

**IN THE MATTER** of a public  
Complaint of A.A.  
Against Staff Sgt T.B. (Ret.) made under the  
*Royal Newfoundland Constabulary Act 1992*

**T.B.**

**APPLICANT**

**AND**

**Royal Newfoundland Constabulary Public  
Complaints Commissioner**

**RESPONDENT**

**AND**

**Chief of the Royal Newfoundland  
Constabulary**

**THIRD PARTY**

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**Preliminary Objection**

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**Hearing Dates:** June 6, 2024

**Decision Date:** August 1, 2024

**For the Applicant:** Bernard M. Coffey K.C

**For the Respondent:** James Strickland

**For the Chief of the RNC:** Erin Matthews

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

## **PROCEDURAL HISTORY**

1. On January 13, 2023, Complaint #17-34936 and Complaint #17-18798 were referred to the Chief Adjudicator for a hearing by Acting Commissioner Augustine Bruce.

2. Complaint #17-34936 involves the circumstances surrounding the allegedly unlawful detention of the Complainant on or about 7 April 2015 and subsequent statements made by the Applicant following the detention. I will refer to this Complaint as the “Detention Complaint.”

3. Complaint #17-18798 involves an allegation that the Applicant conducted himself in a manner unbecoming to a police officer. To differentiate it from the Detention Complaint, I will refer to this Complaint generally as the “Testimony Complaint.”

4. A prior Preliminary Decision granted Third Party Status to the Chief of the Royal Newfoundland Constabulary (RNC).

5. On or about 2 November 2023, the Applicant herein applied for an order under s.23 of the Royal Newfoundland Constabulary Public Complaints Regulations seeking that I either strike the reference in its entirety, amend the reference in accordance with the Applicant’s arguments, and/or order other such relief that I may deem just or appropriate. Unless necessary to refer to a specific relief requested, I will refer to this application generally as an Application to Strike.

## **ISSUES RAISED IN THE APPLICATION**

6. The Applicant has raised many potential issues in their Application to Strike. These issues include apprehension of bias concerns against the RNC and the Royal Newfoundland Constabulary Public Complaints Commission (RNCPC); abuse of process concerns regarding both the RNC investigation of the allegation and the RNCPC investigation of the allegation; abuse of process concerns regarding procedural delay; res judicata concerns regarding a prior decision of former RNCPC Commissioner Rorke; and the argument that the Complaint was received contrary to the statutory time limit of six months.

7. For the reasons that follow, I find that the abuse of process allegations are premature and will not be considered at this time. Further, I find that I have no jurisdiction to hear the Detention Complaint (#17-34936) because the Complaint was submitted beyond the statutory limitation period.

8. Complaint #17-18798 was filed within the appropriate time period and will proceed to a hearing.

### **AGREED FACTS**

9. The following facts are accepted by all parties to the Application:
- i. On April 7, 2015, the Complainant was detained by officers of the RNC under the *Mental Health Care and Treatment Act* (SNL 2006 c. M-9.1). The detention was allegedly initiated in response to certain tweets made by the Complainant in relation to the fatal officer involved shooting of Donald Dunphy
  - ii. RNC officers brought the Complainant to the local hospital where he was detained by the Western Health Care Corporation for a period of six days and subjected to psychiatric assessment
  - iii. The Complainant was not certified as suffering from any psychiatric condition and was not charged with any criminal offence
  - iv. On April 9, 2015, the Complainant filed a writ of *habeas corpus* in relation to his detention by the Western Health Care Corporation. The Complainant did not name the RNC as a party to the application
  - v. The Complainant was released from hospital on April 13, 2015
  - vi. The Complainant filed an unrelated complaint against an RNC officer in May of 2015
  - vii. The Complainant's initial application for *habeas corpus* was denied for lack of jurisdiction by the NLSC
  - viii. Between January 2017 and March 2017, the Commission of Inquiry Respecting the Death of Donald Dunphy held public hearings. During those hearings documentary evidence and oral testimony were observed by the Complainant who was watching the proceedings
  - ix. The Complainant filed Complaint 17-18798, the Testimony Complaint, on March 23, 2017
  - x. On March 28, 2017, the Complainant filed an initial complaint against the Applicant alleging he was unlawfully detained. While no written decision was provided by then Commissioner Rorke to the Complainant, the issue of lapsed timelines was communicated to the Complainant by staff of the RNCPC and RNC
  - xi. On April 13, 2017, the NLCA overturned the decision of the NLSC and referred the application for *habeas corpus* to a fresh hearing<sup>1</sup>

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<sup>1</sup> See *Abbass v. Western Health Care Corp.*, 2017 NLCA 24

- xii. The Complainant filed Complaint 17-34936, the Detention Complaint, on May 16, 2017, essentially renewing the complaint that was filed on March 28, 2017
- xiii. The writ was ultimately granted by Furey J. of the NLSC<sup>2</sup> on April 27, 2018
- xiv. On October 22, 2022, Acting Commissioner Augustine Bruce issued a decision letter to the Complainant stating that certain allegations would not be referred to the Chief Adjudicator while the Testimony Complaint and the Detention Complaint would be referred onward for consideration.

### **EVIDENCE OF THE COMPLAINANT**

10. The Complainant was called by the Commission to provide evidence regarding his personal circumstances between April of 2015 and May of 2017. The Applicant objected to the testimony of the Complainant in this instance. The Applicant argued that I should restrict my assessment to the evidence that would have been known by the Acting Commissioner at the time of their referral. The testimony of the Complaint was admitted with the weight of the testimony to be determined.
11. The Complainant stated that the April 2015 detention had a significant impact on his life. He stated that the following his release from hospital, his family was subjected to a child protection investigation by the Department of Children, Seniors and Social Development (CSSD) which resulted in a removal and kinship placement.
12. The Complainant stated that as a result of the detention, he faced a period of significant hardship that he believed was a direct result of his April 2015 detention.
13. The Complainant stated that he did not want to submit a complaint against the officers who initially detained him because he believed that they were just following orders and that he empathized with them because his own brother was a police officer.
14. The Complainant stated that he did file a complaint against another officer in May of 2015 because of a physical altercation he had with that officer at the Corner Brook Courthouse. The Complainant stated that he went to his local RNC office and filed a complainant because he believed that he had been mistreated.
15. The Complainant stated that only upon learning about the text messaging from the Applicant to another officer during the Dunphy Inquiry did he believe that he had the basis to file a complaint with the RNCPC.

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<sup>2</sup> See *Abbass v. Western Health Care Corporation*, 2018 NLSC 96

16. The Complainant stated that it was his understanding that he would have had to have known the identify of an officer to complain about a specific officer.
17. The Complainant stated that it was his belief that his detention on April 7, 2015, was politically motivated and intended to silence him from critiquing the provincial government on Twitter (as it was then) for its handling of the issues surrounding the fatal shooting of Donald Dunphy.

### **STATUTORY FRAMEWORK**

18. My authority is derived from Part III of the *Royal Newfoundland Constabulary Act, 1992* (SNL 1992 c. R-17). The relevant portions of the Act are:

*22. (1) A person, other than a police officer and a person employed in the constabulary, may file a complaint concerning*

*(a) the conduct of a police officer; or*

*(b) the operational policies or procedures of the constabulary which govern the manner in which a police officer discharges his or her duties*

*where the person making the complaint has been directly affected by that conduct or those policies or procedures.*<sup>3</sup>

...

*(6) A complaint made under subsection (1) shall be made within 6 months after*

*(a) the alleged misconduct occurs; or*

*(b) the date the policy or procedure complained of affected the complainant.*

*(7) Notwithstanding subsection (6), where a complaint made under subsection (1)*

*(a) concerns a case of continuing misconduct by an officer, a complaint shall be made within 6 months after the last incidence of the alleged misconduct; or*

*(b) concerns a case where the policies or procedures of the constabulary are directly affecting the complainant in a continuous manner, a complaint shall be made within 6 months after the last date the policy or procedure complained of affected the complainant.*

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<sup>3</sup> *Royal Newfoundland Constabulary Act, 1992*, (SNL 1992 c. R-17) at s.22(1).

(8) Notwithstanding subsections (6) and (7), the 6 month time limit referred to in those subsections shall not begin to run against a complainant until he or she knows or, considering all circumstance of the matter, ought to know that he or she has a right of complaint concerning the conduct of a police officer or the policies or procedures of the constabulary and the burden of proving a postponement of the running of time under this subsection is upon the complainant claiming the benefit of that postponement.

(9) Where the postponement of filing a complaint is claimed under subsection (8), the matter of that postponement shall be referred to the commissioner who shall determine whether or not the complaint may be filed.<sup>4</sup>

...

(11) Where a police officer against whom a complaint has been made resigns or retires from the constabulary before the completion of an investigation or hearing under this Part, the complaint may be dealt with under this Part as if that police officer had not resigned or retired.<sup>5</sup>

**22.1** Where the commissioner is satisfied that the subject matter of a public complaint is frivolous or vexatious, occurred more than 6 months after facts on which it is based occurred, that the complainant was not directly affected by the policy or procedure that is the subject of the complaint or the complaint does not fall within the scope of section 22, the commissioner

(a) shall decline to take further action on the complaint and shall, in writing, inform the complainant, the police officer against whom the complaint has been made, where the complaint was made under paragraph 22(1)(a), and the chief of his or her reasons for declining to take further action; or<sup>6</sup>

...

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.<sup>7</sup>

19. Further to the Act, the *Royal Newfoundland Constabulary Public Complaints Regulations*,<sup>8</sup> state

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<sup>4</sup> *Ibid.*, at s.22(6)-(9).

<sup>5</sup> *Ibid.*, at s.22(11).

<sup>6</sup> *Ibid.*, at s.22.1

<sup>7</sup> *Ibid.*, at s.31.

<sup>8</sup> *Royal Newfoundland Constabulary Public Complaints Regulations* under the *Royal Newfoundland Constabulary Act, 1992* (O.C. 96-245)

23. (1) At the commencement of the hearing the adjudicator shall determine whether there are objections and where an objection relates to the reference, the adjudicator shall have the power to amend the reference and the proceeding may be adjourned to enable the police officer sufficient time to prepare his or her answer to the amended reference.<sup>9</sup>

### **ABUSE OF PROCESS ARGUMENTS & AVAILABILITY OF STAY**

20. As noted above, the Applicant has raised several concerns in relation to abuse of process allegations and has argued that I should conclude that the appropriate remedy in this instance would be to strike the reference in its entirety.

21. The Supreme Court of Canada recently considered the application of abuse of process for administrative hearings in *Law Society of Saskatchewan v. Abrametz*.<sup>10</sup> The *Abrametz* decision considered an application for stay of proceedings in administrative hearings, specifically inordinate delay in the Law Society of Saskatchewan's disciplinary process.

22. While *Abrametz* dealt with a disciplinary process involving the Law Society of Saskatchewan, I find that RNCPC Adjudications are a similar type of administrative hearing. Further, while the Applicant has technically requested that I amend the reference using my authority under s.23(1) of the *Royal Newfoundland Constabulary Public Complaints Commission Regulations*, I find that the practical effect of granting the Application would be to essentially grant a stay. Consequently, I find the reasoning in *Abrametz* applicable in the instant case.

23. Further, while *Abrametz* dealt exclusively with the prejudicial effect of delay, I find that the analysis is applicable to other grounds for abuse of process raised by the Applicant in this instance.

24. In *Abrametz*, Rowe J., writing for the majority, noted that "[in] administrative proceedings, abuse of process is a question of procedural fairness."<sup>11</sup>

25. Rowe J., noted that

[83] *A stay of proceedings is the ultimate remedy for abuse of process. It is "ultimate" because it is "final"; the process will be permanently stayed: Regan, at para. 53. In*

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<sup>9</sup> *Ibid.*, at s. 23(1).

<sup>10</sup> 2022 SCC 29 (*Abrametz*).

<sup>11</sup> *Ibid.*, at para 38.

*disciplinary matters, that means that charges will not be dealt with, any complaint will go unheard and the public will not be protected. Given these consequences, a stay should be granted only in the “clearest of cases”, when the abuse falls at the high end of the spectrum of seriousness: Blencoe, at para. 120, citing Power, at p. 616.*

*[84] The decision whether to grant a stay involves a balancing of public interests. On one hand, the public has an interest in ensuring that a tribunal established for its protection follows fair procedures, untainted by an abuse of process. On the other hand, the public has an interest in the resolution of administrative cases on the merits. A balance must be struck between the public interest in a fair administrative process untainted by abuse and the competing public interest in having the complaint decided on its merits: Blencoe, at paras. 118-21 and 154; Conway, at p. 1667; Robertson v. British Columbia (Commissioner, Teachers Act), 2014 BCCA 331, 64 B.C.L.R. (5th) 258, at paras. 78-80; Diaz-Rodriguez, at paras. 71-73; Law Society of Upper Canada v. Abbott, 2017 ONCA 525, 139 O.R. (3d) 290, at paras. 61-63 (leave to appeal refused, [2018] 1 S.C.R. v).*

*[85] When faced with a proceeding that has resulted in abuse, the court or tribunal must ask itself: would going ahead with the proceeding result in more harm to the public interest than if the proceedings were permanently halted? If the answer is yes, then a stay of proceeding should be ordered. Otherwise, the application for a stay should be dismissed. In conducting this inquiry, the court or tribunal may have regard to whether other available remedies for abuse of process, short of a stay, would adequately protect the public’s interest in the proper administration of justice.*

*[86] A stay will be more difficult to obtain where the charges are more serious. For example, in Diaz-Rodriguez, a police officer faced disciplinary proceedings because he used a police baton to repeatedly strike a young man on the head. He also attempted, after the fact, to lay (apparently) unfounded charges, including assaulting a police officer; being intoxicated in a public place; and causing a disturbance: para. 72. The Court of Appeal concluded that in this context, the public interest in fairness in the administrative process did not outweigh the public interest in having the matter proceed to a resolution on its merits: para. 73 (see also: Robertson, at paras. 79-80; R. (J.) v. College of Psychologists (British Columbia) (1995), 33 Admin. L.R. 2(d) 174 (B.C.S.C.), at para. 10). The same was also true in Sazant, in which Dr. Sazant faced allegations of sexual misconduct against children. There was a strong public interest in having the case considered on the merits, despite the length of the delay: para. 248.<sup>12</sup>*

26. In the instant case, I must consider the position of the Applicant versus the purpose of the Public Complaints procedure. Presently, the Applicant is a retired member of the Royal Newfoundland Constabulary. Effectively, he faces no potential disciplinary or financial sanction. The only risk facing the officer in this instance is the potential reputational harm that may be caused to him in the event that I find that the complaint is well founded.

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<sup>12</sup> *Ibid.*, at para 83

Considering that the circumstances leading to both the Testimony Complaint and the Detention Complaint have already been subject to significant media attention I find that there is little additional potential prejudice faced by the officer in this instance.

27. I must balance the interests of the officer against the interests of the Complainant and the interests of the Public. The Complainant has alleged that the officer unlawfully detained him through spurious use of the *Mental Health Care and Treatment Act*. Further, the Complainant alleges that the officer, *inter alia*, perjured himself during the Dunphy Inquiry. These are serious allegations. Bad faith use of involuntary mental health detention powers cuts to the heart of individual liberty. False or misleading testimony by a sworn officer raises serious credibility concerns for judicial institutions as a whole. These are serious allegations and should be weighed accordingly when balancing the interests of the parties, including the public, with the potential prejudicial effect of the alleged procedural abuses by the RNC and the RNCPC.
28. Balancing the interests of the officer versus the complainant and the public, I cannot conclude that it would be appropriate to grant a stay in this instance.
29. If, as alleged by the officer, he was subjected to an unwarranted and biased investigation by the RNC he will be afforded the ability to make such arguments during a hearing on the merits of the complaint. In other words, a procedurally fair hearing will provide him with the opportunity to provide a full answer and defence to the allegations that have been made against him.
30. Based on the foregoing, I cannot conclude that it would be appropriate in this instance to amend the reference through s.23(1) of the *Royal Newfoundland Constabulary Public Complaints Regulations* in the manner sought by the Applicant based on the allegation that the procedure thus far raised concerns regarding abuse of process.

#### **LIMITATIONS ARGUMENTS OF THE APPLICANT**

31. The Applicant argued that the Detention Complaint is time barred by s.22(6) of the *Royal Newfoundland Constabulary Act, 1992*.
32. The Applicant noted that the detention of the Complainant occurred on April 7, 2015, and the filing of Complaint 17-34936 occurred on May 16, 2017. The Applicant observed that the period of time between April 7, 2015, and May 16, 2017, is well beyond the six-month time limit established in s.22(6).

33. The Applicant also argued that s.22(9) states that only the Commissioner can determine whether the criteria in s.22(8) have been met. The Applicant argued that while an Adjudicator can determine whether a reference needs to be amended under s.23(1) of the *Regulations*, that does not allow an Adjudicator to determine whether the Complainant or the Commission have satisfied the conditions of s.22(8) of the *Act*.
34. The Applicant further argued that even if I find that I have the ability to consider criteria established under s.22(8), that the Complainant or Commission have advanced no evidence that would suggest that the necessary criteria established in s.22(8) have been met. The Applicant argued that the burden of demonstrating the appropriateness of an extension has not been met in this instance.
35. The Applicant argued that in order to satisfy the criteria of s.22(8), it is necessary to consider the discoverability of the conduct in question. The Applicant directed me to consider the decision of Commissioner Bruce in another matter (*Sivolap*) wherein Commissioner Bruce addressed the issue of applying the principles of discoverability to s.22(8) of the *Act*.
36. The Applicant argued that the Complainant knew about the ability to lodge a complaint and the procedure to lodge a complaint because he had done so against another RNC officer in May of 2015 for an unrelated matter. Accordingly, the Complainant cannot rely on the argument that he did not know there was a process for filing a complaint.
37. Further, the Applicant argued that it is not possible for the Complainant to argue that he was not aware that the conduct was improper or formed the basis for a potential complaint because he had filed a writ of *habeas corpus* in April of 2015 alleging unlawful detention.
38. Based on the above criteria, the Applicant argued that is not possible for the Complainant to contend either that (i) he was unaware of the complaints process, or (ii) unaware that the alleged conduct could have constituted a complaint.
39. The Applicant also argued that while the Complainant raised the issue of his personal circumstances, those circumstances would not warrant a suspension of timelines under s.15 of the *Limitations Act*.<sup>13</sup> The Complainant was in a difficult personal circumstance but those circumstances did not rise to the level of legal incapacity.

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<sup>13</sup> SNL 1995 c L.-16.1

40. In support of its position, the Applicant referred me to the NLCA decision in *Morgan v. Rogers*<sup>14</sup> and its consideration of s.15 of the *Limitations Act*. In *Morgan*, Hoegg J.A. noted that in order to suspend timelines under s.15 of the *Limitations Act*, an individual must “prove as a result of [their] mental or physical condition [they were] incapable of managing [their] affairs for the period in respect of which [they] seek postponement.”<sup>15</sup>
41. The Applicant stated that an appropriate consideration of the circumstances in this matter would lead to the conclusion that the Detention Complaint was time barred by s.22(6) of the *Act* and that neither the Commission nor the Complainant have raised sufficient evidence to warrant a postponement under s.22(8) of the *Act*.
42. Additionally, the Applicant argued that the language of s.22.1(a) is mandatory rather than directory. The Applicant argued that s.22.1(a) states that the Commissioner “shall” decline to hear the complaint if it, *inter alia*, was filed greater than six months following the events in question.

#### **LIMITATIONS ARGUMENTS OF THE COMMISSION**

43. The Commission argued that discoverability was a key circumstance that should be considered when assessing the criteria of s.22(8). Specifically, the Commission argued that the Complainant did not know who ordered his detention until he was watching the testimony during the Dunphy Inquiry. The Commission argued that the limitation period should only begin running in March or April of 2017 when the Applicant testified.
44. In support of this argument, the Commission stated that the complaint form clearly requires that a complainant include the name of an offending officer when completing the form at either an RNC office or the RNCPC office. The Commission suggested that there is a distinction between executing the order to detain someone and ordering someone to be detained. The Commission argued that the Complainant did not take issue with the method by which he was detained, but rather took issue with the order that he be detained. The Commission suggested that until the Complainant knew the identity of the individual who ordered the detention, the time period did not run against him.
45. The Commission argued, *inter alia*, that the public purpose of the complaints process means that the limitation included in s.22(6) should be applied by s.22.1(a) in a directory rather than a mandatory fashion. In support of this position, the Commission relies upon

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<sup>14</sup> 2011 NLCA 27

<sup>15</sup> *Ibid.*, at para 40.

the Supreme Court of Canada decision in *Blueberry River Indian Band v. Canada (Department of Indian Affairs & Northern Development)*.<sup>16</sup> The Commission argued that it is settled law in Canada that the failure to execute a public duty should not circumvent the intention of the legislature to perform a public function.

46. In support of its position, the Commission also cited the Nova Scotia Supreme Court decision in *O'Brien v. LeRue*, wherein the NSSC considered the failure of the Halifax Regional Police to abide by a timeline. In that case, the NSSC sided with the Review Board, finding that “[these types of cases] emphasize that the complainant has no control over the process or the people who exercise the public duty, but can suffer injustice if the public duty is not discharged.”<sup>17</sup>

47. The Commission also cited the decision of the NLCA in *Royal Newfoundland Constabulary Public Complaints Commissioner v. Oates*,<sup>18</sup> wherein a majority of the Court found that the term “shall” in s.28(2) of the *Royal Newfoundland Constabulary Act* was directory rather than mandatory. In that instance, the Court of Appeal found that to interpret language regarding the assignment of Adjudicators as mandatory would have frustrated the intention of the legislature to have a functional complaints process.

48. The Commission argued that the 2003 *Oates* decision echoed the 2002 NLCA decision in *Royal Newfoundland Constabulary Public Complaints Commission v. McGrath*,<sup>19</sup> wherein Roberts J.A. concluded that “it makes no logical sense to frustrate a scheme put in place by the legislature to allow a citizen a user-friendly police complaint procedure by holding that every stop along the way is mandatory.”<sup>20</sup>

## **ISSUES TO BE CONSIDERED**

49. In order to assess the merits of the Application, I must consider the following:
- i. Do I have the authority to consider circumstances under s.22(8) that would extend the timelines for the submission of a complaint, or is that assessment exclusive to the Commissioner under s.22(9) of the Act?
  - ii. If I have the authority to consider circumstances under s.22(8) of the Act, have either the Commission or the Complainant satisfied their burden to warrant an extension of time?

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<sup>16</sup> [1995] 4 SCR 244

<sup>17</sup> 2022 NSSC 379, at para 29.

<sup>18</sup> 2003 NLCA 40.

<sup>19</sup> 2002 NLCA 74.

<sup>20</sup> *Ibid.*, at para 29.

- iii. If neither the Commission nor the Complainant have satisfied their burden under s.22(8) of the Act, is s.22.1(a) of the Act a mandatory or directory provision?
- iv. If neither the Commission nor the Complainant have satisfied their burden under s.22(8) of the Act and if s.22.1(a) of the Act is a directory provision, should I exercise my discretion under s.23(1) of the *Regulations* to amend the Referral?

#### **AUTHORITY TO CONSIDER S.22(8)**

50. The Applicant has argued that while I have the authority to strike portions of the referral under s.23(1) of the *Regulations*, only the Commissioner has the authority to consider circumstances under s.22(8) of the Act that may warrant an extension of timelines. With respect, I disagree with this conclusion.

51. The Applicant has filed an application seeking an amendment of the referral under s.23(1) of the *Regulations*. That section states, in part, that “the adjudicator shall have the power to amend the reference...”<sup>21</sup> There is no additional restriction or provision that would limit my authority to consider the merits of the application.

52. In order to consider the merits of the Applicant’s argument it is an inherent obligation that I consider the factual matrix upon which those arguments stand. I cannot find in favour of the Applicant without considering the facts. I cannot find against the Applicant without considering the facts.

53. To distill the Applicant’s argument, it is

- i. the Complainant was detained in April of 2015 and filed a complaint in May of 2017
- ii. there are more than six months between April 2015 and May of 2017
- iii. there is no written material from Acting Commissioner Bruce indicating that he considered the time between April 2015 and May 2017 and exercised discretion under s.22(9)
- iv. Because there is no written decision on s.22(9) I should strike the reference pertaining to the detention.

54. Public Complaint hearings are accepted to be *de novo* hearings on the merits of a particular complaint. They require that all evidence be freshly called, assessed by the Adjudicator, and ultimately decided on their merits. I find no statutory restriction on my

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<sup>21</sup> *Supra*, at note 8, at s.23(1).

ability to consider whether or not I have jurisdiction to hear a matter based on a limitations issue.

55. Consequently, I find that the ability to hear an application based on a limitations issue is inherently within the jurisdiction of an Adjudicator under the *Act*. Further, I find that an assessment of the factual matrix of a given case is a necessary component to determining such an application. I find that the Applicant's request that I conclude the Complainant is out of time necessarily includes the ability that I could conclude that the Complainant is within the allowable period of time.

56. I find that the powers inherent in s.23(1) of the *Regulations* enable me to consider whether the Complainant is within the time limits of s.22(6) of the *Act* and whether an extension of time is warranted by the criteria established in s.22(8) of the *Act*.

#### **HAS THE BURDEN UNDER S.22(8) BEEN SATISFIED?**

57. It is clear that the Complainant did not meet the six-month limitation contained within s.22(6) of the *Act*. Therefore, it is necessary to consider whether the criteria established in s.22(8) of the *Act* have been met and an extension of time should be granted in this instance. For the reasons that follow, I have concluded that the burden has not been met in this instance.

58. For ease of reference, I will reproduce the relevant provisions of s.22(8):

*(8) Notwithstanding subsections (6) and (7), the 6 month time limit referred to in those subsections shall not begin to run against a complainant until he or she knows or, considering all circumstance of the matter, ought to know that he or she has a right of complaint concerning the conduct of a police officer or the policies or procedures of the constabulary and the burden of proving a postponement of the running of time under this subsection is upon the complainant claiming the benefit of that postponement.*<sup>22</sup>

**[EMPHASIS ADDED]**

59. It is accepted between the Parties that the Complainant filed a public complaint for an unrelated matter in May of 2015. This establishes that the Complainant knew of the existence of the complaints process, knew that he had a right to complain about officer conduct, and knew the process by which he could exercise that right.

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<sup>22</sup> *Supra*, at note 3, s.22(8).

60. The Commission has attempted to distinguish this earlier complaint by suggesting that because it was against a specific officer, known to the Complainant, regarding a specific instance of conduct by that officer, that the prior complaint is distinguishable from the Detention Complaint made in May of 2017. The Commission argued that because the Complainant did not learn the identity of the Applicant until the Dunphy Inquiry, it was impossible for him to file a complaint.
61. I disagree with this interpretation.
62. The Commission suggested that knowing the identity of the officer is a condition precedent to the filing of a complaint. This assertion does not accord with the legislative intent of the Act. The Act contains multiple provisions for the investigation of a complaint. Further, I cannot conclude that the absence of a name would absolve the responsibility of the RNC or the RNCPC to investigate a complaint of merit.
63. Further, the Complainant's assertion that he took no issue with the detaining officers does not grant him a suspension of time under s.22(6). If the Complainant believed that his detention was unlawful, which he did, then the execution of that unlawful order would constitute a potential complaint under s.22(1)(a) or s.22(1)(b) of the Act. The Complainant may not have wanted to complain about the potential misconduct of the detaining officers, but that does not stop the clock from running on the complaint itself.
64. The Complainant knew or ought to have known that someone ordered the officers to detain him in April of 2015. The Complainant believed that there was no lawful basis for his detention in April of 2015. Consequently, it stands to reason that the Complainant knew or ought to have known that he had the basis for a complaint at the moment of his detention. The personal identity of senior staff is not a necessary precursor for the complaint of RNC conduct.
65. To agree with the Commission's line of argument would create exactly the type of scenario s.22(6) of the *Act* attempts to control. The legislature presumably enacted a time limit for a reason, it may be unnecessarily short and fail to consider modern policing realities, but it is the legislatively enacted limit.
66. The Applicant has argued that even if the May 2015 complaint is discounted, the April 2017 complaint for the detention was also dismissed by then Commissioner Rorke so it

should be implied that the Complainant must have also known that his May 2017 complaint for the detention would also be out of time.

67. I find that the April 2017 complaint is distinguishable because then Commissioner Rorke failed to comply with his statutory duties under s.22.1(a) of the *Act* to inform the Complainant in writing that his complaint was dismissed for failing to fall within the timeframe established by s.22(6). While the Complainant may have been informed by third parties that the detention matter was not included within the April complaint, that did not discharge the then Commissioner from his obligations of procedural fairness. The Complainant was owed reasons, he was not provided those reasons.
68. While the Complainant and the Commission have established the Complainant's internal logic for his reluctance to file a complaint regarding his detention within the s.22(6) timeline, they have not met the burden under s.22(8) to delay the limitation period.

#### **IS s.22(1)(a) MANDATORY OR DIRECTORY**

69. Having determined that neither the Commission nor the Complainant have satisfied their burden under s.22(8) of the *Act*, I must now consider whether the provision of s.22(1)(a), requiring that "the commissioner shall decline to take further action on the complaint" is directory or mandatory.<sup>23</sup>
70. A useful analytical framework for determining whether statutory language should be interpreted as either directory or mandatory is provided by the NLCA in the *Oates*<sup>24</sup> by Roberts J.A. Following a review of the historical approach to interpretation of "shall", Roberts J.A. noted:

*[8] Those rules of interpretation or their variants have been given recent approval by the Supreme Court of Canada, in particular, by Iacobucci J. in British Columbia (Attorney General) v. Canada (Attorney General), 1994 CanLII 81 (SCC), [1994] 2 S.C.R. 41, where he considered "shall" in the context of s. 268(2) of the Railway Act[3]; the appeal arose from an application by Canadian Pacific Railway to close down a section of railway on Vancouver Island. Although approving the statement of Sir Arthur Channell in Normandin quoted above,*

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<sup>23</sup> Recognizing that these decisions serve a public function, I will oversimplify and note that if I find it to be mandatory then the complaint is automatically dismissed for being out of time. If the language is found to be directory, it means that the disposition of the complaint is within my discretion.

<sup>24</sup> Supra at note 18.

*Iacobucci J. said he preferred “to place the greater emphasis on what has become of Normandin in Canadian case law”. He continued, at pp. 122-124:*

*In particular, I think it is relevant to note that in Reference re Manitoba Language Rights, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, this Court commented upon the doctrinal basis of the Normandin distinction. The Court stated (at p. 741):*

*The doctrinal basis of the mandatory/directory distinction is difficult to ascertain. The “serious general inconvenience or injustice of which Sir Arthur Channell speaks in Montreal Street Railway Co. v. Normandin, supra, appears to lie at the root of the distinction as it is applied by the courts.*

*In other words, courts tend to ask, simply: would it be seriously inconvenient to regard the performance of some statutory direction as an imperative?*

*There can be no doubt about the character of the present inquiry. The “mandatory” and “directory” labels themselves offer no magical assistance as one defines the nature of a statutory direction. Rather, the inquiry itself is blatantly result-oriented. In Reference re Manitoba Language Rights, supra, this Court cited R. ex rel. Anderson v. Buchanan (1909), 44 N.S.R. 112 (C.A.), per Russell J., at p. 130, to make the point. It is useful to make it again. Russell J. stated:*

*I do not profess to be able to draw the distinction between what is directory and what is imperative, and I find that I am not alone in suspecting that, under the authorities, a provision may become directory if it is very desirable that compliance with it should not have been omitted, when that same provision would have been held to be imperative if the necessity had not arisen for the opposite ruling.*

*The temptation is very great, where the consequences of holding a statute to be imperative are seriously inconvenient, to strain a point in favor of the contention that it is mere directory ....*

*Thus, the manipulation of mandate and direction is, for the most part, the manipulation of an end and not a means. In this sense, to quote from Reference re Manitoba Language Rights, supra, the principle is “vague and expedient” (p. 742). This means that the court which decides what is mandatory, and what is directory, brings no special tools to bear upon the decision. The decision is*

informed by the usual process of statutory interpretation. But the process perhaps evokes a special concern for “inconvenient” effects, both public and private, which will emanate from the interpretive result.<sup>25</sup>

[Emphasis added [in original]]

71. Commission counsel is correct in that the failure to perform a public duty that frustrates the intention of a legislative scheme will likely lead to the result that statutory language will be interpreted as directory rather than mandatory.
72. Simply stated, the public should not suffer individual consequences when public office holders fail to discharge their public duties in accordance with the statutory scheme.
73. Further, as noted by Roberts J.A.,

[17] *I concluded in McGrath, as McLachlin J. did in Narain where the legislation was comparable, that the duties imposed by Part III of the Act, composed of ss. 22 to 43, are fundamentally public in nature and not focused on the private rights of individual police officers. Specifically, I wrote at para. 39:*

*Part III takes its cue from its title, i.e., PUBLIC COMPLAINTS. It creates the office of Public Complaints Commissioner and provides the procedure by which citizens can express dissatisfaction with a particular police action. Once a complaint is made, a citizen ... is in the hands of others. She or he has no control over those whose duty it is to perform the procedures which Part III and the Complaints Regulations require .... It makes no logical sense to frustrate a scheme put in place by the legislature to allow a citizen a user-friendly police complaint procedure by holding that every step along the way is mandatory. That would only, as McLachlin J. opined in Narain, at p. 198, “frustrate the process of public complaint and inquiry which [Part III of the Act] was concerned to foster”.*<sup>26</sup>

74. It may be worth noting the issues involved with both the *Oates* and *McGrath* decisions of the NLCA. In *Oates*, no Chief Adjudicator had been appointed by the province. The Chief Adjudicator is responsible for the assignment of adjudication references. In the absence of a Chief Adjudicator, the Commissioner essentially conducted a random draw to assign references to adjudicators on the roster. In *McGrath*, the Adjudicator in a matter

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<sup>25</sup> *Ibid.*, at para 8.

<sup>26</sup> *Ibid.*, at para 17.

adjourned a hearing but failed to set a “date certain” for its resumption as required by the Act. Both cases involved legislative non-compliance by public office holders and the non-compliance would have directly impacted the private individuals who had filed complaints.

75. The purpose of the RNCPC, and adjudication hearings held pursuant to the Act, is for the investigation and potentially adjudication of, *inter alia*, alleged police misconduct. Hearings into matters of merit should not be dismissed on what may be publicly perceived as “minor” technicalities.

76. However, this instant case does not turn on the execution of a public duty. A time period in the Act was not missed because a public office holder failed to properly discharge their duty. Rather, this case deals with the private right of an individual to choose whether or not they wish to file a complaint regarding officer conduct or departmental policy. The private right of complaint should not be confused with the public duty to execute statutory authority.

77. The facts of this case are concerning. The Detention Complaint alleges that an individual was detained by the state without cause. Furey J. granted the Complainant’s writ of *habeas corpus* having concluded the same. There is certainly a public interest in determining what factors led the RNC to the Complainant’s door on April 7, 2015.

78. However, regardless of what public interest may be present, my authority is limited by what is contained within the Act.

79. In his dissent in the *Oates* decision, Rowe J.A. (as he was then) considered what he believed to *ultra vires* conduct of the then RNCPC Commissioner. Rowe J.A. noted:

**[40] As a general proposition, the courts should favour a practical result, that is fair to the parties and that is in accord with the purposes of any relevant legislation; by the same token, the courts should not favour results that bar a disposition on the merits and frustrate the purposes of any relevant legislation. (See, for example, Royal Newfoundland Constabulary Public Complaints Commission v. MacGrath (2002) NLCA 74, paragraph 39)**

**[41] Having said this, the courts must not gloss over even a good faith effort to take a step for which there is no legal authority. Is that not what the Commissioner has done here? It seems to me inescapable that it is. That being so, what is the role of this court on the facts of this case? Is it, in effect, to ratify or confirm judicially the Commissioner’s good faith act, which we can see**

*would give rise to a disposition on the merits, without prejudice to the parties, even where this act by the Commissioner goes beyond his authority as set out in the legislation? However desirable from a practical or policy point of view, that cannot be our role. In the absence of constitutional considerations, our role is to interpret and apply the law, and nothing more. The legislature approved a scheme for complaints which required the appointment by the Lieutenant- Governor in Council of a Chief Adjudicator. Here the Lieutenant- Governor in Council failed to appoint a Chief Adjudicator in a timely way. In the absence of a Chief Adjudicator, no complaint could lawfully be referred to (another) adjudicator. That problem is not one that either the Commissioner or this court can properly remedy.<sup>27</sup>*

[Emphasis Added]

80. A hearing on the merits of the Complainant's Detention Complaint would, in my mind, be desirable from both a practical and public policy point of view. However, to allow the Detention Complaint to proceed would require that I bend s.22(6), s.22(8), and s.22.1(a) of the Act beyond what I believe to be a reasonable interpretation and application.
81. This is not an instance where we are considering a situation where a public office holder failed to comply with a statutory timeline. This is an instance where we are considering the failure of a private individual to file a complaint within the legislated timeline and where there is a clear statutory consequence for failing to file.
82. Based on the foregoing, I conclude that a proper interpretation of s.22.1 of the Act requires that I conclude the language to be mandatory rather than directory. The Detention Complaint is time barred.

## **SUMMARY**

83. For the reasons above, I find the following:
  - i. Complaint #17-34936 was filed outside the 6-month time limit established in s.22(6) of the Act
  - ii. Neither the Complainant nor the Commission established that the timeline should be extended under the criteria established by s.22(8) of the Act
  - iii. S.22.1 of the Act requires that a complaint filed beyond 6 months from the event in question must be dismissed unless the timeline is extended under s.22(8)

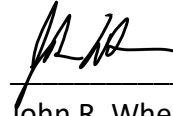
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<sup>27</sup> Oates, supra at note 18, paras 40-41.

**ORDER**

84. By my authority under s.23(1) of the *Royal Newfoundland Constabulary Public Complaints Regulations*, I am amending the Referral to an Adjudicator filed by Acting Commissioner Augustus Bruce on January 13, 2023. The Referral shall be amended to strike any reference to Complaint #17-34936.

85. There is no order as to costs.



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John R. Whelan Q. Arb  
Chief Adjudicator