

**ROYAL NEWFOUNDLAND CONSTABULARY  
PUBLIC COMPLAINTS COMMISSION**

**IN THE MATTER OF** a complaint by  
**Rosemary Tee and Brian Lahey**

**Between:-**                      **Brian McGrath**                                      *Applicant*

**And:-**                              **The Royal Newfoundland Constabulary**  
**Public Complaints Commission**                                      *Respondent*

**SOLICITORS:-**

**Mr. D. B. Wicks** ..... Counsel for the Applicant

**Mr. N. Whalen, Q.C** ..... Counsel for the Commission / Respondent

**Introduction:**

The facts of this matter are not complicated and are adequately set out by the Applicant and Respondent. Suffice to say this case has been on-going for seven years - awaiting the conclusion of a criminal trial and navigating its way to the Supreme Court of Canada on procedural matters. Circumstances, however, dictate that the current procedural objection be addressed. The crux of the matter stems from the fact that the assigned Adjudicator, Ms. L. Hoegg, Q.C., withdrew from the case, without hearing evidence on the merits, when appointed Commissioner to the same Commission under the Royal Newfoundland Constabulary Act, 1992, SNL Chapter R-17 and regulations made thereunder.

The salient sections supporting the applicants position are reproduced hereunder.

**18 (1) The Lieutenant-Governor in Council shall appoint a Royal Newfoundland Constabulary Public Complaints Commission consisting of a Commissioner.**

**(2) The commissioner shall supervise and direct the officers, investigators and other employees and the work of the commission.**

**(a) receive and review a complaint made against a police officer;**

**(b) investigate a complaint; and**

**(c) dismiss or refer a complaint for a hearing under section 28.**

**22 (1) A person other than a police officer may file a complaint concerning the conduct of a police officer in writing at a constabulary office or with the commissioner.**

**(2) A complaint made under subsection (1) shall be a complaint which, if substantiated, would lead to review and discipline under this Act.**

**23 Where a complaint has been received under section 22, the police officer against whom the complaint is made shall within a reasonable time be given notice of the substance of the complaint unless, in the opinion of the chief, or the commissioner where the complaint relates to the chief, to do so would prejudice further investigation of the matter.**

**24 (1) Where, under section 22, a complaint is filed with the commissioner or is received at a constabulary office, that complaint shall be referred to the chief, or where the chief is not available, the deputy chief.**

- (2) Where a complaint is received at a constabulary office, the chief or deputy shall notify the commissioner of that complaint.
  - (3) Upon receipt of a complaint under subsection (1), the chief, or the deputy chief shall investigate the complaint and that investigation shall be completed as soon as is practicable but no later than 3 months from the date the complaint is filed or received.
  - (4) The chief or the deputy chief may appoint a police officer to investigate complaints referred to him or her under subsection (1).
- 25 (1) Following an investigation under section 24, the chief or the deputy chief shall consider the complaint and he or she may
  - (a) with the agreement of all parties, settle the matter;
  - (b) dismiss the complaint; or
  - (c) discipline the police officer who is the subject of the complaint.
- (2) The complainant and the police officer who is the subject of a 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.
  - (3) Where a police officer is disciplined under this section, that police officer may, within 15 days of his or her receipt of that discipline decision, appeal that decision by filing an appeal with the commissioner.
  - (4) A complainant who is not satisfied with a decision of the chief or deputy chief under subsection (1) may, within 15 days of his or her receipt of that decision, appeal the decision by filing an appeal with the commissioner.
- 26 (1) Upon receipt of an appeal under section 25, the commissioner shall forward a notice of the appeal to the chief and the other parties.
- (2) Where an appeal under section 25 is filed with the commissioner, the commissioner or an investigator shall investigate the complaint.
- 28 (1) Following an investigation of a complaint, where the commissioner determines that the decision of the chief or deputy chief appealed under subsection 25(3) or (4) was properly made, he or she may dismiss the complaint and confirm the decision of the chief or deputy chief.
- (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 subsection (1) and does not effect a settlement under section 26, he or she shall refer the matter to a single adjudicator appointed under section 29 who shall conduct a hearing into the matter.
  - (3) Notwithstanding subsections (1) and (2), where a decision is appealed under subsection 25(3) or (4) and the penalty imposed upon a police

officer by the chief or deputy chief includes a suspension without pay for 2 weeks or longer, dismissal or demotion, the commissioner shall refer the matter to a single adjudicator appointed under section 29 who shall conduct a hearing into the matter.

***Royal Newfoundland Constabulary Public Complaints Regulations:***

**7. The chief or the officer appointed to investigate a complaint under subsection 24 (4) of the Act shall**

- (a) conduct the investigation in an objective and neutral manner consistent with recognized investigative procedures;**
- (b) impartially and diligently gather evidence with a view to bringing the investigation to a conclusion;**
- (c) upon completion of the investigation prepare and submit to the chief a final report which sets out the subject matter of the Investigation, all relevant findings and conclusions and the statements obtained shall be appended to that final report; and**
- (d) where a criminal investigation is being conducted or a prosecution is commenced under any Act of Canada or the province in relation to the subject matter of the complaint the 3 month period for completing the investigation under subsection 24(3) of the Act shall also be suspended pending the conclusion of the investigation or proceeding whichever is the latter.**

**19. The provisions of paragraphs 7(a), (b), and (c) shall apply, with the necessary changes, to an investigation performed under subsection 26 (2) of the Act, and the final report shall be submitted to the commissioner.**

The Commissioner also has by Section 30 (1)(3) of the Act the “carriage of this matter.” Section 30 (1)(a) is as follows:

**‘30.(1) the parties to the proceeding before an adjudicator are:**

- a) the commissioner, who shall have the carriage of the matter.’**

It is of note that the application of section 7(1) and 19 of the *Regulations* requires that an investigator of a complaint appealed to the Commissioner be investigated ‘...in an objective and neutral manner’ ... and that evidence

‘..is impartially and diligently gathered.’

**Position of the Parties:**

Counsel for the Applicant emphasizes the administrative, investigative and adjudicative powers of the Commissioner in her continued carriage of this case. He submits that the present Commissioner has made adverse decisions against his client in the past ( found on appeal to be legally correct ) and has now been appointed prosecutor in the same case in which she had earlier made such decisions.

This, the Applicant submits

- (a) places the Commissioner in a position where she is the judge in her own cause;
  - (b) taints her ability to make an impartial decision as to whether or not this matter should be heard; and
  - (c) destroys the integrity of the proceedings
- in that it creates a reasonable apprehension of bias.

The Respondent counters that

- (a) the Applicant has mis-stated the law, particularly the **Brousseau** case in as much as it applies to the facts of this case.
- (b) the Commissioner ( Ms. Hoegg, Q.C.) was acting within her statutory function or duty.
- (c) this Commissioner did not involve herself in the merits of this case in addressing procedural matters.
- (d) this matter was referred for a hearing by an earlier Commissioner and that once it had been referred the disposition of it rests solely with the Adjudicator, not the Commissioner.
- (e) while the Applicant alleges that the Commissioner owes a duty of fairness he has not shown even a speculative breach of that duty and points only to mere possibilities.

**Issues:**

- (1) Does the appointment of the former adjudicator, Ms. L. Hoegg, Q.C. as Commissioner raise a reasonable apprehension of bias ?  
If answered in the affirmative
- (2) Does the present adjudicator have the jurisdiction to proceed with the matter.

**The Law and Analysis:**

The test for apprehension of bias is found in **Committee for Justice and Liberty et al**, v. **National Energy Board et al** [1978] I S.C.R. 369 at 394 - 5; (1976) 68 D.L.R. (3d) 716 at 735 -6.

Essentially it states

...the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information....

what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude ....

the grounds for this apprehension must, however, be substantial ...

The parties appear to agree that this is the test to be applied.

I have considered the respective positions of the Applicant and Respondent on **Brousseau v. Alberta ( Securities Commission)** [1989] I S.C.R. 301. The applicant seeks support from this case for the proposition that no one ought to be the judge in his or her own cause. As a general principle this is not permitted in law because the taint of bias would destroy the integrity of the proceedings. I agree. But as Justice L' Heureux - Dube found in **Brousseau** the position taken by Dubin J A in **Re: W. D. Latimer and Bray** (1974), 6 O. R. 129 that

“The structure of the Act whereby commissioners could be involved in both the investigatory and adjudicatory functions did not, by itself, give rise to a reasonable apprehension of bias.”

She concluded:

“I am in agreement with the proposition. So long as the Chairman did not act

outside of his statutory authority , and so long as there is no evidence to show involvement above and beyond the mere fact of the Chairman's fulfilling his statutory duties, a "reasonable apprehension of bias" affecting the Commission as a whole cannot be said to exist."

As pointed out by the Respondent, in **Latimer** the dual roles of investigator and adjudicator could be performed by the Commissioners and did not create any apprehension of bias as long as they did not act outside their statutory mandate. Justice L' Heureux- Dube, nevertheless, looked beyond the strictness of the statute to determine any 'improper purpose' or suspicious motives in the conduct of the Chairman or the Commission.

Other than statutory direction, there is no evidence or suggestion by the parties that Commissioner Hoegg demonstrated improper purpose or suspicious motive. As well, it is my considered view that Commissioner Hoegg need not have directed that a hearing be conducted in this matter. That had already been done by Commissioner Harris and continued to have force and effect. The new Commissioner need only have given notice of withdrawal from the case and direct that a new adjudicator be assigned. In any event it cannot be said that the actions of the Commission would prejudice the Applicant or a requirement to be heard as in **Giles v. Newfoundland (Royal Newfoundland Constabulary Public Complaints Commission)** ( 1996 ) 144 Nfld. And P.E.I.R. 17.

Additionally, a distinction can be drawn between a case *de novo* and instruction to maintain regularity of a case or complaint already assigned and / or on the docket. In the former the discretion, investigative, adjudicative and administrative powers outlined by the Applicant are necessary, conduct oriented and evaluative. There is a statutory protocol to the carriage of the case.

As already stated, in this case the Adjudicator Hoegg withdrew from it and as Commissioner, notified the parties and directed the chief Adjudicator to assign a new Adjudicator.

Other cases cited by the Applicant, **R v. Osler Inc** [1991] O. J. No 1319 and

**Guay v. LaFleur** 47 D.L.R. 2d 226 , have been considered and found to be instructive on the ‘creation’ of a reasonable apprehension of bias - the general principles remain the same.

At this point I feel compelled to refer to D. M. Roberts, J. A. in this case on other procedural objections. ( Docket: 01 / 61 Citation: 2002 NLCA 74 ) Albeit, the court was asked to determine if notice sections of this Act were mandatory or discretionary. However, certain comments emphasise the pith and substance of this statutory regime. He narrates:

... the primary objective of the public complaints scheme is not discipline, although discipline may ultimately result.

Agreeing with McLachlin J. in **Re: Narain** ( 1983), 45 B.C.L.R. 191 ( B.C.S.C. ), he continues:

I conclude that the duties imposed by part 111 of the Act and the Complaints Regulations are essentially public in nature and not focused on the private rights of individual police officers.... It creates the office of Public Complaints Commissioner and provides the procedure by which citizens can express dissatisfaction with a particular police action.

As with Mrs Tee;

She has no control over those whose duty it is to perform the procedures which Part 111 and the Complaints Regulations require. The failure to perform those duties within the time limits prescribed can cause serious inconvenience and even injustice to such a person. It makes no logical sense to frustrate a scheme put in place by the Legislative to allow a citizen a user - friendly police complaint procedure by holding that every step along the way is mandatory.

Complainants, generally, are ordinary people who expect that the subject matter of a complaint be heard ( merits ) - a common sense approach - not lost in procedural wrangling if at all possible. At times this can be legally irritating.

I agree that procedural bias must be absent and integrity of the hearing maintained but not to the extent that others, ( ie the citizens), appear unjustly served.

### **Conclusion:**

Having considered the facts, arguments and cases provided, I find that



Commissioner Hoegg, Q.C. acted within statutory confines and without improper purpose or motive. There is no factual basis to conclude that the Commissioner's conduct would taint or destroy the integrity of these proceedings. As well, any allegations as to breach of duty or fairness is speculative and expressed in terms of mere possibility. This is far from the "substantial" evidentiary basis needed to show a breach or reasonable apprehension of bias.

Issue 1 is answered in the negative. Therefore the jurisdiction of the adjudicator is not affected.

The Applicant's objection is not sustained.

Unless there is an Appeal filed or Prohibition ordered, we will continue on the dates assigned to hear on the merits.

DATED at Harbour Grace, in the province of Newfoundland and Labrador, this 13<sup>th</sup> day of January, 2004 A.D.

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James Kean

Chief Adjudicator

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