c) granted Constable Conohan's right to be represented by legal counsel;
- and,

- d) recognized and declared Constable Conohan's right to testify subject to the protection of Section 13 of the *Canadian Charter of Rights and Freedoms*, Section 5 of the *Canada Evidence Act* and Section 5 of the *Newfoundland and Labrador Evidence Act*.

I delivered oral reasons, which have now been transcribed and which are attached as Appendix "B".

The hearing of the evidence began on August 29, 2005 and continued on August 30, 2005. Evidence was given by Mr. Allan Martin, Sergeant Paul Hierlihy, Constable Joseph Boland, Sergeant John Walsh, Constable Patrick Doyle, Constable Stewart Giles and Constable Stephen Conohan.

There were significant differences between the evidence of some of the RNC officers, in particular Constable Boland, and the evidence of RCMP Constable Conohan. It is not necessary to review the various differences in any detail.

Two of the more important differences are the following:

1. Constable Conohan maintained that the informant could be properly described as a confidential informant of Constable Boland. Constable Boland denied that the person was a confidential informant handled by him.
2. Constable Conohan testified that Constable Boland told him that the door of 78 Carter's Hill (the Martin residence) was blue. Constable Boland's initial testimony was not consistent with that assertion. When

Constable Boland was later recalled (discussed later in this Decision), Constable Boland testified that he told Constable Conohan that the door was not blue.

The hearing resumed on October 6, 2005. At the commencement of the hearing, two preliminary matters were dealt with:

1. Mr. O'Flaherty on behalf of the Commission applied to recall Constable Boland. After hearing counsel, I granted the Commission's application to recall Constable Boland.
2. Mr. Jerome Kennedy applied for standing as counsel on behalf of Constable Boland. After hearing counsel, I granted Constable Boland's application to be represented by counsel.

Constable Boland was then recalled and was examined by Mr. O'Flaherty on behalf of the Commission. Mr. Kennedy then began, but did not conclude, his examination of Constable Boland. Following the morning break, counsel requested an adjournment to the afternoon.

When the hearing resumed in the afternoon, counsel for the Commission and counsel for Constable Maloney indicated that they had reached a joint submission with respect to disposition of the matter, including an agreed statement of facts. The Joint Submission is annexed hereto as Appendix "C".

The joint submission with respect to disposition is as follows:

20. The parties jointly submit, that in consideration of the foregoing, an appropriate resolution of the public hearing under s. 33(1) is as follows:

- a) The adjudicator accept the plea of Constable Maloney and that a finding be made that Constable Maloney has acted contrary to s. 3(1)(d) and (j) of the *Royal Newfoundland Constabulary Public Complaint Regulations*; and,
- b) The adjudicator not impose any period of suspension on Constable Maloney.

I adjourned the hearing briefly while I reviewed the agreed statement of facts and joint submission. Upon resumption, I inquired of counsel as to their respective positions with respect to any other form of penalty or order, other than suspension, which could be made under Section 33(1)(b) of the Act. I wanted to be certain that I understood counsels' position with respect to other forms of penalty. I also wanted to ensure that Constable Maloney understood the position of other counsel, including counsel for the Martins, with respect to other forms of penalty before Constable Maloney chose to change his plea and admit the allegations against him.

Counsel for the Commission, the Martins, and Constable Maloney each indicated that he did not seek any form of order or penalty against Constable Maloney.

I then re-read the allegations against Constable Maloney and inquired of him in respect of each allegation whether it was admitted or denied. Constable Maloney, through counsel, admitted each of the allegations contained in the Reference.

**Disposition**

Constable Maloney has admitted the allegations against him. I therefore find that Constable Maloney conducted himself in a manner unbecoming of a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary by

- (i) carrying out his duties contrary to the Policy and Procedures Manual, contrary to Section 3(1)(j) of the *Royal Newfoundland Constabulary Public Complaints Regulations*, C.N.R. 970/96, thereby committing an offence contrary to Section 3(2) of the said Regulations; and,
- (ii) neglecting or omitting to promptly and diligently perform his duties as a police officer, contrary to Section 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 the said Regulations.

Constable Maloney has admitted that he failed in his duty to adequately supervise and monitor the preparation of the Information to Obtain a Search Warrant ("Information to Obtain") and the Warrant to Search by Constable Conohan, who was at the time under his direction and control. It is therefore not necessary for me to review in detail all of the evidence presented. Nevertheless, since the matter raises important issues concerning police investigations and what should be contained in an Information to Obtain, I believe it is appropriate that I comment on some of the issues raised.

Several counsel, in their submissions, indicated that the events were caused by an unscrupulous police informant who lied. That is undoubtedly the case. The

informant's motives are unknown to us. Nevertheless, the case highlights the need for vigilance by police officers in determining the reliability of informant information and the need for accuracy and candor in setting forth the evidence in the Information to Obtain. "Boiler plate" language used without care runs a significant risk of misdescribing the true circumstances and misleading the issuing justice.

In this case, paragraph 1 of Appendix "A" of the Information to Obtain reads as follows:

(1) Source "A" is a believed reliable confidential informant of Sgt. Greg Smith, a member of the Royal Canadian Mounted Police and Cst. Joseph Boland of the Royal Newfoundland Constabulary stationed in St. John's, Newfoundland. Source "A" has not supplied information which has directly resulted in searches, and seizure of controlled drugs and substances and criminal charges in the past but information has been corroborated by independent police investigation. Source "A" is a user of illicit controlled drugs and substances which affords him/her the ability to provide information on the trafficking of said substances. Source "A" has no criminal record.

The paragraph leads one to believe that the deponent Constable Conohan, Sergeant Greg Smith of the RCMP and Constable Joseph Boland of the RNC are each of the opinion that Source "A" is a believed reliable informant. In fact, the testimony discloses that:

1. The deponent, Constable Conohan, could not contact Sergeant Smith to verify the informant's reliability;

2. Constable Conohan did not (and possibly could not) contact the informant's co-handler at the RCMP to verify the informant's reliability;
3. Constable Boland had only met Source "A" on the day in question, did not consider Source "A" to be his informant and had no basis for any belief as to the informant's reliability or unreliability;
4. The conclusion that Source "A" is a believed, reliable informant was the conclusion of Constable Conohan who had not personally dealt with the informant and who based his belief not on direct personal contact, but on the basis of undisclosed confidential briefing documents to which he had been privy as a RCMP member.

Those facts give an entirely different perspective and understanding of the circumstances described in paragraph 1.

I am satisfied from the evidence which I heard that Source "A" was not in any meaningful sense a believed reliable confidential informant of Constable Boland. Paragraph 1 is at best misleading and parts of it are, at worst, false.

The Information to Obtain contains inaccurate information with respect to the color of the door at 78 Carter's Hill (the Martin residence). Paragraph 5 of the information indicates that the source advised that the house has a blue door. Paragraph 6 indicates that Constable Giles and Constable Doyle confirmed that the house has a blue door on front facing the street. Paragraph 6 is inaccurate.

The Martin house does not have a blue door. There is a blue panel covering one of the front basement windows. Constable Boland testified that he told Constable Conohan that the house did not have a blue door. Constable Conohan testified that Constable Boland had told him that the door was blue. I am satisfied from the evidence that I heard that Constable Boland did not tell Constable Conohan that the house had a blue door. How and why the statement came to be included in the Information to Obtain is unclear. Nevertheless, the error would have helped to confirm the apparent reliability of the informant's information. The issuing justice did not have accurate information which was at variance with the statements of Source "A".

One can never know what the issuing justice would have done if all of the facts had been accurately set forth. However, whether the search warrant would still have issued is not the point. Rather, our justice system depends upon the police placing before the justice all of the relevant circumstances as accurately as possible so that the justice can make an independent and informed decision.

Numerous cases were filed with respect to the content of Informations to Obtain and the need for accuracy and candor in describing the factual circumstances. I will not refer to them all in this Decision. It is sufficient to adopt the words of Rosenberg J. A. in *R. v. Hosie* (1996), 107 C.C.C. (3d) 385 (Ont. C.A.) in which he stated:

34. The courts should not be seen as condoning the use of language in search warrants which masks the true state of affairs and deprives a judicial officer of the opportunity to fairly assess whether the state's interest in detecting crime outweighs the individual's privacy interest in his or her own home.



In *Royal Newfoundland Constabulary Public Complaints Commission v. McGrath* (2002), 220 Nfld. & P.E.I.R. 282, the NL Court of Appeal held that the primary objective of the public complaints scheme is not discipline, though discipline may ultimately result. The duties created by the Act and Regulations are essentially public in nature and not focused on the private rights of individual police officers.

Constable Maloney was not the lead investigator. Constable Conohan was himself an experienced officer. Constable Maloney's failure was in failing to adequately supervise and monitor the preparation of the Information to Obtain and hence the adequacy of the investigation.

The statement of agreed facts indicates that there were matters which the subordinate officer (Constable Conohan) did not bring to Constable Maloney's attention.

Constable Maloney did not act with the intention of hurting Mr. and Mrs. Martin and is remorseful for the pain they have suffered. He has apologized for his conduct. Constable Maloney did not act in bad faith.

Constable Maloney changed his plea and admitted the allegations prior to Mrs. Martin have to testify in the public hearing. I accept that Constable Maloney was motivated in part to avoid further stress to Mrs. Martin.

Mr. O'Flaherty is an experienced Commission counsel. Mr. Lavers is also an experienced counsel. Both have proposed that I make no order, and impose no penalty, against Constable Maloney.

I am satisfied that in all of the circumstances no useful purpose would be served by making an order or imposing a penalty against Constable Maloney.

For all of the foregoing reasons, I make no order, and impose no penalty, against Constable Maloney.

### ***Recommendations***

Pursuant to Section 35 of the Act, I am also empowered to make recommendations respecting matters of concern or interest to the public relating to police services. I heard submissions from counsel with respect to recommendations.

On behalf of the Commission, Mr. O'Flaherty submitted that the current policy and procedures are rigorous and do not require any change. He did not propose any recommendations.

Mr. Lavers on behalf of the Martins proposed that I should make recommendations in three areas.

The first area dealt with the pre-adjudication process. Under Section 26(3) of the Act, following the investigation of a complaint, the Commissioner, with the consent of the parties, may effect the settlement of the complaint. Mr. Lavers contended that he was not privy to the Commissioner's investigative report at the time of the settlement process. He suggested that the settlement process should be moved to a time when the parties have a better understanding of the facts.

No evidence has been presented before me as to what took place during the settlement process. I note that Section 26(3) contemplates that the settlement process takes place following the investigation of the complaint. There is nothing in Section 26 which precludes providing the complainant with reasonable and appropriate information to enable the complainant to make an informed decision with respect to settlement. Indeed, common sense indicates that a complainant should have appropriate information before making a settlement decision. The Commission should review its settlement procedures to see if they can be improved, especially in relation to providing a complainant with adequate information to make an informed decision. I have insufficient evidence before me to make any further or more precise recommendation.

Second, Mr. Lavers submitted that the Act should be amended to include a provision for compensation of the complainant where there is a guilty plea or a decision that the police officer has conducted himself or herself in an improper manner. Mr. Lavers proposed that the compensation should be paid by the Royal Newfoundland Constabulary.

This would entail a significant change in the scope and purpose of the Act. There is no evidence before me with respect to the policy implications of such a change, the approach and experience in other jurisdictions, or other matters that may be relevant to the issue. The parties did not ask for the opportunity to present such evidence, documentation and analysis. I do not believe it is appropriate for me to make such a recommendation without the appropriate basis for an informed opinion. I therefore leave it to the Minister of Justice and Attorney General to consider the appropriateness of conducting a review of the Act in respect of such proposed change.

Third, Mr. Lavers proposed a general recommendation for additional police training and policy changes to better ensure that Informations to Obtain meet legal requirements as set forth in various cases, including decisions by the Supreme Court of Newfoundland and Labrador. However, when questioned, Mr. Lavers was not in a position to provide specifics of the proposed changes. Mr. Kennedy also made submissions with respect to the importance of ensuring that Informations to Obtain meet the standards established by the case law.

It is obviously important that police officers be properly trained and adhere to the standards for full, truthful and plain disclosure established by the case law. However, I do not have evidence or information before me to permit me to conclude that current training procedures are inadequate or to permit me to recommend specific improvements.

In the absence of a thorough explanation of the existing training program enabling me to identify specific weaknesses and formulate specific recommendations, I decline to make general recommendations. The Courts have rendered numerous decisions on the proper content of Informations to Obtain. Nothing will be served by a general recommendation that the police follow what is already the law. That is their obligation in any event.

### **Conclusion**

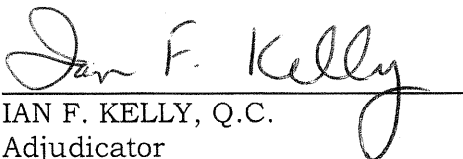
I therefore find that Constable Maloney conducted himself in a manner unbecoming of a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary by

(i) carrying out his duties contrary to the Policy and Procedures Manual, contrary to Section 3(1)(j) of the *Royal Newfoundland Constabulary Public Complaints Regulations*, C.N.R. 970/96, thereby committing an offence contrary to Section 3(2) of the said Regulations; and,

(ii) neglecting or omitting to promptly and diligently perform his duties as a police officer, contrary to Section 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 the said Regulations.

I make no order, and impose no penalty, against Constable Maloney.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 20<sup>th</sup> day of October, 2005.

  
IAN F. KELLY, Q.C.  
Adjudicator

**Appendix "A"**  
**Oral Decision in relation to Application on behalf of Constable**  
**Donald Maloney, December 16, 2003**

MR. ADJUDICATOR:

This matter relates to a complaint against Constable Donald Maloney of the Royal Newfoundland Constabulary.

The complaint alleges breaches of Section 3(1) (j) and 3(1) (d) of the Royal Newfoundland Constabulary Police Complaints Regulations. Particulars of the alleged offence as referred to me are that Constable Donald Maloney, while the acting NCO in charge of the Street Drug Team, failed to ensure that an adequate investigation was conducted by the Street Drug Team prior to a search being conducted at the complainant's residence on August 21st, 2001. Constable Maloney's counsel, Mr. Piercey, has objected to the reference on the basis that I, as Adjudicator, have no authority and/or jurisdiction to review the search warrant and/or the circumstances surrounding the granting of the search warrant, and that the adequacy of the investigation done prior to, at least the issuance of the search warrant, is not a matter that can be reviewed by me as Adjudicator. Mr. O'Flaherty, on behalf of the Commission, opposes the application. Mr. O'Flaherty argues that the applicant has not properly stated the issue which relates to the adequacy of the investigation, that I have jurisdiction to deal with the matter, and that the application is premature and without a sufficient factual basis. Mr. Lavers, on behalf of the complainant, in essence,

supports Mr. O'Flaherty's position. I've read the material filed, including the various case authorities. I take the opportunity to thank counsel for their submissions. In my view, I should only grant this application if I am clearly satisfied that I am without jurisdiction to deal with the matter before me. At this stage, no evidence has yet been presented before me. While it appears from the argument and the documents filed on the application that a search warrant was issued by Judge Rorke, there's no evidence before me of any of the factual circumstances surrounding this matter, including any evidence with respect to any investigation, either before or after the issuance of the warrant. I'm not in a position, nor do I believe I should attempt to determine the legal relevance of the issuance of the search warrant to the charge before me at this stage of the proceeding. The relevance of the issuance of the search warrant, if any, is a question better left until I have all the facts before me. Consequently, the application on behalf of Constable Maloney is denied. Each of the parties have the full right and ability to argue the issue as to the relevance of the search warrant in argument after the presentation of the evidence. None of my comments today should be interpreted as expressing any opinion with respect to the ultimate disposition of the issue.

**Appendix "B"**  
**Oral Decision in relation to Application on behalf of Constable  
Stephen Conohan, August 23, 2005**

MR. ADJUDICATOR:

I intend to dispose of this matter today now so that you all have the benefit of knowing where you stand when we begin on Monday. Anybody else have further submissions before I proceed? I've read all the material, I've read the affidavit of Constable Conohan, the affidavit in response and the various authorities. I heard Constable Conohan's evidence, as well as all of the submissions put forward. I'll deal with this in the order in which the orders are requested. With respect to the order requested with respect to Paragraph 5(a) to shield his physical identity, the principle that has been set forth by the courts, including the Supreme Court of Canada in a number of cases is the principle of an open court hearing, and the same basic principles apply by virtue of the provisions of the legislation in this case. I am not satisfied on the evidence before me that it is necessary or appropriate or that a sufficient evidentiary basis exists for me to make an order simply protecting his identity from the public. I'm mindful of the fact that this is a public hearing, that's the ordinary process, and keeping in mind the fact that Constable Conohan has testified on numerous occasions in public open court, I see no reason to adopt a different procedure in this particular hearing. With respect to the 5(b) order, Mr. Day, I think, rightly takes the position that that is more appropriately dealt with if, as and when these issues arise during the course of



the hearing. The various items in 5(b) cover a range of different issues. We have on the one hand issues with respect to the identity of particular individuals, and that obviously may be a matter of considerable sensitivity and we'll have to hear evidence and submissions on that as we go forward. On the other hand, for example, I note in 5(2) the issue is raised as to particulars of police investigative measures that are employed. It certainly appears to me that it is necessary for me to understand what police investigative measures are in some cases. So that's another item in the spectrum, and until I have the full context, it is impossible for me to make an advance ruling and I think Mr. Day rightly said that's a matter to be dealt with if, as, and when these issues arise, and I propose to follow that or intend to follow that approach. With respect to 5(c), Mr. Day's standing at the hearing, I think that is appropriate, especially in view of the position adopted with respect to 5 (b). So Mr. Day is granted standing as counsel, or to put it more accurately, Constable Conohan is granted the right to have counsel present for his testimony and to lead evidence and make further submissions, etc. Finally, with respect to the issues involving the protection of Section 13 of the Charter and Section 5 of the Canada Evidence Act, and Section 5 of the Newfoundland and Labrador Evidence Act, these are rights which Constable Conohan has and enjoys and is entitled to invoke, and to the extent that it is necessary for me to do so, I declare that he has the right to those protections. Mr. Day, I would suggest that at

the beginning of Constable Conohan's evidence, it would be appropriate for you to specifically raise that issue again, to put that request on the record at the beginning of his testimony, and he obviously is entitled to the benefit of those protections.

MR. DAY:

Point taken, Adjudicator.

MR. ADJUDICATOR:

That's the ruling that I intend to make with respect to this.

Appendix "C"

IN THE MATTER OF a public  
hearing of the complaint of  
Allan Maxwell Martin

**BETWEEN:**

**THE ROYAL NEWFOUNDLAND CONSTABULARY  
PUBLIC COMPLAINTS COMMISSION  
COMMISSION**

**AND:**

**CONSTABLE DONALD MALONEY  
RESPONDENT**

---

**AMENDED JOINT SUBMISSION OF THE COMMISSION AND RESPONDENT**

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## I. INTRODUCTION

1. Constable Maloney is the subject of a complaint by a member of the public, Mr. Allan Martin, that he conducted himself in a manner unbecoming a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary by:
  - i) conducting himself in a manner contrary to the Policy and Procedures Manual, contrary to s. 3(1)(j) 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; and/or
  - ii) neglecting or omitting to diligently perform his duties as a police officer, contrary to s. 3(1)(d) of the Royal Newfoundland Constabulary Public Complaints Regulations, C.N.R. 970/96;

by virtue of the particulars:

*“That Constable Donald Maloney, while the acting NCO in charge of the Street Drug Team, failed to ensure that an adequate investigation was conducted by the Street Drug Team prior to a drug search being conducted of the Complainant’s residence on August 21, 2001. ”*

2. Subsections 3(1)(d) and (j), and 3(2) of the *Royal Newfoundland Constabulary Public Complaint Regulations* read as follows:

### **Conduct**

**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:

(d) neglect or omit to promptly and diligently perform his or her duties as a police officer;

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

(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.

**TAB 1:** *Royal Newfoundland Constabulary Public  
Complaint Regulations, CNR 970/96, s. 3;*

3. The parties agree that the additional provisions of the legislation, the subordinate legislation and the RNC Policy and Procedures Manual that are relevant to this complaint are set out following.
4. Sections 6 and 8 of the *Royal Newfoundland Constabulary Act, 1992* provide:
  6. (1) The chief shall:
    - (d) establish and enforce rules respecting policies and procedures for the effective management and control of the constabulary;
    - (l) issue orders, directives, rules and guidelines respecting policy and matters relating to the constabulary, police services, police officers and other constabulary employees.
  8. (1) The duties of a police officer include:
    - (g) obeying constabulary regulations, orders, and rules respecting police and procedures.

**TAB 2:** *Royal Newfoundland Constabulary  
Act, 1992. s.6, s.8;*

5. Section 57 of the *Royal Newfoundland Constabulary Act* provides that:
  57. The minister may make regulations:
    - (a) prescribing standards for police services;
    - (o) governing the conduct, duties, discipline, suspension and dismissal of police officers and respecting the consideration of a complaint and conduct of a hearing following an investigation carried out under section, 24;
    - (s) prescribing a code of conduct or other regulations or rule in which offences constituting misconduct are described;

**TAB 3:** *Royal Newfoundland Constabulary  
Act, 1992, s. 57*

6. Section 6(2) of the *Royal Newfoundland Constabulary Regulations* provides:

6(2) A supervisor shall ensure that police officers coming under his or her supervision will adhere to all directives, memorandums, policies and procedures as approved by the Chief of Police and is responsible for reporting to his or her immediate supervisor any police officer who fails to carry out his or her duties in a manner as required by the directives, memorandums, policies and procedures not considered of a minor nature.

**TAB 4:** *Royal Newfoundland Constabulary Regulations, s. 6(2)*

7. Section 12 (a) and (b) of Part 1; Chapter B of the *Royal Newfoundland Constabulary Policy and Procedures Manual*, (“Search and Seizures”) included in Consent 1, Tab 13, reads as follows:

**12. General Search Procedures:**

- a. Because of its extraordinary and sensitive nature, persons and/or their property shall not be searched unless:

- (1) It is carried out strictly in accordance with the law;
- (2) It is based upon reasonable and probable grounds

- b. Search procedures pursuant to the *Controlled Drugs and Substances Act*:

- (1) Due to the nature of Drug Enforcement duties, and the fact that physical contact is frequently encountered, *it is mandatory that all drug investigations be conducted with the utmost care and professionalism* (emphasis added);
- (2) Before any search is conducted, the investigator must first establish reasonable and probable grounds that illicit drugs or substances, by means of or in respect of which an offence has been committed, are present. Mere suspicions are not adequate grounds to conduct a search.

8. Section 13 (a) (b) (d) and (i) of Part 1, Chapter B of the *Royal Newfoundland Constabulary Policy Manual* (“Search and Seizure”), included in Consent 1, Tab 13, reads as follows:

13. **Preparation of Information to Obtain a Search Warrants and Warrants to search:**

- a. A Search Warrant will not be valid unless it has been issued pursuant to some statutory authority after all formal and substantive requirements therein have been strictly complied with. Members are therefore instructed to comply with the following procedures when preparing Informations to Obtain a Search Warrant and the resulting Warrant to Search:

. . . . .

- (2) To obtain a warrant, a member must have reasonable and probable grounds to believe:

- (a) An offence was committed;
- (b) The item(s) [information and /or data] sought will afford evidence with respect to the alleged offence; and
- (c) The location of the items [information and/or data].

- (3) The information in the previous paragraph must be clearly stated on the Information to Obtain a Search Warrant.

- b. *All Informations to Obtain a Search Warrant and all Warrants to Search shall, when completed, be submitted for review to the member's immediate supervisor* (emphasis added).
- d. Before executing a Warrant to Search, the member will notify a supervisor of the particulars of the intended search.
- i. Upon execution of the Search Warrant the member will report the particulars as noted in (f) to their immediate supervisor

9. Section 5 of Part 3, Chapter L of the Royal Newfoundland Constabulary Policy and Procedures Manual ("Drugs") included in Consent 1, Tab 14, reads as follows:

5. **Searches and Seizures:**

- a. Due to the nature of drug enforcement duties and the fact that physical contact is frequently encountered, *it is mandatory that all drug*



*investigations be conducted with the utmost care and professionalism* (emphasis added).

- b. Before any search is conducted, the investigator must first establish reasonable and probable grounds that illicit drugs, by means of or in respect of which an offence has been committed, are on the premises. Mere suspicion is not adequate grounds to conduct a search.

10. Sections 3, 4, and 5 of Part 10, Chapter A of the Royal Newfoundland

Constabulary Policy and Procedures Manual (“Organization”), included in

Consent 1, Tab 15, reads as follows:

3. **Unity of Command:**

- a. The RNC concurs with the principle of management that states the chain of command should include with clarity every member of the organization so that every member knows from whom he receives orders and to whom he reports. Clear lines of authority minimize conflict, confusion, and avoidance of responsibility.
- b. Reporting relations in the RNC are clearly defined. Each organization component is under the direct command of only one supervisor. Members in the performance of their regular duties report to their immediate supervisor. When members are on special assignment, extra duty, or temporarily transferred, they report to the immediate supervisor of the special, extra duty, or temporary assignment.

4. **Delegation of Authority:**

Delegation of authority is an organizational process that permits the transfer of authority from supervisor to subordinate. A subordinate is responsible for the completion of assigned work and is accountable to his supervisor for satisfactory performance of that work. Similarly, supervisors at each level of supervision are accountable for the performance of staff under their immediate control.

5. **Span of Control:**

- a. “Span of Control” refers to the number of subordinates a supervisor can effectively manage. Several factors must be taken into consideration in determining the ideal number of subordinates assigned to one supervisor. These include complexity of the job,

size of the organization, philosophy of management, and the abilities of the individual supervisors and their subordinates.

- b. The number of subordinates assigned to RNC supervisors shall not be excessive and will depend upon circumstances in the immediate work environment. No supervisor shall have more subordinates than he can effectively oversee.

## II. AGREED FACTS

11. The search of the Martin residence was conducted on the authority of a search warrant obtained on August 21, 2001 by the Royal Newfoundland Constabulary. The search warrant was Royal Newfoundland Constabulary work product and the relevant procedures and policies governing the obtaining of the search warrant were those of the Royal Newfoundland Constabulary.
12. The sworn Information to Obtain a Search Warrant (the "Information to Obtain") contained information received from a confidential source much of which subsequently proved to be incorrect, inaccurate or false. The Information to Obtain also contained information received from other members of the RNC which, based on the evidence, subsequently proved to be incorrect or inaccurate.
13. Constable Maloney was the Acting NCO I/C of the Street Drug Team on August 21, 2001. Constable Maloney was in an acting supervisory capacity, not a permanent one, at the time.
14. Constable Maloney had a duty to supervise and monitor the conduct of the investigation carried out by the members of the Street Drug Team leading to the preparation of the Information to Obtain on August 21, 2001. Maloney had a duty to review all Informations to Obtain and all Warrants to search prepared by the Street Drug Team, and a duty to ensure that RNC Policies and Procedures were followed by members of the Street Drug Team in the conduct of their investigations, including in the preparation of Informations to Obtain and Warrants to Search. The parties agree that the standard required by the RNC

Policy and Procedure Manual in the supervision and monitoring of drug investigations is a high one, namely “utmost care and professionalism”.

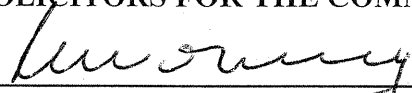
15. Constable Maloney admits that prior to the drug search being conducted at #78 Carter’s Hill he failed in his duty to adequately supervise and monitor the preparation of the Information to Obtain and Warrant to Search by Cst. Conohan, who was at the time a constable under his direction and control.
16. Constable Maloney did not act with the intention of hurting Mr. and Mrs. Martin and is remorseful for the pain they have suffered.
17. Constable Maloney did not act with an absence of good faith.
18. Evidence presented at this hearing indicates there were matters which the subordinate officer did not bring to Constable Maloney’s attention.
19. Constable Maloney has entered a plea of guilty prior to Mrs. Martin having to testify in the public hearing.

III. RELIEF SOUGHT

20. The parties jointly submit, that in consideration of the foregoing, an appropriate resolution of the public hearing under s. 33(1) is as follows:
  - a) The adjudicator accept the plea of Constable Maloney and that a finding be made that Constable Maloney has acted contrary to s. 3(1) (d) and **(j) of the Royal Newfoundland Constabulary Public Complaint Regulations;** and,
  - b) The adjudicator not impose any period of suspension on Constable Maloney.

DATED at St. John's, this 19<sup>th</sup> day of October, 2005.

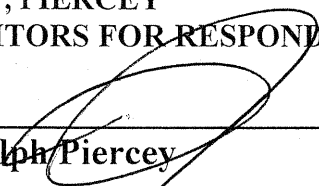
**GOODLAND O'FLAHERTY  
SOLICITORS FOR THE COMMISSION**

**Per:**   
\_\_\_\_\_  
**Peter O'Flaherty**

**Whose Address for Service is:**

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St. John's, NF A1C 1B4

**KELLY, PIERCEY  
SOLICITORS FOR RESPONDENT**

**Per:**   
\_\_\_\_\_  
**Randolph Piercey**

**Whose Address for Service is:**

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140 Water Street  
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