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2016 RCAD 6

File: 20153389



IN THE MATTER OF A CONDUCT HEARING
PURSUANT TO
THE *ROYAL CANADIAN MOUNTED POLICE ACT*

Between:

Commanding Officer, "K" Division

Conduct Authority/Respondent

And

Constable Lee Brown, Regimental Number 54267

Subject Member/Applicant

Decision on Motion for Abuse of Process-Unreasonable Delay

Section 17 *Commissioner's Standing Orders (Conduct)*

Inspector Bernard Tremblay, Conduct Board

October 19, 2016

Mr. Denys Morel, Conduct Authority Representative

Staff Sergeant Brigitte Gauvin, Member Representative

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Introduction

[1] The Applicant seeks a stay of proceedings for abuse of process due to the unreasonable delay between the time the conduct hearing was initiated by the Respondent and the date the Applicant was served with a Notice of Conduct Hearing.

[2] These written reasons confirm the decision I rendered on October 13 , 2016, by email granting the stay of proceedings.

Factual and Procedural Background

[3] On May 12, 2014, a Code of Conduct investigation was ordered by the Officer in Charge of "K" Division Traffic Services, pursuant to section 40(1) of the *Royal Canadian Mounted Police Act*, R.S.C., 198 5, chapter R-10, as it read before November 28, 2014 (former *RCMP Act*).

[4] The Applicant was suspended with pay on May 13, 2014.

[5] A criminal investigation was also conducted by the Alberta Serious Incident Response Team (ASIRT). Their report was provided to the "K" Division Professional Standards Unit

(PSU) on December 8, 2014, with supplemental information provided by ASIRT to the PSU on January 14, 2015.

[6] On or before January 21, 2015, the Code of Conduct investigation was completed by the PSU and the investigation report was provided to the officer in charge of "K" Division Traffic Services.

[7] On February 25, 2015, the Conduct Authority Representative Directorate (CARD) received the file.

[8] In March 2015, senior Conduct Authority Representative (CAR), John Benkendorf, had three meetings with the complainant.

[9] On April 2, 2015, the Respondent signed a notice to the Designated Officer requesting a conduct hearing. A conduct board was appointed on April 8, 2015.

[10] On April 15, 2015, the acting Commanding Officer received a letter from ASIRT informing the Respondent that ASIRT decided not to pursue criminal charges.

[11] On July 16, 2015, the file was reassigned to senior CAR Julie Roy.

[12] On September 23, 2015, the file was reassigned to senior CAR Denys Morel.

[13] Senior CARs John Benkendorf and Julie Roy resigned from the RCMP on September 23, 2015, and December 10, 2015, respectively.

[14] On April 1, 2016, the Respondent signed a Notice of Conduct Hearing which was served on the Applicant on April 12, 2016.

[15] The conduct hearing is scheduled to begin on October 25, 2016.

Position of the Parties

[16] The Applicant submits that:

- a. The Respondent failed to serve the Applicant with the Notice of Conduct Hearing "as soon as feasible" as required by section 43(2) of the *RCMP Act*.
- b. This delay is presumptively unreasonable and it has not been justified by the Respondent.
- c. The suspension from duty for more than two years and the stigma attached to the complaint of sexual assault caused significant prejudice to the Applicant.
- d. The unreasonable delay caused irreparable prejudice to the integrity of the RCMP conduct system.
- e. The Respondent's actions or inaction are an abuse of process that warrant a stay of Proceedings.

[17] On the other hand, the Respondent submits that the requirement of section 43(2) was complied with and that the delay was not unreasonable. He also argues that the delay did not cause a prejudice that amounts to an abuse of process.

The Law and RCMP Policy

[18] The *RCMP Act* was modified on November 28, 2014. This represented a new beginning as the discipline process was replaced by the new conduct process.

[19] Section 43 of the *RCMP Act* states:

(1) On being notified under subsection 41(1) of an alleged contravention of a provision of the Code of Conduct by a member, the officer designated for the purpose of that subsection shall, subject to the regulations, appoint one or more persons as members of a conduct board to decide whether the member contravened the provision.

(2) **As soon as feasible** after making the appointment or appointments, the conduct authority who initiated the hearing shall serve the member with a notice in writing informing the member that a conduct board is to determine whether the member contravened a provision of the Code of Conduct.

(3) The notice may allege more than one contravention of any provision of the Code of Conduct and is to contain

- (a) a separate statement of each alleged contravention;
 - (b) a statement of the particulars of the act or omission constituting each alleged contravention;
 - (c) the names of the members of the conduct board; and
 - (d) a statement of the member's right to object to the appointment of any person as a member of the conduct board as provided in section 44.
- (4) The statement of particulars contained in the notice is to contain sufficient details, including, if practicable, the place and date of each contravention alleged in the notice, to enable the member who is served with the notice to identify each contravention in order that the member may prepare a response and direct it to the occasion and events indicated in the notice.

[Emphasis mine]

[20] The RCMP *Commissioner's Standing Orders (Conduct)* state:

15. (1) In this section , "investigation report" means a report resulting from the investigation referred to in subsection 40(I) of the Act and includes supporting material.

(2) **As soon as feasible after the members of the conduct board have been appointed, the conduct authority must provide a copy of the notice referred to in subsection 43(2) of the Act and the investigation report to the conduct board and must cause a copy of the investigation report to be served on the subject member.**

(3) Within 30 days after the day on which the subject member is served with the notice or within another period as directed by the conduct board, the subject member must provide to the conduct authority and the conduct board

- (a) an admission or denial, in writing, of each alleged contravention of the Code of Conduct;
- (b) any written submissions that the member wishes to make; and
- (c) any evidence, document or report, other than the investigation report, that the member intends to introduce or rely on at the hearing.

[Emphasis mine]

[21] RCMP Policy, Administration Manual, Chapter XTI.1.3.8 states:

Conduct boards will make every reasonable effort to **hold a conduct hearing within 90 days** of being appointed by the designated officer.

[Emphasis mine]

Analysis

[22] In the recent criminal case of *R. v. Jordan*, 2016 SCC 27 (CanLII), (*Jordan*), the Supreme Court of Canada developed a new framework for dealing with unreasonable delay under section 11(b) of the *Canadian Charter of Rights and Freedoms* (*Charter*). The Applicant submits that the principles of natural justice, as redefined in *Jordan*, apply to administrative tribunals such as an RCMP conduct board.

[23] I agree with the Respondent that, as a result of *R. v. Wigglesworth*, [1987] 2 SCR 541, section 11(b) of the *Charter* does not apply to RCMP disciplinary matters. Although I would not directly apply *Jordan* and its "presumptive ceiling" concept here, many passages from that decision are relevant to the RCMP conduct process:

[22] [...] Timely trials impact other people who play a role in and are affected by criminal trials, as well as the public's confidence in the administration of justice.

[23] Victims of crime and their families may be devastated by criminal acts and therefore have a special interest in timely trials (*R. v. Askov*, [...], [1990] 2 SCR 1199, at pp. 1220-21). Delay aggravates victims' suffering, preventing them from moving on with their lives.

[24] Timely trials allow victims and witnesses to make the best possible contribution to the trial, and minimize the "worry and frustration [they experience] until they have given their testimony" (*Askov*, at p. 1220). Repeated delays interrupt their personal, employment or business activities, creating inconvenience that may present a disincentive to their participation.

[25] Last but certainly not least, timely trials are important to maintaining overall public confidence in the administration of justice.[...] Failure "to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures" (p. 1221).

[26] Extended delays undermine public confidence in the system.[...]

[27] Canadians therefore rightly expect a system that can deliver quality justice in a reasonably efficient and timely manner. [...]

[24] *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, (*Blencoe*), continues to apply in an application for a stay of proceedings for delay in the RCMP conduct

process. In order to succeed with this motion, the Applicant must prove on a balance of probabilities that:

- the delay is unacceptable;
- a significant prejudice resulted from this delay; and
- a stay of proceedings is the appropriate remedy.

1) Is the delay unacceptable?

[25] As stated in *Blencoe* at paragraph 122, context must be considered when determining whether the delay is acceptable or not:

The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

[26] The Applicant argues that the Respondent did not comply with section 43(2) of the *RCMP Act*, which requires that once a hearing is initiated, the conduct authority shall, "as soon as feasible," serve the member with a notice that there will be a hearing before a conduct board. The Applicant submits that the French version of section 43(2) uses "dans les meilleurs délais" which is equivalent to "as soon as possible". I note that section 15(2) of the *Commissioner's Standing Orders (Conduct)* uses "as soon as feasible" in English and "des que possible" in French.

[27] The Respondent submits that the replacement of the word "forthwith" in the former *RCMP Act* with "as soon as feasible" brings flexibility and shows the intent to take away the sense of immediacy which was present under the former *RCMP Act*. She argues it should be interpreted to mean that something must be done soon, taking the circumstances into account.

[28] There are subtle differences between the phrases "as soon as feasible" and "as soon as possible". Despite the removal of "forthwith", section 43(2) still requires a reasonably quick action by the conduct authority. At that stage of the conduct process, the PSU investigation is completed and the conduct authority has already notified the Designated Officer there will be a conduct hearing.

[29] On April 2, 2015, the Respondent initiated a conduct hearing by notifying the Designated Officer as required by section 41(1) of the *RCMP Act*. There is no dispute this was done within the section 41(2) prescription period of one year from the time the Respondent became aware of the alleged contravention by the Applicant.

[30] On April 8, 2015, the Designated Officer appointed a conduct board to decide whether the Applicant contravened the Code of Conduct. This triggered the section 43(2) requirement for the Respondent to serve the Applicant "as soon as feasible" with a written notice that there would be a conduct hearing. That notice was served on the Applicant more than one year later, on April 12, 2016.

[31] It is important to note the conduct process imposes no obligations on a subject member prior to being served with a Notice of Conduct Hearing. Requirements such as providing a response and a witness list within 30 days are only engaged once the Subject Member is served with this notice. No delay can be attributed to the Applicant here.

[32] The Respondent submits the delay was caused by several factors. The CARD experienced significant challenges due to a realignment of human resources, file reassignments, staff departures and the volume of files referred to the CARD. Also, the complainant in this sexual misconduct matter had expressed serious concerns about participating in the hearing process, which resulted in additional delays.

[33] The Respondent refers to the *Blencoe* decision, where the Supreme Court found that a 30-month delay between the filing of a human rights sexual harassment complaint and a scheduled hearing, and the lack of proof of significant prejudice did not amount to abuse of process. He

points out the period of time in the present case beginning from the initiation of the investigation to the time of the hearing date amounts to 29 months.

[34] The RCMP conduct process now operates in a unique environment, which means that delays must be looked at through a different lens. Although the principles of *Blencoe* still apply, delays which were acceptable or tolerated under the previous regime may now be considered inordinate. The RCMP, through its policy, set a benchmark of 90 days for a conduct hearing to be held following the appointment of the conduct board. Although 90 days is not inflexible, conduct boards must "make every reasonable effort to hold a conduct hearing" within that timeframe. This implies that the following will occur within these 90 days:

- the Notice of Conduct Hearing will be served on the member;
- the member will seek and obtain legal advice ;
- the member will provide a mandatory written response (within 30 days of being served the Notice of Conduct Hearing);
- the hearing date will then be set;
- the conduct hearing will be held.

[35] Although I am not prepared to go so far as to decide that the phrase "as soon as feasible" means the Notice of Conduct Hearing must always be served soon enough to allow the conduct process to meet the 90-day objective of policy, I find that in this specific case the Notice of Conduct Hearing was not served "as soon as feasible" as required by section 43(2) of the *RCMP Act*.

[36] Although I accept that there is no bad faith on the part of the Respondent or her representative, the delay of approximately 370 days in serving the Applicant with the Notice of Conduct Hearing is unacceptable.

2) Did a significant prejudice result from the delay?

[37] The Applicant submits he has been suspended from his duties for over two years and he has suffered from the stigma attached to a complaint of sexual assault which resulted in criminal and internal investigations. He adds the delay in serving him with the Notice of Conduct Hearing defeats the purpose and the nature of the new conduct process and brings the conduct process into disrepute.

[38] The Respondent submits the Applicant has not sustained any significant prejudice as a result of the delay, and failed to demonstrate that an abuse of process occurred. He adds the delay alone, however long, is not enough.

[39] The Supreme Court in *Blencoe* states at paragraph 115:

[...]Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. [...] It must, however, be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute.[...]

[40] The Applicant was suspended with pay on May 13, 2014, shortly after the incidents were reported by the complainant. By January 21, 2015, reports from both the criminal investigation and the Code of Conduct investigation were provided to the Officer in Charge of "K" Division Traffic Services. The CARD received the file on February 25, 2015, and a conduct board was appointed on April 8, 2015. From this point, the Notice of Conduct Hearing, which was to be served "as soon as feasible", was served more than one year later. Throughout the two-year period, the Applicant was suspended from duty and did not know if or when there would be a conduct hearing.

[41] I find that the Applicant suffered a significant prejudice as a result of the delay.

3) Does the abuse of process require a stay of proceedings?

[42] The Respondent submits the public interest and the RCMP would not be served by terminating the discipline proceeding simply because the proceeding was not dealt with as expeditiously as possible. He argues this is especially true in cases of sexual assault allegations.

[43] The Supreme Court of Canada stated in *R. v. O'Connor*, [1995] 4 SCR 411, at paragraph 68, that a stay of proceedings for an abuse of process will only be warranted in the clearest of cases. The *RCMP Act*, the *Commissioner's Standing Orders (Conduct)* and the RCMP Policy aim to ensure conduct issues are dealt with promptly and are not permitted to linger prior to adjudication. Although there will undoubtedly be cases where lengthy delays are unavoidable, this is not one of them. The conduct process must give the public and members of the RCMP confidence that allegations of misconduct will be dealt with promptly and fairly.

[44] Although I am aware that a stay of proceedings will not allow the adjudication of the merits of the allegations, I conclude the integrity of the RCMP conduct process will be better protected by a stay of proceedings than by condoning the unacceptable delay and allowing this matter to proceed to a conduct hearing.

Finding on Motion for Abuse of Process

[45] The Applicant's motion is granted. The proceeding with respect to the Notice of Conduct Hearing dated April 1, 2016, is stayed.



Bernard Tremblay

October 19, 2016

Issued at Ottawa, Ontario

Conduct Board