

Introduction

This hearing relates to a complaint against Constable Timothy Buckle of the Royal Newfoundland Constabulary alleging conduct unbecoming to a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary. The matter was referred to me as Adjudicator on May 3, 2000 to conduct a public hearing pursuant to the Act and the Regulations.

The full text of the alleged conduct forming the basis of the complaint as set forth in the Reference is as follows:

Pursuant to the *Royal Newfoundland Constabulary Act, 1992, R-17*, as amended, and the Regulations made thereunder, Constable T. Buckle, Reg No. 554, is alleged to have conducted himself in a manner contrary to s. 3(1)(a), 3(1)(b), and 3(1)(j) of the Royal Newfoundland Constabulary Public Complaints Regulations thereby committing an offence under subsection 3(2) of the Regulations.

Particulars of the alleged offence are as follows:

1. Constable Buckle entered the residence of Mr. John Bishop at Apt. 208, 235 Blackmarsh Road, St. John's, Newfoundland on November 12, 1998 without proper legal authority;
2. Constable Buckle arrested and/or attempted to arrest Mr. John Bishop on November 12, 1998 without proper legal authority;
3. Constable Buckle used excessive force while arresting or attempting to arrest Mr. John Bishop during which Oleoresin Capsicum Spray (O.C. Spray) was used without justification on November 12, 1998.

Constable Buckle denied each allegation set forth in the Reference.

The matter was heard at St. John's on August 14, 15, 16, 17 and December 11, 12, 13, 18 and 19, 2000. Mr. Norman Whalen and Mr. Kenneth Jerrett represented the Commission, Mr. Bernard Coffey represented Constable Buckle and Mr. Paul Noble represented the Chief of Police. The Complainant, Mr. John Bishop, while primarily relying upon the presentation of evidence by Commission Counsel, did participate as a party from time to time in the hearing.

The events giving rise to the complaint occurred on November 12, 1998 when Constable Buckle responded to a report of a domestic dispute at the residence of Mr. John Bishop. The Complainant, Mr. Bishop, filed a complaint the next

day, November 13, 1998.

At the hearing, evidence was given by Sergeant James Carroll, Mr. Robert Turnbull, Mr. Blane Kelly, Ms. Sherry Marie Sheppard, Mr. John Bishop, Ms. Diane Humber, Sergeant Calvin Barrett, Constable Monica Murphy, Mr. Noel Nurse, Inspector Sean Roach, Constable Lester Parsons and Constable Timothy Buckle.

Background

Responding to domestic disputes can be one of the most dangerous police activities. Emotions are often running high and rational thought may be at a minimum. The police officer often will have little advance notice of what he will encounter. There is a risk to the safety of the police officer and a risk to the safety of those present.

This matter could have resulted in much more serious consequences, either for Mr. Bishop or Constable Buckle. Fortunately, there were no permanent physical injuries.

The circumstances of the call to the RNC Communications Centre and the events at the Bishop residence are unusual. Some background information is helpful.

Mr. Bishop and his wife, Geraldine Bishop, reside at Apartment 208, 235 Blackmarsh Road. Mr. Bishop operates a small paving business and drives a taxi after the construction season is over.

One of the Bishop's daughters, J, is married to Sergeant RH. of the Metro Toronto Police Department. They live in Ontario. On August 4, 1998, J gave birth to twin boys, the H's first children and the Bishop's first grandchildren.

Mr. and Mrs. Bishop were excited by the arrival of the grandchildren. The Bishops went to Ontario to be with their daughter. At first they stayed with their daughter and Sergeant H at their home. However, after a short period of time, a heated argument occurred at the residence between Mr. Bishop and Sergeant H. The precise cause or subject matter of the argument is not clear from the evidence. During the dispute, Mr. Bishop alleges that Sergeant H. put a gun to Mr. Bishop's head. The police were called. Mr. and Mrs. Bishop left their daughter's home and stayed with Mrs. Bishop's sister.

Mr. Bishop alleges that the next day Sergeant H. said that Mr. Bishop would never be permitted to see his grandchildren again. Mr. Bishop testified that he has not been allowed to see his grandchildren since that time, except on one occasion when his daughter showed him the children at a mall while Sergeant H. was at work. Mr. Bishop has not seen his grandchildren since approximately October 1998.

Mr. Bishop was devastated by the "loss" of his grandchildren. The family dispute was upsetting to Mr. Bishop and his wife. Mr. Bishop became suicidal

and was admitted for a time to the Waterford Hospital in St. John's.

Sometime after returning to St. John's, Mr. Bishop contacted the internal affairs department of the Metro Toronto Police and inquired about making a disciplinary complaint against Sergeant H. over the alleged gun incident. I wish to make it clear that I make no finding with respect to the occurrence of this incident. It is not necessary for the purpose of this Decision. Sergeant H. was not called to testify. From the evidence that was given, I surmise that Sergeant H. has a different view of the events than Mr. Bishop. What is important is simply that Mr. Bishop was considering "charging" his son-in-law over this alleged incident.

On the evening of November 11, 1998, Mr. Bishop had been driving taxi. He arrived home at approximately 1:00 a.m. He had a few drinks. Either that evening and/or the next morning, Mr. Bishop and his wife argued over whether Mr. Bishop was going to lay charges against their son-in-law, Sergeant H. Whether the argument began that night or only began the following morning at 8:00-9:00 a.m. is unimportant. Mrs. Bishop did not want her husband to lay charges, apparently fearing it would make matters worse and might affect her own ability to see the grandchildren.

On the morning of November 12, 1998, Mr. Bishop argued with his wife over whether to charge Sergeant H. Mr. Bishop called his daughter J and told her that he and her mother were arguing over RH and whether to charge him. Mr. Bishop testified that his daughter got angry and upset. She didn't want her husband charged. His daughter eventually hung up on Mr. Bishop.

Sometime later, his daughter called back. Mr. Bishop hung up on her and unplugged the phone. Mr. Bishop testified that he was upset with his daughter because she was taking her husband's side.

The phone in the bedroom had been turned down so it wouldn't ring.

Mr. Bishop left the apartment for awhile to go to the taxi office. Sometime after his return to the apartment, Mrs. Bishop's sister, Barbara Evans, arrived. She apparently stayed for lunch. After lunch, Mrs. Bishop and her sister left to go to Kilbride. Mr. Bishop went back to bed and went to sleep.

The Incident

The RNC master recording tape for November 12, 1998 was not preserved. The testimony before me indicates that the computer times from the various dispatch stations are not necessarily synchronized. The computer time periods are therefore not necessarily precise. In addition, without the master tape, it is not possible to put precise times on some of the events. However, it is possible to set forth the events with sufficient accuracy for the purpose of this Decision.

At approximately 14:47 (2:47 p.m.), Robert Turnbull at the RNC Communications Centre received a call from R H who identified himself as a Sergeant with the Metro Police in Toronto. The complaint of possible domestic

violence is contained in the following extracts from the conversation between Mr. Turnbull and Sergeant H, (reproduced as written in Exhibit RT#2).

RH: Ah, we're, ah, calling because I was wondering if you can a scout car to, to an address out there in St. John's, we're really concerned about my, ah, my mother-in-law.

...

RH: Ahm, it's, it's actually regarding the father-in-law, he's, ah _____, he's got a long history of, ah, of, of domestic violence and he called up here not so long ago and had a conversation with his daughter, my wife, on the phone an' hung up and we can't get a, and we could here her m'um, the, the mother-in-law screaming in the background and now there's no answer so we're just concerned about her safety.

...

RH: Yeah, he's got, he's, he's suicidal too, he's attempted suicide in the past too and he's, and he's violent so...

...

RH: She's very terrified of 'em so she may not, I don't know how it is in St. John's, I know over here we go and check for any signs of domestic abuse or anything.

...

RH: He may have very well done something to her and she, she won't even say anything.

The call was treated as a Priority 1 call. Mr. Blane Kelly of the RNC Communications Centre dispatched Constable Buckle at approximately 14:59 (2:59 p.m.). The following are extracts from Mr. Kelly's conversation with Constable Buckle.

Mr. B. Kelly: 10-4, I have a complaint of a disturbance at number 2-3-5 Blackmarsh Road, 2-3-5 Blackmarsh Road. Ah, the suspect is a Geraldine Bishop, Geraldine Bishop. Apparently her and her husband are havin' a fight or had an argument on the phone there, while she was talkin' to her son-in-law, over.

...

Mr. B. Kelly: 10-4, I'm just bringin' it up there now, just stand by. Ah, 235 Blackmarsh, 235. Ah, Constable Buckle, ah, Sergeant H.,

Sergeant H from Toronto called it down. Ah, when you're there, he'd like to speak to, ah, Geraldine while, while you're in the presence there, just to make sure that everyt'ng is okay, copy.

...

Mr. B. Kelly: 10-4. I got a phone number there for her to call him now when, ah, when you're there so he wants to talk to her just to make sure everything's okay there, over.

Constable Buckle had no previous knowledge of the Bishops. He had only the information provided by Mr. Kelly. He had not heard the communication between Mr. Turnbull and Sergeant H.

Constable Buckle was leaving Provincial Court at Atlantic Place. He proceeded to RNC headquarters on Military Road to drop a passenger and then proceeded directly to Blackmarsh Road, arriving at approximately 15:14 (3:14 p.m.).

Constable Buckle gained entry to the apartment building through the main entrance and proceeded down the corridor to Apartment 208. Constable Buckle knocked on the door and tried the door, but couldn't get an answer. He confirmed the apartment number with Mr. Kelly.

Constable Buckle exited the apartment building through the emergency exit at the end of the building. He attempted to look in the bedroom windows, but couldn't see in. He went to the patio door and knocked. There was no answer. The door was unlocked. Constable Buckle opened the door. He notified Mr. Kelly to request back up as follows:

Cst. T. Buckle: 10-4, you might wanna get another Unit ahead long here with me too just in case there's some problem here.

Constable Monica Murphy indicated that she would respond.

There was a divergence between the testimony of Mr. Bishop and that of Constable Buckle as to what occurred during the next few minutes. In summary, Mr. Bishop testified that he was asleep in the bedroom when he thought he heard someone yelling his name. He closed his eyes and went back to sleep. When he opened his eyes, Constable Buckle was standing in his bedroom. Mr. Bishop asked what he was doing there. Constable Buckle said he was looking for his wife (Mrs. Bishop). Mr. Bishop asked why. At one point, Mr. Bishop testified that he asked "What's wrong sir?" Constable Buckle told him he knew. Mr. Bishop said he didn't know. Mr. Bishop got up out of bed and moved toward Constable Buckle. Constable Buckle backed up down the hallway toward the kitchen. Mr. Bishop testified that he told Constable Buckle that if he wasn't going to tell him what's going on, please leave his house. Constable Buckle took his hands from behind his back and tried to pepper

spray Mr. Bishop's eyes. Mr. Bishop put his hands over his eyes and turned around at the kitchen sink. The spray hit his shoulder and back. Constable Buckle left. Mr. Bishop went back to his bedroom to get a cigarette.

Constable Buckle's version of events is somewhat different. In summary, Constable Buckle testified that he was standing in the patio doorway when Mr. Bishop came out of the hallway. Mr. Bishop was standing in his pants, no shirt, and looked a bit unkept. Mr. Bishop asked what he wanted. Constable Buckle told him he was looking for Mrs. Bishop. Constable Buckle testified that he remembered Mr. Bishop's reply: "There's no Mrs. Bishop here." Constable Buckle's initial reaction was that he feared that he had the wrong apartment, something that had occurred to him on a previous occasion. Constable Buckle told Mr. Bishop that we had received a call from a relative in Toronto who was concerned about her. Constable Buckle asked if Mrs. Bishop was in the apartment. At this point, Mr. Bishop became upset and angry and told him to get out. At one point, Constable Buckle told Mr. Bishop that he needed to speak to Mrs. Bishop and that he would not leave until he determined her safety. Mr. Bishop would not respond to his inquiries regarding Mrs. Bishop. Constable Buckle believed that Mr. Bishop had initially tried to mislead him and that he had the correct apartment. Constable Buckle was concerned about Mrs. Bishop's safety.

According to Constable Buckle's testimony, Mr. Bishop was standing at the junction of the hallway, living room and kitchen. Constable Buckle had moved into the living room and was now in approximately the middle of the room. Constable Buckle then moved closer, despite Mr. Bishop's confrontational demeanor. Constable Buckle moved to the side to block the hallway to prevent Mr. Bishop from going back down to the bedroom. Constable Buckle was concerned about Mrs. Bishop's welfare and attempted to arrest Mr. Bishop to place him under control so Constable Buckle could search for Mrs. Bishop. Constable Buckle touched Mr. Bishop on the arm and told him he was under arrest. Mr. Bishop pulled away and moved into the kitchen to avoid arrest. Constable Buckle followed Mr. Bishop into the kitchen, pulled out his pepper spray, told Mr. Bishop to turn around and that he was under arrest. Constable Buckle testified that Mr. Bishop lunged at him, struck his hand and knocked the pepper spray canister to the floor. Constable Buckle picked up the canister with his right hand. Mr. Bishop turned away and put up his hands to cover his face. The spray contacted the side of his head, shoulder and back. Constable Buckle moved to the middle of the kitchen. Mr. Bishop ran past him to the bedroom. Constable Murphy arrived shortly afterwards.

In his testimony before me, Mr. Bishop denied that Constable Buckle had told him that he was under arrest.

Having listened carefully to the examination and cross-examination of both witnesses as well as considering the other evidence before me, I generally find the evidence of Constable Buckle to be a more accurate rendition of the events than that of Mr. Bishop. I am satisfied that Constable Buckle was never in Mr. Bishop's bedroom. In a statement given to Inspector Roach the next day, Mr. Bishop said that the initial encounter took place in the hallway. It may well

have been that Constable Buckle had already entered some distance into the living room when Mr. Bishop presented himself. However, I accept that the initial encounter took place at the junction of the living room/hallway/kitchen, substantially as described by Constable Buckle.

I also accept that Constable Buckle told Mr. Bishop that he was under arrest. In statements made after the incident to Inspector Roach and to the CBC, Mr. Bishop stated that Constable Buckle had said that he was under arrest.

I find that Mr. Bishop was asleep in bed when Constable Buckle arrived at the apartment. Mrs. Bishop had gone with her sister to her home in Kilbride. Constable Buckle, having gotten no answer at the apartment door, proceeded through the emergency exit, attempted to look into the windows, came to the patio door and found it unlocked. Having gotten no answer, he opened the patio door and called out for Mr. and Mrs. Bishop. He may even have entered some distance into the living room before Mr. Bishop presented himself at the junction of the hallway/living room/kitchen.

I am satisfied that Constable Buckle was in full uniform and that Mr. Bishop immediately recognized him as an RNC officer.

I find that Constable Buckle told Mr. Bishop that he was looking for Mrs. Bishop. I am satisfied that Mr. Bishop's initial reply contained words to the effect: "There's no Mrs. Bishop here", causing Constable Buckle to wonder whether he had the correct apartment. Constable Buckle told Mr. Bishop that he needed to speak to Mrs. Bishop. Possibly in response to Mr. Bishop asking "why" or "what's wrong", Constable Buckle told Mr. Bishop that we had received a call from a relative in Toronto (or on the mainland) and that the relative was concerned about her. I am satisfied that Constable Buckle conveyed the understanding to Mr. Bishop that there had been a report of a disturbance, fight or confrontation.

I am satisfied and so find that at that point, Mr. Bishop became angry and upset. He had argued with his wife and daughter earlier that morning. He already believed (without foundation) that Sergeant H. had arranged for the RNC to watch him. He blamed two previous routine RNC stops of his vehicle on Sergeant H's action. When Constable Buckle told Mr. Bishop that they had received a call from a relative in Toronto or on the mainland, Mr. Bishop concluded that Sergeant H. was responsible for the call. Mr. Bishop may have drawn that conclusion when he first saw Constable Buckle in the living room in uniform, but he certainly did so no later than having been told by Constable Buckle of the call from a relative.

Indeed, Mr. Bishop did not deny that he had concluded that Sergeant H. was behind the RNC being at his apartment. Mr. Bishop testified that he thought Sergeant H. and Constable Buckle were "buddies" even before this incident. Of course, Constable Buckle had no prior knowledge of Mr. Bishop, Sergeant H. or their family circumstances.

I am satisfied that Constable Buckle told Mr. Bishop that he needed to

determine whether Mrs. Bishop was safe and that he wanted to speak to her and would not leave until he had determined that she was safe.

Mr. Bishop became angry and told Constable Buckle to leave the apartment. He knew full well that his wife was at her sister's in Kilbride and he could easily have told Constable Buckle her whereabouts. He admits that he did not tell Constable Buckle. Mr. Bishop, in attempting to justify under cross-examination his refusal to tell Constable Buckle where his wife was, testified: "No one was getting any sense out of the other... He was stubborn, I was stubborn... He wouldn't tell me anything, I wouldn't tell him anything... He acted dumb, I acted dumb."

I find that Constable Buckle honestly believed from the nature of the dispatch call to him that the alleged domestic dispute was either in progress or at least had recently occurred. He encountered an unco-operative, if not openly hostile, Mr. Bishop. Mr. Bishop would not give him any information as to his wife's whereabouts. I am satisfied that Constable Buckle was reasonably concerned for the safety of Mrs. Bishop.

I am satisfied that Constable Buckle moved forward and placed himself in a position to prevent Mr. Bishop from returning down the hallway to the bedrooms. Constable Buckle wanted to keep him in plain view and did not want him returning to the bedrooms where Mrs. Bishop may have been located or where weapons could possibly be stored.

I find that Constable Buckle told Mr. Bishop that he wanted to search or would be searching the apartment for Mrs. Bishop. Constable Buckle told Mr. Bishop to sit in the living room and that if he didn't, he would be arrested. When Mr. Bishop failed to comply, Constable Buckle touched his arm and told him he was under arrest.

Constable Buckle did not purport to arrest Mr. Bishop for a specific offence. He attempted to arrest him to place him under control so that he would be able to look for Mrs. Bishop.

Constable Buckle did not give Mr. Bishop a caution at any time. Constable Buckle testified that he did not yet have control of Mr. Bishop.

Mr. Bishop pulled away and moved into the kitchen. Constable Buckle followed, took out the pepper spray, told Mr. Bishop to turn around and that he was under arrest.

Mr. Bishop was fully aware of what was in the canister, how it would be used and its effect. Mr. Bishop testified that his son-in-law, Sergeant H., had told him all about pepper spray and how it was used.

Mr. Bishop refused to comply with Constable Buckle's demand to turn around. In his testimony, Constable Buckle testified that he thought that Mr. Bishop next lunged at him, struck his hand and knocked the pepper spray canister to the floor. Constable Buckle picked it up and then discharged it at Mr. Bishop.

In a statement written after the incident, Constable Buckle placed the events in the reverse order. Constable Buckle wrote that he attempted to administer the spray, Mr. Bishop covered his face and turned away and the spray covered his right shoulder and back. After that, Mr. Bishop turned back toward Constable Buckle, lunged toward him, striking his hand and knocking the canister from his grasp. Constable Buckle testified that, while he was not certain, he thought the written statement was in error in that Mr. Bishop knocked the can from his hand before the spray was discharged.

I do not need to make a definite finding as to the order of these events. I am satisfied that Mr. Bishop, knowing that Constable Buckle might discharge the spray at his face if he did not comply, took steps to avoid that possibility including covering his face and turning away. He knocked Constable Buckle's hand causing him to drop the canister. Nothing turns on whether the canister was knocked from Constable Buckle's hand before or after the discharge of the spray.

Constable Buckle chose to withdraw at this point for his own safety and to await the arrival of Constable Murphy. Mr. Bishop went to the bedroom.

I am satisfied that the events described from the time Constable Buckle opened the patio door, through to the pepper spray incident, and up to Constable Murphy's arrival unfolded quite quickly and took only a few minutes. There were only approximately 17 minutes between Constable Buckle's arrival at the apartment building and Constable Murphy's arrival. Constable Buckle had to first gain entrance to the building, proceed to the apartment door, exit the building, proceed to the windows and then ultimately to the patio door. I conclude that the events unfolded relatively quickly once Constable Buckle opened the patio door and encountered Mr. Bishop.

Subsequent Events

Nothing of significance turns on the subsequent events, so I will outline them in summary form without going into extensive detail. Failure to refer to any particular piece of testimony does not mean that I have not fully considered all of the evidence before me.

Constable Murphy arrived very shortly after the pepper spray incident occurred. Constable Smith arrived in another police vehicle immediately thereafter.

Constable Murphy spoke to Mr. Bishop through the bedroom window. Once Mr. Bishop had calmed down, she was able to enter the apartment and speak to him. Mr. Bishop told her that his wife was at her sister's in Kilbride. He provided a cell phone. Constable Murphy spoke to Mrs. Bishop and determined that she was all right.

Mr. Bishop was subsequently taken to hospital by another of his daughters where he was treated for the effects of the pepper spray.

Constable Buckle and Constable Murphy later interviewed Mrs. Bishop. Mrs.

Bishop apparently told them that the only force used during the argument was that she was pushed onto the couch. However, she related a more serious incident which had apparently occurred some 10-15 years earlier.

Constable Buckle conveyed Mrs. Bishop to the Iris Kirby House.

Constable Buckle returned to the Bishop apartment later that evening to arrest Mr. Bishop and charge him with assault causing bodily harm on Mrs. Bishop (the incident from 10-15 years earlier), common assault on Mrs. Bishop (the day of the incident), resisting arrest and assault on Constable Buckle. Mr. Bishop was not at home. The file was turned over to others at the RNC.

Mr. Bishop complained of an alleged assault by Constable Buckle on him and also complained pursuant to the *Act* and Regulations.

No criminal charges were proceeded with against either Mr. Bishop or Constable Buckle. It appears obvious from the evidence before me that Mrs. Bishop was not interested in proceeding with any charges against her husband. The testimony indicates that Mr. and Mrs. Bishop continue to reside together as husband and wife.

What is left is Mr. Bishop's complaint against Constable Buckle.

The Allegations against Constable Buckle

Many cases and authorities were referred to me in argument. I have read and considered all of them. I am grateful to Counsel for their assistance. I will refer to only a limited number of cases and authorities in rendering this Decision, even though other references and citations could have been added.

Section 33(1) of the *Act* provides that the Adjudicator shall make a determination on the balance of probabilities. Police discipline proceedings are not criminal or penal in nature. The criminal standard of proof beyond reasonable doubt does not apply. *Trimm v. Durham Regional Police*, [1987] 2 S.C.R. 582; *Hickey v. Ploughman*, (1998) Brown Q.C., Adjudicator.

Nevertheless, even in civil proceedings, the more serious the allegation, the clearer and more convincing ought to be the evidence. Before finding the allegations to be proven, the evidence should be such that the fair and reasonable conclusion is that Constable Buckle had acted improperly as alleged. *Hickey v. Ploughman*, supra.

i) Alleged entry without proper legal authority.

The first allegation against Constable Buckle is as follows:

Constable Buckle entered the residence of Mr. John Bishop at Apt. 208, 235 Blackmarsh Road, St. John's, Newfoundland on November 12, 1998 without proper legal authority.

In *R. v. Godoy*, [1999] 1 S.C.R. 311, the Supreme Court of Canada held that public policy requires that the police have the authority to investigate 911 calls for assistance. In appropriate circumstances, this includes the right to forcibly enter a private residence to ascertain the health and safety of the person thought to be in distress. Chief Justice Lamer writing for the Court made the following comments:

16. A 911 call is a distress call - a cry for help. It may indeed be precipitated by criminal events, but criminal activity is not a prerequisite for assistance. The duties specifically enumerated in s. 42(1) of the Act may or may not be engaged. The point of the 911 emergency response system is to provide whatever assistance is required under the circumstances of the call. In the context of a disconnected 911 call, the nature of the distress is unknown. However, in my view, it is reasonable, indeed imperative, that the police assume that the caller is in some distress and requires immediate assistance. To act otherwise would seriously impair the effectiveness of the system and undermine its very purpose. The police duty to protect life is therefore engaged whenever it can be inferred that the 911 caller is or may be in some distress, including cases where the call is disconnected before the nature of the emergency can be determined.

...

20. One can imagine, for example, a person having a heart attack who dials 911 but cannot speak. Perhaps there is no one home to answer the door. Would a reasonable person expect that the police would take steps to ensure that the 911 caller was all right? I believe so. A further example might be a situation where a home is burglarized and a resident is being held at gunpoint. Assuming a resident can actually make the 911 call, he or she might answer the door to the police under a threat of bodily injury should the police be allowed to enter. On the other hand, the person who answers the door might well be the intruder. I see no other use for an emergency response system if those persons who are dispatched to the scene cannot actually respond to the individual caller. I certainly cannot accept that the police should simply take the word of the person who answers the door that there is "no problem" inside.

21. Further, the courts, legislators, police and social service workers have all engaged in a serious and important campaign to educate themselves and the public on the nature and prevalence of domestic violence. One of the hallmarks of this crime is its private nature. Familial abuse occurs within the

supposed sanctity of the home. While there is no question that one's privacy at home is a value to be preserved and promoted, privacy cannot trump the safety of all members of the household. If our society is to provide an effective means of dealing with domestic violence, it must have a form of crisis response. The 911 system provides such a response. Given the wealth of experience the police have in such matters, it is unthinkable that they would take the word of the person who answers the door without further investigation. Without making any comment on the specific facts of this case, it takes only a modicum of common sense to realize that if a person is unable to speak to a 911 dispatcher when making a call, he or she may likewise be unable to answer the door when help arrives. Should the police then take the word of the person who does answer the door, who might well be an abuser and who, if so, would no doubt pronounce that all is well inside? I think not.

22. Thus in my view, the importance of the police duty to protect life warrants and justifies a forced entry into a dwelling in order to ascertain the health and safety of a 911 caller. The public interest in maintaining an effective emergency response system is obvious and significant enough to merit some intrusion on a resident's privacy interest. However, I emphasize that the intrusion must be limited to the protection of life and safety. The police have authority to investigate the 911 call and, in particular, to locate the caller and determine his or her reasons for making the call and provide such assistance as may be required. The police authority for being on private property in response to a 911 call ends there. They do not have further permission to search premises or otherwise intrude on a resident's privacy or property. In *Dedman, supra*, at p. 35, Le Dain J. stated that the interference with liberty must be necessary for carrying out the police duty and it must be reasonable. A reasonable interference in circumstances such as an unknown trouble call would be to locate the 911 caller in the home. If this can be done without entering the home with force, obviously such a course of action is mandated. Each case will be considered in its own context, keeping in mind all of the surrounding circumstances. (I specifically refrain from pronouncing on whether an entry in response to a 911 call affects the applicability of the "plain view" doctrine as it is not at issue on the facts of the case at bar.)

Commission counsel attempts to distinguish *Godoy* on the basis that technically the call from Sergeant H. was not a 911 call, nor was the call from the person thought to be in distress. The call was from a third party.

I reject both of these arguments. To accede to them would be a triumph of form over substance. The 911 system is a local call. Calls from outside the area or the province must arrive by a long distance call. What is important is the nature of the call, not the technical means by which it arrives at the RNC Communications Centre. A call for assistance should be responded to within the principles established by *Godoy*, whether or not it is a 911 call or a long distance call.

Similarly, it does not matter whether the call is from the person in distress or a third party, at least in the absence of compelling evidence that the third party call is in the nature of a “crank call”. A person injured either by a medical problem such as a stroke or by an assault may not be able to call for help. It would be ludicrous to suggest that third party calls for assistance for such persons should be treated differently than calls by the person actually in distress. Indeed, in *Godoy*, no one knew in advance whether the caller was the person herself or a third party, because the line was disconnected before the person spoke. The Court’s decision did not turn on who originated the call.

Based upon those distinctions, Commission counsel argued that some minimal level of investigation should have been done, such as having the RNC call the house first to see if the phone was in fact disconnected or calling back to Sergeant H. in Toronto when Constable Buckle got no answer at the door.

I reject those submissions for three reasons. First, and most importantly, those forms of investigation waste precious time in determining whether the person is in fact in distress and needs medical assistance. The police properly treat such a call as a Priority 1 call and promptly dispatch an officer to the location. Requiring some form of even minimal investigation could delay the arrival of help which may be urgently needed to stop an assault in progress or to render emergency medical aid.

Second, calling ahead may have disastrous consequences if in fact a serious assault is in progress. Receiving a call from the RNC dispatcher before an officer is present at the location could aggravate the assault. Alternatively, the police may be lulled into a false sense that there is no problem.

Third, neither of these suggestions would have made any difference to the result. The phone was in fact disconnected and Sergeant H. could not provide any additional useful information. Constable Buckle was at the correct apartment.

The only logical course is that followed by the RNC - dispatch an officer as a Priority 1 call.

I am satisfied that Constable Buckle, having received the call from the RNC dispatch centre, having gotten no answer at the apartment door, having been unable to see in the windows and finding the patio door unlocked, was justified in opening the patio door and entering the residence to determine whether Mrs. Bishop was safe.

I am further satisfied that Constable Buckle was justified in not leaving the residence when requested to do so by Mr. Bishop. In addition to the items referred to in the previous paragraph, Mr. Bishop was uncooperative and failed to respond reasonably to Constable Buckle's inquiries as to the whereabouts of Mrs. Bishop. His refusal to provide meaningful information as to Mrs. Bishop's whereabouts justified Constable Bishop in remaining in the residence to determine if Mrs. Bishop was present and if she was safe.

Indeed, I am of the opinion that Constable Buckle would not have fulfilled the duty upon him as enunciated in *Godoy* if he had left the residence as requested by Mr. Bishop without determining if Mrs. Bishop was present and safe.

Commission counsel also argued that the entry or refusal to leave was without proper legal authority because there was inadequate announcement or explanation of the purpose of the entry. Commission counsel argued that Mr. Bishop should have been told the reason for Constable Buckle's presence, communication of the information upon which it was based, and that a search would be conducted to locate Mrs. Bishop.

This argument is without merit. Constable Buckle was in full uniform. Mr. Bishop was not under any misapprehension whether Constable Buckle was in fact an RNC officer. Constable Buckle told Mr. Bishop that he was looking for Mrs. Bishop, that the RNC had received a call from a relative in Toronto, that there was a report of a disturbance, that he wanted to determine if Mrs. Bishop was all right, and that he would search for Mrs. Bishop when Mr. Bishop refused to co-operate. I am satisfied that sufficient information was communicated to Mr. Bishop to enable him to understand why Constable Buckle was there and what he intended to do.

The sufficiency of the explanation must be judged by the circumstances. The explanation was sufficient, especially when considered in the context of all of the circumstances.

The first allegation against Constable Buckle is dismissed.

ii) Alleged arrest and/or attempt to arrest without proper legal authority.

The second allegation against Constable Buckle is as follows:

Constable Buckle arrested and/or attempted to arrest Mr. John Bishop on November 12, 1998 without proper legal authority.

As I have already indicated, Constable Buckle did not purport to arrest Mr. Bishop for some specific offence. Constable Buckle attempted to arrest or detain him to enable Constable Buckle to search for Mrs. Bishop when Mr. Bishop refused to co-operate with the officer as to Mrs. Bishop's whereabouts.

Constable Buckle told him to sit in the living room or he would be arrested. Mr. Bishop failed to comply.

It would not have been prudent for Constable Buckle to search the residence for Mrs. Bishop until Mr. Bishop was safely under control. That would have placed Constable Buckle in unreasonable risk of harm.

Constable Buckle had a duty to search for Mrs. Bishop to determine if she was safe. He could not fulfill that duty in the circumstances without detaining or arresting Mr. Bishop. *Godoy*, while not directly dealing with the issue of arrest for investigative purposes, clearly contemplated that the police were justified in using reasonable force to enter the home to locate the person in distress. Logically, if they are prevented from searching by an individual upon entry, the police must be justified in detaining or arresting that person to permit the search to take place. Otherwise, the search could be stymied and the beneficial purpose of the forced entry negated.

Godoy contemplated that reasonable interference with the rights of the occupant is permissible to enable the police to determine whether a person is in distress. In this case, it was necessary and appropriate to arrest Mr. Bishop to permit the search. It was a reasonable interference in the circumstances.

Further support for this proposition is found in *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.) and other cases referred to in argument.

Commission counsel argues that the arrest was illegal because there was insufficient announcement. I have already rejected this argument in the context of entry into the residence. I also reject it in the context of the attempt to arrest Mr. Bishop. By this stage, Mr. Bishop had refused to provide information as to his wife's whereabouts. Constable Buckle had indicated that he intended to search for Mrs. Bishop. Mr. Bishop was asked to sit in the living room and was told that he would be arrested if he refused. Mr. Bishop failed to comply. In the circumstances, I am satisfied that there was sufficient announcement or communication to Mr. Bishop before Constable Buckle attempted to arrest him.

Commission counsel also argued that the arrest was unjustified because Constable Buckle had testified that he did not intend to conduct the search until Constable Murphy arrived. Constable Murphy was expected momentarily. Constable Buckle intended to arrest or detain Mr. Bishop so that Mr. Bishop was under control and the search could be conducted as quickly as possible as soon as a second officer arrived. It must be remembered that Mrs. Bishop could have been lying injured in one of the other rooms. Constable Buckle was not required to wait for Constable Murphy's arrival before Mr. Bishop could be placed under control.

Indeed, I do not see how Constable Murphy's imminent arrival could affect the legality of the arrest. Constable Buckle was justified in controlling Mr. Bishop by placing him under arrest because of his actions. That would have been so given Mr. Bishop's conduct whether Constable Buckle was alone or whether

other officers were present. It is no answer to suggest that Mr. Bishop may have behaved more co-operatively if other officers were present.

Commission counsel argued that there was no power to arrest or detain Mr. Bishop to conduct a search. He argued that it is illegal to arrest for that investigative purpose. Commission counsel argued that there is no power of arrest unless the conduct amounts to obstruction of the officer in the course of his duty. I have already rejected that argument based upon the principles set forth in *Godoy*. However, if I am found to be wrong in that regard, I would also have concluded that Mr. Bishop's conduct was sufficient to amount to obstruction, justifying the arrest.

Finally, even if I had found some technical deficiency in the process of arrest, I would not have concluded that it was appropriate to find that Constable Buckle had breached the *Act* or Regulations. I would not have concluded that his conduct amounted to conduct unbecoming to a police officer and liable to bring discredit upon the RNC. Constable Buckle acted reasonably, faced with a difficult situation. He was there to determine the safety of Mrs. Bishop. The entire incident could have been avoided if Mr. Bishop had simply co-operated and told the officer where his wife was. In the circumstances, justice would not be served by finding that Constable Buckle had breached the *Act* and the Regulations by some technical deficiency in the process of attempting arrest, or, in the alternative by imposing some penalty on Constable Buckle for any such deficiency.

The second allegation is therefore dismissed.

iii) Alleged use of excessive force.

The third allegation against Constable Buckle is as follows:

Constable Buckle used excessive force while arresting or attempting to arrest Mr. John Bishop during which Oleoresin Capsicum Spray (O.C. Spray) was used without justification on November 12, 1998.

Section 25 of the Criminal Code authorizes a police officer to use necessary force if he acts on reasonable grounds where he is required or authorized by law to do anything in the administration or enforcement of the law. However, there are limitations on the use of force. Some limitations are contained in Section 25 itself. Section 26 contains criminal sanctions for excessive force. Section 26 provides as follows:

26. Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

The Royal Newfoundland Constabulary Use of Force Guidelines are attached hereto as Schedule "A". The parties agreed that this document was in effect as of November 12, 1998. The Use of Force Guidelines were amended effective November 19, 1998, but the amendment is not relevant to the issues before me. The operative provisions as amended were the same as contained in Schedule "A".

For ease of reference, I set forth the following sections:

2. Guidelines For the Use of Force:

- a. Members shall not resort to the use of force **UNLESS** such use is necessary in the execution of their duties as peace officers and this purpose cannot **REASONABLY** be accomplished by less violent means.
- b. The decision as to whether force is to be used, and the amount to be applied, shall rest solely with the member at the scene who is personally involved.
- c. Although decisions may have to be made instantly, in each case the decision shall be based on as reasonable an assessment of the circumstances as possible under the conditions prevailing.
- d. Members shall not use any more force than is necessary under the circumstances to accomplish their lawful objectives.

...

5. Oleoresin Capsicum Spray:

- a. Oleoresin Capsicum Spray (O.C. Spray) is an inflammatory agent that occurs naturally in cayenne pepper. This aerosol weapon is designed to incapacitate a subject who can then be controlled with minimal physical contact. **Members are reminded that O.C. Spray is a prohibited weapon.**

(1) The O.C. Spray may be used by members trained in its use.

...

(3) The O.C. Spray does not replace the defensive baton or service revolver. The O.C. Spray must not be used as an alternative to the use of deadly force when a member is faced with the likelihood of death or grievous bodily harm.

...

- (5) Normally, O.C. Spray will discourage an attacking dog or aggressive subject, regardless of size or strength, however, it may have no effect on an attack-trained dog in the attack mode. Similarly, it may not affect certain subjects, and subjects wearing tight-fitting eyeglasses may experience a delayed reaction or none at all.
- (6) O.C. Spray is designed to be used on individuals exhibiting active hostile resistance where verbal commands and pain compliance techniques have failed or are likely to fail. An “active resister” is defined as a subject who actively resists in a defensive manner and moves to avoid physical control.

...

b. The O.C. Spray may be used to:

- (1) aid in the arrest of a resisting subject;
- (2) control a subject when lesser means are not likely to succeed or have failed, and more severe means are not yet required; and
- (3) control an attack or threat of an attack from an animal.

c. Pre-usage:

- (1) Members shall **NOT** use O.C. Spray as a solution for all confrontational incidents. Use of O.C. Spray is not acceptable if the situation could have been resolved by lesser means.

...

- (3) If a member finds it necessary to resort to O.C. Spray and if time permits, the member must verbally warn the subject that O.C. Spray will be used.

...

- (5) Use of O.C. Spray shall be **discontinued** if initial use has proven ineffective on a particular subject.

d. The force that an officer uses to gain control over a subject’s resistant action shall be dependent upon the officer’s

perception of resistance and danger. The use of the O.C. Spray by a member shall be in accordance with the approved use of force continuum.

The Use of Force Continuum referred to in 5(d) is a chart, which is attached hereto as Schedule "B".

The case of *Anderson v. Smith and the City of Point Moody*, 2000 B.C.S.C. 1194 per Madam Justice Dillon, contains a useful review of the legal principles governing the use of force and, in particular, the use of O.C. Spray.

I have already found that it was appropriate for Constable Buckle to arrest or detain Mr. Bishop to establish control over him to enable Constable Buckle to conduct a search of the premises for Mrs. Bishop.

Tactical communications, i.e. talking to Mr. Bishop, had not been effective. When Constable Buckle told Mr. Bishop that he was under arrest and touched his arm, Mr. Bishop pulled away and moved into the kitchen. When Constable Buckle followed him and told him to turn around and put his hands behind his back, Mr. Bishop did not comply. Mr. Bishop was actively resisting arrest in these circumstances.

Constable Buckle was therefore faced with essentially four choices:

- a) to withdraw and wait for backup assistance;
- b) to use physical force by hand;
- c) to use O.C. Spray;
- d) to use physical force by baton.

I have already concluded that Constable Buckle acted appropriately in deciding not to withdraw and wait for backup, based upon the information available to him at the time. Mrs. Bishop may have been injured and in need of medical assistance. Fortunately, that was not the case. However, Constable Buckle did not know that and proceeded to try to establish control over Mr. Bishop so that a search for Mrs. Bishop could be conducted as quickly as possible.

The decision to withdraw or not was a matter of judgment that Constable Buckle was required to make in a limited time. The exercise of such judgment should not be viewed with the benefit of information only available subsequently.

Mr. Bishop is an apparently strong man weighing over 200 pounds. Constable Buckle concluded that the use of physical force by hand or by baton would not be appropriate, potentially resulting in unreasonable risk of harm to either Constable Buckle, Mr. Bishop or both of them. I agree with that conclusion.

The use of the baton (hard impact weapon) is considered a more serious use of force than O.C. Spray. Its use could have resulted in serious injury to Mr. Bishop.

The remaining option was the use of O.C. Spray. Its use in the circumstances was within the Use of Force Guidelines and in accordance with the Use of Force Continuum.

In the circumstances, I find the use of O.C. Spray was not without justification and was not excessive.

The third allegation is therefore dismissed.

The Complaint against Constable Bishop is therefore dismissed.

Costs

Section 33 of the *Act* gives me various powers with respect to an award of costs. I am reluctant to make an award of costs without first affording the parties an opportunity to be heard and make submissions after having considered my Decision.

If the parties are unable to agree on the issue of costs, either party may apply to me to decide the issue. I will afford the parties an opportunity to be heard. I will remain seized of the matter for the purpose of hearing and deciding the issue of costs, if necessary. Any application with respect to costs shall be filed within 21 days of the date of this Decision.

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. Having heard this matter and the evidence presented to me, I make the following recommendations:

1. It is recommended that the Royal Newfoundland Constabulary adopt such policies and/or procedures as may be necessary to preserve the relevant master recording tape of the Royal Newfoundland Constabulary Communications Centre where a complaint is filed pursuant to the *Act* and Regulations until the complaint has been finally disposed of in accordance with the *Act* and Regulations.

All parties are in agreement with this recommendation. Mr. Noble has advised that steps have been taken to preserve the master recording tape in future cases.

2. It is recommended that Royal Newfoundland Constabulary policies, procedures, orders and any revisions thereto be marked with the date that they came into force.

Many of the policy and procedure documents presented before me either had no effective date or merely the month and year. This led to delays in determining exactly what policy or procedure was in effect at a particular time. The public, RNC officers, the Commission, and Adjudicators would

all be better served by a process of having the documents marked with the date of coming into force.

3. The Use of Force Guidelines should be reviewed and revised.

I will limit my specific comments to two items derived from this hearing and its particular facts. However, it may be beneficial to conduct a more comprehensive review, including a comparison with other Use of Force Guidelines in effect with other police forces.

First, there is some confusion in the language of the policy regarding when O.C. Spray is to be used to aid in arrest or control of a person. Section 5(a)(6) uses the term “active hostile resistance”, but then proceeds to define “active resister” without use of the phrase “hostile”. One is left in doubt as to what degree of hostility, if any, is required before the use of O.C. Spray is justified. The confusion is compounded by Section 5(b) which indicates the circumstances in which O.C. Spray may be used without reference to the definition established by Section 5(a)(6). Reading all of the sections, together with the Use of Force Continuum, indicates that O.C. Spray may be used for active resistance, but that its use is inappropriate when resistance is merely passive. This should be expressly clarified in the Use of Force Guidelines.

Second, Section 2(b) and Section 5(d) should be clarified. I assume the point of Section 2(b) is that the officer alone, rather than any other person, must make the actual decision with respect to the use of force. With respect to Section 5(d), while the officer’s perception of resistance and danger is an important factor, that perception must be reasonable. These sections as written may lead to the erroneous conclusion that the decision by the officer as to the use and amount of force, based upon his perception, is final and not subject to review. Section 1(b) does make the point that these decisions must be reasonable and not excessive. However, Sections 2(b) and 5(d) should be clarified so that officers clearly understand that the decision to use force and the amount thereof must be reasonable and not excessive and that such decisions are subject to review in criminal, civil and/or disciplinary proceedings.

4. I was asked by Constable Buckle’s counsel to recommend that the Royal Newfoundland Constabulary Policy Manual be updated regularly, in a timely fashion. He suggested that the Policy Manual is not amended quickly enough in response to changes in the law from Court decisions. I do not quarrel with the proposition that the Policy Manual should be updated regularly and in a timely fashion in response to changes in the law. However, there is insufficient basis in the evidence before me to enable me to conclude that this has not been done or that some specific recommendation would be appropriate. I therefore decline to make any recommendation.

5. I was also asked by Constable Buckle’s counsel to recommend that the Royal Newfoundland Constabulary policy on prosecution of domestic violence

should be more strictly adhered to. This appears to result from some perception by Constable Buckle that either in this case or generally there was or is insufficient adherence to the policy. There is no basis in the evidence before me to enable me to draw such a conclusion. I therefore decline to make such a recommendation.

Conclusion

The Complaint against Constable Buckle is dismissed.

Any party may apply with respect to the issue of costs within 21 days of the date of this Decision.

DATED at St. John's, in the Province of Newfoundland, this 2nd day of March, 2000.

IAN F. KELLY, Q.C.
Adjudicator