



Whelan Dispute Resolution

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February 27, 2023

RE: RNC Public Complaints of D.B, Z.B, and K.B.

Respondent: Constable S.S.

I write in connection to the above captioned matter and further to our meeting of February 17, 2023 wherein we discussed procedural matters related to the above noted Complaint(s). As you are aware, the above Complaint(s) had been originally referred to then Chief Adjudicator Gregory A. French on or about July 2, 2019 by then Commissioner John Rorke. The matter was referred by former Chief Adjudicator French to Adjudicator Wadden (as he was then) to hear the matter.

Procedural History

The Complaint(s) 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.

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.¹

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*² (the *Act*) or the *Royal Newfoundland Constabulary Public Complaints Regulations* (the *Regulations*).

While the July 2, 2019 referral has been the subject of multiple preliminary applications, no hearing has been conducted regarding the Complaint(s).

Act & Regulations Silent on Incapacity of an Adjudicator

Sections 29-35 of the *Act* delineate the appointment and powers of adjudicators under the *Act*. Sections 20-31 of the *Regulations* outline procedural requirements and powers for adjudicators at hearings. Neither the *Act* nor the *Regulations* deal with adjudicator incapacity, or the inability of an adjudicator to conclude hearing a matter referred by the chief adjudicator.

The absence of language in the *Act* and *Regulations* must be contrasted with the language that is found in the *Judicature Act*.³ Section 29 of the *Judicature Act* explicitly deals with the matter of judicial incapacity. It states:

*29. (1) Where a judge is absent, ill, or the office has become vacant, or where there is some other cause, and it is urgent to do so, another judge may sit for that judge to hear or dispose of a proceeding heard in part by that judge.*⁴

(2) Evidence that has been heard by a judge before the substitution of that judge under subsection (1) may be used by the judge who sits pursuant to subsection (1).

Ultimately, the July 2, 2019 referral was made pursuant to s.28(2) of the *Act*. That section states:

(2) Following an investigation of a complaint and where the commissioner does not dismiss a complaint and confirm the decision of the chief or deputy chief under

¹ See *Simmons v. Royal Newfoundland Constabulary Public Complaints Commission*, 2022 NLSC 27 (CanLII) at para 151.

² SNL1992 c. R-17

³ RSNL1990 c. J-4

⁴ *Ibid.*, at s.29

subsection (1) and does not effect a settlement under section 26, he or she shall refer the matter to the chief adjudicator of the panel appointed under section 29 who shall conduct a hearing into the matter or refer it to another adjudicator.⁵

In the instant case, a hearing has not been conducted in relation to the subject matter of the Complaint(s). The obligation on the chief adjudicator under s.28(2) has not been fulfilled. Accordingly, I find that I retain jurisdiction to either hear the matter or refer it to another adjudicator. I will conduct the hearing into this matter and it will not be referred to another adjudicator.

Does the matter continue from its past point, or start anew?

As mentioned above, neither the *Act* nor *Regulations* provide clarification around the procedure to be followed in the event that an adjudicator no longer has capacity to conduct a hearing. Further, there are no established procedural rules for the conduct of hearings pursuant to the *Act* or *Regulations*. Finally, there is no suggestion that an established convention, or procedural assumption, exists with respect to this issue. Consequently, I find that the matter rests within my discretion.

Given the complexity of this matter prior to the refusal of reconsideration on 2 December 2020, I do not think that it would be fair to either the Complainants or the Respondent for me to simply assume the matter subsequent to Adjudicator Wadden's preliminary decisions and the decision of Justice Marshall. The matter in relation to Constable SS has not progressed to a point where either party would be materially disadvantaged by fresh preliminary applications in relation to the s.28(2) hearing. Accordingly, I find that I am not bound by any prior preliminary decisions of Adjudicator Wadden in relation to the Complaint of D.B., Z.B., and K.B. against Constable SS. I would state unequivocally that this decision has been made solely to ensure fairness to each of the parties and consistency in the decision making process; it is not a reflection or comment on any decisions made on the matter prior to my involvement.

As discussed during our February 27, 2023 call – a meeting will be held via Zoom on March 15, 2023 at 11am to discuss any preliminary applications that the parties may wish to bring.

Regards,



John Whelan – Chief Adjudicator

⁵ *Supra*, at note 2, at s.28(2).