1999 **S.H. 157048**

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Woolridge v. Halifax (Regional Police Service), 1999 NSSC 80

BETWEEN:

SPECIAL CONSTABLE IAN PETER WOOLRIDGE

Applicant

- and -

CHIEF OF POLICE DAVID P. MacKINNON
(of the Halifax Regional Police Service)
and
DEPUTY CHIEF ROBERT A. BARSS
(of the Halifax Regional Police Service)

Respondents

DECISION

HEARD: **in Halifax before Justice Walter R. E. Goodfellow on August 5, 1999**

DECISION: **August 5, 1999 (Orally)**

RELEASE DATE: **August 9, 1999**

COUNSEL: **Joel E. Pink, Q.C., for the plaintiff**
Sandra O. Arab, for the defendant

Goodfellow, J.: (Orally)

This is a decision on the matter of Special Constable Ian Peter Woolridge, Chief of Police David MacKinnon and Deputy Chief Robert Barss.

1. Background

Special Constable Ian Woolridge is an officer of the Halifax Regional Police, employed in charge of booking on October 30, 1998. On October 30, 1998, a prisoner of the Halifax Regional Service, Brian Micheau, died in a cell and there is, on file, the report of the Medical Examiner that Mr. Micheau died from a mixed drug overdose, alcohol, meperidine, diazepam and cocaine and part of the record is the report of the Medical Examiner.

On or about the 30th of October, 1998, Constable Woolridge was advised that an internal investigation was being commenced and November 6, 1998 a Form 8- Notice of Allegation (Complaint of Internal Discipline) passed pursuant to the **Police Act and Regulations**, R.S.N.S., 1989, c. 348 was signed and served on Constable Woolridge. On November 9th a letter was sent to Chief Police David MacKinnon from E. Garry Mumford, Director of the Nova Scotia Police Commission acknowledging receipt of the complaint in Form 8 and advising the Chief of Police that the investigation had to be completed on or before January 6, 1999.

On December 23, 1998, Inspector Greg Murray, Officer in Charge of Professional Standards of the Halifax Regional Police Service, faxed a request to M. Jean Beeler, Chairperson of the Nova Scotia Police Commission, requesting a suspension of the investigation pursuant to s-s 17(4) of the **Police Act and Regulations, supra** until completion of the criminal investigation.

On December 23, 1998, pursuant to s-s 17(4) of the **Police Act and Regulations, supra** M. Jean Beeler, Registrar of the Police Review Board, suspended the investigation of the internal complaint until such time as the criminal matter was dealt with.

On May 10, 1999, M. Jean Beeler wrote to Chief David MacKinnon advising that the criminal investigation had been completed and that the investigation shall be extended by the number of days that the investigation was suspended.

On May 18, 1999, Inspector Greg Murray, Officer in Charge of Professional Standards, Halifax Regional Police, pursuant to s. 12(5)(b) of the **Police Act and Regulations, supra**, signed Form 9 certifying "that the investigation of the complaint filed on November 5, 1998, was completed on May 18, 1999" and on or about June 1, 1999, Form 10 was served on Special Constable Ian Woolridge. Indeed, at that time, he received a copy of the complete file containing information pertaining to the investigation into the death of Brian Micheau. There were certain correspondence in that file and at that time Mr. Woolridge's solicitor raised objection that s.. 21(3) of the **Police Act and Regulations, supra** had not been completed and a date was set for the hearing for June 28, 1999 and essentially, this application is for relief by way of a declaration by way of prohibition or otherwise to stay the continuation of proceedings against Special Constable Woolridge.

2. Issue

The issue is stated in Mr. Pink's brief (p. 4) and also in Ms. Arab's:

> Does the Chief of Police, David P. MacKinnon, have jurisdiction to proceed with disciplinary action against Special Constable Ian Peter Woolridge. (Emphasis added)

3. Police Act and Regulations

This requires a careful of review of certain provisions. Section 34 of the **Police Act, supra** and ss. 17(3), 17(4), 17(5), 19(1), 19(2), 20(1)(a), 21(3), 24(4) and 24(3) of the **Regulations** and they read as follows:

Police Act:

34 No member of a municipal police force is subject to reduction in rank, to dismissal or to any other penalty for breach of the code of discipline except after proceedings have been taken in accordance with this **Act** and the regulations. R.S., c. 348, s. 34

Regulations made under s. 46 of the Police Act:

17(3) The conduct of a criminal investigation or the laying of criminal charges against a member does not preclude the continuation of the complaint procedure even if the conduct being investigated pursuant to the complaint procedure is that which constitutes the alleged criminal offence.

(4) Despite subsection (3), the Registrar may suspend the investigation of a complaint which is also the subject of a criminal investigation until the completion of the criminal investigation.

(5) Where the investigation of a complaint is suspended pursuant to subjection (4), the time period provided for the completion of the investigation shall be extended by the number of days that the investigation is suspended.

19(1) The chief officer of a police force is the disciplinary authority for the police force.

(2) For the purposes of Sections 20 and 21, the chief officer includes an officer not below the rank of inspector who has been delegated by the chief officer to hear and decide a disciplinary matter.

20(1) A member of a police force may allege that another member of that police force has committed a disciplinary default by filing a written allegation with

(a) the chief officer of the police force

...

21(3) The investigation shall be completed expeditiously and in any case within sixty days of the date the written allegation is filed, except that the chair of the Review Board may, upon request before or after the time limit has expired, extend the time to complete the investigation where the chair of the Review Board is satisfied that there are reasonable grounds for granting the extension and the extension will not unduly prejudice any member.

24(4) Despite subsection (3), the Registrar may suspend the investigation of an internal disciplinary matter which is also the subject of a criminal investigation until the completion of the criminal investigation.

(5) Where the investigation of a complaint is suspended pursuant to subsection (4), the time period provided for the completion of the investigation shall be extended by the number of days that the investigation is suspended.

4. The Interpretation Act, R.S..N.S., 1989, c. 235

I agree with counsel that the **Interpretation Act**, **supra**, is of assistance in particular 9(3) and 9(4) as quoted in Ms. Arab's brief at pp. 8-9:

> 9(3) In an enactment, "shall" is imperative and "may" is permissive
>
> ...
>
> (5) Every enactment shall be deemed remedial and interpreted to ensure the attainment of its objects by considering among other matters:
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> (a) the occasion and necessity for the enactment;
> (b) the circumstances existing at the time it was passed;
> (c) the mischief to be remedied;
> (d) the object to be attained;
> (e) the former law, including other enactments upon the same or similar subjects;
> (f) the consequences of a particular interpretation; and
> (g) the history of legislation on the subject.

5. Law

As stated in Ms. Sandra Arab's brief at p. 9, she states the following:

The Regulation of Professions in Canada, Casey writes at p. 15-11:

> ... Generally, the Courts have been reluctant to grant such orders except in the clearest of cases. For example, the Alberta Court of Appeal has held that where a charge is defective, an order of prohibition should only be granted after particulars are refused or after particulars supplied were defective. The court held that the disciplinary machinery is entrusted to a society to be exercised in the public interest; before prohibiting the society from hearing a complaint that may result in professional misconduct going unpunished, great care should be taken.

She continues at p. 10:

In *Brunelle v. Royal Canadian Mounted Police* (1991), 81 D.L.R. (4th) 153 (F.C.T.D.) (**Tab 3, Respondents' Book of Authorities)**, the applicant RCMP officer applied for an order prohibiting the commissioner of the RCMP from proceeding with an internal disciplinary inquiry. Criminal charges were laid against the officer. He was eventually acquitted and the RCMP served notice of their intent to carry on with the disciplinary proceeding. The officer alleged excessive delay in proceeding with the disciplinary matter. Although that case also involved Charter arguments, the following passage taken from page 157 of the judgment is applicable to the present case:

> "The remedy sought here is essentially one of prohibition: to prohibit the commissioner from proceeding with the internal inquiry into the conduct of a member of the RCMP. I do not need to say that it is an extraordinary relief for the court to intervene in the day-to-day running of the force and therefore should be granted only in cases where it seems clearly justified and necessary to do so." (emphasis added)

In *R. (J.) v. College of Psychologists (British Columbia)* (1995), 33 Admin.L.R. (2d) 174 (B.C.S.C.) (Carswell version) (**Tab 4, Respondents' Book of Authorities)**, the applicant sought an order to prohibit the College of Psychologists from proceeding with a hearing of a bill of complaint on the basis of excessive delay. In dismissing the application, the Chambers Judge writes on the last page:

> "The jurisdiction invoked here is essentially analogous to the inherent residual discretionary power to stay proceedings in criminal cases. In *R. v. Jewitt* (1985), 20 D.L.R. (4th) 651 (S.C.C.), Dickson, C.J.C. at page 659 said that such a power should be exercised only in the 'clearest of cases'. This is by no means such a case." (emphasis added)

Mr. Pink states in his Book of Authorities quotes from The Regulation of Professions in Canada, **supra**:

6.2 **Mandatory v. Directory**

While a finding that a mandatory has not been followed will generally result in a finding of a lack of jurisdiction over the individual, to fail to comply with statutory provisions which are merely directory does not result in a loss of jurisdiction.

Whether a procedural provision is mandatory or directory is problematical. The test is easy to state, but difficult to apply:

> Whether a procedural provision is mandatory or simply directory depends on its importance to the proceedings. The more important the provision the more likely the individual will be prejudiced by its breach ....Interference by certiorari will not be countenanced for mere trivial or technical oversights ...

de Smith (sic) states that if procedural rules have been laid down such as for the hearing of disciplinary charges against a police officer, those rules will be treated as mandatory except insofar as they are of minor importance.

The use of the word "shall" in the context of a procedural requirement makes it more likely that the provision will be regarded as mandatory in accordance with provincial legislation concerning the interpretation of statutes. However, the use of the word "shall" does not in all cases mean that a provision is mandatory.

...

Whether a provision is mandatory or directory must be decided by the nature of the particular requirement in the statutory setting in which it is found. Some of the factors to be considered are whether the failure to perform the statutory duty would cause serious inconvenience to persons who have no control over the proceedings, whether there is a penalty provided for non-performance of the requirement, whether the requirement is a regulation but not in an enabling statute, and whether there is any prejudice to persons who may be affected by the failure to fulfill the requirement.

Mr. Pink states in his brief at para. 26, 27, 28, 29 and 30 at pp. 10 to 12:

In Ans v. Paul (1980), 41 N.S.R. (2d) 256 (N.S.S.C.), disciplinary proceedings were instituted against a member of the (then) Halifax City Police. At issue was whether 14 days notice had been given prior to a disciplinary hearing being convened. It was contended that there had been a verbal waiver of said notice requirement. The late Morrison, J., referring at p. 268 (para. 31) to the procedural rule requiring 14 days notice, said:

> 31 ...In my opinion, this procedural rule must be considered as being mandatory (subject to the effect of waiver under regulation 41) and not directory only.

[27] And at paragraphs 32 and 33, Morrison, J., went on to say:

> 32 Regulation 13(2) is a regulation authorized by statute and sets down a specific time limit in which notice must be given. The powers conferred by these regulations are conferred upon the administration of the Halifax Police Department and they affect, because they are disciplinary in nature, the fundamental rights of the police officer affected. In such circumstances all material requirements as to notice must be closely observed.
>
> 33 S.A. DeSmith in his *Judicial Review of Administrative Action* (3rd Edition), 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 (sic) as they are of minor importance; and upon them there will be engrafted the implied requirements of natural justice.

[28] A similar ruling was made in Perrott v. Storm, Wilson and Fry (1984), 65 N.S.R.

(2d) 271 (N.S.S.C.) by Rogers, J., at p. 273 (para. 13) when he quoted the decision of Morrison, J., in Ans, *supra*. There is no issue of waiver in the case at bar.

[29] In Ans, *supra*, it was argued by the Applicant that the disciplinary tribunal wrongly found that the 14 days notice requirement had been waived. Based on this finding, it conferred upon itself the jurisdiction to determine the matter by way of disciplinary action. It was argued by the Respondent that since a finding of fact was made beyond a reasonable doubt the court should defer to the finding of the decision maker. The Respondent cited Segal v. The City of Montreal, [1931] S.C.R. 460 as authority for that proposition (at s. 265 of Ans, *supra).*

[30] In Ans, *supra*, Morrison, J., at pp. 266-667 quoted from Segal, *supra*, which goes to the heart of the Applicant's position, when he stated as follows:

> 27 I refer to the remarks of Anglin, Chief Justice of Canada, in concurring with Lamont, J.'s decision as page 462 of the *Segal* decision (supra). Anglin, C.J.C., said as follows:
>
> > It is well settled law that a judge cannot give himself jurisdiction by wrongly finding as facts the existence of conditions essential to his jurisdiction. On the other hand, it is equally well settled that, where it is necessary for a judge to interpret a statute or by-law, in order to determine whether the facts established come within its purview, the interpretation of such statute or by-law, so far as may be necessary to his decision, is as much within his jurisdiction as is the finding of relevant facts themselves.
>
> 28 Now, that we are faced with in this case is the question as to whether or not the presiding officer had jurisdiction. The presiding officer made a finding as to the existence of a condition essential to his jurisdiction. The condition essential to his jurisdiction was either that the plaintiff had been given fourteen days notice of the first date of hearing or that he had waived such requirement. As Anglin, C.J.C., said, supra, a judge cannot give himself jurisdiction by wrongly finding as the facts the existence of conditions essential to his jurisdiction. In the case at bar the presiding officer found as fact that the plaintiff had waived his right to fourteen days notice by signing the acknowledgment at the bottom of Form 3. This is clearly a wrong finding as the acknowledgment at the bottom of page 3 is merely an acknowledgment of service of that Form. As Lamont, J., said in the *Segal* case, supra: "...if, upon the facts proved or admitted he has no jurisdiction, his finding that he has jurisdiction will not prevent prohibition...". In my opinion upon the facts proved the presiding officer had no jurisdiction.

6. Conclusion and Findings

The evidence before me is by way of affidavit as follows:

1. The affidavit of Joel Pink, Q.C. setting out the chronology of events.

2. Th affidavit of Rosann Rice, Administrative Assistance to the Deputy Chief of Police.

3. The affidavit of William Francis Moore, Sergeant.

4. The affidavit of Gregory Dean Murray, Inspector.

There is very little, if any, dispute as to the chronology of the events which I have recited in the background. Sergeant Moore was assigned to investigate the death of the prisoner, Brian Micheau, and on March 1, 1999, he wrote to the Public Prosecution Service stating:

> I have concluded that I have no reasonable grounds to lay any charges in this matter, but I would request it be reviewed for a Crown opinion and that opinion forwarded to me.
>
> A copy of this file has also been forwarded to the Chief Medical Examiner, Dr. J. Butt for his review.

That letter was then referred by Mark Chisholm, Q.C., the Associate Deputy Director of Public Prosecutions to Susan C. Potts, the Senior Crown Attorney who responded by letter dated April 23, 1999. She says as follows:

> The file with respect to the above-noted forwarded to Alana Murphy, Crown Attorney March 1, 1999 was forwarded to me for review. I have now had the opportunity to review your very comprehensive investigation. I noted that there were obvious gaps in the police notes forwarded to me which I confirmed with you were the result of the entry of information in relation to other investigations which were not related to the death of Mr. Micheau.
>
> As I advised verbally after perusing the records forwarded I can find nothing which would cause me to conclude that there was any criminal wrong doing involved in the death of

> Mr. Micheau. I would be pleased to discuss this matter further should you find that helpful.

So we have reached the stage that material has been provided to Dr. Butt, the request of which provided for in the **Act** for a review by Crown Prosecutor, a referral to a Senior Crown Prosecutor and a concurring view or a view expressed by the Crown Prosecutor which results in a letter of April 28, 1999 from Sergeant William Moore, the officer in charge of the investigation and the second paragraph reads as follows:

> In light of her (and there, he is referring to Ms. Susan Potts, Senior Crown Prosecutor) concurring with my findings, **I am closing the criminal investigation in this matter**. I have found no evidence to indicate that there was any criminal actions. (emphasis added)

In para. 23 of his affidavit, Sergeant Moore refers to the *file* continuing but in my view the file may well have been open for information for any inquiries but it is clear to me as of April 28, 1999 the criminal investigation was at an end; the criminal investigation was closed.

Turning now to the **Regulations** and applying as best I can the principles of interpretation which are well spelled in Ms. Arab's brief, turning first to **Regulation 17(4)**, despite the forceful argument by Ms. Arab, it seems to me that the additional terminology "until a completion of the criminal investigation" is a limiting provision to that section. It is discretionary in a sense that the Registrar is not compelled to suspend the investigation of the complaint which is subject to a criminal investigation but if the

Registrar does so the only capacity is to suspend it **until the completion of the criminal investigation**.

Turning to 21(3), first of all, the terminology used in there is "shall" which is mandatory but does not always have to be interpreted as being mandatory. In reading that section, I am taking into account the purpose and intent of the **Act** itself. But, when you read that section, it seems to me unequivocally it is intended to be mandatory and the time frame is of significance because it not only says it is mandatory "shall" but it sets a time limit. It says "it shall be completed expeditiously" which clearly conveys to me that it is to be done as soon as possible because it is important to have it completed the earliest conceivable date and goes on to put in a clear time limitation in any case within sixty days of the date of the written allegation. It does provide for an extension which is further indication of the weight that should be given to the terminology "shall" and the significance of it being done expeditiously because in order to extend that time, the threshold required, it is not automatic, it would then place a threshold and onus upon the person requesting it to establish to the satisfaction of the Review Board that there are reasonable grounds for granting an extension and further that the extension will not unduly prejudice any member.

It seems to me the opening words of 21(3) are clear in their intent, as I say, not only is the terminology "shall" in part of the terminology but the significance of the additional language confirms, in my view, that it was meant to be mandatory and not discretionary.

In summary, we have the direction to do it as soon as possible and in any case by an outside limit of sixty days. As I have already mentioned, no extension is possible on an automatic basis without meeting the threshold as I have spoken of.

The consequences of the investigation of a complaint are indeed significant to Constable Woolridge. The punishment possible is, to say the least, significant both personally and professionally. I conclude the intent of the **Regulations** is clear. It is mandatory and directs that the complaint be finalized within the sixty days. I have read and I intend to incorporate the final letter from Ms. Beeler, the Chair and in all the circumstances I have concluded that being a mandatory in an important provision and that it was not complied with. In the circumstances and I am of the view and that there is no further jurisdiction to proceed with the complaint. I have a little difficulty with whether it is an order for prohibition or stay. I am not sure but in any event I am prepared to issue a prohibition or whatever the appropriate remedy is.

I conclude that no jurisdiction now exists for proceeding with the s. 10 hearing.

J.