

NOVA SCOTIA COURT OF APPEAL

Citation: *Mercier v. Nova Scotia (Attorney General)*, 2013 NSCA 43

Date: 20130410

Docket: CA 400079

Registry: Halifax

Between:

Roger Edouard Mercier

Appellant

v.

Attorney General of Nova Scotia
and Police Complaints Commissioner

Respondents

Judges: MacDonald, C.J.N.S., Fichaud and Beveridge, J.J.A.

Appeal Heard: March 27, 2013, in Halifax, Nova Scotia

Held: Appeal dismissed with \$200 costs, per reasons of Fichaud, J.A.; MacDonald, C.J.N.S. and Beveridge, J.A. concurring

Counsel: Roger Mercier, Appellant in Person
Duane Eddy, for the Respondents

Reasons for judgment:

[1] On July 16, 2010, further to s. 810.1 of the *Criminal Code*, the Provincial Court of New Brunswick placed Mr. Mercier on a recognizance for one year. The recognizance contained conditions that Mr. Mercier keep the peace and be of good behaviour and that he “shall abide by a curfew where you shall remain in your place of residence every day between the hours of 11 p.m. and 6 a.m.”.

[2] Mr. Mercier moved to Dartmouth, Nova Scotia. On October 23, 2010, at 3:45 a.m., Halifax Regional Police officers conducted a curfew check at his Dartmouth residence. They knocked at the door. Mr. Mercier did not appear. The officers were unable to determine whether or not Mr. Mercier was inside.

[3] On October 26, 2010, an information was sworn against Mr. Mercier alleging that he breached the conditions of his house arrest and, on that day, Halifax Regional Police Cst. Bradley Jardine arrested Mr. Mercier.

[4] On April 6, 2011, Mr. Mercier filed a complaint against Cst. Jardine alleging that, during the arrest, Cst. Jardine assaulted Mr. Mercier and engaged in discreditable conduct.

[5] Halifax Regional Police Department Staff Sergeant Cecchetto investigated Mr. Mercier’s complaint. On July 7, 2011, the Disciplinary Officer and Superintendent Kelly issued a Disposition of the complaint. The Disposition stated that the complaints against Cst. Jardine were “not sustained”.

[6] On July 19, 2011, Mr. Mercier filed a Notice of Review of the Disposition with the Office of the Police Complaints Commissioner, a respondent in this appeal. The Commissioner’s office is established by the *Police Act*, S.N.S. 2004, c. 31, with a mandate that includes the review of public complaints against police officers. Sections 72-79 of the *Police Act* authorize the Police Board to hear complaints against police officers. Further to s. 74(4) of the *Act*, if the Commissioner “is satisfied that the complaint is frivolous or vexatious”, the complaint is not referred to the Police Board.

[7] Section 74(2) of the *Police Act* permits the Commissioner to appoint an independent investigator to inquire into the complaint. On July 29, 2011, the

Commissioner appointed Mr. Stuart Ryder to investigate Mr. Mercier's complaint. Mr. Ryder wrote a report dated September 19, 2011, which recited the steps in his investigation and his findings, and concluded:

I concur with the decision as outlined by Supt. Colleen Kelly on Form 11, dated July 7th, 2011. I agree two complaints are not sustained and I do not recommend this investigation be referred for further consideration.

[8] By a letter of September 29, 2011, the Commissioner informed Mr. Mercier that, after reviewing the file and Mr. Ryder's report, there was no basis for a finding of misconduct, and the complaint would not be referred to the Police Board for a hearing.

[9] On October 21, 2011, Mr. Mercier filed a Notice for Judicial Review, in the Supreme Court of Nova Scotia, of the Commissioner's decision not to refer the complaint to the Police Board. On December 8, 2011, the Commissioner filed the "Record by Decision-Making Authority" with the Court further to *Civil Procedure Rule 7.09*. The Commissioner certified that the record contained all the materials that were in her possession prior to making her decision.

[10] The hearing of the judicial review was scheduled for February 13, 2012. On December 22, 2011, Mr. Mercier filed material for the judicial review hearing. His filing cited evidence that was not included in the record filed by the Commissioner on December 8, 2011. Rule 7.27 requires that evidence for a judicial review, outside the filed record, must be in the form of an affidavit. On February 7, 2012, Supreme Court Justice Wright wrote to the parties, advising of the requirements of Rule 7.27. Justice Wright's letter said:

I would direct Mr. Mercier to Civil Procedure Rule 7.27 which is recited on page 15 of Mr. Eddy's brief. That rule must be adhered to whenever a party to a judicial review proceeding seeks to introduce any evidence beyond the Record produced by the decision making authority. It cannot be done by simply referring to or attaching documents to a brief. Moreover, it is supposed to be done at the same time as the motion for directions, which was held here on November 24, 2011 (unless a judge orders otherwise).

Since Mr. Mercier is self-represented, I am prepared to allow him to make such a belated motion, accompanied by the required affidavit in compliance with the

Rule. In order to allow the respondent adequate time to file its materials in response, this matter obviously cannot proceed on February 13th. ...

[11] On February 10, 2012, Mr. Mercier filed a Notice of Motion for several items, including:

3. That the Respondents [Attorney General of Nova Scotia and Police Complaints Commissioner] failed to comply with Rule 7.09(1) by not producing ... “a complete copy of the record” after service and before the Motion for date and direction of November 24, 2011. ...

[12] On April 17, 2012, Supreme Court Justice Coady heard and dismissed the motion with an oral decision, confirmed by an Order of May 15, 2012. Justice Coady’s oral decision of April 17 said:

... certainly my conclusion is that I am satisfied that the record is sufficient and as required. ... By way of observation, what he is looking for, if it exists, I would ... I don’t think it was not ... it’s not related to the decision that these officers ... that these review ... that these discipline officers had to make or anybody involved in this process. And I am certainly satisfied that anything that is not in the possession has been referenced very clearly in the reports of the investigative officers. I have reviewed the entirety of the file, which is substantial and everything that was spoken about here today, I have seen at one point or another in the file.

Justice Coady’s Order dismissed Mr. Mercier’s motion without costs.

[13] On May 18, 2012, Mr. Mercier then filed another Notice of Motion, seeking to add material to the Record for Judicial Review.

[14] On June 12, 2012, Supreme Court Justice Moir heard and, by an oral decision, dismissed Mr. Mercier’s motion. Justice Moir referred to Justice Coady’s Order, then said:

Mr. Mercier now argues that these same documents should be somehow before the review Judge, and he makes reference to concepts like background and narrative which to my mind are utterly meaningless on a Judicial Review.

Your motion is dismissed, sir. You wasted my time and the Court’s time trying the same thing over again that Justice Coady decided just a short while ago. ...

Justice Moir's Order of June 12, 2012 dismissed the motion with costs of \$250.00 payable forthwith by Mr. Mercier.

[15] On July 3, 2012, Mr. Mercier filed a Notice of Appeal in the Court of Appeal, which he amended by an Amended Notice of Appeal filed on July 19, 2012. He seeks to appeal from both Justice Coady's Order of May 15, 2012 and Justice Moir's Order of June 12, 2012.

[16] Mr. Mercier's Notice of Appeal was filed outside the time limits under Rule 90, from both the interlocutory Orders of Justices Coady and Moir. Mr. Mercier made no motion to extend the time limits. Normally that would be the end of the matter, and the Court of Appeal would not hear the merits of the appeal. But the Respondents' counsel stated that the Respondents waive the limitation period. On that basis, the Court will consider Mr. Mercier's appeal from the Orders of both Justices Coady and Moir.

[17] Mr. Mercier alleges that the Commissioner possesses relevant documents, that influenced her decision, which the Commissioner did not include in the Record by Decision-Making Authority filed with the Supreme Court on December 8, 2011 further to Rule 7.09. Mr. Mercier asserts that the Commissioner is controlled by the provincial Attorney General or Department of Justice. According to Mr. Mercier, there exist documents which show how this control was exercised to influence the Commissioner's decision that Mr. Mercier's complaint not be referred to the Police Board. The focus of Mr. Mercier's appeal is to obtain those further documents and add them to the record for the judicial review.

[18] At the hearing in the Court of Appeal, Mr. Mercier was asked to identify any evidence in the Appeal Book that the Commissioner either possessed or that her decision was influenced by such undisclosed relevant documents. Mr. Mercier pointed to a single item, a letter of July 28, 2011 from Mr. Fred Sanford, Director of Policing Services with the provincial Department of Justice, to Mr. Mercier. The letter says:

On behalf of the Honourable Ross Landry, Minister of Justice, I am responding to your correspondence dated July 19 and July 25, 2011.

I have reviewed your correspondence, and understand that you are unhappy with the response and subsequent investigation into the complaint you have filed against a Halifax Regional Police Officer. As discussed in our telephone conversation on July 26, 2011, I again advise you that the office of the Nova Scotia Police Complaints Commissioner was established to ensure there is effective, independent oversight of the actions of police officers. *I have been advised by the Police Complaints Commissioner, that your complaint is currently being reviewed by their office, and decisions regarding the investigation will be forthcoming, following due process.* I encourage you to cooperate with the Complaints Commissioner to facilitate this process, I am confident a successful resolution can be achieved.

Please feel free to contact me directly, if you require further information. Thank you for your correspondence regarding this matter. [emphasis added]

Mr. Mercier submitted that the passage I have italicized shows that the Commissioner had communication with the Department of Justice. He says the documents that constitute this communication have not been disclosed to Mr. Mercier and are not included in the Commissioner's Record for judicial review under Rule 7.09.

[19] I cannot agree with Mr. Mercier's submission.

[20] The statement in Mr. Sanford's letter, italicized above, indicates that the Department of Justice inquired with the Commissioner as to the progress of Mr. Mercier's complaint, in response to Mr. Mercier's earlier correspondence to the Department. Nothing in Mr. Sanford's letter suggests that the Commissioner possesses any undisclosed document that pertains to either the merits of Mr. Mercier's complaint against Cst. Jardine or the Commissioner's decision to not refer the complaint to the Police Board. Nothing else in the record for this appeal shows that the Commissioner possessed any document, pertinent to her decision under judicial review, other than those appended to the Commissioner's Record filed with the Supreme Court under Rule 7.09.

[21] Though this does not affect my conclusion, I add that the Appeal Book, prepared by Mr. Mercier for this appeal, does not include the full Record that the Commissioner filed with the Supreme Court under Rule 7.09. The Appeal Book contains the introductory pages to the Commissioner's Record, which lists topical items including "13 Correspondence". The original Record would have appended

the identified material. It appears that not all of the appended material was included in the Appeal Book for this appeal. I cannot discern, from the Appeal Book, what items of “correspondence” comprised the documents that were appended to the Commissioner’s Record filed under Rule 7.09. It is also unclear whether the Appeal Book contains the same documents that were in the motion records before Justices Coady and Moir.

[22] Mr. Mercier has not established that either Justice Coady or Justice Moir erred factually or legally, that there is an injustice, patent or otherwise, or that there exists any undisclosed relevant item of evidence, which influenced the Commissioner’s decision and should supplement the record for this judicial review.

[23] Several of the documents Mr. Mercier cites to supplement the record for judicial review are legislation (the *Police Act* and its *Regulations*), the notice of motion for judicial review, and briefs of legal argument. It is not necessary that legislation be in the Record under Rule 7.09. The judge who hears the judicial review will have the pleadings, including the notice of motion for judicial review. Mr. Mercier will be entitled to file a brief of legal argument and to cite legislation and case law. The pleading and legal brief may not attach unsworn evidence.

[24] I would dismiss the appeal with costs of \$200.00, the amount requested by the Respondents, payable forthwith by Mr. Mercier.

Fichaud, J.A.

Concurred:

MacDonald, C.J.N.S.

Beveridge, J.A.