

IN THE MATTER OF

a complaint pursuant to

the Royal Newfoundland Constabulary Public Complaints Regulations

AND IN THE MATTER OF

a Public Complaint

Adjudication pursuant

to the Royal Newfoundland Constabulary Act, 1992,

R.S.N. 1990, c.R-17

BETWEEN:

ROYAL NEWFOUNDLAND CONSTABULARY

PUBLIC COMPLAINTS COMMISSIONER

AND:

CONSTABLE DEREK BALLARD

## **DECISION**

Constable Derek Ballard has appealed from a finding of the Chief of Police made pursuant to the Royal Newfoundland Constabulary Act, 1992 (the "Act") and the Royal Newfoundland Constabulary Public Complaints Regulations (the "Regulations") that he did engage in conduct unbecoming a member of the Royal Newfoundland Constabulary contrary to

Section 3(1)(k) and 3(1)(l) of the Regulations thereby committing an offence contrary to Section 3(2) of the Regulations.

The particulars of the offences giving rise to the Appeal are as follows:

1. On or about the 25th day of October, A. D. 1994 at or near St. John's, in the Province of Newfoundland, he did engage in conduct unbecoming a member of the Royal Newfoundland Constabulary to wit; while a witness in a criminal proceeding before the Honourable Mr. Justice Puddester he did without lawful excuse conceal an official document or record being a continuation report relating to RNC File No. 92-24910 dated 92.09.14, contrary to section 3(1)(l) of the Royal Newfoundland Constabulary Public Complaints Regulations, thereby committing an offence contrary to section 3(2) of the Royal Newfoundland Constabulary Public Complaints Regulations.

2. On or about the 25th day of October, A. D. 1994 at or near St. John's, in the Province of Newfoundland, he did engage in conduct unbecoming a member of the Royal Newfoundland Constabulary to wit; while sworn to tell the truth as a witness in a criminal proceeding before the Honourable Mr. Justice Puddester he did wilfully or negligently attempt to mislead the Court by his testimony in answer to questions asked by Bernard Coffey and the Court, contrary to section 3(1)(k) of the Royal Newfoundland Constabulary Public Complaints Regulations, thereby committing an offence contrary to section 3(2) of the Royal Newfoundland Constabulary Public Complaints Regulations.

This decision follows a hearing conducted pursuant to the provisions of the Act and the Regulations.

## BACKGROUND

Constable Ballard was a potential witness in the trial of a fellow police officer, Sergeant Robert Escott, in the Supreme Court of Newfoundland. During the course of the trial, the Defence made Application to the Court seeking a declaration of mistrial, among other things, based upon alleged improper and prejudicial dealings between crown counsel and various crown witnesses (the "Misconduct Application"). Constable Ballard gave testimony during this Application and an incident (the "incident") arose during his testimony on October 25th, 1994 which ultimately gave rise to the disciplinary charges against him.

Mr. Justice Puddester filed a decision in the Misconduct Application on November 18th, 1994. On January 13th, 1995 Lieutenant William Brown of the Internal Review Section of the RNC was assigned to review the decision of Mr. Justice Puddester to determine if any disciplinary action was warranted against any or all of the four police officers who gave evidence in the Misconduct Application. On February 3rd, 1995 Constable Ballard was charged internally, however, prior to determination, Mrs. Dora Callahan filed a public complaint pursuant to the Act on March 17th, 1995. The internal charges were then stayed pursuant to section 19 of the Regulations.

The complaint of Mrs. Callahan named various officers, one of whom was Constable Ballard. The nature of the complaint against him was stated in a letter to Dr. Leslie Harris, Public Complaints Commissioner, dated March 15th, 1995 as follows:

(d) at least one officer improperly dealt with evidence during the trial (reference, Cst. Ballard).

As a result of the investigation into the complaint of Mrs. Callahan, Constable Ballard was charged as stated above. He pleaded not guilty to the two charges and following a hearing before the Chief of Police, Leonard P. Power, a written decision was filed on November 23rd, 1995. Constable Ballard was found guilty of both offences and a discipline penalty was imposed by the Chief of Police on December 15th, 1995. Constable Ballard filed an Appeal of the Chief's decision.

The "incident" which occurred during Constable Ballard's testimony on October 25, 1994 involved his handling of a 1624 form (the "letter") and the exchange which took place between Bernard Coffey (Crown prosecutor), the Court and Constable Ballard. The transcript shows the exchange to be as follows:

"MR. COFFEY: I see you're -- what is that you're putting in there, Constable?  
A. In where?  
Q. You just put something in the file folder.  
THE COURT: In that top file. What did you just slide in there?  
MR. COFFEY: You just slid something in the top file folder?  
A. It was a rubber band I just --  
THE COURT: No.  
MR. COFFEY: You just slid something --  
THE COURT: I just saw you slide something in there. What did you put it?  
A. In where?  
Q. The top folder in the last document down on the top?  
A. I didn't put anything in. Oh this one here? This folder here is just a folder of my notes and that.

That's not --

MR. COFFEY: Constable, open up the top file folder please. What documents are contained in that?

A. Oh this one here, okay, that's that letter.

Q. Yes. Okay. So you just then slid that back in the file folder didn't you?

A. Yes I put that into the folder just to get it out of the way.

It is helpful at this point to briefly set out some of the circumstances leading up to the "incident".

Constable Ballard commenced to give testimony in the Misconduct Application on October 17th, 1994 and his evidence continued on October 18th to 21st inclusive and October 25th to 27th inclusive. Cross-examination by Mr. Coffey began on October 19th. In response to Mr. Coffey's question as to why he did not go to his superior officers with his complaints concerning Crown counsel in the Escott trial, Constable Ballard initially responded that he did not know why. He subsequently informed the Court that he had something to say in the context of clarifying or expanding his previous testimony. He sought the protection of the Newfoundland Evidence Act and an adjournment was granted to give him time to consult with independent counsel. On October 21st, 1994, Constable Ballard's lawyer, Mark Kennedy, appeared in Court with him. Constable Ballard gave evidence on this day in response to Mr. Coffey's question as to why he did not go to senior officers with his concerns. As is evident from the transcript, in response to further questions on cross-examination by Mr. Coffey, Mr. Kennedy argued that Constable Ballard's evidence should be given in camera for two reasons. His response to Mr. Coffey's questions would relate to two separate matters. The first matter involved an investigation Constable Ballard

had completed some two years prior. His testimony would relate to what he believed should have happened in the investigation and not what did happen. His testimony, it was argued, could embarrass innocent third parties. [This matter is subsequently referred to as the "club file" and it is in the context of this file that the "letter" assumes significance. On September 09, 1994 Constable Ballard wrote a letter to "Sir" wishing to bring to his attention some concerns he had with the then current "club file" investigation. His testimony was that this "letter" was intended for the then Police Chief Coady. As the investigator he did not agree with the then Deputy Chief Power's decision concerning certain matters pertaining to the file. He set forth the facts and requested the Chief's decision.] The second matter related to a company that Constable Ballard was involved with (the "company file") and to fully and frankly answer Mr. Coffey's question could prejudice his defence to disciplinary charges that were then pending against him with respect to his involvement with this file.

Subsequent to the argument for the in camera hearing, on October 25th, 1994, Judge Puddester sought clarification that the two year old "club file" was closed. He ordered Constable Ballard's lawyer to produce the file to Mr. Coffey and for Mr. Coffey to return the file to Constable Ballard through Mr. Kennedy. Mr. Coffey reviewed the "club file" and Constable Ballard took the stand for the continuation of his cross-examination.

### THE ISSUE

The issue to be determined is whether, on the evidence, Constable Ballard was properly adjudged guilty of the disciplinary offences as charged.

## SUMMARY OF EVIDENCE

### BERNARD COFFEY

Mr. Coffey is the Assistant Director of Public Prosecutions with the Department of Justice. He represented the Crown in the Misconduct Application. It was during his cross-examination of Constable Ballard on October 25th, 1994 that the "incident" occurred which resulted in the disciplinary charges against Constable Ballard. Mr. Coffey's evidence was fair and straightforward.

As was stated in background information, the Court ordered Constable Ballard's lawyer to produce the "club file" for Mr. Coffey's review. The Court recessed for thirty minutes. Mr. Coffey was given a group of file folders and Mr. Coffey met with a commissioned officer, Lieutenant Patrick Ledwell, to review these files. Mr. Coffey made a list of the files which turned out to be sixteen in number. Lieutenant Ledwell brought additional material to the meeting from the Deputy Chief's office (including a copy of the "letter") from which Mr. Coffey observed that he did not have the complete "club file". At approximately 2:25 PM, before the Court reconvened at 2:30 PM, Mr. Kennedy gave Mr. Coffey another file which contained originals and copies of materials which Mr. Coffey had seen that morning but which were not part of the sixteen files previously given to him. Mr. Coffey sought a brief adjournment to review this seventeenth file (headed D/Power - Letters) (the "correspondence file") and asked Mr. Kennedy for the complete file, including the sixteen files he had previously viewed. He was provided with the sixteen files together with the "letter" which was separate from the sixteen file folders. He also had in his possession the seventeenth file. Mr. Kennedy advised Mr. Coffey that the "letter" was a personal letter not belonging to the file. The file and "letter" were returned to Constable Ballard before he

took the stand.

In the afternoon Constable Ballard took the stand and cross-examination by Mr. Coffey continued. Mr. Coffey confirmed that the tape of the proceedings on the afternoon of October 25th, 1994 reflects occurrences in the court room. Mr. Coffey was standing, about to continue his cross-examination of the witness. At that time he had an unobstructed view of the witness box. He was not aware of how many files Constable Ballard had taken with him to the witness box. Constable Ballard, in response to Mr. Coffey's questions, asked to leave the box to retrieve the "club file". When he returned to the box, Mr. Coffey observed certain actions by Constable Ballard. His testimony is that what caught his eye, was the manner in which Constable Ballard looked and glanced around the court room after which he saw Constable Ballard take what he now knows to be the "letter" (although he could not identify it as such at the time) and slide the "letter" into a file folder. Constable Ballard initially denied doing this and it was Mr. Coffey's testimony that there was a change in Constable Ballard's demeanour and his facial expression during this "incident".

Mr. Coffey's testimony is that when Constable Ballard returned to the box with the "club file" he placed the group of files on the flat surface or shelf of the witness box. The component files were stacked. He cannot recall if Constable Ballard had other files or not on the shelf but the "letter" (at least what he subsequently found out was the "letter") was on top of the stack of files comprising the "club file". It is his testimony that Constable Ballard slid the "letter" into another file folder.

CONSTABLE DEREK BALLARD



Constable Ballard joined the RNC on February 8th, 1982. As part of his regular duties, among other things, he has worked on the patrol unit, CID, Crime Protection and the High Complaint Unit. He has frequently testified in court and acknowledges that credibility is a very big part of his job.

He was the last Crown witness to testify in the Misconduct Application. He was a potential witness in the Escott trial as he attended the scene of the accident on the night in question. He was not called as a witness in the trial as he, and three other officers, alleged impropriety of Crown counsel in her interviews with them. During Constable Ballard's testimony in the Misconduct Application, an issue arose as to why he did not consult senior officers with his concerns. Initially he said he did not know why. He says he was nervous and afraid and had concerns about stating his reasons in open court. He was concerned in relation to his career and his continuing relations with the Crown attorney's office. Later he wanted to explain why he had not gone to senior officers and he sought the protection of the Newfoundland Evidence Act. His explanation for not going to senior management related to two matters. The first related to the "club file" and it is with respect to this file that the "letter" assumes significance. The "letter" is a standard 1624 form which is used for reporting matters pertaining to investigations and a variety of other uses. Constable Ballard's testimony is that in his view the "letter" was not a part of the "club file" but rather it was a personal correspondence to the then Chief of Police Coady expressing concerns he had with an investigation and a decision made by the then Deputy Chief Power. While the "letter" was to go up the chain of command, Constable Ballard thought the letter ultimately would end up in the hands of Chief Coady. Constable Ballard gave the "letter" to Inspector Skehan who in turn gave it to Deputy Chief Leonard Power who in turn made a notation on the "letter" and it was returned through Inspector Skehan to Constable Ballard. The second

explanation for not going to senior management related to an ongoing disciplinary matter then under investigation by Deputy Chief Power. Constable Ballard and two other members of the RNC were involved in a private company as a result of which two officers were investigated and one was not. Constable Ballard was the only officer charged and the disciplinary matter was pending when the "Misconduct Application" was heard.

It is Constable Ballard's testimony that he brought the "letter" and the "company file" correspondence to court for the purpose of placing it in evidence, if necessary, as he felt these documents explained why he could not go to senior officers with his concerns. On the morning of October 25th, 1994 the "club file" and the "letter" were at Constable Ballard's residence. When he left for the court house he took the "letter" with him in a separate file folder with his preparation notes, copies of the "letter" and other correspondence. At that time he was not aware that the "club file" was at his residence. He went to headquarters to retrieve the file and discovered it had previously been signed out to him. He returned home prior to Court to retrieve the file, which had been broken down by him into seventeen file folders. It was his practise to do this as it assisted him in easy retrieval of information during his testimony at the Provincial Court trial. His testimony is that he brought the "club file" to court because his lawyer suggested that he should become familiar with it in the event that questions arose during his cross-examination. It is his testimony that he had removed the "letter" from the "club file" and placed it in a personal file in November of 1993 when he was charged internally with respect to the "company file". It is his testimony, as well, that he believed the "letter" to be of significance in answering the question put to him by Mr. Coffey and he believed this to be so before he retained Mr. Kennedy.

Constable Ballard testified that when he came to the court house he had the seventeen file folders comprising the "club file" in his briefcase together with miscellaneous papers and three other file folders. One file folder was a blue folder which contained the original "letter" and also other documentation pertaining to the "company file" and the disciplinary charges with respect thereto as well as notes which he had prepared for presentation to the Court on October 25th. He had another folder which contained documents respecting the "company file" and a third folder containing copies of materials in both files including copies of the "letter". On the morning of October 25th, 1994 Mr. Kennedy asked Constable Ballard to give to him the "club file". Constable Ballard was not aware that this was pursuant to an Order of Mr. Justice Puddester, however, in any case he provided sixteen file folders to Mr. Kennedy. Just prior to attending for the afternoon session when Constable Ballard was reviewing his file and preparing to give his testimony, he discovered that he had left one file folder pertaining to the "club file" in his briefcase. This was the "correspondence file". He brought this to the attention of his lawyer and his lawyer provided the file to Mr. Coffey for his review. Constable Ballard was later asked by his lawyer to provide the "letter" to him, which he did. He did not know why his lawyer asked for it but he is aware that he went back into Court with the "letter". Prior to taking the stand in the afternoon of October 25th, Mr. Kennedy returned the seventeen file folders and the letter to Constable Ballard. An elastic band was around some or all of the file folders and the "letter" was outside the file folders. When Constable Ballard took the stand he was carrying two file folders. One file folder contained documentation respecting the "company file" and the second contained notes and copies of documents that he wished to refer to in his presentation that day as well as the original "letter" which he had placed in the folder as he was entering the court room. This file also contained copies of the "letter". Prior to taking the stand he had placed his briefcase behind the witness box and the "club file" was in his

briefcase. Immediately prior to taking the stand he was aware that Deputy Chief Leonard Power and Lieutenant Ledwell, the chief investigator for the Internal Review Section, were present in the court room. While a senior commissioned officer had been present in the court room through the entire Misconduct Application, neither Lieutenant Ledwell nor Deputy Chief Power had been present during previous testimony.

When Constable Ballard took the stand it is his testimony that he put the "company file" folder to his left on the ledge of the witness box and he opened up the file folder containing his notes. The original "letter" was in this file and he laid the "letter" to one side. He was preparing to testify when Mr. Coffey asked him why the "correspondence file" was not provided to him that morning as part of the "club file". He explained that this was inadvertence on his part and, in response to a question as to whether the file contained correspondence between Deputy Chief Power and Colin Flynn, Constable Ballard's testimony was that as he did not recall any letters from Colin Flynn, he asked to step down to retrieve the file. He then stepped down from the witness box to retrieve the "club file" and he returned to the box with seventeen file folders grouped together with an elastic band. He demonstrated that he removed the elastic band and flipped through the folders until he found the "correspondence file". He took the other group of sixteen file folders and put them to his right on the ledge of the witness box having placed the "correspondence file" under his arm. He closed the file folder containing his notes, which had been open in front of him, placed it on top and put the elastic band on top of the file. He then opened the "correspondence file" to get ready for questioning. It was at that point that the "incident" arose. Constable Ballard's testimony was that he was not conscious of each and every act. He said he had absolutely no idea as to what Judge Puddester and Mr. Coffey were referring, he was confused as there was a barrage of questions coming at him and when he

tried to answer he was cut off. Just before Mr. Coffey asked him to open the folder, he focused on the file to which they were referring. It is his testimony that he had no reason to hide the "letter" as he brought it to Court for the purpose of producing it as evidence if required to do so. He says he may have been looking around the court room but he denies that he was doing so to make sure that no one was watching so he could slip it into the file. After the incident no further explanation was required and that was the last he heard of the matter until the internal investigation commenced in January of 1995.

Constable Ballard's testimony is that he had no reason to hide the "letter" as he had, prior to the incident, drawn the attention of the Court to it in general terms. The "letter" was, subsequent to the "incident", read into evidence, however, it was not filed as an exhibit.

#### DENISE BUTLAND-POWER

Ms. Butland-Power was the Court Clerk on October 25th, 1994. Her testimony is that she was seated directly in front of the witness, approximately two and one half to three feet away. She was writing her court minutes and her attention was drawn to the matter when Judge Puddester spoke. There was a discussion between Judge Puddester, Bernard Coffey and Constable Ballard which, in her words, "got a bit heated or more intense". The question related to whether or not Constable Ballard had placed something in a file and during the questioning from Mr. Coffey and Judge Puddester, her testimony was that Constable Ballard appeared "very bewildered" and appeared not to understand. She observed him opening and closing a file but was not sure of the number of files he had. On cross-examination, her testimony was that he did not appear surprised, rather more bewildered as to what they were actually talking about. The bewilderment was apparent

when Constable Ballard said "in where?" or "I didn't put anything in". It was later determined that something had been put in the file.

Ms. Butland-Power has observed Constable Ballard give evidence since 1984. He is not nervous giving evidence and other than this incident, in her view, everything else was fine.

MRS. DORA CALLAHAN

Mrs. Callahan is the mother of Kerri-Lynn Callahan, the individual injured in the motor vehicle accident involving Sergeant Escott. She was present during all the court proceedings and she laid a complaint against Constable Ballard, among others. Her testimony was that, of the complaints she laid, the complaint against Constable Ballard was the least of her concerns. She gave prior written statements, signed by her, to Lieutenant Brown on March 21st, 1995 and a written statement was read in the proceedings before the Chief of Police on September 21st, 1995. Her testimony was that, on the day in question, she remembered Constable Ballard stepping down from the witness box, getting paper from a table and going back into the box. (She had a direct view of the witness box.) He had the paper on top of a file, scanned the room, looked at her and put it in the file. Judge Puddester asked what it was. He said something about an elastic band. She says she saw him put something in a file folder but did not know what file folder he put it in and did not know how many file folders he had. She said Constable Ballard did not seem nervous until he got caught, when, at that point, he did not know what to say or do. In cross-examination Mrs. Callahan stated that it was her impression that Constable Ballard got caught doing something red-handed, he was red in the face and during the incident he was stumbling. This testimony appears inconsistent with her past written statements put to her by Mr. Avis.

In her statement to Lieutenant Brown she said she wasn't sure of the events that happened. "He got something from a file, went back to the box and at that point I wasn't really paying attention. I wouldn't be able to say 100% what happened". When asked by Mr. Avis why she didn't say that he looked at her and Mr. Coffey and scanned the room, her response was that she wasn't asked, so she didn't say. In her statement of November 21st, 1995, read by her lawyer William Cadigan to Chief Power, she indicated that Constable Ballard may very well have been confused with respect to the questions asked by Judge Puddester on October 25th, 1994. In her prepared statement she did not say he was red in the face or caught red-handed.

#### MRS. MARGARET GODDEN

Mrs. Godden is a friend of Mrs. Callahan. She was present in the court room on the day in question and her testimony was that she had an unobstructed view of the witness box. She testified Constable Ballard took the stand, stepped down, retrieved a paper from the bench behind him and returned to the stand. She thought he slipped a paper he had gotten from the table into a file folder when he returned to the box and denied to the court that he had done so. What stuck in her mind was that she saw him do something that he denied doing under oath. Her testimony was that he appeared very flustered during this incident.

#### ERNEST BOONE

Mr. Boone was a student at law with the civil division of the Department of Justice assigned to work with the prosecutor on the Escott trial. Although there is some discrepancy as to time and place, I am satisfied he was present in the court room during the incident. His

testimony is that he saw Constable Ballard take the stand with two file folders, the first he put in front of him and the second he placed to the left. He removed a document from the file folder on the left and put it into the file folder on the right. When the piece of paper was three quarters of the way in, Mr. Justice Puddester looked up. This all happened in front of his eyes and he had the impression from Mr. Justice Puddester that something was wrong. Missing from his testimony is the request by Constable Ballard to leave the witness box to retrieve the "club file" and his return to the box with the "club file".

#### OTHER EVIDENCE:

As stated above, Judge Puddester filed a lengthy decision in the "Misconduct Application" on November 18th, 1994. This has been entered as a consent exhibit and the question has arisen firstly, as to whether this is evidence before me; and, secondly if it is, what weight it can be given. Judge Puddester did not give evidence at the hearing, it being the position that he, although a competent witness, was not compellable.

Mr. Whalen, on behalf of the Commissioner, takes the position that the facts and opinions expressed in the decision are evidence before me although this evidence cannot be treated with the same weight as viva voce evidence as Judge Puddester is not available to be examined or cross-examined. It is his position that the decision is admissible as an exception to the hearsay rule and that it could be used as though it were an Affidavit or Statutory Declaration.

Mr. Avis argues that the decision of Mr. Justice Puddester is entered as a consent exhibit for background, that it is not properly evidence before me and, if for some reason I decide that it is, I can give it no weight. He draws the analogy that it is useful as background, much



like the transcript of a Preliminary Inquiry before a trial.

I have reviewed the cases presented by Mr. Whalen and I do not find that there is anything there that would lead me to conclude that the facts and opinions expressed in the decision of Mr. Justice Puddester are evidence before me as exception to the hearsay rule. Even if I were satisfied otherwise, I cannot attribute any weight to the facts and opinions expressed therein as Judge Puddester was not available to be examined or cross-examined.

#### THE COMMISSIONER'S POSITION

Mr. Whalen, on behalf of the Commissioner, argues that on the balance of probabilities, Chief Leonard Power came to a correct decision.

Mr. Whalen argues that it is significant that the "club file" was ordered to be produced to Mr. Coffey and that clearly all of the file was not turned over in the first instance. It is his position that the most important component to the issue at hand, the "letter", was not given until the last instance when it was requested by Mr. Coffey. Notwithstanding that this "letter" was very important in the mind of Constable Ballard, Mr. Whalen argues that Constable Ballard had already concluded his response to Mr. Coffey's question as to why he did not go to senior officers with his concerns about Crown Counsel, and he had not submitted this "letter" to the Court. It came out later in evidence in response to further questions on cross-examination. It was never proffered as an explanation of anything and he submits that the document is not an explanation of anything.

He argues that Constable Ballard's view that the "letter" was a personal letter and not part of the file does not accurately set forth the reality of the situation. However, he states that whether this is or is not part of the file is not of any great relevance to what I have to determine. The best evidence in his view is the tape of the "incident" and the transcript. It is his view that nothing of significance turns on the "letter" although he acknowledges that Constable Ballard held a different view. He argues that the action of Constable Ballard in placing the "letter" into the file was not an inadvertent act but a conscious act and when he was asked about it he clearly denied having placed it into the file. He is a good calm witness and it is hard to see him getting flustered. He can offer no explanation why Constable Ballard did what he did in the Supreme Court of Newfoundland in the presence of a Supreme Court Judge. In the alternative, he argues that even if he inadvertently put the "letter" in the file and had no intention to mislead, he was not, in his response to Judge Puddester and Mr. Coffey, open, direct and forthright. His original response was to deny what he had done. It was not necessary and he did not benefit in any way.

#### DEFENCE POSITION

Mr. Avis argues on the balance of probabilities, that Chief Leonard Power did not come to a correct decision with respect to the facts of this matter. He argues that there has to be intent to mislead and, as Mr. Whalen has pointed out, as the act is a motiveless act, the Commissioner's case is not made out.

He agrees that Constable Ballard is not a witness who is easily intimidated and argues that it took courage for him to raise allegations against a senior Crown counsel and further that it took courage to complain about the Deputy Chief of Police to the Chief of Police. It was

his view that when he was initially asked by Mr. Coffey why he did not go to senior officers with his concerns he said he did not know why because he really didn't want to touch it. This was against the background of having questioned a decision of the then Deputy Chief Power with respect to an investigation and having been the only one of three officers charged in relation to the "company file". However, he was aware that he had not answered the question properly and later wished to explain. The "letter" therefore becomes very significant in the mind of Constable Ballard, however, whether it is a part of the "club file" or not really is not relevant. Mr. Avis argues that the "correspondence file" was of no great importance and that Constable Ballard's explanation of inadvertence in passing it over to Mr. Kennedy is reasonable. In Constable Ballard's mind, as well, the "letter" was personal and not part of the file and, therefore, his explanation of not passing the letter over to Mr. Kennedy, in the first instance, is also reasonable.

The most important evidence, Mr. Avis argues, is the tape and the atmosphere for Constable Ballard in the court room at the time in question. He was there to talk about concerns he had with an investigation which concluded two years ago, he was facing disciplinary charges in relation to a private company matter which were still pending and present in the court room was the then Deputy Chief of Police, (the subject of his complaint to the Chief), and the chief investigating officer for internal affairs. Both the Judge and the Crown prosecutor were talking to him at the same time and from the tape it is not absolutely clear what they are saying, especially when we listen to the tape for the first time.

He argues that Constable Ballard did not understand what was being asked of him because of the overlap of the questions and, finally, when he realized what file folder they were talking about, he was cut off in his explanation by Mr. Coffey's request that he open the top

file folder. By the time he was asked to open the top file folder, he had realized which folder they were talking about and acknowledged having slid "that letter" back into the file folder, to get it out of the way. Mr. Avis argues that it is absurd that Constable Ballard would conceal a document and deliberately mislead the Court about it when he himself, regardless of what we feel about his intentions, meant and intended to produce it as an explanation of why he did not raise his concerns with senior officers.

He argues that the only objective witness is Denise Butland-Power, the court reporter, and her evidence is that he was "very bewildered" and he didn't understand what they were talking about.

Mr. Avis argues that Constable Ballard went to the stand with two files. He steps down from the box and retrieves the "club file" in order to answer questions put to him by Mr. Coffey. He therefore has nineteen file folders on the stand. His note file folder is open in front of him and another file folder is to his left. The tape shows a shuffling of papers, Constable Ballard flipping through the "club file" to find the "correspondence file", sixteen file folders are laid down, the note file is put to one side and the "correspondence file" is opened at the same time Mr. Coffey is saying "what is that you are putting in there, Constable?" He argues that Constable Ballard is a very credible witness. He was not shaken on the stand or discredited. To Constable Ballard the movement of the "letter" was a non-event which has been blown out of proportion.

#### BURDEN AND STANDARD OF PROOF

In determining whether or not Constable Ballard is guilty of the offences as charged, I must be satisfied on the "balance of probabilities" that this is so. There is no burden on

Constable Ballard to disprove anything. The standard of proof is set out in Section 33 of the Act which requires that all determinations be made on the balance of probabilities.

#### ANALYSIS AND DISPOSITION

It is alleged that Constable Ballard is guilty of conduct unbecoming a member of the Royal Newfoundland Constabulary in that while he was a witness in a criminal proceeding, he concealed an official document or record and wilfully or negligently attempted to mislead the Court by his testimony in answer to questions put to him. I will deal with these two charges separately.

#### CONCEALMENT

Central to this issue is Constable Ballard's handling of the "letter" prior to his appearance in court on October 25th, 1994 and during his testimony on October 25th, 1994. Much evidence has been placed before me respecting the whereabouts of the "club file" and whether the "letter" was a part of the "club file". I accept that Constable Ballard did not turn the "letter" over to Mr. Coffey in the first instance. I accept the testimony of Constable Ballard that it was his personal and honest belief that this "letter" was not a part of the "club file". Whether the "letter" should be considered to be a part of the "club file" is of no concern to me. The relevant issue is what was in the mind of Constable Ballard.

As well, I find that nothing of significance turns on the fact that Constable Ballard did not pass over the "correspondence file" to Mr. Coffey. I accept Constable Ballard's evidence that this was inadvertence on his part.

It is Mr. Coffey's testimony that his attention was drawn to this matter when he observed Constable Ballard glance around the room, after which he saw Constable Ballard take a piece of paper and slide it into a file folder. Constable Ballard, in response to questions by Mr. Coffey and the Court, denied having slid the paper into a file folder and it was later proven that he had done so.

In response, Constable Ballard states that while he may have glanced around the court room, he did not do so for the purpose of determining if anyone was looking at him so he could slide the piece of paper into the file folder. I accept his testimony that he brought the "letter" to court for the purposes of producing it as evidence if he was required to do so. There is no evidence to contradict him on this point.

It is very difficult to reconcile the evidence as to exactly what Constable Ballard had in front of him during the "incident". Mr. Coffey was standing approximately twenty feet away from the witness box and although he observed that the folders comprising the "club file" had been placed in front of Constable Ballard on the ledge of the witness box, he could not recall whether Constable Ballard had any other additional files or not. It is Constable Ballard's testimony that he had taken two file folders to the witness stand. The "company file" was placed to his right and his notes file containing the "letter" was opened in front of him. This is supported by Mr. Boone's testimony. I accept Constable Ballard's testimony as to the number of and placement of files he had with him at the witness box during the "incident".

For this charge to be made out, it has to be proven that Constable Ballard had an intention to conceal this "letter". Given that he brought the "letter" to court for the purpose of

producing it and given that Mr. Coffey, by his evidence, had in the minutes before the "incident" reviewed the "letter", I find it difficult to accept that he intended to conceal or did in fact conceal the "letter". I accept that he placed the "letter" into his notes file "to get it out of the way" as he was opening the "correspondence file" to answer Mr. Coffey's questions. I am influenced by Constable Ballard's response to Mr. Coffey: "...that's that letter". This corroborates Constable Ballard's testimony that even though he had not previously placed the "letter" in evidence, he had referred to it in general terms and, at this point in his response to Mr. Coffey, he believed the Court and Mr. Coffey knew of the "letter".

I find that Constable Ballard was confused and that he genuinely did not focus in on the file to which the Court and Mr. Coffey were referring in their questioning of him. This "incident" took place in a forty second time span and Constable Ballard had before him nineteen file folders.

I find that the evidence of Ms. Denise Butland-Power corroborates the evidence of Constable Ballard as it was her impression that Constable Ballard was "very bewildered" and did not appear to understand what Mr. Coffey and Judge Puddester were saying to him.

Constable Ballard is an experienced police officer who has testified in court on numerous occasions. It is difficult to conceive, in view of his testimony that credibility is a very big part of his job, that he would have done something which the Judge and the Crown Prosecutor indicate that they have seen him do and deny doing it if, in fact, he was aware of what they were asking him.

In conclusion, the evidence does not satisfy me on the balance of probabilities that Constable Ballard did, as charged, engage in conduct unbecoming a member of the Royal Newfoundland Constabulary by concealing an official document while giving evidence as a witness before Mr. Justice Puddester on October 25th, 1994.

#### ATTEMPTING TO MISLEAD THE COURT

On the second charge of attempting to mislead the court, it is noteworthy that the entire "incident" took place in a forty second time span and questions and comments by Mr. Coffey and the Court were overlapping.

I accept Constable Ballard's testimony that he placed the "letter" into the file containing his notes. It would appear that after Constable Ballard closed the notes file, he placed it on top of the sixteen file folders which had been stacked to his left on the witness box, he placed an elastic band on top of the note file and he opened the "correspondence file" to answer Mr. Coffey's questions. At some point he moved the "letter", as he testified "just to get it out of the way".

It is obvious from the tape and the transcript that both Judge Puddester and Mr. Coffey observed Constable Ballard's placing this "letter" into the file. I am not, however, satisfied from listening to the tape that Constable Ballard himself had focused on the file to which they were referring or on his placement of the "letter" into the file.

Mr. Coffey asked Constable Ballard "what is that you're putting in there, Constable?". Constable Ballard responds "In where?". As Mr. Coffey says "you just put something in the file folder", the Court also comments "In that top file. What did you just slide in there?",



overlapping Mr. Coffey's question. Mr. Coffey then states "You just slid something in the top file folder?", Constable Ballard responds "It was a rubber band I just ..." whereupon the Court interjects "No". Mr. Coffey overlaps with the response "You just slid something...".

Subsequent to this there is a comment by the Court "I just saw you slide something in there. What did you put it?".

Constable Ballard, once again responds, "In where?" and when the Court states "The top folder in the last document down on the top?", Constable Ballard responds "I didn't put anything in", whereupon he appears to recognize the file to which the Court and Mr. Coffey are referring and responds appropriately once he identifies the file: "Oh. This one here? This folder here is just a folder of my notes and that. That's not ..." whereupon he is interrupted by Mr. Coffey and told "Constable, open the top file folder, please". When he is asked by Mr. Coffey what documents are contained therein, he responds "Oh this one here, okay, that's that letter".

Given the overlapping of questions and comments by Mr. Coffey and the Court and the substantiation of Constable Ballard's testimony by the impressions of Ms. Butland-Power, I find that Constable Ballard was confused as to what was being asked of him.

Notwithstanding that both the Court and Mr. Coffey were referring to a top file, I am not satisfied that Constable Ballard's mind was directed to the appropriate file. While Constable Ballard should have taken more care to say to the Judge and to Mr. Coffey that he did not understand what they were referring to, instead of saying that he didn't put anything in the file, on the evidence, I am not satisfied on the balance of probabilities that he wilfully or negligently attempted to mislead the Court in answering questions put to him.

DATED AT St. John's, Newfoundland this 4th day of September, A. D. 1996.

LINDA M. ROSE, Q.C.,

ADJUDICATOR

TO:

Dr. Leslie Harris, O.C., Ph.D., Commissioner,

Constable Derek Ballard

Leonard P. Power, Chief of Police

Mrs. Dora Callahan