

Date: 20121205
Docket: 11/53
Citation: *Royal Newfoundland Constabulary Police
Complaints Commission v. Morgan*, 2012 NLCA 74

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

THE ROYAL NEWFOUNDLAND CONSTABULARY
PUBLIC COMPLAINTS COMMISSION APPELLANT

AND:

LAWRENCE MORGAN FIRST RESPONDENT

AND:

JACINTA MORGAN SECOND RESPONDENT

Coram: White, Harrington and Hoegg JJ.A.
Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (General) 201001G5691

Appeal Heard: May 11, 2012
Judgment Rendered: December 5, 2012

Reasons for Judgment by White J.A.
Concurred in by Harrington and Hoegg JJ.A.

Counsel for the Appellant: Kenneth Jerrett
Counsel for the First Respondent: Self Represented
Counsel for the Second Respondent: Self Represented

White J.A.:

[1] This appeal is about whether it was reasonable for the Royal Newfoundland Constabulary Public Complaints Commission (the “Commission”) to dismiss a complaint on limitations grounds. It raises questions about what happens when statutory offices are left unfilled for protracted periods. It also raises questions about the meaning of the limitations provisions in the *Royal Newfoundland Constabulary Act, 1992*, SNL 1992, c. R-17 (the “Act”).

BACKGROUND

- *the origins of the complaint*

[2] The complaint that is the subject of this appeal dates back to the middle of August, 2009, when Jacinta and Lawrence Morgan (the “Morgans”) took a family vacation in Alberta with their four children. They left behind their home, which they had been building for the past ten years.

[3] While the Morgans were gone, one of their neighbours saw G.D. leaving their house at around 3:00 a.m. The neighbour seems to have thought that G.D.’s presence was a cause for concern. He called Lawrence Morgan’s father, Ike Morgan, to warn him about the sighting. The two of them went to examine the house and found some siding melted.

[4] Ike Morgan inferred that G.D. had tried to burn the house down and that he would likely try again. He called the Royal Newfoundland Constabulary (“RNC”). Two officers came to investigate. Ike Morgan told them that G.D. usually prowled around between 2:00 and 4:00 a.m. and that he would likely try to burn the house again. He asked if they would watch the house and keep it safe.

[5] There is some controversy about what the RNC officers said in response. According to the officers, they said they would conduct extra patrols. According to Ike Morgan, they said they would watch the property and, most important, that Ike Morgan should not go near it.

[6] Two days later, the Morgans’ house burned down at about 4:00 a.m.

[7] When the Morgans returned, they were upset to hear that the officers had not watched their house or spoken to G.D. They filed a complaint with the Commission requesting both compensation and disciplinary action.

- *the RNC complaints process*

[8] Pursuant to subsection 24(1) of the *Act* the complaint was initially assigned to the RNC Chief of Police (the “Chief”). He investigated the complaint and concluded that, although the officers should have conducted a more thorough investigation, their error was not serious enough to justify discipline.

[9] He wrote the Morgans on May 13, 2010 informing them of his decision. His letter indicated that the Morgans could appeal “within 15 days of the receipt of this letter”. It did not indicate where or how an appeal should be filed.

[10] Lawrence Morgan received the Chief’s decision on May 25, 2010 and replied five days later. He observed that it was unfair that, after waiting four months for a decision, he had only 15 days to respond to it. He then explained his substantive objections to the Chief’s decision in eight numbered points. Finally, he stated that he would “be submitting an inquiry/complaint with the External Complaints Commission”.

[11] Lawrence Morgan thought he had filed a valid appeal, and two months later, he called to ask about its progress. He was told that he had not filed an appeal at all. His letter should have been addressed to the Commission, not to the Chief. He was told to send an appeal form and a letter explaining the circumstances, which he did.

[12] The *Act* provides for a Commissioner but no one was acting as such during this period. The last person to occupy the office, Commissioner Rorke, had resigned just as the Morgans had begun their Alberta vacation. He had not been replaced.

[13] Commissioner Rorke was reappointed on September 27, 2010. He wrote the Morgans on October 25 dismissing their appeal:

Since more than 15 days elapsed between your receipt of the Chief’s decision and your attempted filing of your Notice of Appeal, on the face of it your notice is simply outside the time allowed for appeal, unless I am persuaded otherwise.

[14] Commissioner Rorke began his reasons by noting that he had just taken up his duties and then outlined the history of the case and the limitations provisions in the *Act*. He did not consider, explicitly at least, whether a limitations period could run in the absence of a Commissioner.

The only issue he considered was whether the Morgans knew of the 15-day limitation period:

Complainants who wish to appeal the initial decision of the Chief of Police must do so in writing within 15 days of [receiving] his decision. Otherwise, the Commission does not have the authority to proceed unless the complainant can satisfy the Commissioner that he or she did not know of the requirement.

[15] Commissioner Rorke concluded that the Morgans had known that their appeal had to be addressed to the Commission and not to the Chief. Despite the seriousness of the complaint, he thought he was required to dismiss the appeal:

I am required by law to reject your appeal, as it is legally out of time and statute-barred.

... I realize my response only adds insult to injury for a family who has been the victim of one of the largest property crimes in our Province's history, but I am bound to uphold the law.

- ***the Supreme Court of Newfoundland and Labrador Trial Division***

[16] The Morgans appealed to the Supreme Court of Newfoundland and Labrador Trial Division under subsection 36(1) of the *Act*. They argued that they had not been properly informed of the appeal procedure. They had written the Chief within 15 days, and he had done nothing with their letter. They also noted that the Commissioner would not have been able to address their case until October in any case, as he was "out of the office for more than a year".

[17] The applications judge found that the appropriate standard of review was correctness for errors of law and reasonableness for errors of fact or mixed fact and law. She found that the Morgans could not have submitted a notice of appeal to the Commissioner because the office of the Commissioner was vacant. As a result, the appeal period could not run against them, and Commissioner Rorke had erred in law in dismissing the appeal. The applications judge at paragraph 21 also concluded that "At the very least, the decision of the Commissioner was unreasonable due to his failure to consider in his reasons what is the appropriate interpretation of section 25(4)", which section sets out the 15-day period for filing an appeal.

[18] For the reasons that follow I would dismiss the Commission's appeal.

ISSUES

[19] This appeal raises three issues, which I will address in this order:

What is the correct standard of review for the decisions of the applications judge and Commissioner Rorke?

If the appeal period expired, should Commissioner Rorke have nevertheless heard the Morgans' appeal?

Could the appeal period run while no one was acting as Commissioner?

ANALYSIS

- *standard of review*

[20] The ordinary principles of appellate review govern an appeal from a Trial Division review of an administrative tribunal. The applications judge's choice of standard of review and her application of that standard are questions of law. They must be reviewed by this Court on a correctness standard: see *Burke v. Newfoundland and Labrador Association of Public and Private Employees*, 2010 NLCA 12, 294 Nfld. & P.E.I.R. 230 at para. 49.

[21] The second issue, whether Commissioner Rorke should have waived the limitation period, has two distinct parts, which must be analyzed separately to determine what standard of review the applications judge ought to have applied to them. The first, whether the *Act* allows the Commissioner to consider an appeal despite the expiry of a limitations period, is a question about a tribunal's interpretation of its home statute and does not involve a constitutional question, a question of law that is of central importance to the legal system as a whole, a question regarding jurisdictional lines between competing tribunals or, otherwise a true question of jurisdiction. Accordingly, it must be reviewed on a reasonableness standard: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 ("*Alberta Teachers*") at paras. 30 and 39. The second, whether the Commissioner should have exercised a discretion in favour of the Morgans in this case, is a question of discretion and must also be reviewed on a reasonableness standard: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 51.

[22] The third issue, whether the limitation period could run while no one was acting as Commissioner, turns on the interpretation of subsection 25(4) of the *Act*. Commissioner Rorke's interpretation of his home statute must again be reviewed on a reasonableness standard. However, because Commissioner Rorke made no explicit reference to the vacancy issue, this Court will first have to decide whether in the circumstances it is appropriate to review his implicit decision. If it is, then in applying the reasonableness standard to an implicit decision, the Court must consider any reasons that might have been offered in support of it: *Alberta Teachers* at paragraph 53.

- ***the discretion issue***

[23] While acting on the assumption that the appeal period had expired, the Commissioner seems to have decided that he nevertheless had a discretion to consider the complaint. That interpretation is implicit in his statements (in his letter of October 25 rejecting the appeal) that he could waive the requirement in certain circumstances:

... [T]he Commission does not have the authority to proceed unless the complainant can satisfy the Commissioner that he or she did not know of the requirement.

... [Y]our notice is simply outside the time allowed for appeal, unless I am persuaded otherwise.

[24] It was also accepted by counsel for the Commission, who agreed during the hearing that "sometimes the Commissioner is flexible with respect to time periods and that a practice perhaps has evolved in that regard".

[25] The only reference to a 15-day period is found in subsection 25(4), which is concerned with conferring rights on the complainant and not on limiting the jurisdiction of the Commissioner:

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

[26] The Commissioner is explicitly empowered under subsection 28(1.1) to dismiss complaints if they have been withdrawn or abandoned, but is given no explicit power to dismiss complaints on limitations grounds:

Following an investigation of a complaint, where the commissioner does not confirm the decision of the chief or the deputy chief under subsection (1) and is satisfied

...

(b) that the complaint has been abandoned or withdrawn ...

...

the commissioner shall decline to take further action on the complaint.

[27] One interpretation of the *Act* is that there is no need to empower a Commissioner to dismiss an appeal filed after 15 days, because the Commissioner has no jurisdiction under the *Act* to consider a late appeal. However, Commissioner Rorke's implicit interpretation that he could consider an appeal filed outside of the 15-day period is more consistent with the purpose and policy of the *Act*. It is more consistent with *Alberta Teachers*, where Rothstein J. said at paragraph 33, "Experience has shown that the category of true questions of jurisdiction is narrow indeed. Since *Dunsmuir*, this Court has not identified a single true question of jurisdiction ...". It is also more consistent with subsection 36(9) of the *Act*:

Technical errors as to form, failure to file or to give notice on time, and other procedural errors of a minor nature, do not go to the jurisdiction of an adjudicator and may not be appealed to the Trial Division on any ground, unless the error prejudiced a fair determination of the issues at the public hearing.

[28] Given these circumstances, Commissioner Rorke's decision that the *Act* allowed him to consider late complaints was reasonable.

[29] What was not reasonable was the narrow view that Commissioner Rorke took of the scope of his discretion. He appears to have thought that the only relevant factor was whether the Morgans were aware that they ought to file the appeal with the Commission. He did not consider the absence of a Commissioner, the actual steps that were taken by the Morgans in relation to filing, the fact that the Morgans evidenced an intention to appeal by responding to the Chief's letter within the 15-day period (though technically not to the correct body), the relative prejudice to the Morgans and the officers, the seriousness of the complaint, or the public interest in resolving complaints on the merits.

[30] Nothing in the text of the *Act* limits the scope of the Commissioner's discretion to hear late appeals. Neither does the scheme of the *Act*, its purpose, or its policy. On the contrary, the courts in this province have often emphasized that the Commission should resolve complaints on the merits wherever possible instead of dismissing them on procedural points: see *McGrath v. Newfoundland (Royal Constabulary Public Complaints Commission)*, 2002 NLCA 74, 220 Nfld. & P.E.I.R. 282 at para. 39; *Oates v. Royal Newfoundland Constabulary Public Complaints Commissioner*, 2003 NLCA 40, 229 Nfld. & P.E.I.R. 23 at para. 19 *per* Roberts J.A. and at para. 40 *per* Rowe J.A., dissenting; *Coady v. RNC Public Complaints Commission*, 2007 NLTD 83, 266 Nfld. & P.E.I.R. 61 at para. 40 ("*Coady*").

[31] The Commissioner failed, in the circumstances, to consider several factors that were relevant to his exercise of discretion. The Morgans had a serious complaint about police misconduct that may have contributed to the destruction of their house, which Commissioner Rorke referred to as "one of the largest property crimes in our Province's history". The complaint was not frivolous: the Chief acknowledged that the officers had erred, and there was a serious question about whether further discipline was appropriate. Commissioner Rorke should have considered the apparent strength of the appeal in exercising his discretion. This consideration is analogous to the "potential merits of the appeal", one of the factors this Court applies in determining whether it will extend the period for filing an appeal (see *Fahey v. Law Society of Newfoundland*, 2000 NFCA 19, 95 A.C.W.S. (3d) 1011 at para. 3).

[32] The Morgans had intended to appeal from the first. They had sent the Chief a letter that set out their reasons, and they filed an affidavit indicating that they had complied with the provisions of the *Act*. Commissioner Rorke should not have rejected their evidence on the basis of credibility without hearing or seeing them.

[33] In exercising his discretion, Commissioner Rorke should also have considered the prejudice to the officers, to the Morgans, and to the public. The officers had not been prejudiced by the timing of the Morgans' filing, because the appeal could not have moved forward until Commissioner Rorke was reappointed. If evidence went stale, it would have gone stale in any case. If the officers' repose was troubled by the delay, it would have been troubled in any case. The vacancy is to blame for the delay, not the Morgans.

[34] Dismissing the Morgans' complaint would, on the other hand, cause substantial prejudice to the Morgans and to the public. The Morgans have lost their house and want to know why; they deserve to have their questions answered. The public, also, has an interest in seeing significant questions about questionable police conduct answered.

[35] The *Act* is designed to ensure that citizens who have complaints about the police receive a fair hearing on the merits by an impartial tribunal. It is designed to raise public confidence in the police and to protect the substantive rights of the public and of officers. Commissioner Rorke failed to take the importance of a merits-based resolution into account.

[36] In exercising his discretion, Commissioner Rorke failed to consider a number of relevant factors. His decision is, therefore, unreasonable and cannot stand.

[37] The next question is whether to remit the appeal to Commissioner Rorke, the incumbent Commissioner, or whether he should now be precluded from considering the Morgans' appeal on its merits. The *Act* does not specify whether, in allowing an appeal from a Commissioner's decision, the court has the power to vary it. The general practice of the courts has been to remit the decision to the Commissioner.

[38] For instance, the Commissioner in *Coady* decided that she had no jurisdiction to hear the appeal, but went on to decide on the merits that the officers had committed no conduct worthy of sanction. Orsborn J. decided that the Commissioner did have jurisdiction and that, in the case of two of the officers whose conduct was under scrutiny, she gave insufficient reasons for her decision on the merits. He nevertheless remitted the appeal to the same Commissioner at paragraph 54:

... I do not consider that the commissioner who heard Mr. Coady's appeal should be precluded from reconsidering his appeal, particularly in light of the fact that her initial decision was based *primarily* on jurisdictional grounds. There is nothing to suggest that the commissioner would be anything other than impartial and independent in revisiting the issue.

(Emphasis added.)

[39] A similar conclusion was reached by Barry J. (as he then was) in *Giles v. Newfoundland (Constabulary Public Complaints Commission)* (1996), 144 Nfld. & P.E.I.R. 17 (NFTD) ("*Giles*"). The Chief sanctioned an officer,

and the Commissioner, relying on an investigator's report, upheld the Chief's decision without hearing representations from the officer. Barry J. concluded that there had been a breach of procedural fairness, but nevertheless remitted the appeal to the Commissioner.

[40] This case is different from *Coady* and *Giles* in that the Commissioner's error involved a discretionary decision. If the Commissioner had weighed the proper factors unreasonably, the discretionary nature of his error might be a reason for departing from the general practice and varying his decision directly. In this case, the Commissioner seems instead to have misunderstood the breadth of his discretion. There is no reason at this stage to think that he would have come to an unreasonable conclusion if he had considered all the relevant factors. In the interests of justice, I would remit the decision to him to consider whether the appeal should be heard on the merits.

[41] The foregoing is sufficient to dispose of this appeal; however, because much of the applications judge's decision was based on the effect of the extended vacancy in the office of the Commissioner, I consider it appropriate to make some *obiter* observations on this issue.

- ***the vacancy issue***

[42] The *Act* does not contemplate the possibility that the office of the Commissioner might be vacant. It is designed to ensure that it is always occupied. There is no discretion not to appoint a Commissioner—see subsection 18(1):

The Lieutenant-Governor in Council shall appoint a Royal Newfoundland Constabulary Public Complaints Commission consisting of a commissioner.

Nor is there any discretion not to fill a vacancy—see subsection 18(5):

... [W]here the position of commissioner is vacated, the Lieutenant-Governor in Council shall appoint a person to fill that vacancy and that person shall be appointed to hold office for the remainder of the term of office of the commissioner being replaced.

[43] The word “Commissioner” does not appear to be a metonym for the Commission generally, in light of paragraph 2(e) of the *Act*:

“commissioner” means the commissioner appointed under subsection 18(1)

[44] Even if the Commissioner is only temporarily unable to act, the position may be filled under subsection 18(5):

Where the commissioner is unable to act as commissioner the Lieutenant-Governor in Council may temporarily appoint a person to carry out the duties of the commissioner under this Act

[45] It seems to be a structural premise of the *Act* that the office of the Commissioner would always be occupied, and the failure (extending some fourteen months) to appoint a replacement Commissioner after Commissioner Rorke's 2009 resignation might be expected to create anomalous results. However, Commissioner Rorke did not address in his reasons whether his absence had any legal effects. He may not have considered the question or may have concluded that it was not important.

[46] Before dismissing the Morgans' appeal on technical grounds, the Commissioner ought to have considered any technical objections that could have been made on their behalf. Because he did not consider the legal effect of his absence, the applications judge had to consider the issue without benefit of his reasoning. She concluded that in the absence of a Commissioner, no appeal could be filed and the appeal period could not run. She relied on the words of subsection 25(4) of the *Act*:

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

(Emphasis added.)

[47] In general, courts are reluctant to set decisions aside on the basis of arguments that were not raised in the tribunal below. That principle promotes many judicial policies. It ensures that arguments are situated within a proper factual foundation; it shortens litigation and conserves judicial resources; it ensures fairness to the parties; and it allows generalist appellate decision-makers to have the benefit of the particular expertise of more specialized tribunals and courts. See *Alberta Teachers* at paragraph 22 (judicial review); *R. v. O'Keefe* (No. 2), 2012 NLCA 25 at paras. 24–26 (ordinary appeal); and *Nabors Canada Ltd. v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2010 ABCA 243, 324 D.L.R. (4th) 747 at paras. 4–7 (statutory appeal).

[48] Courts, nevertheless, retain the discretion to consider new arguments, and each case must be considered in its own circumstances. Several factors support the applications judge's decision to consider the vacancy issue. The evidentiary record is complete because the question is a pure question of law on which no evidence is relevant. The conclusion that the limitations period ran even though there was no acting Commissioner was salient and implicit in Commissioner Rorke's decision that the limitation period had expired.

[49] In addition, the only document the Morgans had an opportunity to file was a notice of appeal, a printed form on which Mr. Morgan wrote by hand the facts surrounding the late filing. Nothing in that document suggested that it was the Morgans' last or best opportunity to make legal arguments about a limitations issue. The Commissioner did not hold an oral hearing about whether the limitation period had expired or invite written submissions on the point. In the circumstances, the Morgans had no practical opportunity to question the interpretation of subsection 25(4) of the *Act* before the Commissioner.

[50] The parties would not have presented their case differently before the Commissioner, as they did not present their case at all. The Morgans cannot be said to have waived the limitations issue, as they were given no opportunity to raise it. In general, no party can be foreclosed from raising an issue at the first possible opportunity: *Gedge v. Hearing Aid Practitioners Board*, 2011 NLCA 50, 310 Nfld. & P.E.I.R. 199 at paras. 19-25.

[51] On the other hand, administrative decision-makers have a special familiarity and expertise in interpreting their home statute. The general policy of the law is to give them the first chance to resolve difficult questions about the meaning of their home statute, and to confine appellate courts to a deferential review for errors.

[52] The limitations issue in this case raises fundamental questions about the interpretation of the *Act* and the procedure before the Commission. It may be engaged in cases presently before the Commission. Accordingly, I am reluctant to decide it without the benefit of the Commissioner's views.

[53] In this case, I would nevertheless resolve the limitations issue if it were necessary to decide the appeal. However, I have already decided on other grounds that Commissioner Rorke's decision is unreasonable and that this case must be remitted to him. In the circumstances, I will express no

opinion on the limitations issue. Commissioner Rorke can decide the question, as he should have done at first instance.

CONCLUSION

[54] I would dismiss the appeal and refer the matter back to the Commissioner with costs to the respondents on a party-and-party basis to be taxed based on column 3 of the scale of costs in this Court and on the application before the Trial Division.

C.W. White J.A.

I concur:

M.F. Harrington J.A.

I concur:

L.R. Hoegg J.A.