

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION**

Citation: *Coady v. RNC Public Complaints Commission, et al.*, 2007NLTD83

Date: 20070413

Docket: 2004 01T No. 0005

IN THE MATTER OF a complaint filed by
Gerard Coady on January 16, 2003 pursuant
to Section 36 of the Royal Newfoundland
Constabulary Act, 1992.

BETWEEN:

GERARD COADY APPLICANT

AND:

THE ROYAL NEWFOUNDLAND
CONSTABULARY PUBLIC
COMPLAINTS COMMISSION FIRST RESPONDENT

AND:

ROBERT BRADBURY SECOND RESPONDENT

AND:

GEORGE CARTER THIRD RESPONDENT

AND:

SHAWN O'REILLY FOURTH RESPONDENT

AND:

PATRICK ROCHE FIFTH RESPONDENT

Before: The Honourable Justice David B. Orsborn

Place of hearing:

St. John's, Newfoundland and Labrador

Appearances:

Gerard Coady

On his own behalf

Kenneth W. Jerrett

Counsel for the Royal Newfoundland
Constabulary Complaints Commission

Blair Rogers

Counsel for Constables Carter,
O'Reilly, Bradbury and Roche

Authorities Cited:

CASES CONSIDERED: Newfoundland and Labrador (Royal Newfoundland Constabulary Public Complaints Commissioner) v. Oates, 2003 NLCA 40; Newfoundland (Royal Newfoundland Constabulary) v. Newfoundland (Royal Newfoundland Constabulary Public Complaints Commissioner), 2002 N.J. No. 203 (T.D.) (Q.L.); Martin v. Royal Newfoundland Constabulary Public Complaints Commission, 2004 NLSCTD 129; Gosse v. Royal Newfoundland Constabulary Public Complaints Commission, 2004 NLSCTD 121; Royal Newfoundland Constabulary Public Complaints Commission v. McGrath, 2002 NLCA 74; Newfoundland and Labrador (Minister of Justice) v. Critch, 2007 NLCA 10; R. v. Sheppard, 2002 SCC 26

STATUTES CONSIDERED: *Royal Newfoundland Constabulary Act*, S.N.L. 1992, c. R-17; *Royal Newfoundland Constabulary Public Complaints Regulations*, Consolidated Newfoundland and Labrador Reg. 970/96

DECISION OF ORSBORN, J.

Appeal of Decision of Public Complaints Commissioner under the
Royal Newfoundland Constabulary Act

INTRODUCTION AND ISSUE

[1] This is an appeal from a decision of a commissioner under the *Royal Newfoundland Constabulary Act*¹ dismissing a public complaint alleging police misconduct on the part of three police constables.

¹ S.N.L. 1992, c. R-17 (the “Act”)

[2] The appeal is brought as of right under the *Act*. The issue is whether, applying the appropriate standard of review, the commissioner erred in dismissing the complaint against the three constables.

BACKGROUND

[3] In January 2003, Gerard Coady complained of the conduct of three police officers.²

[4] Briefly, the complaint against Constable Robert Bradbury arose out of his investigation and charging of Mr. Coady with sexual assault on one Wilbur Whalen, a charge of which Coady was acquitted in June 2002. The complaints against Constables Shawn O'Reilly and George Carter arose out of comments allegedly directed at Coady by one or other of the constables while Coady was in the area of the sauna and showers of the YMCA and while Constables O'Reilly and Carter were there – off duty - acting as volunteers in the fitness programs.

[5] The complaint against Constable Bradbury is that, during his investigation of and subsequent arrest of Mr. Coady he:

- (1) took hearsay evidence from Constable Patrick Roche;
- (2) upgraded the charge to sexual assault from sexual touching;
- (3) attached a non-association condition to Coady's release following arrest; and

² The initial complaint included a fourth officer – Constable Patrick Roche. However, Coady did not appeal to the commissioner the dismissal of his complaint against Constable Roche and it is therefore not necessary to deal with that part of the complaint which concerns Constable Roche.

- (4) did not advise interested persons in the fitness facilities when Coady was eventually acquitted.

[6] In general, Coady asserts that Bradbury's investigation was motivated and influenced by homophobic considerations.

[7] With respect to Constables Carter and O'Reilly, Coady alleges that the following incidents took place in the fitness facility:

- (1) On April 8, 2001, while Coady was sitting in the sauna, he heard a high-pitched voice saying "yoohoo, yoohoo, Gerry". He said that this voice was either that of Constable Carter or Constable O'Reilly and that shortly after he heard the voice, he saw Constable Carter smirk and wink at him.
- (2) On December 4, 2001, Constable O'Reilly jumped out of the shower close to Coady and said "ha ha".
- (3) On October 19, 2002, Constable Carter was overheard in conversation with a fitness centre employee saying "I see Mr. Coady is back in circulation".
- (4) On November 16, 2002, Coady heard, while at the fitness facility, either Constable O'Reilly or Constable Carter say in a high-pitched voice "Gerry Gerry".

Mr. Coady's complaint is that this conduct represented harassment because of his sexual orientation.

[8] Mr. Coady lodged a complaint under the *Act* and, as required by the *Act*, the complaint was forwarded to the Chief of Police. The Chief dismissed the complaint. Coady then appealed to the statutory Public Complaints Commission. In December 2003, the Commission dismissed Coady's appeal. The commissioner

concluded that she lacked the jurisdiction to consider the complaint against Constables O'Reilly and Carter because the conduct complained of did not take place in the course of their acting as police officers. In other words, it was not police conduct, but conduct of a volunteer member of the YMCA. But she went on to consider the appeal as if she had jurisdiction and found that the complaint should not be referred to adjudication as there was no conduct that would warrant disciplinary sanction. She went on to consider the complaint about Constable Bradbury's conduct and again found nothing that would warrant an adjudication.

[9] The dismissal meant that the complaint would not proceed to a formal adjudication under the *Act*.

[10] Coady has now appealed the decision of the commissioner pursuant to subs. 36(1) of the *Act*.

THE ISSUES

[11] As stated above, the broad issue in this appeal is whether the commissioner committed reversible error in dismissing the complaints against all three constables. Mr. Coady represented himself on the appeal. He is not legally trained and professes no knowledge of administrative law. It therefore seems to me that I have some responsibility to see that the relevant issues are identified and addressed.

[12] I would put the issues this way:

- (1) Applying the appropriate standard of review, did the commissioner err in concluding that she did not have the jurisdiction to consider the complaint against Constables Carter and O'Reilly because the complaint concerned off-duty conduct? The answer is yes.

- (2) Did the commissioner err in concluding that, in any event, the appeal concerning Constables O'Reilly and Carter should be dismissed? In my view, and in the circumstances of the case before her, the commissioner provided insufficient reasons for the substantive but hypothetical dismissal of the complaint. The complaint warrants reconsideration.

- (3) Applying the appropriate standard of review, did the commissioner err in concluding that there was no reason to warrant referring the complaint against Constable Bradbury to adjudication? The answer is no.

THE COMMISSIONER'S DECISION

[13] It is helpful to set out the commissioner's decision in full:

Your appeal to the Royal Newfoundland Constabulary Public Complaints Commission of Chief Richard Deering's dismissal of your complaints against Constable R. Bradbury, Constable G. Carter and Constable S. O'Reilly has been investigated pursuant to Section 26(2) of *the Royal Newfoundland Constabulary Act, 1992* and is before me, as Commissioner, for decision under Section 28 of the *Act*.

I have reviewed the complaints and investigation and identified several issues for consideration.

Concerning your complaints against Csts. Carter and O'Reilly, I note that these officers were not acting as police officers when they engaged in the behaviour of which you accuse them. Rather, your complaint alleges that Csts. Carter and O'Reilly engaged in conduct that is unbecoming of police officers, but does not relate to the carrying out of their police duties.

The *Royal Newfoundland Constabulary Act, 1992*, and *Regulations* provide a mechanism for such complaints to be dealt with by the police department. Recent decisions from the Supreme Court of Newfoundland and Labrador, Court of Appeal, determined that the RNC Public Complaints Commission is to handle

complaints about police action or the exercise of police powers. It consequently appears to me that the Public Complaints Commission is not the appropriate body to entertain the complaints of discrimination you made against Cst. Bradbury and Cst. O'Reilly. Therefore, I do not have jurisdiction to entertain these complaints.

In the event that I had jurisdiction to entertain these complaints, I must advise you that I fail to see how the comments you allege the officers made would substantiate a case against them that would result in discipline under the aforesaid *Act*.

Accordingly, I am confirming the decision of Chief Deering dated April 29, 2003 and dismissing your appeal in relation to these matters.

I now turn to your appeal of Chief Deering's dismissal of your complaint against Cst. Bradbury. There is no question of jurisdiction with this complaint as it relates to a criminal investigation Cst. Bradbury carried out in the course of his duties as a member of the Royal Newfoundland Constabulary.

I have reviewed the investigative report and note you were released on your own Recognizance with conditions after you were charged. The investigation demonstrates that there were reasonable and probable grounds for the charge of assault to have been laid.

However, there appears to be an incorrect procedure used by Cst. Bradbury, in that you ought not have been released on a Recognizance; rather you ought to have been given an Appearance Notice to appear on the charge against you, or been issued a Summons to Appear by the Provincial Court. I have made inquiries into the procedure that was used by Cst. Bradbury, and I have learned that there is some confusion surrounding the circumstances in which a Recognizance should be issued to an accused person. I am satisfied in your case, given the charge of sexual assault against you, that you ought to have been given an Appearance Notice or Summons to Appear, and not released on a Recognizance with conditions by Cst. Bradbury. However, I am equally satisfied that the use of the procedure in your case was routine and not in any way related to you in particular.

Accordingly, I am making recommendations to the Chief of Police and the Minister of Justice pursuant to Section 19(3) of the *Royal Newfoundland Constabulary Act, 1992* that the Royal Newfoundland Constabulary take immediate steps to rectify any existing confusion about the use of recognizances when a charge contrary to Section 271 of the *Criminal Code of Canada* is laid against an individual.

In the result, your appeal of Chief Deering's dismissal of your complaint against Cst. Bradbury is dismissed. However, please be assured that the above action is being taken to correct the use of this inappropriate procedure.

In conclusion, I further advise that you may seek leave to appeal my decision by way of application to the Trial Division of the Supreme Court of Newfoundland and Labrador pursuant to Section 36 of the *Royal Newfoundland Constabulary Act, 1992* within 15 days of your receipt of this correspondence.

STATUTORY PROVISIONS

[14] The relevant provisions are ss. 18 – 36 of the *Act*. The following are of particular relevance:

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

- (a) with the agreement of all parties, settle the matter;
- (b) dismiss the complaint; or
- (c) discipline the police officer who is the subject of 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. (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.

27. (1) For the purpose of the investigation of a complaint, the commissioner or an investigator may, if he or she has reasonable grounds to believe that it is necessary to do so, and, after informing the chief, enter, without a warrant, premises or property owned or occupied by the constabulary and examine there books of account, records, documents, work, material and other things related to the investigation and the persons in those premises shall

- (a) answer all questions concerning those matters put to them; and
- (b) produce for inspection books of account, records, documents, work, material and other things related to that investigation

for the commissioner or investigator.

(2) Where the commissioner or an investigator believes on reasonable grounds that there is in a place anything that there are reasonable grounds to

believe will provide evidence with respect to a complaint, the commissioner or an investigator may, with a warrant issued under subsection (3), at a reasonable time enter a building or a place and may investigate, inquire into, examine and copy books of account, records, documents, work, material and other things relating to that investigation.

(3) Where a Provincial Court judge is satisfied by information upon oath or affirmation that there are reasonable grounds for believing that there is in a building or a place anything that there are reasonable grounds to believe will provide evidence with respect to a complaint, he or she may issue a warrant authorizing the commissioner or the investigator to enter and search that building or place and to make those inquiries and copies of books of account, records, documents, work, material and other things that are necessary, subject to those conditions that may be specified in the warrant.

(4) The owner or person in charge of the building or place referred to in this section and persons found there shall give the commissioner or investigator named in the warrant reasonable help to enable that person to carry out his or her duties and functions under this section and shall provide the information the commissioner or investigator may reasonably require.

(5) A person shall not conceal or destroy documents or things relating to an investigation by the chief or the commissioner under this Part.

...

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

- (a) that the decision appealed from be confirmed;
- (b) that the police officer who is the subject of the complaint

- (i) comply with standards of police service prescribed in the regulations,
- (ii) enter a rehabilitative or further training program which the adjudicator considers necessary,
- (iii) be reinstated with or without a reprimand,
- (iv) where he or she is not a commissioned officer, not be considered for promotion for a time period of up to 3 years,
- (v) where he or she is not a commissioned officer, be demoted permanently or for a specified period,
- (vi) where he or she is not a commissioned officer, be suspended with or without a salary for a specified period of time, and
- (vii) where he or she is not a commissioned officer, be dismissed from his or her position with the constabulary;

...

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(6), 28(1) or of the adjudicator under section 33 by way of application to 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.

[15] The code of conduct to which police officers are subject, and the breach of which may lead to discipline, is set out – at least in part – in the *Royal Newfoundland Constabulary Public Complaints Regulations*³.

3. (1) A police officer shall not conduct himself or herself in a manner unbecoming to a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary, which shall include but not be limited to the following:

- (a) without good and sufficient cause make an arrest or detain a person;
- (b) use unnecessary force with a prisoner or other person contacted in the execution of duty;
- (c) be discourteous to a member of the public;
- (d) neglect or omit to promptly and diligently perform his or her duties as a police officer;
- (e) fail to record or report promptly a complaint made to him or her;
- (f) without proper authority, disclose, directly or indirectly to a person, information which he or she has acquired as a police officer;
- (g) attempt to commit, aid, abet, counsel or procure another police officer to contravene these regulations;
- (h) improperly use his or her character and position as a police officer for private advantage;
- (i) obstruct a police officer or investigator either in the course of an investigation or in the carrying out of that person's duties under an Act;

³ Consolidated Newfoundland and Labrador Reg. 970/96.

- (j) carry out his or her duties in a manner contrary to the Policy and Procedures Manual;
- (k) wilfully or negligently make a false, misleading or inaccurate oral or written statement or entry in an official document or record, or otherwise pertaining to official duties;
- (l) without lawful excuse destroy, mutilate or conceal an official document or record, or alter, erase or add to an entry in that document;
- (m) place himself or herself under pecuniary or other obligation to a person in a manner that might affect the proper performance of his or her duties as a member of the Royal Newfoundland Constabulary;
- (n) report for duty or be on duty while unfit for duty as a result of impairment by alcohol or a drug; or
- (o) conduct himself or herself in a manner contrary to the Act.

(2) A police officer who violates the provisions of subsection (1) commits a breach of these regulations and is liable to the penalties set out in section 33 of the Act.

[16] I note that the enumeration is illustrative only. The general description of conduct which may warrant discipline is conduct “unbecoming to a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary ...”.

[17] As required by the *Act*, the commissioner caused an investigation to be conducted. On behalf of the Commission, William MacDonald conducted a detailed and comprehensive investigation. He obtained and reviewed the previous internal review conducted by the Royal Newfoundland Constabulary; he obtained statements from Coady and from seven personnel employed by or associated with the fitness facility. Constables O’Reilly and Carter declined the opportunity to give statements to the investigator; however the investigator had access to statements the two constables had provided during the internal review by the police force.

[18] The investigator's description of the issue and his assessment, as set out in his report to the commissioner:

ISSUES DISCUSSION

(1) Did Constable R.J. Bradbury have reasonable and probable grounds to lay a criminal charge for sexual assault against the Appellant?

A review of the evidence available to Constable R.J. Bradbury at the time revealed that sufficient grounds did exist for the laying of the criminal charge against the Appellant. The decision made by Constable Bradbury was confirmed by Mr. James Maher, Senior Crown Attorney, reference his letter, dated September 26, 2003, to the Commission's Investigator. No evidence was uncovered to cause any suspicion that Constable Bradbury conducted his investigation in any manner other than is done in similar cases involving persons with a sexual orientation different from the Appellant.

(2) Did Constables George Carter and Shawn O'Reilly discriminate against the Appellant because of his sexual orientation?

The available evidence determined that it is possible that Constable Carter or Constable O'Reilly did say the words as described by the Appellant during the incidents #1 and #4. But, the evidence may not be seen as sufficient to establish the required degree of proof as to which person, if either, did call out to the Appellant. It is not reasonably certain either that the voice tone which was used by the person(s) during these two incidents would be seen as mimicking a homosexual as opposed to calling out to let the Appellant know that people were aware of his improper behaviour pattern.

The incidents #2 and #3, as described by the Appellant, do not establish any evidence of harassment because of the Appellant's sexual orientation. These incidents tend to substantiate the view that some YMCA members, including the named members, were demonstrating to the Appellant that they believed in the validity of the complaints being made about the Appellant's conduct in the sauna and shower area of the facility.

Thus with respect to the complaint against Constable Bradbury, the investigator's assessment was that there was nothing improper in the investigation and charging of Mr. Coady. With respect to the complaints against Constables Carter and O'Reilly, the investigator concluded that it was possible that the incidents may

have happened in the manner described by Mr. Coady, but that they did not establish any evidence of harassment.

[19] I note that in discussing the complaint against Constables Carter and O'Reilly, the investigator framed the issue quite narrowly. That is, he posed the question whether the officers' conduct was discriminatory because of sexual orientation rather than whether or not the alleged conduct could be considered conduct unbecoming a police officer or was otherwise deserving of discipline.

[20] However, this narrow focus is understandable given the wording of Mr. Coady's formal complaint. The complaint clearly focuses on sexual harassment and alleged homophobic incidents.

[21] What is the commissioner required to decide when considering an appeal from the Chief's dismissal of a complaint? This has received little discussion in the authorities.

[22] Under subs. 28(1) of the *Act* the commissioner is to determine if the decision of the Chief is "properly made". This is not further defined.

[23] The commissioner cannot overrule the Chief's decision; the commissioner has no authority to impose or remove discipline. Absent settlement of the appeal, the commissioner has two options only – she can confirm the Chief's decision by dismissing the complaint or, if satisfied that the Chief's decision was not properly made, she can refer the matter to a full public adjudication.

[24] The commissioner does not perform an adjudicative role as such; her role is to conduct her own investigation and, based on that investigation, to assess whether

the Chief's decision was properly made. As described by Roberts J.A. in **R.N.C. v. Oates**⁴ the Public Complaints Commission performs a public rather than a private function. The complaints process provides an avenue for the expression of dissatisfaction with the conduct of police officers; while discipline may flow from a complaint, the primary objective remains the provision of a vehicle for the expression of dissatisfaction rather than the imposition of discipline.

[25] The phrase “properly made” used in subs. 28(1) – as opposed to “correct” or “in error” or “sustainable” – suggests that the role of the commissioner is to assess how or the manner in which the Chief reached the decision under appeal. But it must be acknowledged that the *Act* requires the commissioner to conduct her own investigation – this suggests some level of inquiry into the merits of the complaint.

[26] Bearing in mind the statutory mandate of the commissioner, the public rather than the private nature of her function, and the lack of authority in the commissioner to impose or revoke discipline, I would describe her role as that of screening complaints before triggering the comprehensive adversarial and potentially prejudicial - in terms of imposing sanctions – adjudication process.

[27] In this context, I consider that in determining whether a decision of the Chief is “properly made”, the question for the commissioner is this:- based on the investigation by the commissioner, and on the other information available to the commissioner, and in all of the circumstances, does the decision by the Chief (to impose discipline or to dismiss the complaint) and/or the process by which such decision was reached, exhibit such deficiency or deficiencies that it is in the public interest to refer the complaint to adjudication?

⁴ **Newfoundland and Labrador (Royal Newfoundland Constabulary Public Complaints Commissioner) v. Oates**, 2003 NLCA 40.

[28] In the case of Mr. Coady's complaint, the commissioner made four determinations:

- (1) That she did not have the jurisdiction to entertain the complaint with respect to Constables Carter and O'Reilly since it was with respect to alleged conduct while they were not acting as police officers but rather as private citizens;
- (2) That even if she did have the jurisdiction to hear the appeal, and if the conduct did happen as alleged, the conduct was not such as would result in discipline, and accordingly an adjudication was not warranted;
- (3) That with respect to the complaint regarding Constable Bradbury's investigation and charging of Mr. Coady, there was no basis for the consideration of discipline, and
- (4) That with respect to the non-association condition in Mr. Coady's recognizance there was a procedural error, but the error was not uncommon and was in no way related to Mr. Coady in particular.

ANALYSIS

[29] What is the standard of review by this Court of the commissioner's determinations?

[30] I do not propose to review in detail all of the relevant standard of review factors. These have been comprehensively reviewed by Mercer J. (now J.A.) in **Maloney**⁵ and by Hall J. in **Martin**⁶. For present purposes I am content to

⁵ **Newfoundland (Royal Newfoundland Constabulary) v. Newfoundland (Royal Newfoundland Constabulary Public Complaints Commissioner)**, 2002 N.J. No. 203 (T.D.) (Q.L.).

conclude that the standard of review on the issue of jurisdiction – the first determination of the commissioner – is correctness, and on the other three determinations reasonableness.

[31] Turning to the commissioner's determination of a lack of jurisdiction because the alleged conduct was off-duty conduct, here the commissioner was in error. I need do no more than refer to the decision of Goulding J. in **Gosse v. Royal Newfoundland Constabulary Public Complaints Commission**⁷. I concur with Goulding J.'s analysis and conclusions and refer in particular to paragraph 23:

The Commissioner found that Ms. Gosse's complaint related to conduct that did not involve any exercise of police powers or a particular police action. I am not satisfied that this is a requirement under the legislation. Based on the wording of the *Act* and the regulations, the conduct complained of must be conduct unbecoming of an officer and liable to bring discredit upon the RNC. Under Section 3(1)(c) & (h) of the *Royal Newfoundland Constabulary Public Complaints Regulations*, that conduct would include a police officer being discourteous to a member of the public or improperly using his position as a police officer for private advantage. ...

[32] I appreciate that the decision in **Gosse** was written after the commissioner's decision of December 9, 2003. However, the commissioner refers to appellate decisions which determine that the role of the Commission is to handle complaints about police action or the exercise of police powers. I presume the commissioner was referring to **Royal Newfoundland Constabulary v. McGrath**⁸. The

⁶ **Martin v. Royal Newfoundland Constabulary Public Complaints Commission**, 2004 NLSCTD 129.

⁷ 2004 NLSCTD 121.

⁸ **Royal Newfoundland Constabulary Public Complaints Commission v. McGrath**, 2002 NLCA 74.

comments in **McGrath** by Roberts J.A. – at paragraphs 38 and 39 in particular – concerning the objective of the public complaints scheme were in the context of determining whether or not certain procedural provisions in the *Act* and *Regulations* were procedural or directory. I do not read anything in **McGrath** as standing for the proposition that off-duty conduct by a police officer could in no circumstances be the subject of a public complaint and merit sanction. This is not to say, of course, that the fact that conduct is off-duty may not be a relevant factor in evaluating such conduct.

[33] Applying a standard of correctness, and following the decision in **Gosse**, I find that the commissioner erred in concluding that she had no jurisdiction to entertain the appeal concerning the off-duty conduct of Constables Carter and O'Reilly.

[34] Notwithstanding her finding of lack of jurisdiction, the commissioner went on to consider the complaint against Constables O'Reilly and Carter as if she had jurisdiction. I repeat her short conclusion:

I must advise you that I fail to see how the comments you allege the officers made would substantiate a case against them that would result in discipline under the *Act*.

Detailed reasons are not given. But I note on the point the comments of Hall J. in **Martin** at paragraph 42:

... I am not satisfied that the Commissioner has a duty to provide detailed reasons under s. 28(1) of the **Act** as to why he or she has dismissed a complaint and confirmed the decision of the Chief of Police. The purpose of the **Act** is to provide a reasonable level of public civilian oversight of the activities of police officers. It is not to vest in citizens rights to civil remedies arising from the investigation of the Commissioner. The function is purely a public one designed to promote the public good. This public good is achieved by police officers being aware that the execution of their duties as police officers is subject to a complaints and review process. By and large the public good will be served by this enhanced awareness on the part of police officers. Indeed discipline may result from a

completion of the process. However, the process does not take away causes of action or rights on the part of private citizens to remedies as against police officers.

[35] The issue of sufficiency of reasons does not appear to have been a significant consideration in **Martin**. In **Newfoundland and Labrador (Minister of Justice) v. Critch**⁹ the Court of Appeal discusses sufficiency of reasons in an administrative law context. At paragraphs 18–19:

... Failure to provide adequate reasons is an error of law. As Mercer J.A. wrote in **Diamond Estate et al. v. Robbins** (2006), 253 Nfld. & P.E.I.R. 16 at para. 102:

The requirement to give adequate reasons was not disputed. As observed in **R. v. Sheppard (C.)**, [2002] 1 S.C.R. 869; 284 N.R. 342; 211 Nfld. & P.E.I.R. 50; 633 A.P.R. 50, at para. 15 “Trial courts, where the essential findings of facts and drawing of inferences are done, can only be held properly to account if the reasons for their adjudication are transparent and accessible to the public and to the appellate courts.” As observed therein the challenge is not to extol the values of giving reasons but to identify those situations where deficiencies in the trial reasons warrant appellate intervention. It can be stated as a general proposition that if the alleged deficiency in the reasons does not preclude meaningful appellate review, of both errors of law and palpable and overriding errors of fact, such deficiency would not warrant appellate intervention. **Sheppard**, paras. 21–26. Those statements made in the context of a criminal appeal apply equally to civil appeals. **Morrison v. Morrison**, [2005] A.J. No. 149; 2005 ABCA 72; **Cabot v. Mikkelson** (2004), 187 Man.R. (2d) 104; 330 W.A.C. 204; 242 D.L.R. (4th) 279; 2004 MBCA 107 (C.A.).

While **Sheppard** is a criminal case, **Diamond Estate** is an example of where the requirement to give adequate reasons has been applied in a civil case. For examples of where **Sheppard** has been applied in administrative law cases see **Espino v. Canada (Minister of Citizenship and Immigration)**, [2006] F.C.J. No. 1578, 2006 FC 1255, para. 11; and **Ladouceur v. Canada (Attorney General)**, [2006] N.J. No. 1817, 2006 FC 1438, para. 22.

⁹ 2007 NLCA 10.

[36] **Critch**, and the decisions referred to in the above passage, were in the context of an adjudicative body making a decision directly affecting the rights of individuals.

[37] A commissioner considering an appeal under the public complaints process under consideration here is not performing an adjudicative role as such. No individual rights are directly at stake; in particular, no ‘legal’ right of a public complainant is ever at risk in the process. Those whose rights may be at risk – police officers – are at risk from the decision of the Chief of Police and from any decision of an adjudicator. Thus the commissioner cannot be directly compared to a board of inquiry under human rights legislation (**Critch**). But should a commissioner be required to give reasons for dismissing a complaint of a member of the public? If so, against what standard should the sufficiency of those reasons be assessed?

[38] In **R. v. Sheppard**¹⁰, Binnie J. said this at paragraph 24:

In my opinion, the requirement of reasons is tied to their purpose and the purpose varies with the context. At the trial level, the reasons justify and explain the result. The losing party knows why he or she has lost. Informed consideration can be given to grounds for appeal. Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be.

[39] The statutory right to appeal a commissioner’s decision (s. 36) would appear to be a complete answer to whether reasons should be provided at all. In **Martin**, Hall J. concurred that “detailed” reasons were not required, not that no reasons at all were needed.

¹⁰ 2002 SCC 26

[40] What of sufficiency? The right of appeal suggests that the reasons be sufficient to allow meaningful appellate review of the decision and the reasoning process behind it. On a broader level, the reasons should be sufficient to allow the objective reader to determine whether or not justice has been done – in this context, to determine whether or not it was reasonable to refer or not to refer the complaint to a full public adjudication. Specifically, the reasons – particularly for dismissing a public complaint – must be sufficient to allow the objective reader to have confidence in the system of civilian oversight of the police force. It seems to me that this latter consideration suggests that if one is to err, the error should be on the side of more comprehensive rather than more summary reasons. The establishment of the civilian oversight structure confirms the importance that the legislature has attached to public confidence in those performing the policing function. The police perform an indispensable role in a society governed by the rule of law; but absent public confidence in the police force and its members, the public’s respect for and cooperation with the police will be adversely affected and the system of law enforcement on which we all rely will be weakened. Reasons for dismissing a public complaint without a hearing should be sufficient to allow the objective reader to conclude that the civilian oversight process is functioning as intended - to assure the public that police officers conduct themselves in accordance with the prescribed code of conduct.

[41] I repeat what the commissioner said:

‘In the event that I had jurisdiction to entertain these complaints, I must advise you that I fail to see how the comments you allege the officers made would substantiate a case against them that would result in discipline under the aforesaid *Act*.’

[42] The commissioner’s reasons were given as an alternative – ‘if I am wrong’ – basis for dismissing the complaint against Constables Carter and O’Reilly; she had already concluded that she did not have the jurisdiction to entertain the appeal. But I have concluded that the commissioner erred in finding that she did not have the jurisdiction to entertain the appeal. Thus her ‘alternative’ reasons stand as the only basis upon which the appeal was dismissed. Are the reasons sufficient?

[43] In my view, and in the particular circumstances of this case, the reasons are not sufficient. I note:

- (i) The individual comments allegedly made by the officers are not identified – the investigator was satisfied that they could have been made as alleged – and there is no reference to the non-verbal conduct of winking and smirking. Neither is there any reference to the manner of conduct that might reasonably be expected of off-duty police officers and whether, for example, the conduct alleged might represent “discourtesy to a member of the public” (reg. 3(1)(c)) or otherwise bring discredit upon the police force.
- (ii) The offered reasons focus on the potential for discipline. Without knowing what the commissioner intended by the reference to discipline, it may be that the focus on discipline is too narrow. Under s. 33 of the *Act*, an adjudicator has the authority to order that the officer in question “comply with standards of police service prescribed in the Regulations”. (par. 33(1)(b)(i)) This may or may not be considered discipline.
- (iii) Although the commissioner’s reasons refer to conduct warranting discipline, the Investigator’s Report on which she relied for her determination focused on whether or not the alleged conduct constituted sexual harassment. This is a narrower focus than “conduct unbecoming”; the brevity of the reasons allows the inference that the commissioner was placing considerable reliance on the conclusions of the investigator rather than on a full and considered analysis of the impugned conduct in the context of the more general “conduct unbecoming”.
- (iv) When one compares the reasons for dismissal of the Bradbury complaint, the greater level of detail in those reasons suggests a more comprehensive analysis of the circumstances than that afforded to the Carter/O’Reilly complaint.

[44] Overall, the reasons for dismissing the complaint against Constables O'Reilly and Carter do not address the question of whether, in the public interest, the complaint should be referred to a full adjudication. No doubt the brevity of the reasons may be accounted for, at least in part, by the fact that the complaint had already been dismissed on jurisdictional grounds. But that decision was in error, and Gerard Coady is entitled to have his complaint considered substantively by the commissioner.

[45] The reasons given are insufficient to assure the objective reader, armed with a statutory right of appeal, that the substantive issues raised by the complaint have been fully considered and that civilian oversight of the police force is functioning effectively.

[46] With respect to the complaint against Constable Bradbury, the commissioner found no reason to refer the complaint to adjudication. I have previously reproduced the comprehensive reasons of the commissioner on this aspect of the appeal. The commissioner relied on the investigator's finding, based on correspondence from Crown counsel – that there were reasonable and probable grounds to lay the charge of sexual assault against Mr. Coady.

[47] I would note the following points, not mentioned by the commissioner. Mr. Coady complained that Constable Bradbury upgraded the charge from sexual touching to one of sexual assault. As the investigator pointed out, the sexual touching charge in Section 151 of the **Criminal Code** is limited to complainants under 14. Here, the complainant was 16; the only charge that could reasonably be laid was sexual assault.

[48] Mr. Coady also complained that, in the course of his investigation, Constable Bradbury solicited hearsay evidence from Constable Patrick Roche. Mr. Coady viewed this as some kind of harassment by either or both of Constables Bradbury and Roche. This complaint lacks merit. Both constables were doing exactly what would be expected of them.

[49] Mr. Coady asserted that Constable Bradbury failed to tell personnel at the YMCA, the Aquarena and the MUN pool that he had been acquitted of the charge of sexual assault on June 19, 2002. There is no obligation on a police officer to do any such thing; it is not expected as part of professional police conduct.

[50] The commissioner did agree that when Constable Bradbury released Mr. Coady after his arrest, the constable used an inappropriate procedure and obtained a non-association condition of release that was not properly imposed. The commissioner found that this was a not uncommon procedural error and while it warranted attention by the authorities, it did not warrant triggering the adjudicative process in respect of Constable Bradbury as an individual police officer. Specifically, the commissioner found that Constable Bradbury's conduct was in no way motivated by any personal feelings toward Mr. Coady. In my view, the commissioner's decision with respect to the complaint against Constable Bradbury was not unreasonable.

[51] In conclusion I would point out that with respect to the complaint against Constable Patrick Roche, this complaint was considered time-barred by the Chief of Police and by the previous commissioner. No appeal was taken by Mr. Coady to the commissioner in respect of his complaint against Constable Roche and accordingly the commissioner conducted no investigation of and made no determination regarding the conduct of Constable Roche. Constable Roche should not have been named as a party to this proceeding.

[52] It was not raised in the notice of appeal and accordingly it has not been necessary in this decision to express any opinion on issues of natural justice and, specifically, on whether or not a public complainant is entitled to receive and comment on the investigator's report before the commissioner may dismiss the appeal of the complainant.

CONCLUSION

[53] The commissioner's decision on jurisdiction with respect to the complaints against Constables Carter and O'Reilly was incorrect. Notwithstanding her decision on jurisdiction, the commissioner went on to give a conclusion on this complaint. In my view, and for the reasons I have outlined, her substantive reasons for dismissing the complaint against Constables Carter and O'Reilly were insufficient.

[54] Accordingly, the appeal of the commissioner's dismissal of the complaint against Constables Carter and O'Reilly is allowed and her decision is set aside. This aspect of Mr. Coady's complaint is remitted to the commissioner for reconsideration. I do not consider that the commissioner who heard Mr. Coady's appeal should be precluded from reconsidering his appeal, particularly in light of the fact that her initial decision was based primarily on jurisdictional grounds. There is nothing to suggest that the commissioner would be anything other than impartial and independent in revisiting the issue.

[55] The commissioner's decision to dismiss Mr. Coady's appeal of the Chief's dismissal of his complaint against Constable Bradbury was not unreasonable.

[56] There being divided success on this matter, each party will bear their own costs.

DAVID B. ORSBORN
Justice