

IN THE MATTER of a public
Complaint of D.B., Z.B., and K.B.
Against Constable S.S. made under the
Royal Newfoundland Constabulary Act 1992

Chief of the Royal Newfoundland Constabulary

APPLICANT

AND

Constable S.S.

FIRST RESPONDENT

AND

**Royal Newfoundland Constabulary Public
Complaints Commissioner**

SECOND RESPONDENT

Procedural Decision
Preliminary Application for Standing by the Chief of the Royal Newfoundland Constabulary

Hearing Date: May 10, 2023

Decision Date: June 13, 2023

For the Applicant: Wendy Zdebiak

For the First Respondent: Jerome Kennedy, K.C.

For the Second Respondent: James Strickland

Adjudicator: John Whelan Q.Arb., Chief Adjudicator RNCPC

PROCEDURAL HISTORY

1. On or about July 2, 2019 then Commissioner John Rorke referred the Complaint of D.B., Z.B., and K.B. (“the Complaint”) to then Chief Adjudicator Gregory A. French. The Complaint(s)¹ filed involved several officers and was being heard as a single proceeding. As part of that proceeding, Adjudicator Wadden heard several preliminary matters. Adjudicator Wadden filed a Preliminary Decision on an Application for Dismissal on or about 6 March 2020. Adjudicator Wadden filed a Preliminary Decision on Standing for the Chief of Police on or about 18 October 2020. Finally, Adjudicator Wadden filed a Preliminary Decision removing Mr. Kennedy as Counsel for Constable SS on or about 6 November 2020. A Request for consideration of the 6 November 2020 decision was denied by Adjudicator Wadden on or about 2 December 2020.

2. Judicial review was sought on the Decision on Removal of Counsel and Denial of Reconsideration filed by Adjudicator Wadden. Justice Marshall ruled that the decisions were unreasonable; set aside the decisions; and remitted the matter back for further consideration in accordance with the decision.²

3. On January 4, 2023 Adjudicator Wadden was appointed to the Newfoundland & Labrador Provincial Court. Consequently, he is no longer capable of discharging the duties of an Adjudicator under the *Royal Newfoundland Constabulary Act, 1992*³ (the *Act*) or the *Royal Newfoundland Constabulary Public Complaints Regulations* (the *Regulations*).

4. On February 27, 2023 the undersigned advised the Parties that given the absence of statutory direction, or procedural convention, I would not be bound by prior decisions of Adjudicator Wadden and that the July 2, 2019 referral would be treated as though it were a new referral to the Chief Adjudicator.

5. Accordingly, on or about March 14, 2023, the Applicant herein applied for standing pursuant to Section 30(1)(e) of the *Royal Newfoundland Constabulary Act, 1992* (“the *Act*”).

POSITION & ARGUMENTS OF THE APPLICANT

6. The Applicant submits that the Chief of the RNC should be granted standing per s.30(1)(e) of the *Act*.

7. The Applicant submitted that a principled approach to statutory interpretation should be applied when considering whether the Chief may apply under s.30(1)(e) for standing. The Applicant relied on the Supreme Court of Canada’s articulation of statutory interpretation found in *Rizzo Shoes*⁴ in support

¹ Note: while there are multiple Complainants and multiple elements of their individual Complaints, I will refer herein to a single “Complaint” for convenience as the individual complaints were consolidated into a single referral.

² See *Simmons v. Royal Newfoundland Constabulary Public Complaints Commission*, 2022 NLSC 27 (CanLII) at para 151.

³ SNL1992 c. R-17

⁴ Below at Note 6.

of its position. Simply stated, s.30(1)(e) allows for “a person” with “substantial interest” to be granted party standing. The Applicant submits that a principled interpretation of s.30(1)(e) would grant the Chief the right to seek standing.

8. In support of the position that the Chief has a “substantial interest” in the proceeding, the Applicant noted that the responsibilities of the Chief are engaged by the Complaint. The Applicant stated that the role of the Chief of the RNC is created by s.4(1) of the Act. Further, the responsibilities of the Chief are found a s.6(1)(a)-(m) of the Act. Specifically, the Act requires that the Chief shall:

(a) establish and determine within the constabulary the rank of each police officer other than commissioned officers;

(b) recruit and appoint police officers to the constabulary;

(c) after the end of each calendar year file with the minister an annual report on the affairs of the constabulary;

(d) establish and enforce rules respecting policies and procedures for the effective management and control of the constabulary;

(e) monitor the constabulary to ensure that adequate and effective police service is provided in the province;

(f) monitor the constabulary to ensure that police officers and other constabulary employees comply with required standards of service and discipline;

(g) administer discipline in accordance with this Act;

(h) develop and promote programs to enhance professional police practices, standards and training;

(i) conduct a system of inspection and review of the constabulary;

(j) assist in the co-ordination of police services in the province;

(k) develop, maintain and manage programs and statistical records and conduct research studies in respect of police services and related matters;

(l) issue orders, directives, rules and guidelines respecting policy and matters relating to the constabulary, police services, police officers and other constabulary employees; and

(m) develop and promote programs for community oriented police services.⁵

⁵ Supra, at note 2, s.(6)(1)(a)-(m)

9. The Applicant submits that the particulars of the Complaint engaged many areas that are the statutory responsibility of the Chief. Consequently, the Chief would have a substantial interest in any hearing involving these matters since it would likely impact the Chief in some fashion.

10. Additionally, the Applicant submits that the potential media attention to the Complaint and the proceedings creates a substantial interest for the Chief. The Applicant provided examples of media coverage regarding prior proceedings related to the same incident. The Applicant argued that as the Chief would be required to respond to media requests related to the proceedings, it was important that the Chief have party status to ensure that the proceedings had all relevant and available information so that the coverage would be properly informed. The Applicant suggested that public perception of the RNC was a live issue given potential media coverage, and that the coverage and potential impact of the public's perception of the RNC gave rise to a substantial interest in the proceeding for the Chief.

11. Further, the Applicant submits that my ability to make recommendations under s.35 of the *Act* creates a substantial interest for the Chief. Specifically, the Applicant submits that I may recommend that impact operational policies or procedures. As the Chief is ultimately responsible for the consideration and/or enactment of any recommendations, the Applicant submits that the Chief has a substantial interest in the information that would be before me prior to making any recommendations. The Applicant argued that granting party status to the Chief would assist me in the determination of any recommendations that I may choose to make.

12. The Applicant stated that the word "substantial" is not defined in the *Act* and that it would be helpful to consider common usage of the phrase. The Applicant provided the definition of "substantial" as found in both the *Miriam Webster Dictionary*, *Black's Law Dictionary*, and the *Canadian Abridgement of Words and Phrases*.

13. The Applicant submitted that I should consider the analysis of Justice Handrigan in *Royal Newfoundland Constabulary, Chief of Police v. Royal Newfoundland Constabulary Public Complaints Commission*⁶ [*Maloney*]. The Applicant stated that in *Maloney*, Handrigan J. stated that the ability of the Adjudicator to make recommendations under s.35 of the *Act* could entitle the Chief to party status, but may not accord them the full right of participation enjoyed by other participants.⁷

14. The Applicant submitted that the Chief is not seeking participation in order to assist the Second Respondent in discharging its onus. Rather, the Applicant stated that the Chief is seeking party status in order to ensure that any global matters relevant to the RNC are properly canvassed in the proceeding.

15. The Applicant also submitted a number of cases involving either Coroner Inquest party decisions or judicial reviews of Coroner Inquest party decisions. While these decisions were helpful in canvassing the issue of "substantial interest" it is not necessary to discuss them in detail.

⁶ 2001 CarswellNfld 161 (NLTD), hereinafter *Maloney*.

⁷ *Ibid.*, at para 36.

16. Finally, the Applicant stated that the issue of party status for the Chief had been addressed by Adjudicator Wadden (as he was then) during an earlier iteration of the Complaint at issue. The Applicant noted that Adjudicator Wadden granted a limited right of participation for the Chief in a similar preliminary application. The Applicant noted that while the decision of Adjudicator Wadden was not binding on this proceeding, that I should consider it as persuasive when evaluating whether the Chief has satisfied the “substantial interest” requirement of s.30(1)(e).

POSITION & ARGUMENTS OF THE FIRST RESPONDENT

17. The First Respondent submits that:

- i. The Chief is barred from applying for party status per s.30(1)(e) of the Act;
- ii. Alternatively, that the Chief does not satisfy the requirements for “substantial interest” in the proceeding; and,
- iii. The risk of prejudice to the First Respondent is sufficient that I should exercise my discretion to prohibit the Chief from participating in the proceeding.

18. The First Respondent submitted that because the Chief is an identified party in s.30(1)(d) of the *Act*, I should interpret that s.30(1)(d) read in conjunction with s.30(1)(e) demonstrates an intent to exclude the Chief as a participant in a proceeding where a decision of the Chief is not under appeal. The First Respondent submitted a decision of Hon. David Orsborn dealing with disciplinary proceedings of the RNC and whether they were subject to the open court principle.⁸ The decision accords with the application of the modern approach to statutory interpretation.

19. The First Respondent submitted that the prior Chief of the RNC acted in a manner that should be considered as adversarial towards the Respondent. The First Respondent stated that the RNC may have encouraged the Complainants to file with the RNCPC; treated the First Respondent in a callous manner; and was not supportive of the First Respondent during the initial Complaint process.

20. The First Respondent submitted that it was a fiction that the involvement of the Chief would add to the perception of fairness or transparency given the adversarial stance of the prior Chief.

21. The First Respondent stated that the primary purpose of the proceeding is to ensure that the Respondent officer is provided a fair hearing. The First Respondent submitted that the implications of public perception or media attention are secondary to the principle of fairness and natural justice that must be at the forefront of the hearing.

22. The First Respondent also submitted that if I were to make recommendations under s.35, that I could grant standing to the Applicant at that time. Essentially, that it was not necessary for the Applicant to have standing unless s.35 was directly engaged.

⁸ I note that this decision dealt with a procedural issue for an unrelated adjudicative tribunal. While I agree with the First Respondent that the decision contains sound analysis, its applicability in this instance is nominal.

23. The First Respondent also stated that it was not necessary to grant standing to the Applicant in order to ensure fairness and transparency in the proceeding. Further, that standing was not necessary to ensure that relevant and necessary materials were available for the hearing. The First Respondent stated that if materials were required, that I could use my powers under the *Act* to compel production when or where required.

24. In the alternative, the First Respondent submitted that if I do conclude that the Chief may apply under s.30(1)(d) of the *Act* and that the Chief has satisfied that “substantial interest” requirement then standing should be granted on a restricted basis similar to that granted by Adjudicator Wadden.

POSITION OF THE SECOND RESPONDENT

25. The Second Respondent has taken no position on the merits of the Application. The Second Respondent stated that based on the referral, if standing was granted to the Applicant, it would have to be granted under s.30(1)(e) of the *Act*.

ANALYSIS

26. This application centres on two key issues:

- i. Is the Chief of the RNC permitted to apply for standing under s.30(1)(e) of the *Act*?
- ii. If the Chief of the RNC is permitted to apply for standing under s.30(1)(e), has the Chief established a “substantial interest” in this Complaint?

SECTION 30(1)(e) ROYAL NEWFOUNDLAND CONSTABULARY ACT

27. Section 30 of the *Act* states:

30. (1) The parties to a proceeding before an adjudicator are

(a) the commissioner, who shall have the carriage of the matter;

(b) the complainant;

(c) the police officer who is the subject of the complaint;

(d) the chief, in the case of an appeal by the police officer who is the subject of the complaint; and

(e) a person who satisfies the adjudicator that he or she has a substantial interest in the complaint.⁹

28. The Applicant has taken the position that the language of s.30(1)(e) enables the Chief to apply for standing. The First Respondent has taken the position that the inclusion of the Chief in s.30(1)(d) serves to exclude the Chief from applying for standing under s.30(1)(e).

29. It is trite law to state that statutes in the Province should be interpreted in accordance with the *Interpretation Act*¹⁰ and the modern approach to statutory interpretation noted by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd., Re.*¹¹

30. Section 16 of the *Interpretation Act* states:

*16. Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation, or provision according to its true meaning.*¹²

31. The Court in *Rizzo Shoes* stated that statutory interpretation cannot be based solely on the words of the statute but rather that the interpretation approach requires that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”¹³

32. The Applicant has stated that absent an explicit exclusion of the Chief from s.30(1)(e), I should adopt a liberal approach to my interpretation of the Act and find that the Application is not statute barred. The First Respondent has ably argued, with reliance on cogent analysis from an unrelated decision, that the Chief’s participation was contemplated by s.30(1)(d) of the Act, and that I should interpret that as legislative intent to limit the Chief’s involvement to matters where their decision is under appeal.

33. I find that an ordinary reading of s.30(1)(e), combined with the purpose, object, and intent of the relevant portions of the Act and Regulations, does not lead to a provision that would exclude the Chief of the RNC from applying for party status under s.30(1)(e). The public nature of the proceedings suggests that the words “a person” in s.30(1)(e) should not be interpreted in a manner that would serve to exclude individuals from seeking standing.

34. While they are not statute barred from applying for party status, the Chief must still establish that they have a “substantial interest in the complaint.

⁹ See Note 2, at s.30(1).

¹⁰ RSNL 1990 c. I-19.

¹¹ [1998] 1 S.C.R. 27 [*Rizzo Shoes*].

¹² See Note 5 at s.16.

¹³ See *Rizzo Shoes* at para. 21.

DOES A SUBSTANTIAL INTEREST EXIST?

35. The Applicant submitted, *inter alia*, that given the potential for public scrutiny of the RNC related to the circumstances of the Complaint and the possibility that I would make recommendations in relation to RNC policies or procedures, the Chief of the RNC has a substantial interest in the hearing. The First Respondent submitted that granting party status to the Applicant was unnecessary and created an undue risk that the Applicant would take an adversarial position during the hearing.

36. The Complaint alleges that the First Respondent

- i. Detained two Complainants without sufficient cause;
- ii. Used unnecessary force;
- iii. Was discourteous to a third Complainant;
- iv. Attempted to aid, abet, counsel or procure another police officer to contravene [the Regulations];
- v. Carried out his duties in a manner contrary to the Policy and Procedures Manual; and
- vi. Reported for, or was on duty, while unfit as a result of impairment by alcohol or a drug.

37. Findings in relation to (i), (ii), (iv), and (v) of the above particulars are likely to have an impact upon the Applicant. While the scope and scale of the impact is not yet determined, the potential for impact is readily apparent. I may make factual findings that could have a significant bearing on the RNCs use of force doctrine, de-escalation strategies, or material portions of its Policy & Procedures Manual.

38. The First Respondent has submitted that I could grant standing to the Applicant at some later date prior to my findings or recommendations that may flow from such findings. While I appreciate the perspective of the First Respondent, from a practical or logistical standpoint I question the utility of granting standing at some future date to be determined. Either the Applicant has or does not have, a substantial interest.

39. Handrigan J. in *Royal Newfoundland Constabulary Chief of Police v. Royal Newfoundland Constabulary Public Complaints Commissioner*,¹⁴ dealt with an application by a former RNC Chief to quash an evidentiary decision made by an Adjudicator. Justice Handrigan noted, at para 36, that “recommendations would certainly be of interest to the Chief of Police” but that those recommendations are “ancillary to and not the predominant purpose of the legislation. It might support the Applicant having party status, but it does not accord him the full right of participation that is enjoyed by the other participants.”¹⁵

¹⁴ 2001 CarswellNfld 161, [2001] N.J. No. 161

¹⁵ *Ibid.*, at para 36.

40. I find, in this instance, given the nature of the complaint and the potential for material public scrutiny and potential recommendations that may flow from my findings that the substantial interest requirement has been satisfied.

41. However, I do find that the First Respondent's concerns regarding a fair and just proceeding are warranted. As with any party, there is a risk that the Chief would approach the proceeding with their own interests at the forefront of their mind. In this instance, the First Respondent is concerned that their interests would be adverse to the interests of the Chief. Undoubtedly, there would be other scenarios where the Second Respondent may be concerned about the Chief's interests being adverse to their own. Clearly, the granting of party status comes with attendant risk that the participation will take the shape of something other than the interest in the global functioning of the RNC.

42. Accordingly, while there is no statutory provision explicitly allowing for limited party status under s.30(1) of the *Act*, I will be exercising my discretion to limit the participation of the Applicant to topics and matters that are of a general interest to the RNC and not to the specifics of the Complaint.

ORDER

43. The Applicant will be granted status as a Party to the Complaint per s.30(1)(e) of the *Act*. The right of participation by the Chief will be restricted to matters of general interest to the RNC. The Chief will not be allowed to call evidence without the consent of the First and Second Respondent and my determination that the evidence is relevant. As per the representations of counsel, the participation of the Chief shall be limited to his roles and responsibilities as found in s.6(1) of the *Act*.

44. Further, the Applicant will be responsible for their own costs for their participation in the hearing.

Dated this 13th day of June, 2023.



John R. Whelan, Q. Arb.

Chief Adjudicator