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Docket: T-1465-07

Citation: 2008 FC 936

Ottawa, Ontario, August 11, 2008

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

DEREK SMART

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] Constable Derek Smart seeks judicial review of a decision of Deputy Commissioner Martin of the Royal Canadian Mounted Police. Deputy Commissioner Martin overturned the decision of an RCMP adjudication board staying disciplinary proceedings against Constable Smart on the basis that the proceedings had been commenced outside the statutory time period allowed for bringing such proceedings. Deputy Commissioner Martin also set aside the board's alternative finding that the proceedings should be stayed as an abuse of process.

[2] Constable Smart argues that Deputy Commissioner Martin erred in misinterpreting the relevant limitation period and in failing to accord sufficient deference to the decision of the adjudication board.

[3] In the alternative, Constable Smart contends that Deputy Commissioner Martin erred in applying the wrong test in determining that there had been no abuse of process in relation to the processing of the complaint that had been made against him.

[4] For the reasons that follow, I am not persuaded that Deputy Commissioner Martin erred as alleged. As a consequence, the application for judicial review will be dismissed.

Legislative Framework

[5] Before turning to consider the facts of this case, it is helpful to have an understanding of the legislative provisions governing disciplinary proceedings within the RCMP.

[6] The limitation period in issue in this case is that contained in subsection 43(8) of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10. The subsection provides that “No hearing may be initiated by an appropriate officer under this section in respect of an alleged contravention of the Code of Conduct by a member after the expiration of one year from the time the contravention and the identity of that member became known to the appropriate officer”.

[7] The Commissioner's *Standing Orders (Appropriate Officer)* provide that for a member or officer located in a division of the RCMP, the "appropriate officer" (or ("AO") will be the commanding officer of that division. The appropriate officer in this case was the Commander of "E" Division, namely Deputy Commissioner Bev Busson.

[8] Also relevant to this case is subsection 43(9) of the Act, which provides that a certificate purporting to be signed by an appropriate officer indicating when an alleged contravention of the Code of Conduct by a member and the identity of that member became known to the appropriate officer "is, in the absence of evidence to the contrary, proof of that time without proof of the signature or official character of the person purporting to have signed the certificate".

[9] The Commissioner's *Standing Orders (Representation)* make provision for assistance to be given to appropriate officers in discharging their responsibilities with respect to disciplinary matters. This assistance is provided by "appropriate officer representatives", who are full-time members of the "Appropriate Officer Representative Section", a unit within the RCMP that provides representation or assistance to appropriate officers.

[10] One of the responsibilities of an appropriate officer representative is to communicate with the appropriate officer with respect to the decision to initiate formal disciplinary hearings against members of the RCMP.

Background

[11] On May 21, 2002, a complaint regarding Constable Smart's conduct was filed with his superior officers by a member of the public. The complaint alleged that Constable Smart had improperly accessed and disclosed documents regarding third parties which he had obtained from confidential police data bases to a non-authorized individual.

[12] The officer in charge of Constable Smart's detachment notified him three days later that the complaint had been received regarding his conduct. Constable Smart was further advised that Sergeant Michael Racicot of North District Internal Affairs Unit (or "IAU") had been appointed to carry out an investigation of the complaint.

[13] The IAU was responsible for overseeing the investigation, and for reporting the alleged Code of Conduct violation to the appropriate officer.

[14] The IAU did not communicate directly with the appropriate officer with respect to disciplinary matters, but dealt instead with Timothy Nixon, who was the appropriate officer representative in Constable Smart's case.

[15] According to Inspector Fleury, the Officer-in-Charge of "E" Division Internal Affairs Unit, the IAU routinely provided a list of all active discipline files to the appropriate officer representative. However, correspondence regarding specific files was only generated with respect

to “serious cases”, and was then sent not to the appropriate officer herself, but to the appropriate officer representative.

[16] According to Inspector Fleury, “serious cases” included those in which the member had been suspended without pay, cases potentially involving criminal conduct by a member, and cases that had been the subject of media interest. There does not appear to be any suggestion that Constable Smart’s case met that definition of a “serious case”.

[17] On April 10, 2003, Sergeant Racicot’s investigation into the complaint filed against Constable Smart was completed, and his investigation report was submitted to Inspector Fleury.

[18] On April 28, 2003, Deputy Commissioner Busson signed a certificate as contemplated by subsection 43(9) of the *RCMP Act*, certifying that she had on that day become aware of the Code of Conduct allegations against Constable Smart.

[19] Constable Smart disputes that in the absence of evidence to the contrary, the effect of this certificate is to create a presumption that the date of the certificate is the date upon which the appropriate officer acquired the requisite knowledge to initiate disciplinary proceedings. He does, however, concede that April 28, 2003 was the date upon which Deputy Commissioner Busson personally became aware of the Code of Conduct allegations against him.

[20] On July 21, 2003, approximately three months after Deputy Commissioner Busson acquired personal knowledge of the alleged infraction and the identity of Constable Smart, disciplinary proceedings were initiated against Constable Smart with the service of a Notice of Disciplinary Hearing on him. The disciplinary hearing itself commenced before the adjudication board on May 21, 2004.

The Proceedings Before the Adjudication Board

[21] At the commencement of the disciplinary hearing before the adjudication board, Constable Smart's representative brought two motions to stay the proceedings, the first on the basis that the disciplinary process had been commenced out of time, and the second on the grounds that the proceedings amounted to an abuse of process.

[22] In a June 6, 2004 decision, the adjudication board stayed the proceedings against Constable Smart. The board concluded that the purpose of subsection 43(9) of the Act was best served by interpreting the limitation period as running from the point at which the appropriate officer knew, *or ought to have known*, the details of the alleged contravention and the identity of the member. In coming to this conclusion, the adjudication board had regard to the principle of "discoverability" in interpreting the statutory provision.

[23] In this case, the adjudication board found that Deputy Commissioner Busson "ought to have known" the principal details surrounding the alleged Code of Conduct contravention, as well as the identity of Constable Smart, sometime between May 24, 2002 and July 21, 2002. As a

consequence, the disciplinary proceedings initiated on July 21, 2003 had not been commenced within the one year limitation period provided for in subsection 43(8) of the Act, and were thus out of time.

[24] The adjudication board also found, in the alternative, that the disciplinary proceedings were an abuse of process. The board based this finding upon the failure of the IAU and the Detachment Commander to report the information concerning Constable Smart's case to the appropriate officer within a reasonable period of time after the Code of Conduct investigation had commenced.

[25] Although the adjudication board was not persuaded that information had been intentionally withheld from Deputy Commissioner Busson, or that there had been deliberate "shielding" in this case, it was nevertheless satisfied that the failure to pass on the information in a timely fashion amounted to "an abuse of the limitation period".

[26] Given that the abuse of process related to the inability to claim the benefit of a limitation period, the adjudication board found that the prejudice to Constable Smart would be aggravated by forcing him to submit to a disciplinary proceeding, and that no remedy, short of a stay of proceedings, could prevent this prejudice.

[27] As a consequence, the adjudication board found there to be a second basis for staying the proceedings, namely that there had been an abuse of process.

Deputy Commissioner Martin's Decision

[28] The appropriate officer representative then appealed the adjudication board's decision staying the proceedings. In accordance with the provisions of paragraph 45.14(1) of the *RCMP Act*, the appeal was first referred to the RCMP External Review Committee for consideration before the matter was returned to the Commissioner of the RCMP for a decision.

[29] After reviewing the matter, the External Review Committee concluded that the limitation period had been respected by the appropriate officer. In coming to this conclusion, the External Review Committee found that in the absence of any evidence to the contrary, the subsection 43(9) certificate was proof of the date upon which Deputy Commissioner Busson had become aware of the alleged contraventions of the Code of Conduct and the identity of Constable Smart. As the disciplinary proceedings had been commenced only three months later, the limitation period had been respected.

[30] The External Review Committee also found that the adjudication board had erred in finding that there had been an abuse of process in Constable Smart's case. In the view of the External Review Committee, there had been no undue or abusive delay.

[31] In assessing whether there had been a delay in this matter amounting to an abuse of process, the External Review Committee referred to the decision of the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)* [2000] 2 S.C.R. 307.

[32] In this regard, the External Review Committee stated that in order to establish that there has been an abuse of process, a party had to demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. Such a determination depends upon the facts of, and issues in the case, its nature and complexity, the purpose of the proceedings, whether the party alleging the abuse of process had waived or contributed to the delay, and any other relevant circumstances.

[33] In this case, the External Review Committee noted that the total time between the alleged misconduct and the initiation of disciplinary proceedings was just under 14 months, and Constable Smart's right to a fair hearing had not been compromised.

[34] As a consequence, the External Review Committee recommended that the appeal be allowed, and the matter remitted for adjudication on its merits. The case was then sent to the Commissioner of the RCMP for decision.

[35] As it happened, at the time that the matter was referred to the Commissioner for decision, Deputy Commissioner Busson was acting as the Commissioner. Given her prior involvement in the matter, she recused herself from the proceeding. In accordance with the provisions of subsection 15(1) of the *RCMP Act*, the appeal in Constable Smart's case was instead referred to Deputy Commissioner Peter Martin, as the senior Deputy Commissioner at the RCMP headquarters, for a decision.

[36] In allowing the appeal, Deputy Commissioner Martin found that the limitation period had been respected in this case. In coming to this conclusion, he considered the Federal Court of Appeal's interpretation of the subsection 43(8) limitation period in *Thériault v. Canada (Royal Canadian Mounted Police)*, [2006] FCA 61, a decision had not been available to the adjudication board when it made its decision.

[37] In *Thériault*, the Court found that for the purposes of the subsection 43(8) limitation period, the knowledge of the infraction and of the identity of the alleged offender must be that of the appropriate officer him- or herself. Knowledge of third parties, including the appropriate officer's subordinates, could not be imputed to the appropriate officer.

[38] Deputy Commissioner Martin concluded on this point that:

[61] In the case at bar, the Appellant submitted a *Certificate from the Appropriate Officer pursuant to s. 43(9) of the Act*, indicating that the Appropriate Officer became aware of the Respondent's alleged contravention of the Code of Conduct on April 28, 2003. Therefore, there is a presumption that the limitation period was triggered on that date. I agree with the [External Review Committee] that the Respondent failed to adduce evidence to the contrary and that "*the Board was obligated to accept the certificate as proof that the Appellant actually became aware of the required knowledge on April 28, 2003. Since the hearing was initiated on July 21, 2003, the Board should have found that the section 43(8) time limit was respected in this case.*" [Quoting from paragraph 55 of the External Review Committee report]

[39] Insofar as the abuse of process motion was concerned, Deputy Commissioner Martin agreed with the External Review Committee that the facts of Constable Smart's case did not support a

finding that there had been an abuse of process. The operative portion of his decision (as it relates to the matters still in issue on this application) held that while the 11 month delay in carrying out the investigation was “unfortunate”, it “was not unfair to the point that it was contrary to the interests of justice” for the matter to proceed to a disciplinary hearing.

[40] Deputy Commissioner Martin also found that the adjudication board had erred in finding that the appropriate officer had delegated her authority, or had indicated to her subordinates that she only be advised of the more serious discipline matters within the Division, as no evidence had been adduced to that effect at the hearing.

[41] Moreover, in light of the adjudication board’s finding that the appropriate officer had not been deliberately shielded from information with respect to Constable Smart’s case, there had, in Deputy Commissioner Martin’s view, been no abuse of process.

[42] As a consequence, Deputy Commissioner Martin concluded that the adjudication board had erred in finding that there had been an abuse of the limitation period, and thus the appeal was allowed on this basis as well.

Issues

[43] As was noted in the introduction to these reasons, Constable Smart raises three issues on this application. He submits that Deputy Commissioner Martin erred in misinterpreting the relevant limitation period.

[44] In the alternative, Constable Smart contends that the Deputy Commissioner erred in failing to accord sufficient deference to the decision of the adjudication board to stay the proceedings, and in applying the wrong test in determining that there had been no abuse of process in relation to the processing of the complaint that had been made against him.

[45] Each of these issues will be addressed in turn.

Did Deputy Commissioner Martin Err in Interpreting the Limitation Period?

[46] I agree with the parties that, to the extent that this application requires a consideration of the proper interpretation of subsection 43(8) of the *RCMP Act*, and specifically, the meaning of the words “known to the appropriate officer”, the decision of Deputy Commissioner Martin must be reviewed against the correctness standard: see *Thériault* at paragraph 20.

[47] Constable Smart also acknowledges that as the proper interpretation of the statutory provision is a question of law, Deputy Commissioner Martin was not required to defer to the adjudication board’s interpretation of the provision, and did not err in failing to do so.

[48] It will be recalled that subsection 43(8) provides that “No hearing may be initiated by an appropriate officer under this section in respect of an alleged contravention of the Code of Conduct by a member *after the expiration of one year from the time the contravention and the identity of that member became known to the appropriate officer*” [emphasis added].

[49] It will also be recalled that the adjudication board did not find that the certificate signed by the appropriate officer was inaccurate, or that Deputy Commissioner Busson herself had personal knowledge of the alleged contravention and the identity of Constable Smart any time before the date upon which she signed the subsection 43(9) certificate, namely April 28, 2003. Rather, the board held that Deputy Commissioner Busson “ought to have known” this information before July 21, 2002.

[50] Constable Smart acknowledges that in the *Thériault* decision cited above, the Federal Court of Appeal clearly stated that the knowledge required to trigger the commencement of the limitation period must be that of the appropriate officer, and not that of third parties such as subordinates of the appropriate officer responsible for investigating and reporting on allegations of misconduct.

[51] However, Constable Smart argues that his case is distinguishable from the scenarios considered by the Federal Court of Appeal in *Thériault*, as the knowledge imputed to the appropriate officer in this case was not knowledge possessed by the appropriate officer’s subordinates responsible for investigating and reporting on allegations of misconduct, but was instead knowledge of the appropriate officer’s own representative.

[52] Constable Smart argues that the role of the appropriate officer representative in disciplinary proceedings under the *RCMP Act* is analogous to that of counsel for a party, with the result that

knowledge of the appropriate officer representative should be considered to be knowledge of the appropriate officer him- or herself.

[53] I do not agree.

[54] As the Federal Court of Appeal observed at paragraph 29 of *Thériault*, the purpose of the limitation period contained in subsection 43(8) is to reconcile the need to protect the public, and the credibility of the RCMP as an institution, with the need to provide fair treatment for its members.

[55] The Federal Court of Appeal then went on to observe that the subsection 43(8) mechanism offers a certain measure of flexibility, which is desirable for purposes of investigation and prosecution. This flexibility does, however, have its limits, and, as the Court said, “inevitably the time cutoff falls on inaction and resolves the matter in the offender’s favour”: see *Thériault* at paragraph 29.

[56] In accordance with the provisions of subsection 43(1) of the *RCMP Act*, it is only the appropriate officer him- or herself who has the power to initiate formal disciplinary proceedings. This power cannot be delegated, and thus cannot be exercised by the appropriate officer’s representative.

[57] With the appropriate instructions, legal counsel representing a party in a civil matter can act on that party’s behalf, and can take actions that bind the party. That is not the situation here, insofar as the power to initiate disciplinary proceedings under the *RCMP Act* is concerned.

[58] As it is only the appropriate officer who has the statutory power to initiate formal disciplinary proceedings, it follows that the appropriate officer must personally have the requisite knowledge in order to be able to do so. Constructive knowledge, even on the part of the appropriate officer's representative, will not suffice.

[59] As a result, I am satisfied that Deputy Commissioner Martin's interpretation of subsection 43(1) of the *RCMP Act* was correct, and that the adjudication board erred in law in finding that knowledge imputed to the appropriate officer during the period prior to July 21, 2002 was sufficient to start the clock running with respect to the limitation period for commencing disciplinary proceedings against Constable Smart.

[60] Given that the disciplinary proceedings were actually commenced approximately three months after the appropriate officer acquired the requisite knowledge to initiate proceedings, there was no breach of the limitation period in this case.

[61] As a consequence, the adjudication board erred in principle in staying the disciplinary proceedings on the basis that they were commenced beyond the one year time period provided for in subsection 43(8) of the *RCMP Act*. Deputy Commissioner Martin was correct in concluding that there had been no violation of the limitation period.

[62] Before leaving this issue, it should be acknowledged that this interpretation of subsection 43(8) of the Act could potentially give rise to the “shielding” of appropriate officers, so as to avoid the triggering of the one-year period for commencing disciplinary proceedings.

[63] Indeed, there is a suggestion in the reasons of the adjudication board that senior management in “E” Division has deliberately withheld information from appropriate officers in the past for this purpose. While this would clearly be improper, there are means of discouraging such a practice, including the use of the abuse of process doctrine to stay proceedings in appropriate cases.

[64] Whether it was appropriate to do so in this case will be considered further on in these reasons. Before turning to that question, however, it is first necessary to address Constable Smart’s argument that Deputy Commissioner Martin erred in failing to accord sufficient deference to the decision of the adjudication board in relation to the abuse of process issue.

Failure to Accord Deference to the Decision of the Adjudication Board

[65] Constable Smart says that Deputy Commissioner Martin erred in failing to accord sufficient deference to the decision of the adjudication board, asserting that it was not open to him to simply substitute his own exercise of discretion for that of the adjudication board.

[66] According to Constable Smart, Deputy Commissioner Martin should not have intervened in the matter unless he was satisfied that the decision was based on an error of law, or unless it was clear that the board had wrongfully exercised its discretion, in that no weight, or insufficient weight

had been given to relevant considerations, or that the board had considered irrelevant factors, or failed to consider relevant factors.

[67] For the reasons that follow, I am satisfied that it was indeed clear that the adjudication board had wrongfully exercised its discretion in the manner described above, and that, as a result, it was appropriate for Deputy Commissioner Martin to have intervened.

Did Deputy Commissioner Martin Err Setting Aside the Stay as it Related to the Alleged Abuse of Process?

[68] The first issue to be addressed is the appropriate standard of review to be applied by this Court in relation to this aspect of Deputy Commissioner Martin's decision.

[69] The respondent argues that Deputy Commissioner Martin's finding that there had been no abuse of process justifying the staying of the disciplinary proceedings against Constable Smart should be reviewed against the standard of reasonableness. In contrast, Constable Smart points to paragraph 60 of the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9 as authority for the proposition that decisions involving abuse of process issues should be reviewed on the correctness standard.

[70] Paragraph 60 of *Dunsmuir* states:

As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, [[2003] 3 S.C.R. 77, 2003

SCC 63] at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.*, **which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process issues that are at the heart of the administration of justice** (see para. 15, *per* Arbour J.). [Emphasis added]

[71] The issue in the *Toronto (City) v. C.U.P.E.* case referred to at paragraph 60 of *Dunsmuir* was whether an employee's criminal conviction should be taken as conclusive proof in a subsequent labour arbitration that he was guilty of the conduct in issue or whether it was open to the employee's union to relitigate the issue.

[72] The Supreme Court of Canada held that the union was not entitled to relitigate an issue that had been decided against the employee in criminal proceedings, and that the arbitrator erred in law in allowing the union to try to impeach the employee's criminal conviction by the impermissible route of relitigating the matter in a different forum. The Court found that to do so would amount to a "blatant abuse of process".

[73] It is true that in considering whether a criminal conviction ought to be allowed to be rebutted or should be taken as conclusive in subsequent proceedings, the Supreme Court looked to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process.

[74] That said, the Court held that the union was not entitled under either the common law or by statute to relitigate an issue decided against the grievor in the criminal proceedings. Having exhausted his criminal appeals, the Court held that in law, the employee's criminal conviction must stand, with all its consequent legal effects.

[75] Thus it appears that the central issue in the *Toronto (City) v. C.U.P.E.* case was a general question of law, which the Supreme Court of Canada found to be one that was "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise": see *Dunsmuir* at paragraph 60. As such, it was to be reviewed against the correctness standard.

[76] In contrast, the issue in this case involves the application of the law relating to abuse of process to the particular facts of this case. This is a question of mixed fact and law: see *Sheriff v. Canada (Attorney General)*, [2005] F.C.J. No. 399, 2005 FC 305.

[77] In *Minister of Citizenship and Immigration v. Tobiass*, [1997] 3 S.C.R. 391, the Supreme Court of Canada held that an appellate court will only be justified in intervening in a judge's exercise of his or her discretion if the judge misdirects him- or herself, or if the decision is so clearly wrong as to amount to an injustice: at paragraph 87.

[78] Similarly, in *Elders GrainCo. v. Ralph Misener (The)*, [2005] F.C.J. No. 612, 2005 FCA 139, the Federal Court of Appeal also examined the role of an appellate court in reviewing the exercise of a judge's discretion in granting a stay, holding at paragraph 13 that:

An appellate court is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the trial judge. However, if the decision was based on an error of law or if the appellate court reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations or that the trial judge considered irrelevant factors or failed to consider relevant factors, then an appellate court is entitled to exercise its own discretion.

[79] The decision in issue in this case is not that of a trial judge but that of a senior RCMP official exercising a statutory power of decision-making. Nevertheless, the comments of the Federal Court of Appeal are instructive in this regard.

[80] These comments, coupled with the existence of the privative clause contained in subsection 45.16(7) of the *RCMP Act*, as well as the expertise of Deputy Commissioner Martin in matters relating to the discipline of RCMP members leads to the conclusion that this aspect of Deputy Commissioner Martin's decision should be reviewed against the reasonableness standard.

[81] With this understanding of the appropriate standard of review to be applied to this aspect of Deputy Commissioner Martin's decision, I turn now to consider whether his decision was indeed reasonable.

[82] It should be noted at the outset of this analysis that Constable Smart argued before the adjudication board that he had been prejudiced in a number of different ways by the delay in commencing the disciplinary proceedings against him, which had the effect of compromising or impairing his ability to fully defend himself before the adjudication board.

[83] Constable Smart also asserted that he had been prejudiced by the delay in informing the appropriate officer of the alleged contravention of the Code of Conduct and of his identity, as it deprived him of the ability to rely upon the limitation period contained in subsection 43(8) of the *RCMP Act*.

[84] However, before this Court, the only prejudice that Constable Smart says that he has suffered as a result of the delay in the initiation of those proceedings is his inability to derive the benefit of the limitation period contained in subsection 43(8) of the Act.

[85] That is, Constable Smart is no longer claiming that his ability to fully respond to the allegations leveled against him has been compromised in any way by the delay in initiating the disciplinary proceedings.

[86] Constable Smart contends that even if Deputy Commissioner Martin was correct in concluding that personal knowledge on the part of the appropriate officer was necessary to start the clock ticking on the limitation period, the adjudication board properly exercised its discretion to stay the proceedings as an abuse of process.

[87] With respect to the appropriate test to be applied in determining whether or not a stay should issue, Constable Smart points out that there are two categories of abuse of process. The first of these involves cases where the conduct of a prosecutor affects the fairness or impairs the procedural rights of an individual. An example of this type of cases involving allegations of abuse of process of this nature would be the decision of the Supreme Court of Canada in *Blencoe*, previously cited.

[88] The second type of abuse of process involves cases falling within the “residual category” of cases identified by the Supreme Court of Canada in *Tobiass*.

[89] With respect to this type of case, the Supreme Court stated that:

89 Most often a stay of proceedings is sought to remedy some unfairness to the individual that has resulted from state misconduct. However, there is a “residual category” of cases in which a stay may be warranted. L'Heureux-Dubé J. described it this way, in *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 73:

This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

The residual category, it bears noting, is a small one. In the vast majority of cases, the concern will be about the fairness of the trial.

[90] According to Constable Smart, Deputy Commissioner Martin erred in approaching this case as falling within the first category of cases identified in *Tobiass*, and in focusing his analysis on whether the fairness of Constable Smart's disciplinary hearing had been compromised by delay.

[91] Constable Smart argues that a stay of proceedings was not sought in this case to stop a hearing whose fairness has been compromised. Rather, it was sought because a stay is the only reasonable means of stopping an abuse that would be perpetuated and aggravated through the conduct of a disciplinary hearing.

[92] As was noted earlier, the only prejudice identified by Constable Smart before this Court is his inability to obtain the benefit of the statutory limitation period because of the conduct of the RCMP in failing to provide the appropriate officer with the necessary information to initiate disciplinary proceedings in a timely manner.

[93] However, this has not always been Constable Smart's position.

[94] That is, throughout the proceedings before both the adjudication board and Deputy Commissioner Martin, Constable Smart took the position that the fairness of the disciplinary proceedings had been compromised by both his resultant inability to claim the benefit of the limitation period, and by the delay in this matter.

[95] That is, Constable Smart argued, amongst other things that he had already been disciplined in relation to the allegations underlying the disciplinary proceedings, and that he had been prejudiced because of the disappearance of the file relating to this earlier discipline. Even though the file was ultimately located, it was not found until after the hearing was underway. According to Constable Smart, the late production of the file further contributed to the prejudice that he suffered.

[96] He also alleged that the fairness of the process had been compromised by the failure of the appropriate officer to advise him of the sanction being sought with respect to the alleged contravention of the Code of Conduct, in the event that the allegations were ultimately found to have been substantiated.

[97] In addition, Constable Smart argued before the adjudication board that his inability to conduct timely witness interviews, coupled with “faded memories and lost evidence, such as the file [referred to above]”, reduced his ability to make full answer and defense to the allegations thereby amounting to an abuse of process: see decision of the adjudication board at page 9.

[98] Constable Smart further argued in his appeal brief that the delays in completing the Code of Conduct investigation caused him grave prejudice in relation to his ability to make full answer and defense to the allegations against him.

[99] In the circumstances, Deputy Commissioner Martin can hardly be faulted for approaching this case primarily as one falling within the first of the two categories described in *Tobiass*, and

considering whether the prospective fairness of the disciplinary process, and Constable Smart's ability to fully defend himself, had been compromised by delay.

[100] Moreover, Deputy Commissioner Martin's finding that the delays in this case were not such as to amount to an abuse of process was entirely reasonable.

[101] It will be recalled that the adjudication board found that the fact that it took 11 months to investigate the matter did not give rise to an abuse of process. While the board found that it was "unfortunate" that Sergeant Racicot's schedule did not permit him to get to the matter sooner, it also found that the delays in carrying out the investigation did not amount to an abuse of process.

[102] The adjudication board also found that the procedure utilized by the appropriate officer in delegating certain responsibilities to her appropriate officer representative did not result in an abuse of the process, nor had there been any deliberate shielding of the appropriate officer so as to prevent the limitations clock from starting to tick.

[103] It appears that the basis for the adjudication board's finding that the disciplinary proceedings against Constable Smart amounted to an abuse of process was its view that the time that it had taken for the senior officers in the Division to tell the appropriate officer about the complaint against Constable Smart was unreasonable. According to the adjudication board, this amounted to "an abuse of the time limitation".

[104] Relying on the discoverability principle, the adjudication board held that the appropriate officer “ought to have known” of the complaint and the identity of Constable Smart at some point between May 24, 2002 and July 21, 2002, with the result that the limitation period expired in July 21, 2003.

[105] As the Supreme Court of Canada observed in the *Tobiass* case, previously cited, for a stay of proceedings to be appropriate in a case falling into the residual category, the abuse must rise to a level such that the mere carrying forward of the case will offend society's sense of justice: at paragraph 91.

[106] There are a number of reasons as to why this is not one of the clearest of cases contemplated by *Tobiass* where the unfairness to Constable Smart that would result from allowing the disciplinary proceedings to proceed is of such a degree that it contravenes fundamental notions of justice as to undermine the integrity of the judicial process, thus justifying the granting of a stay of proceedings.

[107] First of all, the delay in this case was not great. The entire period from the receipt of the complaint to the initiation of the disciplinary proceedings was approximately 14 months.

[108] Although the adjudication board had some concerns about the practice, it found that it was not an abuse of process for the appropriate officer to ask subordinates to review active discipline files and only brief her on certain types of files.

[109] Moreover, the adjudication board specifically found that there was no “shielding” of the appropriate officer in this case, and indeed, there does not appear from the board’s decision that there was any bad faith on the part of the RCMP in its handling of this matter.

[110] Moreover, the adjudication board was satisfied that Constable Smart’s ability to defend himself in the disciplinary proceedings had not been compromised in any way.

[111] In addition, the adjudication board did not have the benefit of the reasoning of the Federal Court of Appeal in the *Thériault* decision previously cited, and, in particular, the Court’s observation at paragraph 28 that “It is therefore not entirely accurate to say, and this point must be emphasized, that Parliament intended disciplinary proceedings under the Act to go forward expeditiously”.

[112] As the Federal Court of Appeal noted, if it were Parliament’s intent that disciplinary matters always had to proceed expeditiously, then the limitation period would run from the day of the contravention, and not the date upon which the appropriate officer acquired the requisite knowledge.

[113] There is also a concern that the adjudication board may have relied on irrelevant considerations, as is demonstrated by its lengthy discussion of the law relating to fraudulent concealment. This is puzzling, given the adjudication board’s finding that there had been no intentional shielding in this case.

[114] Finally, as was noted earlier in these reasons, the adjudication board erred in law in its interpretation of the limitation period, in finding that constructive knowledge on the part of the appropriate officer was sufficient to start the clock ticking insofar as the limitation period contained in subsection 43(8) of the *RCMP Act* was concerned.

[115] A review of the reasons of the adjudication board in relation to the abuse of process issue reveals that this error permeated the reasoning of the adjudication board in this regard as well. This is demonstrated by the board's lengthy consideration of principles relating to discoverability and willful blindness.

[116] In the circumstances, I am satisfied that the decision of Deputy Commissioner Martin setting aside the stay of proceedings granted on the basis of an abuse of process was reasonable.

Conclusion

[117] For these reasons, the application for judicial review is dismissed, with costs. The matter is remitted to the adjudication board to be determined on its merits. In the event that the members of the adjudication board originally constituted to deal with this matter are no longer available, then a new adjudication board may be empanelled to hear the case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed, with costs. The matter is remitted to the adjudication board to be determined on its merits.

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Vancouver, B.C.

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DATED: August 11, 2008

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