## DECISION

I have before me five References to Adjudicator concerning five individual police officers. Each Reference to Adjudicator (hereinafter referred to as "Reference") incorporates the same two separate complaints against each of the five officers, they being the complaint of Rosemary Tee filed on May 22, 1996, and the complaint of Brian Lahey filed February 27, 1998.

The five References were referred to me for hearing pursuant to sections 19(1)(c) and 28(2) of the *Royal Newfoundland Constabulary Act, 1992*, S.N. 1992, c. R-17, hereinafter referred to as the "*Act*".

Preliminary motions for dismissal of the complaints were made by all five Respondents. The motions were made respecting the validity of the References and the jurisdiction of the adjudicator to hear the complaints. The issues raised include the timeliness of each complaint, whether each complaint has actually been made against each of the five officers named in the References, and whether procedural requirements prescribed by the *Act* have been complied with, and if they have not been, whether the failures are fatal to the validity of the complaints, References and/or the proceedings.

It was agreed by the parties that the hearings would proceed together, and that the preliminary motions would be dealt with prior to hearing any evidence on the merits of the complaints.

## BACKGROUND

By way of background, in the early morning of May 7, 1996, members of the Royal Newfoundland Constabulary came upon a vehicle driven by Brian Lahey in such a manner which gave them reason to suspect that the driver was impaired. The officers attempted to stop the vehicle, but it did not stop. The RNC gave chase, and at times the pursuit was high-speed, in response to the speed of the Lahey vehicle. Unfortunately, the event ended tragically in an accident which caused the death of Neil Maher, a passenger in the Lahey vehicle. Mr. Maher was a brother of Rosemary Tee. Each of the two complaints in the References before me complains about the police conduct in the pursuit of the Lahey vehicle.

## TIMELINESS OF COMPLAINTS

I will decide the timeliness issues respecting each complaint first.

### The Tee Complaint

The first complaint was the complaint made by Rosemary Tee on May 22, 1996 – some fifteen days following the incident which gave rise to the subject matter of the complaint. This complaint is hereinafter referred to as the "Tee" complaint.

Section 22(4) of the *Act* defines the time period within which a complaint must be made. It reads:

> "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."

The alleged misconduct in this case took place on May 7, 1996. Therefore, the "Tee" complaint was made within the prescribed time period.

On June 12, 1996, the Internal Review Section of the RNC suspended its investigation of the "Tee" complaint citing section 43(1) of the *Act*:

> "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."

Issues respecting the validity of this suspension were raised by interested parties and application was made to the Supreme Court of Newfoundland for a determination. The suspension was subsequently determined to be proper by decision of Mr. Justice Orsborn dated September 30, 1997. After the conclusion of the criminal trial of Brian Lahey, the suspension was lifted. Ms. Tee was notified by correspondence from Inspector S. Roche dated May 5, 1998 that the suspension of the investigation was lifted. By detailed correspondence dated June 16, 1998, Chief of Police L. P. Power advised Tee that the internal investigation had been completed, and that her complaint was dismissed as there were insufficient grounds to support disciplinary action.

Rosemary Tee filed a Notice of Appeal dated July 3, 1998 appealing the decision of the Chief of Police to dismiss her complaint.

According to section 25(4) of the *Act*, such an appeal must be filed within fifteen days of receipt by the complainant, in this case Tee, of the Chief's decision to dismiss. Section 25(4) reads:

> "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."

All of the respondents argued that the appeal of the "Tee" complaint is out of time. It was filed on the 17th day following the date of Chief Power's correspondence. There is no evidence respecting the date on which Ms. Tee received Chief Power's correspondence. There is also no evidence to suggest that Tee's appeal was not filed within fifteen days of her receipt of Chief Power's correspondence. In the absence of such evidence, I am unprepared to conclude that Tee's appeal was filed outside of the required fifteen-day period.

I also make the following comments. A copy of Chief Power's correspondence to Tee dated June 16, 1998 was admitted into evidence by consent of the parties (Consent #1, Tab 8). This correspondence bears a "Received June 19, 1998" stamp in the upper right-hand corner, meaning that whosever copy was used as the consent exhibit received his copy on June 19, 1998.

The June 16, 1998 correspondence was copied to five others, three being police officers whose business addresses are identical to Chief Power's; one being Commissioner Harris, whose office we know to be in St. John's, and one being to the

Honorable Chris Decker, Minister of Justice, whose address is also well-known to be in St. John's, and whose copied correspondence is unlikely to be the one used as the consent exhibit.

The face of the June 16, 1998 correspondence to Tee also bears Tee's address, which is a P.O. Box number in Burnt Cove, Newfoundland. To conclude that correspondence mailed to this address would take at least as long to reach its destination as it would to reach a St. John's address is not stretching the point. Even if Ms. Tee received Chief Power's correspondence as early as June 19, 1998, the filing of her appeal on July 3, 1998 is well within the fifteen-day appeal period prescribed by the Act. It becomes especially likely that the appeal was timely when one considers that the fifteenth day following June 19, 1998 actually falls on a Saturday, which gives the appellant the benefit of having until the next following "business" day, according to the Rules of the Supreme Court of Newfoundland, to file her appeal. Finally, section 40 of the *Act* is also relevant. In the absence of direct testimony as to the date Ms. Tee received the Chief's June 16, 1998 letter, it can be considered to be received 7 clear days after being mailed. The July 3, 1998 appeal would therefore have been filed within 10 days, well within the 15-day limitation period.

Accordingly, in all the circumstances, I find that the "Tee" complaint is within time in every respect, and that my jurisdiction to hear the complaint is not lost.

## The Lahey Complaint

I will now decide the timeliness issue with respect to the "Lahey" complaint.

Brian Lahey filed a complaint with the Royal Newfoundland Constabulary Public Complaints Commission on February 27, 1998. This is 21 months and 20 days after the date on which the alleged misconduct took place, i.e. May 7, 1996. On its face, it is out of time, being beyond the three-month limitation period prescribed by section 22(4) of the *Act*. The three-month limitation period for filing a complaint is undeniably short. However, the *Act* is clear, and the three-month limitation period must be regarded as mandatory. However, section 22(5) provides for post-three month filing of complaints in certain circumstances. Section 22(5) reads:

> "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."

Mr. Lahey's complaint was accepted by the Public Complaints Commissioner and ultimately included in the five References. According to section 22(6) of the *Act*, it is the

commissioner's decision to determine whether the complaint may be filed. It is this decision which I am asked to review with a view to determining whether the commissioner's decision to accept the late complaint is correct, and if not, whether I have jurisdiction to hear the "Lahey" complaint. I will assume I have jurisdiction to review the commissioner's decision to accept the "Lahey" complaint.

The question is therefore whether Mr. Lahey established to the commissioner's satisfaction that he was unaware of his right of complaint before the date on which he filed it, or perhaps even within the three-month period after May 7, 1996.

The evidence respecting the commissioner's decision in this matter comes from Lorraine Roche, the RNC Public Complaints Commission Program Coordinator. She testified that she put the "Lahey" complaint before Dr. Harris and that he accepted it by initialing and dating it. She also gave evidence that she does not recall discussing the details with Dr. Harris, but she believes she would have discussed same with him. Ms. Roche further testified that from her discussions with Brian Lahey, she believed that he believed he had to wait until after his trial to make his complaint. Mr. Lahey did not testify. There is no evidence of any other reason for his delay to complain.

Even assuming that Mr. Lahey's belief that he had to wait until after his trial was the reason for his late filing, he could only have confirmed this belief after the decision of the Supreme Court of September 30, 1997, nearly seventeen months following May 7, 1996. At that time, the three-month limitation period is well past. As well, it is noteworthy that the "Lahey" complaint was made while the suspension order was still in effect, tending to suggest that the suspension order was not the reason for Mr. Lahey's delayed complaint. In any event, it is debatable whether Mr. Lahey's notion that he could not complain until after his trial explains that he did not know he had a right of complaint, which is what is required to be established. It may, in fact, underscore that he knew of his right to complain; he just misapprehended the timing.

In conclusion, the evidence called to support the commissioner's acceptance of the complaint is not, in my view, sufficient to discharge the burden on the complainant Lahey of establishing his entitlement to the postponement of the running of time.

I also make the following comments.

The *Act* requires a decision to be made by the commissioner, presumably after being presented with facts. The *Act* also clearly states the burden of establishing entitlement to postponed filing time to be on the person seeking the benefit of same, in this case the complainant Brian Lahey. To my mind, this process requires more than a cursory consideration of second-hand understanding of a complainant's belief. On this issue, I agree with the essence of the submission on page 3 of the Brief filed by counsel for Constable Langer. However, I do not wish to be interpreted as having decided the nature of the commissioner's decision or that it is necessary for the commissioner to hear evidence in order to make such a decision. I do accept that Dr. Harris had a duty to act fairly and give due consideration to the issue, which has not been established.

Accordingly, in all the circumstances, I find that the "Lahey" complaint was filed out of time and that I am without jurisdiction to consider it. If I am incorrect in my assumption of jurisdiction to review the commissioner's decision, other avenues of redress can be pursued.

**TAINTING**

The issue of the References being defective due to tainting, i.e. the valid complaint is tainted by the invalid complaint contained in the same Reference, has been raised. I have found that the "Tee" complaint is valid whereas the "Lahey" complaint is not. Counsel for Constable McGrath asserted this argument in his Brief and at the hearing, saying that Commissioner Harris had no jurisdiction to refer both complaints together to an adjudicator. I have not been pointed to any authorities which support this argument and, frankly, do not see that the "Lahey" complaint has soured the "Tee" complaint in any way. Therefore, I do not consider the tainting argument to have merit, and accordingly find that the "Lahey" complaint has not tainted the "Tee" complaint so as to invalidate the References.

In the result, I will consider each of the five References, without reference to the "Lahey" complaint, vis a vis each of the five Respondents.

**VALIDITY OF A REFERENCE TO ADJUDICATOR CONCERNING A RESPONDENT WHO HAS NOT BEEN NAMED BY THE COMPLAINANT**

The "Tee" complaint when made on May 22, 1996 identified two "*Members Involved*", to whom I will refer as respondents. They are Constable Brian McGrath and Constable Jeff Thistle. The "Tee" appeal (Exhibit L.R.#1) states the complaint is made against "*Constables B. McGrath, J. Thistle, and other officers involved*". There is no question but that Tee's initial complaint and appeal named Constable McGrath and Constable Thistle as the respondents. The References regarding Tee's complaint are therefore in order.

There are three other officers in respect of whom there are References. They are Constable Donald Langer, Constable Thomas Warren, and Staff Seargent Larry Peyton.

It was argued by respondents Langer, Warren and Peyton that they were never named by the complainant or anyone else as respondents to the "Tee" complaint until they received their notices of this hearing and the References during the fall of 1999, over four and one-half years since the event from which emanated the complaint.

Constable Langer also argues that the adding of him to the complaint by the commissioner is arbitrary and contrary to the *Act*. Constable Warren and Staff Seargent Peyton add there is no provision in the *Act* to add a police officer as a party when he or she is not made the subject of a complaint by a person under section 22. These three parties maintain that it is the responsibility of the complainant to name each and every respondent to a complaint.

This is a position with which I cannot agree. It cannot be seriously contended that a complainant is in every instance in a position to know against whom he or she complains. It may be obvious and easy to identify the respondent in many incidents leading to complaint, but then again it may not. This is especially true in a hierarchical organization like a police force, where decisions can be made by directing minds and carried out by other individuals, and responsibility for the end result may be shared. To expect a complainant to be able to identify all of the persons responsible is asking too much of ordinary individuals who do not have the resources or ability to get the necessary information. Indeed in this case Ms. Tee's own testimony was that she did not really know which police officers had been involved in the May 7, 1996 pursuit of the Lahey vehicle, and that she got the names of Constable McGrath and Constable Thistle out of the newspaper!

In such a situation the playing field is not even, and the result of the three respondents' positions would be unfair. It would be unfair not only to complainants, but to those front-line officers who can be easily identified, when others responsible, perhaps even more responsible, escape identification.

Peyton, Langer and Warren also argue that there is no provision in the *Act* for them to be added as respondents, and therefore they cannot be added.

This is also a position with which I cannot agree. Although it may be desirable, it is not necessary for enabling legislation to provide for every procedural step in a judicial process, however minute. Just because the legislation does not provide for it, does not mean it cannot be done. There is opportunity for clarification of the "members involved" when the complainant files his complaint. As well, the Commissioner and the Chief of Police, separately or together, are well-positioned to establish a mechanism for determining the nature of a complaint and against whom it is or ought to be made. In fact, that is what ultimately occurred in this case. Unless the Public Complaints Commission is "user friendly", it is ineffective and its mandate is not being achieved.

I am therefore of the view that the three References naming Constable Langer, Constable Warren and Staff Sergeant Peyton are not invalid because Tee did not name these officers in her original complaint or because the enabling legislation does not provide a procedure for respondents to be named by the commissioner.

**NOTICE**

All five respondents argue that legislative directives of notice to each of them have not been complied with, with variances among the five officers as to which notices were given to or in respect of which officers. Suffice it to say that the evidence of notice differs as among the officers, and will have to be considered separately where appropriate.

Notice is an essential component of procedural fairness. This is especially true to a person whose professional standing is in issue. Failure to give notice of complaint is elementary, and a breach of the rules of natural justice.

Section 23 of the *Act* provides as follows:

> "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."

Constable McGrath and Constable Thistle

Both Constable McGrath and Constable Thistle were given copies of the "Tee" complaint shortly after its filing according to the testimony of Sergeant Byrne. This is corroborated by Sergeant Byrne's written note dated May 27, 1996, which was tendered as exhibit D.B. #7. This evidence was not refuted nor denied by way of direct testimony from either officer. In fact, neither Constable McGrath nor Constable Thistle testified. As well, both of these constables received written correspondence from Sergeant Byrne dated September 10, 1996 similar to that received by several other officers, which seeks to confirm their knowledge of the complaint. I therefore find that both Constable McGrath and Constable Thistle were given notice of the substance of the "Tee" complaint within the meaning of section 23 of the *Act*.

Constable Langer, Constable Warren and Staff Sergeant Peyton

The evidence respecting the notice received by Constable Langer, Constable Warren and Staff Sergeant Peyton that they were the subjects of the "Tee" complaint is essentially the same; no copies of the "Tee" complaint were given to Warren, Peyton or Langer, nor were these officers advised their conduct was in issue or their professional standing was in jeopardy, as stipulated by section 23 of the *Act*. The only evidence of anything resembling notice to these three officers was that each of them received correspondence dated September 10, 1996 from Sergeant D. Byrne, the Royal Newfoundland Constabulary investigator, requesting responses to various questions related to the pursuit of May 6, 1996 for "clarification purposes". Sergeant Byrne testified he sent out 12 to 15 letters similar to those sent to Langer, Warren and Peyton, i.e. Exhibits D.B. # 3, 4 and 5. Indeed Sergeant Byrne testified that he perceived Constable Langer, Warren and Staff Sergeant Peyton as witnesses, not as respondents, and in response to questions from Constable Langer's counsel, the Sergeant stated that he saw Constable Langer's role as different than Constable McGrath's.

I find that these letters cannot be construed as notice, either on their faces or especially when considered in the context of Sergeant Byrne's evidence. Accordingly, I find that there was no notice to Constables Langer, Warren and Staff Sergeant Peyton that they were respondents to the "Tee" complaint until they received the References in the fall of 1999.

The question becomes now whether notification that you are a respondent to a complaint which has a complicated history of over four and one-half years, and in respect of which notice required by the *Act* has not been complied with, is a proper basis upon which respondents Langer, Warren and Peyton must respond to the References.

In my view, the failure to notify Warren, Langer and Peyton that they were subjects of the "Tee" complaint within a reasonable time following its filing, and when several events have occurred in which these officers, it is now known, had a direct interest, is fatal to the References concerning each of them. These officers had a statutory right to notice under section 23 of the *Act*, which was not complied with. The delay of notice precluded their obtaining timely legal advice and representation if desired, in the events in which they had an interest. These events include: (1) the investigation of the complaint by the Internal Review of the RNC; (2) the application to the Supreme Court of Newfoundland concerning the suspension of the investigation issue; and (3) the trial of Brian Lahey. Had Peyton, Warren and Langer known they were in professional jeopardy for their conduct on May 7, 1996, they may well have participated differently in the investigation, had their interests represented in the Court application and/or had their counsel test the veracity of evidence given at the Lahey trial.

It is not the purpose of this decision to propose how respondents can be identified and notice given in a timely manner. Suffice it to say that it can and should be done in a timely manner, so that arguments respecting timely notice do not arise. If legislative change is thought to be helpful to this process, then it should be sought forthwith.

Prejudice

The issue of prejudice has been raised in that these officers have not demonstrated they suffered prejudice caused by the delay of notice to them. I note none of the three officers has testified. To my mind, however, the delay is of such length and the history of intervening events so relevant and potentially prejudicial, that prejudice must be presumed. In this respect, I rely on the reasoning in *Gage v. Ontario (Attorney General)* 1992, (Ontario High Court of Justice) contained in the Brief filed by Langer's counsel.

Additionally, to my mind, the sequence of events is such that it does not pass the "community's sense of fair play and decency" test as described in *Bennett v. British Columbia Securities Commission* (1992), 94 D.L.R. (4th) 339 (B.C.C.A.) contained at Tab 5 in Commission Counsel's Brief of Argument.

Accordingly, I find I do not have the jurisdiction to hear the References respecting Constable Donald Langer, Constable Thomas Warren, and Staff Seargent Larry Peyton.

There remains for my consideration the following arguments concerning Constable Brian McGrath and Constable Jeff Thistle, as they relate to the References containing only the complaint of Rosemary Tee. Both Constable McGrath and Constable Thistle allege failures to comply with other statutory requirements and that these failures are breaches of procedural fairness and/or the rules of natural justice, such that they result in my loss of jurisdiction to hear the complaint against them.

Breach of Section 24(3) of the *Act*

Constable McGrath and Constable Thistle argue that section 24(3) of the *Act* has not been complied with, in that the Chief failed to complete his investigation of the "Tee" complaint within the statutorily mandated three months.

The chronology of the investigation is as follows. The complaint was made on May 22, 1996. Notice of the investigation being suspended was sent to Ms. Tee by correspondence dated June 12, 1996, indicating that the suspension was in effect on June

12, 1996. The suspension was lifted on May 5, 1998 as indicated in correspondence to Ms. Tee of the same date, and found at Tab 7 of Consent #1. The investigation concluded on or before June 16, 1998.

This suspension of proceedings related to the "Tee" complaint was determined to be valid by the Newfoundland Supreme Court. I find this to mean that the time the investigation was abeyanced does not count as part of the three months. I believe that the *Act* necessarily contemplates calculation of time in this way in order to give effect to section 43. This is confirmed by section 7 of the Regulations which provides for suspension of the three-month period for completing the investigation whenever there is a section 43 suspension. It would therefore appear that the investigation took a total of sixty-three days, falling well within the three-month requirement. In these circumstances, I find no contravention of the *Act*, and that I consequently do not lose jurisdiction.

Breach of Section 43(2) of the *Act*

Both Constable McGrath and Constable Thistle also argue that they were not given written notice of the suspension of the "Tee" complaint in accordance with section 43(2) of the *Act*. There was no evidence given which proves that the officers were given such written notice. There was evidence, however, that they were aware of the suspension of the investigation of the complaint, for Seargent Byrne testified that he advised Constable Thistle and Constable McGrath of it. Again, there is no evidence from the officers themselves that they did not know of the suspension. Therefore, the alleged breach of the statutory requirement or procedural rule is that the two officers were not notified "in writing" of the suspension. There is no evidence of any prejudice suffered by McGrath or Thistle because their notification was not in writing. So the question becomes, does this breach cause me to lose jurisdiction to hear the complaint?

I think not. I do not consider such a breach, which could be considered technical at best on these facts, to be of sufficient importance so as to cause a loss of jurisdiction. There is no consequent prejudice demonstrated, nor has a nexus between the technical breach and the ability of Constable McGrath and Constable Thistle to make full answer and defence to the complaint been established so as to cause any presumption of prejudice. This breach is simply not in the same category as the breach of a statutory right to notice of complaint. Here there has been no impairment to Constable McGrath and Constable Thistle receiving a fair hearing. In reaching this conclusion, I rely on the reasoning in *Re Nisbet and Manitoba Human Rights Commission et al.* (1993), 101 D.L.R. (4th) (Man. C.A.) found at Tab 6 in Commission Counsel's Brief of Argument, which states the law as requiring "evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing" before there is a breach of natural justice or abuse of process which would result in a loss of jurisdiction.

To be sure, I also apply the previously referenced *Bennett* case test of the "community's sense of fair play and decency" to this argument. After due consideration, I conclude the community would not endorse my loss of jurisdiction to hear the "Tee" complaint against McGrath and Thistle because their notification of the suspension of the investigation was verbal and not written. Accordingly, I dismiss this argument.

In the result, I find that I have jurisdiction to proceed to hear the "Tee" complaint against Constable B. McGrath and Constable J. Thistle.

I ask that counsel approach me with suggested dates for hearing. Should agreement not be reached by September 8, 2000, I will set a date for the parties to convene and have the Public Complaints Commission office notify the parties.

**DATED** at St. John's, in the Province of Newfoundland, this day of July, 2000.

**LOIS R. HOEGG, Q.C.**
CHES CROSBIE BARRISTERS
169 Water Street
4th Floor
St. John's, NF A1C 1B1