DECISION File No. 18-0036

NOVA SCOTIA POLICE REVIEW BOARD

IN THE MATTER OF: The *Police Act*, Chapter 31 of the *Acts* of 2004 and the Regulations made pursuant thereto

- and –

IN THE MATTER OF: An appeal filed by **Adam LeRue and Kerry Morris**, Complainants, against Cst. Kenneth O'Brien and Cst. Brent Woodworth, of the Halifax Regional Police, requesting a review of a decision made by Superintendent Colleen Kelly dated June 19, 2019

BEFORE: Jean McKenna, Chair
Hon. Simon J. MacDonald, Vice-Chair
Stephen Johnson, Board Member

COUNSEL: Derek Simon, Solicitor on behalf of Mr. LeRue and Ms. Morris
Nasha Nijhawan, Solicitor on behalf of Cst. Woodworth
James Giacomantonio, Solicitor on behalf of Cst. O'Brien
Katherine Salsman, Solicitor on behalf of Halifax Regional Police

HEARING DATE: **July 15, 2020**

DECISION DATE: **September 11, 2020**

[1] Limitation periods are created for the purpose of protecting against undue delay, and the consequential prejudice, in bringing forward an issue to the attention of a court or tribunal. Limitation periods are invoked against the party alleged to have been impacted by a wrong ("the victim"). It is the "victim" of the alleged wrongdoing, after all, that controls the making of the complaint. The existence of a potential complaint may well be unknown to the alleged wrongdoer. The length of time within which the opportunity to bring the matter forward varies considerably, depending on the nature of the wrong, and the alleged wrongdoer.

[2] The timelines in the complaint process pursuant to the *Police Act*, SNS, 2004, C. 31 are analogous to limitation periods. They attempt to move complaints through the system without undue delay.

[3] In an internal complaint under the *Police Act*, the "victim" of the wrongdoing is the department, and/or a member, but at the same time, the department controls the timelines for processing following initiation of a complaint in the discipline process. In a public complaint, the "victim" is the member of the public, who must file a complaint within limitation, but thereafter, has no control over the process. It is no surprise that at least the early authorities tend to strictly treat time requirements for procedures by the department as mandatory in the case of internal complaints. However, that is not to say that there is no public interest without a public complaint.

[4] At the time the events resulting in the LeRue/Morris complaint occurred, the applicable limitation period for a complaint to be made, either internally or by a member of the public against a police officer, was set out in the *Police Act* Regulations as follows:

Complaint made more than 6 months after occurrence

> **29** If a complaint is made more than 6 months after the date of the occurrence that gave rise to the complaint, the complaint **must not be processed.** (emphasis added)

[5] That period has since been amended, allowing for a one year period in which to bring a complaint, however, that has no application to the LeRue / Morris matter). This amendment comes into effect January 15, 2021.

[6] As noted by the Complainants from the outset, they complied with that restriction, as did they with the time requirement to file a Notice of Review of the decision.

[7] The consequences of failure to meet that initial limitation period is clearly set out....: the complaint **must not be processed**, whether it be a complaint by a member of the public, or an 'internal' complaint. There is no distinction, and an officer, of whatever rank, is protected by that time period.

[8] There is no such express consequence, or any consequence, contained in the Regulations for a failure to meet a procedural deadline in the complaint processing.

The Regulations provide as follows:

Disciplinary authority's decision

44 (1) No later than 30 days after the date a disciplinary authority receives an investigator's report on a complaint against a member, the disciplinary authority must:

(a) decide whether the evidence gathered in the investigation shows that the member may have committed a disciplinary default; and

(b) take action in accordance with subsection (2) or (3).

[9] There is no dispute that in this matter, the Disciplinary Authority's decision not to sustain the complaint was issued 77 days after the investigation report was received, clearly a breach of s.44(1). This, despite two reminders/requests from the Police Complaints Commissioner, although the reminders from the Commissioner did not suggest a consequence.

[10] The Complainant's have appealed the Disciplinary Authority's decision to the Review Board. Although the Commissioner has authority to not refer the complaint to the Board if he/she deems it to be "frivolous, vexatious, without merit, or otherwise an abuse of process" (S 74 (4) *Police Act*, SNS 2004, as amended), the Commissioner forwarded the matter to the Board, without intervention.

[11] Ironically, in this case, it was the Complainants who first raised the issue of the time violations, firstly in a pre-hearing conference call, and then at the scheduled date for the hearing. The Board adjourned the hearing and asked for briefs on the issues.

[12] The initial argument of the complainants was that, as a result of the breach by the disciplinary authority, the HRP has acquiesced to their complaint, and the officers were guilty of a disciplinary default. After retaining counsel who submitted a reply brief on their behalf, they made no further submission on acquiescence.

[13] The Board is now being asked, on behalf of the officers that are the subject of this complaint, to find that as a result of the delay by the disciplinary authority in reaching a decision, the decision is void, and therefore the Board does not have jurisdiction to hear the complaint *de novo*.

[14] Halifax Regional Police argue that the Board has jurisdiction to hear the matter, and that the timelines are directory, not mandatory. HRP correctly sets out the issues as follows:

1. Did the Disciplinary Authority acquiesce to the complaint by missing the deadline set out in s. 44(1) of the Police Regulations, and if so, what is the effect of that acquiescence?

2. Does the Board have jurisdiction to hear this complaint, or has it lost jurisdiction by virtue of the missed timeline?

[15] It is clear that the failure to meet the regulatory timeline cannot mean that HRP acquiesced in the merits of the complaint. If that argument is accepted, there is an investigation without decision, but also, without an opportunity for the officers to respond to the allegations. That argument is therefore dismissed.

[16] On behalf of the officers, it is argued that there is a long line of decisions in both public and internal complaints, that a failure to adhere to the regulatory timelines results in a loss of jurisdiction by the Disciplinary Authority and the Board. Effectively, they say that a late decision results in a nullity and the matter ends there, whether the matter arises from a public or internal complaint. The focus of their argument, and the response of the complainants and

HRP, is on the interpretation of the use of the word "must" as opposed to "may" in the timeline requirements in s. 44 of the regulations. It is notable that in the earlier regulations, which were considered in that "long line" the word "shall" was used , and in the current, applicable regulations, it has been replaced with "must". However, although "shall" is defined as mandatory in the *Interpretation Act,* RSNS c 235, as amended, "must" is not:

> **Interpretation of words and generally**
> 9 (1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.
>
> (2) "Now", "next", "heretofore" or "hereafter" in an enactment refer to the time when the enactment comes into force.
>
> (3) In an enactment, "shall" is imperative and "may" is permissive.

[17] This is to be contrasted with, for example, the *Interpretation Act*, RSBC 1996, c.238, s. 29, which specifies that both "shall" and "must" are both construed to be imperative.

[18] On behalf of HRP, it is pointed out that these cases can be distinguished "... on the basis that they consider internal discipline rather than public complaints, deal with the investigations rather than decisions, and were based on regulations that are no longer in force."

[19] The genesis of the Nova Scotia authorities, is **Ans v Paul,** (1980) 41 NSR (2d) 256, **Ans** was in fact a "public complaint" initiated by "Mrs. Isabelle Loxdale", who complained that Cst. Gary Ans had failed to complete an occurrence report. Cst. Ans was served with a Notice of Hearing, which was required ("shall be") to be served not less than 14 days prior to the hearing. It was not; the hearing was scheduled for only 11 days post-service. The issue was whether the officer had waived compliance with the notice period, which is what had been found by the hearing officer. The constable applied for an order of prohibition, to prevent Insp. Paul from continuing with the hearing.

[20] Morrison, J. held that the procedural rule was mandatory. In doing so, he considered the decision of the Ontario High Court in **Re: Metropolitan Toronto Board of Police Commissioners and Metropolitan Toronto Police Association, unit B,** (1974) 2N.R. 95. In that case, the court concluded that a statutory requirement that an arbitrator "shall" deliver a decision within sixty days, was a "public duty". As it was a "public duty", the timeline was found to be directory, and not mandatory.

[21] Morrison , J. commented that:

> "I think this case would constitute some authority for concluding that a prescription might well be regarded as directory **only when injustice or inconvenience to others who have no control over those exercising the duty would result when that duty was imposed upon a public body. In this case we have a regulation dealing with internal police discipline and one cannot say that injustice or inconvenience to others who have no control over those who exercise the duty would result".** (emphasis added)

[22] Although the complaint in **Ans** was initiated by Isabella Loxdale, Morrison, J. treated it as internal. As well, she was not a party to the application in the court, and apparently injustice or inconvenience to her was neither argued nor considered.

[23] **Ans** began a line of authorities which tend to minimize the public interest in the discipline of police officers, and to emphasize potential unfairness to officers, particularly when the discipline was the result of an internal, as opposed to a public, complaint.

[24] **Ans** was considered by McLachlin, J., (as she then was) in **R. v Narain,** [1983] B.C.J. No. 895S, she noted the distinction between internal and public complaints:

> "The Act and Regulations distinguish between "Internal Discipline" (Regulations, Part I) and "Complaints Against Police" (Regulations, Part II).
>
> Internal disciplinary proceedings are conducted in camera, and have as their primary object, as their title indicates, the discipline of members of the police force. Detailed procedures are set out in the Regulations and penalties are provided. Being disciplinary and penal in nature, one might reasonably conclude

with those who have considered similar procedures elsewhere, that the requirements imposed with respect to internal disciplinary proceedings are mandatory, with the result that failure to comply with them deprives the tribunal in question of jurisdiction: **Ans v. Paul,** (1980), 41 N.S.R. (2d) 256 at 268; S.A. de Smith, Judicial Review of Administrative Action, 3rd Edition at 199.

"Complaints against police" under ss. 39 and 40 have quite a different object, in my view. The "complaint" is viewed more as a dispute between citizen and police than an offence; for example, s. 39(1) and Regulation 52(1) to (4) refer to attempts to effect informal resolution. There are no detailed provisions as to how the investigation under s. 39 or the inquiry under s. 40 are to be conducted (an exception in the case of s. 40, is the requirement that the inquiry must be held in public). 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.** (emphasis added)

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 that 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**, supra, 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."

[25] **Ans** was followed in **Perott v Storm,** (1984) 65 N.S.R. (2d) 271, again, an internal discipline matter, and in **Woolridge,** (1999) NSJ No. 268), also an internal complaint, which followed the reasoning in both **Ans** and **Perrot.**

[26] In **Perott,** following **Ans,** Rogers, J. noted the following:

"S.A. DeSmith in his *Judicial Review of Administrative Action (3rd Ed.),* says as follows at page 199: "If procedural rules have been laid down (e.g., for the hearing of disciplinary charges against police officers), those rules will be treated as mandatory except in so far as they are of minor importance; and upon them there will be engrafted the implied requirements of natural justice."

[27] In **Woolridge** (supra) an internal complaint had been made relating to a death in custody. A criminal investigation was also commenced, and the complaint was suspended pending completion of the criminal investigation. Upon completion of the criminal investigation, a disciplinary hearing was scheduled, but an application was made to stay the continuation of the disciplinary against the constable.

[28] Goodfellow, J. concluded that the timeline was mandatory, it had been breached, and that there was therefore no jurisdiction to proceed with the disciplinary process. He emphasized the consequences of a complaint to the constable.

[29] **Reid v Rushton,** 2002 NSSC 55, was initially brought forward as a public complaint, which triggered a criminal investigation. In considering among other procedural irregularities, MacDougall, J. followed **Woolridge** (supra), and held that the time limit to complete the internal investigation was mandatory, not discretionary. However, he noted that "There are numerous other reasons why I would grant this application to quash the decision of the Amherst Board of Police Commissioners." He went on to point out:

"Chief Rushton appears to have taken into consideration numerous factors that were not contained in the original complaint of Ms. Bonnie Johns. He has also clearly taken into consideration and placed before the Board of Police Commissioners for the Town of Amherst for their consideration, numerous things

that Reid had either been previously cleared of or had not even been formally charged with in the first place. This was highly prejudicial to Reid, as he was not given proper advance notice that Chief Rushton was going to include them in his written recommendation to the local board. Furthermore, he was not given a chance to meet with Chief Rushton along with his legal counsel after the investigation had been finally completed and prior to the recommendation going to the Board to discuss these other alleged infractions and/or indiscretions."

[30] MacDougall, J. also noted that an extension of time to complete the disciplinary investigation was given by the Registrar of the Police Review Board. The regulations at the time provided that such an extension was required to be given by the Chair of the Review Board, but the positions of both the Chair and Vice-chair were vacant and, in fact, then, and at the time of the application to the Court, there were only 2 validly appointed and subsisting members of the Board, when the quorum for the Board was 3. MacDougall, J concluded that in those circumstances, Cst. Reid had been denied natural justice and procedural fairness.

[31] As was the case in **Ans,** supra, the initial complaint in **Reid** was initiated with a public complaint, however, the complainant was not made a party to the proceedings in the Court, nor was public interest argued or considered.

[32] In **Kingsbury v Heighton,** 2003 NSCA 80, the officer had been demoted, and ultimately dismissed, by the Stellarton Board of Police Commissioners; the chambers judge had allowed an application to quash both. The chambers judge noted that **no** proceeding had taken place in accordance with the provisions of the *Police Act*, and therefore that body had no authority to act. With respect to the dismissal, although the regulations at the time required that a Notice of Meeting be sent **forthwith** to the officer, to allow him to hear the results of the investigation, and admit or deny the allegations, Chief Heighton had neglected to give the officer this opportunity forthwith or at all. The absence of the mandatory step was a denial of natural justice which rendered the process void. The chambers judge also noted that"...the relationship between the respondent and Chief Heighton was so bad that a reasonable apprehension of bias in the circumstances was obvious". The decision was upheld in the Court of Appeal.

[33] While in **Kingsbury**, Chipman, J.A, considered the interpretation of the word "shall", he was not dealing with time limitation. He said

> "In my opinion, these cases support the proposition that whenever in the *Police Act* or Regulations the word "shall" is used in connection with a material step in the procedure such step is mandatory, not directory. The omission of such step has the effect of depriving the board or the chief officer, as the case may be, of jurisdiction in the matter."

[34] All of these decisions, and prior decisions of the Police Review Board regarding time, the word "shall" was being considered, not "must".

[35] In **Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),** [1995] 4 S.C.R. 344, the Supreme Court affirmed the role that the object of a statute and the consequences play in the interpretative exercise. Gonthier J., for the majority, wrote:

> "This raises the question of whether the ss. 51(3) and 51(4) are mandatory or merely directory. Addy J. and Stone J.A. below held that despite the use of the word "shall", the provisions were directory rather than mandatory, relying on **Montreal Street Railway Co. v. Normandin**, [1917] A.C. 170 (P.C.), which summarized the factors relevant to determining whether a statutory direction is mandatory or directory as follows (at p. 175): **"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 . . "** (emphasis added)

[36] In **Kelly v Nova Scotia Police Commission,** 2006 NSCA 27, Cromwell, J.A. (as he then was) referred to the purpose of the ***Police Act.*** A hearing before the Police Review Board dealing with a public complaint by a self-represented individual had dismissed Mr. Kelly's complaint, but the chambers judge had quashed the decision of the Board, as he thought that the Board had been unfair to Mr. Kelly. Timelines were not an issue, but the object of the hearing *de novo* was addressed:

> "The object of the hearing, however, is not to provide a remedy for the complainant. Although the Board can make recommendations, it has no jurisdiction to give the complainant any remedy aside from an award of costs and the vindication that follows from the complaint being upheld. Thus, from the point of view of a complainant, the hearing before the Board is an opportunity to present his or her complaint in an adversarial setting but with little prospect of any tangible remedy. From the point of view of the officer who is the subject of the complaint, his or her career is on the line. This is not to minimize the importance of the complaints process to a complainant or indeed to the public. But it must be noted that the personal rights and interests of a complainant are not in play in the process to the same extent as the rights and interests of the officer complained against."

[37] This Board notes that the powers of the Police Review Board are not limited to making a recommendation. It can exonerate, or sanction an officer, and impose penalties ranging from training to and including dismissal. It can also make recommendations to the department on process and policy considerations.

[38] In **Kelly,** that object had been achieved, as both the internal processes and the *de novo* hearing had been completed.

[39] In **Langille v Midway Motors**, 2002 NSCA 39, the appellant argued that the decision of the trial judge had been delivered outside of the 6 month limitation period set out in the *Judicature Act*:

> s. 34 (d)... "upon the hearing of any proceeding, the presiding judge may, of his own motion or by consent of the parties, reserve judgment until a future day, not later than six months from the day of reserving judgment"

[40] Roscoe, J.A. held:

> "Dealing with the last issue first, the appellant seeks a declaration that there was a loss of jurisdiction and an order for a new trial. The last day of trial was May 21, 1999. The cover page of the written decision contains two dates: "Decision: November 20, 1999" and "Decision Released: November 22, 1999".

We have no explanation for the different dates. Assuming without deciding that the decision in this case was reserved for longer than the six months permitted by s. 34 of the **Judicature Act**, we do not agree that there was a loss of jurisdiction in the circumstances. The time limit should not be considered to be mandatory but rather strongly directory. The appropriate remedy for failure to deliver a judgement after trial within six months, should be an order for *mandamus*, not an order for a new trial. Since the decision has now been delivered, no order is required."

[41] In **Royal Newfoundland Constabulary v McGrath**, 2002 NLCA 74, Roberts, J.A followed Narain (supra). He stated at paragraph 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 prvides 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 o 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".

[42] In **Figueiras v (York) Police Services Board,** 2013 ONSC 7419, (Ontario Superior Court of Justice Divisional Court), the interest of a member of the public in the complaint process was addressed. Unlike the case in **Kelly** (supra), where the complainant had been afforded a full opportunity to be heard, the Police Services Board had terminated the public complaint based on delay over which the complainant had no control. The Court stated:

> "The Respondents submit that, unlike Detective Charlebois, the complainant had no direct personal interest in the outcome of the Delay Application other than a possible sense of "satisfaction" or a "sense of grievance."
>
> Again, this submission minimizes one of the fundamental purposes of the complaints system: to ensure transparency and enhance public confidence in the process. Police officers have extraordinary powers to control the public. The public has an interest in ensuring that those powers are exercised in accordance with the law. It is an interest that extends beyond a personal "sense of grievance." Public confidence in those who are responsible for the administration of justice, including police officers, is essential to the health of a free and democratic society."

[43] In **Hache v Lunenburg County District School Board, 2004 NSCA 46,** dealt with a defect in a process requiring notice. The Court (Glube, CJNS, Freeman and Cromwell, JJA) commented:

> "As Professor David J. Mullan points out in his text **Administrative Law**, 3rd ed. (Carswell, 1996) at 318 "[t]he courts are reluctant to allow non-adherence to formalities and technical requirements to defeat the validity of decisions in a manner that is contrary to the public interest." Why this should be so is illustrated by the result arrived at by the learned chambers judge. With great respect to him, his approach to the notice issue in this case has startling implications. It would require a court to find that the discharge of a teacher was void *ab initio* for failure to give particulars of one complainant even if it were proved that the teacher had sexually abused other students and full and proper notice had been given of their complaints. The reinstatement of a teacher who had been proved to merit dismissal on grounds of which full and proper notice had been given and where there had been no failure of natural justice is not in the public interest and does not serve the purposes of the **Education Act**."

[44] While it is important to keep in mind the importance of timelines to all parties, surely the purpose of the legislation is defeated, if the very department in receipt of the complaint can terminate the complaint by failing to decide.

[45] Mr. Simon, on behalf of the Complainants, notes in his brief:

> "Further, a finding that the Board has lost jurisdiction to hear these complaints due to a procedural deficiency for which the Complainants had no role will no doubt have a chilling effect on public confidence in the oversight of police officers in Nova Scotia. This especially true in the current social-political climate and must be appropriately weighed."

[46] We agree. In the view of this Board, the current overarching purpose of the disciplinary aspects of the statute and regulations, is to provide a full and fair evaluation of the complaint, internal or public. This includes, in the case of an officer, an unfettered right of review by an independent, entirely civilian, Board. In the case of a public complaint, the Complaints Commissioner (a civilian) has the power to filter out complaints that are deemed to be frivolous, vexatious, an abuse of process, or without merit (to the extent that merit can be determined without a hearing). The process allows both an officer and a member of the public to have the issues to be dealt with, *de novo,* by an entirely civilian composed panel. It responds to public mistrust surrounding 'police policing the police'. This has always been an important goal but is brought into sharp focus in the current climate of what seems to be public distrust of the police. It is surely as important to police departments as it is to members of the public. The member of the public may not receive any 'tangible' benefit, but what is sought is access to a full and complete right to be heard, by a body that is entirely independent of police and government.

[47] Members of the public need to know that although their issue may not reach the level of criminal conduct, such as in a Serious Incident response Team investigation, they do have access to an entirely civilian oversight review the *Police Act* disciplinary process.

[48] The Board therefore concludes that it has jurisdiction to hear this complaint.

Dated at Halifax, Nova Scotia this 15th day of October, 2020.

Jean McKenna, Chair

Hon. Simon J. MacDonald, Vice-Chair

Stephen Johnson, Board Member

Distribution: Derek Simon – Solicitor on behalf of Mr. LeRue and Ms. Morris
Nasha Nijhawan – Solicitor on behalf of Cst. Woodworth
James Giacomantonio – Solicitor on behalf of Cst. O'Brien
Katherine Salsman – Solicitor on behalf of Halifax Regional Police
Jean McKenna – Chair, NS Police Review Board
Hon. Simon J. MacDonald – Vice-Chair, NS Police Review Board
Stephen Johnson – Member, NS Police Review Board