IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, C. 367

AND

IN THE MATTER OF Constable David Bunderla and Constable Richard O'Rourke

SOUTH COAST BRITISH COLUMBIA TRANSIT AUTHORITY POLICE SERVICE

Review on the Record Pursuant to s. 141 of the *Police Act*

REASONS OF ADJUDICATOR

TO: Complainant, Ms. Maria Lopez

TO: Constable David Bunderla #111 and Constable Richard O'Rourke #250

AND TO: M. Kevin Woodall, Counsel for Constables Bunderla and O'Rourke

AND TO: Mr. Bradley Hickford, Commission Counsel

AND TO: Mr. Doug LePard, Chief Officer (SCBCTAPS)

AND TO: Mr. Stan T. Lowe, Police Complaint Commissioner

Introduction

[1] This is a review on the record under section 138 of the *Police Act*, R.S.B.C. 1996, c. 367. The issue on this review is whether the scope of the review extends to both misconduct and sanctions.

Background

[2] Constables Richard O'Rourke and David Bunderla are officers of the South Coast British Columbia Transit Authority Police Service ("SCBCTAPS"). The officers faced a number of allegations of misconduct under the *Police Act*. The allegations related to the conduct of the officers during an investigation and an arrest that took

place on July 17th and 18th, 2014. Chief Constable Doug LePard was the Disciplinary Authority ("DA"). On August 9th, 2016, he concluded that while some allegations were not proved, three relating to misconduct were proved. He then went on to recommend sanctions for the misconduct he had found.

[3] On October 5th, 2016, the officers applied for a "review on the record," under section 141 of the *Police Act*. Their argument in part reads as follows:

> ... that there is a reasonable basis to find under section 138(1)(c)(i) that the decision of the Discipline Authority was arrived at incorrectly through an incomplete written decision which the officers believe raises a precedent that officers given direction must adhere to absolute obedience without the Discipline Authority giving consideration that lawful authority and good faith may be absent.

[4] The thrust of the officers' argument is that the sanctions imposed by the DA were excessive having regard to all the circumstances. However, the officers in their request sought a review not only of the corrective measures recommended by the DA but also a review of the findings of misconduct.

Complaint Commissioner's Decision

[5] The Police Complaint Commissioner ("the Commissioner"), found there was no basis for reviewing the finding of the DA with the respect to misconduct but went on to order a review on the record of sanctions. (I use the common term "sanctions" to refer to what the *Police Act* calls "disciplinary or corrective measures".) In so doing, he made the following comments:

> ...I have reviewed the record of the disciplinary decision, the associated determinations and the request for a Review on the Record by the officers. I have determined that there is not a reasonable basis to believe that the Discipline Authority's determinations as to whether misconduct has been proven are incorrect pursuant to section 125(1) of the *Police Act*.

He went on to state:

> ...Accordingly, pursuant to sections 137(2) and 141 of the *Police Act*, I am arranging a Review on the Record *on the sole matter of the appropriateness of the proposed disciplinary and corrective*

> *measures* proposed by the Discipline Authority in this matter. [emphasis added]
>
> ...Pursuant to section 138(1) of the *Police Act*, the Police Commissioner must arrange a Public Hearing or Review on the Record if the Commissioner considers that there is a reasonable basis to believe the following: the Disciplinary Authority's [misconduct] findings under section 125(1) are incorrect; the Discipline Authority has incorrectly applied section 126 in proposing disciplinary or corrective measures under section 128(1); or the Commissioner considers that a Review on the Record or Public Hearing is necessary in the public interest.
>
> I have reviewed the record of the disciplinary decision, the associated determinations and the request for a Review on the Record by the members. I have determined that there is not a reasonable basis to believe that the Discipline Authority's determinations as to whether misconduct has been proven are incorrect pursuant to section 125(1) of the *Police Act*.

The Officers' Position

[6] The officers have argued that the Commissioner erred in limiting the review to disciplinary or corrective measures and ought to have considered the question whether misconduct had been proved. It is argued that the adjudicator "*must* determine whether any misconduct has been proved" [emphasis added].

[7] The officers rely on section 141(10), which reads as follows:

> After a review of a disciplinary decision under this section, the adjudicator must do the following:
>
> (a) decide whether any misconduct has been proven;
>
> (b) determine the appropriate disciplinary or corrective measures to be taken in relation to the member or former member in accordance with section 126 [*imposition of disciplinary or corrective measures*] or 127 [*proposed disciplinary or corrective measures*];
>
> (c) recommend to a chief constable or the board of the municipal police department concerned any changes in policy or practice that the adjudicator considers advisable in respect of the matter.
> [emphasis added]

[8] The officers have argued that the plain words of the section require the adjudicator to determine whether any misconduct has taken place. It is argued that there is no discretion. As well, it is argued that the Commissioner's role is merely administrative or supervisory. The argument advanced is that the Commissioner has no role in deciding complaints on their merits. In essence, it is argued that the Commissioner has exceeded his jurisdiction by determining a matter that ought to be properly before the adjudicator. Rather his role is to simply determine whether to order a review on the record or a public hearing.

Commission Counsel's Position

[9] Commission Counsel's argument is that the Commissioner correctly found (1) that there was no basis to believe that the DA's misconduct determinations were incorrect, but (2) the DA incorrectly applied section 126. Thus, the review on the record would be confined to the issue of sanctions.

Analysis

[10] The officers argue that the words of section 141(10) are clear and unambiguous. They are not at all modified. As well, it is argued that unlike section 141(6), there is nothing in the Act stating that a decision by the Commissioner relating to misconduct being proved is said to be final and conclusive.

[11] I must disagree with the arguments proffered by each of the officers. At the outset, it must be stated that in interpreting a statute, the words contained therein must be read in their entire context. They cannot stand alone. To that end, I rely on the words of Iacobucci J. in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21:

Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[12] The Act is complex and at times, difficult to interpret. That much was said by Newbury J. A. in *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92, at para 6:

> Part XI of the Act is dense, complicated and often confusing. Its provisions are hedged round with exceptions, qualifications and limitations that are often located in other sections not in close proximity. One must frequently follow cross-references to other sections, and few provisions can be said to stand alone. It is not a model of clarity.

[13] It is important to examine the historical background of the *Police Act.* The Act that created the position of the Office of the Complaint Commissioner came into effect in 1998. That Act was often criticized because it failed to give to the Commissioner the necessary discretion to effectively oversee police misconduct. The Act in many ways was a compromise between those who favoured strong civilian oversight of policing and some members of the police community who viewed oversight as a mechanism that would deter effective policing. Thus in 2006, the Government appointed Josiah Wood, Q.C. to conduct a review of the Act. In 2007, he filed a report that resulted in the enactment of Part 11 of the Act. That part is entitled "Misconduct, Complaints, Investigations, Discipline and Proceedings." Mr. Wood recommended a stronger form of civilian oversight in which the Commissioner had substantively more discretion. In *British Columbia (Police Complaint Commissioner) v. Bowyer*, 2012 BCSC 1018, Punnett J. acknowledged the intent of Mr. Wood's recommendations wherein he made the following comments (at paras. 84-85):

> It is not disputed that the revisions to the *Act* arising from Judge Wood's report were made to address the fact that the Police Complaint Commissioner under the previous *Act* had "few effective powers with which to ensure that all public complaints were thoroughly investigated and properly concluded" (p. 9). Nor is it disputed that it is important that citizens be free from police misconduct and that civilian oversight is important in achieving that.

> Under prior legislation the Police Complaint Commissioner's power to send the matter to a public hearing was found by Judge Wood to be inadequate. It had too high a threshold, was costly, lengthy and general unsatisfactory (pg. 61). Judge Wood concluded that the Police Complaint Commissioner needed authority to intervene without having to order a public inquiry.

[14] The intent was to recommend a system that would foster greater public confidence in the police discipline process. Mr. Wood conceptualized a review-type process that left to the Police Complaint Commissioner the role of identifying when a review would be required (see paras. 290-93). His report clearly conceives of the review process as one that can address (1) misconduct findings, (2) sanctions findings, or (3) both: see paras. 293 and 296. It is important to note that the Act uses the terminology of "review on the record" rather than "public review." There is of course an important distinction between the two. Under the Act, the DA must make a finding as to whether the alleged misconduct was proved. (s. 125(1)). In the event that misconduct has been found, then the next step is for the DA to determine the appropriate sanctions or corrective measures. It is, of course, the duty of the DA to consider aggravating and mitigating circumstances for determining appropriate sanctions. At the conclusion of a disciplinary proceeding, the DA must give the complainant (if any) and the officer his or her findings on both the questions of misconduct and sanctions (s. 133). At that stage, an officer has a statutory right to make a written request to the Commissioner for a public hearing or a review on the record. (s. 133(5), also see s. 136). The Commissioner then must arrange either for a public hearing or a review on the record.

[15] Section 133(6) states that the DA's findings on misconduct and his or her sanctions "are final and conclusive and not open to question or review by a court on any ground." Thus the DA's findings on misconduct and sanctions are final *unless* the Commissioner arranges for a public hearing or review on the record. This is then a gatekeeper role for the Commissioner who has the option to either open or close that particular gate. Where an officer faces dismissal or a reduction in rank, the Commissioner must order a public hearing upon a request from an aggrieved officer. Otherwise, a public hearing will be ordered or a review on the record if one of three things applies, as follows: (1) there is a reasonable basis to believe the DA's

misconduct findings are incorrect; (2) there is a reasonable basis to believe the DA's sanctions are incorrect; or (3) it is "necessary in the public interest". The Commissioner has a duty to make that determination but where the Commissioner determines that there are insufficient grounds to arrange a public hearing or a review on the record, he must give written reasons for that determination (ss. 138(3)-(5)). Subsection 138(5) states that where the Commissioner determines not to arrange a public hearing or review on the record, then that determination "is final and conclusive and is not open to question or review by a court on any ground."

[16] Section 141 establishes the rules for a review on the record. The officers here rely on s. 141(10) and in particular, the words "decide whether any misconduct has been proven." However, those words cannot be considered in isolation. Rather, they must be considered in light of the provisions set out of s. 138. Clearly, the Act draws a distinction between misconduct and sanction (ss. 138(1)(c)(i) and (ii)), and provides for a public hearing or review on the record on either misconduct or sanctions. The legislative intent of the section makes it clear that where the only dispute relates to sanctions, it would be illogical to require an adjudicator to embark on a new assessment of the findings of misconduct. Conversely, in a case where the eventual sanction was effectively a "joint submission" by the parties, but misconduct findings are at play in the review, under the literal reading of s. 141(10) advanced by the Members, the adjudicator would nonetheless be required to determine the sanction issue. That makes little sense and is out of step with the legislative objectives of the Act.

[17] In this hearing, the officers sought a review on the record dealing with the misconduct findings under s. 133(5). The Commissioner denied the request and gave reasons for doing so. Section 133(6) stipulates that the Commissioner's refusal to arrange a review on the record on the issue of misconduct renders his determinations final and conclusive. In effect, the officers are attempting to do indirectly, that which they cannot do directly.

[18] This review really involves a question of statutory interpretation. Moreover, it involves the power given to the Commissioner under the statutory scheme. Under

that scheme, he clearly has the ability to restrict a review on the record to the issue involving sanctions. He did that in the instant case. Accordingly, the application is dismissed.

Dated at Vancouver, B.C. this 18th day of April, 2017.

The Honourable Wally T. Oppal, Q.C.