

NOVA SCOTIA POLICE REVIEW BOARD

IN THE MATTER OF: *The Police Act, R.S.N.S. 1989, Chapter 348 and the Regulations made pursuant thereto*

- and -

IN THE MATTER OF: An extension in time to file a complaint by **HUGH & DOREEN CUVELIER** against **CONSTABLE ALLAN CUNNINGHAM**, Member of the Bridgewater Police Department.

BEFORE: Jean McKenna - Alt Chair
Theresa Meuse - Member
Brad Barton - Member

COUNSEL: Mr. David Fisher - on behalf of Constable Cunningham
Mr. William Leahey - on behalf of Hugh & Dorren Cuvelier

HEARING DATE: Thursday, December 21, 2000 Beginning at 10:00 a.m.

PLACE Bridgewater Town Council Chambers, 60 Pleasant Street, Bridgewater, Nova Scotia.

DECISION DATE: February 26, 2001

DECISION: Extension Denied

This matter involves an application to extend the time for filing a complaint. A sequence of events was prepared by Mr. Fisher on behalf of the officer; a copy of that sequence is attached as Schedule "A" to this Decision and will be referred to throughout.

The essence of the complaint is that Constable Cunningham failed to properly conduct an investigation.

The Complainants, Hugh and Doreen Cuvelier, had a safety deposit box at the Bank of Montreal in Bridgewater. That box was erroneously drilled and entered on or about January 11, 1999. The Cuveliers allege that some \$28,000.00 was removed from the box while it was opened, and the matter was brought to the attention of the Bridgewater Police. Constable Cunningham was assigned to investigate the file. The Cuveliers also started a civil action against the Bank.

In his correspondence dated September 5, 2000, attached to Form 5, Mr. Leahey, counsel for Mr. and Mrs. Cuvelier, alleges that Constable Cunningham:

- failed to interview a brother of the locksmith who was in the vault at the time and had access to the safety deposit box;
- failed to interview the locksmith himself;
- asked the Cuveliers to take a polygraph test;
- did not ascertain the exact sequence of events that took place in the vault;
- because he did not ascertain the sequence of events, he was not aware that the

locksmith's brother was the last to leave the vault;

- did not disclose to anyone until trial the fact that he was friendly with one of the bank officers.

The Civil trial took place in August, 2000.

Mr. Leahey takes the position that, until he cross-examined Constable Cunningham in the course of the civil trial, neither he nor the Cuveliers were aware of these deficiencies. He argues that the discoverability rule should apply, and that the 30 day limitation period, with the opportunity for a six month extension, which is contained in the *Police Act* and Regulations, is subject to the discoverability rule. It would then follow that the limitation period would not begin to run until August 2000.

On behalf of Cst. Cunningham it is argued that the discoverability rule does not apply, and that in any event, the information was available, or could and would have been known to Mr. Leahey no later than March 20, 2000, when Mr. Leahey received a complete copy of the police file.

The Police Review Board dealt with the discoverability rule in its decision in the **Joachim Richter application for an extension to file a complaint against Sergeant Chatterton of the Halifax Regional Police**. That decision is dated April 9, 1998, and in that case the Board ruled that the discoverability rule did not apply to a complaint under the *Police Act*. Mr. Leahey, however, submits that the **Richter** decision is erroneous and that the Board did not have the benefit of a legal

brief from the unrepresented complainant. Mr. Leahey refers the Board to the decision of the Court of Appeal in *Burt v. LeLeshore* (July 28, 2000) N.S.J. No. 230.

Burt of course had not been decided at the time of the decision of the Board in Richter, and furthermore, *Burt* certainly does appear to have broadened the discoverability rule.

For the purposes of this application, it is not necessary for the Board to decide whether or not the rule applies to the limitations set out in the *Police Act* and Regulations. Of course, if it does not apply, then the Cuvelier complaint is well out of time. If, however, it does apply, in the view of the Board, the Cuvelier complaint would still be out of time.

As stated by Chipman, J.A. in *Burt*,

"Briefly the rule is that where a limitation period can be construed as running from the accrual of the cause of action, or from the occurrence of some component element thereof, time will not run until the plaintiff has discovered, or ought by the exercise of reasonable diligence to have discovered the material facts upon which the cause of action is based."

In considering the time line provided by Mr. Fisher, which is apparently undisputed, it appears, first of all, that Mr. and Mrs. Cuvelier were represented by counsel, and counsel met with detective Cunningham as early as January 26, 1999. This of course was prior to the police file concluding, which occurred on May 31, 1999. However, an action was commenced against the Bank of Montreal by the Cuveliers on May 10, 1999.

The Board also notes from the affidavit of Joe Fichaud, who represented the Bank in the civil action, that discovery examination of the Bank employees took place on September 14, 1999.

During that discovery, information as to who would or would not have been in the vault, as well as the sequence of events in the vault, could very well have come to the knowledge of the Cuveliers and Mr. Leahey. Furthermore, although the police file was not obtained until March 20, 2000 (by Mr. Fichaud who intended to call Constable Cunningham as a witness at trial), there was nothing to prevent Mr. Leahey from serving Constable Cunningham with a notice of examination for discovery in the civil action, and thereby obtaining a copy of his file.

Clearly, these steps could easily have occurred well in advance of the trial of August of 2000.

It is therefore the finding of the Board that, if indeed the discoverability rule does apply, (and we make no specific finding in that regard), then by the exercise of reasonable diligence, the Cuveliers could have discovered the material facts upon which the complaint is based.

The application is therefore dismissed without costs.

DATED at Halifax, Nova Scotia, this day of February, 2001.

Jean McKenna
Alternate Chair

Brad Barton
Member

Theresa Meuse
Member

Distribution

Hugh & Doreen Cuvelier - Complainant
Mr. William Leahey - Solicitor on behalf of the Complainants
Constable Cunningham - Bridgewater Police Department

Mr. David Fisher - Solicitor on behalf the named officer
Mr. Brad Barton - Member - NS Police Review Board
Ms. Theresa Meuse - Member NS Police Review Board
Ms. Jean McKenna - Alt Chair - NS Police Review Board
Chief Shirlen Seamone - Bridgewater Police Department

NSPRB-00-0110

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D E C I S I O N

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Theresa Meuse - Member
Brad Barton - Member