

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kyle v. Stewart*,
2017 BCSC 522

Date: 20160330
Docket: S160919
Registry: Vancouver

Between:

Staff Sergeant CJ Kyle

Petitioner

And

Constable David Stewart

Respondent

- and -

Docket: S156334
Registry: Vancouver

Between:

Constable David Stewart

Petitioner

And

Staff Sergeant C.J. Kyle and Deputy Chief Constable Steve Rai

Respondents

Before: The Honourable Madame Justice MacNaughton

Reasons for Judgment

Counsel for Staff Sergeant CJ Kyle:

D. Lovett, Q.C.

Counsel for Constable David Stewart:

M. Woodall

Counsel for Deputy Chief Constable Steve Rai:

D. Crossin, Q.C.

Place and Date of Trial/Hearing:

Vancouver, B.C.
February 21, 2017

Place and Date of Judgment:

Vancouver, B.C.
March 30, 2017

Table of Contents

THE PETITIONS FOR JUDICIAL REVIEW..... 4

THE FACTUAL BACKGROUND TO BOTH PETITIONS..... 5

THE REGULATORY REGIME ESTABLISHED IN THE ACT 13

 What legislative intent is reflected in s. 101?..... 17

IS THERE A COMMON LAW DUTY OF PROCEDURAL FAIRNESS?..... 18

 Do employment or labour relations principles have any application to this
 complaint? 23

REMEDY 24

The Petitions for Judicial Review

[1] There are two petitions for judicial review before me.

[2] The first is the petition filed on August 4, 2015, by Constable Stewart, naming Staff Sergeant CJ Kyle and Deputy Chief Constable Steve Rai as respondents. In that petition, Constable Stewart seeks the following orders:

- (a) A declaration that the directions or orders that Staff Sergeant CJ Kyle issued to him pursuant to s. 101 of the *Act* intended to compel him to attend a third interview in OPCC file No. 2014-9512, are null and void and without effect.
- (b) A declaration that the order of Deputy Chief Constable Rai made on or about 12 July 2015 is null and void, and without effect.

[3] In this decision, I will refer to this petition as the “Stewart petition”.

[4] The second is the petition filed on January 25, 2016, by Staff Sergeant CJ Kyle, naming Constable David Stewart as a respondent. In that petition, Staff Sergeant Kyle seeks the following orders:

- a) An order in the nature of *mandamus* pursuant to s. 2 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*], compelling Constable Stewart to attend an investigation interview as required by her under s. 101(2) of the *Police Act*, R.S.B.C. 1996, c. 367 [*Act*].
- b) In the alternative, a mandatory injunction pursuant to s. 2 of the *Judicial Review Procedure Act* requiring Constable Stewart to attend an interview as required by her under s. 101(2) of the *Act*, to be in effect only until Constable Stewart’s duty to attend such an interview has been fulfilled.

[5] In this decision, I will refer to this petition as the “Kyle petition”.

[6] At the hearing, I was advised that Constable Stewart is no longer seeking any relief with respect to Deputy Chief Constable Rai.

[7] Both petitions arise from the Office of the Police Complaint Commissioner’s (“PCC”) investigation into Constable Stewart’s conduct under s. 101 of the *Act*.

[8] The issue which gives rise to these petitions is a dispute about the fairness of the investigation.

The Factual Background to Both Petitions

[9] There is very little factual dispute in this case.

[10] Constable Stewart is a constable with the Vancouver Police Department (“VPD”).

[11] Until July 6, 2015, Staff Sergeant Kyle was a Staff Sergeant with the Professional Standards Unit, South Coast British Columbia Transportation Authority Police Service (the “Transit Police”). On July 6, 2015, she was appointed Inspector, Administrative Services, Transit Police. In this role, she has oversight responsibilities for the Professional Standards Unit, Human Resources, Finance and Information Services, and Information Technology. Because Inspector Kyle held the rank of Staff Sergeant when conducting the investigation described below, I will refer to her in this decision in her former rank of Staff Sergeant.

[12] On March 25, 2014, the PCC received information from the VPD which indicated that, on March 23, 2014, Constable Stewart was involved in an off-duty incident in which he used force during the arrest of Harvy Dhudwal.

[13] The following day, the PCC received a complaint from Mr. Dhudwal about Constable Stewart’s off-duty conduct. In this decision, I will refer to Mr. Dhudwal as the complainant.

[14] The complainant alleged that he was engaged in a conversation with two uniformed police officers when Constable Stewart approached him, swore at him, and then assaulted him by shoving him, punching him once in the face, slapping him once in the face, and then shoving him again.

[15] If substantiated, these allegations could constitute improper off-duty conduct under s. 77(3)(j) of the *Act*, which is defined as follows:

(j) "improper off-duty conduct", which is, when off duty, asserting or purporting to assert authority as a member, an officer or a member of the Royal Canadian Mounted Police and conducting oneself in a manner that would constitute a disciplinary breach of trust if the member were on duty as a member;

[16] On April 25, 2014, acting under its authority in s. 83(2) of the *Act*, the PCC admitted the complaint and directed VPD Chief Constable Jim Chu to investigate it. Chief Constable Chu appointed VPD Detective Constable Jason Perry as the investigating officer (the “VPD Investigator” and the “VPD Investigation”).

[17] On July 16, 2014, the VPD Investigator interviewed Constable Stewart who was accompanied by a union representative, the then President of the Vancouver Police Union, Athanasios Stamatakis.

[18] Following the interview, and to follow up on it, various emails were exchanged between the VPD Investigator and each of Constable Stewart, the complainant, and the office of the PCC which was monitoring the investigation.

[19] During the course of the VPD investigation, the PCC concluded that the VPD investigator had demonstrated some reluctance to conduct follow-up enquiries with Constable Stewart to ensure that the complaint was thoroughly and completely investigated. The PCC noted that the investigation of a key issue was conducted through brief and highly informal email correspondence that was materially deficient.

[20] The PCC also learned that Constable Stewart is related to several former senior and high-ranking members of the VPD, including a former VPD Chief Constable, who are well-known to many VPD members. The PCC was concerned about a potential appearance of conflict of interest arising as a result of the VPD conducting the investigation.

[21] Also during the course of the VPD investigation, additional information came to the PCC’s attention, indicating that Constable Stewart may have knowingly misled the VPD investigator during the July 16, 2014 interview. As a result of the concern about the potential conflict and the new information about Constable Stewart’s family connections, exercising his authority under ss. 92(1)(a) and 93(1)(b)(ii) of the *Act*, the PCC determined that it was in the public interest to transfer the investigation to the Transit Police and asked Transit Police Chief Officer Neil Dubord to appoint an investigator.

[22] The PCC also ordered that the external investigation investigate the original allegation of improper off-duty conduct, as well as the following alleged misconduct:

1. Deceit, section 77(3)(F)(i)(A)

It is alleged that Constable Stewart committed Deceit when he stated that he was not intoxicated, and that he had only consumed one alcoholic beverage at home, and one during the course of the evening, an account which he knew to be false.

2. Deceit, section 77(3)(F)(i)(A)

It is alleged that Constable Stewart committed Deceit when he stated that he was alone during the course of the evening in question, and that he did not meet up with any person, or persons, an account which he knew to be false.

[23] Staff Sergeant Kyle was appointed as the investigator by the Chief Officer Dubord.

[24] The PCC also appointed Chief Constable Dave Jones of the New Westminster Police Department (the "NYPD") as an external discipline authority under s. 135 of the *Act*.

[25] Staff Sergeant Kyle interviewed Constable Stewart on February 26, 2015. Constable Stewart was again accompanied by Mr. Stamatakis.

[26] The record before me includes transcripts of Constable Stewart's first interview by the VPD investigator and the second interview by Staff Sergeant Kyle.

[27] On April 14, 2015, Staff Sergeant Kyle emailed Constable Stewart and Mr. Stamatakis, directing Constable Stewart to attend for a further interview with her. She informed them that, before she completed her report, she wanted to clarify certain things and to provide Constable Stewart with an opportunity to comment on a number of remaining evidentiary discrepancies. Mr. Stamatakis asked her to give them "some idea of what the discrepancies" were and to provide them with a copy of Constable Stewart's statement. She provided the statement but did not provide particulars of the discrepancies.

[28] On April 21, 2015, Staff Sergeant Kyle received an email from Mr. Stamatakis which reads, in part:

I am going to advise Constable Stewart that he has satisfied his obligation under Part 11, section 101 of the Police Act.

He has participated in two interviews and fully cooperated during both, including by answering all questions that were posed to him, to the best of his ability, regarding the conduct allegations that he is being investigated for.

[29] On April 22, 2015, Staff Sergeant Kyle sent an email to Constable Stewart and Mr. Stamatakis requesting that Constable Stewart attend an interview with her on April 29, 2015.

[30] Staff Sergeant Kyle's request was made pursuant to her authority under s. 101 of the *Act*.

[31] Mr. Stamatakis responded on the same day, indicating that:

Constable Stewart has complied with his obligations as set out at section 101 of the Police Act. He has participated in two interviews; one which you conducted. He answered all of your questions to the best of his ability and was fully cooperative. ... You have not identified any issues that have not been canvassed.

That being the case, there is no basis for you to require Constable Stewart to attend your office.

[32] Mr. Stamatakis raised his concerns with NWPD Chief Constable Jones. He asked Chief Constable Jones to direct Staff Sergeant Kyle not to conduct a second interview or to excuse Constable Stewart from attending a second interview.

[33] On April 28, 2015, Chief Constable Jones issued a summary information letter outlining his limited role as a discipline authority under s. 101 of the *Act*. He concluded that he could not grant the relief Mr. Stamatakis sought, and only had authority to extend the five-day time limit for Constable Stewart to comply with Staff Sergeant Kyle's request. He went on:

In this instance, the investigator has indicated that their request for an additional interview is necessary for the purposes of completing their investigation, and that request is within the authority of section 101 of *the Police Act*. The investigator has indicated that they are not withdrawing their request, and as such, the interview should occur as directed.

[34] On April 29, 2015, Chief Constable Jones granted Constable Stewart a two-week extension to comply with the direction from Staff Sergeant Kyle to cooperate in an interview. He said:

This is not a [cancellation] of the interview, as that decision is not within the discipline authority's ability to change, but is an extension that can be granted by the discipline authority upon request.

I do note that the concerns that have been expressed by [Mr. Stamatakis] arise from the fact that the member has complied with the initial request(s) for information and interviews, and that the member is subject to the allegation of deceit and improper off duty conduct, and that any subsequent interview will only "rehash" the same questions that have been asked and answered. The member has cooperated with the initial interview and in their view has not been presented with any new information, or even given his indication of wanting to change, or alter, his initial replies.

The member and [Mr. Stamatakis] are seeking details, even if minimal, that if there are new questions to be asked, or clarification to be sought in light of new evidence, then "some" pre-interview disclosure or discussion would be appropriate. These concerns arise from the member's desire to cooperate, but raise concerns over being re-interviewed on the same questions that he has already been asked and provided answers to.

While the ultimate decision to conduct the interview will rest with the investigator, it is strongly felt that some discussion between the investigator and [Mr. Stamatakis] would be beneficial in resolving the above expressed concerns.

The investigator, Staff Sergeant CJ Kyle is requested to contact and liaise with Mr. Stamatakis regarding these concerns and is free to use her schedule to set a new date for the interview to occur, which is to be no later than May 13, 2015.

[35] On May 5, 2015, Staff Sergeant Kyle emailed Constable Stewart and Mr. Stamatakis. She informed them that, subsequent to her first interview of Constable Stewart, she received information from a VPD member and a cab driver which directly contradicted his statements in relation to the allegations against him. She said she was obliged to put that evidence to Constable Stewart. Staff Sergeant Kyle asked Constable Stewart whether he intended to comply with her request to attend a second interview. She did not receive a response; rather, on May 9, 2015, Mr. Stamatakis repeated his opinion that Constable Stewart had complied with his obligations under the *Act*.

[36] On May 14, 2015, Staff Sergeant Kyle formally requested that the PCC extend the time for her to complete her investigation. She informed the PCC, the VPD Chief Constable, Chief Constable Jones, the Transit Police Chief Officer, and Constable Stewart that she was requesting Constable Stewart to attend an interview with her on May 21, 2015.

[37] On May 15, 2015, Mr. Stamatakis emailed Chief Constable Jones, putting him on notice that Constable Stewart objected to the April 29, 2015 extension of time to comply with Staff Sergeant Kyle's request to attend an interview. On the same day, the PCC extended the investigation period to June 22, 2015. In his decision, after reviewing the May 5 and May 9 exchanges between Staff Sergeant Kyle and Mr. Stamatakis, and Staff Sergeant Kyle's May 14 request for an extension, the PCC said:

This investigation includes two allegations of deceit in which new investigative leads have come to light which raise potential discrepancies in earlier statements of Constable Stewart. In addition, the two allegations of deceit arising out of the investigation have increased the complexity of the investigation in light of the objections raised by Mr. Stamatakis on behalf of Constable Stewart. Finally, we are of the view that the public interest would best be served by a thorough investigation into what constitutes very serious allegations. It is important to note that a significant portion of the delay in the investigation to date arises from matters outside the control of the investigator. The extension sought in the circumstances is relatively short in duration.

[38] On May 19, 2015, Staff Sergeant Kyle emailed Constable Stewart and Mr. Stamatakis, informing them that the May 21, 2015 interview would take place in the Transit Police Boardroom. Constable Stewart did not attend. Rather, his lawyer emailed Staff Sergeant Kyle on May 21, 2015, advising that Mr. Stamatakis was away, that Constable Stewart was off work, and that he understood that Mr. Stamatakis had made it clear that, in the two interviews he had already attended, Constable Stewart had complied with his obligations under the *Act* and would not attend any further interviews.

[39] On June 19, 2015, the PCC again extended Staff Sergeant Kyle's investigation and said:

The issues related to Constable Stewart's cooperation with this investigation, and the investigator's attempts to reconcile recently uncovered evidence with previous statements made by Constable Stewart remain. It should be noted that the investigator has also recently collected video evidence that may depict Constable Stewart; in fairness to Constable Stewart, he should be presented with this video evidence and have a chance to respond. Due to technical difficulties, this video only became available very recently and this new investigative lead could not have been revealed with reasonable care.

[40] On July 15, 2015, pursuant to her authority under s. 101 of the *Act*, Staff Sergeant Kyle directed Constable Stewart to attend Transit Police Office on July 22, 2015, for a second interview. At the same time, VPD Deputy Chief Constable Steve Rai ordered Constable Stewart to attend the interview.

[41] Also on July 15, 2015, Staff Sergeant Kyle received an email from Constable Stewart's lawyer indicating that, as he had already attended two interviews, one with the VPD investigator and one with Staff Sergeant Kyle, Mr. Stamatakis and Constable Stewart continued to be of the view that he had fully complied with his obligations under s. 101 of the *Act*.

[42] The following day, Deputy Chief Constable Rai received a letter from Constable Stewart's lawyer, taking the position that Staff Sergeant Kyle's request for a second interview was unreasonable and unlawful, and that Deputy Chief Constable Rai's order was a nullity.

[43] Constable Stewart's lawyer expressed his view that:

It would not be fair to ambush [Constable] Stewart by showing [the video] to him for the first time in a third interview. He should be given a copy, and an opportunity to review it carefully, in private".

[44] The letter also said:

We do not know if there is other supposedly new evidence in addition to the video. If there is, the same principles that apply to the video would apply to such "new" evidence. If the object of a third interview is fairness to [Constable] Stewart, then fairness demands that he be given the "new" evidence, and that he be given an opportunity - not an order - to comment on it.

[45] Constable Stewart did not attend the July 22, 2015 interview with Staff Sergeant Kyle.

[46] Matters escalated and on July 27, 2015, the PCC issued an Amended Order for Investigation under s. 93 of the *Act* in which he determined that Constable Stewart's failure to attend the interviews requested by Staff Sergeant Kyle could, if substantiated, constitute misconduct under the *Act*. The PCC, therefore, ordered that the investigation which was initially to look into the complainant's complaint, should also include the following additional allegations:

- a) *Discreditable Conduct*, section 77(3)(h)(ii) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department, including, without limitation, doing any of the following: (ii) contravening a provision of [this] Act or a regulation, rule or guideline made under this Act. Specifically, failing to attend an interview on April 29, 2015, pursuant to section 101 of the *Police Act*.
- b) *Discreditable Conduct*, section 77(3)(h)(ii) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department, including, without limitation, doing any of the following: (ii) contravening a provision of [this] Act or a regulation, rule or guideline made under this Act. Specifically, failing to attend an interview on July 22, 2015, pursuant to section 101 of the *Police Act*.
- c) *Neglect of Duty*, section 77(m) of the *Police Act* which is neglecting, without good or sufficient cause, to do any of the following, (iii) promptly and diligently obey a lawful order of a supervisor. Specifically, failing to obey the order from VPD Deputy Chief Steve Rai dated July 12, 2015.

[47] Following the impasse that was reached with respect to the requirement that Constable Stewart attend a second interview, on August 4, 2015, Constable Stewart filed the Stewart petition. It alleges that it is "unfair and unreasonable to require a member to attend multiple interviews pursuant to s. 101 unless there has been a fundamental change in the circumstances of the investigation between the dates of past interviews and the date of a proposed additional interview". The Stewart petition further says that s. 101 must be interpreted "in light of the duties of fairness and reasonableness that apply in labour law governing employment discipline generally."

[48] On August 7, 2015, Deputy Chief Constable Rai wrote to Staff Sergeant Kyle and confirmed that he had directed Constable Stewart to attend an interview with her on July 12, 2015.

[49] On January 25, 2016, Staff Sergeant Kyle filed the Kyle petition.

[50] The parties agreed that the Stewart and Kyle petitions should be heard together as they are based on the same underlying facts and consider the same legislative scheme which raises the same issues. As set out above, I was advised that Constable Stewart would not be proceeding with the relief he sought as against Deputy Chief Constable Rai.

[51] The issue between the parties is whether there is a duty of procedural fairness with respect to an investigation conducted under s. 101 of the *Act* and, if so, the scope of that duty.

The Regulatory Regime Established in the Act

[52] The parties agree that that police officers hold offices of public trust and are afforded extraordinary and unique statutory and common law powers to enable them to perform their duties and functions. Without a high level of public confidence in the integrity of police officers, their authority is threatened and their independence diminished. As a result, policing is highly regulated throughout Canada.

[53] Staff Sergeant Kyle directed me to the February 2007 Report on the *Review of the Police Complaint Process in British Columbia* (the “Wood Report”) in which, the author, Josiah Wood, Q.C., observed, at para. 33, that “freedom from police misconduct [is] one of the fundamental values that define a free and democratic society”.

[54] Following the Wood Report, and in 2010, significant amendments were made to the *Act* which sets out a complex regulatory scheme governing all aspects of policing including officer discipline. A focus of the Wood Report’s recommendations was to create a balanced civilian oversight process of police officers’ conduct and to

give the PCC, an independent officer of the legislature, more effective powers to ensure that complaints about police conduct are thoroughly investigated and concluded.

[55] Part 11 of the *Act* governs misconduct, complaints, investigations, discipline, and proceedings. Section 177 of the *Act* gives the PCC general responsibility for overseeing and monitoring: complaints, investigations, and administration of discipline and discipline proceedings. This broad oversight is to ensure that the processes established in Part 11 of the *Act* are complied with in a manner consistent with the intent of the *Act* and is aimed at maintaining public confidence in both the investigation of misconduct allegations and the integrity of the police disciplinary process.

[56] Division 3 of Part 11 of the *Act* sets the processes for dealing with complaints of police misconduct. Briefly, it sets out the stages of the complaints process, including:

- (a) an initial screening decision by the PCC as to whether a complaint is admissible;
- (b) if admissible, an investigation into the complaint by an investigating officer followed by completion of a final investigation report (FIR);
- (c) a review of the FIR by a discipline authority and a decision as to whether it reveals conduct that appears to constitute misconduct; and
- (d) if the discipline authority determines the conduct appears to constitute misconduct, the convening of a disciplinary proceeding.

[57] If a disciplinary proceeding is convened, there are detailed provisions applying to it, including the various procedural and participatory rights of an officer and the disciplinary or corrective measures that may be imposed where a finding of misconduct is substantiated after a hearing on the merits.

[58] The parties generally agreed that the investigative powers in the *Act* were incorporated following the Wood Report's conclusion that the former investigative provisions failed to provide investigators with the necessary powers to ensure that complaints of misconduct could be thoroughly investigated.

[59] In particular, the then PCC had proposed that it was necessary for officers to be required to cooperate with the PCC, and its investigation, including providing statements and attending interviews and, as a corollary, requiring the discipline authority in a police department to require an officer's cooperation: see paras. 155-156, 160-162, and 165 of the Wood Report.

[60] As a result, the Wood Report recommended, at paras. 168-170, that the *Act* be amended to provide a duty to cooperate with an investigator. In particular, the PCC and the legislation expressly impose a duty on a police officer, within five days of an investigator's request, to provide a statement and submit to an interview "when called upon to do so by an officer conducting an investigation into a public trust complaint". The Wood Report also recommended that the then *Code of Professional Conduct Regulation*, B.C. Reg. 205/98 applying to police officers be amended to include an additional category of discreditable conduct in the form of a failure to cooperate with an investigation or a failure to provide a statement or to submit to an interview when required by an investigating officer.

[61] Section 77(3)(h) of the *Act* defines "discreditable conduct" as including off-duty conduct likely to bring discredit on the police department such as "(ii) contravening a provision of this Act or a regulation, rule or guideline made under this Act". That section was the basis of the July 27, 2015 PCC decision to extend the scope of Staff Sergeant Kyle's investigation. Following the Wood Report, substantial amendments were incorporated into the 2010 amendments to the *Act*. As they relate to these petitions, the relevant amendments follow.

[62] Section 100 provides an investigator with broad entry and search and seizure powers without a warrant.

[63] Section 101 sets out a member or officer's duty to cooperate with an investigation into their conduct. It provides:

Members' duty to cooperate with investigating officer, answer questions and provide written statements

101 (1) A member must cooperate fully with an investigating officer conducting an investigation under this Part.

(2) Without limiting subsection (1), at any time during an investigation under this Part and as often as the investigating officer considers necessary, the investigating officer may request a member to do one or more of the following, and the member must fully comply with that request:

- (a) answer questions in respect of matters relevant to the investigation and attend at a place specified by the investigating officer to answer those questions;
- (b) provide the investigating officer with a written statement in respect of matters relevant to the investigation;
- (c) maintain confidentiality with respect to any aspect of an investigation, including the fact of being questioned under paragraph (a) or being asked to provide a written statement under paragraph (b).

(3) A member requested to attend before an investigating officer must, if so requested by the investigating officer, confirm in writing that all answers and written statements provided by the member under subsection (2) are true and complete.

(4) Unless the discipline authority grants an extension under subsection (5), the member must comply with any request under subsection (2) within 5 business days after it is made.

(5) If satisfied that special circumstances exist, the discipline authority may extend the period within which the member must comply with a request under subsection (2).

[Emphasis added.]

[64] Sections 102 -108 provide further investigative powers and govern the investigation process. Section 106 makes it an offence for a member to knowingly hinder, delay, obstruct, or interfere with an investigating officer acting under Part 11.

[65] It is within the framework of those broad powers that I must consider the parties' competing positions.

[66] First, I summarize Constable Stewart's reasons for not attending a further interview as directed or ordered by Staff Sergeant Kyle and Deputy Chief Constable Rai. Summarized from the petition, they are:

- (a) s. 101 of the *Act* must be interpreted in light of the duties of fairness and reasonableness that govern the actions of all statutory decision-makers;

- (b) s. 101 of the *Act* must be interpreted in light of the duties of fairness and reasonableness that apply in labour law governing employment discipline generally;
- (c) it is unfair and unreasonable to require Constable Stewart to attend a second interview with Staff Sergeant Kyle because there was no fundamental change in the circumstances of the investigation between February 26, 2015, her first interview of him, and May 21, 2015 or July 22, 2015, the dates variously scheduled for her second interview; and
- (d) the direction for a second interview with Staff Sergeant Kyle was patently unreasonable, or unreasonable, and was not necessary for her to carry out her duties under the *Act*.

What legislative intent is reflected in s. 101?

[67] I agree with Staff Sergeant Kyle's submission that judicial review of administrative action, as characterized by the Supreme Court of Canada is, largely, a specialized branch of statutory interpretation: *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1087.

[68] Further, statutory interpretation in judicial review requires a reviewing court to seek the intent of Parliament by reading the words of the provision "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, [and] the object of the Act". This principal was first articulated by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21. It has been applied by our Court of Appeal in *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92 at para. 6.

[69] In my view, the legislative intent expressed in s. 101 is clear. As reflected in the emphasis I have added when citing the section, s. 101 imposes a statutory duty on members to cooperate with investigators conducting investigations under Part 11 of the *Act*. Section 101(2) gives the investigator express authority "at any time during an investigation ... and as often as the investigating officer considers necessary" to

request a member to do certain things, including attending at a place specified by the investigating officer to answer questions in respect of matters relevant to the investigation. Where so requested, the member “must fully comply with the request”.

[70] The record here establishes that Constable Stewart refused to comply with Staff Sergeant Kyle’s requests to attend a second interview with her pursuant to these mandatory provisions in s. 101 of the *Act*. The statutory scheme does not give Constable Stewart discretion to decline to attend an interview when requested to do so. The duty to attend is mandatory, not permissive.

[71] What Constable Stewart argues is that common law procedural fairness principles, arising from the employment law context, should inform my interpretation of s. 101 of the *Act* such that there is an obligation on Staff Sergeant Kyle to provide information about the discrepancies she has uncovered between his evidence and the evidence of other witnesses, and to provide him with a copy of the video, which may depict him, for his private review in advance of the interview.

Is there a common law duty of procedural fairness?

[72] The parties agree that, at the adjudicative stage of any discipline proceeding under the *Act*, procedural fairness must be provided to Constable Stewart. Procedural fairness in administrative adjudication requires administrative tribunals to proceed in accordance with the rules of natural justice. They disagree about whether there is any procedural fairness obligation to Constable Stewart at the investigative stage.

[73] Staff Sergeant Kyle submits that the content of any duty to act fairly at the investigative stage is minimal and would not require the disclosure sought by Constable Stewart as a precondition to him attending a second interview with Staff Sergeant Kyle. Constable Stewart argues that what he describes as “interrogation by ambush” does not meet the minimal standard of fairness.

[74] In *Nicholson v. Haldimand Norfolk (Regional) Police Commissioners*, [1979] 1 S.C.R. 311, the Supreme Court of Canada recognized a duty of procedural fairness

in respect of administrative proceedings other than quasi-judicial administrative tribunal proceedings. In that case, Constable Nicholson, a probationary constable with the Haldimand-Norfolk police force, was dismissed without being given advance notice or the opportunity to make representations with respect to his dismissal.

Speaking for the majority, then Chief Justice Laskin wrote at 324:

I am of the opinion that although the appellant clearly cannot claim the procedural protections afforded to a constable with more than eighteen months' service, he cannot be denied any protection. He should be treated "fairly" not arbitrarily. I accept, therefore, for present purposes and as a common law principle what Megarry J. accepted in *Bates v. Lord Hailsham* [[1972] 1 W.L.R. 1373], at p. 1378, "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness".

[75] The significance of the distinction between quasi-judicial decision-making (to which the rules of natural justice apply) and administrative decision-making (to which a general duty to be fair is required) has diminished over time.

[76] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 20, the Supreme Court of Canada recognized that administrative decisions affecting the rights, privileges, or interests of an individual will require a duty of fairness.

[77] *Baker* involved a procedural fairness challenge to an immigration officer's decision, on behalf of the Minister of Citizenship and Immigration, to refuse Ms. Baker an exemption and admission to Canada on humanitarian and compassionate grounds. Ms. Baker asserted a right to an oral interview before the immigration officer, notice to her children of the interview, a right for her and her children to make submissions at that interview, a right to have counsel present, and a right to reasons. The Court found that an oral hearing was not a general requirement for such decisions, an interview was not essential, and that Ms. Baker's opportunity to provide written documentation in support of her application satisfied the requirements of the participatory rights required by the duty of fairness. The real focus was on whether the procedure used, in all of the circumstances, was a fair one.

[78] As Justice L'Heureux-Dubé wrote in *Baker*, on behalf of the majority:

21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19* ... "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" ...

22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[79] In this case, Staff Sergeant Kyle is tasked with conducting an external investigation into a complaint about Constable Stewart's off-duty conduct and, as things have evolved, the deceit allegations and Constable Stewart's refusal to attend a second interview. Her role is investigative, not adjudicative. She is involved in a preliminary stage and will produce a report which may lead to potential disciplinary proceedings. Any duty of fairness owed to Constable Stewart, if it exists, will be minimal.

[80] As Justice L'Heureux-Dubé wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 670:

... not all administrative bodies are under a duty to act fairly ... The finality of the decision will also be a factor to consider. A decision of a preliminary nature will not in general trigger the duty to act fairly, whereas a decision of a more final nature may have such an effect (Dussault and Borgeat, op. cit., at p. 372).

[81] In *Knight*, the Court found that the duty of fairness which applied to the decision of the School Board to dismiss a director of education had been met because Mr. Knight knew the reasons for his dismissal and had an opportunity to be heard by the Board: at 686-687.

[82] A number of cases have considered whether, in the context of professional disciplinary proceedings, a duty of fairness arises at the investigative stage.

[83] In *Puar v. Association of Professional Engineers and Geoscientists*, 2009 BCCA 487, Mr. Puar asserted a denial of procedural fairness at the investigative stage of the Association's process. A Notice of Inquiry was issued against him and published on the Association's website, listing a number of allegations.

[84] Mr. Puar argued that he was denied disclosure and should have been afforded an opportunity to rebut the allegations before they were published. The Court of Appeal wrote:

[19] Mr. Puar's concern does not lie in his ability to ultimately respond to the allegation against him being in any way impaired. It lies in the fact the Notice of Inquiry was published. ...

[85] Distinguishing between the investigative stage and any discipline proceedings that might follow, the court wrote:

[22] ... before a decision is ultimately taken to discipline a member of the Association, the member is entitled to know the allegations against him and be given the opportunity to respond. *Netupsky* does not assist Mr. Puar. It does not establish that, where the investigative function in a disciplinary process is distinct from the adjudicative function, as is the case here, procedural fairness requires the duty to disclose an allegation and afford the opportunity to be heard to be discharged at the investigative stage. While early disclosure may be useful, it is not normally required until the adjudicative stage where the member can expect to be afforded a hearing.

[86] *Puar* was followed by the Nova Scotia Supreme Court in *Levesque v. Nova Scotia College of Optometrists*, .

[87] The issue in *Levesque* was the extent to which the investigative and decision-making function of the respondent college should be subject to court scrutiny. The court concluded, at para. 15, that the primary consideration in ascertaining the content of any duty of fairness in a regulated profession "will be the extent to which the decision under review may affect the applicant's professional status, and in particular, their licence". In that case, the complaints committee could decide to dismiss a complaint about a member on the basis that the complaint was

frivolous, vexatious or malicious, or refer the matter to a hearing committee if the member appeared to have engaged in professional misconduct. The court dismissed Dr. Levesque's concerns. It wrote:

[17] The decision to refer the complaint to the Hearing Committee does not impinge on [his] right to practice. He argues that the fact of the referral and that the hearing will be public is potentially harmful to his reputation and may have a negative impact on his practice. I acknowledge that a public hearing involving alleged unprofessional conduct might be harmful to the reputation of a professional; however, that is part of the price that has to be paid for practicing in a self-regulating profession. ... Any profession which chooses to regulate itself has an obligation to ensure that members of the public are able to see the discipline process in action. ...

[18] The potential embarrassment that may be suffered by Dr. Levesque is not sufficient to impose a high level of procedural fairness on the work of the Complaints Committee. That Committee is charged with the responsibility of investigating complaints and determining if they pass the relatively low threshold justifying referral to a formal hearing. Section 31 of the *Act* permits the Committee to engage assistance as it deems necessary which could include consultation with other optometrists, particularly with respect to the standard of care. There is no statutory requirement to provide that information to a member for comment, and I do not believe that the nature of the Complaints Committee function justifies imposing that obligation as part of the duty of procedural fairness.

[88] Similarly, in *George v. Canada (Attorney General)*, 2007 FC 564, the police officer argued that she was denied procedural fairness when she was not offered an opportunity to be heard before she was suspended. Justice Tremblay-Lamer wrote:

[87] ... the decisions to investigate allegations and to suspend an officer with pay pending that investigation are not final disciplinary decisions; rather they are essentially preliminary non-judicial decisions. Generally speaking, decisions of a preliminary nature will not trigger a fairness duty: *Knight v. Indian Head School*. ... Even in cases where preliminary decisions do trigger a duty to act fairly, such as in formal inquiries where personal reputations are at stake, the individuals implicated will not be entitled to full trial-like procedural protections during this pre-trial fact finding stage ... procedural fairness requirements in the context of a suspension with pay pending an administrative investigation are necessarily lower than those triggered by disciplinary proceedings which would follow an adverse investigation are necessarily lower than those triggered by disciplinary proceedings which would follow an adverse investigation. ... the lower procedural fairness requirement at the preliminary stage is not a license to treat people unfairly; rather it is necessary to allow investigators the chance to do their job and it is corollary to the higher standard to be applied to any subsequent proceedings ...

[89] In sum, these cases establish that the scope of the duty of fairness is minimal at the investigative stage of a complaint about professional misconduct. The investigative stage is preliminary and non-judicial in nature. The content of that duty in Constable Stewart's case consists of providing him with information about the complaint which was made against him and being given an opportunity to respond to it. The record is clear that both of these fairness considerations were met in Constable Stewart's case.

[90] In addition, in this case, Constable Stewart has also been told that two witnesses have come forward with evidence that may contradict his. One of those witnesses is a fellow officer and the other a cab driver. He has also been told that there is a video which may depict him. There is nothing in the evidence to suggest that Staff Sergeant Kyle will not provide Constable Stewart an outline of what the two contradictory witnesses said or that she would not provide him an opportunity to view the video. In her last interview, she advised him about the then available evidence which appeared to contradict his and gave him an opportunity to respond. She also provided him with an opportunity to step out of the interview to speak to Mr. Stamatakis, when he asked to do so.

Do employment or labour relations principles have any application to this complaint?

[91] Constable Stewart also maintains that s. 101 of the *Act* must be interpreted in accordance with employment law or collective agreement principles of fairness.

[92] I have concluded that his argument in that regard cannot succeed.

[93] The *Act* clearly differentiates between: (1) internal discipline matters, which are internally handled by police departments and may be the subject of grievance proceedings under collective agreements; and (2) misconduct proceedings relating to public trust complaints which are governed exclusively by Part 11 of the *Act* and are conducted by discipline authorities or adjudicators.

[94] The clear statutory language of s. 101 does not leave room for employment or labour relations policies to modify the mandatory obligation of Constable Stewart to participate in this investigation and to attend, as often as Staff Sergeant Kyle requires, interviews in furtherance of her investigation.

[95] *In the Matter of Constable B*, a January 26, 2016 decision on review on the record by a delegate of the PCC, does not support Constable Stewart's argument.

[96] In that case, a delegate of the PCC considered whether Constable B had sufficient cause for refusing to provide a statement to another police authority in their investigation of an assault on Constable B's partner. Constable B refused to provide a statement before she had an opportunity to review video footage of the incident. She was concerned that any statement she gave might incriminate her with respect to possible charges against her for misuse of a firearm. The PCC delegate concluded that Constable B had sufficient cause to refuse to assist in the investigation until she had seen the video.

[97] *Constable B* does not support a general proposition that there is a duty of fairness, at an investigative stage, to provide video evidence to an officer in advance of an interview under s. 101.

Remedy

[98] While I accept that it was open to Staff Sergeant Kyle to conclude her investigation based on the interview she held with Constable Stewart and, in so doing, to comment that he was given an opportunity to respond to contradictory evidence and to a video but chose not to do so, that, in my view, opens the door to other officers to refuse subsequent interviews contrary to the mandatory language in s. 101. Staff Sergeant Kyle was appointed to conduct the investigation and entitled to insist that Constable Stewart attend another interview with her before she concluded it.

[99] In light of Constable Stewart's clear and deliberate breach of his statutory duty to comply with Staff Sergeant Kyle's requests that he attend the second interview with her, the Court must craft an appropriate remedy.

[100] Albeit in a somewhat different context, *mandamus* was considered in *Canada (Royal Canadian Mounted Police Public Complaints Commission) v. Canada (Attorney General)*, 2005 FCA 213, as a remedy to compel the RCMP Commissioner to disclose relevant information to the Commission for Public Complaints Against the RCMP, an independent federal agency established to review and investigate public complaints about the conduct of the RCMP. The Federal Court of Appeal said, at para. 58:

Without a legal means of ensuring compliance with the Act by the [RCMP] Commissioner, the Commission becomes, for all practical purposes, hindered to the point of uselessness. I entirely agree with the following comments made by the learned judge when discussing the respondent's argument that the Commission had no power to initiate legal proceedings. At paragraphs 163 and 164 of his decision, he wrote:

If the Respondent is correct in this regard it would mean that, under ss. 45.41 of the RCMP Act, the Complaints Commission has no right to compel the RCMP Commissioner to provide either a copy of the complaint or any material relevant to that complaint. Just as a right without a remedy is no right at all, so an obligation without the means to compel it is no obligation at all. ...

[101] In circumstances where Staff Sergeant Kyle has exhausted all means under the *Act* to have Constable Stewart to comply with his statutory duty to cooperate in her investigation it is appropriate for this Court to make an order in the nature of *mandamus* under the *JRPA* to compel the performance of a statutory duty owed by Constable Stewart to Staff Sergeant Kyle: *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 at para. 55, affirmed *Apotex Inc. v. Canada (Attorney General)*, [1994] 3 S.C.R. 1100. In *Apotex*, the Federal Court of Appeal set out the principal requirements which must be satisfied before an order in the nature *mandamus* will issue together with the authorities supporting those requirements. In summary, as they apply to this case, those requirements are:

- a) a public legal duty to act which is owed to the applicant;

- b) a clear right to performance of that duty, including the satisfaction of all conditions precedent giving rise to the duty, and (i) a prior demand for performance of the duty; (ii) a reasonable time given to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either express or implied;
- c) no other adequate remedy is available;
- d) *mandamus* will be of some practical value and effect;
- e) there is no equitable bar to the exercise of discretion; and
- f) on a balance of convenience *mandamus* should issue.

[102] I conclude that all of the principal *mandamus* requirements are satisfied in this case. There is a public legal duty for Constable Stewart to comply with Staff Sergeant Kyle's request to attend another interview and that mandatory duty is owed to Staff Sergeant Kyle. Previous demands have been made, allowing a reasonable time to comply, and Constable Stewart has refused. The *Act* does not contain another mechanism for enforcement of the duty. Further charges of discreditable conduct do not have the effect of having Constable Stewart attend the interview. *Mandamus* will have the effect of allowing Staff Sergeant Kyle to conclude her investigation in the way she has decided is appropriate. There is no equitable bar to the relief she seeks as Constable Stewart will not be prejudiced by having to attend another interview. The full range of possible answers to questions asked by Staff Sergeant Kyle remain open to him.

[103] Constable Stewart is ordered, pursuant to s. 2 of the *JRPA*, to attend a further interview with Staff Sergeant Kyle as required by her under s. 101(2) of the *Act*.

“MacNaughton J.”