



The particulars of the alleged offense are as follows:

That Constable J. Thistle did, on or about the 7<sup>th</sup> of May, 1996 at or near St. John's, in the Province of Newfoundland, during a high speed pursuit by the Royal Newfoundland Constabulary of a vehicle driven by one *Brian Lahey*, act in a manner contrary to the Policy and Procedures Manual, specifically, the provisions of Part 4, Chapter B - "High Speed Pursuit" - of the Policy and Procedures Manual. It is alleged that Constable Thistle, as the driver and senior member in police cruiser # 84, failed to comply with Sections 1(c), 1(g), 1(h), 1(j), 1(k), 1(l), 1(o), 1(q), and 2(k) of Part 4, Chapter B.

**FURTHER**

- (b) whereas pursuant to the Act and the Regulations made thereunder, Constable B. McGrath, Reg. No 476, is alleged to have conducted himself in a manner unbecoming a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary by carrying out his duties 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 offense contrary to Section 3 (2) of the said Regulations.

The particulars of the alleged offense are as follows:

That Constable B. McGrath, on or about the 7<sup>th</sup> day of May, 1996 at or near St. John's, in the Province of Newfoundland, during a high speed pursuit by the Royal Newfoundland Constabulary of a vehicle driven by one *Brian Lahey*, act in a manner contrary to the Policy and Procedures Manual, specifically, the provisions of Part 4, Chapter B - "High Speed Pursuit" - of the Policy and Procedures Manual. It is alleged that Constable McGrath, as senior and only member in police cruiser # 257, failed to comply with Sections 1(c), 1(g), 1(h), 1(j), 1(k), 1(l), 1(o), 1(q), and 2(k) of Part 4, Chapter B.

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

....  
Commissioner

The matter, after other preliminary motions, was heard on the merits throughout the Spring, Summer and Autumn of 2004.

**EVIDENTIARY SOURCES**

The evidence before me comprises information by way of documentary evidence - submitted with the consent of the parties - as well as *viva voce* evidence offered by the following

witnesses:-

Insp./ Superintendent R Shanahan	( Retired) R. N. C.
Constable D. Beehan	R. N. C.
Constable B. Marshall	R. N. C.
Constable D. Langer	R. N. C.
Sergeant Dennis Byrne	R. N. C.
Sergeant C. Penney	R. N. C.
Constable T. Warren	R. N. C.
Constable J. Penton	R. N. C.
S/Sergeant L. Peyton	( Retired) R. N. C.
Mr Brian Lahey	Civilian
Ms Ethel J. Noseworthy	Civilian
Mr Paul Noseworthy	Civilian
Sergeant J. Hill	R. N. C.
Sergeant David Byrne	R. N. C.
Inspector S. Roche	R. N. C.
Ms Michelle O' Keefe	Civilian R. N. C.
Mr Daniel Boone	Barrister / Solicitor

A view was also taken of the approach to and the crash scene area.

### **BRIEF FACTUAL BACKGROUND**

The catalyst to the cause of action against Constables Thistle and McGrath is provided in the R. N. C. communication record for May 7<sup>th</sup>, 1996 ( RS-1) It essentially details the route, times and observations throughout the period when the above officers (and others) were attempting to stop an evading driver operating a Chevy Blazer 4 x 4. This pursuit lasted approximately 4.4 minutes and covered a distance of approximately 9.1 kilometers at speeds averaging 116 kilometers per hour,(Consent - 5). The travel area was the main artery of the city which included eight (8) major intersections and six (6) lesser ones - not including Topsail Rd. and Logy Bay / MacDonald. All these intersections have traffic- control lights.

The Blazer, driven by *Brian Lahey*, crashed at the Logy Bay / McDonald Drive 'T' intersection; impacting the side walk / embankment and vaulted 34.8 meters at a 78 kph minimum to its resting place. Front seat passenger - Maher - died as a result.

**SALIENT DOCUMENTARY EVIDENCE**, produced hereunder:

**R. S - 1** The transcript detailing persons, time and conversations throughout the pursuit.

**"Sgt K. Butt RNC Communications**

**The following transmission was recorded on May 07, 1996 at 00:37 hours.**

00:37:38  
Cst. McGrath: 376, 257

00:37:42  
Mr. Lane: go ahead

00:37:45  
Cst. McGrath: 376 257 over

00:37:51  
Mr Lane: go ahead 257 over

00:37:54  
Cst McGrath: I'm ah pursuing a ah large size Blazer here on Columbus Drive plate # charlie, echo, juliet 425, charlie, echo, juliet 425 120 kms per hour, won't stop.

00:38:15  
Cst Thistle: Where you to Brian?

00:38:18  
Cst. McGrath: I'm alongside ah Evening Telegram, Evening Telegram, there's ah 4 occupants in the vehicle. I'm at ah Canada Drive now still refusing to pull over.

00:38:30  
Cst. Thistle: I'm coming behind you at Canadian Tire.

00:38:39  
Mr Lane: It's registered to a Brian Lahey from Tors Cove over

00:38:44  
Cst. McGrath: Is it a full size Chev Blazer, full size Chev Blazer?

00:38:56  
Mr Lane: Ya 10, 10-4, it says a Chev truck, I assume that must be the same one, 87 grey in colour, registered to a fella Lahey in Tors Cove.

00:39:08  
Cst. McGrath 10-4 its ah continuing ah north here I'm at ah Mundy Pond Road now ah copy

00:39:16  
Mr Lane: 10-4

00:39:25  
Cst. Janes: 376, 207

00:39:28  
Mr Lane: go ahead over

00:39:40  
S/Sgt. Peyton: Cst. McGrath ,281

00:39:42  
Cst. McGrath go ahead ah I'm here at ah Empire Ave across from ah Columbus Drive

00:39:51  
S/Sgt. Peyton: Do you have that vehicle stopped?

00:39:55  
Cst. McGrath 10-10 he refuses to stop ah I've been chasing him now since Kilbride and we're coming down to ah Thorburn Road now..

00:40:11  
Cst. Beehan: He didn't miss them cars by much there the last time.

00:40:17  
Cst. McGrath: Yeah it's ah the area of the Health Science Centre now it's really ah after taking off ah there 281.

00:40:30  
Cst. Feltham: Cst. McGrath what's your 10-20?

00:40:37  
Cst. McGrath: I'm in the area of the Health Science Centre, on Prince Philip Drive ah Education Building now copy.

00:40:50  
Cst. Feltham: Keep us updated there before you go

00:40:59  
Mr Lane: Ya, Cst. McGrath the vehicle is not on file as stolen there

00:41:06:  
Cst. McGrath: 10-4

00:41:16  
Cst. Warren 275 is behind Cst. McGrath over going down by Confederation Building.

00:41:21  
S/Sgt. Peyton: .....keep us updated.....

00:41:25  
? Cst. Feltham .....tried to cut ya off there.

00:41:38  
Cst. Warren: I'm here, I'm right behind you now

00:41:42  
Cst. McGrath: Boy, he just nearly put that other vehicle out in the woods there

00:41:48  
Cst. Warren: saw that.

00:41:57  
Cst. Thistle: ...we're coming across the parkway over MacDonald Drive.

00:42:14  
Cst. Thistle: Coming across MacDonald Drive going to Torbay Road.

00:42:29  
Cst. Thistle: We're going to be going straight through MacDonald Drive past Torbay Rd.

00:42:40  
Mr Lane: 29 on the registered owner is also 10-10.

00:42:46  
Cst. Thistle: ...Logy Bay Road ..

00:42:50  
Cst. McGrath: ..I suggest at this speed stand by

00:42:58  
Cst. Thistle: ..376 ah get A.I..out here right away"

**R. S- 4 Policy re: HIGH SPEED PURSUIT ( in place at time of incident)**

**1. Pursuits: General**

- c.** A member deciding to initiate or discontinue a pursuit must weigh all the factors involved. Serious consideration will be given to not initiating a pursuit, or to discontinuing a pursuit, if any of the following condition are present:
- (1) the offense, in itself does not involve a clear danger to the public.
  - (2) A licence number has been obtained, or the fugitive is otherwise known or can be identified.
  - (3) The fugitive is operating a motor cycle, A.T.V., snow machine or similar conveyance dangerously exceeding the speed limit, and shows a persistent determination not to stop.
  - (4) The driver of the pursued vehicle is very young.
  - (5) There are passengers in the pursued vehicle.
- g.** A pursuit will not be commenced or, if one has been commenced, will be discontinued when there is a clear danger to the public, the occupants of the pursued vehicle, or the pursuing member(s) which outweighs the necessity of immediate apprehension. A clear danger exists when speeds dangerously exceed that of the normal flow of traffic; or when the presence of pedestrian

or vehicular traffic necessitates the unsafe maneuvering of either vehicle, to avoid traffic.

- h.** A member involved in a pursuit will govern the speed of the pursuit vehicle to take into account the following factors:

  - (1) time of day
  - (2) road conditions
  - (3) weather conditions
  - (4) density of people
  - (5) vehicles and buildings in the area
  - (6) condition of police vehicle
- j.** Members must come to a stop at red lights and stop signs and proceed with caution through intersections.
- k.** No more than two units will be involved in a pursuit.
- l.** High speed pursuit shall be discouraged for routine traffic violations except in extreme circumstances.
- o.** Most accidents during a pursuit, involves the pursued vehicle. Equal or greater attention must be given to the degree of danger created by the fugitives driving.
- q.** No member will be criticized if he/she elects, in interest of safety, not to pursue a violator who refuses to stop. It is far more preferable to let a criminal escape, than to risk death or serious injury to an innocent person.

**2. Primary and Secondary Unit:**

- k.** Members in the secondary vehicle will ensure that no additional vehicles become involved in the pursuit, unless assigned by dispatcher or supervisor.

**POSITION OF THE PARTIES**

**(a) Commission:**

Mr. Whalen, Q.C., at the outset, suggested that he was not seeking sanctions against the two constables or making martyrs of them. He contended, however, that they were a part of a larger police operation and organization where good judgement was lacking and identified incidents which emphasized such:

- a)** Dispatch did not have full information of the pursuit progress. If they did, it would have been discontinued.

- b) When high speeds were evident and the identity of the vehicle known, there was no need to continue and put the public or the passengers in the pursued vehicle at risk.
- c) More than two police vehicles (units) were involved in the pursuit.
- d) Pursuit vehicles did not stop at or take caution through intersections, or weigh all the factors.
- e) What was the necessity of immediate apprehension when high risk factors were present?
- f) All police units (5) saw the pursued vehicle 'impact' which suggested 'crowding'.
- g) Policy was clearly not followed.

Mr. Whalen genuinely felt that there was a causal connection between the alleged breaches of policy - the conduct of the pursuit - and the crash. However, true professional that he is, all available evidence was disclosed and /or called even though it may not have strengthened his position.

**(b) Respondents:**

Both Mr. Wicks and Mr. Walsh, contended that there was no link between the pursuit and the crash; that Mr. Lahey was not 'crowded', and that he was not stopping for anyone.

They further maintained that:

- a) The criminal trial determined that Constable McGrath had reasonable and probable grounds to believe the criminal offenses of impaired or dangerous driving was being committed,( not only the initial speeding).
- b) That this matter should be seen as relitigation and attracts the principles of abuse of process or *issue estoppel*.
- c) That Constable McGrath was the only person in the primary vehicle when policy directs there should be two.
- d) That Constable Thistle was at least the third vehicle, or possibly the fourth - he was only a follower.
- e) That R. S - 4, High Speed Pursuit Policy since the early 1990's received little, if any, complete or regular training or updating.
- f) That there was limited operational training in High Speed Pursuits.



- g) That S/Sgt. Peyton took control and command in the early stages of the pursuit.
- h) That extreme circumstances are not defined in R. S -4.
- i) That R. S -4 allowed officers to make value choices whether to continue the pursuit or to abandon.
- j) That the conduct under scrutiny was an organizational problem.
- k) That serious decisions weighing all the factors had to be made inside of 4.4 minutes.

### **ORAL EVIDENCE:**

#### **Retired Superintendent R. Shannahan;**

testified that he served 35 years with the R.N.C. and was an Inspector at the time of this incident. He did an investigation into the conduct of the officers involved in the pursuit as it related to the policy of R. S -4. This was independent of any complaint. The audio ( R. S -1 ) was reviewed plus all the operational reports. His comments on the policy ( R. S -4) was that by 1996 it had been in place for a number of years but updated by policy directives. He explained that officers coming out of the Academy had some driver training, but could not say if it was based on the policy of R. S -4. His report on the conduct of the officers (to the Deputy Chief) concluded that traffic volume was low; road markings good; there was not always high speed; that the pursuit did not cause the accident; that Cst. McGrath was timely, accurate and without exaggerations. This was a judgement call and he used his best judgement - there was no violation of policy.

The witness acknowledged that after this incident there was talk about doing more on policy R. S-4, requiring particular forms for high speed pursuits; obtaining and instructing on 'spike belt deployment'. He agreed that training days on policy would greatly improve the information base - as one reading of new policy on parade was not likely to sink in. It was noted that while hard cover policy manuals were always available, loose- leaf handbook policy manuals to Constables were taken back because they were not being updated.

The witness agreed with Mr. Noble on cross examination that on the night in question, supervisors could or should have been paged internally - that contact with the communication centre was important for the supervisors. It was agreed that Lieut. (Insp.) Snow, the duty

officer, only found out about the pursuit moments before the crash, largely because S/ Sgt. Peyton had taken control by communicating with the primary vehicle ( Cst. McGrath) and departed the centre without delegating or informing others.

***Constable David Beehan;***

an R. N. C. Officer for 15 years, indicated he heard Cst. McGrath transmit that he was near the Telegram building and positioned himself so as to follow. At Columbus / Old Pennywell Road, the target vehicle, while being pursued by Cst. McGrath narrowly missed another vehicle while going through a red light. He explained that he had to roll stop because he was driving an unmarked vehicle. At Freshwater / Kenmount overpass, Cst. Thistle in a marked vehicle came up behind him, so he pulled over and allowed Cst. Thistle to assume the second position. Another unmarked vehicle, ( Cst. Warren and Cst.Penton) took up the pursuit by the CBC on the Parkway and he continued on.

He could not recall the position (colour) of the traffic lights, but by the Confederation Building, other vehicular traffic impeded the target and it had to slow down. When these vehicles moved out of the way, the target vehicle put some distance between it and the pursuing vehicles. There was no traffic at the Portugal Road or at the Torbay / MacDonald intersections. Cst.Langer and Cst. Marshall took up the chase in their marked vehicle. The target vehicle was traveling too fast, did not apply any brakes, and did not attempt any turn at the crash intersection.

On cross examination, Cst. Beehan explained that driving conditions were good throughout and in his opinion there was always a safe distance between the police vehicles and the target vehicle. The police vehicles were well back when the crash occurred and there was no 'crowding' of the target vehicle at any time. He felt there was no reason to call off the pursuit. When questioned regarding high speed pursuits and policy, this witness recalled that field manuals were issued in the early 1990's, but were later re-called. New orders were read out on parade, but he could not recall if high speed pursuit orders were included. He did remember information about evading police now being a criminal offense.

As for driver training, this was a one week course at the Academy (1989) where high speed chase was but one component. On another occasion a high speed pursuit course offered by the R. N. C. for him and 5 or 6 other officers, was terminated within an hour as they were needed back on the street due to staff shortages.

***Constable T. Warren;***

a 14 year R.N.C. officer, recalled entering the pursuit at University / Parkway. He saw the target vehicle pass by at a high speed and Cst. McGrath about 200 feet behind, so he took up the position as second pursuit vehicle behind Cst. McGrath, and had to catch up in his unmarked vehicle. Cst. Thistle or Cst. Beehan could not be seen South on the Parkway at this time ( which was about half a kilometer away).At the hill ( Confederation Building), the target vehicle took serious maneuvers to avoid civilian traffic and sped up dramatically when he got through. Both he and Cst. McGrath had to slow down to respect this civilian traffic.

This witness remembered seeing another police vehicle at the Torbay / MacDonald intersection and did recall that at the crash area, the McGrath vehicle was about 200 feet back when the target impacted. Throughout the pursuit he advised that his emergency equipment was engaged. Before the impact the target vehicle did not apply any brakes.

The remainder of his evidence recorded:

that, conditions were ideal for the pursuit;

he saw nothing wrong with his actions nor of Cst. McGrath;

he had done driver training from the Academy, and otherwise, which included theory and practice at high speeds;

he was familiar with the policy of abandonment;

he was aware of policy and procedures re High Speed Pursuit, but could not say he read it thoroughly - considering it to be a guideline, a discretionary area, and in any event, S/Sgt.

Peyton was in control of the situation that night.

***Constable J. Penton;***

22 years with the R.N.C. and a senior member, was a passenger with Cst. Warren on the night in question - "just getting back into the rut". His account of events was largely consistent with that of Cst. Warren. They decided to help after hearing transmissions ( R.S -1) and intersected at University / Parkway. The Blazer was seen "flying by" and within seconds, Cst. McGrath went by. They fell in behind Cst. McGrath, but had to play catch-up. Emergency lights were activated, and the siren was used strategically during and receiving transmissions. No attention was paid to who was behind them. At the Confederation Building, the target vehicle encountered civilian traffic and had to slow down, but quickly maneuvered through. The police vehicle had to play catch-up after every intersection. He recalled seeing a marked police vehicle at Torbay / MacDonald. The target vehicle gave no indication of slowing down, and the impact was " to me, unreal."

Additionally, Cst. Penton commented;

that he does recall reading the policy and procedures on High Speed Pursuit from either the larger binder or the handbook version - "it's quite boring" - but not a guideline as related by Cst. Warren, even though he knows "where the constable is coming from;" he would not have done anything different from Cst. McGrath given the observation he made and the necessity of a judgement;

S/Sgt. Peyton was in command but he did not have a full grasp of what they (pursuit vehicles) were seeing;

he had had a couple of days on High Speed Pursuits done in controlled conditions, but the training could not touch that night;

he served two years at the communication centre, and that it was important for a supervisor, (other than dispatcher), to be monitoring at all times and to carry a portable if outside the communication centre.

The evidence of **Constable B. Marshall**, ( R.N.C. since 1994) and **Constable D. Langer**, ( R.N.C. for 19 years ) was substantially the same.

They had heard the transmissions of Cst. McGrath at Kilbride, and decided to move up to the Torbay / MacDonald intersection with the intention of freeing traffic and blocking the intersection- Cst. Langer being the driver. As the target approached, the high speed

suggested he was not going to slow down or stop however, so they moved out of the blocking position. There was a green light and the target vehicle came through at 100 - 120 kph. with the police vehicles 200 - 300 metres behind.

They pulled in behind what they thought was the third vehicle, and upon approaching the crest of the hill, witnessed the crash. On impact, the first police vehicle was approximately 200 - 300 metres back. Cst. Langer advised that when he pulled out, a third and marked vehicle went by. It was 700 metres from this point to the crash area. Both officers explained that they were comfortable with the pursuit portion they saw.

Additional details:

***Constable Langer;***

that he had done high speed pursuits before; but that this was the first one where death occurred ( to his knowledge);  
at the Police Academy in 1984 - 85, he and Cst. McGrath had no practical driver training - only in Radar;  
for him, it was to take the keys and go;  
he was familiar with the policy, but had handed back his field binder in 1996;  
pursuits require balancing public safety, and that in the end, he felt it was discretionary and he had the authority to make that judgement; and that S/Sgt. Peyton was the platoon commander and there were also sector sergeants on duty that day.

***Constable Marshall*** added

that at the Police Academy his driving course was about one week;  
he did three days of a five day police vehicle operation course since this incident, but that the remainder had not been re-scheduled; and  
he still had his field manual from 1994.

***Sergeant Dennis Byrne;***

22 years with the R .N.C., advised that early on May 7th, 1996, he was asked by Lieut. Snow to attend the accident scene. He was the Sergeant in charge of accident investigation at the time. After talking to the other investigators and doing a 'facts check', he did a run of the chase route (Kilbride to impact) timed from 00:38:18 to 00:42:58 ( C. S -1) and

concluded, using the time - distance - speed formula, that the approximate speed for the pursuit was 116 kph. He also gave evidence at the criminal trial of driver Lahey.

Other points worthy of note were:

- i) There are sixteen (16) traffic lights along the route.
- ii) There were near misses during the pursuit.
- iii) Driver alcohol readings were 175/100 blood serum, and 130/100 blood alcohol.
- iv) Witnesses in the flight vehicle confirmed high speeds - 50 to 150 kph.
- v) Police vehicles were far behind the target.
- vi) There was no 'dead end' signage at the impact site.
- vii) The chase route was four (4) lane throughout.
- viii) The deceased was the only person not wearing a seat-belt.
- ix) The overall mechanical condition of the vehicle was good.

He agreed that there were dangerous intersections, but the premise is that all intersections are dangerous meeting points. This officer concluded by saying the extent of his driver training was a half-day at the Police Academy, and had not received any programmed training since then.

***Sergeant C. Penney;***

R.N.C. CID, arrived at the scene at 02:30 hours and met with officers present. He canvassed and examined the scene. He particularly noted that:

- the front passenger seat belt had not been in use,
- there were beer bottles on the floor of the Lahey vehicle, plus ice and beer in the console,
- the end of MacDonald Drive carried the illusion of a continuous road,
- the target vehicle was 34.8 metres from point of impact to resting place,
- the vehicle vaulting speed was a minimum of 78kph., and that
- there were no skids or yawing to indicate braking before impact.

***Staff/Sergeant L Peyton, (Retired);***

covered the many positions he had held throughout his career with the R.N.C.. On

May 7<sup>th</sup>, 1996, he was the S/Sgt. with three or four sergeants under him. Insp. C. Snow (then a Lieut) was the senior officer - the duty officer. The witness explained that he had just returned to Headquarters from road duties, and heard Cst. McGrath's transmission timed at 00:37:54 referencing vehicle CEJ 425 and speeds of 120 kph. This was received on his portable radio. He did not enter the Operations Room (Communications Centre), but instead, returned to his vehicle and attempted to get a hands-on view of the events unfolding. He assumed that the other Sergeants and / or Insp. Snow were privy to the pursuit transmissions via ( at least) portables.

The officer entered the pursuit path at Allandale / Prince Philip Drive, but the other pursuit vehicles were by then past the Confederation Building. He attempted to communicate with Cst. McGrath, but radio traffic was heavy, and shortly after he heard the A.I. (Accident Investigation) call.

This witness was candid, but not shy on how he saw matters associated with this event; that Lieut. (Insp.) Snow was ultimately in control that night;

he may have overstepped his bounds, but he was Acting Inspector/Platoon Commander and in a practical sense, in charge. "What is recorded by me, is so, and accurate";

if he had decided to shut down the pursuit he would have called an 'abandon chase' and would have expected it to be obeyed;

he felt he had ample facts to continue - it was opportune and optimum with minimal potential for danger; and

he had every confidence in Cst. McGrath and Cst. Thistle, and as experienced officers, expected value choices and judgements.

Regarding policy, this witness commented he was familiar with it, especially when he wrote for his Staff Sergeant position in the early 1990's. While there were hard cover and handbooks of policy available, there was no direction from the Chief's Office to read policy changes on parade until after this incident. In any event, he considered policy as a common sense approach matter - a guideline. He acknowledged that there were certain inconsistencies in the policy re: 'High Speed Pursuits', but thought his actions were consistent with assuming

command.

He was not aware, at the time of this event, that Cst. Warren was the second police vehicle. Further, he did not ask Sector Sergeant Kennedy to step in or to use spike belts because he did not know if there were any .

***Ms Ethel J. Noseworthy;***

recalled that she was traveling east on Old Pennywell Road intersecting at Columbus Drive on the time and date in question. She was just about through when this Blazer came through the red light and shook her vehicle. She estimated this vehicle to be traveling about 120 - 125 kph. It narrowly missed slicing her vehicle on the passenger side. Three police vehicles with emergency lights came down the hill, slowed down at the intersection, and continued. Her estimation put the officers about 15 - 20 seconds behind the Blazer. She then continued on her route which happened to take her near the crash site.

***Mr. Paul Noseworthy;***

indicated that he had just finished work on Ropewalk Lane and was entering the Parkway at Westerland. He could see back to Thorburn Road when the Blazer passed by “doing 100 miles per hour. Three or four police vehicles came by 6 - 7 seconds later.” He noted that he was stopped at the light, and that the police slowed down for the intersection, but that the Blazer had sped through a red. The witness continued down the Parkway with the Blazer in sight for 30 - 45 seconds. The police slowed down for all the lights. He had a view of the Blazer and pursuit vehicles to the top of Confederation Hill, and at no time did the police ‘box in’ the Blazer, or ‘crowd’ it. He recalled seeing a police vehicle merge at Allandale with lights in it’s grill, but could not remember seeing an unmarked police vehicle at University / Parkway.

***Mr. Daniel Boone;***

Lawyer, recalled traveling home after midnight. At the Holiday Inn, he turned right



onto MacDonald Drive and proceeded in the centre to turn left at Ottawa. Before making the turn, a civilian vehicle with flashing lights passed him at considerable speed - the fastest he had ever seen. "That's what made the impression on me." As a civic duty, he called the police later that day because reports indicated a chase had taken place. His account, however, was that he saw no police vehicles in pursuit and even after he continued up Ottawa Street for some distance, he did not see any police vehicles pass the intersection.

***Mr. Brian Lahey;***

driver of the target Blazer, acknowledged most of the observations made by other witnesses. The vehicle was not officially registered and was not insured. When he encountered the first police vehicle, approaching the Irving Station at Kilbride, he was speeding, and when the police vehicle turned and followed, it was his decision to evade and take flight.

The witness agreed that, on times, he was doing 140 - 150 kph, - "whatever she could do"- along the Parkway. There were close encounters with other vehicles near the Confederation Building and that he nearly hit an unmarked police vehicle at University / Parkway. In his flight, he paid no heed to the traffic lights - just carried on through. He explained that at the outset of the chase, he was nervous and panicked. Factors such as :- beer in the vehicle, his consumption, no insurance, previous impairment and leaving the scene conviction, his criminal record, undertaking, etc - pressured him to continue. He admitted that passenger O' Driscoll asked him to slow down, and that Mr. Maher *may* have told him "to give it to her" and put up the volume of the music. He softened the latter comment by saying it was hard to tell because the vehicle had no muffler.

Mr. Lahey was not aware of how many police vehicles were following until he was in the Confederation Building area - but he could see their emergency lights. He was not overly familiar with the Torbay - Logy Bay / MacDonald Drive route and how it ended. On further examination, Mr. Lahey admitted the police were just doing their job on that night and even though he had no particular plan, - "things just happened so fast". Immediately

before the crash, he related that he did see police lights flashing but could not tell how far back they were. On earlier questioning, he stated that he could not recall anything after the Confederation Building to the crash area. The witness explained that there was difficulty interpreting the crash site intersection and no breaking was attempted.

The remaining witnesses largely commented on areas where post - incident efforts have been made to:

- (a) Upgrade policy - definitions.
- (b) Improve Communications.
- (c) Enlarge on Training.
- (d) Improve data entry and retrieval on High Speed Pursuits.
- (e) Review other regulatory regimes ( ie H.T.A ) that conflict during pursuits, (ie: use of emergency equipment; impounding and storage.)
- (f) Assumption of control ( re: High Speed Pursuits).

## **THE LAW**

### **A. COMMISSION'S BURDEN OF PROOF**

It is but a formality to state that, in matters of this nature, the principle or test for proof is on the preponderance of evidence.

Royal Newfoundland Constabulary Act, 1992, Chapter R - 17 (as amended)

Section 33(1) Following a hearing ... an adjudicator shall make a determination on the balance of probability....

However, there are occasions in a civil trial where mere tipping of scales is not sufficient -as explained in **Director of Child Welfare (P.E.I.) v. N. W and L. M.**, 156 Nfld & P E I R,241. at page 246.

'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.'

"This passage was cited with approval in **Hanes v. Wawanesa Mutual Insurance Co.**, [1963] S. C.R. 154, at p.161. A similar approach was put forward by Cartwright, J., in **Smith v. Smith** [1952] 2 S. C.R. 312, at pp. 331 - 332:

'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 on the totality of the circumstances on which its judgement is formed including the gravity of the consequences...'"

Whilst these proceedings against the officers mentioned are disciplinary in nature, the consequential penalties can be significant.

## **B. DEFENCES**

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

In **Rabah v. Austin**, Ont. Bd. of Inq., 16 Nov. 1998, at p. 13, it was found that

officers were not guilty of misconduct despite the fact that entry into the complainant's residence was contrary to Supreme Court of Canada case law. The inquiry ruled that the officers acted in *good faith* and had not received training concerning developments in the related law - the police force "failed in its responsibility to keep its members properly informed"

C. **THE STANDARD TO BE MET** - conduct unbecoming or likely to bring discredit.

Adjudicator Morrow, Q.C., in **Fowler v. Adams**, Nfld. Adj., Aug. 30, 2004, dealt with a discreditable conduct charge. He described this type of conduct as all encompassing. It implies that an officer's conduct is of such a nature that it brings discredit upon the force of which he or she is a member. Even though the conduct may be criminal it could involve activities such as inappropriate behavior in court, *inappropriate response to specific situations*, harassment, or cheating.

In **Girard v. Delaney**, [1995] 2 P. L. R. 337 ( Ont. Bd. Inq.), the panel proceeding under the **Police Services Act** did an analysis of what constitutes discreditable conduct and was not satisfied that the subjective test of reasonableness or *good faith* fulfilled the standard which meets reasonable expectation of people in the community. It concludes that:

Rather than making the difficult choice of which among these approaches is appropriate for our case, we have combined elements from each and arrived at the following principles:

1. The test is primarily an objective one.
2. The Board must measure the conduct of the officer by the reasonable expectations of the community.
3. In determining the reasonable expectations of the community, the Board may use its own judgement, in the absence of evidence as to what the reasonable expectations are. The Board must place itself in the position of the reasonable person in the community, dispassionate and fully apprised of the circumstances of the case.
4. In applying this standard the Board should consider not only the immediate facts surrounding the case but also any

5. appropriate rules and regulations in force at the time. Because of the objective nature of the test, the subjective element of *good faith* (referred to in the ***Shockness*** case) is an appropriate consideration where the officer is required by the circumstances to exercise his discretion.

Counsel for both sides agreed that this is the proper statement of law regarding the offense.

## ANALYSIS

The behavior of the officers must be viewed in context and not isolated for the purpose of particularized scrutiny. For Cst. McGrath, the number and range of factors needing consideration for any decision was enormous. Within a matter of seconds, he had to switch from a routine Highway Traffic (speeding) mode to reasonable and probable grounds to believe a criminal offense was being committed; mentally record the indicia, note identifying features of the vehicle, call in the information, operate the police vehicle, engage equipment (emergency), weigh the conditions, evaluate the risk / safety factors and make a value choice whether or not to engage in pursuit.

He decided to pursue; apprehend a fleeing suspect and prevent a further dangerous circumstance from unfolding. Other officers, including Cst. Thistle, privy to his radio communications, decided to back-up and join in at various intersections and continued on to the end. The driver of the flight vehicle was found guilty of criminal negligence causing death and no fault was found with the conduct of the police officers involved.

Constables McGrath and Thistle are now facing disciplinary consideration for not adhering to specific sections of the High Speed Pursuit policy, while others in the same pursuit are not being subjected to the same scrutiny.

At 00:39:51, short of two minutes into the pursuit, S/Sgt. Peyton communicated with Cst. McGrath, and acknowledged, in evidence, he was in control of the pursuit. It was his decision to continue or abandon. That he left the Headquarters without delegating control is

not a negative legal burden on other officers in pursuit. It was also disclosed by the evidence that Cst. Thistle never did catch up to assume second position in the pursuit - his following position was at least third, maybe even fourth at the impact scene.

It is critical at this point to highlight the consistent officer testimony on the 'Pursuit Policy', which include:

- being familiar with it,
- only a guideline,
- discretionary,
- limited and broken training,
- hand manuals not updated and taken back,
- called out of training to perform other duties,
- vague with inconsistencies and lacking in definition.

Against this backdrop then, one must apply the law with respect to the *bona fides* of the officers charged. It is my considered view that the conduct questioned is the product of organizational deficiencies and not individual. As in **Rabah v. Austin** [*supra*] the police officers acted in *good faith* and had not received any measurable, if any, training, practical or otherwise on a very important piece of operational policy. It is apparent the lack of training is broad-based when viewed in light of the varied comments from most officers called at the hearing.

Should the reasoning and result above be considered flawed or wrong, then it remains to be decided whether the technical breaches of policy in the difficult and dangerous situation attracts a finding of conduct unbecoming and liable to bring discredit.

Accepting that **Girard v. Delaney** [*supra*] is a correct statement of the law, then the benchmark against which an officer's conduct is to be measured, is '*the reasonable expectations of the community*'. In the instant case, how is this benchmark determined?

In assessing the conduct of Constables McGrath and Thistle on May 07, 1996, against the reasonable expectations of the community, I am mindful of the following:

1. Citizens expect officers to lawfully apprehend criminals and prevent a

dangerous situation from continuing.

2. Citizens expect officers to act diligently and prudent at all times while protecting the public interest.
3. As a community, the whole slate of officers testifying accept the conduct of Constables McGrath and Thistle. While this may be considered as self-serving, it is none the less reality based with seasoned community dealings.
4. Civilian witness Ethel Noseworthy, appeared offended by the speed and near collision caused by the target vehicle. However, she observed that the police vehicles slowed at the intersection and had lights and siren engaged.
5. Similarly, civilian witness Paul Noseworthy, also appeared appalled at the speed of the target vehicle. He too observed that the police vehicles were slowing for the intersections and endeavoring to catch up. He was adamant that the police were not crowding or boxing in the target vehicle.

Both [4] and [5] above suggest that citizens, when viewing objectively, are prepared to allow latitude when police proceed slowly and prudently through intersections - even against traffic signals - when dangerous criminal activity is evident.

6. Lawyer, Daniel Boone, best exemplified what the community expects. He was offended by reports that the police were crowding the target vehicle and drawing conclusions that they were probably the cause of the crash. Mr. Boone was so upset by this and the resultant unfairness, that he called the police department the same day to report his observations - which were totally inconsistent with crowding of the target vehicle.
7. Generally, citizens would expect that the police, who are mandated to protect their interest, would have sufficient resources and training in policy to meet that requirement.

I am satisfied on the basis of the evidence and the applicable principles, that the actions of Constables McGrath and Thistle were seasoned with *good faith* and does not

constitute discreditable conduct.

Lastly, there is one other aspect of the Respondent's legal argument which needs to be addressed. It is centered on relitigation and the application of *issue estoppel*, collateral attack and abuse of process. **Toronto (city) v. Canadian Union of Public Employees (C.U.P.E.) Local 79**, [2003] 3 S. C.R. 77 is cited as authority. The essence of the argument is that the officers, and in particular, Cst. McGrath, had already been tested for his conduct in criminal proceedings and found to be without fault, and it follows that he should not be tried again for the same conduct.

My considered view, on careful reading of the above case, is that Cst. McGrath was not a party to the criminal proceeding; it was **Her Majesty the Queen ( R ) v. Lahey**. The 'raison d'etre' of it was to determine if the state could prove beyond a reasonable doubt elements of criminal charges, and that included the intent, state of mind - the culpability of Mr. Lahey. It was not a disciplinary procedure ( as here ) which officially measured the conduct of Cst. McGrath for that purpose. Furthermore, as a matter of law, I am bound to give effect to the criminal process and result and there has been no attempt here to undermine it in any way.

Suffice to say at this stage, I am not convinced this case attracts any necessary or needed determination under *issue estoppel*, collateral attack or, in particular, abuse of process.

## **CONCLUSION**

It may be noted that I did not isolate the articles of policy questioning the conduct of officers Thistle and McGrath piece by piece throughout the analysis. This was intentional because it was felt necessary to judge the whole matter in a contextual basis. A reference to 1(c), 1(g), 1(h), 1(j), 1(k), 1(l), 1(o), 1(q), 2(k) and 3(1)(j) [*supra*] will show inclusion throughout the judgement.

Accordingly: the allegations against Constable J. Thistle are dismissed;



the allegations against Constable B. McGrath are dismissed; while maybe not for the same reasons, the results of the decisions appealed from are confirmed.

### **RECOMMENDATIONS pursuant to Section 35**

I am grateful to all counsel at this hearing for demonstrated professionalism, dedication to each interest and their inclusive representation for any change / improvements in policy that *could* positively affect police services in matters of this nature in the future.

#### **Statement**

It is trite to say that the police service is a responsibility of the Government - the Department of Justice and Attorney General - through statutory regimes and regulation.

The office of the Chief ( R. N. C.) has delegated authority to make policy for the effective management of police services, ( see **Royal Newfoundland Constabulary Act, 1992**, Chapter R - 17, section 6 (1) d through n, *supra* ). Simply put, the former provides the resources, the latter crafts the tool depending on the material provided and the public measures the end product. Comparatively, well - intentioned corporations minimize liability in high - risk areas by educating and training employees on a regular and continuing basis. When improper or excessive employee conduct occurs, it can be particularized to that individual, and controls the attraction of liability to the corporation. Sound policy, educating and training, is no different for any other responsible organization or institution.

#### **Against this back drop:**

#### **Recommendation (1)**

For greater certainty (since the effective date of policy presented difficulty at this hearing), that High Speed Pursuit policy R. S - 4 receive total review largely to provide definition, remove inconsistencies and conflicts evident

throughout;

OR

**Recommendation (2)**

That the proposed Suspect Apprehension Pursuit policy (Consent -18) be the acknowledged protocol for future like situations.

- Caveat:*
- (a) Particular attention is drawn to 2 (d) and 2 (e). Do they conflict ?; is it practical?; is it discretion?.
  - (b) 2 (g) and 2 (h). Do they conflict?; does one permit exceeding posted speed but disallow prudent slow stop progress?.
  - (c) In a multi-tasking arena, what is the protocol when the Dispatcher, temporarily or otherwise, is a uniformed officer?.

**Recommendation (3)**

That resources and time be committed for officer training on a continuing basis in the areas of

- (a) Suspect Apprehension Policy
- (b) Police Vehicle Operations

- Caveat:* It is my understanding that efforts are underway to meet this concern; but many aspects of Police Vehicle Operation cannot be realized with ‘stale dated’ equipment.

**Recommendation (4)**

Tire Deflation System (spike belt) on occasion *could* be an integral part of flight cessation alternatives. It is recommended that supply meet this demand coupled with an awareness of where they are located for timely application.

**Recommendation (5)**

Evading the police is now a criminal offense. Seizure and forfeiture of valued items used in the commission of an offense ( ie vehicles) could be a valuable deterrent tool. Provisions in the Criminal Code allow for this (outside organizational crime) and could be advocated. Similar provisions should be enacted under the Highway Traffic Act.

*Caveat:* It is realized that bailee responsibilities and impounding space also attracts concerns.

**Recommendation (6)**

That in-vehicle video recording be considered on a selective basis after a cost - benefit analysis.

Recommendations (5) and (6) while extremely practical, are not intended to weaken the resources committed for (1), (2), (3) and (4).

That Mr. Maher lost his life and Mrs Tee and others continue to live their loss may not be reconciled by these results. Their loss, however, was the impetus throughout.

There is no order of costs - none argued.

DATED at Harbour Grace, in the province of Newfoundland and Labrador, this 10th day of December, 2004 A.D.

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James Kean  
Chief Adjudicator

