IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dickhout v. The Police Complaint Commissioner,* 2011 BCSC 880

Date: 20110630
Docket: S110672
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

In the Matter of the *Police Act*, R.S.B.C. 1996, c. 367

And in the Matter of a Discipline Proceeding Against Constable Daniel Dickhout #86 of the South Coast British Columbia Transit Authority Police Service

Between:

Daniel Dickhout

Petitioner

And

The Police Complaint Commissioner, and The Honourable Ian Pitfield

Respondents

Before: The Honourable Madam Justice Gropper

On judicial review from: The Commissioner's Issuance of a Notice of Public Hearing on November 19, 2010.

Reasons for Judgment

Counsel for the Petitioner:	S. M. Boorne
Counsel for the Respondents:	J.D. Waddell, QC
Counsel for the Public Hearing Counsel:	J. Doyle
Place and Date of Hearing:	Vancouver, B.C. April 27, 2011
Place and Date of Judgment:	Vancouver, B.C. June 30, 2011

Introduction

[1] This matter arises out of an incident which occurred at the Scott Road skytrain station in Surrey on September 13, 2007. On that date the petitioner, Daniel Dickhout, a police officer with the South Coast British Columbia Transportation Authority Police Service (transit police service) deployed his conductive energy weapon (CEW) during his arrest of Christopher Lypchuk. Mr. Lypchuk fell and struck his head, sustaining an injury to his forehead.

[2] The B.C. Civil Liberties Association (BCCLA) brought a series of complaints, including this one, to the office of the police complaint commissioner. There have been several proceedings which I will describe further, but this petition challenges the commissioner's issuance on November 19, 2010, of a notice of public hearing (notice) under s. 143(1)(b) of the *Police Act*, R.S.B.C. 1996, c. 367 (*Act*) and appointment of retired justice Ian Pitfield to preside over that hearing.

[3] The *Act* governs conduct and discipline of municipal police officers in British Columbia. The complaints were brought under the version of the *Act* which was in force in 2007. The *Act* was amended on March 31, 2010. At t*he* conclusion of the hearing, I granted an order prohibiting the public hearing before adjudicator Pitfield from proceeding on May 2, 2011*,* until *40* days after this decision.

Issues

[4] The issues to be determined are:

1. Whether the notice should be set aside on the basis that the commissioner failed to provide reasons for ordering the public hearing;
2. Whether the notice circumvents the October 29, 2010 order of Madam Justice Dickson.

Background

[5] This is the second application for judicial review by the petitioner relating to the disciplinary process undertaken to review his use of a CEW on September 13, 2007.

[6] The first petition sought an order setting aside the June 17, 2010 decision of Chief Constable Brad Parker, the discipline authority appointed under s. 26(1) the then applicable *Act.* Chief Parker refused to recuse himself from presiding over a disciplinary hearing for reasonable apprehension of bias. The basis of the allegation was that Chief Parker, on his own initiative, contacted a retired use-of-force trainer, John McKay, to provide a use-of-force report. The petitioner alleged that in contacting and meeting with Mr. McKay, Chief Parker had embarked upon an investigation. His contacts with Mr. McKay were without the prior knowledge of the petitioner and were *ex parte*.

[7] On October 29, 2010, Madam Justice Dickson ordered that Chief Parker be removed for reasonable apprehension of bias: *Dickhout v*. *Parker* (October 29, 2010), Vancouver S104994 (S.C.). She remitted the matter to the current chief officer of the transit police service for the appointment of a new discipline authority to preside over the hearing in accordance with the provisions of the *Act*. She stated at para. 39:

> I conclude that the respondent stepped out of the role of impartial adjudicator when he contacted and met privately with Mr. McKay to gather further information for consideration at the disciplinary hearing...I find that his reason for so doing, however well-intentioned, is irrelevant beyond the fact that his purpose was to obtain further information on the key issue for determination. In these circumstances, I am satisfied that an informed person could form the view that the respondent created a reasonable apprehension of bias...

[8] A new discipline authority has not been appointed to preside over a new disciplinary hearing. On November 19, 2010 the commissioner issued a notice of public hearing and appointed Ian Pitfield as adjudicator.

[9] The notice reviews the factual background of the complaint, including the order of Dickson, J. and states (at paras. 11 and 12):

> 11. The Police Complaint Commissioner, having reviewed the investigation and discipline proceedings into this matter to date, pursuant to section 143(1)(b) of the *Police Act* had determined that a public hearing in this matter is required to preserve or restore public confidence in the investigation of misconduct and the administration of police discipline. In arriving at this determination I have considered several relevant factors including but not limited to the following:

a) The complaint is serious in nature as the alleged misconduct involved a significant breach of trust.

b) The nature and seriousness of the alleged harm to have been suffered by the person involved in this matter.

c) There is a reasonable prospect that a public hearing will assist in determining the truth.

d) There is an arguable case that the investigation of this matter was flawed.

e) A public hearing is not limited to the evidence and issues that were before a discipline authority in a discipline proceeding, therefore would allow for the introduction of both use of force opinion reports submitted outside of the formal investigation into this matter.

12. It is therefore alleged that Constable Dickhout committed the following disciplinary default pursuant to section 77 of the *Police Act*:

a) Abuse of Authority: contrary to section 77 of the *Police Act*, subject member committed the disciplinary default of abuse of authority, in the performance of duties, intentionally or recklessly used unnecessary force.

Position of the Parties

Petitioner

[10] The petitioner argues that the appropriate standard of review of the commissioner's decision is correctness.

[11] The basis of the petitioner's submission is that the commissioner is a statutory decision maker under the *Act* and his decisions require reasons, and seeks to rely upon *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 for this assertion. Reasons are required so that the individuals affected know the process by which the decision maker came to his or her conclusions and so the court, exercising a judicial review function, is able to examine the validity of the decision for the existence of "justification, transparency, and intelligibility in the decision making process" (*Dunsmuir* at para. 47).The petitioner also relies on *Lake v. Canada (Minister of Justice),* 2008 SCC 23, where the Court states at para. 46:

> As for the adequacy of the Minister's reasons, while I agree that the Minister has a duty to provide reasons for his decision, those reasons need not be comprehensive. The purpose of providing reasons is twofold: to allow the individual to understand why the decision was made; and to allow the reviewing court to assess the validity of the decision.

[12] The petitioner argues that the commissioner did not provide any reasons to support his conclusion that a public hearing be held, but merely restated the provisions of s. 138(2)(a) without providing any analysis, explanation, or objective evidence.

[13] In respect of the factors referred to in para. 11 of the commissioner's notice, the petitioner asserts that there is no evidence describing the seriousness of the alleged harm, except that Mr. Lypchuk suffered a cut to the forehead. In respect of whether there is a reasonable prospect that a public hearing will assist in determining the truth, the petitioner argues that there is nothing which suggests that a public hearing will be any more successful in arriving at the "truth" than the disciplinary hearing ordered to be conducted by Dickson J. in October 2010. The commissioner states that there is an "arguable case that there was a flaw in the investigation" to which the petitioner responds that if there are flaws it is unclear what they are and when they came to light. In respect of the admissibility of evidence, the petitioner argues that the commissioner has predetermined the admissibility of evidence and has unduly influenced or fettered the discretion of the trier of fact in the case.

[14] The petitioner asserts that the court may draw a negative inference from the commissioner's refusal to provide any evidence or reasons for his decision, such that if evidence had been presented it would not have favoured the commissioner's determination.

[15] The petitioner urges that a public hearing is not necessary to restore public confidence in the police, particularly when this court has already ordered that a new hearing be held before a different disciplinary authority. The petitioner argues that public confidence in the police will be undermined by the commissioner refusing to abide by the order of Dickson J.

Commissioner

[16] The commissioner argues that the standard of review applicable in this case is reasonableness. Section 143(1)(b) refers to the commissioner's opinion that a

public hearing is required. The commissioner exercises his discretionary power in accordance with that section. Where a decision maker is interpreting its own statute with which it has particular familiarity, the court will usually employ deference: *Dunsmuir* at paras. 52 to 62.

[17] The commissioner says that he is not required to provide reasons under s. 130. The commissioner is acting in his gatekeeper function under this section, not as an adjudicator. There is no requirement on the commissioner to seek submissions or hold a hearing. The *Act* specifies when reasons are required, as it has in s. 143(10) which requires an adjudicator in a public hearing is required to give reasons; s. 125(1)(b) where a disciplinary authority must provide reasons at the conclusion of the hearing; s. 119(3) where the disciplinary authority determines whether there will be witnesses at the disciplinary proceedings; s.112(4) where a disciplinary authority determines there is no need for a disciplinary proceeding; and s. 110(7) where the police board requires a suspension without pay of a police officer.

[18] The commissioner argues that para. 11 of the notice should not be read in a vacuum. It must be considered within the context of the entire notice. The commissioner is not adjudicating on any matters addressed in para. 11 and, if read as a whole, the notice demonstrates that in his opinion: the complaint is serious in nature. This is evidenced by the fact that an external body, the BCCLA, brought the complaint; by the question of the nature and seriousness of the alleged harm to Mr. Lypchuk, and the need to determine whether it was initiated by the use of the CEW; the reasonable prospect that a public hearing will assist in determining the truth (although it is not necessary to demonstrate that it will do so); and the arguable case that the investigation of the matter was flawed, including the obtaining of the McKay opinion by the previous disciplinary authority as well as potential oversight in the final investigation report. The commissioner has not determined that the investigation was flawed. A public hearing is not limited to the evidence and issues before the discipline authority. It could address the contradictory use-of-force opinions. The commissioner is not determining their admissibility.

[19] The commissioner also argues that judicial review of his decision is premature. The *Act* is intended to be a complete code for the resolution of disciplinary matters involving police constables. The legislature has given the adjudicator exclusive jurisdiction to determine such questions, and the adjudicator's non-discretionary determinations are reviewable by the court, subject to a privative clause (s. 154(3)), unless there are exceptional circumstances. The law requires that the adjudicator be allowed to decide these matters in the first instance and that the petitioner exhaust his remedies within the comprehensive discipline adjudication scheme created by the legislature and outlined in the *Act*. Further, delay is a factor related to the public interest in the proceeding. The incident involving Mr. Dickhout's use of a CEW involving Mr. Lypchuk occurred in 2007. The complaint was filed in April 2008. This is the second petition for judicial review instituted by the petitioner. The entire matter has to move along to a public hearing before an impartial adjudicator in order that there can be a full assessment on the merits.

[20] Finally, the commissioner argues that his issuing a notice does not conflict with the order of Dickson J. She considered the issues before her. She did not consider the residual discretion of the commissioner to order a public hearing. Her order does not prevent the issuance of a notice as none was contemplated or addressed before her. In any event, the commissioner has not made an order that would interfere with or prevent the appointment of the new discipline authority and the conduct of a discipline proceeding.

Discussion

Statutory Framework

[21] The relevant provisions of the *Act* are:

> **Determining whether to arrange public hearing or review on the record in other circumstances**
>
> 138 (1) On
>
> ...
>
> (b) the police complaint commissioner's own initiative if the limitation period established for making the request under section 136 (1) *[time*

> *limit for requesting public hearing or review on the record]* has expired,
>
> the police complaint commissioner must arrange a public hearing ... if the police complaint commissioner
>
> ...
>
> (d) ...considers that a public hearing ... is necessary in the public interest.
>
> (2) In considering whether a public hearing ... is necessary in the public interest, the police complaint commissioner must consider all relevant factors including, without limitation, the following factors:
>
> (a) the nature and seriousness of the complaint or alleged misconduct;
>
> (b) the nature and seriousness of harm or loss alleged to have been suffered by any person as a result of the conduct of the member or former member, including, without limitation, whether
>
> (i) the conduct has caused, or would be likely to cause, physical, emotional or psychological harm or financial loss to a person,
>
> (ii) the conduct has violated, or would be likely to violate, a person's dignity, privacy or other rights recognized by law, or
>
> (iii) the conduct has undermined, or would be likely to undermine, public confidence in the police, the handling of complaints or the disciplinary process;
>
> (c) whether there is a reasonable prospect that a public hearing or review would assist in determining the truth;
>
> (d) whether an arguable case can be made that
>
> (i) there was a flaw in the investigation,
>
> (ii) the disciplinary or corrective measures proposed are inappropriate or inadequate, or
>
> (iii) the discipline authority's interpretation or application of this Part or any other enactment was incorrect.
>
> ...
>
> **Determinations may be made available to public**
>
> 140 (1) The police complaint commissioner may make available to members of the public, by both of the following means, any determination made under section 138 *[determining whether to arrange public hearing or review on the record]* ...
>
> (a) posting the determination on a publicly accessible website maintained by or on behalf of the police complaint commissioner;
>
> (b) having the determination available for public inspection in the office of the police complaint commissioner during regular office hours.

> **Appointment of adjudicator for public hearing or review on the record**
>
> 142 (1) ...when the police complaint commissioner determines that there are sufficient grounds to arrange a public hearing or review on the record under section 138 *[determining whether to arrange public hearing or review on the record]* ... the police complaint commissioner must request the Associate Chief Justice of the Supreme Court to
>
> > (a) consult with retired judges of the Provincial Court, the Supreme Court and the Court of Appeal, and
> >
> > (b) recommend one or more retired judges to act as adjudicator for the purposes of section 141 *[review on the record]* or 143 *[public hearing]*, as the case may be.
>
> **Public hearing**
>
> 143 (1) ...the police complaint commissioner must appoint an adjudicator under section 142 to conduct a public hearing under this section ...if ... the following applies:
>
> ...
>
> > (b) in the police complaint commissioner's opinion, a public hearing of the matter under this section is required to preserve or restore public confidence in the investigation of misconduct or the administration of police discipline.
>
> (2) A public hearing is a new hearing concerning conduct of a member or former member that was the subject of an investigation or complaint under this Division.
>
> (3) A public hearing is not limited to the evidence and issues that were before a discipline authority in a discipline proceeding.
>
> ...
>
> (10) Within 10 business days after reaching a decision under subsection (9), the adjudicator must provide notice of that decision, together with written reasons...

Standard of Review

[22] The Court in *Dunsmuir* directs that the process of judicial review involve two steps. The first is to determine whether the jurisprudence has already determined the degree of deference to be accorded to the tribunal; and second, where there is a paucity of jurisprudence, the Court must analysis the relevant factors to identify the proper standard of review: (para. 62).

[23] The degree of deference which must be accorded to the commissioner in reviewing his determination that a public hearing should be held has not been

considered in the context of a petition for judicial review. I will therefore analyze the factors described by the Court in *Dunsmuir* at para.64:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[24] It is unnecessary to consider whether there is a privative clause in relation to the commissioner's determination that a public hearing be held. He accepts that his decisions are subject to judicial review.

[25] The commissioner has many responsibilities under the *Act.* One responsibility is to ensure public confidence in the investigation of misconduct or of the administration of police discipline. Section 143(1)(b) of the *Act* provides the commissioner with the exercise of discretionary power to appoint an adjudicator to conduct a public hearing, if in the commissioner's opinion a public hearing is required to preserve or restore public confidence. *Dunsmuir* suggests that where discretion is being exercised, deference will usually apply automatically. "Deference will usually result where a tribunal is interpreting its own statute": (para. 54).

[26] In this case, I find that the standard of review is reasonableness. The commissioner is interpreting his own legislation and is entitled to particular deference where he determines that a public hearing is warranted.

[27] The reasonableness standard is summarized in *Celgene Corp. v. (Attorney General),* 2011 SCC 1, at para. 34:

> Only if the Board's decision is unreasonable will it be set aside. And to be unreasonable, as this Court said in *Dunsmuir*, the decision must be said to fall outside "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (para. 47).

Analysis

Requirement to Provide Reasons

[28] The petitioner relies on *Dunsmuir to* argue that the commissioner has a duty to provide reasons for his determination that a public hearing ought to be held. As the Court states at para. 47:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.

[29] The petitioner's interpretation of that paragraph is that the commissioner is required to provide reasons in the context of ordering a public hearing. He must consider the factors outlined in s. 138, not merely restate them and add that he has considered them. Based upon *Dunsmuir'*s requirement that there must be justification, transparency and intelligibility, every decision, determination or opinion made by an administrative tribunal requires written reasons.

[30] In my view, a proper interpretation of *Dunsmuir* does not require that an administrative tribunal provide reasons in every case.

[31] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Court held that in certain circumstances procedural fairness would require that reasons be provided. There does not appear to be any rule which states that all statutory decision makers must provide reasons. *Baker* sets out the factors which should be considered in determining the level of procedural fairness required and whether in certain circumstances procedural fairness would require that reasons be provided.

[32] The Court outlines the factors affecting the contents of the duty of fairness at paras. 21 – 28. They are:

1. The nature of the decision being made.
2. The nature of the statutory scheme and the terms of the statute under which the administrative decision maker operates.

3. The importance of the decision to the individual affected.

4. The legitimate expectations of the person challenging this decision.

5. The choice of procedures made by the tribunal and its institutional constraints.

[33] *Baker* notes that the list of factors is not exhaustive and that other factors may be important. The Court states at para. 28:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

The nature of the decision being made

[34] The determination to arrange a public hearing is to be made on the basis that the commissioner considers that a public hearing is necessary in the public interest. This decision involves the exercise of discretion and a consideration of policy. It is not a decision after a full hearing and submissions. In this case, the commissioner is required by the *Act* to order a public hearing on his own initiative if he considers it necessary in the public interest based upon his consideration of the relevant factors including those listed in s. 138(2).

[35] The factors must be considered before determining that a public hearing is warranted, the commissioner's determination does not result in a decision, other than a decision to hold a public hearing. This, in my view, would attract the fewest procedural requirements. By contrast, the adjudicator appointed to conduct the public hearing does attract a high level of procedural fairness and the statute provides that the adjudicator must provide written reasons (s. 143(10)).

The nature of the statutory scheme and terms of the statute under which the administrative decision operates

[36] As noted by the commissioner, he has a broad discretion to determine if the public interest requires that a public hearing be held as part of his "gate keeping" function under the *Act*.

The importance of the decision to the individual affected

[37] Where the rights of an individual may be seriously impacted as a result of the decision, procedural fairness requirements will increase. While a disciplinary decision is important to the petitioner because it will go to his reputation in his career, the commissioner's determination to hold a public hearing does not address whether the petitioner is deserving of discipline, nor, if discipline is appropriate, the nature of the discipline. All these matters will be before the adjudicator, in whose process a significant degree of procedural fairness is required.

[38] Applying *Lake* to suggest that written reasons should be provided here ignores the facts of that case. *Lake* reviewed the decision of the Minister of Justice to extradite Mr. Lake to the United States to stand trial for distributing crack cocaine in Detroit. Among his other grounds of appeal, Mr. Lake argued that the Minister failed to provide adequate reasons why extradition was preferred. The Minister's decision had significant importance to Mr. Lake, yet the Court determined that the Minister was only required to give brief reasons to "make it clear that [the Minister] considered the individual's submissions against extradition and ... some basis for understanding why those submissions were rejected" (at para. 46).

[39] There should be less of a requirement to provide even brief reasons here, where the commissioner's determination that there will be a public hearing only goes to a matter of process, not to the petitioner's individual rights.

Legitimate expectations of the person challenging the decision

[40] The petitioner, to establish this factor, must provide evidence that the usual practice of the commissioner in determining that a public hearing ought to be held involves his issuing reasons. The petitioner has not demonstrated a practice of any sort related to the commissioner providing reasons for determining that a public hearing is appropriate.

The choice of procedures made by the tribunal and its institutional constraints

[41] The commissioner is given discretion under the *Act* to determine whether a public hearing is appropriate, provided he considers the factors outlined in s. 138. While the commissioner must proceed fairly, he has been given the scope in the legislation to perform his public interest functions efficiently. Requiring the commissioner to provide extensive reasons relating to his determination may negatively impact that efficiency. I agree with the commissioner that the public interest is served by moving this matter along to a public hearing before an impartial adjudicator where there can be a full assessment on the merits.

Summary

[42] The degree of procedural fairness required of the commissioner in determining that a public hearing be arranged under s. 138(2)(b) of the *Act* does not require that written reasons for that determination be provided. If is sufficient for the commissioner to review the background of the complaint, explain that he has considered the factors and issue a notice of public hearing. Applying the reasonableness standard does not require the tribunal to issue decisions in respect of its every determination. The *Baker* analysis demonstrates that the degree of procedural fairness required in respect of this determination is minimal: it engages the discretion of the commissioner to determine if a public hearing is warranted in consideration of the public interest; the determination is one of process; and the adjudicator of the public hearing is required to observe a high degree of procedural fairness, given that Mr. Dickhout's rights might be seriously affected. Further, the *Act* specifies that the adjudicator must provide written reasons for his decision.

[43] *Dunsmuir* does not require a tribunal to provide written reasons in every case in order to demonstrate "justification, transparency, and intelligibility in the decision making process." When I apply the test for reasonableness, I conclude that the commissioner's determination is within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47). He reviewed the facts, applied the factors which he was required to apply in accordance

with the *Act* and made a determination that was within the range of possible acceptable outcomes.

Does the notice circumvent the order of Madam Justice Dickson of October 29, 2010?

[44] In his first petition before Dickson J., the petitioner sought an order remitting the matter to the chief officer of the transit police service to appoint a new disciplinary authority to preside over a new disciplinary proceeding. The commissioner's decision to arrange a public hearing does not offend that order. I agree with the commissioner that Dickson J. considered the issues before her. She did not consider the residual discretion of the commissioner to order a public hearing.

Conclusion

[45] The petition is dismissed. The public hearing before Adjudicator Pitfield may proceed 40 days after this decision.

"Gropper J"