IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20110518
Docket: S110641
Registry: Vancouver

Between:

Wendy Bowyer

Petitioner

And:

Stan T. Lowe, the Police Complaint Commissioner, and the Honourable Mr. Justice Ian Pitfield (retired)

Respondents

Before: The Honourable Mr. Justice Kelleher

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	D. Butcher, Q.C.
Counsel for the Respondents:	J. Heaney
Date and Place of Hearing:	May 18, 2011 Vancouver, B.C.

[1] THE COURT: This is a petition seeking an order quashing an appointment made under the *Police Act*, R.S.B.C. 1996, c. 367, and declaring certain decisions as having no force and effect.

[2] The petitioner, Wendy Bowyer, is a municipal constable within the meaning of the *Police Act*, and a member of the New Westminster Police Service. The respondent, Stan T. Lowe, is the Police Complaint Commissioner (the "Commissioner"). The respondent Ian Pitfield is a retired judge of this court.

[3] On March 23, 2009, the plaintiff and other police officers attended at an apartment in the City of New Westminster to arrest a youth pursuant to a warrant. The following day, the New Westminster police received a complaint, pursuant to the *Police Act*, alleging misconduct on the part of the petitioner and other officers.

[4] The New Westminster Police Service commenced an investigation into that complaint. In the course of the investigation, various allegations were made about the petitioner's conduct. There were, in all, five allegations of misconduct against the petitioner.

[5] On September 14, 2010, the investigator, Sergeant Todd Matsumoto, submitted his final investigation report. He recommended that the allegations in Counts 1 to 4 be found substantiated and that the allegation in Count 5 be found unsubstantiated.

[6] On September 29, 2010, Deputy Chief Constable Dave Jones issued a decision pursuant to s. 112 of the *Police Act*. He concluded that Counts 1, 3, and 4 were substantiated, and Counts 2 and 5 were unsubstantiated. Deputy Chief Constable Jones is the discipline authority within the meaning of the *Police Act*.

[7] Section 112(5) provides:

> 112 (5) The discipline authority's decision under subsection (4)
>
> (a) is not open to question or review by a court on any ground, and
>
> (b) is final and conclusive, unless the police complaint commissioner appoints a retired judge under section 117(1).

[8] Under s. 117, the Commissioner can review a decision by a discipline authority that conduct does not constitute misconduct. If the Commissioner considers there is a reasonable basis for believing the decision is incorrect, he can appoint a retired judge. The retired judge is then to review the original report of the investigating officer and make her or his own decision as to whether the allegation is substantiated.

[9] On October 29, 2010, the Commissioner reviewed Deputy Chief Constable Jones' decision and concluded there was a reasonable basis to conclude that his conclusion respecting Count 2 was incorrect. He then appointed "... retired Provincial Court judge Brian Neal as adjudicator to review this matter and to arrive at his own conclusion based on the evidence".

[10] This process is pursuant to recent amendments to the *Police Act*. The Commissioner's letter is entitled "Notice of Appointment of New Discipline Authority". This is an inaccurate description of the appointment. Mr. Lowe explained the process in the letter of appointment and he said:

> Pursuant to Section 117(9) if the retired judge determines that the conduct in question appears to constitute misconduct, they assume the role of a new Discipline Authority for all purposes under the Act. If the retired judge as adjudicator determines the conduct in question does not constitute misconduct, he or she must provide reasons and the decision is final and conclusive.

[11] The title of the letter is inaccurate, because the retired judge does not become the "new discipline authority", unless and until he or she decides that the conduct in question appears to constitute misconduct.

[12] On November 22, 2010, Judge Neal issued reasons described as "Notice of Discipline Authority's Decision". In this decision, he carefully considered all five allegations. He understood "this matter" in the letter of appointment to include all five allegations, not simply the allegation in Count 2. He reached the same conclusion as Sergeant Matsumoto; namely, that the allegations in Counts 1, 2, 3, and 4 were substantiated, and the allegation in Count 5 was not substantiated.

[13] On January 31, 2011, the petitioner in this matter commenced a petition in respect of Judge Neal's determination. The basis of that petition is that the Commissioner exceeded his jurisdiction.

[14] That petition was not pursued. Judge Neal recused himself by letter dated March 23, 2011.

[15] On March 25, 2011, the day after receiving Judge Neal's letter of recusal, the Commissioner appointed Ian Pitfield, a retired judge of this court. The letter of appointment is more aptly entitled "Notice of Appointment of Retired Judge". The letter differs from the letter of appointment of Judge Neal in another respect. The appointment directs Mr. Pitfield to "... review this matter and arrive at a decision with respect to Count 2 based on the evidence". The letter then goes on:

> Pursuant to section 117(9) if retired Justice Pitfield determines that the conduct as set out in Count 2 appears to constitute misconduct, retired Justice Pitfield assumes the powers and performs the duties of a discipline authority in respect of all substantiated allegations associated with this matter.

[16] The petition was filed on April 27, 2011. It alleges that the Commissioner exceeded his jurisdiction. It is put this way in the petition:

> 6. Section 117(1) of the *Act* permits the Police Complaint Commissioner to appoint "a retired judge" to review a decision of a discipline authority. The Honourable Judge Brian M. Neal is a part-time judge holding office pursuant to s. 9.1 of the *Provincial Court Act*, R.S.B.C. 1996, c. 379, and was not a "retired judge" at the time of his delegation. Judge Neal's appointment, and subsequent decision, were both nullities.
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> 7. Section 117(3) of the *Act* requires the Police Complaint Commissioner to appoint a retired judge within 20 business days after receiving the notice under s. 112 of the *Act*. Notice was provided on September 29, 2010. Mr. Pitfield was appointed on March 25, 2011.
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> 8. Failure to comply with the strict time limits outlined in the Act resulted in the Police Complaint Commissioner losing jurisdiction over the discipline matter of the Petitioner.
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> 9. In the alternative, the *Act* does not permit the Police Complaint Commissioner to appoint a second retired judge to conduct a section 117 review and potentially become the second Discipline Authority.

[17] The petitioner takes the position that Judge Neal is a part-time judge of the Provincial Court and not a retired judge within the meaning of the *Police Act*. It is not necessary to address this submission. Judge Neal has recused himself. No action is being taken on the conclusions that he reached. Mr. Pitfield has been appointed to approach the matter anew.

[18] There are two matters before me:

> (1) Was the Commissioner entitled to appoint Mr. Pitfield outside the 20 business day time limit in s. 117(3) of the *Police Act*?
>
> (2) Having made one appointment under s. 117, did the Commissioner have the right to appoint Mr. Pitfield when the first appointee recused himself?

[19] Section 117(1) and (3) provide:

> (1) If, on review of a discipline authority's decision under section 112 (4) or 116 (4) that conduct of a member or former member does not constitute misconduct, the police complaint commissioner considers that there is a reasonable basis to believe that the decision is incorrect, the police complaint commissioner may appoint a retired judge recommended under subsection (4) of this section to do the following:
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> > (a) review the investigating officer's report referred to in section 112 or 116, as the case may be, and the evidence and records referenced in that report;
> >
> > (b) make her or his own decision on the matter;
> >
> > (c) if subsection (9) of this section applies, exercise the powers and perform the duties of discipline authority in respect of the matter for the purposes of this Division.
>
> ...
>
> (3) An appointment under subsection (1) must be made within 20 business days after receiving the notification under section 112 (1) (c) or 116 (1) (c).

[20] There is no doubt that the appointment of Mr. Pitfield took place more than 20 days after the receipt of notification under s. 112(1)(c).

ANALYSIS

[21] For the reasons below, I conclude that the time limit for the appointment of a discipline authority is directory, not mandatory, and it was open to the Commissioner to appoint Mr. Pitfield after the recusal of Judge Neal.

Was the Commissioner entitled to appointment Mr. Pitfield outside the 20 business day time limit?

[22] The use of the word "must" indicates the time limit under s. 117(3) of the *Police Act* is imperative not discretionary: see s. 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238. However, in deciding whether a provision is mandatory or directory, one must have regard to the legislation as a whole: *Cleary v. Canada Correction Services* (1990), 56 C.C.C. (3d) 157 (F.C.A.). As well, this decision is informed by s. 8 of the *Interpretation Act*, which provides that:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

See: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42.

[23] The new iteration of the *Police Act* was drafted after Josiah Wood, Q.C., as he then was, published *The Report on the Review of the Police Complaint Process in British Columbia* in 2007. He is a former justice of the British Columbia Court of Appeal and an acknowledged experienced criminal law expert. Since publishing his report he has been appointed a judge of the Provincial Court of British Columbia.

[24] There are multiple interests at stake in the investigation of the alleged misconduct by police. As Judge Wood put it at paragraph 33 of his report:

> ... I regard freedom from police misconduct as one of the fundamental values that define a free and democratic society, just as surely as I regard freedom from the fear of political interference as a fundamental value that defines the independence of the police who serve and protect our free and democratic society.

[25] Judge Wood identified two deficiencies in the police complaint process. First, the Commissioner had few effective powers with which to ensure that all public

complaints were thoroughly investigated and properly concluded. Second, for respondents to complaints there is a sense of prejudice from having unresolved complaints hanging over their heads for long periods of time.

[26] Thus, it appears to me that strict timelines are important, but in the context of a process that ensures complaints from the public are investigated thoroughly and concluded properly, and done so in a timely manner.

[27] In *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41 at 121-122, Mr. Justice Iacobucci for the majority discusses the distinction between directory and mandatory time limits:

> To begin, I evince some concern about whether it is profitable to characterize s. 268(2) using the words "mandatory" or "directory" in a reverential way. These words, well-known to Anglo-Canadian jurisprudence, respond as best they can when the facts of a case involve failed procedural preconditions. Professor Wade introduced the topic of procedural conditions using the following language, in *Administrative Law* (6th ed. 1988), at pp. 245-46:
>
>> If the authority fails to observe such a condition, is its action *ultra vires*? The answer depends upon whether the condition is held to be mandatory or directory. Non-observance of a mandatory condition is fatal to the validity of the action. But if the condition is held to be merely directory, its non-observance will not matter for this purpose. In other words, it is not every omission or defect which entails the drastic penalty of invalidity.

He concluded that the time limit before the Court in that case was directory. He was influenced by the fact that there were "significant adverse consequences" associated with finding the provision to be mandatory.

[28] In *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, at para. 42, the Court confirmed that "the object of the statute, and the effect of ruling one way or the other, are the most important considerations in deciding whether a directive is mandatory or directory". In the context of that case, the Court concluded it would work "serious inconvenience" if the provisions were read as mandatory, so the "shall" in the provisions was held to be directive: at para. 43.

[29] In the case before me, there would be serious adverse consequences if the 20 business day limit were found to be mandatory. Here, Judge Neal recused himself. In other cases, a retired judge might become incapacitated or worse and be unable to complete the task she or he was appointed to carry out. If the provision were mandatory, the Commissioner would not be able to proceed any further.

[30] While it is important that police officers not be prejudiced by having complaints unresolved for long periods of time, there is no particular prejudice here. The Commissioner acted within a reasonable amount of time in appointing the discipline authority. Notably, he appointed Mr. Pitfield the day after receiving the letter of recusal. Further, if the petitioner's argument is upheld, it will prevent an allegation from being, in the words of Judge Wood, "thoroughly investigated" or "properly concluded". Thus, to attain the objectives of the *Police Act*, I conclude that the time limit is directory.

Did the Commissioner have the power to appoint a second retired judge when the first appointee recused himself?

[31] There is no express opinion in the *Police Act* for the replacement of a retired judge who is unable or unwilling to continue. The principle which commends itself to me is that expressed by the Supreme Court of Canada in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015 at para. 63: "[u]nfortunately, tribunals and courts must often make decisions by interpreting statutes in which there are gaps."

[32] There is arguably a gap in the *Police Act*. There is no express provision on what is to occur under s. 117 when a person is unable or unwilling to continue. However, I may analogize to statutes covering comparable procedural situations and construe the *Police Act* as having a comparable effect. See: *Gell v. Canadian Pacific Ltd.*, [1988] 2 S.C.R. 271.

[33] The *Provincial Court Act*, R.S.B.C. 1996, c. 379, confers on the chief judge the power to remedy the situation where a judge is unable to continue a proceeding by replacing him or her with another judge; that is the effect of ss. 2(2), 11(1), and

11(4). Similarly, the *Supreme Court Act*, R.S.B.C. 1996, c. 443, provides that the court may be held before the chief justice or any one of the judges. Specifically s. 14(1) of the *Supreme Court Act* provides that "[a]ll proceedings in the court and all business arising from those proceedings, if practicable and convenient, must be heard, determined and disposed of before a single judge".

[34] It would be absurd to suggest the legislature believed the present situation would never arise. Further, it is reasonable that the legislature foresaw that appointed individuals may become incapacitated or die. The legislature could not have intended that investigations and proceedings under s. 117 of the *Police Act* would terminate upon the occurrence of such events.

[35] I conclude, therefore, that the *Police Act* does not prevent the Commissioner from making a second appointment.

CONCLUSION

[36] For the foregoing reasons, the petition is dismissed. I conclude that the Commissioner did not lose jurisdiction to make a replacement appointment under s. 117 of the *Police Act*, and neither the time limits nor the previous appointment of Judge Neal prevented the Commissioner from appointing Mr. Pitfield.

"Kelleher J."