IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lowe v. Diebolt,*
2013 BCSC 1092

Date: 20130621
Docket: S124731
Registry: Vancouver

Between:

Stan T. Lowe, the Police Complaint Commissioner

Petitioner

And

Hon. William J. Diebolt (Ret'd.)
and Karen Burridge

Respondents

Before: The Honourable Mr. Justice Myers

Corrected Reasons: This judgment was corrected at paras. 16, 17, 21, 24, 25, 34, 35, 38 and 52 on July 8, 2013.

Reasons for Judgment

Counsel for the Petitioner:	John S. Heaney Michael Tammen
Counsel for the Respondent, Karen Burridge:	David Butcher, Q.C. Anila Srivastava
Counsel for the Attorney General of British Columbia	Jonathan Penner
Place and Date of Hearing:	Vancouver, B.C. April 11 -12 & May 30 -31, 2013
Place and Date of Judgment:	Vancouver, B.C. June 21, 2013

I. OVERVIEW

[1] The petitioner seeks judicial review of a decision of the respondent Hon. William Diebolt made (as a retired judge) under s. 117 of the *Police Act,* R.S.B.C. 1996, c. 367 (the "*Act*"). The decision relates to a misconduct complaint against the respondent Cst. Karen Burridge, of the Abbotsford Police Department. I will refer to the Hon. William Diebolt as the Adjudicator.

[2] The Adjudicator's decision was, in turn, a review of a disciplinary authority's decision that there had not

been misconduct. The Adjudicator upheld the decision, concluding that misconduct had not been substantiated on a balance of probabilities.

[3] The legislative history and scheme of the *Police Act* with respect to police misconduct was described in depth by the Court of Appeal in *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92, and by Punnett J. in *British Columbia (Police Complaint Commissioner) v. Bowyer*, 2012 BCSC 1018. I will not tread the same ground here and will only emphasize the sections of the *Act* that are directly relevant to the issues in this application.

II. THE COMPLAINT AND PRIOR PROCEEDINGS

[4] On August 15, 2009, Jocelyn Gowland was stopped when driving on South Fraser Way by three constables of the Abbotsford Police Department: the respondent Cst. Burridge and Csts. Morgan and Kilvert.

[5] On February 3, 2011, Ms. Gowland lodged a complaint on the petitioner's website in which Ms. Gowland said, among other things, that:

a) the constables asked her to step out of her car, handcuffed her and searched her car;

b) the female officer told her she could either go to the Abbotsford Police Department station to be searched or submit to a search in the Petro Canada washroom; and

c) in the washroom, the female officer had her take off her bra and panties, squat and cough and get dressed again.

[6] On February 21, 2011, Rob Sweetland, an analyst in the petitioner's office, issued a Notification of Admissibility pursuant to section 83(2) of the *Act*, indicating that the misconduct alleged, if substantiated, would constitute misconduct contrary to s. 77 of the *Act*.

[7] On February 28, 2011, Deputy Chief Constable Len Goerke of the Abbotsford Police Department issued a Notice of Complaint and Initiation of Investigation to Cst. Burridge and the other two constables. He assigned Sgt. M. Drebit of the Abbotsford Police Department (the "Investigating Officer") to investigate. The alleged misconduct was identified as abuse of authority under section 77(3)(a)(ii)(B), which reads:

> (3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:
>
> (a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,
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> …
>
> (ii) in the performance, or purported performance, of duties, intentionally or recklessly
>
> (A) using unnecessary force on any person, or
>
> (B) detaining or searching any person without good and sufficient cause, or
>
> …

[Emphasis added.]

[8] The Investigating Officer concluded that the constables had the requisite grounds for detention and search and "were acting in good faith and had an honest belief that Ms. Gowland may have drugs in her vehicle and/or on her person". However, he found that Cst. Burridge erred when she failed to inform Ms. Gowland of her right to counsel. The Investigating Officer found that there were no exigent circumstances requiring Cst. Burridge to strip search Ms. Gowland in the gas station washroom and that *Charter* breaches occurred when Ms. Gowland was not informed of her rights to retain and instruct counsel and when she was strip searched. However, he concluded that Cst. Burridge had acted in good faith and her actions were not morally blameworthy to the point of constituting police misconduct.

[9] On November 4, 2011, Abbotsford Chief Constable Bob Rich, acting as a discipline authority (the "Discipline Authority"), issued a Notice of Discipline Authority's Decision pursuant to s. 112 of the *Act*. The Discipline Authority held that:

a) reasonable and probable grounds existed to stop and conduct a drug search of Ms. Gowland and her vehicle;

b) after the initial search of Ms. Gowland's vehicle and person, there were not enough grounds to continue the detention or arrest or to perform a strip search. The strip search was therefore a violation of the *Charter*;

c) nevertheless, Cst. Burridge "did not commit an abuse of process" and "she was acting in good faith and was not acting in an arbitrary or abusive fashion".

[10] Although the Discipline Authority did not find misconduct, he directed that Cst. Burridge receive an update on the law surrounding strip searches.

III. THE REVIEW DECISION

[11] Section 117 of the *Act* allows the petitioner to appoint a retired judge to review a Final Investigation Report in which no misconduct was found, if the petitioner considers that there is a reasonable basis to believe that the decision is incorrect. Subsections 117(9) and (10) provide the retired judge reviewing the decision two options:

> (9) If, on review of the investigating officer's reports and the evidence and records referenced in them, the retired judge appointed considers that the conduct of the member or former member appears to constitute misconduct, the retired judge becomes the discipline authority in respect of the matter and must convene a discipline proceeding, unless section 120 (16) *[prehearing conference]* applies.
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> (10) If, on review of the report and the evidence and records referenced in it, the retired judge decides that the conduct of the member or former member does not constitute misconduct, the retired judge must include that decision, with reasons, in the notification under subsection (7).

[Emphasis added.]

[12] The section contains a privative clause:

(11) The retired judge's decision under subsection (10)

(a) is not open to question or review by a court on any ground, and

(b) is final and conclusive.

[13] On December 6, 2011, pursuant to s. 117 of the *Act*, the petitioner appointed the Adjudicator to review Cst. Burridge's strip search of Ms. Gowland. This resulted in the decision, handed down on December 20, 2011, which is the subject of this judicial review.

[14] In a section titled "Circumstances Leading to the Complaint" the Adjudicator laid out the following facts:

> This complaint arose from a traffic stop of the Gowland vehicle by Constables Burridge and Kilvert who were joined at the scene by Constable Morgan in another police vehicle. The stop occurred near a gas station in the 32500 block of South Fraser Way, Abbotsford at approximately 22:06 hours on August 15, 2009.
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> Constables Burridge and Kilvert were transporting a prisoner from hospital to police cells when the prisoner advised the officers that he recognized [Ms. Gowland], driving in another vehicle, to be a drug dealer, someone from whom he had purchased drugs, and further if the police stopped her vehicle they would probably find drugs as she was known as one who has transported drugs in the past.
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> [Ms. Gowland]'s vehicle was stopped as aforesaid and while checking the police computer observed Ms. Gowland to be wiggling around quite a bit inside the car. Constable Burridge also described the movement as moving up and down in her seat. Constable Burridge said from her past experience that this movement could indicate someone hiding something in their car or on their person.
>
> Upon proceeding to [Ms. Gowland]'s vehicle all three offers noticed the smell of burnt marijuana emanating from the vehicle.
>
> Ms. Gowland was removed from her car and appeared somewhat nervous. Additionally she was "lippy and mouthy" and was not following police directions. Police dispatch advised that the registered owner was Jocelyn Gowland with a notation "Caution "victor" (violence)" and that she was awaiting disposition of outstanding charges of traffickingX2 and breachX2". She was told by Constable Burridge that she was under investigation for drugs.
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> [Ms. Gowland]'s vehicle was a lowered older model car with dual mufflers and displayed a temporary operating permit due to expire at midnight, in other words, within 2 hours.
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> As a result [Ms. Gowland] was handcuffed behind her back and she sat on the curb. She claims she sat smoking a cigarette.
>
> Her vehicle was searched and no drugs were discovered. At this point Constable Burridge advised Ms. Gowland that she would be required to be strip searched. Constable Burridge indicated that Ms. Gowland said "Go ahead, you won't find anything." The Constable further said that if any drugs were found she would be charged with drug possession. Ms. Gowland advised that she did not consent to such a search or that of her car.
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> Constable Burridge at this point advised Ms. Gowland that the search could be conducted at the Abbotsford Detachment or be done in private in the washroom of the PetroCan service station nearby. The constable indicated that this option was given to Ms. Gowland because if she were to go to the detachment, the delay in completing the search and returning would probably result in her car being towed because of the expiration of her temporary operating permit at midnight and the resulting expenses related thereto. Ms. Gowland obviously chose the second option and as she said in her statement "I just turned around and started walking to the bathroom."

> The strip search did occur in the washroom with only Ms. Gowland and Constable Burridge present. Ms. Gowland's clothes were removed, first above the waist and then below the waist and her clothes were examined by the constable. Ms. Gowland was required to spread her "butt cheeks" to show that nothing was hanging from her anus or vagina.
>
> No drugs were found with the result that Ms. Gowland was released without any charges and allowed to leave. She was however given a Motor Vehicle ticket to have her car inspected. Without going into details of the issuance and service of the ticket suffice it to say the inspection did not occur and the vehicle was seized and has since been destroyed. Regrettably this occurred before Ms. Gowland registered her complaint and the investigation was unable to check details of her car that surfaced on the night of August 15, 2009, such as the problems with her door handles, the opening of her trunk and the complaint of pop being spilled on her car seats.

[15] While there were differences in some of the witnesses' statements, they are, the parties agree, not consequential or germane to this application. This section from the decision serves as a useful recitation of the facts relating to the search. There was no dispute that the strip search took place.

[16] In the next section of his decision, the Adjudicator reflected on the credibility of the witnesses. The petitioner says there was no basis for the Adjudicator to prefer Cst. Burridge's evidence over that of Ms. Gowland. However, given my comment in the prior paragraph, it is difficult to see how this could have affected the resulting decision.

[17] Turning to the substantive issues, at p. 7, the Adjudicator noted that he was required to look at all the circumstances in order to determine if Cst. Burridge had reasonable and probable grounds to conduct the strip search. The Adjudicator concluded, at page 8, that "there was reasonable suspicion to perform the traffic stop on the Gowland vehicle for drugs." This was so because of the source information and the result of the CPIC search which disclosed that Ms. Gowland was the owner of the vehicle and was awaiting disposition of outstanding charges of "traffickingX2 and breachX2".

[18] The Adjudicator, at pp. 8 - 9, noted that there must be reasonable and probable grounds for an arrest and reasonable and probable grounds to justify a strip search, citing *R. v. Golden*, 2001 SCC 83, *R .v Mann*, 2004 SCC 52, and *R. v. Webster*, 2008 BCCA 458. He then concluded that there were reasonable and probable grounds to perform a strip search:

> The aforementioned authorities satisfy me that with the prisoner's information supported in part from that from police dispatch, the odour of burnt marijuana, [Ms. Gowland]'s wiggling around inside her car, her actions outside the car, the fact that no drugs were found in her vehicle, and the information she received from Constable Morgan, that Constable Burridge had reasonable and probable grounds to perform a strip search on the complaint's person. It should be noted that at this particular stage the trunk of [Ms. Gowland]'s vehicle had not yet been accessed but there is nothing to indicate that Ms. Gowland had any access to the trunk from the time the police started to observe her to the time Constable Burridge decided to perform the strip search.
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> [Emphasis added.]

[19] In the following paragraph, the Adjudicator noted that Cst. Burridge did not provide Ms. Gowland with a *Charter* warning. He further noted that Cst. Burridge "was of the view that she did not have enough grounds to charge Ms. Gowland with trafficking and thus did not arrest her but detained her for purposes of

investigation." He said that Cst. Burridge was wrong not to have provided Ms. Gowland with a *Charter* warning.

[20] Next, the Adjudicator cited *R. v Dubois,* 2004 BCCA 589, for the proposition that that an actual arrest is not a prerequisite to a search if both objective and subjective grounds exist for an arrest.

[21] The Adjudicator (at p. 10) then quoted from *Golden*, compressing several excerpts from that judgment into one paragraph which noted that:

- Strip searches are inherently degrading and cannot be done as a matter of routine;
- Strip searches are only valid where they are conducted as incidental to an arrest – in other words the search must be related to the reasons for the arrest;
- In addition to the reasonable and probable grounds for the arrest, the police must establish reasonable and probable grounds for the strip search;
- In the absence of exigent circumstances, strip searches should generally be conducted at a police station.

While not referred to by the Adjudicator, *Golden* also established that for a strip search to be valid, the arrest itself must be valid.

[22] At p. 10, the Adjudicator dealt with the location of the strip search. He found that there were no exigent circumstances requiring conduct of the search at the gas station. Rather, Cst. Burridge was motivated to do the search there in order to avoid Ms. Gowland's car being towed due to the imminent expiry of its registration. Therefore, he concluded that Cst. Burridge was acting in good faith in giving Ms. Gowland an option for the location of the search. He further noted that, when presented with the option of a police station search or the service station washroom, Ms. Gowland chose the washroom option.

[23] The Adjudicator concluded, at pp. 11-12, that the failure to give a *Charter* warning does not give rise to a finding of police misconduct. He further concluded that "misconduct has not been substantiated by proof on a balance of probabilities".

IV. OVERVIEW OF THE PARTIES' POSITIONS

[24] I will provide further details of the parties' positions when I deal with the discrete issues, but at this stage it is useful to provide an overview.

[25] The petitioner argues that the standard of review is correctness. He says the Adjudicator erred in law in concluding that the strip search was justified. He ought to have inquired, but did not, whether the search was conducted incidental to a lawful arrest and, if so, whether there were additional requisite grounds to conduct the strip search. There were no objective reasonable and probable grounds for the arrest, and Cst. Burridge said she did not have the subjective grounds. Once a determination was made that the officer

lacked grounds for arrest and thus had no justification for the strip search, there could be no doubt that the conduct at issue appeared to constitute misconduct. The reliance on good faith was misplaced.

[26] Cst. Burridge argues that the standard of review is reasonableness. She says that the petitioner is incorrectly conflating the test for a *Charter* breach with the definition of police misconduct. The decision met the reasonableness standard.

[27] The Attorney General takes no position on the merits of the application. With respect to the standard of review, she identified a number of discrete questions and argued that the standard of review for all of them is reasonableness.

V. THE STANDARD OF REVIEW

[28] The Adjudicator is not subject to the *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Therefore the standard of review is to be determined by common law principles.

[29] Following the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick,* 2008 SCC 9, there are two possible standards, correctness or reasonableness. As noted in *Dunsmuir* at paras. 58-61, the "correctness" standard is applicable where the reviewing court should not defer to the decision-maker's decision. This includes circumstances where the decision turns on a constitutional question regarding the division of powers or the jurisdiction (narrowly construed) of the decision-maker to decide a particular matter, or where the question at issue is one of general law, important to the legal system as a whole, and outside the decision-maker's specialized area of expertise.

[30] The "reasonableness" standard applies in all other circumstances. The standard requires the reviewing court to defer to the decision-maker, particularly where the question in issue is one of fact, discretion or policy, or where legal and factual issues cannot be readily separated.

[31] In determining the standard of review, the court must first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. If there has been no such determination, the court must then apply the appropriate factors and identify the standard: *Dunsmuir* at para. 62.

[32] The ultimate question that the Adjudicator had to answer was whether, paraphrasing s. 77(3)(a)(ii)(B) and 117 (9) and (10) of the *Act*, it appears that Cst. Burridge negligently or recklessly searched Ms. Gowland without good and sufficient cause (ss. 9) or whether she did not (ss. 10). A decision in the negative (ss. 10) is subject to the privative clause; an affirmative decision is not.

[33] The Attorney General and Cst. Burridge argue that the standard of review has been determined in *British Columbia (Police Complaint Commissioner) v. Bowyer*, 2012 BCSC 1018. The petitioner disagrees.

[34] In *Bowyer*, former Justice Pitfield conducted a s. 117 review of one of four counts originally lodged against an officer. Under s. 117(9) he determined that there appeared to be misconduct and therefore became the discipline authority. The petitioner demanded that Mr. Pitfield deal with three other counts that

had been the subject of earlier proceedings. (I will not set out the details of this because they are not germane to the issue.) Mr. Pitfield ruled that he could only deal with the one count that was the subject of the original referral to him. The petitioner sought judicial review of that decision.

[35] Punnett J. held that the issue decided by Mr. Pitfield was not a question of jurisdiction; rather it was a question of statutory interpretation. He determined that the standard for the issue was one of reasonableness. In coming to his conclusion, Punnett J. considered many of the same arguments made by the petitioner in this case: that the matter was not within a specialized area of expertise and that the matter was one of general importance.

[36] The petitioner says that *Bowyer* is not determinative of the standard of review here because the decision at issue was not one under s. 117. This is so because Mr. Pitfield was acting as a disciplinary authority; in other words, he was past the s. 117 stage. The latter observation is correct, but I agree with counsel for Cst. Burridge and counsel for the Attorney General that that is a difference without a distinction because the character of the issues to be determined in each phase is similar.

[37] Furthermore, in *Bowyer*, Punnett J. did not rely on any privative clause. Section 117, on the other hand, contains a very strong privative clause which strengthens the argument in support of a standard of reasonableness.

[38] Even if *Bowyer* was not directly applicable, taking account of the following considerations, I would conclude that the standard is one of reasonableness:

a. There is the broad privative clause.

b. The ultimate question for the Adjudicator is not one of general legal importance. For example, unlike the *Copyright Act* at issue in *Rogers Communications Inc. v. Society of Composers, Authors & Music Publishers of Canada*, 2012 SCC 35, the misconduct parts of the *Police Act* are not of general application and will not be dealt with by the courts (apart from judicial review applications).

c. While retired judges hearing s. 117 reviews are not doing so on a regular, or full-time basis, it is clear that they do have some expertise in criminal law, fact finding and applying the law to the facts.

d. Questions of mixed fact and law are generally reviewed according to the reasonableness standard: *Dunsmuir* at para. 53; *Rogers Communications* at para. 20.

[39] The petitioner argued that because the s. 117 review is one of the record, and that the same record is before me, less deference need be given to the decision. That is something for which the petitioner provided no authority nor is it a factor mentioned in *Dunsmuir* or subsequent cases. I do not agree that this is a relevant consideration in determining the standard of review in this case.

[40] Further, this case is also different from a case like *Rogers Communications* where the court said, at

para. 20, that the only question it had to consider was a pure question of law. As I discuss below, the validity of the search is only the first part of the inquiry that was in front of the Adjudicator. It might be that a legal ruling or conclusion necessary to the ultimate decision is so flawed and so fundamental to the decision that if it is decided incorrectly the decision must be held to be unreasonable, as in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63. However, that requires looking at the decision as a whole, which I will do in the following section.

[41] Furthermore, even if the issue of the legality of the search were looked at discretely and regarded as a question of law, the standard would, under *Bowyer*, be one of reasonableness.

VI. THE SUBSTANTIVE ISSUE

[42] Although the petitioner argued that he was not saying that a *Charter* breach automatically constituted misconduct, substantively that was very close to his position.

[43] The petitioner hinged his argument on the fact that the search could not be valid under the *Charter*: Cst. Burridge acknowledged she did not think she had the grounds to arrest Ms. Gowland, and she did not, in fact, make an arrest. Since a strip search could only be conducted incidental to a lawful arrest, the search could not be justified. In his written argument, the petitioner stated:

> The fact of the strip search itself was not in dispute. Once a determination was made that the officer lacked grounds for arrest and thus had no justification for the strip search, there could be no doubt that the conduct at issue appeared to constitute misconduct. Based on the Respondent's own statements, she conducted a highly invasive search procedure knowing that she lacked grounds for arrest, but rather based only on suspicion. That conduct can only be intentional or reckless as those terms are understood in Canadian law.
>
> [Emphasis added.]

[44] The reason why the petitioner says that Cst. Burridge's conduct could only be reckless or intentional is, quoting again from his written argument:

> Put another way, either the Respondent knew that her conduct was unlawful or she ought to have known. By the time of the events in issue, the *Golden* decision had been the law in Canada for approximately seven and half years. It was well known to all in the law enforcement and general legal community.

[45] The petitioner's conflating the legality of the search and misconduct under s. 77(3)(a)(ii)(B) is shown starkly in his argument with respect to the standard of review, with respect to which he identified one issue:

> The question at issue in this appeal (*sic*) is clearly one of law; it is the application of a legal test, as defined by the Supreme Court of Canada in *R. v. Golden*, for the circumstances in which police may lawfully conduct a strip search of an individual.

[46] I do not agree with this position. The question of misconduct is different from whether a *Charter* breach occurred, and also from whether evidence obtained from an illegal search should be excluded. That is clear from the definition of the charged misconduct, which requires recklessness or intent. The "intent" cannot

refer to the physical act of the search, because it is virtually impossible to conduct a physical search non-intentionally. It must refer to the *mens rea*, or state of mind of the officer. Recklessness must be interpreted in the same manner. The fact that an officer is ignorant of the law related to searches does not, by itself, indicate intent or recklessness. It is more in line with negligence, or, for that matter, poor training. (I address actual knowledge below at para. 52.)

[47] Turning to the Adjudicator's decision, as I said above (para. 18), at page 8 of his decision, he concluded that Cst. Burridge had reasonable and probable grounds to perform a strip search. If he meant that the strip search was justified, he would be incorrect because of the lack of an arrest or the subjective grounds for that arrest. Cst. Burridge concedes as much. That finding might even be unreasonable. But as the foregoing demonstrates, that is not the end of the matter for a misconduct charge under the *Act*. (In fact, it would not be the end of a matter in a criminal trial, since a s. 24(2) analysis must be done in order to determine whether evidence obtained pursuant to a *Charter* breach is admissible.)

[48] The Adjudicator found that there were objective grounds for the arrest, and I do not think the petitioner takes issue with that. The Adjudicator also appears to have concluded that there were objective grounds for a strip search because Ms. Gowland wiggled around. The adjudicator concluded that Cst. Burridge acted in good faith in conducting the search in the gas station. Those are not unreasonable conclusions. (Again, this is separate from whether the search was valid.)

[49] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Court said this with respect to the reasons given by a tribunal:

> 12 It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:
>
> > "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added.]
> >
> > (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

[50] At para. 15, the Court said that while a reviewing court should not draft its own reasons in substitution for those of the tribunal, it can look to the record in order to assess the reasonableness of the outcome.

[51] Similarly, in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, the Court said:

> [54] The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para. 14). In the absence of finding that the

> decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. In this case, the board's conclusion was reasonable and ought not to have been disturbed by the reviewing courts.
>
> [Emphasis added.]

[52] In this case, the difficulties with the Adjudicator's approach to the validity of the search were apparent, and therefore not a "treasure hunt". However, as I have stated, that is only the starting point. On several occasions, I invited the petitioner's counsel to point me to anything in the record indicating either intentional or reckless misconduct by Cst. Burridge other than the search itself. He could not do so other than to point out her acknowledgment that she did not have grounds to arrest. But that factor merely circles back to the validity of the search. There was nothing in the evidence to show that Cst. Burridge knew that the lack of grounds for arrest meant she could not do the search, something which might amount to intention. While there might be cases in which the misconduct bespeaks intention or recklessness, this is not one of them.

[53] The petitioner argued that the Investigating Officer did not put the proper questions to Cst. Burridge in order to explore her state of mind. The answer to that is the review by the retired judge under s. 117 is one of the record. There is nothing to allow him or her to speculate on what might have been asked, but was not, and to then further speculate whether the blanks may filled in at a possible (not, under the *Act*, an inevitable) further oral hearing.

[54] I therefore conclude that the decision met the reasonableness standard, irrespective of whether the conclusion regarding the validity of the search was unreasonable or incorrect.

VII. OTHER ISSUES

A. Timeliness

[55] Cst. Burridge argued that I should exercise my discretion and dismiss the petition because of delay. Section 79 of the *Act* provides that a complaint must be filed within 12 months of the impugned conduct, but that can be extended by the petitioner. The search occurred in August 2009. The complaint was not filed until February 2011 but the petitioner extended the time to allow it to be filed. Within that attenuated time frame, it took the petitioner six months to file this petition. Cst. Burridge contrasts that with the 10-day period in which a retired judge must conduct the s. 117 review.

[56] I agree with Cst. Burridge that, given the circumstances, the time the petitioner took to file this proceeding is troubling. However, having reached the conclusion to dismiss the petition on its merits, it is unnecessary for me to deal with this issue.

B. Notice to the Attorney General

[57] The petition was, of course, brought pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. Section 16 provides for notice of all judicial review applications to be served on the Attorney General and that the Attorney General is entitled to be heard at the application.

[58] The petitioner did not comply with this requirement. When I learned of this at the outset of the hearing I stood the matter down allowing the petitioner's counsel, Mr. Heaney, to contact counsel at the Ministry of Justice to ascertain their position. He returned and advised that the Ministry was content to have the hearing proceed. I agreed to do so on the basis that I might, in due course, invite the Attorney General to make submissions, which I did.

[59] I agree with the Attorney General's submission that it is important that s. 16 must be complied with. It is not, as submitted by counsel for the petitioner (when he was urging me to proceed with the hearing before contacting the Ministry) a mere technicality or formality. It is particularly important that the Attorney General be given the opportunity to appear in a case such as this where the decision being reviewed is not that of a board or other institutional tribunal, which normally appear at the hearing to deal with matters of jurisdiction and standard of review. One cannot expect an individual adjudicator to make such an appearance, and in that absence the submissions of the Attorney General can be helpful, as they were in this case.

"E.M. MYERS J."