

**THE ROYAL NEWFOUNDLAND CONSTABULARY
PUBLIC COMPLAINTS COMMISSION**

IN THE MATTER OF:

LAWRENCE HICKEY

APPELLANT

AND:

STEVE PLOUGHMAN

RESPONDENT

DECISION

INTRODUCTION

Constable Lawrence Hickey has appealed from a finding of the Chief of Police made pursuant to the *Royal Newfoundland Constabulary Act*, 1992, and the Regulations made thereunder, that he conducted himself in a manner contrary to Section 3(1)(b) of the *Royal Newfoundland Constabulary Public Complaints Regulations*, thereby committing an offence contrary to Section 3(2) of those Regulations. On May 6, 1998 the matter was referred to me to conduct a public hearing pursuant to the Act and Regulations.

The hearing in this matter was held in St. John's on June 4 and 5, 1998. Present at the hearing was

Peter O'Flaherty representing the Commissioner, William Caddigan representing Cst. Hickey, and Paul Noble representing the Chief of Police.

The matters giving rise to this Complaint occurred on August 1, 1996 in what was supposed to be a routine traffic stop of Mr. Steve Ploughman. The particulars of the offence against Cst. Hickey are that during this traffic stop he engaged in conduct unbecoming a police officer in that he used unnecessary force by deliberately poking Mr. Ploughman several times in his shoulder area with his fingers while taking enforcement action against Mr. Ploughman under the Licensing and Equipment Regulations. On August 2, 1996 Mr. Ploughman filed a complaint against Cst. Hickey.

At the hearing, evidence was given by Mr. Ploughman and his neighbours, Michael Legge and Felix Bruce; Lynn Verge, Mr. Ploughman's girlfriend; and Cst. Paul Woodruff, Cst. Hickey and Sgt. Robert Kennedy. Sgt. Kennedy was with Cst. Hickey when they stopped Mr. Ploughman. As well, there was agreement between the parties on some of the events that transpired and an Agreed Statement of Facts was filed.

EVIDENCE

The facts for which there is agreement are these. On August 1, 1996 at approximately 10:15 a.m. Mr. Ploughman, together with a Keith Hanrahan, were transporting lumber in a pickup truck from a building

at Fort Townsend at 75 Lime Street. Mr. Ploughman was the owner and operator of this truck and Mr. Hanrahan was the passenger. The pickup truck was observed leaving Fort Townsend by Sgt. Kennedy who had received information the previous day from Staff Sgt. Peyton regarding possible breaches of the Licensing and Equipment Regulations by a similar pickup carrying lumber in the same vicinity.

Cst. Hickey as driver and Sgt. Kennedy as passenger were in a black unmarked police car. Neither officer was in uniform. Cst. Hickey proceeded to follow the pickup and observed it make a left hand turn onto Lime Street. The pickup truck stopped in the vicinity of 75-77 Lime Street on the right side of the road facing south and the police car stopped immediately behind it. As a consequence of the traffic stop Mr. Ploughman received 5 tickets under the Licensing and Equipment Regulations. Apart from these facts, there is significant discrepancy in the evidence presented before me of the events which subsequently transpired.

Mr. Ploughman testified that on the day in question and on the previous day he was transporting lumber from Fort Townsend to Lime Street. He was delivering his last load when stopped by the Police. While the police car was unmarked and the officers were in plain clothes he knew them to be policemen when they approached him.. One of the officers flashed his badge and identified himself as a police officer. He testified that both officers were planning to give him a hard time from the beginning and he describes himself as being upset with their attitude. He acknowledged however that he first started shouting.

Mr. Ploughman admits that there is no red flag on his load and some of the lumber extended past the back of his pickup by as much as 8 feet. He states that he was told immediately not to move his truck. The officers checked his truck and Mr. Ploughman began to unload the lumber. He describes their attitude as poor and they gave him 2 or 3 tickets at that time. While he was unsure, Mr. Ploughman stated that he either tore up the tickets or threw them into his truck and when he did he made a comment to the effect "If you give a bayman a badge he thinks he owns the place".

Mr. Ploughman admitted that he has a temper and described his attitude as not being the best. He states that when he made this comment the officers became angry and a loud argument ensued. He states that foul language was used by himself but that it was also used by both police officers, Hickey and Kennedy. He believes that his comment concerning "bayman" upset the police officers, but also admitted that he may have earlier stated that all he was trying to do was earn a living and the police were unnecessarily bothering him. It was during this argument that Mr. Ploughman states that he was poked by one of the officers. He states that he was poked three times in the right shoulder. During the hearing he demonstrated this contact and in doing so Mr. Ploughman showed that he was struck forcefully in the right shoulder by the policeman's finger. From Mr. Ploughman's demonstration one would not conclude that this was an incidental physical contact.

When he was hit, Mr. Ploughman, in what can only be described as a very loud voice, stated to the officer that he had just assaulted him and if Mr. Ploughman had done that to the officer he would had

been arrested. He felt the officers were trying to provoke him into a fight. He put his thumbs in his pocket to ensure that nothing else happened. He admits being upset. In his words his "blood was boiling". One of the officers, whom he believed to Cst. Hickey, told him to keep it down or he would get arrested.

After this altercation he toned back his voice and things settled down. He was then given another series of tickets relating to the mechanical condition of his truck. The first tickets had related to the load his truck was carrying. All of the tickets were signed by Cst. Hickey. The whole incident lasted about an hour. As the officers were leaving he was told by Sgt. Kennedy not to move his truck. He states Sgt. Kennedy identified himself to Mr. Ploughman but that Cst. Hickey refused to do so.

Mr. Ploughman testified that Sgt. Kennedy was not the officer who hit him. The officer who assaulted him was the officer wearing dress pants and was the same officer who was the driver of the police car. Shortly after the police left he went to police headquarters to learn the identity of the officer who hit him. He spoke to another police officer and while there he saw Cst. Hickey enter the building. He was then informed who he was. At the hearing he could not positively identify Cst. Hickey as the officer who hit him except to see that he was 90% sure that it was Cst. Hickey.

After the officers left, Mr. Ploughman wanted to have another policeman check his truck. Mr. Hanrahan flagged down Cst. Woodruff who was driving by on LeMarchant Road. Mr. Ploughman asked Cst. Woodruff to check his truck and testified that he refused to do so. Mr. Ploughman admits that he

became angry at Cst. Woodruff. He did not tell Cst. Woodruff that he had been assaulted by another officer earlier that morning.

Evidence was also presented by Michael Legge. At the time of this incident Mr. Legge was staying at 77 Lime Street. He had only spoken to Mr. Ploughman on one previous occasion and knew him by name only. Mr. Legge was in an upstairs bedroom, from where he observed this incident. However, he did not stay at the window the whole time. He stated the police officers were there for about 15-20 minutes. He was drawn to the window by a police siren. He describes himself as having difficulty hearing. He saw the police pull Mr. Ploughman over and saw Mr. Ploughman give one of the officers his registration and insurance, after which the officer returned to the police car. Mr. Legge described the police officer driving the car as wearing gray pants and a gray dress shirt. The officer, who was a passenger, was wearing jeans, a t-shirt and sneakers and had a brush cut. He states that Mr. Ploughman was using foul language but in the end the police were also using foul language. When the police officers returned to give Mr. Ploughman a ticket, loud words were exchanged and an officer poked Mr. Ploughman in the chest 3 or 4 times. He described it as a fairly solid poke and certainly more than a simple laying on of hands. When this happened he heard Mr. Ploughman say something to the effect that he was a taxpayer and that he had been assaulted and you can't do that.

Mr. Legge stated that the officer who assaulted Mr. Ploughman was the officer who was wearing the dress pants and the driver of the police car. At the hearing he identified Cst. Hickey as that officer who

struck Mr. Ploughman, although he admitted that he only had a side view of this officer's face from his window. About 2 or 3 minutes later the officers left.

Lynn Verge is Mr. Ploughman's girlfriend of some 6 or 7 years. She initially was on the front door step of 75 Lime Street minding her 14 month old granddaughter. Mr. Ploughman arrived in his truck and she went inside to get a drink for his passenger. When she returned she saw the black car behind the Ploughman truck, although at that time she did not recognize it as a police car. She describes the passenger of this car as wearing jeans and a t-shirt. She recalls the officers and Mr. Ploughman discussing a red flag. She states that she saw the officers give Mr. Ploughman a ticket. Mr. Ploughman was about 3 or 4 feet away from her and facing her. Both officers were present facing Mr. Ploughman with their backs to her. She states her view was clear. One of the officers, whom she described as the driver of the car and the one wearing dress pants poked Mr. Ploughman. She states he was poked 3 or 4 times to make a point. She described it as a forceful tap.

Ms. Verge stated that Mr. Ploughman did not lose his temper until he was struck. Both sides then became hot under the collar, voices were raised and foul language was used by both. After this she states that a further inspection was made of Mr. Ploughman's truck and further tickets were issued. Shortly after, the officers left. At the hearing Ms. Verge could not positively identify Cst. Hickey as the officer who poked Mr. Ploughman. She was only able to say that he looked familiar.

Evidence was also presented by Mr. Felix Bruce, a neighbour who resides at 89 Lime Street. He knew Mr. Ploughman as a neighbour, although he testified that Mr. Ploughman is now under a bond to stay away from his family. At the time of this incident Mr. Bruce went to help Mr. Ploughman unload his truck. He saw the police car pull in behind the pickup with two officers. He describes one as wearing jeans and the other wearing dress pants. The police officers were at the scene for about 5 to 10 minutes before they gave Mr. Ploughman some tickets. Mr. Bruce then describes Mr. Ploughman as being "smart" and started to tear up the tickets. In Mr. Bruce's words, he was trying to push the police officers as far as he could get. Mr. Ploughman swore at the policeman. Voices got loud and both started arguing. Both used foul language.

Mr. Bruce testified that during this incident one of the police officers tapped Mr. Ploughman on the shoulder with his finger. He did so using the words "Don't push it". He described the tapping as not hard and simply as a touching. To him, and in Mr. Bruce's words, "It was no big deal". He had no difficulty in hearing what was going on and after the tapping he heard Mr. Ploughman tell the officer that he was going to charge him with assault. After this, further tickets were issued to Mr. Ploughman. Mr. Bruce testified that the officer who did the tapping was the officer in the dress pants.

Constable Paul Woodruff was patrolling on LeMarchant Road when he was flagged down and asked to go to Lime Street. When he arrived he meet Mr. Ploughman who asked him to inspect his truck. He described Mr. Ploughman as being polite at first. Later, however, he became upset, waving his arms.

He made no mention to Cst. Woodruff of any assault by Cst. Hickey.

Sgt. Robert Kennedy also gave evidence at the hearing. Sgt. Kennedy has been a policeman for 20 years and a sergeant for approximately 7 years. He testified that on July 31, 1996 he was advised by his supervisor that a two tone brown pickup truck was seen in the Fort Townsend area operating with an unsecured load of lumber. That day Sgt. Kennedy looked for this vehicle but couldn't locate it. On August 1, 1996 Sgt. Kennedy was on his day off, however he had been in court that morning. At the time this incident arose Cst. Hickey was driving him home. Sgt. Kennedy was wearing jeans and a t-shirt, and he had a brush cut.

As they left Fort Townsend Cst. Hickey was driving and Sgt. Kennedy was in the front seat. They saw a pickup, similar in description to that given to Sgt. Kennedy, carrying a load of wood and turning onto Lime Street. They followed in the unmarked police car. This pickup stopped on Lime Street and the police car parked behind it. Both Sgt. Kennedy and Cst. Hickey got out the approached the driver of the pickup whom Sgt. Kennedy recognized to be Mr. Ploughman. Sgt. Kennedy testified that he identified himself to Mr. Ploughman and showed him his badge. He also identified to Mr. Ploughman the other officer as Cst. Hickey. He described the pickup as being overloaded and with the lumber sticking out the rear by 8-12 feet.

Sgt. Kennedy testified that as soon as Mr. Ploughman got out of his truck he was yelling and

screaming at them accusing them of harassing him. Mr. Ploughman produced his licence and registration, which Cst. Hickey took and went back to the police car to write up some tickets. Those tickets related to the load on the truck. Sgt. Kennedy stated that after those tickets were written up they intended to inspect the pickup for vehicle defects. It took some time to complete these tickets as Cst. Hickey had to radio police headquarters to obtain the specific offence sections.

Sgt. Kennedy testified that during this period of time Mr. Ploughman continued to be upset, describing him as yelling and screaming, and walking around waving his arms. He went back to the police car to wait for Cst. Hickey to finish writing the tickets. When this was done they both got out of the car and approached Mr. Ploughman. Cst. Hickey gave Mr. Ploughman the first set of tickets. Sgt. Kennedy testified that Cst. Hickey did not strike Mr. Ploughman. They then proceeded to check the truck for defects. A second set of tickets were written up and given to Mr. Ploughman. Throughout this period Mr. Ploughman continued to yell and scream. Sgt. Kennedy informed Mr. Ploughman that if he continued he would be charged with disturbing the peace.

Sgt. Kennedy considered Mr. Ploughman a threat, based on his behaviour. He testified that neither he nor Cst. Hickey raised their voices to him and at all times referred to him as "Sir" or "Mr. Ploughman". At no time did he or Cst. Hickey intentionally poke Mr. Ploughman.

Cst. Hickey testified on his own behalf. He has been a police officer for 16 years. He testified that

he did not poke or touch Mr. Ploughman nor he did not use impropriate language. He stated that after he stopped the police car on Lime Street both he and Sgt. Kennedy got out together and Sgt. Kennedy showed his badge to Mr. Ploughman. Cst. Hickey was wearing casual clothing. He states that Mr. Ploughman was shouting and swearing from the beginning. Cst. Hickey testified that he had very little contact with Mr. Ploughman and that he spent most of his time in the police car waiting for information from headquarters to enable him to write out the tickets. The first tickets he completed were for carrying a load without a red warning flag and for carrying too heavy a load. He describes Mr. Ploughman as ranting and raving during this period. He then got out of the car to give these tickets to Mr. Ploughman. Sgt. Kennedy was close by. He describes his contact with Mr. Ploughman as being very brief, lasting at most 1-2 minutes out of the 45/50 minutes he was there.

Cst. Hickey stated that when he gave the first tickets to Mr. Ploughman he attempted to go over the tickets and explain them to him. In doing so he inadvertently told Mr. Ploughman that he was being charged under the *Liquor Control Act*, as opposed the Licensing and Equipment Regulations. When he did this Mr. Ploughman started swearing at him again calling him a "F---ing Idiot". He testified that he did not physically touch Mr. Ploughman and did not raise his voiced to him. He simply walked away.

He went back to the patrol car and was in the process of writing a further ticket for a bald tire. Sgt. Kennedy then came back to the car and told him to write two additional tickets which he did. One ticket was for a defective licence plate light and the other was for a signal light not working. Cst. Hickey signed

all the tickets. He believes that Sgt. Kennedy gave Mr. Ploughman the second set of tickets.

CONCLUSION

Section 33(1) of the Act provides that the Adjudicator shall make a determination on the balance of probabilities. Mr. Caddigan has argued that in view of the serious nature of the complaint against Cst. Hickey and the penalty imposed against his client, the application of the civil standard requires clear and convincing evidence for the case to be proven.

As a general principle I accept this argument. In my view, the statutory reference to proof based upon a balance of probabilities simply distinguishes the burden of proof from that of the criminal standard of proof beyond reasonable doubt, and recognizes that police discipline proceedings are not criminal or penal in nature. As stated in the case of *Re Trumbley et al and Flemming* 29 D.L.R. 557, a 1986 decision of the Ontario Court of Appeal, the most serious consequence that can befall a police officer in such a proceeding is the loss of his or her position and while a serious consequence, it is a civil consequence and not punishment of a criminal nature.

In criminal cases a charge must be proved beyond reasonable doubt but within that standard there are degrees of proof. In proportion as the crime is enormous so ought the proof to be clear. Also in civil cases the case must be proved by a preponderance of probability, but there may be degrees of probability

within that standard. Acting therefore with caution, the evidence must be such to lead me to the fair and reasonable conclusion that Cst. Hickey has acted improperly as alleged.

The conduct which I must judge is that of Cst. Hickey. Whatever my determination of Cst. Hickey's conduct, the evidence is patently clear, while required to be a lawabiding citizen, Mr. Ploughman's conduct fell far below that standard. In short, Mr. Ploughman's behaviour was simply unacceptable. Mr. Ploughman has testified that initially the officers attitude was bad and they intended on giving him a hard time from the beginning. I do not accept this. It was he who was the aggressor toward these officers; it was he who lost his temper, it was he who raised his voice and it was he who hurled insults and obscenities at both policemen. These policemen were in the lawful exercise of their police duties which Mr. Ploughman obviously did not respect.

Cst. Hickey has been charged with conduct unbecoming a police officer by the unnecessary use of force in deliberately poking Mr. Ploughman several times in his shoulder area with his fingers. I will confine my remarks of Cst. Hickey's conduct to those charges. However outrageous a citizen's conduct might be toward a police officer, clearly any citizen is entitled not to be assaulted by a police officer unless lawful excuse exists.

The evidence of the "poking" from the witnesses is unreconcilable. Mr. Ploughman describes a serious physical assault. Mr. Legge describes it as a fairly solid poke. Ms. Verge described it as a forceful

tap. Mr. Bruce described it as a light tap or a simple touching. Cst. Hickey and Sgt. Kennedy state that no such physical contact took place. Clearly there is no way to reconcile this evidence.

Having heard and observed all of these witnesses, in my view, Mr. Bruce has provided the most consistent and reliable evidence of the events of the morning and I accept his evidence. I do so for a number of reasons. His evidence is clear and he possessed a good recollection of what transpired. He testified, as did others, that it was Mr. Ploughman who was the aggressor and whose conduct towards the police officers was provocative. We know from all accounts that Mr. Ploughman was angry. His voice was raised and he was using profanity towards the policemen. Sgt. Kennedy testified that he was concerned, based on Mr. Ploughman's aggressive behaviour, that things might get out of hand and by this he meant that matters might escalate into a physical confrontation.

Mr. Bruce was the only witness who was able to testify as to the words that were spoken when the officer pointed his fingers at Mr. Ploughman. It seems perfectly clear that the conduct of pointing one's finger 3 or 4 times in this situation was meant as a warning and in the normal course of events I would expect that conduct to be associated with spoken words of warning. Mr. Bruce testified that as the officer pointed his finger he did give a verbal warning of "Don't push it".

From other evidence we know that this episode took place as Cst. Hickey was giving Mr. Ploughman his first set of tickets, and in doing so mistakenly referred to the Liquor Control Act. At this

time Mr. Ploughman's behaviour again became very provocative. We also know that at this time Mr. Ploughman, by his own evidence, was told to settle down or he would be charged with disturbing the peace. I therefore conclude that while Cst. Hickey did point his finger and did touch Mr. Ploughman, that physical contact was at most a light touch, all of which was given by Cst. Hickey in the circumstances which I have described and given as a warning to prevent matters from escalating beyond where they were.

I have reviewed the Use of Force Guideline of the Royal Newfoundland Constabulary. That guideline recognizes that police officers possess the authority to preserve the peace, good order and tranquility of the community, and that members shall not resort to the use of force unless such use is necessary, in the execution of their duties. The guideline also clearly provides that members must not lose their temper and must take utmost care in remaining calm, cool and collected in even the most trying of circumstances.

I have concluded from the evidence that Cst. Hickey did point his fingers at Mr. Ploughman and in doing so slightly touched or tapped his shoulder. This physical contact was slight and together with the words spoken was given to Mr. Ploughman as a warning to prevent matters from escalating. I do not conclude that it was simply a retaliation because of Mr. Ploughman's insults. Even if I were to conclude that this incidental physical contact amounted to a use of force as meant in the police guideline, which I do not, based on Mr. Ploughman's conduct, such contact was justified in the circumstances.

In conclusion, I am not satisfied that the evidence has established that Cst. Hickey acted in a manner unbecoming a police officer. I therefore allow his appeal and order pursuant to Section 33(i)(iii) that he be reinstated without reprimand. I made no order as to costs.

DATED at St. John's, in the Province of Newfoundland, this day of , 1998.

REGINALD H. BROWN, Q.C.
ADJUDICATOR