

**IN THE MATTER OF** S. 28 (2) of the  
Royal Newfoundland Constabulary Act  
1992 (“the Act”)

**AND IN THE MATTER OF** the  
Complaint of *Michael Joseph Kavanagh*  
dated the 8<sup>th</sup> day of March, 2001

**BETWEEN:**

THE ROYAL NEWFOUNDLAND CONSTABULARY  
PUBLIC COMPLAINTS COMMISSIONER

COMMISSIONER

**AND:**

CONSTABLE R. DONOVAN  
AND  
CONSTABLE A. J. WALSHE

RESPONDENT

RESPONDENT

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DECISION

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**Introduction**

This matter involves a complaint by *Michael Joseph Kavanagh* dated March 8<sup>th</sup>, 2001 against Constables *R. Donovan* and *A. J. Walshe*, members of the Royal Newfoundland Constabulary. The complaint in Form 9 ( produced below ) states the allegations and the conduct which is at the root of the complaint.

**FORM 9**  
**SECTION 28 (2)**

**REFERENCE TO CHIEF ADJUDICATOR**

**TO: The Honourable Judge James Kean, (retired), Chief Adjudicator**

**WHEREAS** on or about the 8<sup>th</sup> day of March, 2001 the complainant *Michael Joseph Kavanagh* filed a public complaint with respect to the actions of *Constable A. J. Walshe*, Regimental No. 487, and *Constable R. Donovan*, Regimental No. 570, who, on the 4<sup>th</sup> day of March, 2001, had entered the complainant’s residence without notice, a warrant, or the consent of the complainant, and thereafter assisted in the removal of , inter alia, matrimonial property from the complainant’s residence by *Cathy Kavanagh*;

**AND WHEREAS** following an investigation under Section 24 of the Royal Newfoundland

Constabulary Act, 1992, S.N.1992, as amended (hereinafter "the Act") the Chief of Police dismissed the said public complaint of *Michael Joseph Kavanagh*;

**AND WHEREAS** pursuant to the Act and the regulations made thereunder, *Constable A. J. Walshe* and *Constable R. Donovan* are alleged to have conducted themselves in a manner unbecoming a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary by:

- i) neglecting or omitting to diligently perform their duties as police officers, contrary to s. 3(1)(d) of the Royal Newfoundland Constabulary Public Complaints Regulations, C. N. R. 970/96; and
- ii) by conducting themselves in a manner contrary to the Policy and Procedures Manual, contrary to s. 3(1)(j) of the Royal Newfoundland Constabulary Public Complaints Regulations, C. N. R. 970/96;

thereby committing an offense contrary to Section 3(2) of said Regulations;  
The particulars of the alleged offence are as follows:

"That *Constable A. J. Walshe* and *Constable R. Donovan*, on or about March 4, 2001, at or near Flatrock, in the Province of Newfoundland and Labrador, did, without notice, a warrant, or the consent of the complainant, *Michael Joseph Kavanagh*, enter the complainant's residence and assist in the removal of, inter alia, matrimonial property by *Cathy Kavanagh*."

**NOW THEREFORE** pursuant to Section 28 (2) of this Act this matter is referred to you to appoint an adjudicator to conduct a hearing pursuant to the Act and the regulations made thereunder.

**DATED** at St. John's, Newfoundland and Labrador, this 10<sup>th</sup> day of December, 2002.

Leslie Harris, O.C., Ph.D.,  
COMMISSIONER,  
ROYAL NEWFOUNDLAND CONSTABULARY  
PUBLIC COMPLAINTS COMMISSION

The matter was referred to me as Chief Adjudicator by the Commissioner, Dr. L. Harris , on December 10<sup>th</sup> , 2002. To suit all schedules , the matter received hearing days in late April, early May, mid June, and concluded with submissions on July 10<sup>th</sup> , 2003.

**Evidentiary Sources**

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

- William McDonald ..... Investigator for the Commission
- Yvette O' Driscoll ..... R. N. C. Telecommunications
- Constable A. Grace ..... R. N. C. Communication Centre
- Inspector John Brown ..... (Retired) R. N. C.
- Rosalind Gulliver ..... Iris Kirby House ( Co-ordinator)

Ronald Follett	Flatrock
Cathy Follett ( Kavanagh)	Torbay
Michael Joseph Kavanagh	Flatrock
Diane Nurse, R. S. W.,	Director, Child and Family Services
Inspector Connie Snow	R. N. C., Planning and Research
Sharon E. Trenholm	Civilian Employee, R. N. C.
Constable R. Donovan	R. N. C.
Constable A. J. Walshe	R. N. C.

### **Preliminary Remarks**

*Michael Joseph Kavanagh* ( hereinafter referred to as *Mr. K* ) is a unique person and the complainant. He was introduced to this hearing with a wide range of qualities that make people different. He was a challenge to all, including his counsel, Mr. Aylward. Even before the hearing opened, *Mr. K* was careless with his loud commentary and accusations that this was another ‘kangaroo court’. There was no doubt that other conflicts in his past had created the notion that there was a systemic conspiracy to degrade him and to deny him his rights. It was evident throughout his testimony that he wanted to visit those other conflicts, but they were restrained. This adjudicator was ever mindful that a complainant had to feel that the hearing was a user-friendly forum and that it was critical for this citizen to be heard.

Initially, *Mr. K* decided not to testify, then later opted that he would. He had to be constantly constrained from his rambling, accusations, snide remarks, patronization and argumentative style. Occasionally during cross examination, counsel were cautioned by myself not to ‘push the wrong buttons’. *Mr. K* would blame his outbursts on his injuries sustained from a car accident in the early 1980's. His disabilities include having to walk with a cane, a speech impediment and being hearing impaired. He admits to being paranoid, short-fused, and that those traits are accentuated by his medication. He demonstrated intense mood swings, especially when challenged on his testimony. There were references to his doctor and to the fact he had a bad memory.

*Mr. K* also presented as a person who became frustrated with his verbal limitations in expressing his thoughts and with his own concept that he was not expressing himself well. He

also could swing to excessive politeness, certainly towards this adjudicator; and it appears he left the hearing pleased that he had attended and had been heard.

### **The Evidence.**

Mrs. Cathy Follett Kavanagh, (hereinafter referred to as *Mrs. K* ) and *Mr. K* were married in 1991 after a year of cohabiting. *Mr. K* had a house constructed at 53 Powers Lane, Flatrock, which became the matrimonial home. Rebecca, a child of the relationship, was nine years old at the time of the complaint date. The relationship deteriorated and in May of 2000 *Mrs. K* moved out taking Rebecca with her. They stayed at Kirby House for a couple of days; then moved back to the matrimonial home a few days later after *Mr. K* called and said that he would vacate the premises. He did in fact move to British Columbia. In October of 2000 he returned and stayed at his mother's house for a fortnight. *Mr. K* then called *Mrs. K* regarding his accommodation; and she consented to his temporary return to their home, provided that

“Yes, you can stay under one condition, that we're separated, we're still separated.”

She explained that *Mr. K* had the spare bedroom and that whenever he found alternate accommodation, he would move out. This was not to be. On January 30<sup>th</sup>, 2001, *Mrs. K* vacated the residence under the following exchange:-

“Because I know that the night of January 29<sup>th</sup>, the child was in bed ready to go to sleep. It was 9:30 -10:00 in the night and Mike was deliberately going around the house banging doors, cupboard doors, had the TV blasting up loud .I went out and I said ‘Turn the TV down’. That was the breaking point where I left the next morning.... She started to cry. She said ‘why is he doing this ?’. She said ‘I want to go to sleep’ and ‘I need to get my sleep’. And I said to him, ‘please turn down the TV’, I said ‘ Rebecca can't go to sleep,’ and I said ‘she's crying.’ He didn't care. He just kept the TV blasting, and she just went to sleep crying that night and that was it. I said ‘ that's it, no more’, and when I got up the next morning, he was out in the living room, sitting down. I came out. I said ‘Are you leaving today ?’. He said ‘No’. I said ‘Good enough’. I went in, got my suitcases, packed her bag and mine and walked out the door. That child has seen a lot in the few years.....and she seen him in many outrages, you know, just losing control .....”

*Mrs. K* found an apartment in Shoe Cove late February, 2001. There is evidence that during this month, she had a conversation with Insp. Brown on other matters pertaining to documents in her home and in the course of that conversation *Mrs. K* was of the belief that if she needed to return to her home at Flatrock, that safe escort should be asked for. Evidence also points to the fact that she attended on the home in this same month to retrieve some items, and that *Mr. K* became upset, volatile and 'lunged' at her. She testified that she thought Insp. Brown was informed of this. *Mrs. K* also testified that in February, 2001, she became aware that the locks had been changed on the doors of the Flatrock residence.

On March 3<sup>rd</sup>, 2001, *Mrs. K* rented a U-haul truck and moved some furniture from Mount Pearl to her apartment in Shoe Cove. She was assisted by her brother, Ronald Follett. They held the truck and decided to retrieve Rebecca's bedroom furniture and other personal items from the residential home the following day.

Approximately 13:15, Sunday, March 4/ 2001, *Mrs. K*'s call was received at the R.N.C. Telecommunications Centre. This was classified as a priority three call - an escort call. It was recorded as *Mrs. K* 'requested items from her house'. At 13:58 the officer acknowledged he was in route. Between 14:21 and 15:00, when they arrived at the residence, Const. Walshe (driver of the marked police vehicle) and Const. Donovan (passenger) had met up with *Mrs. K*, Ronald Follett and Rebecca at the Lighthouse Store parking lot. They were in the U-haul truck. After a brief conversation - *Mrs. K* with both Constables - they proceeded to the Kavanagh residence where *Mr. K* resided.

From the evidence, I am satisfied that Constables Walshe and Donovan were of the understanding that *Mr. K* was aware that they (police) would be attending as escort for the purpose of *Mrs. K* collecting her personal belongings and selected furniture items. Notwithstanding, Const. Walshe was aware of *Mr. K*'s volatile nature and indicated safety risks were his concern; as well as the potential for or 'hint' of threats or assault as from previous encounters *Mrs. K* had experienced with the complainant. Const. Walshe instructed *Mrs. K* not to say or do anything to provoke *Mr. K* -

“ ....just to go in ..do your thing and get out”

At the residence, there were parking difficulties due to a recent snowfall.. Whilst Const.

Walshe parked the police vehicle, Mrs. K, Rebecca and Const. Donovan proceeded and entered the residence. Const. Walshe followed a minute or two later, along with Mr. Follett. *Mrs. K* had entered the house without knocking, followed by Rebecca and Const. Donovan. *Mr. K* became very upset with *Mrs. K* and immediately asked who had invited him (indicating Const. Donovan) in, and for him to take off his boots. *Mrs. K* explained that she had invited them, and proceeded into the residence to collect her things. *Mr. K* began calling her names “slut, whore, bitch” and accused her of giving him “the clap”. He was still calling her names when Const. Walshe entered. *Mr. K* asked who had invited him in, why was he there, and to take his boots off. Const. Walshe tried to calm *Mr. K* by explaining that they were there as escort to see that nothing happened, being impartial to both parties. I accept from the evidence that *Mr. K* continued to ask if there was a warrant and why they needed to be there. He also asked to see the officer’s badge.

I accept the evidence that Constables Walshe and Donovan did everything they could while inside the residence to prevent further escalation of tension or reaction between *Mr. K* and *Mrs. K*. Keeping the peace and not letting the situation get out of hand was paramount. Rebecca meanwhile, was moving between her bedroom and outside the house; and *Mr. K* would attempt to talk to her. She would cry either because of what he had said to her, or because of how loud and angry he would become with her mother.

I accept, as well, evidence that the officers were in the home for approximately 30 to 40 minutes – not the 60 to 90 minutes claimed by *Mr. K*. During this time, *Mrs. K* removed...

“Rebecca’s single bed, her bureau, a floor model TV which had belonged to my brother; my grandmother’s old rocking chair, and some clothes and toys belonging to Rebecca; and a few boxes which I can remember there was Xmas decorations and that in them. I took those. And probably some more clothes.”

*Mr. K* claims that much more was taken, but I am not convinced on balance that this was the case. When it was disputed by both over the removal of an antique table, Const. Walshe, sensing that *Mrs. K* was about to snap and that the situation was deteriorating, instructed *Mrs. K* to leave the table..

“It’s not worth it, let’s get out of here”.

I also accept from the testimony, that Const. Walshe moved the headboard from the hallway to the porch and that Const. Donovan moved some boxes to the porch so that Mr. Follett could take them to the U-haul. This was explained as expediting the matter to relieve the tension and not prolong the visit more than was necessary. The evidence does not indicate that *Mr. K* was constantly hostile towards the officers. There were periods when he was chatty, polite and even discussed newspaper items with Const. Walshe and viewed scrapbooks. However, he would quickly revert to name-calling and shouting accusations.

The escort completed and furniture removed, the officers, *Mrs. K*, Rebecca and Ronald Follett left the residence.

Throughout the hearing, police witnesses presented evidence on the safe escort *policy*. Counsel for the Commission in his opening comments, commended the R. N. C. for delivering such a program. He was, however, quick to qualify that it could not be implemented at the expense of trampling on the rights and freedoms of others. All the witnesses called who were civilian employees or members of the Constabulary (with one exception), detailed what they understood the safe escort *policy* required, and the type of action it permitted in providing this service - from receiving a call for service, to the implementation at the location. Officers Grace, Donovan, Walshe and Insp. Brown canvassed, in detail, knowledge of the *policy* and the numerous occasions it had been used. Each officer appeared dedicated to a sensitive approach in applying this *policy* and emphasized that each case required a great deal of discretion on site for each call. Reference was made throughout to the guidelines in **Consent # 7**.

In her testimony, Insp. Snow informed the hearing that there was no safe escort *policy*. **C. S -1** was also tendered through her which reflected that **Consent #7** and **C. S - 1** (both active) was current *policy* on how officers were to deal with, inter alia, domestic dispute situations. It became apparent that the safe escort *policy* was no more than a *practice*, which developed during the 1990's, with good intentions. Notwithstanding, it never became a scripted part of the *policy*, i.e. codification.

It is trite to say that the required approach in responding to complaints of assaults, threats etc., would be different from that of providing a safe escort to collect items of necessity. The

above status regarding *policy* and *practice* is important in analysing the conduct of Constables Donovan and Walshe.

### **The Issues**

1. Whether or not *Mr. K* consented to the presence of the officers in his residence.
2. Whether or not *Mrs. K* could invite the officers and consent to their presence over the objections of *Mr. K*.
3. Whether or not there is any other lawful authority to support the conduct of the Officers.

### **The Law and the Issues**

#### **Issue # 1.**

This is a matter of fact and inferences that can be drawn from them. Counsel for the Commission submits that *Mr. K* did not invite the officers into the residence and, therefore, did not consent to their presence. Counsel for the officers argue that *Mr. K* was objecting to *Mrs. K* being present and that directing the officers to remove footwear was, essentially, an acquiescence to their presence. Furthermore, the viewing of scrapbooks, and conversing generally was also a signal of consent.

Whatever can be inferred from this, it remains that *Mr. K* asked for a warrant, badges and identification, and was heard to say or shout on several occasions that he had not invited them in and was, overall, upset at their presence. Mr. Ronald Follett testified that he heard *Mr. K* instructing the officers to get out of the house.

I am satisfied on any balancing of the facts that *Mr. K* did not invite the officers into the home and did not then (at entry) or subsequently, consent to their presence.

#### **Issue # 2.**

Counsel for the Commission submits that possession is nine - tenths of the law.

His memorandum (p- 26) refers to the **Semaynes' Case** :

..the house of everyone is to him as his castle and fortunes.

and **Entich v. Carrington:**

..Our law holds the property of every man is so sacred, that no man can set foot upon his neighbour's close without his leave: if he does he is a trespasser, though he does no damage at all: if he will tread upon his neighbour's ground, he must justify it by law.

While these principles are sound and have carried the law for centuries, one cannot help but notice the lack of gender neutrality. The law has evolved at least to the extent that husband and wife are equally recognized (statutorily) as it relates to the matrimonial home and property. They are joint tenants.

Commission Counsel argued that *Mrs. K* vacated the home and therefore was not an occupant. He further asserted that *Mr. K* was the legal occupier as against any other person and it was only with his consent or invitation that others (including his wife) could enter. The authorities presented by the Commission, I agree, show a great respect for the privacy rights of the person in possession. However, it has to be acknowledged, that in this case, *Mrs. K* had not abandoned anything. She was required to leave because of the conduct of *Mr. K*. Her indication, by act and word, was to stay in the matrimonial home if *Mr. K* was not there. Between January 31/ 2001 and February 28/ 2001, she appeared active in applying her intentions to claim her personal possessions. How can it be said that the law supports the position that *Mr. K*, through his conduct and control, obtains superior management of the home? In my view, this is counter to the spirit and intent of the **Family Law Act, - RSNL 1990 Chapter F - 2, Section 8 and 15,** (produced hereunder.)

### **Matrimonial Home**

**8.** ( 1 ) Notwithstanding the manner in which the matrimonial home is held by either or both of the spouses, each spouse has a ½ interest in the matrimonial home owned by either or both spouses, and has the same right of use, possession and management of the matrimonial home as the other spouse has.

(2 ) Subsection ( 1 ) creates a joint tenancy with respect to the matrimonial home.

(3 ) Notwithstanding subsection (2), where spouses hold a matrimonial home as tenants in common, either before or after July 1, 1980, that tenancy continues.

(4) Where title to the matrimonial home is held by 1 spouse by virtue of adverse possession or a license or easement relates to the use and enjoyment of the matrimonial home, the period of adverse possession, licence or easement that has accrued prior to the time the home becomes a matrimonial home accrues to the spouse who acquires an interest in the matrimonial home

under this Act and the period of adverse possession, licence or easement continues to run notwithstanding the effect of Parts I and II upon the title to the home.

(5) Notwithstanding anything contained in this Part and Part II, the joint tenancy created with respect to the matrimonial home by this section

(a) creates a right of survivorship in a surviving spouse; and

(b) operates to vest beneficial ownership in the matrimonial home in the surviving spouse without the need for the probate or the administration of an estate of the deceased spouse.

(6) Where the right of survivorship referred to in subsection (5) operates, the matrimonial home shall not be subject to division as a matrimonial asset under Part II

(7) Parts I and II shall be considered to have come into force on July 1, 1980.

15. (1) The court may order, on the application of a spouse,

(a) direct that 1 spouse be given exclusive possession of a matrimonial home, or part of it, for life or for the lesser period that the court decides and, in addition, may release other property that is a matrimonial home from the application of this Part;

(b) direct a spouse to whom exclusive possession is given under paragraph (a) to pay the periodic or other payments to the other spouse or surviving spouse that are prescribed;

(c) direct that the contents of a matrimonial home that are matrimonial assets as defined in section 18, or a part of the assets, remain in the matrimonial home;

(d) fix the obligation to repair and maintain the matrimonial home and to pay for other liabilities arising in respect of the matrimonial home; and

(e) authorize the disposition or mortgage of the interest of a spouse in a matrimonial home who has not been granted exclusive possession.

(2) Where a surviving spouse does not reside in the matrimonial home at the time of the death of the other spouse and a child resides in that matrimonial home at that time, the court may, on the application of the child through a next friend, direct that the child, through his or her guardian, be given exclusive possession of the matrimonial home until the child reaches the age of majority, or where the child attends a post secondary institution, until the age of 24 years and make those other orders under subsection (1) that it considers appropriate.

(3) The court may only make an order for exclusive possession of the matrimonial home under subsection (1) or (2) where, in the opinion of the court,

(a) other provision for shelter is not adequate in the circumstances; or

(b) it is in the best interests of a child to make the order.

(4) Where the court is satisfied that there has been a material change in the circumstances, it may discharge, vary or suspend an order made under paragraphs (1)(a), (b), (c)..and (d), or subsection (2), upon the application of a party to the original application.

Section 8 (1.) directs that:

each spouse.....has the same right of use, possession and management of the matrimonial home as the other has.

Section 15 (1) directs that:

The court may by order, on the application of a spouse,  
(a) direct that one spouse be given exclusive possession of a matrimonial home

There was no order for exclusive possession by *Mr. K*. The Commission relies on

**Bottos v. Bottos ( 1989) 19 R.F.L.3rd 458** that

section 19 of the Family Law Act gives both spouses an equal *right* to possession of the matrimonial home. This is a right to possession. It is not possession itself.

**Section 19(1) of the Ontario Family Law Act S.O.1986,ch.4** states

Both spouses have an equal right to possession of the matrimonial home.

Section 19(1) ,unlike our Section 8(1), does not include the right of use and management. It may be noted in Bottos v Bottos *supra*, that the factual finding was that

the wife surrendered her possession of the matrimonial home and contents when she left in July 1988.

It can be concluded that the court in Bottos was only concerned with the *right* to possession. Further commentary denotes the concern of the court in making its decision.

The right of self-help is an ancient right but its use is hedged about by certain protections in order to prevent breaches of the peace.

Also,

These matrimonial matters are fraught with tension and a breach of the peace is never too far removed, and actions such as this do nothing to foster a spirit in which settlement is possible.

Since *Mrs. K* had not abandoned her right to use, possession or management, was forced to leave by conduct of *Mr. K* and had continued to actively show her interest in the home and property; it is my view that the law supports her return to the home without the consent of *Mr. K*, and her invitation extended to the officers over his objections. This view of the law is fortified by argument and case offered by Counsel for the respondents.

**Payne v. Payne, [2002] M. J. No. 120 ( MBQB) 89**

120 the wife's claim of ouster, triggering a right to occupation rent, is based on the theory that although she left the home voluntarily the husband subsequently changed the locks and had a significant change in attitude about virtually all marital issues from those which he espoused when she agreed to leave. This says she was an intentional deception and amounts to an ouster. I do not agree. She left voluntarily. From that day forward she has had an equal right to enjoy and occupy the whole of the premises. She could have simply re-entered by herself obtaining the services of a locksmith or she could have proceeded to court for an order of sole-occupation as against the husband pursuant to the provisions of The

Family Maintenance Act, C.C.S.M. C. F15. She attempted neither. Overall the evidence falls short of establishing to my satisfaction that the husband's behaviour was so oppressive or intimidating as to amount to ouster of a co-owner. (Underline is mine)

**R. v Bryze, (1981), 63 C.C.C. (2d) 21 (Ont. Prov. Ct., Criminal Division)**

1. The trailer entered by the accused was or had been the matrimonial home.
2. No other Act known to our law changed the nature of the matrimonial home categorization which attached to the home in question by virtue of the parties having considered it their home while they cohabited therein as husband and wife.
3. No separation agreement existed which provided that either party should have exclusive possession of the home.
4. No Court order existed which provided that either party should have exclusive possession of the home.
5. The parties were, at the time when the offense of break and enter was alleged to have occurred, and continue to be to the date hereof, husband and wife. They have not ceased to be spouses in law, although they now live separate and apart from each other.

*It follows, therefore, that this accused was, at the relevant time, entitled to possession of the family home to the same extent as was her husband. She was entitled to that possession for a minute; or an hour; or for as long as she wanted.. She was entitled to that possession until one of those events set out in s. 40(2) had occurred.*

I conclude this issue by deciding that the officers were not trespassers and were in the residence with the consent of *Mrs. K*. They were escorts, not seeking information for the state, and to the extent that they 'touched' a bedhead and a carton, it was only incidental to facilitating a speedy exit after *Mr K* and *Mrs. K* heightened tension over ownership of a living room table.

**Issue # 3.**

Counsel for officer Donovan, in submission, argued that there is sufficiency in the above law and fact to resolve the matter. In my view, the conduct of the officers must include what they understood all the law to be, and their responsibility as police officers in providing a service within the law. On Mar 4 /2001, they responded to a call for safe escort. It has already been determined that there was no *policy* - no code of official direction outlining protocol for safe escort. It was only a *practice* which had been in use for over a dozen years.

As Inspector Snow suggested, the practise worked well ninety - eight percent of the time

and it is a valuable service to displaced and victimized spouses. This incident however, is one where the conduct and approach of the officers has been called into question.

The following represents the statutory position of the Chief of Police.

**Royal Newfoundland Constabulary Act, 1992.**

**SNL 1992 Chapter R - 17**

**Administration**

6.(1) the Chief shall

- (a) establish and determine within the constabulary the rank of each police officer other than commissioned officers;
- (b) recruit and appoint police officers to the constabulary;
- (c) after the end of each calendar year file with the minister an annual report on the affairs of the constabulary;
- \* (d) establish and enforce rules respecting policies and procedures for the effective management and control of the constabulary;
- (e) monitor the constabulary to ensure that adequate and effective police service is provided in the province;
- (f) monitor the constabulary to ensure that police officers and other constabulary employees comply with the required standards of service and discipline;
- (g) administer discipline in accordance with this Act;
- \* (h) develop and promote programs to enhance professional police practices, standards and training;
- (i) conduct a system of inspection and review of the constabulary;
- (j) assist in the co-ordination of police services in the province;
- (k) develop, maintain and manage programs and statistical records and conduct research studies in respect of police services and related matters;
- \* (l) issue orders, directives, rules and guidelines respecting policy and matters relating to the constabulary, police services, police officers and other constabulary employees; and
- \* (m) develop and promote programs for community oriented police services

(2) The chief shall report to the minister and shall obey the minister's orders and directions.

(3) The orders and directions referred to in subsection (2) shall be in writing.

The above duties of the chief ( and his office) are assigned by law. The asterisk subsections outline the areas where the duties, conduct and responsibilities of member peace officers become circumscribed. The delivery of service to the public, within the law, flows from the policy,

procedure, standards and directions which come from this office,- with other statutory authority ( ie. Criminal law ).

Each officer is charged with the following duties:

**SNL 1992 Chapter R -17**

8. (1) The duties of a police officer include

- \* (a) preserving the peace;
- (b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;
- (c) assisting victims of crime;
- (d) apprehending criminals and other offenders and persons who may lawfully be taken into custody;
- (e) laying charges, prosecuting and participating in prosecutions;
- (f) executing warrants that are to be executed by police officers and performing related duties;
- \* (g) obeying constabulary regulations, orders and rules respecting policy and procedures; and
- \* (h) performing the lawful duties assigned to him or her.

Particular reference is made to subsections noted by asterisk above.

The safe escort practise developed from the Domestic Disputes Policy. ( Consent #7 and C.S.-1 ). Until reviewed for this hearing, everyone involved assumed this practice was established policy, which was evident in the conduct throughout the years. Officers Donovan and Walshe responded to an assigned duty believed to be covered by active policy - obeying constabulary duties.

It is my view they conducted themselves professionally and as gentlemen, sensitive to *Mr. K's* disability and within cautions of law that this was a balancing act. They were to maintain the peace, respect the legal position of both persons and provide safe escort. If they were wrong in law on either account, everything they did was in good faith. They believed the law supported their conduct and it is only now with the benefit of 20 /20 hindsight, that we argue whether they were right or wrong.

Counsel for the Chief of Police submitted that the Adjudicator should consider the cases of **R v. Godoy [1999] 1 S.C.R. 311** and **Lamb v. Director of Public Prosecutions, 154 JP 381, [1990] Crim C R 58**

While I have already decided that the officers were not trespassers, should I be wrong, then there is sufficient evidence to support them staying to prevent a breach of the peace. This was reasonable given the insulting and hostile demeanor *Mr. K* demonstrated towards *Mrs. K* in their presence, and earlier knowledge that there was an incident when he ‘lunged’ at her.

Support for this position is outlined in the cases below:

**Lamb:**            (Headnote)

The appellant was charged with criminal damage and assaulting a police officer in the execution of his duty. The facts are as follows: Miss W sought the assistance of a police officer in order to collect her belongings from the house where she had been living with the appellant. The police officer, anticipating on reasonable grounds that a breach of the peace might occur, agreed to accompany her and as they walked down the path the appellant came out of the house and ordered them off his land. Miss W told the officer that she was the joint owner of the land and when she went into the kitchen the officer remained outside in the doorway. As she took some keys from a drawer in the kitchen the appellant attacked her and when the officer entered the kitchen to prevent a breach of the peace there was a violent struggle in which the officer was assaulted and his shirt was damaged.

The justices found that the officer honestly and reasonably believed that he had an implied licence to be on the premises but as Miss W had no title under which to give such a licence, the officer was a trespasser. They concluded, however, that he was not only entitled but bound, by virtue of his office, to act as he did to prevent a breach of the peace so that when he was assaulted he was acting in the execution of his duty.

On appeal by way of case stated it was contended on behalf of the appellant that as the officer had committed an unlawful act by remaining on the premises after his implied licence to be on the premises had been withdrawn by the appellant, he could not thereafter be acting in the execution of his duty without first nullifying his unlawful act by leaving the premises before returning to prevent the breach of the peace.

Held ( dismissing the appeal): A police officer was entitled to enter premises to prevent a breach of the peace even though immediately before entering the premises he was a trespasser. He was not obliged to nullify his trespass by leaving the premises before returning to deal with the breach of the peace. Once the police officer anticipated a breach of the peace he had an independent right to remain on the premises and enter the kitchen, so that he was then acting in the execution of his duty.

and **Godoy** -involving entry of a dwelling in response to a 911 call.

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.

(Underline is mine)

### **Conclusion**

Having considered the evidence and the law and decided that

- 1) Mrs. K could invite and consent to the officers' presence in the home;
- 2) the officers were not trespassers and if they were it was to maintain the peace;
- 3) throughout they acted in utmost good faith.
- 4) the involvement with property removal was only incidental to a speedy exit.

Then, I conclude that the charges against Constable R. Donovan and Constable A.J. Walshe under

s.3(1)(d) of the Royal Newfoundland Constabulary Public Complaints Regulations, C.N.R. 970/96

and

s.3(1)(j) of the Royal Newfoundland Constabulary Public Complaints Regulations, C.N.R. 970/96 are to be dismissed..

I make no order of costs.

Section 35 of the Act empowers an Adjudicator to make recommendations on matters of public interest relating to police services. If the R.N.C. wishes to continue an escort service to victims caught in domestic conflict situations, then the following recommendations are suggested. (They are not intended to be exhaustive, and would apply only where no court order exists.)

1. Response to complaints of domestic violence situations and calls for assistance as escorts are not the same. The former requires reasonable and probable grounds that an offense has been committed or is about to be committed; whereas the latter entails apprehension of conflict

2. An established protocol should be in place for all officers involved in providing escort assistance - an established policy. This would lessen the broad discretionary call each officer is required to make under current practice.
3. Generally, escort assistance is not a life or death situation, rather it is to retrieve items that would provide some regularity of comfort to the individual displaced. Such items or category of items should be identified for greater certainty, i.e. medications, wheelchairs, prosthesis, bedding, personal care items, child's bed and personal comfort items, etc.
4. Attending on the residence in official moving vans should be discouraged as it tends to signal wholesale removal.
5. Children, certainly under the age of fourteen, should not attend such events. It only places them in a 'catch - 22' situation and heightens conflict.
6. Policy should include circumstances when officers should make timely withdrawal.

DATED at Harbour Grace, in the province of Newfoundland and Labrador, this 12<sup>th</sup> day of August, 2003 A.D.

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James Kean  
Chief Adjudicator