

# SCHEDULE D

IN THE MATTER of a public  
Complaint of D.B., Z.B., and K.B.  
Against Constables B.M., S.S., and I.W. made under  
The Royal Newfoundland Constabulary Act 1992

## Decision re Preliminary Application for Dismissal (Heard January 30 & 31, 2020)

I.W., B.M., and S.S. ("the Constables") have applied for a dismissal of the complaints as against them. They cite a failure by the Royal Newfoundland Constabulary Public Complaints Commission ("the Commission") to comply with a limitation period set out in the Royal Newfoundland Constabulary Act ("the Act") and also cite the Royal Newfoundland Constabulary Public Complaints Regulations ("the Regulations").

For reasons noted below, the Application is dismissed.

Section 24 of the Act encompasses 'Initial Investigation'. In particular, Section 24.(3) notes a timeline of 3- months within which an investigation is to be completed.

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.

(2) Where a complaint is received at a constabulary office, the chief or deputy chief shall notify the commissioner of that complaint.

(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.

(4) The chief or the deputy chief may appoint a police officer to investigate complaints referred to him or her under subsection (1).

(5) Notwithstanding subsection (3), the chief or deputy chief may, where he or she believes it to be in the public interest to do so, transmit the complaint to the commissioner and that complaint shall be considered by the commissioner under section 26 as if it were an appeal under section 25.

Section 43 of the Act notes the circumstances under which an investigation may be suspended. This is also noted under Section 7.(d) of the Regulations.

### **Proceedings suspended**

43. (1) Where a criminal investigation is being conducted or a prosecution is commenced under an Act of the Parliament of Canada or another Act relating to the subject-matter of a complaint, proceedings under this Part shall be suspended pending a decision on that prosecution.

(2) Where a proceeding is suspended under subsection (1), notice of that suspension shall be given to all parties in writing, together with the reason for that suspension.

(3) Where, respecting a complaint or proceedings resulting from a complaint under this Part, there is a conflict with a collective agreement made under Part IV, this Part shall prevail.

### **Investigation of complaint**

7. The chief or the officer appointed to investigate a complaint under subsection 24(4) of the Act shall

- (a) conduct the investigation in an objective and neutral manner consistent with recognized investigative procedures;
- (b) impartially and diligently gather evidence with a view to bringing the investigation to a conclusion;
- (c) upon completion of the investigation prepare and submit to the chief a final report which sets out the subject matter of the investigation, all relevant findings and conclusions and the statements obtained shall be appended to that final report; and
- (d) where a criminal investigation is being conducted or a prosecution is commenced under any Act of Canada or the province in relation to the subject matter of the complaint the 3 month period for completing the investigation under subsection 24(3) of the Act shall also be suspended pending the conclusion of the investigation or proceeding whichever is the later.

Also relevant to this Application is Section 26 of the Act:

### **Commission Investigation and settlement**

26. (1) Upon receipt of an appeal under section 25, the commissioner shall forward a notice of the appeal to the chief and the other parties.

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

(3) Following an investigation of a complaint, the commissioner, with the consent of the parties, may effect a settlement of the complaint.

(4) Where the commissioner effects a settlement of a complaint under subsection (3), he or she shall report the settlement to the chief, and the commissioner shall notify the other parties that no further action will be taken with regard to the complaint unless the terms of the settlement are not complied with.

(5) Where the terms of a settlement referred to in this section are not complied with, the commissioner may reopen the complaint and proceed as if a settlement had not been effected.

(6) A complaint shall be considered settled for the purpose of this Part only if the commissioner and all parties approve the settlement and comply with its terms.

(7) For the purpose of this section, the word "parties" shall include the chief, the complainant and the police officer against whom the complaint was made.

### **Position of the Constables**

The Constables say that the 3-month period noted in S.24 of the Act is applicable, and that it begins to run as of May 1 (or possibly May 2) 2018.

On July 6 2018 (66 days having gone by) the investigation was suspended as evidenced by a letter from Inspector S. Bill due to the initiation of a separate criminal investigation and pursuant to S.43 of the Act.

A letter dated March 7 2019 from Solicitor Stephen Ring which advises charges would not be proceeding, marks the restart of the S.24 3-month investigation period.

On March 28 2019 (another 21 days having gone by) a letter from Randy Doyle (Manager, RNC Public Complaints Commission) evidences that the investigation into the public complaints was suspended again due to the initiation of another criminal investigation and pursuant to S.43 of the Act.

On April 15 2019 a letter from Randy Doyle indicates the criminal proceedings had concluded and investigation into the public complaints had resumed.

On June 25 2019 (another 68 days having gone by for a total of 155 days according to the Constables), John Rorke, RNC Public Complaints Commissioner issued a decision indicating that Commission Counsel had been instructed to refer the complaint to the Chief Adjudicator. The reference to the Adjudicator was dated July 2 2019.

The brief submitted by Constables I.W. and S.S. says that the limitation period which should apply, was breached by 2 months.

**Position of the RNC Public Complaints Commission**

The Commission says that the relief sought by the Constables should not be granted and that this matter ought to proceed forward to be heard on its merits pursuant to the Act. The Commission says the 3-month period noted in S.24 of the Act is not applicable. In the alternative the Commission says that if the limitation period outlined in S.24 does apply that it was not violated. In the further alternative the Commission says that should it be found that the limitation period was violated, such limitation period must be considered directory and not mandatory.

**Analysis**

**Applicability of the 3-month limitation noted within S.24.(3) of the Act**

The Constables say that if I accept the Commission's position that the 3-month period does not apply because the Chief of Police elected to refer the matter to the Commission (pursuant to S.24.(5)) with an investigation being conducted under S.26, then the legislated 3-month period is redundant, as such time limitation could always be easily circumvented.

I agree that the 3-month period can be bypassed by way of use of S.24.(5), and that S.24.(5) was utilized in this instance. That is not to say that the 3-month limitation was craftily side-stepped, but merely an option available to the Chief relating to process was utilized. S.24.(5) contains what might be characterized as a 'notwithstanding' clause, and in my view this affords the Chief the ability to essentially override the 3-month period noted within S.24.(3), or in practical terms, take an alternate route. This route was taken on March 11 2019 when the Chief transmitted the complaint to the Commissioner. I disagree, as the Constables intimated, that the taking of such route can translate into the possible tactic of waiting 89 days and then referring the matter under S.24.(5). My agreement that such an approach could be taken could suggest I am imposing upon the Chief the idea that the Chief would possibly be willing to act in a manner that might be characterized as bad faith. I am not willing to accede to that view. That being said, referring a matter under S.24.(5) at a late date would not necessarily bring with it any bad faith at all, rather it might simply in certain cases be the appropriate thing to do. It appears to have been so, here.

The Constables asked at the hearing of the within Application if the referring of the matter to the Commission as per S.24.(5) ends the 3-month limitation, then why not put such provision explicitly in the legislation? In my view such provision has been patently placed in the legislation by way of the 'notwithstanding' language in S.24.(5).

Moreover and just as important, as properly noted by the Commission, the legislature clearly intended to denote a defence between the initial investigation, and that which can be conducted by the Commission under S.26.

I do not agree with the view submitted at the hearing that the 3-month limitation placed in the Act is a "waste of ink". In the context of an investigation that is within the purview of S.24.(3), it is germane. This

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begs the question of course, what sort of investigation can be characterized as one which could remain within the purview of S.24.(3)? The answer in my view is possibly one which has a less complex fact pattern and fewer players than the scenario which is the subject of the complaints related to this matter, and is perhaps more suited to a sole and briefer consideration by the Chief.

The Constables have suggested that if a matter is referred by the Chief pursuant to S.24.(5) with the investigation being conducted under S.26, then I should keep in mind that S.26 is not about investigations, but rather about appeals. This position ignores language within S.24.(5) which still allows complaints to be considered by the Commissioner, and in that instance as if it were an appeal.

It is also worth noting that S.19 of the Act affords the Commissioner the ability to investigate a complaint as well as dismiss or refer it, with no limitation for same being noted.

Counsel for the Constables referred me to various case law. I will not reference all these cases. One such case (referred to by Counsel for B.M.) was *Vialoux v. Registered Psychiatric Nurses of Manitoba* (1983, Manitoba Court of Appeal). The issue there was whether a time requirement as prescribed by the *Manitoba Registered Psychiatric Nurses Act* in relation to the holding of an inquiry was mandatory. There, a limitation period which was not followed was seen to have been mandatory. However, the relevant legislation referred to in *Vialoux* does not appear to have included a subsection similar to that of 24.(5) in the Act, and as such the analysis of the time requirement there is not entirely useful to conducting an analysis here.

I was also referred to *Pagee v. Manitoba* (2000, Manitoba Court of Appeal). There, a time limitation in relation to the filing of a Notice of Appeal in relation to discontinuance of social assistance. I believe this case to have been filed to show another example of failure to meet a particular deadline as set out in legislation, to have produced a fatal result. However, I note paragraph 6 wherein Philp J.A. quotes *Petch v. Gurney*. [1994] (Eng. C.A.) noting in part when discussing adherence to time stipulations (which reasoning Philp agreed with):

*Unless the court is given a power to extend the time, or some other and final mandatory time limit can be spelled out of the statute, a time limit cannot be relaxed without being dispensed with altogether; and it cannot be dispensed with altogether unless the substantive requirement itself can be dispensed with.*

In this matter, indeed there appears to be power to essentially extend time (or in essence dispense with it) by way of transmitting the complaint to the Commissioner via 24.(5).

As I find the 3-month limitation noted within S.24.(3) of the Act does not apply, I need not consider whether the 3-month period (90 days) is flexible or whether the 90 day barrier was met if the limitation in S.24.(3) did apply.

## Prejudice

Counsel for the Constables asked that I consider prejudice sustained by the Constables as a result (in part) of the criminal investigation which lasted approximately 8 months beginning on July 6 2018. I am not prepared to consider prejudice. While one might consider prejudice (e.g. emotional toil) to the Constables to be obvious given the length of the criminal investigation, in the context of the within Application no actual evidence has been put before me in that regard other than the say so of Counsel for the Constables (including but not limited to paragraph 18 of B.M.'s brief). Perhaps the length of time which has expired in relation to getting the Constables to a place where ultimate determinations are made in relation to the complaints is not 'fair'. But my decision in the context of this Application is based on what the legislation demands, and whether such demand should be deemed fair, is not within my purview. Additionally, I have no actual evidence from the Constables themselves or their employer that they have been prejudiced. While I appreciate prejudice may be inferred in lieu of proof, I am not prepared to infer it here, and I am certainly not prepared to infer it to the extent that would be necessary to disallow proceeding with a substantive hearing of the complaints.

The Constables rely partly on *Newfoundland and Labrador (Attorney General) v. Snow* (2005), Newfoundland and Labrador Supreme Court). The Constables do so primarily to refer me to the philosophy behind limitation periods as it relates to stress and delay in career. While I agree that prejudice can sometimes be considered, again I have no evidence in this matter which affords me the proper ability to consider it. While I suspect like any persons who are the subject of a complaint the Constables are under stress, I cannot in this matter simply take notice that prejudice has occurred. Moreover, I have determined that a limitation period is not applicable.

Counsel for the Constables also raised the concept of prejudice (although not explicitly) when it comes to witness testimony and memories of those witnesses having faded, with limitation periods being an insulator to this concern. I agree in certain circumstances this can be a valid concern. However, the allegations which give rise to this complaint occurred in early November 2017. In my view we are not so far removed from the relevant occurrence that this should be a concern. Further, it is not at all out of the ordinary in our system for a witness to be called upon to testify 3 or more years beyond the occurrence about which they are being asked to speak, with such testimony being deemed dependable.

Last, it was suggested at the within hearing that given remedies (some more severe than others) available under S.33 of that Act (depending of course on the findings at a hearing on the merits) there is prejudice to the Constables in not knowing what the future will bring. Limitation arguments aside, that uncertainty presumably exists no matter what, and is a consequence of any complaint made (for the complainants as well). This does not factor into my decision.

## Witnesses Called

At the hearing of the within Application, 2 witnesses (Mr. Randy Doyle and Mr. Robert Harry Eugene Cuff) were called by the Constables. The Commission noted their objection to the calling of these witnesses,

and I indicated I was prepared to hear their evidence and determine later what weight I would give to their testimony. While these witnesses spoke to their understanding of time constraints at the time of their respective participation in the investigative process, I have not given any weight to their testimony nor have I considered their views in my determination of this Application. My decision is dictated by the legislation referenced and briefs and oral submissions of Counsel as they relate to the legislation and case law.

This of course is not to detract from the abilities or credibility of either Mr. Doyle or Mr. Cuff. Both were quite articulate, and each gave the clear impression that they are extremely capable. I simply did not view their contribution to this particular Application as relevant to my determination.

#### **Summary**

In the result, the Application for dismissal, is dismissed, and the complaints shall proceed to a hearing on the merits. Prior to such hearing, it will need to be determined either by agreement of Counsel or by way of adjudication if the Chief will participate as a party under S.30 of the Act.

Notwithstanding the request of the Commission, there is no Order as to costs at this time. Costs are in the cause.

Thank you to all Counsel for their submissions both oral and written. Thank you to the Constables as well and their union representation for their attendance on various dates.

**Dated this 6<sup>th</sup> day of March 2020  
Andrew Wadden - Adjudicator**