ROYAL NEWFOUNDLAND CONSTABULARY
PUBLIC COMPLAINTS COMMISSION

IN THE MATTER OF a public hearing of the complaint of Percy Smith

BETWEEN:

THE ROYAL NEWFOUNDLAND CONSTABULARY PUBLIC COMPLAINTS COMMISSION **COMMISSION**

AND:

CONSTABLE W.F. GOSSE **RESPONDENT**

PRELIMINARY DECISION

The Respondent, Constable Gosse, raises a preliminary issue with respect to disclosure. Argument was heard February 13th, 2001.

FACTS

Counsel on behalf of Constable Gosse requested disclosure of the investigated file prepared by the investigator retained by the Royal Newfoundland Public Complaints Commission in relation to the appeal of Percy Smith against the decision of the Chief of Police finding that the public complaint of Percy Smith did not warrant disciplinary action.

Counsel for the Commission has provided counsel for Constable Gosse with statements and other information gathered during the course of the investigation conducted on behalf of the Royal Newfoundland Constabulary Public Complaints Commission. However, he has refused to provide a copy of the complete investigative report prepared by the investigator.

It is the position of Constable Gosse that the contents of the investigative report, prepared on behalf of the Commissioner and relied upon by him in determining that the decision of the Chief of Police should be overturned and an adjudication ordered, ought to be disclosed to Constable Gosse in order to assist in his defence.

ISSUE

Does the Commission's non-disclosure of the investigator's report constitute a breach of procedural fairness?

THE RESPONDENT'S POSITION

It is the position of Constable Gosse that the material comprising of the investigator's report may be of significance in preparing his case before me, that the non-disclosure of the report constitutes a breach of

procedural fairness and that there is no special reason why the report should not be disclosed. Give the heightened standard recently applied to administrative tribunals as pertains to disclosure, he requests that I order disclosure of the investigator's report.

THE COMMISSION'S POSITION

It is the position of the Commission that it has fulfilled all disclosure obligations imposed on it by the legislation and the common law. Constable Gosse has been provided with the entire report of the investigator as it relates to the factual information gathering process. He has not been provided with the private conclusions of the investigating officer. He submits that they should not be provided, as they are inadmissible as irrelevant opinion evidence or hearsay. The personal opinions of the investigating officer cannot determine whether a matter proceeds to adjudication, cannot affect the proceeding in any way and therefore it cannot be said that such opinions are relevant to the adjudication. If they are not relevant, there can be no requirement of disclosure of such opinions. He further submits that absent exceptional circumstances, I should not impose a higher standard upon the Commission than those that have been imposed by the legislature.

THE LEGISLATION

The relevant sections of the *Royal Newfoundland Constabulary Public Complaints Regulations* ("the Regulations") made pursuant to the *Royal Newfoundland Constabulary Act, 1992* ("the Act") are as follows:

THE 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 recognised 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 our the subject matter of the investigation, all relevant findings and conclusions and the statements obtained shall be appended to that final report;

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.

21. (1) A police officer who is the subject of a complaint is not compelled to testify at a hearing before an adjudicator but he or she may give evidence under oath.
   (2) Upon the request of the police officer against whom a complaint has been made, the commissioner or his or her representative shall provide a list of the witnesses to be called in relation to the subject matter of the hearing and a summary of the facts each witness is expected to relate at the hearing.
   (3) Upon the request of the commissioner the police officer or his or her representative shall provide a list of witnesses to

be called on behalf of that police officer and a summary of the facts each witness is expected to relate at the hearing.

THE ACT

33. (1) Following a hearing not respecting the chief an adjudicator shall make a determination on the balance of probability and may order

(a) that the decision appealed from be confirmed;
(b) that the police officer who is the subject of the complaint
(i) comply with standards of police service prescribed in the regulations,
(ii) enter a rehabilitative or further training program which the adjudicator considers necessary,
(iii) be reinstated with or without a reprimand,
(iv) where he or she is not a commissioned officer, not be considered for promotion for a time period of up to 3 years,
(v) where he or she is not a commissioned officer, be demoted permanently or for a specified period,
(vi) where he or she is not a commissioned officer, be suspended with or without a salary for a specified period of time, and
(vii) where he or she is not a commissioned officer, be dismissed from his or her position with the constabulary;

CASE LAW AND ANALYSIS

The Supreme Court of Canada laid down the following propositions in Kane v. Board of Governors of University of British Columbia, [1980] 1 S.C.R. 1105; 31 N.R. 214, at pp. 1112-1114 (S.C.R.):

> "1. It is the duty of the courts to attribute a large measure of autonomy to a tribunal ...sitting in appeal, pursuant to legislative mandate. The Board need not assume the trappings of a court ...

> "2. As a constituent of the authority it enjoys, the tribunal must observe natural justice which ... is only "fair play in action". In any particular case, the requirements of natural justice will depend on the "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter, which is being dealt with, and so forth" ... . To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.
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> "3. A high standard of justice is required when the right to continue in one's profession or employment is at stake... . A disciplinary suspension can have grave and permanent consequences upon a professional career.
>
> "4. The tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity "for correcting or contradicting any relevant statement prejudicial to their views"... .
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> "5. It is a cardinal principle of our law that, unless expressly or by necessary implication, empowered to act ex parte, an appellante authority must not hold private interviews with witnesses ...or, a fortiori, hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such party ... "know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them... Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other".

The Supreme Court of Canada has recently reviewed the law regarding procedural fairness and factors affecting the content of the duty of fairness. Justice L'Heureux-Dube in Baker v. Canada [1999] 2 S.C.R. 817 stated at paragraph 20 that "The fact that a decision is administrative and effects 'the rights, privileges or interests of an individual' is sufficient to trigger the application of the duty of fairness:...". She concluded at paragraph 28 that there are many factors,

which are not exhaustive, which help a court determine whether procedures followed respect the duty of fairness.

Relevant to the issue before me, at paragraph 21, Justice L'Heureux-Dube stated:

> The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in..., the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness:... .

And she further stated at paragraph 25:

> A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those, the more stringent the procedural protections that will be mandated.

In applying the above principles, I am of the view that the duty to disclose in the circumstances of this case exceeds the minimal standard set out in the legislation. If Constable Gosse were to be found guilty of the charges against him, the penalty could be quite significant. He could be dismissed from his position. In these circumstances "a high standard of justice is required".

Counsel for the Respondent refers to various cases where courts, having considered the elements of procedural fairness, have ordered

disclosure of investigator's reports. In particular he refers to Giles v. Newfoundland Royal Newfoundland Constabulary Public Complaints Commission, (1996), 144 Nfld. & P.E.I.R 17 (Nfld. SCTD). The circumstances of that case, however, are clearly distinguished from the present matter under consideration. In *Giles*, the decision maker had access to the report and the person whose conduct was under scrutiny did not. Accordingly, minimum standards of fairness required that Constable Giles be provided access to the report. The court did not address its mind to the issue of whether the report should be disclosed in every case. Other cases to which I have been referred may be distinguished from the present case as the decision makers had access to material not disclosed to the persons whose conduct was under scrutiny. I see no need to review these cases.

While Constable Gosse has been provided with witnesses' statements and other factual information, he has not been provided with the complete report. The report as contemplated by the Regulations should set out the subject matter of the investigation, all relevant findings and conclusions and the statements obtained must be appended to the report. I understand that it is the conclusions of the investigator that have not been provided.

In argument, Commission counsel submits that these are private conclusions of the investigator that cannot influence any decision I might make as they will not and cannot form part of the record. He argues they have no relevance. He did, however, state that some of the investigators conclusions are prejudicial to the Commission and that some are prejudicial to Constable Gosse. While I agree with him that the Commission has provided disclosure beyond that required by the legislation, I am somewhat unsettled by the circumstance that in preparing the case that the Respondent has to meet, Commission counsel has had access to potentially prejudicial material that is not known to Constable Gosse. While I am satisfied that this not a situation where I as adjudicator will "hear evidence or receive representations from one side behind the back of the other" or that evidence has been held back for the element of surprise, I am not persuaded that this material is not relevant to Constable Gosse in preparing his defence. Given the possible grave and permanent consequences for Constable Gosse, the disclosure in this case must meet the "highest standard of justice". While the case law is not entirely conclusive on this point, I agree with counsel for the Respondent that there exists a body of jurisprudence that approaches the criminal law standard of disclosure. I am referred to a decision of Williams, C.J. of the British Columbia Supreme Court in Hammami v. College of Physicians and Surgeons of British Columbia [1997] B.C.J. No. 1702. In that case, Chief Justice Williams considered

whether the principles of disclosure as articulated by the Supreme Court of Canada in R. v. Stinchcombe apply to administrative tribunals. After canvassing various decisions which considered the application of Stinchcombe in administrative settings, the Chief Justice wrote:

> It is seems to me the following principles can be gleaned from the above cases:
> 1. The Stinchcombe case itself arose in the criminal context and held that full disclosure must be made in indictable offences, and that it may be applicable in other offences as well.
> 2. That in cases arising from the administrative law context where the decision of an administrative tribunal might terminate or restrict the "accused's" right to practice or pursue that career or seriously impact on a professional reputation then the principles in Stinchcombe, in respect of disclosure may well apply.
> 3. In appropriate cases the court's approach should be as outlined by the Court of Appeal in J.P.G. et al. v. Superintendent of Family and Child Services (BC) and that is where the disclosure "might have been useful" then disclosure should be made by the Crown (or tribunal) unless there is "any special reason why such material should not be disclosed" and in those circumstances the special reason should be brought to the attention of the judge or tribunal. (see Para 75)

I am also referred to Bailey v. Saskatchewan Registered Nurses Association [1998] S.J. No. 332. In Bailey, the Saskatchewan Court of Queen's Bench at paragraphs 143-144 of the decision, in applying the Stinchcombe principles to professional disciplinary proceedings involving the nursing profession, cited James T. Casey in The Regulation of Professions In Canada (Toronto: Carswell, 1994):

As stated by James T. Casey in The Regulation of Professions in Canada, supra, at pp. 8-23 and 8-24 under the heading "Disclosure of Exculpatory Information":

> What is the duty of disclosure in the context of a disciplinary hearing for professionals? Certainly there is a duty on the prosecutor to disclose sufficient information so that the member knows the case to be met. . . . Professional organizations fulfill important public functions in the regulation of professions and should not be viewed as adversaries engaging in a form of civil litigation. Like a criminal prosecution, the purpose of a disciplinary hearing should not be to obtain a conviction, it should be to present all relevant information to the Discipline Committee to determine whether professional misconduct has occurred. . . A finding of professional misconduct can have grave and permanent consequences for a professional. In some cases, the consequences are more severe than a criminal conviction. Therefore, the policy reasons for full disclosure of all . . . material should apply equally to professional discipline hearings. In fact, it is interesting, to note the comments of the Ontario Divisional Court in response to a complaint regarding a disciplinary hearing that a potentially important witness interview memorandum was not produced. The Court stated that there was "...no reason to believe that the memorandum in question would not have been produced to the defence in response to a standard Stinchcombe letter." . . In Howe v. Institute of Chartered Accountants (Ontario) [(1994), 19 O.R. (3d) 483 (C.A.) leave to appeal to S.C.C. refused (February 2, 1995) . . .] the Ontario Court of Appeal dismissed an application to compel production of a report... Laskin, J.A. in a strong dissent found that several of the observations made by Sopinka J. in Stinchcombe seemed apt to determine the content of the fairness obligations of administrative tribunals and would have ordered production of the report.

At pp. 8-24 and 8-24.1, the learned author in The Regulation of Professions in Canada, had this to say:

> The standard of disclosure for a disciplinary tribunal has been described by one Court as follows:
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> > The importance of full disclosure to the fairness of the disciplinary proceedings before the Board cannot be overstated. Although the standards of pre-trial

> disclosure in criminal matters would generally be higher than in administrative matters (see Biscotti et al. v. Ontario Securities Commission, supra), tribunals should disclose all information relevant to the conduct of the case, whether it be damaging to or supportive of a Respondent's position, in a timely manner unless it is privileged as a matter of law. Minimally, this should include copies of all witness statements and notes of investigators. . . . The absence of a request for disclosure or otherwise, is of no significance. The obligation to make disclosure is a continuing one. The Board has a positive obligation to ensure the fairness of its own processes. The failure to make proper disclosure impacts significantly on the appearances of justice and the fairness of the hearing itself. Seldom will relief not be granted for a failure to make property disclosure. Markandey v. Board of Ophthalmic Dispensers (Ontario), supra.

Commission counsel has referred me to a decision of Paras, J. of the Alberta Court of Queen's Bench, Kullman v. Borbridge (1995), 168 A.R. 227 where the judge held that the legislation governing the disciplinary hearing of the police officers had all the indicia of a fair hearing procedurally and substantively and he failed to order disclosure of the investigative file. This decision pre-dated *Hammami* and *Bailey*, which cases, in my opinion, point to a higher standard of disclosure in these circumstances. This decision has been superseded by subsequent jurisprudence.

Commission counsel has met and indeed exceeded the disclosure required by the legislation. He has not, however, met the standard of common law respecting procedural fairness in determining that the

investigator's conclusions are not relevant in these circumstances. With respect, that is not an appropriate decision for him to make.

I am satisfied that as the investigator's report, including the investigator's conclusions, is known to Commission counsel as he prepares the case to be presented before me, it must also be disclosed to the Respondent as he prepares his defence. This may assist him in pursuing additional avenues of defence. To this extent, the conclusions of the investigator may be relevant to him. To deny disclosure in the circumstances of this case where grave and permanent consequences upon the professional career of Constable Gosse could ensue would constitute a breach of procedural fairness. The report is not privileged as a matter of law. There is no special reason why the report should not be disclosed.

DISPOSITION

The application is successful and the investigators report shall be disclosed to the Respondent.

DATED AT St. John's in the Province of Newfoundland this 13th day of March, A.D., 2001.

LINDA M. ROSE, Q.C.