Date: 20020802
Docket: 200101T3223

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

DONALD MALONEY **APPLICANT**

AND:

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

Heard: April 26, 2002
Filed: August 02, 2002

DECISION OF MERCER, J.

[1] This is a statutory appeal from the decision of an adjudicator (Adjudicator) who conducted a hearing into a complaint filed with the Royal Newfoundland Constabulary Public Complaints Commission (Commission). The complaint alleged that an inadequate police investigation had resulted in an unwarranted criminal charge.

BACKGROUND

[2] On April 18, 1997 Corey Evans (Evans) gave a statement to the Royal Newfoundland Constabulary (RNC) that he had been assaulted on George Street, St. John's earlier that day by Gregory Parsons (Parsons) and David Woolridge (Woolridge). The applicant herein, Donald Maloney (Maloney) is the RNC constable who was the investigating officer respecting the alleged assault. Parsons

was then on bail. He had been convicted of the murder of his mother. The Court of Appeal overturned the conviction, ordered a new trial, and ordered Parsons released pending the retrial. (Parsons was later exonerated of the murder, without the necessity of retrial, when the Crown withdrew the charge following DNA analysis of evidence from the crime scene.)

[3] Following his initial investigation Maloney arrested and charged Parsons on April 22, 1997 with assault causing bodily harm. Parsons was imprisoned until April 25, 1997 when he was released on bail, with consent of the Crown. Investigation of the alleged assault had continued past April 22 when Parsons was arrested. It revealed problems with Evans' initial statement and with other aspects of the case against Parsons. Ultimately the Crown entered a stay of proceedings on the charge on September 16, 1997, the trial date.

[4] On October 20, 1977 Parsons filed a complaint with the Commission claiming discrimination against him by the RNC related to the murder charge, in particular alleging that Maloney was responsible for "false arrest/false imprisonment arising out of an incident on George Street leading to a charge of assault causing bodily harm being laid without proper investigation and then stayed." This complaint was dismissed by the RNC and, in accordance with statutory process, was referred by the Commission to the Adjudicator. The reference alleged that Maloney:

> **"...conducted himself in a manner unbecoming a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary by:**
>
> **(i) without good and sufficient cause, making an arrest or detaining a person contrary to Section 3(1)(a) of the *Royal Newfoundland Constabulary Public Complaints Regulations*, C.N.R. 970/96, thereby committing an offence contrary to Section 3(2) of the Regulations;**
>
> **(ii) neglecting or omitting to promptly and diligently perform his or her duties as a police officer, contrary to Section 3(1)(d) of the *Royal Newfoundland Constabulary Public Complaints Regulations*, C.N.R. 970/96, thereby committing an offence contrary to Section 3(2) of the said Regulations."**

[5] Following a duly conducted public hearing the Adjudicator determined that Maloney had conducted himself in a manner unbecoming to a police officer in respect of both disciplinary offences charged. Maloney was given a four day suspension without pay on each offence to be served concurrently.

The Royal Newfoundland Constabulary Act, 1992; Chapter R-17, S.N. 1992, as amended, (the Act);

[6] The Act authorizes regulations respecting, among other things, the disciplinary offences (Regulations). The Act establishes the Commission and the complaints process and provides for an appeal to this Court.

[7] Relevant provisions of the Act include:

> **"18.(1) The Lieutenant-Governor in Council shall appoint a Royal Newfoundland Constabulary Public Complaints Commission consisting of a commissioner.**
>
> **...**
>
> **(3) The commissioner shall**
>
> **(a) serve for 5 years during good behaviour.**
>
> **19. (1) The commissioner may**
>
> **(a) receive and review a complaint made against a police officer;**
>
> **(b) investigate a complaint; and**
>
> **(c) dismiss or refer a complaint for a hearing under section 28.**
>
> **22.(1) A person other than a police officer may file a complaint concerning the conduct of a police officer in writing at a constabulary office or with the commissioner.**
>
> **(2) a complaint made under subsection (1) shall be a complaint which, if substantiated, would lead to review and discipline under this Act.**

24.(1) Where, under section 22, a complaint is filed with the commissioner or is received at a constabulary office, that complaint shall be referred to the chief, or where the chief is not available, the deputy chief.

....

(3) Upon receipt of a complaint under subsection (1), the chief, or the deputy chief shall investigate the complaint and that investigation shall be completed as soon as is practicable but no later than 3 months from the date the complaint is filed or received.

25.(1) Following an investigation under section 24, the chief or the deputy chief shall consider the complaint and he or she may

...

(b) dismiss the complaint.

(4) A complainant who is not satisfied with a decision of the chief or deputy chief under subsection (1) may, within 15 days of his or her receipt of that decision, appeal the decision by filing an appeal with the commissioner.

26.(2) Where an appeal under section 25 is filed with the commissioner, the commissioner or an investigator shall investigate the complaint.

28.(2) Following an investigation of a complaint and where the commissioner does not dismiss a complaint and confirm the decision of the chief or deputy chief under subsection (1) and does not effect a settlement under section 26, he or she shall refer the matter to the chief adjudicator of the panel appointed under section 29 who shall conduct a hearing into the matter or refer it to another adjudicator.

29.(1) The Lieutenant-Governor in Council shall, on the recommendation of the minister, appoint a panel of persons to act as adjudicators.

(2) A panel appointed under subsection (1) shall consist of 12 persons, each of whom shall be a lawyer and 1 of them shall be appointed as the chief adjudicator.

(3) A member of the panel shall

(a) serve for 3 years during good behaviour; and

(b) continue in office until reappointed or replaced.

31.(1) An adjudicator has the powers of a commissioner appointed under the *Public Inquiries Act.*

(2) An adjudicator shall conduct a hearing without undue delay to inquire into the matter referred to him or her and shall give full opportunity to all parties to present evidence and make representations, in person or through counsel.

33.(1) Following a hearing not respecting the chief an adjudicator shall make a determination on the balance of probability and may order

...

(b) that the police officer who is the subject of the complaint

(vi) where he or she is not a commissioned officer, be suspended with or without a salary for a specified period of time.

...

(4) An order or recommendation of an adjudicator shall be made in writing, together with a statement of the reasons for the order or recommendation, and a copy shall be provided to the commissioner, the chief and all parties.

....

(8) an order of an adjudicator shall be binding on all parties.

....

35. Notwithstanding section 33 and an order which the adjudicator may make, the adjudicator may also make recommendations respecting matters of concern or interest to the public relating to police services by sending the recommendation, with supporting documents, to the minister.

36.(1) The complainant or the police officer who is the subject of the complaint may appeal an order or decision of the commissioner under subsection 22(5), 28(1) or of the adjudicator under section 33 by way of application to the Trial Division.

(2) An appeal shall not be made without leave of a judge of the Trial Division.

....

(6) A judge of the Trial Division may confirm, reverse or vary the order of the adjudicator and may make an order that an adjudicator may make under section 33."

APPEAL GROUNDS AND ISSUES

[8] Maloney did not have an appeal as of right from the Adjudicator's decision. Pursuant to Section 36(2) of the Act Maloney was granted leave to advance a series of grounds of appeal as follows:

(a) the Adjudicator erred in law by finding the (sic) Constable Maloney did not have reasonable grounds to arrest Gregory Parsons;

(b) the Adjudicator erred in law by finding that Constable Maloney did not do a complete and thorough investigation prior to arresting Gregory Parsons;

(c) the Adjudicator erred in law by finding that upon Gregory Parsons and David Woolridge giving statements contradicting David Evans (sic), Constable Maloney lost his reasonable grounds to arrest and had to further investigate statements he did not believe;

(d) the Adjudicator erred in law by failing to give due weight to uncontradicted expert evidence called by Constable Maloney;

(e) the Adjudicator erred in law by finding that all evidence had to be obtained prior to the arrest of Parsons;

(f) that the expert witnesses called by Constable Maloney only had a summary of evidence supplied to them by Constable Maloney, particularly in relation to Constable Maloney's view as to what Evans and Peddle could say. (p. 55 of her decision). The testimony at the hearing indicated that all three experts had the actual statements, not just summaries;

(g) that Crown Attorney Steven Dawson testified there was "not a likelihood (sic) of conviction" (p. 32). Dawson testified there was a low likelihood of conviction.

(h) that the police officer who actually swore the Information against Parsons, and who was satisfied on the material supplied to him by Constable Maloney that there were reasonable grounds to charge Parsons, did not have Peddle's statement (p. 48). The evidence at the hearing indicated that the swearing officer had Peddle's statement.

(i) that Constable Maloney acknowledged that Peddle's testimony was not true (p. 49). This finding is taken out of context. Constable Maloney's evidence was that Peddle was lying in the statement if his testimony at the hearing was true."

[9] Maloney narrowed the focus in his Brief of Argument which stated:

"15. Grounds of Appeal alleging errors of law lettered A, B, C, and E, will be argued as one ground of appeal. They all involved essentially the same issue: the Adjudicator's finding that Maloney did not have reasonable grounds to arrest Parsons as Maloney did not do a complete investigation prior to the charge in that he failed to interview witnesses named by Parsons and/or Woolridge.

57. Except as argued above in relation to Mills' and Flynn's knowledge of the reasonable grounds, the Appellant will not argue errors of fact."

[10] His Brief then stated the issues on appeal as follows:

> **"ISSUE 1: Was Adjudicator Myles correct in finding that Maloney's arrest of Parsons was improper?**
>
> **ISSUE 2: Was Adjudicator Myles correct in rejecting the expert evidence called by the Defence?"**

[11] The Respondent Commission disputed this characterization of the issues both as it pertained to the standard of review and to the implicit assertion that the Adjudicator ought not to have considered evidence beyond that considered by Maloney at the time of arrest. The Commission submitted that the issues on Appeal should be properly characterized as follows:

> **"(i) Whether the adjudicator committed a reviewable error in concluding that Maloney had a duty to properly and thoroughly investigate the criminal complaint of Evans prior to laying charges against Parsons?**
>
> **(ii) Whether the adjudicator committed a reviewable error in taking into account events that occurred after the arrest of Parsons in deciding whether Maloney had failed to conduct a proper and thorough investigation of the criminal complaint of Evans prior to laying charges against Parsons?**
>
> **(iii) Whether the adjudicator committed a reviewable error in concluding that, in the circumstances of the case, Maloney failed to properly and thoroughly investigate the criminal complaint of Evans prior to laying charges against Parsons?**
>
> **(iv) Whether the adjudicator committed a reviewable error in finding that the expert evidence called by the Applicant did not support the conclusion that Maloney's decision to arrest Parsons was proper?"**

[12] Following review of the written and oral submissions from both parties I concluded that the following issues will have to be resolved:

1. **Which standard of review is applicable on the appeal from the Adjudicator's decision;**

2. **Whether the Adjudicator breached the applicable standard in her assessment of the evidence by consideration of matters which occurred after the arrest and charge.**

3. **Whether the Adjudicator breached the applicable standard in her assessment of expert evidence.**

4. **Whether the Adjudicator breached the applicable standard in concluding that Maloney failed to thoroughly and properly investigate the alleged offence prior to arresting and charging Parsons. (Both parties having concurred that a police officer has a duty to properly and thoroughly investigate an alleged offence prior to arresting and charging a person).**

STANDARD OF REVIEW

[13] The standard of review refers to the degree of scrutiny that the Court will apply in reviewing the decision of a statutory delegate or, to phrase it another way, the extent to which the Court will defer to the decision of the statutory delegate. There has been extensive recent case law in this area from the Supreme Court of Canada and from the Courts in this jurisdiction. (See ***Standards of Review in Administrative Law,*** David Philip Jones, Q.C. and Anne S. de Villars, Q.C., Newfoundland Continuing Legal Education, November, 2001). In *Osmond v. Workers' Compensation Commission* (2000) 200 Nfld. & P.E.I.R. 202 (Nfld. C.A.) the Court of Appeal stated:

> **"Pezim and Southam as well as, more recently, Pushpanathan v. Canada (Minister of Citizenship & Immigration) [1998] 1 S.C.R. 982 and Baker v. Canada (Minister of Citizenship & Immigration) [1999] 2 S.C.R. 817, establish that whenever an administrative decision is being challenged in the court, whether by way of statutory appeal or judicial review, one of a 'spectrum' of potential standards of review may be applicable, with a standard of correctness at one end and a standard of patent unreasonableness at the other. Somewhere in between is a standard of 'reasonableness simpliciter'. There may well be**

> **other, as yet unarticulated standards."** (para. 79 per Green, J.A.; see also *Canada (Deputy Minister of National Revenue) v. Matel Canada Inc.* (2001) 199 D.L.R. (4th) 598 (S.C.C.))

[14] The applicable standard of review is determined through a pragmatic and functional analysis which examines the legislative intent of the statute creating the statutory delegate to determine the degree of court supervision warranted. In *Pushpanathan v. Canada (Minister of Citizenship & Immigration)* [1998] 1 S.C.R. 982 Bastarache, J. identified four categories of factors to be considered in determining the standard of review. He provided the following elaboration:

> **"(i) privative clauses**
>
> **The absence of a privative clause does not imply a high standard of scrutiny, where other factors speak a low standard. However, the presence of a "full" privative clause is compelling evidence that the court ought to show deference to the tribunal's decision, unless other factors strongly indicate the contrary as regards the particular determination in question. A full privative clause is "one that declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded" (Pastechnyk, supra, at para. 17, per Sopinka J.) .... At the other end of the spectrum is a clause in an Act permitting appeals, which is a factor suggesting a more searching standard of review.**
>
> **....**
>
> **(ii) Expertise**
>
> **"Described by Iacobucci J. in Southam, supra, at para. 50, as "the most important of the factors that a court must consider in settling on a standard of review", this category includes several considerations. If a tribunal has been constituted with a particular expertise with respect to achieving the aims of an Act, whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act, then a greater degree of deference will be accorded.**
>
> **....**

Nevertheless, expertise must be understood as a relative, not an absolute concept.... Making an evaluation of relative expertise has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise....The criteria of expertise and the nature of the problem are closely interrelated.

....

In short, a decision which involves in some degree the application of a highly specialized expertise will militate in favour of a high degree of deference, and towards a standard of review at the patent unreasonableness end of the spectrum.

(iii) Purpose of the Act as a Whole, and the Provision in Particular

"As Iacobucci, J. noted in Southam, supra, at para. 50, purpose and expertise often overlap. The purpose of a statute is often indicated by the specialized nature of the legislative structure and dispute-settlement mechanism, and the need for expertise is often manifested as much by the requirement of the statute as by the specific qualifications of its members. Where the purposes of the statute and of the decision-maker are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies, then the appropriateness of court supervision diminishes....Also of significance are the range of administrative responses, the fact that an administrative commission .... plays a role in policy development; Pezim, supra, at p. 596. That legal principles are vague, open-textured, or involve a 'multi-factored balancing test' may also militate in favour of a lower standard of review. (Southam, at para. 44) These considerations are all specific articulations of the broad principle of 'polycentricity' well known to academic commentators who suggest that it provides the best rationale for judicial deference to non-judicial agencies. A 'polycentric issue is one which involves a large number of interlocking and interacting interests and considerations." (P. Cane, An Introduction to Administrative Law (3rd ed. 1996), at p. 35). While judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously,

and the promulgation of solutions which concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint. The polycentricity principle is a helpful way of understanding the variety of criteria developed under the rubric of the 'statutory purpose".

(iv) The "Nature of the Problem": A Question of Law or Fact?

"....even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention, as this Court found to be the case in Pasiechnyk, supra. Where, however, other factors leave that intention ambiguous, courts should be less deferential of decisions which are pure determinations of law. The justification for this position relates to the question of relative expertise mentioned previously. There is no clear line to be drawn between questions of law and questions of fact, and, in any event, many determinations involve questions of mixed law and fact. An appropriate litmus test was set out in Southam, supra, at para. 37, by Iacobucci J., who stated:

> **Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.**

....

...all the factors discussed here must be taken together to come to a view of the proper standard of review,... In the usual case, however, the broader the propositions asserted, and the further the implications of such decisions stray from the core expertise of the tribunal, the less likelihood that deference will be shown. Without an implied or express legislative intent to the contrary as manifested in the criteria above, legislatures should be assumed to have left highly generalized propositions of law to courts." (Paras. 30 to 38)

[15] Turning to the review of these four categories of factors in the context of this appeal I comment as follows:

(i) **Privative Clause.**

The Act provides that an order of an adjudicator shall be binding on all parties - section 33(8). The adjudicator's order is not expressed to be final as the Act does permit appeals, subject to a leave requirement. Accordingly I do not find there to be even an equivocal privative clause.

(ii) **Expertise.**

The central inquiry here is whether the Adjudicator has a particular expertise with respect to achieving the aims of an Act. This aspect involves several considerations, including the specialized knowledge of the Adjudicator, whether any special procedures or non-judicial means of implementing the Act apply, and whether the Adjudicator plays a role in policy development. (See *Canada (Deputy Minister of National Revenue) v. Matel Canada Inc.*, at para. 28.

In this case the Act ensures that the Adjudicator is a lawyer and addresses only in a general manner the procedures - section 31(2) - that the Adjudicator is to follow in the performance of her duties. It is significant that the Adjudicator is obliged to conduct a hearing with legal safeguards and must therefore assess the credibility of witnesses.

The Act contemplates - section 35 - that the adjudicator may make recommendations concerning matters of concern or interest to the public relating to police services by sending the same to the Minster. The Adjudicator's decision and this appeal do not relate to the policy area contemplated in section 35.

An assessment of the expertise of the Adjudicator versus that of the Court must focus on the training and background required of adjudicators under the Act, the procedures of the complaint process and the means of implementing an adjudicator's decision. None of these factors in this case provide a strong argument for deference beyond that accorded to a decision maker who hears and assesses testimony.

(iii) Purpose of the Act.

I accept the submission of Counsel for the Commission that "the purpose of Part III of the Act as a whole is to provide for an independent civilian oversight process to review the conduct of police officers in the province through a public complaints system. The Act and the Regulations are intended to establish an alternative to the civil court system, one that will be more timely and presumably less costly for determining issues of police accountability, in order to improve public access and participation in the system." I observe that in addressing complaints against particular police officers the Adjudicator is performing a quasi-judicial or adjudicative function, rather than addressing a polycentric issue.

(iv) The Nature of the Problem.

There were matters of law and of mixed fact and law before the Adjudicator. Two matters - namely, the extent of the duty upon a police officer to investigate prior to laying charges, and the grounds for making an arrest - involve general principles of criminal law. Also central to the Adjudicator's decision were matters of mixed fact and law; for example, whether in the circumstances of this case Maloney had conducted an investigation to the legal standard. Assessments of the credibility of witnesses and of expert testimony were involved in the resolution of these matters of mixed fact and law.

Conclusion re Standard of Care.

Having regard to the foregoing I conclude that on the legal issues before the Adjudicator the standard of review to be applied should be one of correctness. The lack of a privative clause and, the relative expertise of the Adjudicator versus that of the Court, and the fact the Adjudicator was performing a quasi-judicial function lead me to this conclusion. Therefore the standard of correctness will apply to the Adjudicator's decision on Issue #2.

The purpose of the Act in providing the complaints process, and the necessity that the Adjudicator assess credibility of witnesses at the public hearing indicate that a level of deference is appropriate however on issues of mixed fact and law. The applicable standard should be that of

reasonableness, also referred to as “reasonableness simpliciter”. The standard of reasonableness will apply to Issues # 3 and 4. The standard of reasonableness was explained in ***Canada (Director of Investigation and Research v. Southam Inc.*** [1997] 1 S.C.R. 748:

> **“I conclude that the third standard should be whether the decision of the Tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal’s decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reason that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.**
>
> **The difference between “unreasonable” and “patently unreasonable” lies in the immediacy or obviousness of the defect. If the defect is apparent on the fact of the tribunal’s reasons, then the tribunal’s decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in Canada (Attorney General) v. Public Service Alliance of Canada, [1993] 1 S.C.R. 941, at p. 963, “[i]n the Shorter Oxford English Dictionary ‘patently’, an adverb, is defined as ‘openly, evidently, clearly’”. This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. See National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324, at p. 1370, per Gonthier J.; see also Toronto (City) Board of Education v. O.S.S.T.F., District 15,**

[1997] 1 S.C.R. 487, at para. 47, per Cory J. But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.

....

The standard of reasonableness simpliciter is also closely akin to the standard that this Court has said should be applied in reviewing findings of fact by trial judges. In Stein v. "Kathy K" (The Ship), [1976] 2 S.C.R. 802, at p. 806, Ritchie J. described the standard in the following terms:

> **... the accepted approach of a court of appeal is to test the findings [of fact] made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view of the balance of probability. [Emphasis added.]**

Even as a matter of semantics, the closeness of the 'clearly wrong' test to the standard of reasonableness simpliciter is obvious. It is true that many things are wrong that are not unreasonable; but when "clearly" is added to "wrong", the meaning is brought much nearer to that of "unreasonable". Consequently, the clearly wrong test represents a striking out from the correctness test in the direction of deference. But the clearly wrong test does not go so far as the standard of patent unreasonableness. For if many things are wrong that are not unreasonable, then many things are clearly wrong that are not patently unreasonable (on the assumption that "clearly" and "patently" are close synonyms). It follows, then, that the clearly wrong test, like the standard of reasonableness simpliciter, falls on the continuum between correctness and the standard of patent unreasonableness. Because the clearly wrong test if familiar to Canadian judges, it may serve as a guide to them in applying the standard of reasonableness simpliciter."

[16] A summary of the facts and of the Adjudicator's decision will next be stated.

FACTS

[17] On April 18, 1997 at about 2:00 a.m. Evans reported that he had been assaulted earlier that night. He was initially interviewed by a member of the RNC street patrol who forwarded the matter to the Major Crime Section for further investigation. The investigation was assigned to Maloney when he began his shift at 9:00 a.m. on April 18. Maloney reviewed Evans' written statement and then took a second statement from Evans. Maloney observed injuries on Evans' body which he believed to be consistent with the alleged assault and which would warrant charges of assault causing bodily harm as opposed to common assault. He then arranged for pictures of the injuries and also spoke to the doctor who had treated Evans at a hospital following his injuries. Maloney knew that Evans had a criminal record for assault and that he had been drinking on the night in question.

[18] In his statements Evans said that he was at the Cornerstone nightclub (Cornerstone) on George Street with a friend where he had consumed seven or eight beer. He stated that following a verbal exchange with Parsons and Woolridge he decided to leave the Cornerstone to avoid trouble. He said he was followed by Parsons and Woolridge who attacked him from behind, knocked him to the ground and kicked him repeatedly in the face and head. According to Evans he managed to get away and ran towards a taxi cab, pursued by Parsons and Woolridge. When he was inside the cab he was threatened by Woolridge.

[19] Prior to the conclusion of his shift on April 18 Maloney had located the taxi driver who had driven Evans following the incident. Maloney interviewed him in the presence of another RNC member, Constable Sean Donovan. According to the interview as recorded by Maloney the taxi driver appeared to confirm that Evans was chased to the cab by two males and was threatened while in the cab by one of the males who identified himself as Woolridge. The taxi driver noticed Evans' injuries and stated that he appeared intoxicated. Maloney asked Peddle whether the other person chasing his passenger had been Parsons. Peddle's response, as recorded by Maloney, was "I have to live on the hill". The police officers assumed that response to mean that Peddle lived in Shea Heights where Parsons lived and that he was accordingly reluctant to name Parsons. It was following this that Peddle declined to sign a statement.

[20] Following a three day long weekend Maloney resumed the investigation on Tuesday, April 22. He spoke to Evans' brother, David Evans, who stated that Evans and Parsons had a history of bad blood and he described a prior incident on George Street where Parsons had allegedly acted aggressively towards Evans.

[21] Maloney decided at this point, about 11:00 a.m. on April 22, that he had reasonable grounds to arrest Woolridge and Parsons for assault causing bodily harm. He first arrested Woolridge, who refused to give a formal statement. Woolridge did advise the arresting officers that there was an altercation between himself and Evans inside the Cornerstone and that the altercation outside had been verbal only. Woolridge further advised that Parsons did not hit Evans and that he alone had chased Evans along George Street. It was after speaking with Woolridge that Maloney had Parsons brought to police headquarters by two other police officers. Parsons told those police officers that he had not hit Evans and that he had witnesses who could attest to that fact.

[22] At about 1:00 p.m. on April 22 Maloney entered the interview room at police headquarters where Parsons had been placed. Maloney did not speak to the police officers to whom Parsons had made the above noted comments. Maloney advised Parsons he was under arrest for assault causing bodily harm. Though Parsons declined to give a formal statement to police he did tell Maloney that he had no involvement in the fight inside the Cornerstone. He also gave Maloney the names of other people who witnessed the fight inside the Cornerstone and who could affirm that Evans started the fight and that only one person, not Parsons, had hit Evans. Parsons and Woolridge were formally charged in Provincial Court on the afternoon of April 22. Prior to the formal charge, and while Parsons and Woolridge were in a holding cell, an undercover police officer who had been placed in the cell overheard conversation between the two which was consistent with their earlier statements to the police that it had been Woolridge, not Parsons, who had hit Evans. Maloney did not receive this information from the undercover police officer until after the formal charges had been laid.

[23] As a result of the charges against Parsons his bail was revoked.

[24] On Wednesday, April 23, Maloney continued his investigation and spoke to an employee of the Cornerstone who confirmed that Evans and Woolridge had been involved in a fight at the nightclub on April 17 and that Evans had been escorted from the nightclub bleeding from the mouth. That employee did not observe Parsons as being involved in the fight. He stated that neither Parsons nor Woolridge appeared intoxicated and that Parsons had been attempting to calm the situation. Maloney was then given the names of other witnesses inside the club, namely, the bartender and the doorman who were on duty that night.

[25] Maloney next contacted Evans and interviewed him for a third time at police headquarters on April 23, 1997. He confronted Evans concerning the information that he had been involved in a fight inside the Cornerstone. Evans' third statement revealed that he thought he told Maloney about the incident inside the Cornerstone in his earlier statements. During this interview Evans described being punched and kicked in the head inside the club at first by Woolridge and subsequently by Woolridge and Parsons together. Evans stated that after being hit inside the nightclub he was bleeding.

[26] On the evening of April 23rd 1997 Maloney interviewed four additional witnesses, including the bartender and doorman who had been at the Cornerstone on the night in question. None of these witnesses corroborated Evans' version of events. Some of the witnesses stated that Evans was intoxicated and injured as he left the Cornerstone and none of the witnesses stated that Parsons had been involved in the assault upon Evans.

[27] As a result of this further information Maloney met with Crown Prosecutors on April 24th for a review of the matter. In view of the weaknesses in the case against Parsons the Crown consented to the granting of judicial interim release to Parsons on April 25th 1997. Maloney telephoned Peddle, the taxi driver, to advise him that he would not be needed to testify at a bail hearing for Parsons. It was

during that call that Peddle told Maloney that he had not seen Parsons on George Street on the night in question.

[28] On April 28th 1997 Maloney interviewed Jason Hollett who had been with Evans at the Cornerstone on the night of April 17th-18th. Hollett stated that Evans had been intoxicated at the nightclub and that there had been a fight inside the nightclub.

[29] During the period May to December 1997 Maloney was in contact at various times with other witnesses. He also obtained inconclusive blood stain test results from the crime lab and a forensic opinion from Dr. Simon Avis concluding that Evans' injuries were equally consistent with blows from one person or two persons. Various witnesses contacted during the period gave statements supporting the version of events given by Parsons and Woolridge.

[30] Following its review of the investigation file, the Crown Attorney's office in September 15th 1997, one day prior to trial, stayed the charges against Parsons.

ADJUDICATOR'S DECISION

[31] To address the issues on this appeal the decision must be considered in detail.

(a) EVIDENCE

[32] The Adjudicator, Joan Myles, first addressed certain preliminary objections, none of which are relevant on this appeal, and then continued with a public hearing respecting the substance of the complaint. The hearing was conducted over thirteen hearing days. The Adjudicator summarized the nature of the evidence as follows:

> **"Documentary evidence was entered as evidence during the hearing. It included all statements taken during Maloney's investigation, all police reports, and notes, court documents, medical documents, certain RNC Routine Order and excerpts from the RNC Policy Manual. In addition to documentary**

evidence entered by the parties by Consent or as Exhibits during the Hearing, oral testimony was heard from 16 witnesses. Witnesses for the Commission were David Camp, qualified as an expert witness as to police investigative techniques and standard operations in assault cases; Gregory Parsons, the Complainant; Cst. James Higdon, Sgt. Calvin Barrett; Cst. Sean Donovan; Dr. Craig McIssac; Cst. Karl Piercey; Brian Peddle, taxi driver; David Evans, brother of Corey Evans; and David Woolridge, Co-Accused with Parsons in the incident. Witnesses for the Respondent included Dr. Simon Avis, Forensic Pathologist, Chief Medical Examiner, qualified as an expert witness; Stephen Dawson, Crown Attorney, qualified as an expert witness concerning criminal law practice and procedure; Colin Flynn, at that time, Director of Public Prosecutions, qualified as an expert witness concerning criminal law practice and procedure; Thomas Mills, at that time, Senior Crown Attorney-Special Prosecutions, qualified as an expert witness concerning criminal law practice and procedure; Cst. Charles Shallow and Cst. Donald Maloney, the Respondent. At the completion of the hearing, it was agreed that the transcripts of the entire hearing would form part of the record."

(b) ISSUES

[33] The Adjudicator defined the issues before her as:

> **"(i) Whether Maloney arrested or detained Parsons without good and sufficient cause?**
>
> **(ii) Whether Maloney conducted a full and proper investigation of the assault complaint by Evans prior to arresting and charging Parsons?"**

(c) SUBMISSIONS

[34] On pages 14 to 51 of the decision the Adjudicator reviewed the testimony and then summarized the submissions of the parties as follows:

> **Submissions of the parties**

Mr. Piercey, Counsel for Maloney, argued that Maloney had lawful grounds to arrest Parsons. Piercey argued that the factors upon which Maloney had acted were sufficient. He argued that these factors were: Maloney's subjective honest belief that Parsons was probably guilty; Evans' two consistent statements to police prior to Parsons' arrest; Evans' physical injury; Evans' clear identification of Parsons and Woolridge as the accused; Peddle's statement that two people chased Evans to his cab; Maloney's assumption that Peddle would identify Parsons as one of these two people; and David Evans' account of past trouble between Evans and Parsons.

Piercey argued that it was reasonable for Maloney to delay investigation of Parsons' and Woolridge's version of events until after the charges have been laid against the accused. He argued this is so because: subjectively Maloney did not believe the two accused who had declined to give written statements upon arrest; there was conflicting evidence as to how many persons chased Evans; in the circumstances, that Parsons was free on an undertaking pending a trial on the charge of murder and that Woolridge had no criminal record from his police experience, that it was not unusual for an accused in less jeopardy to lie to protect the accused in greater jeopardy. Piercey argued that to say now that other investigations should have been conducted by Maloney prior to the arrest of Parsons would be an exercise in "Monday morning arm-chair quarterbacking". He argued that Maloney, in addition to the evidence in hand, had to consider the fact that Parsons was on an undertaking pending the murder trial. Therefore, he argued that, while the consequences to Parsons of being arrested were serious, the consequence to society, upon release of an accused murderer following new charges of assault causing bodily harm, could have been greater.

Finally, Piercey argued that Maloney's supervising officer, Sgt. Barrett, had testified that Maloney would have been in dereliction of duty had he not charged Parsons in the circumstances. .... Barrett in his evidence focussed on what Maloney had at the time of forming his grounds for arrest not what Maloney could have had to achieve the level of completeness required in the circumstances. The evidence before me is that Maloney received permission post-arrest and charge to obtain overtime to continue the investigation in light of the change of circumstances. I find it difficult to accept that if Maloney had gone to Sgt. Barrett or another superior to explain that he required further time to investigate Evans' complaint prior to any arrest and charge in order to justify on an objective basis his subjective grounds, that he would have been disciplined for doing so. In my view, to suggest that Maloney would have been disciplined for not arresting Parsons, is not consistent with the evidence that it

was Maloney's judgment alone, as the investigating officer, as to reasonable and probable grounds that was significant.

Piercey offered several cases in support of his submissions. He cited *Storrey v. Queen* (1990), 53 C.C.C. (3d) 316, in support of the proposition that the police officer prior to arrest must have a subjective belief that the accused is probably guilty and this must be justifiable from an objective point of view. He urged that all that is needed is the probability of guilt, which is a lesser standard than the probability of conviction, prima facie case or proof beyond reasonable doubt.

***Randall Wiles v. The Police Complaints Commissioner* (unreported) Ont. Div. Ct., New Market No. 35862/95 was cited by Piercey in support of the proposition that the determination of whether reasonable grounds existed is based on the circumstances apparent to the officer at the time of arrest, not on what is learned later. This case he also cited for the proposition that there is no obligation upon a police officer to weigh and determine the validity of various versions of events and render judgment before effecting an arrest. In support of his assertion that the adjudicator is not entitled to merely substitute her discretion for that of the police officer, but must find an absence of reasonable grounds. Piercey cited two cases...**

Finally, Piercey cited the case of *Regina v. Golub* (1997), 117 C.C. (3d) 193, or the principle that a police officer can reject evidence where they have good reason to believe it is unreliable.

....

Piercey also submitted that the conclusion that Maloney's decision to arrest was proper, was supported by the evidence of the four expert witnesses in criminal law. The four expert witnesses did give similar evidence with respect to the standard applicable to arrest and charge and what was necessary to support reasonable grounds for arrest and charge. All the experts' evidence is summarized above in my decision. I do not find support in their opinions for the conclusion that Maloney's decision to arrest was proper. Each of the three Crown Attorneys, Dawson, Mills and Flynn may have made statements and testified that they saw no problem with the reasonable and probable grounds. However, all of them had before them summaries of evidence based on Maloney's view of what these witnesses, notably Evans and Peddle, could say. Further, the Crown Attorneys, Dawson and Mills, were involved with the file at a stage when they were more concerned, as noted above, about the strength of

the evidence and whether or not there was likelihood of conviction. In other words, as Dawson testified, they would not be putting their minds as to what information or evidence was available to Maloney at the time he made the arrest. Rather, they would address what evidence they would need in order to proceed with the trial. I also note the submission of O'Flaherty on this point with respect to the evidence of Flynn. He recalled Flynn's evidence to the effect that, all of the things that Maloney had to satisfy himself that he had reasonable and probable grounds were assumed to have been the result of a thorough investigation prior to arrest. In addition, Flynn would have had the same information from Maloney as did Cst. Fitzpatrick which included that the taxi driver, Peddle, would identify Parsons as a person chasing Evans up George Street and also the first erroneous statements by Evans.

While Piercey acknowledged that there is an obligation on the police officer to consider all available evidence when deciding whether to arrest, he argued that I am not entitled to substitute my own discretion for whether there were grounds to arrest in this case. He urged that the Adjudicator must analyse the objective reasonableness of Maloney's decision.

Mr. O'Flaherty, Counsel for the Commission, submitted that the circumstances of this case required that a reasonable police officer go further with the investigation than Maloney had at the stage when he arrested and subsequently charged Parsons with assault causing bodily harm on April 22, 1997. O'Flaherty argued that the determination of whether Maloney's investigation met the appropriate standard must be viewed within the context within which he exercised the power of arrest. In this respect, he noted the following factors: that in forming his grounds for arrest, Maloney was acting on the information of private citizens not on personal observation of unlawful activity; that Evans had been drinking at the time of the alleged offence, said to have occurred in a busy and public area of downtown; that Maloney knew Parsons was under reporting conditions and there was no risk of flight; that there was no concerns as to a recurrence of the alleged offence; that the investigation of the complaint waited three days during scheduled days off; and that Maloney knew that if Parsons was charged with assault causing bodily harm while he was on bail pending a murder trial, he would lose his liberty and remain incarcerated pending trial.

O'Flaherty argued that Maloney had been provided with information from Woolridge and Parsons that the fight had occurred inside the Cornerstone between Woolridge and Evans, but Woolridge had acted in self-defence and

that Evans had left the club injured and bleeding. Further, he argued that this version of events could have been readily confirmed, and was of critical importance to the truthfulness of Evans' allegations, his credibility as a complainant and determining whether the assaults had occurred either by Woolridge or Parsons.

O'Flaherty submitted that by choosing not to speak to any of the witnesses who could confirm where the fight occurred, and whether Woolridge and Parsons had assaulted Evans prior to the arrest of Parsons or prior to charges being laid, Maloney deprived himself of the opportunity to have a full picture of what happened with respect to the incident. He submitted that a reasonable officer would have considered the information important and continued his inquiry. However, Maloney ignored important information readily available to him, arrested and laid the charge against Parsons before completing a full and thorough investigation. O'Flaherty concluded that Maloney in so doing deprived himself of the opportunity to properly form reasonable and probable grounds. Further, he submitted that an officer is not entitled to rely only on evidence which tends to incriminate an accused while disregarding available exculpatory evidence in forming his grounds.

O'Flaherty argued that Maloney was under a legal duty to make such due inquiry before arresting Parsons, that the circumstances of the case would indicate to a reasonable officer was practical and necessary. He noted that Maloney offered no justification for not completing a thorough investigation prior to laying a charge, other than he believed he had formed reasonable and probable grounds and that no further investigation was necessary. O'Flaherty argued that Maloney's legal error was in ignoring all the other available evidence prior to the arrest and charge. Nevertheless, O'Flaherty conceded that it would be going too far to suggest that in each case every available witness must be interviewed prior to the arrest and laying the charge or that in each case the accused must be interviewed, ... However, in this case, in the circumstances which Maloney faced prior to arresting Parsons, he chose to ignore critical statements by the accused, and declined to interview witnesses critical to confirming the allegations or to reinterview Evans on April 22, 1997, thereby clearly failing to thoroughly investigate the matter prior to the laying of charges against Parsons.

O'Flaherty submitted, at paragraph 25 of his written brief, that

> **The obligation to carry out a full and thorough investigation is distinct from but in practice directly related to the principle of reasonable and probable grounds. Thus, if an officer fails to conduct the inquiry which the circumstances reasonably permits and which reasonable prudence requires, the officer can have formed an honest belief in the guilt of an accused, but the officer may have deprived himself of the opportunity to properly assess the issue of whether the accused was probably guilty of the offence charged. Furthermore, without a properly formed subjective belief, the objective requirement that a reasonable person placed in a position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest will generally not be satisfied, rendering the arrest unlawful.**

O'Flaherty supported his submissions in this matter with relevant case law on the law on reasonable and probable grounds. He reiterated what the expert witnesses on criminal law and practice indicated; that the power to arrest persons without warrant and charge them with criminal offences may only be exercised where a police officer has formed reasonable and probable grounds on which to base the arrest, and where those grounds are justifiable from an objective point of view. In stating that the process of forming reasonable and probable grounds carries with it the duty of making due inquiry before arrest, O'Flaherty cited the case *Chartier v. Quebec (Attorney General)* (1979) 104 D.L.R. (3d) at pages 341-342, where the Supreme Court of Canada stated as follows:

> **For a peace officer to have reasonable and probable grounds for believing in someone's guilt, his belief must take into account all of the information available to him. He is entitled to disregard only what he has good reason for believing not reliable. Since the suspect was denying that he had been involved in the incident, and there was no reason to fear he would run off, all of descriptions provided by the eye witnesses should have been checked out before he was incarcerated."**

Decision pages 51 to 59.

[35] Both Crown Counsel had referred the Adjudicator to *R. v. Storrey*, (1990) 53 C.C.C. (3d) 316 (S.C.C.) in which the Supreme Court of Canada discussed the requirement that an arresting officer must subjectively have reasonable and probable grounds on which to base an arrest, which grounds must, in addition, be justifiable

from an objective point of view. *R. v. Storrey* quoted with approval from *Dumbell v. Roberts* (1944) 1 All E.R. 326 at 329 (Court of Appeal):

> **"The power possessed by constables to arrest without warrant, whether at common law for suspicion for felony or under statute for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law, and so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a prima facie case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably."**

(d) FINDINGS OF ADJUDICATOR

[36] The Adjudicator stated her findings as follows:

> **"The case law on the issues of reasonable probable grounds for arrest and charge and the duty of police to conduct a thorough investigation, as submitted by the parties, is fairly consistent and without controversy...**
>
> **I agree with O'Flaherty that the duty to carry out a full and thorough investigation is linked to the principle of reasonable and probable grounds. So, where a police officer fails to conduct the investigation which the circumstances reasonably permit and require, that officer may have formed an honest belief in the guilt of the accused, but ... may have done so without the opportunity to properly assess whether that accused was probably guilty of the offence alleged. As submitted by O'Flaherty, without properly formed subjective belief, the objective requirement to support the reasonable and probable grounds will generally not be satisfied.**
>
> **I am persuaded to the view that Maloney's conduct in the circumstances of this case clearly consisted of a failure to thoroughly investigate the allegations prior to arresting and laying the charges against Parsons. By ignoring all the other available evidence prior to the arrest and charge, he deprived himself of the opportunity to properly form reasonable and probable grounds.**

I am also of the view that after the charge was laid against Parsons, Maloney continued to pursue the charges even though his investigation revealed weak support for the charges. I acknowledge that after the charges were laid it was the decision of the Crown, not Maloney, whether to withdraw or stay the charges. However, Maloney in the period after the charges were laid up to the stay of the charges simply continued to submit his written continuation reports on any further investigation to the Crown Attorneys Office and carry out the further investigation, albeit on a reasonably timely manner, on two occasions in July and August requested by the Crown. Maloney did not make any other effort to review the evidentiary support for the charges with the Crown. The Crown Attorneys testified that they work preparing a case in anticipation of the trial date. The Crown Attorneys did not say Maloney was precluded from flagging any concern with them during the post-charge period that there was weak evidentiary support for the charges. Further, it is evident from the results of the investigation which Maloney conducted after the charges were laid against Parsons that there was critical evidence he could have obtained prior to arresting and charging Parsons.

In finding that the two allegations against Maloney have been made out; one, that he did not have good and sufficient cause to arrest Parsons, and two, that he did not properly and thoroughly investigate the assault complaint by Evans prior to arresting and charging Parsons, I note that there is no evidence before me that such failures were intentional on Maloney's part. It is simply a finding that Maloney had breached his duty to do a thorough and proper investigation before arresting Parsons. If he had done a thorough and proper investigation at that stage, Parsons would not have been arrested, charged or imprisoned. The investigative steps Maloney took prior to Parsons being arrested and charged did not constitute a thorough investigation in the circumstances of this case.

In my deliberations, certain evidence was particularly determinative and will be set out here by way of explanation. I found the statement of Peddle, the taxi driver, which was relied upon by Maloney, particularly scanty. Peddle was not interviewed vigorously enough in order for Maloney to comprehend fully what Peddle had in fact witnessed. He did not establish with Peddle on site at George Street where the taxi had been located at the time Evans ran to the cab. It was not established what Peddle could have observed and seen from the cab, much less what he in fact did observe. Maloney's interjection of Parsons' name into the first interview with Peddle, by his own admission, changed or stopped short the flow of information from this witness. Peddle declined to give further

pertinent information. A mere four or five days after providing his first statement, Peddle told Maloney that Parsons was not present on George Street on the night in question. At the hearing before me, Peddle testified he couldn't actually see the face of the person outside the cab shouting at his passenger inside the cab. There were also obvious discrepancies between Evans' initial statement and Peddle's statement as to how Evans came to be in the cab that evening. Peddle indicated that he was simply parked near the cab stand, whereas Evans in his first detailed statement indicated that the cab had pulled along side and he was able to climb in.

The evidence of Peddle was particularly critical in this case, because it was included in the objective evidence required to support Maloney's reasonable and probable grounds. Maloney's view of Peddle's evidence flowed up to both Officer Fitzpatrick at the Provincial Court, who swore the information that would attest to reasonable and probable grounds, and also to the Crown Attorney's Office who assumed that Maloney had objective support for his reasonable and probable grounds.

Based on the evidence before me, it clearly appears Maloney had made up his mind early in his investigation that he had reasonable and probable grounds to arrest, even without interviewing the accused. He neglected to interview any witnesses that could corroborate Parsons' and Woolridge's versions of events. Maloney, or any other police officer in similar circumstances, can't ignore other evidence available to them at the time they are assessing reasonable and probable grounds for arrest. He seemed to focus on the bare minimum of what he needed to have and not on what he should have had in order to give himself a complete understanding of what had occurred and properly support his subjective belief.

My decision reflects the key principle enunciated in the case law, that a police officer has a duty to thoroughly and properly investigate an alleged offence prior to arresting and charging a person. However, my findings concerning Maloney's conduct in this case should not be interpreted to mean as a general proposition that in every case every potential witness must be interviewed prior to the arrest and charging of the accused.

Maloney proceeded to conclude his investigation and charge Parsons and Woolridge very quickly after a day and a half investigation, especially in the context of the three-day delay between the first day of the investigation and the day on which Parsons and Woolridge were arrested and charged. He could

> **have, in the circumstances of this case, taken more time and in fact he acknowledged in his testimony that he wished he had waited another day to do at least the further investigation which he did do on April 23, 1997, the day after the charges had been laid and Parsons was imprisoned. In so doing, it is apparent that Maloney closed his mind early in his investigation and restricted himself to Evans' version of events.**
>
> **Conclusion**
>
> **In summary, I find that Constable Maloney has conducted himself in the manner unbecoming of a police officer as charged, contrary to Section 3(1)(a) and 3(1)(d) and has therefore committed offences contrary to Section 3(2) of the Regulations."** (Decision pp. 63-68)

DISCUSSION

[37] Having resolved Issue #1 respecting the applicable standard of review I will address the remaining issues in order.

[38] As a preliminary point I note that there was no dispute about two general principles of law.

[39] The first is that a police officer has a duty to thoroughly and properly investigate an alleged offence before arresting and charging a person. It is the duty " of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable." - ***Dumbell v. Roberts*** (1947) 1 All E.R. 326 at 329 (C.A.); ***R. v. Storrey*** - p. 323. In ***R. v. Golub*** (1997) 117 C.C.C. (3d) 193 the Ontario Court of Appeal described the duty succinctly:

> **"In deciding whether reasonable grounds exist, the officer must conduct the inquiry which the circumstances reasonably permit."**

I refer to this below as the duty of due inquiry.

[40] The second undisputed principle concerns the required grounds for a warrantless arrest. In ***R. v. Storrey*** the Supreme Court of Canada said:

> **"In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a prima facie case for conviction before making the arrest."** (p. 324)

[41] In the determination of reasonable and probable grounds a police officer must consider all information available to him and must disregard only information that he has good reason to believe is unreliable. ***R. v. Golub*** p. 203; ***Chartier v. Attorney General of Quebec*** (1979) 48 C.C.C. (2d) (S.C.C.) 34 at p. 56.

[42] A cogent summary of these principles was stated by the Alberta Law Enforcement Revision Board in **Smith** v. **Richardson**, decision dated December 31, 1997 as follows:

> **"For a police officer to have reasonable and probable grounds for belief in the commission of an offence, the belief must take into account all of the available information. An officer is entitled to disregard only that information which he or she has good reason to believe unreliable. In this connection, it is improper to ignore reliable exculpatory circumstances and only pay attention to factors that tend to incriminate (see, Chartier v. Attorney General of Quebec, ante, R. v. Feeney, ante, Stevelman v. Page, ante; Mathieson v. Gourlie and Beaven (1997) (No. 014-97-L.E.R.B. - Alta); Wiles v. Police Complaints Commissioner (1996) (Ont. Gen. Div. - No. 35802-95 unreported); Rishi v. Auger, ante).**
>
> **The above noted obligation of law, of course, is qualified by the over-riding basis requirement that there be, at a minimum, reasonable and probable grounds. An officer who has properly reached that threshold is not obliged to immediately pursue further and additional aspects of information before executing arrest and charging authority (even though they may be available). This means that a police officer is not compelled by law to speak to every potential witness before making an arrest; nor is it imperative in every instance to speak with both parties involved in a dispute. In some instances there will be credible independent witnesses (or other real or compelling evidence) who will be highly probative and lawful grounds may be achieved. In other circumstances, however, the matter may not be so finely cut and consideration of both sides or the position of both parties is then both prudent and advisable.**

> **When there is cause to believe that the matter may be reasonably disputed (or is equivocal in some material respect) an officer should decline to arrest or charge until such time as all available information is reviewed, including the positions of both parties."** (p. 12)

[43] Issue #2 - Did the Adjudicator breach the applicable standard (correctness) by considering matters which occurred after the arrest and charge?

[44] The extent to which the Adjudicator relied upon post-arrest matters may be gathered from pp. 10-14 of her decision in the recitation of facts and in her findings, quoted in paragraph 37 hereof. Two aspects of the evidence are involved. Firstly, the Adjudicator's view that the initial interview of Peddle was flawed took into account Peddle's statement to the police on April 25, and his testimony before the Adjudicator. Secondly, the Adjudicator noted that Maloney did not interview witnesses named by Parsons and Woolridge prior to arrest, though many were interviewed the day after, April 23, and provided statements corroborative of Parsons' version of events.

[45] Counsel for Maloney submitted that it was an error in law for the Adjudicator to use subsequently obtained evidence to analyse the reasonableness of a decision made without that evidence. He cited ***R. v. Nelson*** (2000) 190 Nfld. & P.E.I.R. 130 in which Puddester, J. stated:

> **"Evidence as to events which had not occurred up to the point where the officer forms his or her belief, or which the evidence does not support as being within the knowledge of the officer at that time, cannot properly be considered with respect to either the subjective or objective tests respecting reasonable and probable grounds."** (para. 46)

See also ***R. v. McClelland*** (1995) 12 M.V.R. (3d) 288 (Alta. C.A.) at paras 21-22. Both cases involved a charge of refusing the breathalyzer.

[46] In ***R. v. Nelson*** Puddester, J. was considering whether the trial judge erred in concluding an officer lacked reasonable and probable grounds, by considering evidence from the accused's testimony at trial, which was not information before the police officer at the time of the making of the demand. Puddester, J. was not addressing whether evidence acquired after arrest could be considered in determining the adequacy of the investigation prior to arrest.

[47] Puddester, J. did refer to paras. 21-22 of ***R. v. McClelland*** which stated:

> **"... the evidence of reasonable and probable grounds must be based on facts known by or available to the police officer at the time he formed the requisite belief."**

[48] That statement was not addressing a challenge to the adequacy of an investigation but the propriety of a summary conviction appeal judge relying on evidence of observations of an accused after the breathalyzer demand was given, in assessing whether an officer had grounds for making a breathalyzer demand.

[49] The time constraints necessarily involved in police decisions on breathalyzer cases are obvious. The police do not have a lengthy period to perform investigations prior to determining whether to make a breathalyzer demand. I therefore do not accept that the above statements in ***R. v. Nelson*** and ***R. v. McClelland*** are applicable to the issue of whether there was due inquiry in situations where the police arguably have the time for further investigation and such investigation is practical and reasonable.

[50] The complaints process under the Act provides an adjudicative process to assess a complaint that a police officer failed to comply with the duty of due inquiry before making an arrest. An adjudicator conducting a hearing under the Act should adhere to general evidentiary principles. The fundamental rule of evidence is that relevant evidence is admissible unless subject to an exclusionary rule. **Morris** v. **The Queen** [1983] 2 S.C.R. 190; Sopinka, Ledermen, Bryant, **The Law of Evidence in Canada**, (2nd) ed; Butterworths pp. 23-38. Evidence respecting post-arrest investigation would, in my opinion, often be relevant in assessing the adequacy of the pre-arrest investigation. Whether the post-arrest investigative steps could have and should have been taken pre-arrest may well be central to the determination of whether due inquiry was conducted. This is analogous to the consideration of post-accident remedial measures in a determination of negligence. **Winsor** v. **Marks & Spencer Canada Inc.** (1995) 129 D.L.R. (4th) 189. Accordingly in my opinion the Adjudicator did not err in considering matters which occurred after the arrest and charge. The weight to be accorded to such evidence rests with the Adjudicator, and her conclusion on that, and on other evidentiary matters will be reviewed (under Issue #3) on the standard of reasonableness.

ISSUE #3 **Whether the Adjudicator breached the applicable standard of review (reasonableness) in her assessment of expert evidence.**

[51] Three Crown Attorneys, Stephen Dawson, Tom Mills and Colin Flynn, were called by Maloney and accepted by the Adjudicator as experts in criminal law. Counsel for Maloney now contends that the Adjudicator concluded that their evidence was not relevant to the issue before her; that she misconstrued the evidence of Mills and Flynn on whether they had addressed the presence or absence of reasonable and probable grounds for the arrest; and that she had thereby deprived herself of important evidence presented by Maloney. Counsel for Maloney in particular referred to the comments of the Adjudicator in that section of her decision in which she summarized the submissions of Counsel. That section is quoted in paragraph 35 hereof and repeated here:

> **Piercey also submitted that the conclusion that Maloney's decision to arrest was proper, was supported by the evidence of the four expert witnesses in criminal law. The four expert witnesses did give similar evidence with respect to the standard applicable to arrest and charge and what was necessary to support reasonable grounds for arrest and charge. I do not find support in their opinions for the conclusion that Maloney's decision to arrest was proper. Each of the three Crown Attorneys, Dawson, Mills and Flynn may have made statements and testified that they saw no problem with the reasonable and probable grounds. However, all of them had before them summaries of evidence based on Maloney's view of what these witnesses, notably Evans and Peddle, could say. Further, the Crown Attorneys, Dawson and Mills, were involved with the file at a stage when they were more concerned, as noted above, about the strength of the evidence and whether or not there was likelihood of conviction. In other words, as Dawson testified, they would not be putting their minds as to what information or evidence was available to Maloney at the time he made the arrest. Rather, they would address what evidence they would need in order to proceed with the trial. I also note the submission of O'Flaherty on this point with respect to the evidence of Flynn. He recalled Flynn's evidence to the effect that, all of the things that Maloney had to satisfy himself that he had reasonable and probable grounds were assumed to have been the result of a thorough investigation prior to arrest. In addition, Flynn would have had the same information from Maloney as did Cst. Fitzpatrick which included that the taxi driver, Peddle, would identify Parsons**

> **as a person chasing Evans up George Street and also the first erroneous statements by Evans.**

[52] Counsel for Maloney submitted:

> **"It is conceded that while her comments in relation to Dawson is correct, she is in error in relation to Mills and Flynn. Her complaint about Mills is that he was only involved in the file at a stage when he was more concerned with the strength of the case then reasonable grounds to arrest. This is clearly wrong. At page 86-87 of the November 10, 2000 transcript Mills testified directly on that point:**
>
> **MR. PIERCEY:**
>
> **Q. At that point, did you address your mind to reasonable and probable grounds for the charge being laid, or were you past that by now?**
>
> **A. I was well past that point by now, but it's certainly that – you know, it's like opening a book. You still see the first page when you go through it."** (para. 51, Appellant's Brief)

[53] On this contention I note that the Adjudicator, as she stated in the paragraph quoted above, summarized all the expert evidence in her decision. Regarding Mills' evidence she confirmed that he had provided a similar understanding of the concept of reasonable grounds for police officers to arrest, as did the other Crown Attorneys, and that he distinguished between that standard and the standard applied by Crown Attorneys in determining whether a charge would proceed to trial. Mills in May of 1997 had assigned the file respecting this matter to another Crown Attorney for review in respect of the standard applicable to bring the matter to trial. The Adjudicator's summary of Mills' evidence referred to the foregoing and stated:

> **"Mills indicated that at this stage he did not have any concerns about the reasonable and probable grounds to lay the charge but that the matter had progressed passed that point by this stage."** (p. 36, Adjudicator's decision)

[54] The Adjudicator's summary shows that she was well aware of Mills' opinion that Maloney had reasonable and practical grounds at the time of arrest. A review of Mills' evidence also confirms that the Adjudicator had ample grounds to

conclude that his prime concern was whether the evidence justified proceeding to trial.

[55] With respect to the Adjudicator's references to Flynn's evidence in the above noted paragraph Counsel for Maloney contended:

> **"Her complaints are two fold: Flynn improperly assumed a complete investigation had been done and Flynn made the same assumption about Peddle's evidence that Maloney had. As argued in section one above, a complete in terms of a proper investigation, had been done. The assumption about Peddle was reasonable. Even though it turned out to be improper, this does not detract from its value at the time of the forming of the grounds."** (para. 54, Appellant's Brief)

[56] Counsel for Maloney then referred to Flynn's detailed testimony respecting his knowledge of the grounds for arrest. That testimony referred to the interview of Peddle in the following terms:

> **"He (Maloney) had also interviewed a Mr. Peddle and the statement of Mr. Peddle was, <u>at least as we have it</u>, was to the effect that this fellow, Evans, did enter his vehicle and there were two guys chasing him."** (Emphasis added)

[57] In her decision the Adjudicator had noted that Flynn became involved in the file for one meeting only on April 24, 1997 and she summarized his evidence on the point as follows:

> **"He recalled that Maloney laid out...the objective evidence which he had prior to charging Parsons. Flynn could not recall whether he actually read the statements obtained by Maloney, but he confirmed that they discussed it. He recalled the evidence as being the statement from the complainant's evidence, medical evidence as to Evans' injuries, the statement of the taxi driver Peddle and the statement of David Evans. It is clear from Flynn's evidence that he assumed Peddle in particular would be able to corroborate Evans' allegations..."** (P. 33, Adjudicator's Decision)

[58] The Adjudicator then referred to Flynn's testimony in which he stated:

> **"From my perspective, where the standard is reasonable grounds to believe, in my view, and we discussed it, and I think we both came to the same view that,**

> **indeed, he did have reasonable grounds at that stage to lay the charge."** (p. 33, Adjudicator's decision.)

[59] My review of the Adjudicator's decision therefore satisfied me that she was fully aware of (a) Flynn's opinion on whether Maloney had grounds for the arrest, and (b) the basis for Flynn's opinion. I am also satisfied the evidence strongly supports the Adjudicator's view that Flynn's involvement with the file was not for the purpose of reviewing the arrest per se but to consider the impact of post-arrest evidence, particularly upon Parsons' imprisonment.

[60] Nor do I accept the contention that the Adjudicator "rejected" the evidence of the Crown Attorneys. She considered that evidence, and found, logically in my opinion, that it did not directly address whether there had been due inquiry by Maloney, which she found to be a pre-requisite to a police officer's proper formation of reasonable and probable grounds.

[61] In summary my conclusion is that the Adjudicator's assessment of the testimony of those expert witnesses was supported by the evidence and her conclusion therefrom was valid. I therefore reject the submission that the Adjudicator breached the applicable standard in her treatment of the expert evidence of the Crown Attorneys.

ISSUE #4 Whether the Adjudicator breached the applicable standard (reasonableness) in concluding that Maloney failed to thoroughly and properly investigate the alleged offence prior to arresting and charging Parsons.

[62] Counsel for Maloney submitted that:

> **"The review of a professional's decision by an adjudicator is, to a large extent, always an exercise in "Monday afternoon quarterbacking". The adjudicator is presented with the task of deciding whether the professional's decision was a reasonable one in all the circumstances. In Tomie-Gallant v. Board of Inquiry (1997) 92 O.A.C. 363 the Ontario Divisional Court made it clear that a police officer's decision to arrest was the type of decision which restricted an adjudicator to reviewing reasonableness. At page 373 the Court stated:**

> **The Board, in my view, was in error in engaging in an ex-post facto analysis of the arrest and substituting its discretion ('what we would have done') for the discretion of the appellant who acted in good faith at the time of the arrest."** (para. 17, Appellant's Brief)

[63] He submitted that the Adjudicator erred in her findings by addressing what she would have done rather than addressing the circumstances facing Maloney. He contended that Maloney's assumption that Peddle's evidence would be corroborative was a reasonable one. Reference was made to **Spirak** v. **OPP Commissioner** (1991) 10 C.R. (4th) 72, in which Matheson, J. addressed at length the problems faced by a police officer and the pitfalls of ex poste facto analysis. Matheson, J. comments included:

> **"The police often have to act at once, on the facts as they appear on the spot. They should be justified by the facts as they see at the time to them, and to that mythical, objective and 'reasonable person', and not as those facts may be viewed later in retrospect by some process of ex post facto analysis. As Denning summed it up:**
>
> > **If every motorist who is acquitted is to have an unanswerable claim for damages against the police, I should think that the police would soon give up trying to arrest anyone; and that would be very bad for us all. The police must be entitled to act on the facts as they appear to them at the time.**
>
> **Was the action of the defendant police officers on October 30, 1986 in arresting and incarcerating the plaintiff for sexual assault reasonable and probable? Was it 'legitimate', 'fair' and 'justifiable' in light of the circumstances, was it 'sane' and 'plausible'? Was it well-founded, did it appear logical..."** (pp. 90-91)

[64] With respect to the Adjudicator's comments that Maloney had failed to interview witnesses named by Parsons and Woolridge prior to the arrest Counsel for Maloney noted Maloney's testimony, that he had not believed Parsons and Woolridge, for which he was able to articulate reasons. A related submission was that the failure to investigate a defence is not fatal to a police officer's reasonable grounds for arrest. **Randell Wiles** v. **Police Complaint Commission**, (unreported) Ontario Divisional Court, Newmarket No. 35862/95.

[65] In analysing the foregoing contentions it is crucial to relate the general propositions stated in the cases cited to the facts and legal framework of those cases. In **Tomie-Gallant** v. **Board of Inquiry** it is apparent that the disciplinary process therein required the prosecution to prove the charges against the police officer beyond reasonable doubt and that the Board of Inquiry had reversed the onus of proof. The Board of Inquiry had furthermore disregarded the bona fide belief of the police officer at the time of the arrest when it analysed the evidence. There was no discussion in that case of the applicable standard of review. In **Spirak** v. **OPP Commissioner** there was a civil action for false imprisonment following a charge of aggravated sexual assault. The judge was accordingly not reviewing the decision of a disciplinary body but was rendering his decision on whether the police officer had reasonable and probable grounds for the arrest.

[66] The legal framework applicable to this appeal differs from that of the two cases noted in the preceding paragraph. Of particular importance is the statutory framework of the complaints process under the Act which led to my conclusion on the applicable standard of review stated above. The Act required that the Adjudicator had to determine, on a balance of probabilities, whether the offences had been proven. On this issue - whether there had been due inquiry - the Adjudicator's decision should be set aside if it was unreasonable. That means, - **Canada (Director of Investigation and Research)** v. **Southam Inc.**, - that I must determine if there was a defect in the evidentiary foundation (is it a conclusion that has no basis in the evidence or is contrary to the overwhelming weight of the evidence) or in the logical process by which conclusions were drawn (e.g. an invalid inference). The standard of reasonableness, similar to that applied in reviewing findings of fact by trial judges, means the Adjudicator's decision must be examined to determine whether it is clearly wrong rather than whether it is the decision this Court would have made.

[67] In this case the Adjudicator determined that there was a duty of due inquiry, on which all parties agree. She found that the duty had been breached. In her findings the Adjudicator pointed to the following evidence as being determinative in reaching that conclusion:

-- the statement of Peddle relied upon by Maloney which the Adjudicator found to be scanty. Maloney's interview with Peddle was faulted as being incomplete and suggestive.

– the failure of Maloney to interview witnesses named by Parsons and Woolridge. The Adjudicator found that Maloney had made up his mind early in the investigation even without interviewing the accused.

– the brevity of the initial investigation (1 ½ days) in the context of the 3 day weekend hiatus.

[68] Having reviewed the record and submissions I find that the Adjudicator's comments had a solid evidentiary foundation. She did not overlook relevant evidence - see my comments on Issue #3 at paras. 51-61. She chose not to accept unreservedly Maloney's testimony respecting the investigation and his decision to arrest and reached a different conclusion respecting fulfillment of the duty of due inquiry. The Adjudicator was entitled, indeed obliged, to assess and weigh the evidence respecting the investigation and to draw valid inferences therefrom. The statement of Peddle in his initial interview with the police was capable of being characterized as "scanty". It was correct that it was Maloney who introduced Parsons' name into the interview. It is accurate that Maloney failed to interview witnesses named by Parsons and Woolridge and worth noting that there was no indication that such witnesses were not readily available. The investigation was interrupted by a three day weekend. That three day break cannot be faulted but the Adjudicator was clearly entitled to infer that it indicated a lack of urgency in the matter and that further time could have been taken to interview other potential witnesses. From this evidentiary basis the Adjudicator's conclusion appears to be a logical one.

[69] On this appeal submissions were made respecting the importance of striking a proper balance between the maintenance of high standards in police investigations and the concern that police officers not be constrained in the performance of their duty. A review of the Adjudicator's decision indicates that she understood the law respecting the duty of due inquiry and the required grounds for arrest. The key issue before the Adjudicator was whether there had been due inquiry in the circumstances of this case. Her decision was clearly confined to this particular fact

situation and she did not purport to change the clearly established legal principles respecting the required grounds for arrest.

[70] In conclusion on this issue I do not find that the Adjudicator breached the applicable standard of review in concluding that Maloney failed to thoroughly and properly investigate the allege offence prior to arresting and charging Parsons.

SUMMARY

[71] In this appeal the standard of review applicable to the Adjudicator's decision is one of correctness on legal issues and one of reasonableness on issues of mixed fact and law.

[72] The Adjudicator did not err by considering matters which occurred after the arrest and charge. Her decision respecting the testimony of expert evidence and respecting due inquiry prior to arrest did not breach the applicable standard of review.

[73] The appeal is dismissed with costs.

_____

JUSTICE

R. Piercey - Appellant
P. O'Flaherty - Respondent
P. Noble - Chief of Police, R.N.C.