

## DECISION ON PRELIMINARY ARGUMENT

MADE ON JANUARY 10, 2001

This decision addresses the preliminary argument challenging my jurisdiction to continue hearing the complaint of **Rosemary Tee against Constable B. McGrath and Constable J. Thistle**. It is contended by McGrath and Thistle that I have lost jurisdiction to hear this complaint because at the close of preliminary arguments on February 10, 2000, I did not adjourn the proceedings to a date certain. Their argument rests on the meaning and effect of Regulation 30 of the *Royal Newfoundland Constabulary Public Complaints Regulations*, which states:

*"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.*

*(2) All adjournments shall be to a date certain and postponements may be dealt with by written acknowledgment 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." . .*

### History

This matter originally involved two separate complaints against five RNC officers. Several preliminary issues were raised, and evidence and arguments regarding same were heard from February 7 to 20, 2000. At the conclusion of argument, I indicated that due to the volume and complexity of the preliminary arguments, I could not likely have a decision within the three month period stipulated by section 28(2) of the *Regulations*. Instead, it was agreed, on the record, I would have more than the three months to render my decision. I reserved decision. There was no discussion of setting a date certain, and no counsel, of whom there were six before me representing seven separate interests, raised the issue of setting a date certain for the rendering of my decision. I can only presume that had any

counsel considered it an issue at that

time, he would have spoken up rather than knowingly permit the hearing to be adjourned contrary to the Regulations.

I filed my decision on July 6, 2000, and copies were sent to all parties in conformance with the Legislation. I decided I had jurisdiction to continue hearing the complaint of Rosemary Tee against Constable Brian McGrath and Constable Jeffrey Thistle. The final paragraph of my decision called for counsel to approach me with suggested dates for the continuation of the hearing, and if there were no agreement by September 8, 2000, I would set a date.

### **Argument**

McGrath and Thistle argue that Regulation 30(2) infers a loss of jurisdiction when a matter is not postponed to a date certain.

I do not agree. In my view, the reference to loss of jurisdiction in Regulation 30(2) relates to the provision that the formal convention of the hearing is not necessary for adjournment. In other words, when a date certain is set, and the hearing does not reconvene for the purposes of adjourning, jurisdiction is not lost if the matter has been dealt with in writing by the parties. The wording, in my view, is meant to prevent loss of jurisdiction which ensues when a date is set and no one appears. Regulation 30(2) is intended to cure such a defect by providing an alternative to costly and inconvenient postponements. Clearly, it is a practical solution to postponement of a hearing when same is necessary

or desired, and with the consent of the parties. I do not view Regulation 30(2) as pronouncing that all instances of regulatory breach result in a loss of jurisdiction.

I also make the following observation. The Respondents' argument is premised on the view that what transpired on February 20, 2000 was an adjournment within the meaning of Regulation 30(2). I am not certain that this is the case. Section 28(2) of the Regulations provides that *at the conclusion of evidence and submissions, a written decision be served on all parties...* There is no stipulation that the evidence and submissions described in the section cannot be with respect to preliminary issues. The wording also infers no reconvention of the hearing for the purpose of rendering decision.

Accordingly, I find that Respondents' argument fails.

In the event that I am incorrect in my finding that the Respondents' argument fails for the above-noted reason, I will assume that there has been a breach of the Regulation, and address its consequences. The question becomes *does a breach of this Regulation cause me as adjudicator to lose jurisdiction?*

Both counsel for McGrath and Thistle assert that strict compliance with section 30(2) of the Regulations is required or there is a loss of jurisdiction. They argue the regulation is mandatory, and non-compliance with it cannot be cured. Commission Counsel submits the Regulation is directory, not mandatory. On this point, the Commission relies on “Teskey v. Law Society of British Columbia (1990) 71 D.L.R. (4<sup>th</sup>) 531, found at Tab 2 of Commission Counsel's Brief

The *mandatory versus directory* debate provides a method of analyzing and interpreting legislative language so as to assist a court or tribunal in coming to a fair and just decision. I am persuaded by the reasoning in the *Teskey* case, and conclude that the meaning of "shall" as found in section 30(2) of the Regulations is *directory*. I so find for the following reasons:

- (1) no penalty is provided for failure to set a matter to a date certain;
- (2) the requirement is found in subordinate legislation, i.e. the *Regulations* and not in the enabling legislation, i.e. the *Royal Newfoundland Constabulary Public Complaints Act, 1992*;
- (3) there was no prejudice to the respondent officers; and,
- (4) the purpose and objective of the legislation would be violated if compliance with Regulation 30(2) were held to be strict.

In the argument before me, there is no prejudice to Respondents McGrath and Thistle resulting from the failure to set a certain date to reconvene the hearing. Indeed, this is conceded by them. At best, their argument can be characterized as a technical breach of a Regulation, the effect of which is nothing. The law on this issue is well-established and was previously reviewed in my July 6, 2000 decision. For there to be a loss of jurisdiction there must be "*evidence of sufficient magnitude to impact on -the fairness of the hearing.*" *Nisbett and Manitoba Human Rights Commission et al* (1993), 101.t D.L.R. (4<sup>th</sup>) 744 (Man. C.A.). I find that the alleged breach of Regulation 30(2) does not impact the fairness of the pending hearing. There is no prejudice to McGrath and Thistle receiving a fair hearing.

From Rosemary Tee's perspective, she has complained to a public complaints body, and is dependent upon an Adjudicator, Commission Counsel and to some degree all counsel, over whom she has no control. To cause the dismissal of her complaint due to inadvertence of any party or the adjudicator, when she has no control over that person and when there is no adverse effect of the inadvertence on any party, would not promote the objectives of Part III of the *Royal Newfoundland Constabulary Act, 1992*. In this respect I also note the Court's comments on contextual interpretation found at paragraphs 31 and 32 in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)* [2000] 1 S.C.R. 665, which case was forwarded to me by Counsel for the Chief of Police on January 11, 2001.

Like the Court in *Teskey*, I cannot conclude that Regulation 30(2) *was meant to be a basis of loss of jurisdiction if it was not complied with*. The breach of this Regulation, if there is one, is an irregularity only, and does not cause me to lose jurisdiction to hear the complaints.

In the result, the hearing of the complaints of Rosemary Tee against Constable B. McGrath and Constable J. Thistle will continue on September 11, 2001 at 9:30.

**DATED** at St. John's, in the Province of Newfoundland, this 13<sup>th</sup> day of February, 2001.

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