

Giles v. Royal Newfoundland Constabulary Public Complaints  
Commission (Newfoundland Supreme Court [Trial Division])



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**Giles ▶ v. ◀ Royal ▶ ◀ Newfoundland ▶ ◀ Constabulary ▶ Public  
Complaints Commission**

**Stewart ◀ Giles ▶ (applicant) and The ◀ Royal ▶ ◀ Newfoundland ▶ ◀ Constabulary ▶ Public  
Complaints Commission (respondent)**

**Citation:** 1996 CarswellNfld 176, 144 Nfld. & P.E.I.R. 17, 451 A.P.R. 17

**Court:** ◀ Newfoundland ▶ Supreme Court [Trial Division]

**Judge:** L. Barry J.

**Heard:** March 20 and June 4, 1996

**Judgment:** August 22, 1996

**Year:** 1996

**Docket:** St. J. 3719/95

**Counsel:** *D. Bradford Wicks*, for applicant.

*Janet M. Henley-Andrews*, for respondent.

**Subject:**

Public

**Police --- Organization of police forces -- Disciplinary proceedings -- Statutory and regulatory conditions -- General..**

**Police --- Organization of police forces -- Disciplinary proceedings -- Miscellaneous issues. --- Police -- Organization of police forces -- Disciplinary proceedings -- Statutory and regulatory conditions -- Police officer being charged with conduct unbecoming police officer -- Chief of police finding police officer guilty -- Police officer appealing to Public Complaints Commission -- Commissioner confirming decision of chief of police -- Police officer appealing -- ◀ Royal ▶ ◀ Newfoundland ▶ ◀ Constabulary ▶ Act, 1992 authorizing commission both to investigate and decide disposition of complaint -- No reasonable apprehension of bias -- Appeal allowed on other grounds -- ◀ Royal ▶ ◀ Newfoundland ▶ ◀ Constabulary ▶ Act, 1992, S.N. 1992, c. R-17, s. 19..**

Police -- Organization of police forces -- Disciplinary proceedings -- Standards of fairness -- Police officer being charged with conduct unbecoming police officer -- Chief of police finding police officer guilty -- Police officer appealing to Public Complaints Commission -- Commissioner not providing police officer with opportunity to make submissions on investigator's report -- Commissioner confirming decision of chief of police -- Police officer appealing -- Standards of fairness requiring that police officer be given access to investigator's report and opportunity to comment on it -- Police officer having right to speak to commissioner, not just to commissioner's investigator -- Appeal allowed..

A person filed a public complaint against a police officer, who was charged with conduct unbecoming a police officer. At a disciplinary hearing, the chief of police found the police officer guilty of the disciplinary default. He imposed a four-day suspension, and a reprimand was to be placed in the police officer's file. The police officer appealed to the Public Complaints Commission.

Section 19 of the ◀ Royal ▶ ◀ Newfoundland ▶ ◀ Constabulary ▶ Act, 1992 expressly authorizes a public complaints commission both to investigate and decide the disposition of a complaint. The commission appointed an investigator. The police officer advised the investigator that he would not be giving a further statement. Following receipt of the investigator's report, the commissioner confirmed the decision of the chief of police. The police officer appealed, arguing that the commissioner should not have acted as both investigator and adjudicator. The police officer also argued that he had not had the opportunity to make submissions, and had not received a copy of the investigator's report before the commissioner made a

decision.

**Held:**

The appeal was allowed.

The commission, authorized both to investigate and decide the disposition of a complaint, is not a statutory authorization of institutional bias; it is a common sense affirmation by the legislature that the circumstances in such a case as the one at bar do not create a reasonable apprehension of bias. The police officer's reliance upon the principle that no one should be a judge in his or her own cause was not well-founded.

When investigative and adjudicative roles are performed by the same person, the court must be particularly alert to ensure that procedural fairness prevails. Minimum standards of fairness required that the police officer be given access to the investigator's report, and have an opportunity to comment on it. The police officer had the right to speak to the commissioner, and not just to the commissioner's investigator. It was a mistake to infer that the police officer's decision not to make a further statement to the investigator constituted a waiver of his right to see and comment on the investigator's final report to the commissioner. The commissioner's decision was set aside, and the matter was referred back to the commissioner for redetermination following receipt of the police officer's representations.

**Cases considered:**

*Barry v. Alberta (Securities Commission)*, 35 Admin. L.R. 1, 93 N.R. 1, (sub nom. *Brosseau v. Alberta (Securities Commission)*) 65 Alta. L.R. (2d) 97, [1989] 3 W.W.R. 456, 57 D.L.R. (4th) 458, [1989] 1 S.C.R. 301, 96 A.R. 241 -- *considered*

*Healey v. Memorial University of Newfoundland* (1993), 14 Admin. L.R. (2d) 259, 106 Nfld. & P.E.I.R. 304, 334 A.P.R. 304 (Nfld. T.D.) -- *referred to*

*Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105, 18 B.C.L.R. 124, [1980] 3 W.W.R. 125, 31 N.R. 214, 110 D.L.R. (3d) 311 -- *applied*

*Maillet v. College of Dental Surgeons (Quebec)* (1919), 28 Que. K.B. 539, 34 C.C.C. 138, 58 D.L.R. 210 (C.A.) -- *referred to*

**Statutes considered:**

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11

*generally considered*

◆ *Royal* ◆ *Newfoundland* ◆ *Constabulary* ◆ Act, 1992, S.N. 1992, c. R-17

*generally considered*

s. 18(1) *considered*

s. 18(2) *considered*

s. 19 *considered*

s. 19(1) *considered*

s. 22(1) *considered*

s. 22(2) *considered*

s. 23 *considered*

s. 24(1) *considered*

s. 24(2) *considered*

s. 24(3) *considered*

s. 24(4) *considered*

s. 25(1)considered

s. 25(2)considered

s. 25(3)considered

s. 25(4)considered

s. 26(1)considered

s. 26(2)considered

s. 28(1)considered

s. 28(2)considered

s. 28(3)considered

s. 31(1)considered

s. 31(2)considered

s. 36(1)pursuant to

#### Regulations considered:

◀ Royal ▶ ◀ Newfoundland ▶ ◀ Constabulary ▶ Act, 1992, S.N. 1992, c. R-17

◀ Royal ▶ ◀ Newfoundland ▶ ◀ Constabulary ▶ Public Complaints Regulations, Nfld. Reg. 100/93

s. 8

s. 16

s. 20

APPEAL by police officer from decision of commissioner confirming decision of chief of police.

#### **L. Barry J.:**

1 This appeal of a decision of the ◀ Royal ▶ ◀ Newfoundland ▶ ◀ Constabulary ▶ Public Complaints Commission, pursuant to s. 36(1) of the ◀ Royal ▶ ◀ Newfoundland ▶ ◀ Constabulary ▶ Act, 1992, S.N. 1992, c. R-17, arises from an incident where a police officer who investigated a traffic accident was disciplined for not issuing a breathalyzer demand to a fellow officer involved in the collision.

#### **The Facts**

2 On May 27, 1994, Michael Callahan, Sr., filed a public complaint with the Commission against Constable Stewart ◀ Giles ▶, who the previous day had investigated a motor vehicle accident on Kenmount Road, St. John's, involving Michael Callahan, Jr., and Constable James Higdon, an off-duty member of the RNC. Constable Higdon's vehicle hit the rear of another vehicle, operated by Michael O'Neill, and caused the O'Neill vehicle to collide with Callahan's. All vehicles incurred considerable damage. Fortunately, the people involved suffered only minor injuries.

3 Upon arrival at the scene of the accident, the parents of Michael Callahan, Jr., expressed concern that alcohol may have been a factor in the accident. Michael Callahan, Sr., said he asked Constable ◀ Giles ▶ if alcohol was involved and Constable ◀ Giles ▶ answered "no". When Mr. Callahan learned a smell of alcohol had been detected by his wife on Constable Higdon's breath, Mr. Callahan concluded Constable Higdon had received preferential treatment from Constable ◀ Giles ▶ in not receiving a breathalyzer demand. Mr. Callahan lodged a public complaint against Constable ◀ Giles ▶. Constable ◀ Giles ▶ position was that

he had neither the subjective belief nor sufficient objective grounds to form a subjective belief that a breathalyzer demand should have been made. ◀ Giles ▶ was charged with conduct unbecoming a police officer. On a disciplinary hearing, the Chief of Police concluded there was sufficient basis for reasonable and probable cause to make the breathalyzer demand. He found Constable ◀ Giles ▶ guilty of the disciplinary default and imposed a four day suspension and a reprimand to be placed in Constable ◀ Giles ▶ file.

4 Constable ◀ Giles ▶ appealed the Chief's decision to the Public Complaints Commission. The Commissioner, Dr. Leslie Harris, ordered an investigation and, following receipt of the investigator's report, confirmed the Chief's decision.

5 Constable ◀ Giles ▶ now appeals the Commissioner's decision, on the basis he had no opportunity before the Commissioner to cross-examine witnesses, call evidence, or make submissions, and had not received a copy of the investigator's report, prior to the Commissioner's decision. Constable ◀ Giles ▶ also submits the Commissioner should not have acted both as investigator and adjudicator.

6 The investigator appointed by the Commissioner deposed that his secretary had informed him of Constable ◀ Giles ▶' saying by telephone that, on the advice of his lawyer, he did not wish to add anything to his previous statement and did not wish to meet the investigator to provide any further information. Constable ◀ Giles ▶ confirmed that he did tell the investigator he would not be giving a further statement. He challenges, however, the statement in the investigator's report that he had "advised that upon the advice of his counsel he did not wish to make any further statement or submission in respect of his appeal".

## The Statute

7 The ◀ Royal ▶ ◀ Newfoundland ▶ ◀ Constabulary ▶ Act, 1992, provides:

18. (1) The Lieutenant-Governor in Council shall appoint a ◀ Royal ▶ ◀ Newfoundland ▶ ◀ Constabulary ▶ Public Complaints Commission consisting of a commissioner.

(2) The commissioner shall supervise and direct the officers, investigators and other employees and the work of the commission.

19. (1) The commissioner may

- (a) receive and review a complaint made against a police officer;
- (b) investigate a complaint; and
- (c) dismiss or refer a complaint for a hearing under section 28.

22. (1) A person other than a police officer may file a complaint concerning the conduct of a police officer in writing at a ◀ constabulary ▶ office or with the commissioner.

(2) A complaint made under subsection (1) shall be a complaint which, if substantiated, would lead to review and discipline under this Act.

23. Where a complaint has been received under section 22, the police officer against whom the complaint is made shall within a reasonable time be given notice of the substance of the complaint unless, in the opinion of the chief, or the commissioner where the complaint relates to the chief, to do so would prejudice further investigation of the matter.

24. (1) Where, under section 22, a complaint is filed with the commissioner or is received at a ◀ constabulary ▶ office, that complaint shall be referred to the chief, or where the chief is not available, the deputy chief.

(2) Where a complaint is received at a ◀ constabulary ▶ office, the chief or deputy chief shall notify the commissioner of that complaint.

(3) Upon receipt of a complaint under subsection (1), the chief, or the deputy chief shall investigate the

complaint and that investigation shall be completed as soon as is practicable but no later than 3 months from the date the complaint is filed or received.

(4) The chief or the deputy chief may appoint a police officer to investigate complaints referred to him or her under subsection (1).

25. (1) Following an investigation under section 24, the chief or the deputy chief shall consider the complaint and he or she may

- (a) with the agreement of all parties, settle the matter;
- (b) dismiss the complaint; or
- (c) discipline the police officer who is the subject of the complaint.

(2) The complainant and the police officer who is the subject of a complaint shall be informed, in writing, of the dismissal of the complaint or of the discipline imposed and the reasons for that dismissal or discipline.

(3) Where a police officer is disciplined under this section, that police officer may, within 15 days of his or her receipt of that discipline decision, appeal that decision by filing an appeal with the commissioner.

(4) A complainant who is not satisfied with a decision of the chief or deputy chief under subsection (1) may, within 15 days of his or her receipt of that decision, appeal the decision by filing an appeal with the commissioner.

26. (1) Upon receipt of an appeal under section 25, the commissioner shall forward a notice of the appeal to the chief and the other parties.

(2) Where an appeal under section 25 is filed with the commissioner, the commissioner or an investigator shall investigate the complaint.

28. (1) Following an investigation of a complaint, where the commissioner determines that the decision of the chief or deputy chief appealed under subsection 25(3) or (4) was properly made, he or she may dismiss the complaint and confirm the decision of the chief or deputy chief.

(2) Following an investigation of a complaint and where the commissioner does not dismiss a complaint and confirm the decision of the chief or deputy chief under subsection (1) and does not effect a settlement under section 26, he or she shall refer the matter to a single adjudicator appointed under section 29 who shall conduct a hearing into the matter.

(3) Notwithstanding subsections (1) and (2), where a decision is appealed under subsection 25(3) or (4) and the penalty imposed upon a police officer by the chief or deputy chief includes a suspension without pay for 2 weeks or longer, dismissal or demotion, the commissioner shall refer the matter to a single adjudicator appointed under section 29 who shall conduct a hearing into the matter.

31. (1) An adjudicator has the powers of a commissioner appointed under the *Public Inquiries Act*.

(2) An adjudicator shall conduct a hearing without undue delay to inquire into the matter referred to him or her and shall give full opportunity to all parties to present evidence and make representations, in person or through counsel.

8 The *Royal Newfoundland Constabulary Public Complaints Regulations* provide:

8. The chief or the officer appointed to investigate a complaint under subsection 24(4) of the Act shall

- (a) conduct the investigation in an objective and neutral manner consistent with recognized investigative procedures;
- (b) impartially and diligently gather evidence with a view to bringing the investigation to a conclusion;
- (c) upon completion of the investigation prepare and submit to the chief a final report which sets out the subject matter of the investigation, all relevant findings and conclusions and the statements obtained shall be appended to that final report.

16. The chief or deputy chief in exercising the authority conferred under subsection 25(1) of the Act shall afford the complainant and the police officer an opportunity to speak to the subject matter of the complaint.

20. The provisions of paragraphs (a), (b) and (c) of section 8 shall apply with the necessary changes to an investigation performed under subsection 26(2) of the Act, and the final report shall be submitted to the commissioner.

## The Issue

9 Two issues arise:

1. Was it improper for the Public Complaints Commissioner to act both as investigator and adjudicator in the circumstances?
2. Did the Public Complaints Commissioner apply procedural fairness in performing his duties?

## Case Law and Analysis

### 1. Commissioner acting as investigator and judge

10 One principle of administrative law is that no person should be judge in the person's own cause: *nemo iudex in sua causa debet esse*. See, Jones and de Villars, *Principles of Administrative Law* (2d ed. 1994), at p. 322. This principle concerning bias has been found to cover situations of institutional bias where one person acts as complainant, investigator or prosecutor as well as adjudicator in the same proceedings. See, *Maillet v. College of Dental Surgeons (Quebec)* (1919), 58 D.L.R. 210 (Que. C.A.); and Mullan, *Administrative Law* (2d. ed 1979), at pp. 3-130 to 132. But, as Mullan points out at p. 3-132, at times the statutory provisions establishing a particular decision-making process will authorize the participation in that process of persons who under the common law rules would be held to be disqualified: for example, because of involvement at earlier investigative and policing levels causing the formation of tentative views. See, *Barry v. Alberta (Securities Commission, (sub nom. Brosseau v. Alberta (Securities Commission))* [1989] 3 W.W.R. 456 (S.C.C.), where the Court held that the legislation impliedly authorized the chairman of a disciplinary panel to obtain information from an internal investigation before sitting on the panel. Also see, Jones and de Villars, at p. 330, for a discussion of institutional bias.

11 In the present case, s. 19 of the *Royal Newfoundland Constabulary Act, 1992* expressly authorizes a Public Complaints Commission to both investigate and decide the disposition of a complaint. I have been shown no *Charter* or other reason why the legislation should not determine this matter. I do not view this as the statutory authorization of institutional bias, which Jones and de Villars, at pp. 338-9, caution against too quickly finding, but rather the common sense affirmation by the Legislature that these circumstances do not in themselves create a reasonable apprehension of bias. I conclude the Applicant's reliance upon the *nemo iudex* principle is not well-founded in this case. I accept, however, that, where the investigative and adjudicative roles are performed by the same person, a court must be particularly alert to ensure that procedural fairness prevails.

### 2. Procedural fairness

12 The Supreme Court of Canada laid down the following propositions in *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105, at pp. 1112-1114:

1. It is the duty of the courts to attribute a large measure of autonomy to a tribunal

.....

sitting in appeal, pursuant to legislative mandate. The Board need not assume the trappings of a

court.

.....

2. As a constituent of the authority it enjoys, the tribunal must observe natural justice which

.....

is only 'fair play in action'. In any particular case, the requirements of natural justice will depend on 'the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter, which is being dealt with, and so forth'

.....

To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.

3. A high standard of justice is required when the right to continue in one's profession or employment is at stake

.....

A disciplinary suspension can have grave and permanent consequences upon a professional career.

4. The tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity 'for correcting or contradicting any relevant statement prejudicial to their views'

.....

5. It is a cardinal principle of our law that, unless expressly or by necessary implication, empowered to act *ex parte*, an appellante authority must not hold private interviews with witnesses

.....

or, *a fortiori*, hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such party must

.....

'know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them

.....

Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other'.

13 Applying the above principles, I need not get into whether Constable ◀ Giles ▶ should have the right to cross-examine witnesses making statements to his prejudice or the extent of any oral hearing before the Commission. The failure to provide an opportunity to Constable ◀ Giles ▶ to make submissions concerning the investigator's report determines the present case.

14 I note that Constable ◀ Giles ▶ had the express right to a hearing before the Chief of Police. See, *Regulation 16*. Also the *Act* would have provided him with the right to a further hearing before an adjudicator, had his suspension been for more than two weeks. But a four day suspension and reprimand noted in his file is still seriously prejudicial to his career. The *Act* does not expressly or by necessary implication empower the Commissioner to act in such a matter without providing a fair opportunity to a party to make representations upon investigative reports. Minimum standards of fairness required that Constable ◀ Giles ▶ be provided access to the investigator's report and an opportunity to comment upon it. See, *Healey v. Memorial University of Newfoundland* (1993), 106 Nfld. & P.E.I.R. 304

(Nfld. T.D.). See also *Regulation 20*. I interpret the police officer's right to "an opportunity to speak to the subject matter of the complaint" as a right to speak to the Commissioner, not just to the Commissioner's investigator.

15 I accept that a party may waive access to investigative reports and waive the right to make representations concerning them. It was a mistake, however, to infer that Constable ◀ Giles ▶' decision not to make a further statement to the investigator constituted a waiver of his right to see and comment to the Commissioner upon the investigator's final report.

16 Procedural fairness requires that the Commissioner consider representations from Constable ◀ Giles ▶ concerning the investigator's report, before deciding the appeal. Whether or not the Commissioner should provide an opportunity to cross-examine witnesses and the extent of oral submissions will depend upon the nature of Constable ◀ Giles ▶' representations concerning the investigator's report. This Court should not attempt at this stage to set down further guidelines for the Commissioner, when it is unclear whether any further problem will arise.

### **Disposition**

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1. The appeal is allowed, the decision of the Commissioner is set aside, and the matter is referred back to the Commissioner for re-determination following the receipt of representations from Constable ◀ Giles ▶ concerning the investigator's report.
2. Constable ◀ Giles ▶ shall have his costs.

*Appeal allowed.*

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