

**ROYAL NEWFOUNDLAND CONSTABULARY
PUBLIC COMPLAINTS COMMISSION**

IN THE MATTER OF a complaint by Jane Henderson dated 30 April, 2007, pursuant to the **Royal Newfoundland Constabulary Act, 1992**, and the **Royal Newfoundland Constabulary Public Complaints Regulations**,

AND IN THE MATTER OF an Appeal in relation to the said complaint, dated 28 April, 2008.

BETWEEN:

**THE ROYAL NEWFOUNDLAND CONSTABULARY PUBLIC
COMPLAINTS COMMISSIONER**

AND:

CONSTABLE TODD THORNHILL

AND

**THE CHIEF OF POLICE OF THE ROYAL NEWFOUNDLAND
CONSTABULARY, First Intervener**

AND:

**THE ROYAL NEWFOUNDLAND CONSTABULARY
ASSOCIATION, Second Intervener**

DECISION

**J David Eaton Q.C.
Adjudicator**

28 May, 2010

INTRODUCTION

1. What nature or degree of conduct by a police officer while off duty will engage the disciplinary process? Has Cst. Thornhill's conduct in preparing and dealing with his access/custody proceeding crossed that line and thereby justified the disciplinary sanction imposed by the Chief? These are the core issues involved in this appeal. However, other issues arising from how this complaint was handled must be addressed.

THE COMPLAINT

2. In early April, 2007 Ms. Henderson went to the Royal Newfoundland Constabulary (RNC) office to make a complaint. She initially spoke with a police officer at the front desk and was then contacted by a member of the Professional Standards Section ("PSS"). On 13 April, 2007 Jane Henderson attended at the PSS of the RNC, St. John's, and made an allegation of breach of privacy against Cst. Todd Thornhill. On 30 April, the allegation became a public complaint against Cst. Thornhill, the Public Complaints Commission ("PCC") Form 1 was signed by Ms. Henderson and she was provided with PCC Form 2. Cst. Thornhill received written notice of the complaint the next day.

BACKGROUND FACTS

3. Ms. Henderson and Cst. Thornhill had a brief relationship in early 2005. Unbeknownst to either at the time the relationship ended, Ms. Henderson was pregnant. Their son was born on 26 December, 2005. Access, and then custody, proceedings followed.
4. By April, 2007, Cst. Thornhill had obtained access to his son. Initially access was supervised and took place in Ms. Henderson's home where she lived with her parents. As time progressed Cst. Thornhill's access was extended and he was able to take his son for several hours at a time.

5. Cst. Thornhill took hundreds of photographs of his son while exercising his access both at Ms. Henderson's home and away from her home. They included pictures of the inside of the home, pictures of Ms. Henderson's car, pictures of her boyfriend and one picture of prescription medication taken in her home. Cst. Thornhill had permission to take pictures of his son in Ms. Henderson's home. Whether the pictures taken went beyond the scope of that permission is in issue.
6. Shortly before the complaint was made to the RNC in April 2007 a settlement conference was held as part of the custody/access proceedings at the Unified Family Court (UFC). Cst. Thornhill submitted a brief which included a compact disc containing a large number of the pictures he had taken. It was the contents of the brief and the accompanying pictures that caused Ms. Henderson to make her complaint.
7. When making the complaint Ms. Henderson provided a letter dated 27 April, 2007 to Sgt. Barry Constantine (now Acting Inspector Constantine, but referred to throughout this decision as Sgt. Constantine) who was then assigned to the PSS (Consent #2, document #1, Tab 3). In addition, she was asked to provide a detailed statement (which she did by 15 June).

The 2005 Complaint

8. In the letter (27 April) and the statement (15 June) Ms. Henderson made reference to a complaint that she made against Cst. Thornhill in April 2005. In that complaint, Ms. Henderson alleged that Cst. Thornhill had altered her personal information on a dating website known as Lavalife.
9. By way of background, the April, 2005 complaint was made by Ms. Henderson at the "front desk" of RNC headquarters. It was not treated as a public complaint; however, it was investigated as a criminal complaint. It was assigned to Cst. Jim Case who at that time was assigned to Technical Services which investigated computer related crime. It does not appear that an internal investigation was

started to accompany the criminal investigation. (This complaint is referred to hereafter as the "Lavalife complaint" or "Lavalife investigation".)

10. While the Lavalife investigation was on-going, Ms. Henderson went to RNC Headquarters in August, 2005 to make another complaint; this time alleging that she had received a harassing phone call which was left on her voice mail. This became part of the same investigation being conducted by Cst. Case. In both complaints, Ms. Henderson pointed to Cst. Thornhill as the suspect. Admittedly, Ms. Henderson said that she did not recognize the voice of the person who left the message as that of Cst. Thornhill.
11. Cst. Case did not speak to Cst. Thornhill about the Lavalife complaint while investigating that complaint. It was not until after Cst. Case had finished his first investigation, and during the investigation into the harassing phone call, that Cst. Thornhill was advised of the two complaints. Cst. Thornhill did know that Ms. Henderson had made a complaint to the police about the Lavalife incident as Ms. Henderson had told him that she either did or was going to complain, but did not know that he was named as a suspect.
12. Cst. Thornhill denied any involvement with either matter. Cst. Case completed his investigation of both complaints and concluded that there was "no evidence to support" Ms. Henderson's allegations that Cst. Thornhill was responsible for either of the events.
13. It appears that Cst. Thornhill was not happy with the "inconclusive" findings of the investigation and in December, 2005, he requested that Cst. Case's investigation be reviewed. The complaints against Cst. Thornhill seem to have been discussed in evidence at the UFC in the custody/access proceedings and each of Cst. Thornhill and Ms. Henderson made statements about what the investigation determined or what each had been told by Cst. Case. Cst. Thornhill's request for

a review suggested that if the investigation had been more vigorous, it would have fully exonerated him rather than determining that there was no evidence.

14. A review was conducted by Sgt. Ennis (Consent #7). He concluded in March, 2006 that Cst. Case had fully investigated the complaints and had come to a clear and logical resolution.

The 2007 Complaint

15. The April, 2007 complaint was investigated by Sgt. Constantine. On 28 August, 2007 a Notice of Public Complaint Discipline Proceedings ("the Notice") was issued by the Chief of Police. It was served on Cst. Thornhill on 6 September, 2007. The Notice required Cst. Thornhill to appear before the Chief on 26 September, 2007 to answer to the matter.
16. Upon receipt of the Notice Cst. Thornhill spoke with a representative of the RNC Association. From that conversation he concluded that the appearance before the Chief would be brief and would in essence be for a plea only.
17. In early September Ms. Henderson met with the Chief of Police. It is unclear what took place at that meeting, however, it seems that it related to her complaint. There is no suggestion that the Chief disclosed at that time what his intentions were with respect to dealing with her complaint.
18. Before appearing before the Chief, Cst. Thornhill had prepared a lengthy statement in response to the allegations. However, he was not interviewed by Sgt. Constantine or requested to provide a statement. As a result, when the investigation report on the matter went to the Chief, Cst. Thornhill's position was not included. Additionally, Cst. Thornhill had not received a copy of the investigation report and therefore had no idea what was contained in it other than the initial statements from Ms. Henderson that had been provided to him.

19. During the 26 September, 2007 appearance before the Chief, issues were raised by Cst. Thornhill that caused the Chief to request further investigation. Cst. Thornhill testified that he asked which photographs were in issue and was informed that the Chief had not seen the photographs. In addition there was a live issue about what had taken place during the UFC proceedings and a transcript was to be obtained. Cst. Thornhill was advised that when the further information had been obtained, he would be called back before the Chief to provide his complete story for consideration. That did not occur.
20. Within a few minutes after concluding the meeting with the Chief which took about an hour, Cst. Thornhill received a request from Sgt. Constantine to provide a statement. In response he provided the written statement that he had prepared earlier.
21. It is not clear when the additional information was provided to the Chief or how matters moved from the Chief to Deputy Chief Johnston. However, in early April, 2008 Deputy Chief Johnston asked Sgt. Constantine to prepare a letter of reprimand to be issued to Cst. Thornhill. In preparing that letter Sgt. Constantine mistakenly referred to s. 29 of the Collective Agreement rather than s. 25(1)(c) of the **Royal Newfoundland Constabulary Act, 1992** (hereinafter "the Act"). The letter of reprimand was dated 4 April, 2008 and served on Cst. Thornhill. A separate letter dated 7 April, 2008 was sent to Ms. Henderson advising her of the outcome of her complaint.
22. As the letter to Cst. Thornhill was not in the standard format for public complaint matters, it did not advise him of his right to appeal the Chief's decision to the Public Complaints Commission. At best it provided very limited reasons for the decision and at worst reasons were completely lacking. The body of the letter stated as follows:

On April 13, 2007 Ms. Jane Henderson presented at the office of the Royal Newfoundland Constabulary, Professional Standards Section to make a complaint against you. There were several components that formed the basis of her complaint some of which were not a matter of concern or consideration for this section.

On April 30, 2007 Ms. Henderson made a public complaint against you which included her allegations of your actions while at her parents' home. The area of concern for this section was the taking of photographs of that residence without her knowledge or permission and without the knowledge or permission of her parents. It is my opinion that this was an action that constitutes behaviour that is indicative of conduct unbecoming of a member of the Royal Newfoundland Constabulary.

Therefore, under section 29.06(a)(ii) of the Collective Agreement this will serve as a written reprimand for your actions while visiting the residence of Neville and Elsie Henderson with respect to your failure to obtain direct permission to photograph the contents of the house. This letter will be placed on your personnel file. Please be advised that any future behaviour that warrants further discipline shall be applied in a progressive fashion. Should you wish to grieve this matter you can do so under section 30 of the Collective Agreement.

23. The letter to Ms. Henderson was completely lacking of any reasons for the decision. That letter read as follows;

On April 13, 2007, you attended the Royal Newfoundland Constabulary, Professional Standards Section, and made a public complaint against Constable Todd Thornhill, alleging the invasion of privacy by the actions of Cst. Thornhill taking pictures of your parents' home, both inside and out.

This matter was assigned to A/Inspector Barry Constantine for investigation. After thorough review, it was found that your complaint has been substantiated and on April 14, 2008 [sic] Constable Thornhill received a written reprimand from the office of the Chief of Police. The matter is now concluded.

24. On 28 April, 2008 Ms. Henderson appealed the decision to the Commission.
25. In her appeal Ms. Henderson stated that the issues raised by her complaint had not been adequately addressed. She raised the following issues.
- That there was no mention of the pictures taken of her or her family outside her home;
 - That there was no mention of the pictures taken of her prescription medication;

- That the documents that she had requested relating to her earlier complaints (Lavalife and harassing phone call) were not provided;
- That written documentation of her 2007 complaint was not provided as requested;
- That a copy of the letter of reprimand was not provided.

26. Ms. Henderson also raised a new complaint at that time relating to a text message that she had recently received from Cst. Thornhill questioning whether she had the best interests of her son in mind with respect to the access/custody proceedings. This is not properly part of the appeal.

27. The Commissioner was unable to resolve the matter and referred it to the Chief Adjudicator. Around that same time he wrote to Ms. Henderson and set out 6 issues that he thought would have to be resolved as part of the appeal. They are as follows:

- 1) What behaviour constitutes off-duty behaviour?
- 2) Do Cst. Thornhill's actions amount to a breach of privacy?
- 3) Should complaints of criminal behaviour against police officers be treated as public complaints, and should complainants be permitted to withdraw them?
- 4) What constitutes "natural justice" when police officers are required to appear before the Chief of Police, and were the rules of natural justice followed in this case?
- 5) How much material is a complainant entitled to receive about an internal investigation into a complaint? and
- 6) Should the Chief of Police be required to give reasons for his decision to reprimand, and should the reprimand be made public?

28. The 2005 complaints are not in issue on the matter before me. However, considerable time has been spent discussing how they were handled and, in addition, how complaints made by members of the public about police officers are handled generally. That issue will be addressed later.

The Photographs

29. There were approximately 487 photographs taken by Cst. Thornhill or members of his family to record various events occurring during his visits with his son. By Cst. Thornhill's count 78 or 79 of those were taken at the Henderson house during access visits. Cst. Thornhill had requested and received permission to take pictures in the home. He indicated that either Ms. Henderson or one of her family members were present from time to time and would have been present during the taking of most, if not all, of the photos.
30. Of all the photos taken, only one is really in issue; that is the one photo of a prescription medicine bottle. Ms. Henderson testified that she usually kept her prescription medicine in the bathroom; however, she could not say if that was where she kept the particular bottle that was photographed. Cst. Thornhill testified that the bottle was in plain view and he simply picked it up a photographed it. He said that there was no "snooping around" involved. I accept Cst. Thornhill's evidence
31. Cst. Thornhill explained that the he took the photo without knowing whether the prescription belonged to Ms. Henderson or his son. He was having difficulty getting medical information about his son from Ms. Henderson. Also, he had been told that access visits had to be at Ms. Henderson's house as she was unable to express enough milk to allow his son to be bottle-fed away from home. He had suspicions about the truthfulness of that statement and indicated that on one occasion, the independent third party who attended the access visits found Ms. Henderson's mother bottle feeding his son upstairs.

32. All of the photos taken by Cst. Thornhill were put onto a CD and filed with a brief at the Unified Family Court in advance of a settlement conference in early April, 2007. Cst. Thornhill was unrepresented at that time.
33. The access proceedings had become quite acrimonious. Cst Thornhill wanted to document the state of the location where access was taking place and the state of cleanliness of both the premises and his son. As he said, "a picture is worth a thousand words," and he took the pictures instead of talking about it. He believed that the pictures related to issues that the UFC should address.
34. During his evidence before me Cst. Thornhill stated that neither the RNC nor the PCC is a place for personal bitterness arising from a bad personal relationship. That bitterness was observed during Ms. Henderson's evidence.

ISSUES

35. The Reference to the Chief Adjudicator, which was then referred to me to determine, related only to the April 2007 complaint alleging a breach of privacy. The earlier complaints did not form part of the Reference. The primary issue to be decided is whether the complaint has been made out (as per s. 26 of the Public Complaint Regulations, *infra*). In the course of dealing with the specific complaint other procedural or systemic issues arose.
36. The 2005 complaints are not in issue on the matter before me. However, considerable time has been spent discussing how they were handled and, in addition, how complaints made by members of the public about police officers are handled generally. Those issues will be addressed later.
37. In dealing with the complaint I have been requested to specifically address three issues with respect to the Chief's decision: (i) what constitutes off-duty behaviour; (ii) what constitutes "natural justice" when appearing before the Chief

on a public complaint; and (iii) were the rules of natural justice followed in this case.

38. In addition I have been asked to address certain questions for the purpose of making recommendations pursuant to s. 35 of the Act.

DISCUSSION

The Chief's Decision -- Natural Justice

39. All parties agree that the first and perhaps most fundamental issue is whether the hearing and Chief's decision followed the principles of natural justice.
40. It is clear from the evidence that the 2007 complaint was not fully investigated before Cst. Thornhill was served with notice to appear before the Chief in September. He had not been interviewed or asked to provide any input into the matter. Cst. Thornhill had not been provided with the investigation report or any information beyond the letter of complaint. The Chief had not viewed the photographs and could not indicate which ones were in issue. The appearance before the Chief was not recorded and a full record of what took place is not available. However, it is not disputed that at the conclusion of that appearance the Chief wanted further information. Cst. Thornhill expected that once that information was obtained the "hearing" would continue and he would be given an opportunity to fully address the complaint.
41. Cst. Thornhill provided his prepared written statement to the investigator very shortly after the meeting with the Chief. He was not, however, given an opportunity to address the complaint after the additional information was obtained. In fact, he had no knowledge of what additional information was actually obtained.

42. Section 15 of the **Royal Newfoundland Constabulary Public Complaints Regulations**, O.C. 96-245, as amended (hereinafter the "Public Complaints Regulations") requires that the Chief give both the complainant and the police officer an opportunity to speak to the subject matter of the complaint before reaching a decision pursuant to s. 25 of the Act. The evidence shows that this was not done for either party after all of the information was before the Chief.
43. The decision of the Chief was actually delivered by Deputy Chief Johnston, who did not participate in any part of the hearing. There is no evidence that Deputy Chief Johnston reviewed the file before issuing the letter of reprimand to Cst. Thornhill on 4 April, 2008. It may be that he was doing so at the instruction of the Chief, but that is speculation.
44. The decision was to reprimand Cst. Thornhill, and in error the letter purportedly did so under the Collective Agreement rather than under the Public Complaints Regulations and the Act. As a result Cst. Thornhill filed a grievance under the Collective Agreement rather than appealing the Chief's decision under the Public Complaint process. Sgt. Constantine took responsibility for the error as he drafted the letter on the instruction of Deputy Chief Johnston who did not specifically refer to either the Public Complaints Regulations or the Collective Agreement.
45. For the various reasons set out above, it is beyond dispute that the decision relating to Cst. Thornhill was arrived at in a manner that ignored the principles of natural justice. It is unclear from the Act and the Public Complaints Regulations that an adjudicator has the authority to set aside the decision of the Chief. However, s. 24 of the Public Complaints Regulations does provide the authority to proceed with a discipline hearing when the police officer does not admit the allegations.
46. If I had the authority to set aside the Chief's decision I would do so. But given the uncertainty of the language of the Act, I will simply proceed with

consideration of the merits of the matter without any consideration of the Chief's decision.

Did the Taking of the Photographs Constitute a Breach of Privacy?

47. Counsel for the Commissioner has referred to s. 3 of the **Privacy Act** RSNL 1990, c. P-22, as amended, which, along with the relevant portion of s. 5 reads as follows:

Violation of privacy

3. (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of an individual.

(2) The nature and degree of privacy to which an individual is entitled in a situation or in relation to a matter is **that which is reasonable in the circumstances**, regard being given to the **lawful interests of others**; and in determining whether the act or conduct of a person constitutes a violation of the privacy of an individual, **regard shall be given to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties.**[Emphasis added]

Defences

5. (1) An act or conduct is not a violation of privacy where

(a) it is consented to by some person entitled to consent;

(b) the act or conduct was incidental to the exercise of a lawful right of defence of person or property;

48. Cst. Thornhill clearly had consent from Ms. Henderson to take photographs of his son. Ms. Henderson agreed, but Cst. Thornhill, as his son's father, could have consented as well. As for the photographs of the Henderson home, general permission had been given and the evidence indicated that for most, if not all of those photographs, either Ms. Henderson or a family member was present. These were photographs taken of the location in which Cst. Thornhill's supervised access was occurring and where his son lived. The living conditions were certainly relevant to the custody/access matter before the court.

49. The photograph of the medicine bottle stands alone and is, in reality, the only one in issue. The bottle was on a table in plain view. There was no effort to keep this medication away from plain view. There was no “snooping” involved to take this photograph.
50. Having regard to all of the circumstance surrounding the taking and the ultimate use of this particular photograph, (i.e. “the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties”) I am unable to conclude that taking it and submitting it to the court during the custody/access proceedings constitutes a breach of privacy under the **Privacy Act**. In such proceedings privacy is lost insofar as matters being presented to the court, but retained to some degree by the nature of proceedings at Unified Family Court. In the litigation process, and family matters are certainly no exception, private and personal information will get disclosed and some collateral damage will result as is the case here.
51. The Commissioner also argued that the taking of the photograph of the prescription medicine was a breach of privacy outside of the **Privacy Act** but did not fully argue this position. I conclude that the **Privacy Act** fully covers this situation and given my conclusion that the conduct of Cst. Thornhill was not a breach of the **Privacy Act** I do not see a basis to find some general breach of privacy under common law or otherwise.

Is the Conduct Complained of Conduct Covered by the Act and Regulations?

52. Despite having already concluded that Cst. Thornhill’s conduct did not amount to a breach of privacy, I will continue with the analysis as to whether it could still be conduct unbecoming a police officer.
53. The conduct complained of and under consideration occurred while Cst. Thornhill was off duty. The pictures were taken for purely private reasons related to the on-going, acrimonious, custody/access dispute that Cst. Thornhill was engaged

in with Ms. Henderson. The pictures were filed with the Unified Family Court in that proceeding and not circulated to others or used for any other purpose.

54. Section 15 of the Act sets out very limited activities in which a police officer shall not engage. None of them are applicable here. However, pursuant to s. 8 of the Act police officers have a duty to obey the regulations.
55. There are two sets of regulations; (1) the **Royal Newfoundland Constabulary Regulations** O.C. 96-244, as amended, (hereinafter “the RNC Regulations”) and (2) the Public Complaints Regulations, *supra*.
56. Section 7 of the RNC Regulations sets out various types of conduct in which a police officer shall not engage. With the exception of ss. (p) all of the items set out are duty related. Subsection (p) says that a police officer shall not “engage in conduct unbecoming a police officer and liable to bring discredit upon the constabulary”.
57. Section 3 of the Public Complaint Regulations also details various types of conduct in which a police officer shall not engage. Again, the over-riding principle can be found in to opening words, “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...”. Of the 15 specific types of conduct listed in s. 3 all are either duty related or involve misuse of the status of a police officer for private advantage.
58. The conduct complained of here does not involve any activity for which there is a specific prohibition. The issue then is whether it fits within the broad scope of “conduct unbecoming a police officer and liable to bring discredit...”.
59. Counsel for the Commissioner argues that off-duty conduct is covered by the Act and regulations. He relies on **Gosse v. Royal Newfoundland Constabulary Public Complaints Commission** 2004 NLSCTD 121 and **Coady v. Royal Newfoundland Constabulary Public Complaints Commission** 2007 NLTD 83.

These cases simply indicate that off-duty conduct may engage discipline but neither of these cases engages in any specific analysis of what type or degree of off-duty conduct might be covered.

60. In **Royal Newfoundland Constabulary Public Complaints Commission v. McGrath** 2002 NLCA 74 the Court indicated that the fact that conduct occurred off duty is a relevant factor in considering whether it is disciplinable.
61. Counsel for the RNCA provided authorities from other jurisdictions where specific off-duty conduct has been considered. In Alberta, a police officer is entitled to a presumption of off-duty right to privacy and non-interference (see **Ratcliff v. Edmonton Police Services** A.L.E.R.B. No. 032-2001).
62. The Act and regulations do not remove a police officer's right to privacy or non-interference. From that it flows, that off-duty conduct must have some nexus with his or her functioning as a police officer to fall within conduct unbecoming a police officer. It seems that the more private the conduct the more severe it would have to be to cross the line and become disciplinable. For instance, if a police officer became intoxicated at home or at a private function it would be conduct of a private nature and not subject to discipline. But, that same conduct in public would likely engage the disciplinary process, and that conduct while on duty would definitely engage the process.
63. Cst. Thornhill's conduct here was not duty related. It was part of a private custody/access dispute before the Unified Family Court. He did not abuse his status as a police officer. He took pictures of things in plain view to document that state of affairs during his access visits. He could have presented *viva voce* evidence of these things. He did not distribute the pictures.
64. I cannot conclude that Cst. Thornhill's actions here in collecting and presenting evidence in his private custody/access dispute falls within the definition of conduct unbecoming a police officer and liable to bring discredit upon the Constabulary.

CONCLUSION ON THE MERITS

65. For the reasons above I have concluded that the complaint against Cst. Thornhill must be dismissed. The specific actions complained of did not constitute a breach of privacy and, in any event, were not sufficiently connected to his status as a police officer to fall within the Act or Public Complaints Regulations.

OTHER MATTERS TO CONSIDER

66. Five issues raised in the Commissioner's letter have not been specifically addressed above. They are:

- 1) should the Chief be required to give reasons for his decision to reprimand;
- 2) should the reprimand by the Chief be made public;
- 3) how much information is a complainant entitled to receive about an internal investigation of a complaint;
- 4) what is the appropriate way in which complaints should be taken, investigated and proceeded with when a member of the public seeks to make a complaint to the RNC regarding the conduct of an RNC officer; and
- 5) should complaints of criminal behaviour against a police officer be treated as a public complaints and should complainants be permitted to withdraw them.

67. I will provide comments and/or recommendation with respect to these issues.

(1) Should the Chief be Required to Give Reasons?

68. Section 25 (2) of the Act states:

- (2) The complainant and the police officer who is the subject of the complaint shall be informed, in writing, of the dismissal of the complaint or of the discipline imposed and the reasons for that dismissal or discipline.

69. This provision makes it clear that both the complainant and the police officer are entitled to know the outcome of the complaint and the reasons for that outcome. As each party has a right to appeal the Chief's decision to the Commission, it is logical and sensible that they be reasonably informed before making that decision.
70. The Supreme Court of Canada dealt with the requirement for reasons by a trial judge in the context of a criminal appeal in **R. v. Sheppard**, 2002 SCC 26, paragraph 66, stating
- Where a party has a right of appeal, the law presupposes that the exercise of that right is to be meaningful. This obvious proposition is widely supported in the cases.
71. The appeal available to a police officer or a complainant with respect to a decision by the Chief is not of the same nature as a criminal (or civil) appeal. The appeal allowed under the Act is a review and, if appropriate, a full hearing of the evidence relating to the complaint. This suggests that the reasons that the Chief must provide are not of the same nature or extent as required of a judge. Certainly, to avoid an appeal in every case that Chief should make it reasonably clear what the decision is and why.
72. In this matter different letters were sent to the officer and the complainant. The "reasons" were not sufficient to give either a meaningful explanation of why the particular outcome was reached and as a result both appealed (although Cst.Thornhill's appeal was not filed with the Commission as it should have been due to the error in the letter).
73. It seems appropriate, and I would strongly suggest, that in the absence of some valid reason, both the officer and the complainant should be advised of the outcome and the reasons therefore via the same document. It was pointed out in argument that there may be information available to the Chief that is not public and should not be made public. An internal disciplinary record of an officer would

be one such example. Where a police officer has a prior internal disciplinary record and receives a more severe sanction from the Chief based upon that record, it may be inappropriate for the Chief to disclose that to the complainant. However, it would have to be disclosed to the officer. In such circumstances the reasons provided to the complainant would not contain that additional information.

(2) Should the Reprimand be Made Public?

74. In a general sense the question should more appropriately be whether the discipline imposed or the dismissal of the complaint should be made public.

75. There is no requirement under the Act or Public Complaints Regulations that there be a public announcement of the outcome of a public complaint. The outcome must be communicated to the complainant, who is a member of the public, and I am not aware of any restriction on the complainant which would prohibit further distribution of that information.

76. I agree with the submission of the Chief that the reasons, which include the outcome, are sufficient to inform the complainant and there is no obligation to provide a copy of the actual letter issued to the police officer and placed on his or her file. In fact as submitted by the Chief, s. 30 of the **Access to Information and Protection of Privacy Act**, prohibits the disclosure of the letter of reprimand. So, when discipline had been imposed, the actual letter to the officer should not be made public, but the disposition must be communicated to the complainant.

(3) How Much Information is a Complainant Entitled to Receive about an Internal Investigation of a Complaint?

77. Based on the information put before me it is clear that with respect to an internal investigation a member of the public has no formal entitlement to any information about the investigation or the outcome. The RNC Regulations are clearly

designed to deal with complaints that arise internally and can be dealt with internally without involving members of the public.

78. Ms. Henderson's request for documentation relating to her Lavalife complaint and the harassing phone call were not treated as public complaints (as she likely intended) and therefore she is not entitled to the information that she requested. It is too late to remedy that problem in any event and I add, without getting into all of the specifics, that she might not have been entitled to all of what she requested if the matter had been fully addressed.
79. The more difficult question is whether the internal investigation is an appropriate way to deal with a complaint arising from a member of the public.
- (4) What is the Appropriate way in which Complaints Should be Taken, Investigated and Proceeded with when a Member of the Public Seeks to Make a Complaint to the RNC Regarding the Conduct of an RNC Officer?**
80. Given the history of the complaints made by Ms. Henderson against Cst. Thornhill, and the manner in which they were addressed, some direction is needed on this issue. There needs to be a clear procedure, which is actually followed in practice, that ensures that members of the public have their complaints dealt with in the appropriate manner.
81. Ms. Henderson's Lavalife complaint in April 2005 and her subsequent complaint later that year relating to the harassing phone call, were both complaints that alleged conduct that could be considered criminal. In fact, both were treated as criminal investigations, but in neither instance was there a corresponding public complaint file opened (or even an internal investigation).
82. The evidence presented shows that for a considerable period of time there was at best an informal practice that members of the public who attended at the RNC office to make a complaint were likely offered the options of (i) an informal

complaint, (ii) an internal complaint, (iii) a public complaint, or, (iv) where conduct that could be considered criminal was alleged, a criminal complaint. Some explanation of the different processes should have been provided to the complainant so a choice of procedure could be made. Ms. Henderson was not given these options

83. The informal practice became more formalized in 2008 when Acting Superintendent Carroll was assigned to the Professional Standards Section. Within a few months of taking over as the officer in charge of the PSS, A/Supt. Carroll noticed that there were inconsistencies with respect to how files relating to public complaints were generated.
84. As A/Supt. Carroll understood the process at the time if a person attended the RNC to make a complaint against a police officer the complaint would be taken by an officer at the front desk and Form 1 (the public complaint intake form) would be completed. If the allegation could be considered criminal then a sergeant would be asked to take the complaint. In any case, the complainant should have been given different options with some explanation of how the process would work with each option, and asked to decide how the complaint should be processed. His statistical review for 2007 and 2008 (J.C. #3) showed that 10 of 42 internal investigations in 2007 and 28 of 73 in 2008 were generated by public complaints. During the same years there were 23 and 27 public complaints that followed the Public Complaints process. For 2008 just under half of the complaints made by members of the public proceeded through the Public Complaints process.
85. In April, 2009 A/Supt. Carroll issued a Routine Order providing guidance to RNC members on the proper way to receive and process complaints from members of the public. That Order is attached to these reasons as Appendix "A". While this direction was a big step forward in standardizing the method of intake and process, it is still lacking. The Order had appended to it a document entitled "Complainant Advisory" which the officer taking the complaint would sign and

provide to the complainant. The document sets out the four options available: **Informal Complaint; Internal Complaint; Public Complaint; and Criminal Complaint.**

Informal Complaint: You may ask that an officer be spoken to by a superior officer. The officer will be spoken to and cautioned, but there would be no record of the conversation in the officer's personnel file.

Internal Complaint: You may ask that an internal investigation be conducted by the RNC. Internal investigations involve the taking of statements from witnesses and other methods of gathering evidence. At the conclusion of an internal investigation, a recommendation is made to the Chief of Police for discipline. The discipline options run from coaching and counselling to dismissal from the RNC.

Public Complaint: You may file a formal Public Complaint. Filing a Public Complaint means that an RNC Member will obtain statements from witnesses and pursue other avenues of investigation which may include options such as an informal resolution. On conclusion of his or her investigation, a report will be forwarded to the Chief of Police. The Chief will decide if your complaint has been substantiated and if it has been, he will decide what the appropriate sanction should be. The possible sanctions range from direction to comply with policies to dismissal from the Constabulary. If you are dissatisfied with the decision of the Chief, you may appeal to the Public Complaints Commission (the PCC). The PCC will assign an investigator who is not employed by the RNC and possibly conduct a formal hearing. The Adjudicator of such a hearing has the same options available to him or her as the Chief regarding discipline. That is, an Adjudicator can impose discipline up to and including dismissal.

Criminal Complaint: You may file a criminal complaint against the officer. The officer will be investigated as would any other person accused of a criminal offence. All criminal investigations against RNC members have corresponding internal investigations. A Member will be disciplined internally if convicted of a criminal offence, in addition to any penalty a court might impose.

86. If, instead of making a complaint at the RNC station, a member of the public contacts the Commission, the complaint will be treated as a public complaint and there are no options to proceed informally or internally. The Commissioner will then refer the matter to the RNC pursuant to s. 24 of the Act. Presumably, if the conduct complained is of a criminal nature a criminal investigation will also follow once the matter is received by the RNC.
87. The Commissioner submits that all complaints by members of the public must be dealt with as public complaints and that the effect of the amendments to the Act

creating the Public Complaints process, combined with the passing of the Public Complaints Regulations mandates this. Further, he points to the comments of Mercer, J. (as he then was) in **Maloney v Royal Newfoundland Constabulary Public Complaints Commission** (2002), 215 Nfld. & P.E.I. R. 181 (NFLD S.C. T.D.) where he said the following in relation to the purpose of the Act:

(iii) Purpose of the Act

I accept the submission of Counsel for the Commission that “the purpose of Part III of the Act is to provide for an independent civilian oversight process to review the conduct of police officers in the province through a public complaints system. The Act and the Regulations are intended to establish an alternative to the civil court system, one that will be more timely and presumably less costly for determining issues of police accountability, in order to improve public access and participation in the system.” I observe that in addressing complaints against a particular police officer the Adjudicator is performing a quasi-judicial or adjudicative function, rather than addressing a polycentric issue.

88. The comment of Mercer, J. certainly points to the significance of civilian oversight as part of the public complaint process. Members of the public are entitled to engage this process to have their complaints addressed. Are they equally entitled to engage a different process that has different parameters?
89. The Chief of Police submits that the legislation and regulations do not limit the manner of processing public complaints. Further, it is submitted that if all complaints by members of the public must follow the Public Complaint process the RNC will be hamstrung in dealing with misconduct by its officers as many members of the public will not report, or pursue, misconduct issues as it requires their participation in a formal process.
90. The Chief agrees with the Commissioner that there has been confusion in the handling of Ms. Henderson’s several complaints, but submits that there is no evidence that this confusion has appeared in other matters. There was no evidence of the prevalence of the confusion before me. However, on the other hand, there was no evidence that complete clarity is now the state of affairs. Certainly the fact that for 2008 more than half of the complaints from members of the public did not proceed as public complaints raises a question about whether

the process is being properly respected. It may be a matter of choice or it may be that some influence is exerted. I can only speculate.

91. If choices are going to be available, it is essential that the choice be made on the basis of full information. While A/Supt. Carroll is to be commended for his efforts in documenting the intake process in an effort to standardize it, providing full information in a clear and understandable manner is not an easy task. There is much more that could be said about each option. However, that would likely confuse many complainants.
92. Regardless of how detailed or how succinct the description of the options, there would, no doubt, be questions asked about which procedure is best. The intake officer, however impartial, would always be vulnerable to attack for any answers provided.
93. The real danger is that a complaint by a member of the public may receive different treatment if made directly to the RNC office instead of to the Commission. That is unacceptable. Whether inadvertently or advertently, members of the public may be encouraged not to choose the public complaint option when making their complaints at the RNC office. Obviously, there should be no influence exerted nor should there be any appearance of influence.
94. Prior to the amendments to the Act and the making of the Public Complaint Regulations there was no recognized manner for the public to complain about an officer's conduct other than going to the RNC office. Once the complaint was made there was no participation in the process and no right to appeal the outcome.
95. The Chief and the Commissioner differ in their submissions on the effect of the creation of the Public Complaint process. The Commissioner's position is that all complaints made by members of the public must be dealt with through that

process while the Chief maintains that it simply creates an alternative process at the option of the complainant. The problem with the Chief's position is that a complainant who makes a complaint directly to the Commission will not have any options. Therefore, whether an option is offered will depend on where the complainant goes to make to complaint. It is difficult to conclude that such a difference was contemplated or intended.

96. If options are to be available, more thought and effort will be required to ensure that all officers involved in the intake process fully understand the various processes as they will be responsible to ensure that members of the public fully understand their options. There must be no influence by the intake officer on the complainant. For the process to be fair, complaining members of the public must understand that they are completely free to choose the process.
97. As I read the Act and the Public Complaints Regulations I believe that both contemplate that all public complaints, whether made initially received by the RNC directly or by the Commission, will follow the same process (i.e. the Public Complaint process). The current confused practice should be clarified by amendments to either the Act or the regulations. As a matter of policy the Act and regulations should be clear about whether the Public Complaint process is mandatory or optional, and if optional, what the options should be, including the consequences for the complainant in terms of any involvement in the process.
98. As to the Chief's submission that the Public Complaint process is too cumbersome to deal with trivial complaints, I believe that s. 22 (4) of the Act may provide the answer. Complaints (that would not be sufficient to engage review and discipline by the Chief) are not complaints under the Act and do not engage the public complaint process. However, this is something that should be clarified as well.
99. With respect to allegations of "criminal conduct" it is not the complainant who decides if the nature of the allegations should be investigated as a criminal

complaint. The complainant may want a criminal investigation commenced but if the conduct alleged does not constitute a criminal offence there would be no reason to investigate it as such.

100. Where conduct of a criminal nature is alleged against a police officer by a member of the public and a criminal investigation has begun (or a prosecution commenced) the public complaint is suspended pursuant to s. 43 of the Act. In such cases, the public complaint remains open but there would be no further need to provide information to the complainant until the matter re-commences. It is incorrect to suggest that if an allegation of conduct that is criminal is made against a police officer, there will be a corresponding internal investigation. If the complaint came from a member of the public then the corresponding investigation is a Public Complaint and not an Internal Complaint.

101. It appears that under the current scheme established by the Act and the Public Complaints Regulations, complaints made by members of the public are intended to be treated in accordance with those provisions and not under the RNC Regulations. However, I recommend that this be reviewed and resolved by clarifying the legislation or regulations.

(5) Should Complaints of Criminal Behaviour Against a Police Officer be Treated as Public Complaints and Should Complainants be Permitted to Withdraw Them?

102. These two questions are perhaps deceiving. I would view the correct question as whether a public complaint should be treated as a criminal complaint and not the reverse.

103. As stated above, it is not the complainant who decides whether a criminal investigation is required. That will be determined by the RNC based upon the nature of the allegations. Where there are reasonable grounds to believe that

the alleged conduct may constitute a criminal offence it is appropriate that a public complaint file be opened and a criminal investigation file as well. If the investigations determines that no criminal conduct has occurred then the public complaint remains and should be dealt with.

104. The Commissioner asserts that the complainant should be able to withdraw his or her public complaint at any time, regardless of whether a criminal investigation has been commenced. Section 6 of the Public Complaints Regulations contemplates that the complainant can withdraw a public complaint at any time by completing the appropriate form. Such a withdrawal would terminate the public complaint but would not necessarily terminate any criminal investigation. The Commissioner further submits that the fact that the complainant wishes to withdraw the public complaint is a factor to be considered in the criminal investigation, but like any criminal investigation, that would not be the deciding factor. I agree. I would add however, that if a complainant withdraws a public complaint and the criminal investigation continues, then it would be expected that the public complaint investigation would be converted into an internal investigation and the complainant would then lose any ability to obtain any further information.

CONCLUSION

105. The complaint against Cst. Thornhill is dismissed.
106. I recommend that the Minister review and clarify the public complaint intake process and specifically address whether complaints by members of the public should be permitted to be dealt with in any manner other than under the Public Complaint process. If so, the options should be reviewed and the parameters clarified.

107. Finally I recommend that in meeting the statutory requirement to provide reasons the Chief of Police provide the same reasons to both the complainant and the police officer, unless there is some substantial and valid reason for doing otherwise, and that the reasons provide sufficient information to allow either party to make an informed decision about engaging the appeal process.

Dated at St. John's, Newfoundland & Labrador, this 28th day of May, 2010.



J David Eaton Q.C.
Adjudicator

Appearances

Norman Whalen Q.C.....for the Commissioner

Cst. Todd Thornhillfor himself

Lynn Moorefor the Chief of Police

Jamie Martinfor the Royal Newfoundland Constabulary Association