SUPREME COURT OF NOVA SCOTIA
Citation: *MacLean v. Fraser*, 2024 NSSC 35

Date: 20240126
Docket: 530174
Registry: Halifax

Between:

Halifax Regional Police Chief Officer Donald MacLean

Applicant

v.

Daniel Fraser, Jeannette Rogers, The Nova Scotia Police Review Board and the Attorney General of Nova Scotia

Defendants

DECISION

Judge:	The Honourable Justice John A. Keith
Heard:	January 26, 2024, in Halifax, Nova Scotia
Oral Decision:	January 26, 2024
Written Decision:	February 1, 2024
Counsel:	Edward Murphy and Andrew Gough for the Applicant Mark Bailey for Daniel Fraser Jason T. Cooke, K.C. and Ashley Hamp-Gonsalves for Jeanette Rogers Myles Thompson for the Nova Scotia Police Review Board No one attending for the Attorney General of Nova Scotia

By the Court:

FACTUAL BACKGROUND

[1] Corey Rogers died while in police custody at a Halifax Regional Police facility on Gottingen Street, Halifax. The Respondent in this proceeding, Daniel Fraser, was one of two booking officers on duty at the time of his death.

[2] On September 9, 2016, Sgt. David Publicover filed an internal disciplinary complaint against Mr. Fraser under the provisions of Nova Scotia's *Police Act*, S.N.S. 2004, c. 31 (the "**Internal Disciplinary Complaint**"). The Internal Disciplinary Complaint related to Mr. Fraser's actions (or inaction) during the night Corey Rogers died.

[3] On September 29, 2016, Jeannette Rogers, the deceased's mother, filed a separate, public complaint against Mr. Fraser under the provisions of the *Police Act* (the "**Public Complaint**").

[4] Inspector Derrick Boyd was assigned to consider the Internal Disciplinary Complaint. Inspector Boyd was also assigned to consider Ms. Rogers' Public Complaint.

[5] In written submissions dated January 25, 2024, Halifax Regional Police ("**HRP**") argued that "Halifax Regional Police investigated these two complaints contemporaneously" (at page 2). I have no additional evidence or information regarding how (or the extent to which) these two investigations overlapped or intertwined. While the underlying facts may have been the same, the specific issues and focus of the investigations into the Internal Discipline Complaint and the Public Complaint may have been different.

[6] It is clear that Inspector Boyd ultimately issued two separate decisions:

1. By decision rendered November 17, 2020 in response to the Internal Disciplinary Complaint, Inspector Boyd terminated Mr. Fraser's employment with HRP (the "**Internal Disciplinary Decision**").
2. By separate and subsequent decision rendered May 13, 2021 in response to Ms. Rogers' Public Complaint, Inspector Boyd

> confirmed (or re-affirmed) the same remedy that had already been granted through the Internal Disciplinary Decision: Mr. Fraser's employment with HRP was terminated (the "**Public Complaint Decision**").

[7] On December 4, 2021, Mr. Fraser filed a Form 13 Notice of Review to review the Internal Disciplinary Decision before the Nova Scotia Police Review Board (the "**Review Board**").

[8] Form 13 is a very basic form and essentially requires the disciplined officer to:

1. Place a check mark confirming whether the requested review is from a public complaint or internal discipline;
2. Sign and date the form.

A copy of the Form 13 signed by Mr. Fraser to initiate a review of the Internal Disciplinary Decision is attached to these reasons.

[9] Mr. Fraser did not file a form initiating a review of Ms. Rogers' Public Complaint Decision. However, s. 54(1) of the *Police Regulations* made under *Police Act*, S.N.S. 2004, c. 31, as amended, states that the Notice of Review must be initiated "by filing a notice of review with the Complaints Commissioner in the prescribed form no later than 30 days after the date the decision is received." Mr. Fraser's legal counsel, Mark Bailey, refers to this section and "adamantly disputes" (Mr. Bailey's words) that Mr. Fraser received the Public Complaint Decision. Therefore, Mr. Bailey argues, the 30-day statutory period to file a Notice of Review neither began nor ended.

[10] On January 31, 2022, the Review Board wrote to counsel for the HRM Police and Mr. Fraser. The letter stated, among other things, that:

> There is also an issue with the public complaint of Ms. Rogers: as we understand it, the public complaint was dealt with by HRP, also with the decision being dismissal of the special constables. However, we do not have an appeal from either Ms. Rogers or from S/Csts. Gardner or Fraser from that decision (public). Does that unappealed decision impact on the appeal of the internal? That is something we will all have to address on the conference call.

[11] The conference call referenced in this letter occurred the following week – on February 6, 2023. I understand the call was recorded, although the recording was

not available for the hearing before me. All parties agreed that counsel for HRP and Mr. Fraser participated in the conference call and that neither Ms. Rogers nor her counsel participated. Beyond that details surrounding the conference call were somewhat unclear other than to say that it was agreed the issue of Ms. Rogers' Public Complaint and the Public Complaint Decision were discussed.

[12] What seems clear is that neither HRP nor Mr. Fraser took any immediate action following the conference. I do not have any evidence as to any steps being taken regarding the Public Complaint Decision for about a year – or until the first day of the Review Board's hearing regarding the Private Complaint Decision on Tuesday, January 23, 2024.

[13] On January 22, 2024, the Review Board convened a hearing to review the Internal Complaint Decision. Because this review arose out of an "internal discipline matter", it was not open to the public (s. 76(2) of the *Police Act*).

[14] Also on January 23, 2024, counsel for HRP took the position before the Review Board that the Public Complaint Decision was not under review. Counsel for HRP further submits that the Review Board accepted that submission and that is also confirmed it "was without jurisdiction to hear any appeal related to [the Public Complaint]" (HRP written submissions dated January 25, 2024, page 2).

[15] Based on these events, HRP states that it confirmed an intention to bring a motion to immediately strike the ongoing review of the Internal Disciplinary Decision as an abuse of process. In a nutshell, HRP's argument is:

1. Mr. Fraser did not appeal (or initiate a review of) the Public Complaint Decision;
2. The time for appealing (or initiating a review of) the Public Complaint Decision has long passed. As such:
    a. The Public Complaint Decision (including the termination of Mr. Fraser's employment) is final, binding and may not be changed or altered; and
    b. It is not within the jurisdiction of the Review Board to conduct a review of the Public Complaint Decision.
3. Mr. Fraser seeks to overturn the termination of his employment through a review of the Internal Disciplinary Decision. However, this intended outcome necessarily undermines an otherwise final and binding decision (i.e. the Public Complaint Decision).

4. Therefore, counsel for HRP conclude, Mr. Fraser's review of the Internal Disciplinary Decision represents an improper, collateral attack upon an identical, and otherwise final, binding decision and is an abuse of process.

[16] Counsel for HRP raised other concerns. For example, a hearing to review Ms. Rogers' Public Complaint Decision would have been open to the public "unless the Review Board is of the opinion that it is in the best interests of the public, the maintenance of order or the proper administration of justice to exclude members of the public for all or part of the proceedings." (s. 76(1) of the *Police Act*). But because the review began as a hearing regarding the Internal Disciplinary Decision and because reviews of internal discipline are not open to the public, the hearing began in private (i.e. the public was excluded).

[17] On Wednesday, January 24, 2024, the Review Board heard HRP's motion to strike Mr. Fraser's review of the Internal Disciplinary Decision as an abuse of process.

[18] Counsel for Ms. Rogers supported HRP's dismissal request. Mr. Fraser opposed the dismissal request.

[19] On Thursday, January 25, 2024, the Review Board denied HRP's dismissal request. The parties agreed that the Review Board decided to:

1. Activate a review of the Public Complaint Decision, with this newly constituted review being folded into the ongoing review of the Internal Disciplinary Decision; and
2. Continue the hearing in private (i.e. the public would be excluded). However, at the end of the private hearing, the public would be given an opportunity to participate.

[20] In its written submissions, counsel for the HRP states that the Review Board supported its decision by concluding that:

1. It had "inherent jurisdiction" to activate a review of the Public Complaint Decision under s. 5 of Nova Scotia's *Public Inquiries Act*; and
2. The decision to continue the hearing with the public being excluded was "in the interest of justice" (HRP Written Submissions dated January 25, 2024, page 3).

The Review Board denied a request by HRP to adjourn the review process pending judicial review of their decision and it confirmed that the hearing would continue in private at 1:45 p.m. on January 26, 2024.

[21] I pause here to again emphasize that I did not have the benefit of the audio recording from the Review Board hearing to confirm counsel's agreements and submissions as to the facts.

[22] Later that same day, at about 4 p.m. on January 25, 2023, the Halifax Regional Police filed an application for judicial review of a decision of the Review Board. They also filed an emergency Notice of Motion seeking an interim stay to temporarily pause the continuing Review Board proceedings until such time as an interlocutory motion for a longer stay could be heard on an accelerated basis.

[23] I agreed to hear the emergency motion at 9:30 a.m. the following day, Friday, January 26, 2024.

[24] At the hearing of the interim motion, counsel for Mr. Fraser and the Review Board expressed an intention to pursue a motion to strike the application for judicial review.

ANALYSIS

[25] All parties agreed that a party seeking to stay proceedings must demonstrate:

1. A serious issue to be tried;
2. That the Applicant will suffer irreparable harm if the relief is not granted; and
3. That the balance of convenience favours the Applicant. In other words, that the Applicant will suffer greater harm if the stay is denied that the Respondents will suffer if the stay is granted.

[26] As a preliminary comment, all counsel agreed that staying the Review Board's ongoing proceedings must only be granted in the most rare and exceptional circumstances. The following concerns compel the need for judicial restraint in these circumstances:

1. The democratic process: The Courts must respect the legislature's decision to grant administrative tribunals certain statutorily defined powers;

2. Expertise: The Court must show respect of (and demonstrate deference for) the expertise of administrative tribunals which possess an expertise in the matters which fall within its statutory scope of authority; and
3. Practicality and Efficiency: The Courts must give administrative tribunals the ability to effectively and efficiently fulfill their statutory mandate. The Courts must not allow an administrative tribunal's ongoing processes to be routinely interrupted, splintered, or bogged down by parties who seek judicial intervention for any complaint which might arise. To do so would inevitably infect administrative proceedings with corrosive waste and inefficiency. The Court must remain alive to this type of pernicious disruption and actively discourage it. Again, the Court should only intervene in the most rare and exceptional circumstances.

[27] In Re. *Wilson and Atomic Energy of Canada Ltd.*, 2015 FCA 17 ("**Re Wilson**"), Stratas, J.A. speaks powerfully to these same concerns at paragraph 31 – 32. See also *Thielmann v. The Association of Professional Engineers and Geoscientists of the Province of Manitoba*, 2020 MBCA 8 ("**Thielmann**") at paragraphs 51 – 59.

[28] With that overarching caution, I turn to each element of the test.

Serious Issue to be Tried

[29] Counsel for HRP, Ms. Rogers and Mr. Fraser all agreed that there were serious issues to be tried. That said, in his written submissions, counsel for Mr. Fraser briefly alluded to the doctrine of prematurity. Counsel for the Review Board was more vigorous in pursuing this issue.

[30] The doctrine of prematurity is most frequently discussed when assessing whether the issue in question is sufficiently serious to justify judicial intervention in ongoing proceedings. I begin with a review of the jurisprudence.

[31] *C.B. Powell Ltd. v. Canada*, 2010 FCA 61 ("***C.B. Powell***") is a seminal decision often cited when assessing whether a particular issue arising out of administrative tribunal proceedings is premature – and the related, overarching issue

discussed above regarding the general reluctance of the Court to intervene in ongoing proceedings before an administrative tribunal.

[32] In this decision, Stratas, J.A. wrote:

> 33 Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin*, *supra*; *Okwuobi*, *supra* at paragraphs 38-55; *University of Toronto v. C.U.E.W., Local 2* (1988), 52 D.L.R. (4th) 128 (Ont. Div. Ct.) . As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.
>
> (Emphasis added)

[33] In *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, Justice Cromwell echoed many of the same concerns identified by Stratas, J.A. in *C.B. Powell* as to the importance of judicial restraint before the Court presumes to insinuate itself in the ongoing proceedings of an administrative tribunal. Cromwell, J. wrote:

> ... Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes ... Thus, reviewing courts now show more restraint in short-circuiting the decision-making role of the tribunal, particularly when asked to review a preliminary screening decision ... [Citations omitted, at paragraph 36]

[34] In Re. *Wilson*, Stratas, J.A. expanded upon his earlier decision in *C.B. Powell*. At paragraphs 31 to 33, he wrote:

> 31 The general rule against premature judicial reviews reflects at least two public law values. One is good administration — encouraging cost savings, efficiencies, promptness and allowing administrative expertise and specialization to be fully brought to bear on the problem before reviewing courts are involved. Another is democracy — elected legislators have vested the primary responsibility of decision-making in adjudicators, not the judiciary.
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> 32 The weighty nature of these public law values explains the force and pervasiveness of the general rule against premature judicial reviews. Indeed, in appropriate cases, the general rule can form the basis of a preliminary motion to strike: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] D.T.C. 5001 at paragraphs 66 (motion to strike available), 51-53 (general rule against supporting affidavits) and 82-89 (discussion of prematurity in the context of motions to strike). Such motions serve to nip in the bud premature judicial reviews that corrode these values.
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> 33 The force and pervasiveness of the general rule against premature judicial reviews and the need to discourage premature forays to reviewing courts means that the exceptions to the general rule are most rare and preliminary motions to strike are regularly entertained. As *C.B. Powell*, *supra* explained, the recognized exceptions reflect particular constellations of fact found in the decided cases. They are rare cases where the public law values do not sound loudly in the particular circumstances, the public law values are offset by competing public law values, or both. For example, there are rare cases where the effect of an interlocutory decision on the applicant is so immediate and drastic that the Court's concern about the rule of law is aroused: *Dunsmuir v. New Brunswick* 2008 SCC 9, [2008] 1 S.C.R. 190 *at* paragraphs 27-30. In these cases — often cases where prohibition is available — the values underlying the general rule against premature judicial reviews take on less importance.

[35] In the more recent decision of *Thielmann*, the Manitoba Court of Appeal considered the question of what constitutes the exceptional circumstances. Writing for the Court, Steel, J.A. provided a number of relevant factors to help guide the analysis:

> 49 In conclusion, the courts have not provided a definition of "exceptional circumstances" with respect to the prematurity principle. The factors to be considered in exercising this discretion cannot be reduced to a checklist or a statement of general rules. The list of factors to be considered is not closed and courts will not have to apply every factor, but only those that are relevant.
>
> 50 Among the factors that might be considered are: (i) hardship/prejudice (including irreparable harm, urgency, and excessive delay); (ii) waste of resources

> if judicial review is not proceeded with; (iii) delays if judicial review proceeds; (iv) fragmentation of proceedings; (v) strength of the case, including whether there is a clear abuse of process or proceedings that are so deeply flawed that it is clear and obvious that judicial review will be successful; and (vi) the statutory context, including whether there is an adequate alternative remedy. Furthermore, weight should always be given to the overarching consideration that an administrative tribunal should be given the opportunity to determine the issue first, and to provide reasons that can be considered by the court on any eventual review.

[36] In *Fraser v. Sampson*, 2023 NSSC 355, Constable Gary Fraser was the investigating officer for certain criminal allegations involving Christopher Sampson. Mr. Sampson filed a complaint against Mr. Fraser alleging investigatory misconduct. An internal investigation determined that Mr. Fraser committed numerous disciplinary defaults.

[37] The complainant, Mr. Sampson, filed a Notice of Review, seeking referral of his complaints to the Board. A preliminary review was conducted by the Commissioner. On February 17, 2023, the Commissioner decided that all but one of Sampson's complaints would be dismissed. The single remaining complaint would proceed to a hearing before the Review Board.

[38] Mr. Fraser sought judicial review of the Commissioner's decision alleging that it did not conform to the requirements of procedural fairness, among other things. He was also concerned that the Review Board proceedings would be unfair due to an alleged bias or a reasonable apprehension of bias.

[39] The matter came before Justice Gogan. In her reasons, Gogan, J. considered the decision in *Thielman* and the question of whether the alleged exceptional circumstances in that case (e.g. hardship, waste, delay, fragmentation, case strength and statutory context) were sufficient to grant a stay. She observed that: "Absent exceptional circumstances, an applicant must exhaust all levels of administrative procedure before seeking a remedy from the Court. The burden is on the party invoking exceptional circumstances." (at paragraph 22)

[40] Ultimately, Justice Gogan was not satisfied the circumstances were sufficiently exceptional to grant a stay and allow Mr. Fraser's request for judicial review of the Commissioner's decision to proceed. She wrote that Mr. Fraser's concerns "do not outweigh the overarching consideration that the Board should have the opportunity to determine the issues, provide a decision with reasons, subject then to judicial review." (at paragraph 32)

[41] In *Abdi v. Canada (Safety and Emergency Preparedness)*, 2018 FC 202, a report identified concerns regarding the Applicant Abdoulkader Abdi's "serious criminality". A delegate of the Minister of Public Safety and Emergency Preparedness determined that the report was well-founded. On the basis of that determination, the report was referred to the Immigration Division to determine whether Mr. Abdi was inadmissible for assistance under Canada's *Immigration and Refugee Protection Act*.

[42] Mr. Abdi filed an application for judicial review of the decision referring the report of his serious criminality to the Immigration Division. After the Minister refused to withdraw the referral, Mr. Abdi sought to stay the hearing before the Immigration Division until the judicial review of the underlying referral was concluded.

[43] Justice Boswell refused the request for a stay. In doing so, Boswell, J. affirmed that: "Absent exceptional circumstances, therefore, this Court should not interfere with the on-going administrative process involving the Applicant before the [Immigration Division] until after that process has been completed or until any available, effective remedies under the [*Immigration and Refugee Protection Act*] have been exhausted. He explained that:

> 1. None of Mr. Abdi's complaints around bias or procedural unfairness or potential constitutional issues rose to the rare and exceptional level required to interfere in the ongoing proceeding before an administrative tribunal;
> 2. Mr. Abdi's ability to ultimately seek judicial review of any decision by the Immigration Division remained intact; and
> 3. Mr. Adbi had yet to request that the Immigration Division adjourn the upcoming hearing around his alleged inadmissibility under the *Immigration and Refugee Protection Act*, pending a determination of his application for judicial review of the initial referral to the Immigration Division.
>
> (see paragraph 18)

[44] Justice Boswell concluded that an effective remedy might still be achieved following a hearing before the Immigration Division, the arguments in support of a stay were greatly diminished (at paragraphs 19 – 21). And any potential delay which would be caused by a stay ran counter to the legislative scheme and purpose attributed to the Immigration Division which was to "hold an admissibility hearing

quickly, and if it finds the person inadmissible, it must make a removal order" (at paragraph 21).

[45] In *Lourenco v. Hegedus*, 2017 ONSC 3872 ("***Lourenco***"), a police officer facing allegations of misconduct asked that the officer hearing the matter, Inspector Richard Hegedus, recuse himself on the grounds of reasonable apprehension of bias and lack of jurisdiction because of defects in Inspector Hegedus' designation. Inspector Hegedus dismissed the recusal motion. The officer facing discipline sought judicial review of Inspector Hegedus's recusal decision. The Chief of Police sought to quash the application for judicial review so that the hearing could proceed. Corbett, J. agreed with the Chief of Police and quashed the application for judicial review. In doing so, however, Justice Corbett also spoke to the rare circumstances in which a stay may be granted. He wrote (at paragraph 6):

> In rare cases this court will intervene on an application for judicial review in the midst of an administrative process where there are strong reasons to believe that the ongoing process is so deeply flawed that there is a strong likelihood that it will have to be run over again, usually on the basis of bias, reasonable apprehension of bias or want of jurisdiction. This does not mean that judicial review is available before the conclusion of administrative proceedings in any case where an allegation of this kind is made. It must be emphasized that early judicial review is the rare exception, not the rule, and will only be permitted in rare cases where the potential prejudice of the risk of repeating proceedings after review outweighs the prejudice to the general orderly processing of administrative proceedings without interruption until their conclusion. Analogies can be drawn to criminal prosecutions where it is very rare indeed for a proceeding to be interrupted for judicial review or appeal prior to the conclusion of the proceeding.

[46] Finally, *Black v. Advisory Council for the Order of Canada*, 2012 FC 1234 offers an example of exceptional circumstances where a stay was granted. In that case, the Advisory Council for the Order of Canada determined that there were reasonable grounds to terminate Mr. Black's appointment to the Order of Canada. The Council denied Mr. Black's request for an oral hearing. Mr. Black sought judicial review of that decision and an interim order restraining the Council from proceeding with further deliberations or from rendering a decision pending the determination of the application for judicial review.

[47] Justice de Montigny concluded that Mr. Black's concerns were an "exceptional circumstance" sufficient to prevail over any concerns regarding prematurity. He began by observing that it is the Governor-General (not the Council) who decides whether the appointment to the Order of Canada will be

terminated, after having received Council's recommendation. de Montigny, J. further acknowledged that the Governor-General was not bound by Council's recommendation and, as well, that the entire process was "fraught with uncertainty" as it had never been the subject of judicial review. (at paragraph 39)

[48] Nevertheless, he concluded that: "There is a real possibility that the Applicant would be left with no possible alternative remedy if he was prevented from bringing his application for judicial review of the Council's refusal to let him appear before it." (at paragraph 42) In reaching this conclusion, de Montigny, J. explained that:

> There are good reasons to believe that the Governor General's ultimate decision to terminate an appointment is not judicially reviewable, as it is a true exercise of a prerogative power. The same is probably true of the final recommendation given by the Council to the Governor General pursuant to stage 9 of the termination procedure set out in the Policy, as it can be argued that this recommendation also constitutes an exercise of the prerogative power. Even if that recommendation could be challenged on the ground that it is vitiated by a violation of the Applicant's right to natural justice and procedural fairness (a debatable proposition), the Governor General could very well act upon that recommendation before an application for judicial review could be filed, let alone be heard and decided.
>
> (at paragraph 40)

[49] Taking the foregoing into account, in my view, this case raises issues that are sufficiently serious that it falls among the very rare exceptions to the doctrine of prematurity and warrants an interim stay to enable the parties to assemble a fulsome record and present argument for a full stay pending judicial review – all on an accelerated basis.

[50] I begin by recognizing that even a brief, temporary pause of proceedings raises the spectre of fragmentation, delay, inefficiency and waste discussed above. These reasons should not be interpreted as diminishing or diluting those concerns on the basis that the proposed interim stay is brief – or otherwise suggesting that an issue need not be as serious where any potential delay is minimal. The significant risks associated with a stay of ongoing proceedings resonate as powerfully regardless of whether the proposed stay is brief or lengthy.

[51] I similarly recognize that this decision is made without the benefit of a full record. As a result, there are gaps in the evidence. For example:

1. The details regarding the Public Complaint Decision are unclear including, for example, whether it re-affirmed an existing

termination of Mr. Fraser's employment or confirmed (for a second time) that Mr. Fraser's employment was terminated;

2. The circumstances surrounding the conference call on February 6, 2023 where the Review Board discussed the Public Complaint Decision with counsel for HRP and Mr. Fraser are unclear; and
3. The circumstances surrounding the decisions by counsel for Mr. Fraser and counsel for HRP to take no further steps following that February 6, 2023 conference call regarding the Public Complaint Decision are similarly unclear – including the HRP's decision to resurrect the issue of the first day of the hearing before the Review Board when it now threatens the entire proceeding;
4. The complete details regarding the Review Board hearing between January 23 – 26, 2024.

[52] These may become issues at the hearing of the expedited stay motion where the parties will have the opportunity to present the Court with a full record – including a transcript of the February 6, 2023 call and the hearing before the Review Board commencing Tuesday, January 23, 2024.

[53] Despite these concerns, I remain firmly convinced that the exceptionally unique facts before me are sufficiently drastic as to raise serious issues that touch upon fundamental public law values and, absent a temporary pause, undermine the possibility of an adequate remedy absent a temporary pause. My reasons are based on the cumulative impact of the following two extremely unusual circumstances:

1. The Review Board's assumption of jurisdiction to activate a review hearing for the Public Complaint Decision in the midst of the review hearing for the Internal Disciplinary Decision and, more importantly, in the absence of a Notice of Review being filed by the disciplined member (Mr. Fraser in this case);
2. Having activated a review hearing into a public complaint, the Review Board's contemporaneous decision to immediately exclude the public from the hearing of a public complaint. The Board then refused an adjournment request such that the public would be excluded from the review hearing into both the Internal Disciplinary Decision and the newly constituted hearing into the Public Complaint Decision.

[54] I emphasize that, in my view, it is the combination of these two rare and highly unusual circumstances that warrant a brief, interim stay so that the following two motions can be heard on an accelerated basis:

1. The HRP motion for a stay pending hearing of the judicial review. I understand Ms. Rogers supports this motion. Mr. Fraser and the HRP oppose it;
2. A contemplated motion by either Mr. Fraser or the HRP to strike the application for judicial review.

I make no determination as to whether any one of these circumstances, in isolation, would be sufficient to warrant an interim stay – particularly given the exceeding rare nature of interim stays in the midst of administrative tribunal proceedings.

Assumption of Jurisdiction to Activate a Public Complaint Review

[55] Mr. Fraser maintains that he did not file a Notice of Review for the Public Complaint Decision because he never received the Public Complaint Decision in the first place. Thus, he says, the 30-day time period to initiate a review process under s. 54(1) of the *Police Act Regulations* had not yet begun to run.

[56] There may be a factual dispute as to whether/when Mr. Fraser received the Public Complaint Decision. Pending a full review of the record, there may be further disputes as to:

1. Whether Mr. Fraser is legally entitled to initiate a review absent strict compliance with the provisions of the *Police Act Regulations*;
2. Whether Mr. Fraser's employment was terminated twice, in two separate decisions (i.e. first through the Internal Disciplinary Decision and then again through the Public Complaint Decision);
3. Whether, as counsel for HRP suggests, the Board initially stated that it did not have jurisdiction to review the Public Complaint Decision and then reverse that decision by assuming jurisdiction. There may be a related argument as to whether the Board is, in the circumstances, entitled to reconsider its jurisdiction.

[57] However, there is no dispute before me that:

1. Mr. Fraser never filed a Form 13 Notice of Review of the Public Complaint Decision; and

2. It was the Review Board (not Mr. Fraser) that ultimately activated a review of the Public Complaint Decision on January 25, 2024 in the absence of receiving a Form 13 Notice of Review from Mr. Fraser.

[58] Section 54(1) of the *Police Act Regulations* states that "A review of a disciplinary decision by the Review Board, as referred to in s. 81 of the [Police] Act **must be initiated by a member who is the subject of a disciplinary decision**…" (Emphasis added)

[59] The mandatory wording in the Regulation ("must") clearly contemplates that only the member who is the subject of a disciplinary decision (not the Review Board) may initiate the review process.

[60] The wording in s. 81 of the *Police Act* is more permissive in nature in that it states:

> After a disciplinary decision has been made in accordance with this Act and the regulations, a police officer who is the subject of the disciplinary decision **may** initiate a review of the decision by filing a notice of review with the Complaints Commissioner in accordance with the regulations. (Emphasis added)

[61] Nevertheless, the statute does not state that the Review Board may, on its own initiative, assume the authority to initiate a review – or that it may do so at any time, without any initial assessment by the Complaints Commissioner.

[62] These provisions address "who" initiates the review of a disciplinary decision. With respect to "how" a review is initiated:

1. Section 54(1) of the *Police Act Regulations* states that a review is initiated when the disciplined member files "a **notice of review** with the Complaints Commissioner **in the prescribed form** no later than 30 days after the date the decision is received." (Emphasis added);
2. As indicated s. 81 of the *Police Act* similarly refers to a police officer initiating a review by "filing a notice of review";
3. Finally, s. 82 of the *Police Act* which states that "**Upon receipt of a notice of review**, the Review Board shall conduct a hearing." (Emphasis added)

[63] In this case and based on the agreed facts before me, there is a serious issue as to whether Mr. Fraser, as the disciplined police officer, initiated any review of the

Public Complaint Decision. Moreover, it is clear that Mr. Fraser did not file (and the Review Board never received) a Notice of Review for the Public Complaint Decision.

[64] Based on the facts presented to date, the notion that the Review Board would presume the statutory power to initiate a review process on its own motion is problematic and goes to the core of public law principles. Judicial review considers the legality of an administrative decision-maker's decision which is predicated on the presumption that administrative tribunals act within the limits imposed by the state. In this case, neither the *Police Act* nor its *Regulations* entitle the Review Board to decide, unprompted and on its own initiative, to commence its own review of a public complaint.

[65] What heightens this concern and, as indicated, justifies an interim stay is the fact that the Review Board not only activated a review of a public complaint but then immediately decided to exclude the public – without any form of public notice. I turn to that issue.

Excluding the Public in the Review of a Public Complaint

[66] The hearing of an internal disciplinary matter is closed to the public (*Police Act*, s. 76(2)). As such, the Review Board was correct to exclude the public when commencing the review hearing on January 23, 2024.

[67] However, the hearing of a public complaint is open to the public "unless the Review Board is of the opinion that it is in the best interests of the public, the maintenance of order or the proper administration of justice to exclude members of the public for all or part of the proceedings." (*Police Act*, s. 76(1))

[68] According to counsel for HRP, immediately after activating a review hearing for the Public Complaint Decision, the Review Board ruled that "in the interests of justice" the public would be excluded from both the ongoing review of the Internal Disciplinary Decision and the newly constituted review of the Public Complaint Decision (HRP Written Submissions dated January 25, 2024, page 3).

[69] The difficulty in this case is that the Review Board both activated the hearing of a public complaint and then contemporaneously excluded the public – without any public notice and any opportunity for members of the public to make submissions.

[70] Given the interconnected facts between the review of the Internal Disciplinary Decision and the newly constituted review of the Public Complaint Decision, it is foreseeable that issues may arise regarding public access to the hearing. However, the presumption of jurisdiction to review a public complaint in the middle of an ongoing internal disciplinary review with the combined and contemporaneous decision to then exclude the public is problematic.

[71] A "complaint" under s. 2(d) means:

> … any communication received from a member of the public in writing, or given orally to the chief officer or the chief officer's delegate and reduced to writing and signed by the complainant, that alleges that a member of a department breached the code of conduct or **alleges the failure of the department itself to meet public expectations**. (Emphasis added)

[72] The process of assessing whether public expectations are met becomes somewhat illusory when the public is excluded without notice to the public immediately after the Review Board assumed the jurisdiction to activate a review of a public complaint, again without notice to the public.

[73] There are related concerns regarding the transparency of Review Board hearings into public complaints and, more specifically, the issues surrounding publication bans on otherwise public proceedings. (See, for example, *Dagenais v. Canadian Broadcasting Corporation*, [1994] 2 SCR 835)

[74] Having decided that a review of the public complaint will proceed in this manner, in my view, Ms. Rogers and the HRP may be deprived of an effective remedy because the entire public complaint review process will have been completed when, they submit, it was seriously contaminated from the very start. Absent a brief interim stay, there is a very significant risk that the parties would ultimately be compelled to re-start the entire process.

[75] At a minimum and based on the facts before me, these concerns are sufficient, in my view, to order a brief, interim stay so that the matter may proceed on an accelerated basis to a full motion on the record.

[76] I repeat and caution that these are unusual and exceptionally rare circumstances and that the concerns raised are sufficient to raise serious issues and are not defeated by the doctrine of prematurity for the *purposes of granting an interim stay*. I make no final determinations on whether any of these issues are sufficient to grant a stay pending the hearing of the HRP's application for judicial

review, once the Court has the benefit of a full evidentiary record and full argument. These are issues that will be before the judge hearing the motion for a stay.

[77] I am compelled to also observe that responsibility for the current impasse cannot be fairly or fully laid at the feet of the Review Board. The Review Board proactively (and without any prompting from any party) raised concerns regarding the Public Complaint Decision almost a year before the hearing began. No party took any further steps. The Review Board was then suddenly confronted with complicated issues on the first day of the hearing. In the circumstances, while it does not alter my decision regarding an interim stay, it is certainly understandable how the Review Board would struggle with issues that it tried to avoid.

Irreparable Harm

[78] In my view, there will be irreparable harm if the HRP is precluded from placing a full record before the Court.

[79] As indicated, the Review Board has confirmed its intention to proceed with the newly constituted review of the Public Complaint Decision. Absent a brief pause to fully consider the issues, the opportunity to seek effective remedy would be irretrievably compromised and, based on the information before me, the risk of having to re-start the process is great.

Balance of Convenience

[80] I appreciate that the judiciary must exercise extreme caution before granting these types of remedies which threaten to delay, splinter or fragment ongoing proceedings of administrative tribunals. For reasons discussed above, I am satisfied the circumstances exist in this case.

[81] Having made that decision, Mr. Fraser and the Review Board process would only be briefly delayed while an accelerated motion for a further stay unfolds. By contrast, failing to take a brief, interim pause carries great risk. To quote Corbett, J. in *Lourenco*: "the potential prejudice of the risk of repeating proceedings after review outweighs the prejudice to the general orderly processing of administrative proceedings without interruption until their conclusion." (at paragraph 6). See paragraph 46 above)

CONCLUSION

[82] The Review Board's ongoing hearing regarding the Internal Disciplinary Decision and the Public Complaint Decision shall be briefly stayed to allow the motion for a further stay to proceed on an accelerated basis, with further pre-hearing milestones to ensure the Court has the benefit of a full record.

Keith J.

SUPREME COURT
OF NOVA SCOTIA
JAN 2 6 2024
HALIFAX, N.S.

FORM 13

Notice of Review

(Public Complaint or Internal Disciplinary Matter)
[Sections 50(7), 54(1) and 38 of the *Police Act* Regulations]

TAKE NOTICE that pursuant to the *Police Act* Regulations, I hereby request a review of a:

Public complaint ____

Internal disciplinary matter ✓

The date of the Decision by the Police Authority in the Form 11 Public Complaint Decision, or the Form 12 Internal Disciplinary Decision is: 11/17/20 (Date) DD/MM/YY.

Signature of Complainant or Police Officer

DAN FRASER
PRINT NAME

DATED at HALIFAX, this 4TH day of DECEMBER, 2020.

IMPORTANT: **If you wish a review of a decision you must complete this Form, sign it and forward it to the Commissioner.**

BY MAIL: P.O. Box 1573, Halifax, Nova Scotia, B3J 2Y3.
BY FAX: 902-424-1777
BY EMAIL: polcom@novascotia.ca
IN PERSON: 1690 Hollis Street, Halifax, Nova Scotia

This form must be filed no later than 30 days after the date you received the decision (Form 11 or Form 12) of the Chief of Police or his designate or Local Board of Police Commissioners.

NOVA SCOTIA
Police Complaints Commissioner

Revised: 2017-07-26