Date: 20021223
Docket: 01/61
Citation: 2002 NLCA 74

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

THE ROYAL NEWFOUNDLAND CONSTABULARY PUBLIC COMPLAINTS COMMISSION — APPELLANT

AND:

CONSTABLE BRIAN MCGRATH — RESPONDENT

Coram: Roberts, Welsh, JJ.A. and Russell, J. *(ex officio)*
Court Appealed From: Supreme Court of Newfoundland and Labrador
2000 St. J. No. 2007

Appeal Heard: October 15, 2002
Judgment Rendered: December 23, 2002

Reasons for Judgment by Roberts J.A.
Concurred in by Welsh, J.A. and Russell, J. *(ex officio)*

Counsel for the Appellant: Norman Whalen ,Q.C.

Counsel for the Respondent: Bradford Wicks

Roberts J.A.:

[1] This appeal is on behalf of a complainant whose complaint hearing was stopped because of procedural deficiencies. In particular, it raises questions concerning the interpretation of s. 43(2) of the **Royal Newfoundland Constabulary Act, 1992**, S.N.L. 1992, c. R-17 (the **Act**) and s. 30(2) of the **Royal Newfoundland Constabulary Public Complaints Regulations**, CNLR 1970/96 (the **Complaints Regulations**). Both sections use the word "shall" to qualify the carrying out of the actions specified. The appellant submits that notwithstanding the word "shall", (1) the sections are directory and not mandatory; and (2) the alleged failures to comply with s. 43(2) and s. 30(2) do not, in either case, provide compelling justification for denying the complainant a hearing of her complaint.

Background

[2] The incident which eventually gave rise to this appeal occurred in the early morning of March 7, 1996 when Brian Lahey refused to comply with a Royal Newfoundland Constabulary (RNC) request to stop his motor vehicle and, instead, sped off, with the police car in pursuit. The Lahey vehicle rolled over while attempting to make a turn at the intersection of MacDonald Drive and Logy Bay Road in the City of St. John's. Mr. Lahey's passenger, Neil Maher, was killed. Mr. Lahey was later charged with various **Criminal Code** offences.

[3] Rosemary Tee, sister of Neil Maher, filed a complaint (the Tee complaint) with the appellant, the Royal Newfoundland Constabulary Public Complaints Commission (the Commission) on May 22, 1996 concerning the manner in which the police pursued the Lahey vehicle. Copies of the Tee Complaint were forwarded on or about May 24, 1996 to the chief of police, who assigned Sergeant David Byrne of Internal Review to investigate. Sergeant Byrne promptly notified Constable Brian McGrath (the respondent), and provided him with a copy of the complaint.

[4] The chief of police suspended the investigation of the Tee complaint in June 1996 because of the pending charges against Lahey. Sergeant Byrne advised Constable McGrath verbally and Mrs. Tee in writing of the suspension.

[5] Because the criminal prosecution of Brian Lahey carried on for some time, the appellant and the Attorney General for Newfoundland and Labrador jointly

sought a determination from the Trial Division as to the propriety of the extended suspension of the Tee Complaint. Orsborn J., in a decision dated September 30, 1997, ruled that the suspension of the Tee complaint under s. 43(1) of the **Act** was proper.

[6] Brian Lahey was convicted in Provincial Court on February 17, 1998. Sentencing was set over to April. Ten days later, on February 27, 1998, Mr. Lahey filed a complaint with the RNC Public Complaints Commission (the Lahey complaint). The Lahey complaint was suspended pending his sentencing.

[7] Mrs. Tee and Mr. Lahey were both advised by correspondence dated May 5, 1998 that the suspension of their respective complaints had been lifted and the complaints would now be investigated. By correspondence dated June 16, 1998, the chief of police advised Mrs. Tee that the various allegations contained in her complaint were being dismissed. He explained that an internal review of the pursuit of the Lahey vehicle carried out by Inspector Robert Shannahan "did not identify any egregious breach of policy by any member of the RNC involved in the pursuit".

[8] Mr. Lahey was advised by the chief of police on June 24, 1998 that his complaint had also been dismissed.

[9] Mrs. Tee filed a Notice of Appeal with the Royal Newfoundland Constabulary Public Complaints Commissioner (the Commissioner), pursuant to s. 25(4) of the **Act**, on July 3, 1998. Mr. Lahey did likewise on July 21, 1998.

[10] The Commissioner completed an investigation of the complaints and, failing to effect a resolution, referred them for adjudication pursuant to s. 28(2) of the **Act**. There were officers other than Constable McGrath who were the subject of the complaints and all were represented by counsel before the adjudicator.

[11] Arguments with respect to preliminary procedural objections, including the alleged breach of s. 43(2) of the **Act**, were heard by the adjudicator on February 7-10, 2000. The adjudicator filed her decision concerning the objections on July 6, 2000. She ruled that the Lahey complaint was out of time. She further ruled that three other officers named had not been given proper notice of the investigation and, consequently, she had no jurisdiction to adjudicate against them. These rulings were not appealed by the Commission.

[12] Constable McGrath sought leave to appeal to the Trial Division, however, with respect to the adjudicator's decision concerning s. 43(2) of the **Act**, which requires that notice of a suspension of the investigation of a complaint "be given to all parties in writing, together with the reason for that suspension". The adjudicator found that Constable McGrath had been given notice of the suspension of the investigation of the Tee complaint because Sergeant Byrne had discussed it with him, and she also found there was no prejudice to Constable McGrath because the notice given by Sergeant Byrne was verbal rather than in writing.

[13] When the appeal before the adjudicator resumed on January 10, 2001 with respect to Constable McGrath and one other officer, Constable J. Thistle, counsel for Constable McGrath submitted that the adjudicator was without jurisdiction to continue to hear the complaints because when she reserved her decision with respect to the preliminary objections she had not, as required by s. 30(2) of the **Complaints Regulations**, adjourned the hearing to a date certain.

[14] The adjudicator dismissed Constable McGrath's submission concerning s. 30(2) of the Regulations in a written decision dated February 13, 2001. Constable McGrath again sought leave to appeal and leave was granted.

[15] The s. 43(2) and s. 30(2) appeals were heard together in the Trial Division in April 2001. The Trial Division judge allowed Constable McGrath's appeal with respect to both sections. He concluded, at paras. 60 and 69:

> Therefore based on the relevant law and evidence, I find that there was an adjournment by the Adjudicator on February 10, 2000, which was not to a date certain as required by Regulation 30(2) and the Adjudicator thereby lost jurisdiction. Procedural protection and fairness must be afforded to the appellant in the context of a potentially lengthy and costly proceeding with significant consequences to the appellant. The private rights of the appellant are paramount and Regulation 30(2) is mandatory.
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> .....
>
> The Act and regulations are for the protection of the public including those who make complaints and those who are the subject of complaints. The penalties for a member, if found guilty, are severe, serious and grave. So the provisions of the Act respecting time limits affect the private rights of individuals and are mandatory. Under the Act, a member of the R.N.C. could be dismissed with devastating

consequences to the member and his family, with the chance of obtaining alternate employment being extremely difficult. So there must be fairness to all concerned and therefore S. 43(2) of the Act must be complied with.

Relevant statutory provisions

- ***Royal Newfoundland Constabulary Act, 1992, S.N.L. 1992, c. R-17***

Part III
PUBLIC COMPLAINTS

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.

.....

19.(1) The commissioner may

(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.

(3) The complainant shall be given a statement, in a form prescribed by the regulations, that sets out the procedures to be followed in dealing with a complaint and describes the rights of the complainant.

(4) A complaint made under subsection (1) shall be made within 3 months after the alleged misconduct occurs or, in the case of a continuing misconduct, within 3 months after the last incidence of the alleged misconduct.

(5) Notwithstanding subsection (4), the 3 month time limit referred to in that subsection shall not begin to run against a complainant until he or she knows or, considering all circumstances of the matter, ought to know that he or she has a right of complaint concerning the conduct of a police officer 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.

(6) Where a postponement of filing a complaint is claimed under subsection (5), the matter of that postponement shall be referred to the commissioner who shall determine whether or not the complaint may be filed.

(7) Where a complaint is made by a person other than the person who is alleged to have been subjected to the misconduct, the commissioner may refuse to act on the complaint unless the person alleged to have been subjected to the misconduct consents.

(8) 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.

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 chief 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.

(3) Following an investigation of a complaint, the commissioner, with the consent of the parties, may effect a settlement of the complaint.

(4) Where the commissioner effects a settlement of a complaint under subsection (3), he or she shall report the settlement to the chief, and the commissioner shall notify the other parties that no further action will be taken with regard to the complaint unless the terms of the settlement are not complied with.

.....

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 the chief adjudicator of the panel appointed under section 29 who shall conduct a hearing into the matter or refer it to another adjudicator.

.....

29.(1) The Lieutenant-Governor in Council shall, on the recommendation of the minister, appoint a panel of persons to act as adjudicators.

.....

30.(1) The parties to a proceeding before an adjudicator are

(a) the commissioner, who shall have the carriage of the matter;

(b) the complainant;

(c) the police officer who is the subject of the complaint;

(d) the chief, in the case of an appeal by the police officer who is the subject of the complaint; and

(e) a person who satisfies the adjudicator that he or she has a substantial interest in the complaint.

(2) The adjudicator shall notify the parties, in writing, of the time and place of the hearing and the notices shall contain a copy of the complaint.

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.

.....

33.(4) An order or recommendation of an adjudicator shall be made in writing, together with a statement of the reasons for the order or recommendation, and a copy shall be provided to the commissioner, the chief and all parties.

.....

(8) An order of an adjudicator shall be binding on all parties.

36.(1) The complainant or the police officer who is the subject of the complaint may appeal an order or decision of the commissioner under subsection 22(6), 28(1) or of the adjudicator under section 33 by way of application to the Trial Division.

(2) An appeal shall not be made without leave of a judge of the Trial Division.

.....

(6) A judge of the Trial Division may confirm, reverse or vary the order of the adjudicator and may make an order that an adjudicator may make under section 33.

(7) Commencement of an appeal under this section does not operate as a stay of proceedings of the order of an adjudicator unless a judge of the Trial Division otherwise orders.

.....

43. (1) Where a criminal investigation is being conducted or a prosecution is commenced under an Act of the Parliament of Canada or another Act relating to the subject-matter of a complaint, proceedings under this Part shall be suspended pending a decision on that prosecution.

(2) Where a proceeding is suspended under subsection (1), notice of that suspension shall be given to all parties in writing, together with the reason for that suspension.

- ***Royal Newfoundland Constabulary Public Complaints Regulations, CNLR 970/96***

28.(1) Upon the conclusion of the respective presentations of evidence the commissioner and the police officer shall be permitted to make submissions to the adjudicator.

(2) Upon the conclusion of the presentation of the evidence and the making of submissions the adjudicator shall find whether the complaint has or has not been substantiated and shall prepare a written decision which shall be served upon all of the

> parties within 3 months from the date of the conclusion of the proceeding, unless the adjudicator indicates to the parties reasons for requiring an extension of time and the parties to the proceeding consent.
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> .....
>
> **30.** (1) The adjudicator may adjourn the hearing from time to time and may also adjourn at the close of submissions before rendering his or her decision.
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> (2) All adjournments shall be to a date certain and postponements may be dealt with by written acknowledgement of all the parties, in which case it shall not be necessary to convene the hearing for the purpose of postponing the matter and there shall be no loss of jurisdiction of the adjudicator over the matter.
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> [Emphasis added.]

Analysis

[16] Notwithstanding s. 11(2) of the **Interpretation Act**, R.S.N.L. 1990, c. I-19 which states that "[t]he word "shall" shall be construed as imperative and the word "may" as permissive and empowering", the question of whether a particular statutory provision containing the word "shall" is mandatory or directory does not always have a ready reply. Nor is the question easily answered because it has been asked for so long and so often. There is, nevertheless, an accepted analysis at the end of which, in most cases, the answer becomes obvious. I would begin, then, by referring to the reasons of Morgan J.A. of this Court in **Stephenville Minor Hockey Assn. v. N.A.P.E.** (1993), 104 D.L.R. (4th) 239 where he wrote, at pp. 242 - 243:

> It is impossible to lay down any general rule for determining whether a statutory provision is mandatory or directory. In each case regard must be had to the subject-matter and the importance of the provision to the general object intended to be secured by the Act. As stated by Lord Campbell in *Liverpool Borough Bank v. Turner* (1860), 30 L.J. Ch. 379 [at pp. 380-1]:
>
> > No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed.
>
> The circumstances under which a statutory provision for the performance of a public duty should be treated as merely directory was

considered by the Privy Council in *Montreal Street R. Co. v. Normandin* (1917), 33 D.L.R. 195, [1917] A.C. 170, an appeal from the Superior Court of Quebec. In that case, Sir Arthur Channell stated at p. 198:

> When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only ...

Although that case did not involve a question of time limitation, as here, the principle enunciated by Sir Arthur Channell is of general application.

[Emphasis added.]

[17] The **Montreal Street R. Company v. Normandin** case referred to by Morgan J.A. was considered, together with other decisions, by Shaw J. in **Teskey v. Law Society of British Columbia** (1990), 71 D.L.R. (4th) 531 (B.C.S.C.), at p. 536:

> As I read these cases, a statutory or regulatory requirement may be read as directory rather than mandatory if the enactment relates to the performance of a public duty, the failure to perform that duty would cause serious inconvenience to persons who have no control over those who are entrusted with the duty, and this would not promote the main objective of the enactment. Other considerations are whether or not there is a penalty provided for non-performance of the requirement, whether the requirement is in a regulation but not in the enabling statute, and what if any prejudice there is to persons who may be affected by the failure to fulfill the requirement. Each case must be decided on the nature of the particular requirement and the statutory and regulatory setting in which it is found.

[Emphasis added.]

[18] In this appeal, the Commission stresses the public complaint nature of the proceeding before the adjudicator. Constable McGrath, on the other hand,

emphasizes the aspect of possible disciplinary measures and the consequent prejudicial impact on him.

[19] The Commission cites in support of its position, among other cases, **Re Narain** (1983), 45 B.C.L.R. 191 (B.C.S.C.) and **Hawrish v. Law Society of Saskatchewan** (1998), 161 D.L.R. (4th) 760 (Sask. C.A.).

[20] In **Re Narain**, McLachlin J. (as she then was) considered a situation not wholly unlike the present one. The complainant there had lodged a complaint against a police officer and requested an inquiry under s. 40 of the **Police Act**. The police board held it did not have jurisdiction to proceed with the inquiry because the police officer had not been served with notice of the inquiry as required by s. 40(5), which provided:

> (5) A disciplinary tribunal shall, not more than 14 days after the date it receives a notice requesting an inquiry under subsection (3), send a notice specifying the date and place of the inquiry to
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> (a) the complainant;
>
> (b) the provincial constable or municipal constable against whom the complaint is made; and
>
> (c) the appropriate disciplinary authority,
>
> and the disciplinary tribunal shall hold the inquiry on the date and at the place specified in the notice.

[21] The complainant, instead of appealing to the police commission, complained to the provincial ombudsman. The police commission, notwithstanding, brought a petition for a declaration as to whether the failure to notify the police officer deprived the police board of jurisdiction to enquire into the complainant's complaint. Although McLachlin J. held that the police commission lacked standing to bring the petition, she dealt with the questions posed, nevertheless. She concluded that complaints against police officers under ss. 39 and 40 of the **Police Act** were to be viewed more as a dispute between citizen and police than an offence, writing at p. 198:

> ... The disciplinary authority may take disciplinary action against a police officer as the result of an investigation or inquiry under ss. 39 and 40. However, this is not the primary object of the provisions of the Police Act relating to complaints; in my view that object is to provide means by which the public may lodge and pursue complaints against the police.

[22] McLachlin J. continued:

> I therefore conclude that the duties imposed by ss. 39 and 40 of the Police Act are essentially public. It follows that the court may interpret the provisions of these sections as to the manner in which the duty is to be discharged as regulatory if viewing them as mandatory would work injustice or cause inconvenience to others who have no control over those who exercise the duty: *Ans v. Paul* [(1980), 41 N.S.R. (2d) 256 (T.D.)], at p. 269. In the case at bar, interpretation of the provisions of s. 40 as mandatory would interfere with Mr. Narain's legitimate desire to have the public inquiry under the Police Act delayed until the criminal proceedings against him had been concluded. Such an interpretation could work an injustice against him. I cannot think that it was the intention of the legislature to impose mandatory requirements which would frustrate the process of public complaint and inquiry which it was concerned to foster. The Act confers a right of public inquiry on a person aggrieved by the conduct of the police. To construe s. 40(5) as mandatory would mean that that right is lost if the police board makes even a small technical error. That, in my view, would be neither reasonable nor just. For these reasons, I conclude that the provisions as to service in s. 40(5) of the Police Act should be read as regulatory, not mandatory.
>
> [Emphasis added.]

[23] In **Hawrish v. Law Society of Saskatchewan**, a hearing committee established by the provincial law society gave its decision finding a lawyer guilty of conduct unbecoming a lawyer in 1995. The hearing committee did not, however, deliver its decision to the discipline committee until 1997, having decided to allow the lawyer to complete an ultimately unsuccessful appeal against the decision before proceeding further. The lawyer then brought an application for an order prohibiting the law society from acting upon the decision of the hearing committee, arguing that jurisdiction had been lost because of the failure of the hearing committee to give its decision to the discipline committee within 45 days of the hearing, as required by s. 53(1) of the **Legal Profession Act**. The trial judge granted the application. The Court of Appeal allowed the law society's appeal, holding that the order of prohibition should not have been made. Cameron J.A., for the Court, wrote, at p. 764:

> In the light of all this, coupled with the unpalatable consequences of holding otherwise, we do not think the legislature intended to ascribe fatal effect to every failure of the hearing committee to report one of its decisions to the Discipline Committee within 45 days of the hearing. Were it otherwise, even a mere slip in failing to so report a decision upholding a complaint would sound the death of the proceedings, even though the complaint had already been determined on its merits, with only sentencing remaining. And were it otherwise, a failure to so report, even if based upon sound reason, as it was here in light of the appeal that had been taken, would render worthless all that had been done and result in paralysis. Obviously, this would not so much achieve as defeat the object of these provisions and would be inimical to the interests of all but the lawyer against whom the complaint was made. It would serve to advance the narrow interest of the lawyer, but only at the expense of the interest of the complainant, together with the general interest of the public and the profession.
>
> And so we regard this aspect of the provision as directory rather than mandatory. ...

[24] Constable McGrath relies for his position that both s. 43(2) of the **Act** and s. 30(2) of the **Complaints Regulations** are mandatory on a number of cases, including **Toronto Transit Commission v. Ryan** (1998), 37 O.R. (3rd) 266 (Ont. Ct. Gen. Div.), **Labrador Inuit Assn. v. Newfoundland (Minister of Environment of Labour)** (1997), 152 D.L.R. (4th) 50 (Nfld. C.A.), **Bunn v. Law Society of Manitoba** (1990), 67 D.L.R. (4th) 465 (Man. C.A.), **Gloucester Properties Ltd. et al. v. R. In Right of British Columbia Environment and Land Use Committee et al.**, [1981] 4 W.W.R. 179 (B.C.C.A.), **Glow-Worm Investments Ltd. v. Atlantic Shopping Centres Ltd. et al.** (1981), 46 N.S.R. (2d) 223 (N.S.C.A.), and **Costello et al v. The City of Calgary**, [1983] 1 S.C.R. 14. In particular, Constable McGrath argues that the decisions in **Stefani v. College of Dental Surgeons (British Columbia)** (1996), 44 Admin. Law Report (2d) 122 (B.C. S.C.), **Cameron v. Law Society of British Columbia** (1991), 81 D.L.R. (4th) 484 (B.C.C.A.), **Re Vialoux and Registered Psychiatric Nurses Association of Manitoba** (1983), 2 D.L.R. (4th) 187 (Man.C.A.) and **Newton v. Tataryn** (1990), 65 Man. R. (2d) 175 (Q.B.), where, as here, discipline was an issue,

demonstrate the imperative, in such cases, to classify time limits as mandatory.

[25] In **Toronto Transit**, it was held that an Ontario Labour Relations Board order, to be enforceable, must be filed in strict compliance with all statutory requirements. The employer, not having complied with the requirements, failed in its application for an order finding the respondents, the organizers of a labour protest, in contempt of the Board's order. In **Labrador Inuit**, this Court held that the provincial Minister of the Environment and Labour lacked jurisdiction to grant permission to build a road and airstrip in advance of receiving the recommendations of a statutory panel. In **Bunn**, the Manitoba Court of Appeal held that the Law Society had acted beyond its authority in suspending Mr. Bunn because of the **Law Society Act's** requirement that before a suspension there must be an inquiry. The inquiry concerning Bunn did not begin until thirty days after his suspension. In **Gloucester Property**, an order in council passed pursuant to the **Environment and Land Use Act** was held to be invalid because it was done without a statutorily required environment and land use committee recommendation. In **Glow-Worm Investments**, the Nova Scotia Court of Appeal upheld the decision of the Provincial Planning Appeal Board that it lacked jurisdiction to hear an appeal because it was not filed within thirty days as required by the relevant statute. In **Costello et al. v. The City of Calgary**, a city expropriation by-law was held to be void because it did not comply with a statutory provision requiring twenty-one day's notice of a meeting.

[26] The College of Dental Surgeons in **Stefani** referred a written complaint concerning a dentist to a professional review committee for investigation six months after receiving it. It also delayed six months in advising the dentist of a separate oral complaint. The review committee convened a hearing 16 months after the initial complaint was received to consider them both. The dentist attended with counsel, but his counsel was not permitted to participate, nor was he allowed to present evidence in reply. The second complainant neither attended nor presented evidence. The committee filed its report with the College 37 days after the hearing. Nineteen days later the dentist received a summary of the report. There were also other irregularities. The dentist finally applied for an order prohibiting further investigation and for an order quashing the steps already taken by the College. Warren J. granted the application because of a number of procedural deficiencies, including the requirement under the rules of the **Dentists Act** that the committee submit its

report within fifteen days after completing its review. Warren J. concluded, at p. 144:

> In any event the delay involved in this proceeding satisfies me that there has been unfairness resulting in a denial of natural justice.

[27] In **Cameron v. Law Society of British Columbia**, the British Columbia Court of Appeal dealt with the requirement for authorization of the extension of time by the Law Society Standing Discipline Committee if a citation were not served within ninety days of the date of issuance. The chambers judge ordered that the citation, which was served ninety days after its issuance, be quashed and the Law Society prohibited from taking further action against the lawyer in relation to the original complaint. The British Columbia Court of Appeal agreed with the chambers judge that the particular citation be quashed. It held that the relevant rule did not confer a jurisdiction on the Standing Discipline Committee to extend the time for service of the citation after the ninety day limit provided in the rule expired. The Court of Appeal varied the order of the chambers judge, however, as it pertained to further proceedings. Wood J.A. wrote, at p. 496:

> ... On the material before this court there is no basis upon which it could be argued, nor as I have said has it been argued, that the delay in the proceedings against the member, resulting from the procedural indiscretions of the Standing Discipline Committee, has prejudiced him to such an extent that the committee should now be prohibited from proceeding anew. That fact alone, of course, will not prevent him from moving for appropriate relief in the event that such prejudice can be shown at a later date. But it is a sufficient basis upon which to conclude that no order prohibiting further proceedings should be made in these proceedings.

[28] The Manitoba Court of Appeal in **Vialoux** considered s. 37(1) of the **Registered Psychiatric Nurses Act**, which provided that the discipline committee of the Registered Psychiatric Nurses Association of Manitoba "shall, within 30 days, from the date of the direction or decision fix a date, time and place for holding of the inquiry which shall commence no later than 60 days from the date of the direction or decision". The Court agreed with the chambers judge that the provision was mandatory in nature and ought to be strictly observed, since the provision involved the private rights of an individual; the discipline committee acted without jurisdiction when it failed to begin an inquiry no later than sixty days from the date of a direction.

[29] In reaching the above conclusion, Philp J.A., for the court, at p. 189, considered the comments of Freedman C.J.M. in **Bilodeau v. A.-G. Man.** (1981), 61 C.C.C. (2d) 217, at p. 224:

> One of the tests for determining whether a statute is mandatory or directory is the degree of hardship, difficulty, or public inconvenience that will result from treating it as mandatory. The *rationale* for this approach is that the Legislature could not have intended widespread chaos to be the consequence of non-compliance with a particular statute. Hence, to avoid this consequence of chaos, an intention will be imputed to the Legislature that the statute was directory in its effect, and not mandatory.

Philp J.A. continued, at p. 190:

> There is an element of public concern in proceedings under s. 37 of the *Registered Psychiatric Nurses Act*. The public has an interest in the standards for the practice of psychiatric nursing in Manitoba and in the standards of professional ethics of registered psychiatric nurses. However, at stake in the inquiry before the discipline committee was the right of Vialoux to practise his profession. This is not a case of "widespread chaos" which was the concern of Freedman C.J.M. in *Bilodeau*. In my view, the apprehended or potential public concern must yield to the private rights of Vialoux.
>
> In my view, the time requirements of this statute ought to be strictly observed, involving as it does the private rights of an individual. ...

[30] Scott, A.C.J.Q.B. (as he then was) followed the reasoning of **Vialoux** in **Newton v. Tataryn** where he found that a discipline committee of the Manitoba Association of Registered Nurses had lost jurisdiction by scheduling a complaint inquiry more than sixty days following a direction that an inquiry should be held. He concluded that the time provision was mandatory and a statutory prerequisite to jurisdiction. Binder J. followed **Vialoux** in **Carlin v. Registered Psychiatric Nurses' Assn. (Alberta)** (1996), 40 Alta.L.R. (3d) 206 (Q.B.), where the circumstances were similar to those in **Newton**.

[31] The cases relied upon by Constable McGrath and addressed in para. 25 above are readily distinguishable from the case under appeal. The statutory requirements not complied with in those cases were substantial in nature and

went to grounding jurisdiction either to begin a proceeding or to continue with some derivative aspect of it, e.g., the bringing of contempt proceedings in **Toronto Transit Commission v. Ryan**.

[32] Concerning the cases particularly relied upon, in **Stefani v. College of Dental Surgeons (British Columbia)** there was an almost complete disregard of specified procedures, to the point that the appeal judge concluded there had been a denial of natural justice. In **Cameron v. Law Society of British Columbia**, the extension of time was required for continued jurisdiction, but even there the British Columbia Court of Appeal hastened to add that the prejudice to lawyer Cameron was not such that the Law Society could not begin its discipline proceedings anew. In **Vialoux**, the missed time period went to the Committee's initial jurisdiction. More importantly, in all three of those cases, and in **Newton v. Tataryn**, the committees were disciplinary committees and therefore different in nature from an adjudicator appointed pursuant to the public complaints provisions of the **Act,** where discipline is not the principal focus but only a possible outcome.

[33] One last case relied upon by Constable McGrath is the unreported oral decision in **Ballard v. Coady,** 1995 St. J. No. 0154, where Orsborn J., in dealing with an unsigned notice of a charge, stated:

> ... it seems to me, at a minimum, a police officer who is charged is entitled to have served upon him, in accordance with the regulations, a Notice of a Charge which bears the signature of the complainant.

[34] **Ballard v. Coady** differs from the present appeal for two reasons. Firstly, the proceeding was under Regulation CNLR 802/96 which, unlike the **Complaints Regulations**, has police discipline as its object and focus. Secondly, the notice of a charge insofar as a police officer is concerned, begins the process against him. Section 10(1) of Regulation CNLR 802/96 reads:

> Where a police officer is charged with a breach of these regulations, the charge shall be laid within 30 days of the alleged offence coming to the attention of the Chief of Police by laying an information and serving a notice of the charge upon the police officer.

[35] As Orsborn J. said at the beginning of his reasons, and I agree with him, "... it is a, really, a pre-condition to the Constitution and proceedings of a discipline panel, that the Notice of Charge and the information be appropriately

completed and served". **Ballard v. Coady** is analogous to the cases treated in para. 25 above.

[36] I return to the statements of Morgan J.A. in **Stephenville Minor Hockey Association** and Shaw J. in **Teskey** underlined in paras. 16 and 17 above to the effect that there is no general rule for determining whether a statutory provision is mandatory or directory and that each case must be considered having regard to the nature of the particular requirement, i.e., the requirement's importance in the overall statutory scheme.

[37] The role of the Royal Newfoundland Constabulary Public Complaints Commission and the subordinate role of an adjudicator under s. 28 is defined in s. 19(1) and (3) of the **Act**:

> **19.** (1) The commissioner may
>
> (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.
>
> .....
>
> (3) The commissioner may make recommendations respecting matters of concern or interest to the public relating to police services by sending the recommendations, with supporting documents, to the chief and a copy to the minister.
>
> [Emphasis added.]

[38] The primary objective of the public complaints scheme is not discipline, although discipline may ultimately result. Discipline of Royal Newfoundland Constabulary members is dealt with by s. 42 of the **Act** and, more particularly, by Royal Newfoundland Constabulary Regulations, CNLR 802/96.

[39] Like McLachlin J. in **Narain**, I conclude that the duties imposed by Part III of the **Act** and the **Complaints Regulations** are essentially public in nature and not focused on the private rights of individual police officers. 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, such as Mrs. Tee, 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. 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 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".

[40] As indicated above, one also has to consider the particular requirement and the statutory or regulatory setting in which it is found. In that regard, s. 43(2) of the **Act** provides for notice to parties of a suspension of proceedings under Part III while a criminal investigation or prosecution is ongoing. In such a situation, the complaint proceeding has already commenced and the particular police officer will have been notified of the complaint against him. That was so with Constable McGrath. Although the notice of the suspension of the proceeding was communicated to him verbally, and not in writing as the section dictates, I agree with the adjudicator that, given the nature of this requirement, the verbal notice was sufficient. There was no resulting prejudice to Constable McGrath.

[41] The requirement of s. 30(2) of the **Complaints Regulations** is likewise not critical to the protection of Constable McGrath's rights. The adjudicator, before she adjourned on February 10, 2000 to consider the preliminary procedural objections, advised counsel that she might not be able to file a written decision within three months, as required by s. 28(2) of the **Complaints Regulations**, and asked them if they would consent then to an extension, should one be needed. All counsel consented. Neither the adjudicator nor counsel, however, adverted to the requirement of s. 30(2) that "all adjournments shall be to a date certain ...". This was no more than an oversight. Constable McGrath was not prejudiced thereby and it has not been suggested that he was, except in the general sense that because he may eventually be disciplined he should be entitled to strict compliance with all time limits, no matter how innocuous non-compliance with them might be. As indicated earlier, the judge of the Trial Division agreed with this latter position.

Conclusion

[42] I find that the judge of the Trial Division erred in law in failing to distinguish between the directory and mandatory applications of the word “shall”. His emphasis on the possible discipline of Constable McGrath to the exclusion of any consideration of the real purpose of the public complaints scheme provided in Part III of the **Act** led him to conclude that the sections in question were mandatory. For the reasons discussed, I conclude that both s. 43(2) of the **Act** and s. 30(2) of the **Complaints Regulations** are directory in nature and failure to strictly comply with them should not prevent the hearing of Mrs. Tee’s complaint.

Disposition

[43] The appeal is allowed with costs in this Court and in the Court below.

_____
D.M. Roberts, J.A.

I Concur: _____
B.G. Welsh, J.A.

I Concur: _____
D.L. Russell, J. *(ex officio)*