IN THE MATTER OF a complaint by Brian Richard Nolan pursuant to the ***Royal Newfoundland Constabulary Public Complaints Regulations***

AND IN THE MATTER OF a Public Complaint Adjudication pursuant to the ***Royal Newfoundland Constabulary Act***, 1992, c. R-17.

BETWEEN:

ROYAL NEWFOUNDLAND CONSTABULARY PUBLIC COMPLAINTS COMMISSIONER

AND:

CONSTABLE KRISTA CLARKE (DAY), CONSTABLE LARRY HICKEY, CONSTABLE GLENN BARRY AND CONSTABLE LESTER PARSONS

DECISION ON VOIR DIRE

This issue on this **voir dire** is whether a statement given by Cst. Hickey in November, 1993, can be used now for the purpose of cross-examination.

BACKGROUND

In July, 1993, a few days after the complaint of Mr. Brian Nolan was made, Cst. Hickey and the three other police officers were contacted by Lt. Duffett who had been asked by the Chief

of Police to investigate the complaint. Cst. Hickey was advised of the substance of the complaint and asked to prepare a report in reply. The report was completed and given to Lt. Duffett that same day, or the next day.

It is apparent, although there is no direct evidence on the point, that Lt. Duffett completed his investigation and submitted his report to the Chief of Police. The Chief of Police dismissed the complaint, pursuant to s. 25(1)(b) of the **Royal Newfoundland Constabulary Act**, 1992, (the "**Act**"), and Mr. Nolan appealed to the Commissioner pursuant to s. 25(4) of the **Act**. The Commissioner appointed an investigator, Mr. Joe Gillies, to conduct a further investigation pursuant to s. 26(2) of the **Act**. By appointment Mr. Gillies met with Cst. Hickey and his counsel, Mr. Wicks, at the office of the Commissioner on November 18, 1993. Also present in the room at the time was a secretary.

Cst. Hickey described his meeting with Mr. Gillies as a conversation, in which Mr. Gillies asked questions and Cst. Hickey answered. He did not realize that the secretary who was sitting in the corner of the room was recording what was being said. At the end of the meeting Mr. Gillies and the secretary left the room and came back a short time later with a typed form of the questions and answers. Cst. Hickey read it through and was not satisfied it was an accurate record of what had been said. He requested some changes which were made. He read it through again, and requested further changes. Once he was satisfied that it was a correct record of the questions and answers, he was asked to sign it.

Before signing the question and answer statement, Cst. Hickey attached the following caveat as a claim for privilege:

> *"This report is being made at the (request)(suggestion)(order)(direction) of [Mr. Gillies] and is made without prejudice. I object to and claim privilege from the use of all, or any part, or parts, of this statement in any proceeding, whether criminal, or civil and including disciplinary proceedings, or in any investigation or inquiry.*
>
> *Subject to the above, I submit the following:*

Mr. Gillies agreed to have the caveat attached before the statement was signed. He did not, however, agree that the caveat would have any effect.

The report prepared at the request of Lt. Duffett was not tendered as an exhibit. It was, however, used in the cross-examination of Cst. Hickey, without objection. The statement given to Mr. Gillies likewise was not tendered. Counsel for Cst. Hickey objects to the use of it for cross-examination. It is, therefore, only the latter statement I am concerned about on this **voir dire**.

POSITIONS OF THE PARTIES

COUNSEL FOR THE COMMISSIONER

Counsel for the Commissioner argues that he should be able to use the statement in cross-examination. Several points were raised in support of that position.

As a starting point, it is argued, that there is a general rule that all relevant evidence is admissible as the purpose of the proceeding is the search for truth. Only evidence which is subject to some exclusionary rule should not be admitted.

Section 16 of the **Public Complaints Regulations, 1993** (the "**Regulations**") provides that a police officer who is the subject of a complaint shall be given an opportunity to speak to the matter. There is no mandatory requirement that the police officer provide a statement at any stage, therefore, any statement given is given on a completely voluntary basis. It is suggested that by virtue of s. 60(2) of the **Act**, any statement given, such as the statement given to Mr. Gillies, is admissible at a hearing as it is a document prepared under Part III of the **Act** (that is during the investigation).

With respect to the issue of privilege, it is argued that there are four fundamental conditions which must exist before privilege can exist. They are set out in **Slavutych v. Baker**, [1976] 1 S.C.R. 254 at 311 as follows:

1. *The communications must originate in a confidence that they will not be disclosed.*

2. *This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.*

3. *The relation must be one which in the opinion of the community ought to be sedulously fostered.*

4. *The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for correct disposal of litigation.*

In support of the argument that these four conditions are not present, Counsel for the Commissioner has put forward **R. v. Delong** (1989), 69 C.R. (3d) 147 and Ceyssens, **Legal Aspects of Policing**, Carswell, pp. 5-18 to 5-22. Additionally it was argued that from a public policy perspective it would be wrong to encourage police officers to be fully candid and tell the truth during internal investigations by protecting their statements.

Finally, it is argued that the legislative scheme in this province, is different than that in other jurisdictions where a police officer may be ordered to give a statement, but such a statement may not then be used during any subsequent hearing. Our **Act** and **Regulation** exclude the idea of privileges by not making statements compulsory. Any unilateral assertion of privilege by an officer who is not required to give a statement has no effect.

COUNSEL FOR THE RESPONDENTS

Counsel for the Respondents argues that the statement made by Cst. Hickey was, under the circumstances, a communication made in furtherance of settlement and therefore, is privileged. He relies on Sopinka, **The Law of Evidence in Canada**, Butterworth, 1992, pp. 719-725, which sets out three conditions for the recognition of privilege (for communications made in furtherance of settlement). They are as follows:

1. *a litigious dispute must be in existence or within contemplation;*

2. *the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and*

3. *the purpose of the communication must be to attempt to effect a settlement.*

It is argued that scheme for dealing with complaints under the **Act** is such that if at all possible a complaint should be settled rather that litigated Section 25 and 26 of the **Act** show this objective.

It is argued that the statement made to Mr. Gillies was made for the purpose of helping settle this complaint, that privilege was claimed at the time and clearly litigation was in existence or contemplated. Further, it is stated, that in future there would be no incentive for a police officer to give a statement if that statement can be somehow used against him. This will have the effect of making investigations more difficult, and it will not faster settlements.

ANALYSIS

Quite clearly, counsel for the Commissioner is correct that the purpose of the proceeding is the search for truth. However, the search for truth has always been qualified by evidentiary rules which exclude evidence for public policy reasons or to ensure the fairness of the proceeding.

I do not agree with the subjected interpretation of s. 60 of the **Regulations**. I view it more as a provision which prevents certain documents from being used in other proceedings. It does not in my view, make admissible evidence which would not otherwise be admissible.

The **Act** and **Regulations** do not require a police officer who is the subject of a complaint to provide a statement. Common law, however, may provide authority for an employer to require an employee to answer questions, that is to provide information about how he or she has carried out his or her duties, regardless of the fact that the answer may be inculpatory. Whether or not a privilege exists which would allow the employee to refuse to answer will depend on whether the four conditions in **Slavutych** set out above, are satisfied. We are not, however, in this case, concerned with the possibility of a privilege against self incrimination. That issue will have to be decided in another case.

In my view, the **Act** and **Regulations** do not consider the issue of privilege; either privilege against self incrimination or a claim for privilege for a statement made on a "without prejudice" basis. Therefore, the issue at hand must be decided on the basis of the common law rules of evidence.

In his article **"Without Prejudice" Communications - Their Admissibility and Effect** (1974) 9 U.B.C. L. Rev. 84, Professor David Vaver discusses the history of this evidentiary rule. He concludes, and I agree, that "without prejudice" communications have been lumped under the general heading of privilege but really they are a separate and distinct item.

Privilege is more appropriately used for confidential communications such as between solicitor and client or husband and wife, or the right against self incrimination. He cautions that authorities dealing with true privilege issues should not be confused with those dealing the "without prejudice" communications. These tests for whether or not privilege will be recognized are different. A review of the entire chapter on privilege in **The Law of Evidence in Canada** also supports this view. I, therefore, conclude that the test set out in **Slavutych** is not the test for privilege claimed in relation to "without prejudice" communications.

As the claim for privilege here is based upon the common law rule with respect to communications made in furtherance of settlement it is appropriate to examine whether that rule applies, and if so, whether the conditions have been satisfied.

Clearly the **Act** and **Regulations** set out a process of dealing with public complaints that attempts to resolve them, rather than litigate them, while at the same time providing for a full and formal hearing if the matter cannot be resolved. This process benefits everyone in that it avoids needless litigation thereby saving everyone time and reducing the cost to all.

Once this matter had gone beyond the Chief of Police and was in the hands of the Commissioner to investigate, the police officer involved had no obligation to speak to the investigator and could have simply declined to do so. Cst. Hickey co-operated by agreeing to sign the question and answer statement under a claim of privilege, which as noted above

was agreed to by Mr. Gillies. That is, Mr. Gillies agreed to let Cst. Hickey make the claim, but he did not agree or hold out that the claim would have any effect.

The general rule behind the protection of communication in furtherance of settlement is that in the absence of protection parties would simply not discuss the issue in dispute for fear that something said may be somehow used against them. Therefore, any communication, whether written or oral, made with a view to settlement or reconciliation will be protected. This rule is not limited to civil cases, but rather applies to quasi-criminal cases and in practice, if not in law, to criminal cases (subject perhaps to some exceptions).

As the public complaints process under the **Act** and **Regulations** is designed to resolve rather than litigate complaints, it seems appropriate to encourage the police officers who are the subject of complaint to co-operate, without fear that their co-operation will somehow subsequently be used against them. It seems logical that co-operation will lead to the resolution of more complaints, and the lack of co-operation will lead to more public hearings. Therefore, I conclude that purpose of the **Act** will be advanced by applying the evidentiary rule with respect to "without prejudice" communications.

As set out above the rule has three components. In this case, quite clearly, there was a dispute in existence or in contemplation at the time the communication was made. Also, there was an express intention that the communication not be disclosed if the matter was not

resolved. The question remains as to whether the communication was made in an attempt to effect a settlement.

In looking at this condition "settlement" should not be narrowly interpreted. It must be taken to mean a resolution of the issue without resorting to litigation. In this case, the complaint was dismissed by the Chief and then appealed to the Commissioner. The Commissioner then initiated a further investigation which included a request to Cst. Hickey to clarify some matters or provide further information. Cst. Hickey hoped that by providing this information the matter may be resolved.

It has been indicated that the statement in question was not inculpatory, but rather was exculpatory. I do not agree that only inculpatory statements, statements which concede some point or make an admission against interest, can be considered as statements made to effect a settlement. I accept that this statement was made in a spirit of co-operation and was made for the purpose of attempting to avoid litigation even though it is said to be totally exculpatory in nature.

CONCLUSION

I conclude, therefore, that all three conditions for the recognition of privilege have been met. The statement would not, therefore, be admissible if tendered by the Counsel for the Commissioner. It flows from this, that as it is not admissible, it cannot be used to cross-examine Cst. Hickey.

COMMENT

As a final comment, I add that even though the four conditions set out in **Slavutych** are not specifically applicable here, the fourth condition which requires the balancing of the injury caused by disclosure against the benefit gained for the correct disposal of the litigation, is deserving of comment. In this particular case, on balance, I conclude that the benefit gained by not allowing the claim for privilege is out-weighed by need to recognize the claim for privilege. As noted above, the recognition of the rule with respect to without prejudice communications in situations where it is applicable will assist in attaining the objective of the public complaints provisions in the **Act**.

DATED at St. John's in the Province of Newfoundland, this 21st day of July, 1994.

J. DAVID EATON
ADJUDICATOR