<u>IN THE MATTER OF</u> s. 28 of The Royal Newfoundland Constabulary Act, 1992, S.N.L. 1992, c. R-17, as amended

<u>AND IN THE MATTER OF</u> a Complaint by Wayne Thompson, dated 8 August, 2001

<u>BETWEEN</u>:

THE ROYAL NEWFOUNDLAND CONSTABULARY PUBLIC COMPLAINTS COMMISSION

<u>AND</u>:

CST. EDMUND OATES

DECISION ON PRELIMINARY OBJECTION WITH RESPECT TO APPOINTMENT OF ADJUDICATOR

DECISION ON PRELIMINARY OBJECTION

1. This matter has come before me by way of a Reference to Adjudicator, pursuant to s. 28(2) of the **Royal Newfoundland Constabulary Act**, 1952, S.N. 1992, as amended (the **Act**), dated 11 April, 2002, and signed by Leslie Harris, the Commissioner appointed pursuant to s. 18 of the **Act**.

2. On 8 August, 2001, a public complaint was made by Mr. Wayne Thompson against Cst. E. Oates. The complaint was referred to the Chief of Police pursuant to s. 24 of the **Act**. The Chief dismissed the complaint pursuant to s. 25(1) of the **Act** and an appeal was filed with the Commissioner by Mr. Thompson pursuant to s. 25(4). The Commissioner did not dismiss the appeal and therefore determined that the matter should be referred to an adjudicator for a hearing. The referral is attached as Appendix A to this decision.

3. At the commencement of the hearing, Mr. Pike, counsel for Cst. Oates, raised a preliminary objection to the manner in which I was assigned to adjudicate this matter. In fact, the nature of the objection calls into question the manner in which all adjudicators are assigned.

4. Section 28(2) of the **Act** states that where the Commissioner does not dismiss a complaint and confirm the decision of the Chief and does not effect a settlement of the matter

> ... he 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.

5. A panel of adjudicators has been appointed under s. 29 but there has been no appointment to the position of Chief Adjudicator. All of the adjudicators are lawyers engaged in the private practice of law.

6. This is the 13th matter referred to adjudication since the Commission came into being. All matters have been referred directly to individual adjudicators by the Commissioner.

7. As there is no Chief Adjudicator, the Commissioner has referred complaints to individual adjudicators directly. It is accepted that this process is achieved generally on a rotational basis, in alphabetical order, but subject to the availability of the adjudicator whose turn it is and, of course, any potential conflict. While the Commissioner has signed the referral, the Commission staff has done the "selection" for the Commissioner's formal approval.

Position of Cst. Oates

8. Mr. Pike takes the position that there is a perception of bias in the appointment of adjudicators by the Commissioner as the Commissioner is also responsible for investigating complaints and for carriage of the matter during the hearing before the adjudicator. Such a process has the appearance of allowing one of the parties to the proceeding to select the individual adjudicator, who will hear and determine the proceedings, from the panel of adjudicators available.

9. There is no suggestion here of any actual bias in the selection process.

10. Mr. Pike argues that the legislature recognized the potential for such an argument when the **Act** was drafted and enacted s. 28(2) with that in mind. The process set out in s. 28(2) avoids any perception of bias as the Commissioner's role is limited and the Chief Adjudicator has the responsibility of appointing the adjudicator for each

individual hearing. Mr. Pike also suggests that the intercession of the Chief Adjudicator is an important procedural safeguard as the Chief Adjudicator would, where appropriate, be able to select an individual adjudicator for a particular matter, rather than simply select on an alphabetical rotational basis.

11. Finally, Mr. Pike argues that the process set out in s. 28(2) is mandatory rather than directory, and that there is no authority anywhere else in the **Act** that allows the Commissioner to appoint an adjudicator directly.

<u>Position of the Commissioner</u>

12. Mr. O'Flaherty takes the position that the manner of appointment in this case, or all others, creates no actual bias or reasonable apprehension of bias. He points to the actual method of selection of adjudicators for individual hearings (ie. based on alphabetical rotation) and that it is done by Commission staff rather than the Commissioner.

13. Mr. O'Flaherty argues that s. 28(2) of the **Act** is not a mandatory process but is directory. He takes the position that when the purpose of the legislation is considered, the Commissioner has a public duty to see that matters that are not otherwise disposed of or resolved are adjudicated by one of the adjudicators on the panel. He argues that the fact that the process specified in s. 28(2) cannot be followed does not mean that the matter cannot be adjudicated and that in the absence of an ability to appoint in accordance with that section, the Commissioner has a public duty to see that an adjudicator is otherwise appointed.

<u>Analysis</u>

14. In **Maloney v. The Royal Newfoundland Constabulary Public Complaints Commission** (Docket: 2001 01T 3223, judgment released August 02, 2002), Mercer, J., at page 13, accepted the position put forward by counsel for the Commission that:

> "the purpose of Part III of the Act as a whole is to provide for an independent civilian oversight process to review the conduct of police officers in the province the a public complaints system. The Act and Regulations are intended to establish an alternative to the civil court system, one that will be more timely and presumably less costly for determining issues of police accountability, in order to improve public access and participation in the system"

15. Mr. O'Flaherty has maintained the same position here, and I agree that it outlines the overriding purpose of the **Act**.

16. We cannot, however, lose sight of the rules of natural justice which must be applied to proceedings under the **Act**. In particular, it is fundamental to the rules of natural justice that a hearing be conducted by an unbiased tribunal. Additionally, there must be no reasonable apprehension of bias. Allowing one of the parties to a proceeding to select the tribunal can give rise to actual bias or a reasonable apprehension of bias, depending on how the actual selection occurred.

17. In essence, the issue to be resolved here is whether any adjudications can proceed where the adjudicators have been appointed directly by the Commissioner in the absence of a Chief Adjudicator. Resolution of that issue involves the balancing of competing principles.

18. I agree with Mr. Pike's argument that insofar as s. 28(2) of the **Act** requires that the reference be to the Chief Adjudicator, it was enacted for the purpose of avoiding the potential argument of a reasonable apprehension of bias in the appointment of

adjudicators to individual cases. Having the Chief Adjudicator assign the individual adjudicator removes an appearance of bias. That process cannot be followed as no Chief Adjudicator has ever been appointed.

19. The Commissioner has not complied with s. 28(2) because it is impossible for him to do so. There is no other reason for failure to comply with that provision. If the Commissioner did not select individual adjudicators, public complaints found to be deserving of adjudication could not be determined. Parties would thereby be prejudiced.

20. If the selection of individual adjudicators by the Chief Adjudicator as set out in the **Act** is a fundamental requirement for any adjudication to proceed, then the failure to comply with that provision for whatever reason will be fatal and this adjudication cannot proceed. If the failure to comply is not fatal, it becomes necessary to determine whether the process used by the Commissioner has created a reasonable apprehension of bias.

Is s. 28(2) a mandatory provision?

21. The law seems clear that if a provision is mandatory, the carrying out of the provision is a necessary step in the process which grants the tribunal the power to proceed. A failure to comply would leave the tribunal with no authority to proceed. If the provision is directory, a failure to comply does not automatically result in a loss of authority in the tribunal, providing that a continuation would not result in a miscarriage of justice.

22. The use of the word "shall" in s. 28(2) suggests that it is a mandatory provision rather than a directory provision. Section 11(2) of the **Interpretation Act**, R.S.N.L. 1990 C. I-19 supports that conclusion. However, legal writers suggest, and judicial authority

confirms, that the determination of whether a provision is mandatory or directory involves much more than the use of the word "shall"[1].

23. Mr. O'Flaherty has submitted that judicial authority suggests that the following three criteria should be used to determine whether a statutory provision is directory or mandatory:

1. A review of the whole act to determine its overall purpose;

2. Is there a public duty on the body required to comply with the statutory provision? If so, the provision is more likely directory so that a failure to comply will not frustrate the purpose of the **Act**; and

3. Will non-compliance with the provision prejudice one or more of the parties before the tribunal? If so, the provision is more likely mandatory.[2]

24. The overall purpose of the **Act** has been referred to above. It is to resolve or adjudicate public complaints against RNC police officers.

25. Under the **Act** the Commissioner has the duty and responsibility to see that complaints are processed through to conclusion, which in some situations will mean adjudication. I would classify the duty on the Commissioner to see that matters are brought to a conclusion as a public duty. As stated above there would be prejudice if unresolved

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[1]see Mullan, D.J. **Administrative Law** (3rd ed.) (Toronto: Carswell 1996) @ 317 and **City of St. John's v. St. John's Development Corporation** (1986), 19 Admin. L.R. at 10 (Nfld. S.C.T.D.)

[2]see **Marshall v. Ontario (Child & Family Services Review Boards)** (1994), 31 Admin. L.R. (2d) @ 69-70 (Ont. G.D.)

Re Toronto Board of Police Commissioners and Toronto Police Association, [1973] 3 O.R. 563 (Ont. H.C.)

Teskey v. Law Society (B.C.) (1990), 45 Admin. L.R. 132 (B.C. S.C.)

matters were not sent for adjudication. I am satisfied that the non-compliance with that part of the section stating that matters be referred to the chief adjudicator will cause no prejudice to any of the parties. All of this leads to the conclusion that s. 28(2) is a mandatory provision in that unresolved matters must be send for adjudication but not in that they be referred to the Chief Adjudicator.

26. Therefore I conclude that the failure of the Commissioner to refer this matter to the Chief Adjudicator is not fatal to this adjudication proceeding.

27. The manner of appointment set out on the **Act** is designed avoid arguments of perception of bias. The fact that it has not been followed in this case simply leaves it open for a party to raise the argument as Mr. Pike has done. Therefore, I must consider the question of whether the way in which I was appointed as adjudicator gives rise to a reasonable apprehension of bias.

Is there a reasonable apprehension of bias?

28. In **McBain v. Canadian Human Rights Commission** (1985), 22 D.L.R.(4th) 119 the Federal Court of Appeal found a reasonable apprehension of bias where the Commissioner had investigated, decided that the complain had been substantiated, prosecuted and appointed the tribunal members. Of particular significance, the Court stated at page 129:

> At the very least, the prosecutor should not be able to choose his ‘judge’ from a list of temporary ‘judges’. That, however, is just what happens when the Commission chooses the Tribunal members who will hear the particular case.

29. The statutory scheme under consideration in **McBain** required the Commission to designate an investigator to investigate complaints. The investigator was required to report his or her findings to the Commission. The Commission was then to decide whether the complaint was substantiated.

30. A complaint found to be substantiated could be referred to a tribunal which was to be selected from a panel of prospective members appointed by the Governor in Council.

31. In **McBain**, the Commission received the investigator's report and decided that the complaint was substantiated. They decided to refer the case to a tribunal and authorized the Chief Commissioner to appoint the tribunal.

32. The Court concluded that the appointment process gave rise to a reasonable apprehension of bias because there was a direct connection between the prosecutor of the case (the Commission) and the decision maker (the tribunal) as the tribunal was selected by the prosecutor. The Court found that this gave rise to a suspicion of influence or dependency. The test applied by the Court was that from the Supreme Court of Canada's decision in **Committee for Justice and Liberty et al v. National Energy Board et al** [1978] 1 S.C.R. 369 at 394-5; (1976), 68 D.L.R. (3d) 716 at 735-6. Essentially the test is:

> ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information...
>
> What would an informed person, viewing the matter realistically and practicably - and having thought the matter through - conclude...

> I see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The ground for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience'.

33. In **McBain**, there was nothing before the Court concerning the manner in which, or the basis upon which, the Chief Commissioner selected the tribunal members.

34. Decisions since **McBain**, although applying the same test, have come to different conclusions upon different facts. It seems clear that the application of the test is subject to some variation and that the facts of individual cases are key.

35. In **Tanaka v. Certified General Accountants' Association (N.W.T.)** (1996), 38 Admin. L.R. (2d) 99, (N.W.T. S.C.), the same individual investigated the complaint, directed that the matter go before a committee of inquiry and appointed the committee members, all of which were authorized by the statute. It was proposed that the same individual would assist the prosecutor. Among other things, Tanaka sought to have the decision convening the inquiry quashed. The Court would not allow the same individual to have a continuing role with the prosecution. As the person had investigated and appointed the committee, his role was over. The Court did not express any concern with the fact that the same person investigated, referred the matter for a hearing, and selected the hearing committee. As I read the case the real concern was that the same individual should not personally appoint a committee of inquiry and then appear before it. There was no concern about the process continuing without the particular person being involved.

36. In **Katz v. Vancouver Stock Exchange** (1995), 128 D.L.R. (4th) 424 (B.C. C.A.), the appointment of members to a hearing panel was challenged. The panel members were appointed by a staff member who selected the chair from a larger standing committee on a rotational basis subject to availability. While the arguments raised were different than in the current matter, the Court found no reasonable apprehension of bias. The Supreme Court of Canada upheld the decision. ((1996), 139 D.L.R. (4th) 575)

37. The Commissioner, who made the decision to refer the case to adjudication, did not personally select the adjudicator. If the Commissioner or Commission Staff had exercised some evaluation process to determine who among the members of the adjudication panel should hear a particular case, a perception of bias could result. While a Chief Adjudicator might chose an adjudicator to hear a particular matter on the basis of some characteristic, it would be inappropriate for the Commissioner or Commission staff to do so. In my view, the inability of the Commissioner to do so does not affect the selection process.

38. Additionally, the Commissioner will not personally be involved in the presentation of the case before me.

39. On the basis of the above, I conclude that the assignment process implemented by the Commissioner in this matter in the absence of a Chief Adjudicator does not create a reasonable apprehension of bias. On balance, I am satisfied that a reasonable, right-minded person considering the question with all of the necessary information would not reasonably apprehend bias.

40. In conclusion, Mr. Pike's preliminary objection is not sustained and the adjudication will continue.

J. David Eaton Q.C.
Adjudicator

Counsel

Peter O'Flaherty for the Commissioner

Mark Pike for Cst. Oates

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