# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Police Complaint Commissioner) v. Bowyer,* 2012 BCSC 1018

Date: 20120710
Docket: S116122
Registry: Vancouver

Between:

**Stan T. Lowe, the Police Complaint Commissioner**

Petitioner

And:

**Hon. Ian H Pitfield (Ret'd.), Wendy Bowyer and David Jones**

Respondents

Before: The Honourable Mr. Justice R. Punnett

## Reasons for Judgment

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|---|---|
| Counsel for the Petitioner: | J.S. Heaney |
| Counsel for the Respondent Wendy Bowyer: | D.G. Butcher, Q.C<br>A.D. Srivastava |
| Place and Date of Hearing: | Vancouver, B.C.<br>March 8 and 9, 2012 |
| Place and Date of Judgment: | Vancouver, B.C.<br>July 10, 2012 |

[1] The petitioner seeks to quash a ruling made by the Hon. Ian H. Pitfield (retired) in his capacity as a Designated Discipline Authority under the *Police Act* and, if granted, ancillary orders arising as a result. The respondents Pitfield and Jones took no position on the application.

[2] The petitioner is the provincial Police Complaint Commissioner. The respondent Wendy Bowyer is a municipal police constable and a member of the New Westminster Police Service ("NWPS") whose conduct was the subject of an investigation brought pursuant to Part 11, Division 3 of the *Police Act*, R.S.B.C. 1996, c. 367 (*"Act*"). The respondent David Jones is the Chief Constable of the NWPS. He is the discipline authority ("DA") pursuant to s. 76(1)(a) of the *Act*. The respondent, the Hon. Ian Pitfield, a retired judge of this Court, was appointed by the Police Complaint Commissioner to conduct a review of the investigation (s. 117 of the *Act*).

[3] As a DA under the *Act* Mr. Pitfield acted pursuant to a statutory power as a tribunal as that term is defined in the *Judicial Review Procedure Act*. He was not a tribunal to which any of the provisions of the *Administrative Tribunals Act* apply.

**Background**

[4] This matter originated with a public complaint about the conduct of the respondent Cst. Bowyer and two other officers resulting in discipline proceedings under the *Act*.

[5] The matter has a somewhat unusual history, much of which is not relevant to this hearing, however a brief summary is required.

[6] On March 23, 2009 Cst. Bowyer and two other officers attended at a residence in New Westminster, B.C. to arrest a youth on an outstanding warrant. The arrest was executed. The next day the NWPS received a Form 1 Notice of Complaint pursuant to the *Act* alleging misconduct by the constable and the two other members of the NWPS during the arrest.

[7] On March 25, 2009 Sgt. Matsumoto of the NWPS commenced an investigation. The allegations against Cst. Bowyer, were:

> Count 1: Discreditable conduct for breach of *Charter* rights.
>
> Count 2: Discreditable conduct for making a false or misleading statement. (This count arose during the course of the investigation).
>
> Count 3: Abuse of authority for arrest without lawful authority.
>
> Count 4: Abuse of authority for excessive force.
>
> Count 5: Neglect of duty for failing to file a Subject Behaviour Report.

[8] The report of Sgt. Matsumoto was filed on September 14, 2010 with Chief Cst. Jones. (s. 98 of the *Act*). The report recommended that counts 1-4 be substantiated against Cst. Bowyer.

[9] On September 29, 2010 Chief Cst. Jones issued a Notice of Discipline Authority's Decision (s. 112 of the *Act*) substantiating counts 1, 3 and 4 and finding that counts 2 and 5 were not substantiated. He proposed sanctions and offered a prehearing conference pursuant to s. 120 of the *Act*.

[10] The Police Complaint Commissioner reviewed Chief Cst. Jones' decision and decided that there was a reasonable basis to believe that Jones' decision respecting count 2 was incorrect. The Police Complaint Commissioner issued a document entitled "Notice of Appointment of New Discipline Authority" pursuant to s. 117(5) of the *Act*. A provincial court judge was appointed as the adjudicator.

[11] The Police Complaint Commissioner attached to the appointment a procedural summary "outlining the [Office of the Police Complaint Commissioner's] interpretation as to the process contemplated by the legislation." The summary included the following:

> …
>
> … Again, the recommendations that we provide with respect to procedure are recommendations, I do not wish to in any way fetter the discretion of an adjudicator.
>
> …

[12] On November 22, 2010 the provincial court judge issued a document entitled "Notice of Discipline Authority's Decision" concluding that counts 1-4 were substantiated. As a result he became the DA for the pending discipline hearing (s. 117(9) of the *Act*).

[13] Constable Bowyer filed a petition seeking to quash the decision on the basis that the Police Complaint Commissioner had exceeded his jurisdiction in referring counts 1, 3 and 4 which had already been substantiated by Chief Cst. Jones and that the retired judge had fettered his discretion in making adverse findings of fact. Subsequently the issue of whether the retired provincial court judge was in fact retired arose. As he was a part-time, not a retired judge, he recused himself and the hearing of the petition did not occur.

[14] On March 25, 2011 the Police Complaint Commissioner issued a document entitled "Notice of Appointment of Retired Judge" pursuant to s. 117(1) of the *Act* asserting he had a reasonable basis to believe that Chief Cst. Jones' conclusion respecting count 2 was incorrect. The Police Complaint Commissioner took no issue with respect to count 5. The Notice appointed the Honourable I. Pitfield to review the matter and "arrive at a decision with respect to count 2".

[15] The Notice of Appointment also stated:

> …
>
> 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 discipline authority in respect to all substantiated allegations associated with this matter. Should a prehearing conference be offered to the member, the matter will be returned to the originating department for the assignment of a Prehearing Conference Authority. If a prehearing conference is not offered or a resolution not reached, the matter will return to retired Justice Pitfield as the Discipline Authority for the purposes of a discipline proceeding.
>
> …

[16] Constable Bowyer sought to quash that appointment on the basis that it was out of time. Her petition was dismissed by Kelleher J. in reasons filed September 15, 2011, Vancouver file VLC-S110641.

[17] On April 18, 2011 Mr. Pitfield issued a "Notice of Decision on Review of Final Investigation Report." He found the allegation in count 2 to have been substantiated. Constable Bowyer declined the offer of a prehearing conference and the matter was therefore remitted to Mr. Pitfield to conduct a discipline hearing.

[18] On July 19, 2011, in response to an objection by Cst. Bowyer to the scope of the discipline hearing, Mr. Pitfield ruled that he could only conduct a discipline hearing with respect to count 2 and that the resolution of counts 1, 3 and 4 remained the responsibility of Chief Cst. Jones in his capacity as DA respecting those counts.

[19] It is that ruling the Police Complaint Commissioner seeks to quash.

[20] Specifically, the Police Complaint Commissioner seeks the following orders:

a) An order quashing the ruling of the DA Mr. Pitfield dated July 19, 2011 ("Ruling");

b) An order declaring the Ruling to be a nullity, and of no force or effect;

c) Final and interim order prohibiting the respondent Chief Cst. Jones from taking any steps in respect of a Discipline Proceeding on Allegations 1, 3 and 4 faced by the respondent Cst. Bowyer;

d) An order declaring that the petitioner's Section 117 Proposed Procedures and the procedures the petitioner set out in his March 25, 2011 appointment of the respondent Pitfield under the *Act* ("Pitfield Appointment") were a lawful exercise of the petitioner's authority and should be considered as a directive to be taken into account by a retired judge appointed under s. 117 of the *Act*; and

e) An order directing the respondent Pitfield to conduct the Discipline Proceeding on Allegations 1, 2, 3 and 4 faced by the respondent Cst. Bowyer.

[21] The answer to the relief sought is a matter of statutory interpretation.

**Scheme of the *Act***

[22] The *Act* was amended in March of 2010 after Mr. Josiah Wood Q.C. (now Provincial Court Judge Wood) reported on his Review of the Police Complaint Process in British Columbia. The legislature adopted some but not all of his recommendations.

[23] The duties and functions of the Police Complaint Commissioner are described in the *Act*:

> **7** (1) The commissioner, under the minister's direction,
>
> (a) has general supervision over the provincial police force, and
>
> (b) must
>
> (i) exercise powers and perform duties assigned to the commissioner under and in accordance with this Act and any other enactment, and
>
> (ii) ensure compliance with the director's standards as they relate to the provincial police force.

[24] Relevant to this matter is the responsibility of the Police Complaint Commissioner to:

a) Oversee and monitor complaints, investigations and the administration of discipline and proceedings under Part 11 of the *Act* -- entitled "Misconduct, Complaints, Investigations, Discipline and Proceedings"; and

b) Ensure that the purposes of Part 11 are achieved.

[25] Section 177 provides:

> **General responsibility and functions of police complaint commissioner**
>
> **177** (1) The police complaint commissioner is generally responsible for overseeing and monitoring complaints, investigations and the administration of discipline and proceedings under this Part, and ensuring that the purposes of this Part are achieved.
>
> (2) In addition to any other duties imposed under this Part or Part 9, the police complaint commissioner must do the following:

(a) establish guidelines to be followed by members or individuals referred to in section 78 (2) (b) [*how complaints are made*] or 168 (2) (b) [*making a service or policy complaint*] in receiving a complaint under Division 3 or 5;

(b) establish guidelines to be followed by municipal police departments and their employees in receiving and handling an oral or written report by a member of the public or any other person that raises a question or concern about the conduct of a municipal constable, but which question or concern does not result in a complaint being made and registered under section 78 [*how complaints are made*];

(c) establish forms for the purposes of section 80 (2) (e) [*if complaint made to member or designated individual under section 78 (2) (b)*], 85 (1) (a) [*departments to make record of reports not resulting in registered complaints*] or 89 (1) [*reporting of death, serious harm and reportable injury, and mandatory external investigation in cases of death and serious harm*];

(d) establish and maintain a record of each complaint and investigation under this Part, including all records related to each complaint and investigation under this Part;

(e) compile statistical information in respect of records referred to in paragraph (d), including, without limitation,

(i) demographical information in respect of persons who make complaints under this Part, if available,

(ii) information respecting the number and frequency of complaints and investigations or of different types or classes of complaints and investigations, and the outcome or resolution of them, and

(iii) any trends in relation to information compiled under subparagraphs (i) and (ii);

> (f) at least annually and subject to subsection (3), prepare reports respecting the matters described in paragraphs (d) and (e) and make those reports available to the public by posting them on a publicly accessible website maintained by or on behalf of the police complaint commissioner;
>
> (g) develop and provide outreach programs and services for the purposes of informing and educating the public in respect of this Part and the powers and duties of the police complaint commissioner;
>
> (h) for the purposes of paragraph (g), consider and address the particular informational needs of British Columbia's diverse communities;
>
> (i) accept and consider comments from any interested person respecting the administration of this Part and Part 9;
>
> (j) inform, advise and assist the following in respect of this Part:
>
> (i) persons who make complaints;
>
> (ii) members and former members;
>
> (iii) discipline authorities;
>
> (iv) boards;
>
> (v) adjudicators;
>
> (k) establish a list of support groups and neutral dispute resolution service providers and agencies that may assist complainants with any mediation or other informal resolution process under Division 4 and make that list available to the public;
>
> (l) make any recommendations for improvement of the complaint process in the annual report under section 51.1.

[26] The initiation of a complaint has already been referred to in the factual background to this matter. Briefly stated, a complaint may be made to the petitioner by filing a Form 1 Record of Complaint about the conduct of a police officer. The petitioner then issues a Notice of Complaint. An internal review is then conducted

and a Final Investigation Report setting out which charges are substantiated and which are not is issued.

[27] At this stage of the proceeding s. 76 of the *Act* provides that a chief constable of the municipal police department in which the member is employed is a DA. On receipt of the report the DA reviews the report. Section 112(3) provides:

> **112** (3) If, on review of the report and the evidence and records referenced in it, the discipline authority considers that the conduct of the member or former member appears to constitute misconduct, the discipline authority must convene a discipline proceeding in respect of the matter, unless section 120(16) [*prehearing conference*] applies.

[28] If the Police Complaint Commissioner disagrees with the DA's decision regarding unsubstantiated counts then he can issue a "Notice of Appointment of New Discipline Authority" (s. 117(5)).

> **117** (1) If, on review of a discipline authority's decision under section 112 (4) [*discipline authority to review final investigation report and give early notice of next steps*] or 116 (4) [*discipline authority to review supplementary report and give notice of next steps*] 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:
>
> (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) [*discipline authority to review final investigation report and give early notice of next steps*] or 116 (1) (c) [*discipline authority to review supplementary report and give notice of next steps*].
>
> ...

> (9) If, on review of the investigating officer's reports and the evidence and records referenced in them, the retired judge appointed considers that the conduct of the member or former member appears to constitute misconduct, the retired judge becomes the discipline authority in respect of the matter and must convene a discipline proceeding, unless section 120 (16) [*prehearing conference*] applies.
>
> …

[29] On September 22, 2010 the Police Complaint Commissioner issued an Information Bulletin entitled “Section 117 Proposed Procedures” providing among other things that:

a) in complaints where there are multiple allegations of misconduct and the DA has delivered a decision where he or she has substantiated at least one allegation and not substantiated others (a “Mixed Decision”) and, if the petitioner has appointed a retired judge, the entire complaint will be forwarded to the retired judge;

b) should the retired judge determine that the originally unsubstantiated allegation or allegations appear(s) to be substantiated, the retired judge will retain jurisdiction over all matters, including the allegation(s) previously substantiated by the discipline authority, until completion; and

c) if the retired judge determines that the previously unsubstantiated allegations(s) do(es) not appear to constitute misconduct, that decision is final and conclusive and the remaining allegation(s) previously substantiated by the original DA will be returned to him or her for completion.

[30] As noted and as required by the *Act* the Police Complaint Commissioner accepted Chief Cst. Jones’ decision respecting counts 1, 3 and 4 which were held to be substantiated and count 5 which was not. However, as a result of the Police Complaint Commissioner objecting to count 2 he issued a letter appointing Mr. Pitfield to determine if count 2 could be substantiated. The letter also directed that Mr. Pitfield would become the DA in respect of that count and all other substantiated

counts. Specifically, the Police Complaint Commissioner provided the following directions to Mr. Pitfield:

> …
>
> 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 discipline authority in respect to all substantiated allegations associated with this matter. Should a prehearing conference be offered to the member, the matter will be returned to the originating department for the assignment of a Prehearing Conference Authority. If a prehearing conference is not offered or a resolution not reached, the matter will return to retired Justice Pitfield as the Discipline Authority for the purposes of a discipline proceeding.
>
> If retired Justice Pitfield determines the conduct in question does not constitute misconduct with respect to Count 2, retired Justice Pitfield must provide reasons and the decision is final and conclusive, in regard to that count only. The remaining counts will be returned to Chief Constable Jones as Discipline Authority.
>
> …

[31] Mr. Pitfield held that count 2 could be substantiated. That is, that certain statements made by Cst. Bowyer appeared to constitute misconduct as they appeared to be false and misleading. Mr. Pitfield therefore became the DA and convened a discipline proceeding. Mr. Pitfield offered Cst. Bowyer a prehearing conference under the *Act*. Constable Bowyer elected to request that witnesses named in the Final Investigation Report be subpoenaed to her Discipline Proceeding. As a result the offer of a prehearing conference was withdrawn and the complaint was remitted to the Discipline Proceeding.

[32] A conference was held by Mr. Pitfield to address the timeline for the disciplinary hearing. The conference was not the type of prehearing referred to in the *Act* but rather was a procedural meeting more in the nature of a case management conference. The respondent officer took the position that Mr. Pitfield was not to assume the role of DA respecting counts 1, 3 and 4. Mr. Pitfield ruled that his role as DA was restricted to count 2 and that counts 1, 3 and 4 remained for resolution by Chief Cst. Jones as DA with respect to those counts. It is this ruling that is the subject of this petition.

**Position of the Petitioner**

[33] The petitioner submits that s. 177(2)(j) of the *Act* requires the Police Complaint Commissioner to inform, advise, and assist various parties to Part 11 proceedings, including discipline authorities. The Police Complaint Commissioner further submits that Part 11 of the *Act* gives the petitioner significant discretion to discharge his overseeing and monitoring duties and to ensure that the purposes of Part 11 are met.

[34] Specifically, the petitioner argues that s. 117(1) provides that once the Police Complaint Commissioner decides there is a reasonable basis to decide the *decision* is incorrect then a retired judge is appointed to "make his or her own decision on the *matter*".

[35] The crux of the petitioner's argument is that while it is the "decision" that the retired judge is requested to review, the wording of the *Act* thereafter does not refer to the decision but to the "matter" instead. The petitioner submits that the use of the word "matter" clothes the retired judge in a much broader mandate. This he submits is particularly so given the retired judge is directed to come to his own decision on the "matter" a term that is not defined and which the petitioner submits is not a "decision." As a result he submits that the retired judge takes over the whole "matter" including the previously substantiated counts.

[36] The Police Complaint Commissioner also argues that Mr. Pitfield was required to follow the directions of the Police Complaint Commissioner to whom deference was owed.

[37] The Police Complaint Commissioner submits that the standard of review of Mr. Pitfield's decision is correctness.

**Position of the Respondent Officer**

[38] Constable Bowyer opposes all orders sought by the Police Complaint Commissioner. She seeks an order affirming Mr. Pitfield's ruling with the result that the allegations deemed substantiated by the Chief Cst. Jones as the DA are

returned to him for disposition and the allegation deemed substantiated by Mr. Pitfield remains with him for disposition.

[39] Constable Bowyer submits that Mr. Pitfield's ruling is consistent with a plain reading of the relevant portions of the *Act* and that use of the word "matter" is defined by and restricted to the "decision" reviewed by the retired judge at the request of the Police Complaint Commissioner.

[40] The respondent argues that the standard of review of Mr. Pitfield's decision is reasonableness.

## Discussion

### Standard of Review

[41] In *Dunsmuir v. New Brunswick,* 2008 SCC 9 at para. 59, the court analyzed questions of jurisdiction that attract a correctness standard. The court distanced itself from earlier extended definitions of jurisdiction and adopted "a robust view of jurisdiction" stating:

> [59] … "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction; … These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.
>
> [60] As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise … Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. … [Citations omitted]

[42] The initial issue is how to characterize the ruling. The petitioner states that Mr. Pitfield refused to take jurisdiction over allegations he was lawfully appointed to decide and as a result the standard is correctness. Constable Bowyer submits that

the ruling was simply an exercise in statutory interpretation attracting a standard of reasonableness.

[43] Was the ruling a question of jurisdiction?

[44] The oral ruling referred to arose from counsel for Cst. Bowyer's concern respecting whether Mr. Pitfield should become the DA respecting counts 1, 3 and 4 which the earlier DA Chief Cst. Jones had concluded appeared to be capable of substantiation. Mr. Pitfield stated:

> …
>
> The basis for Mr. Butcher's assertion lies in the relationship between section 116(3) [sic 112] and sections 117(1), 117(3) and 117(9) of the *Police Act*.
>
> The regime provided by the *Police Act* is this. Under section 116(3) a disciplinary authority is required to review a final investigation report to determine whether or not it appears that any of the allegations in the report constitute misconduct. If the disciplinary authority concludes that is the case, then that authority is required to convene a discipline proceeding in respect of the allegation unless a resolution is reached at a pre-hearing conference. In my opinion, the meaning of section 116 is clear. The disciplinary authority who reviews a final investigation report and concludes that an allegation of misconduct can be substantiated, is charged with the responsibility of carrying the disciplinary process in respect of that allegation to a conclusion.
>
> If a discipline authority concludes that an allegation of misconduct cannot be substantiated, and the Commissioner concludes that there is a reasonable basis on which to conclude that the determination is not correct, then the Commissioner may appoint a retired judge to review the matter. If the review concludes that the allegation can be substantiated, then the reviewer becomes the disciplinary authority in respect of the matter.
>
> I am unable to identify any provision of the *Police Act* that would appear to confer upon the Commissioner a power to override the provisions of the Act that made Chief Cst. Jones the disciplinary authority in respect of counts 1, 3, and 4, and to substitute me, charged with the responsibility to review count 2, as the disciplinary authority in respect of counts 1, 3, and 4.
>
> …

[45] As is clear from the ruling, while Mr. Pitfield's appointment was at the direction of the Police Complaint Commissioner the source of his authority is the *Act*.

[46] In interpreting the *Act* he declined to accept jurisdiction over counts 1, 3 and 4 as they remained with the DA Chief Cst. Jones. Does this qualify as was described in *Dunsmuir* as an explicit determination of its statutory power such that it must

interpret its grant of authority correctly "or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction …?" (para. 59).

[47] The petitioner's submission on the standard of review is that a retired justice of this Court does not have any particular expertise respecting the *Act* or disciplinary matters and as a result Mr. Pitfield's ruling was "not a matter of simple procedure within a discipline proceeding over which he may have had some discretion to exercise." The petitioner asserts as result the refusal to take jurisdiction is not a matter to which deference is to be accorded.

[48] The respondent Cst. Bowyer submits, relying on *Dunsmuir*, that the Supreme Court of Canada endorsed a narrow view of questions of jurisdiction that attract the standard of correctness. She argues that his ruling was not a question of true jurisdiction nor a question of "central importance to the legal system" and "outside the adjudicator's specialized area of expertise." That is, it was "simply an exercise of statutory interpretation."

[49] In *Walker v. British Columbia (Securities Commission)*, 2011 BCCA 415, the correct interpretation of the *Securities Act,* R.S.B.C. 1996, c. 418 by the Securities Commission arose. The appellant said that the scope of s. 57 of the *Securities Act* was a question of law that attracted a standard of correctness. The British Columbia Court of Appeal held the following at para. 21:

> [21] … neither the question of the scope of application of s. 57 of the *Act*, nor the question of whether the processing of shares for a finder's fee was a prohibited act, are questions of general law that are of central importance to the legal system as a whole or questions outside the Commission's specialized area of expertise". In *Weyerhaeuser Company Ltd. v. Assessor of Area No. 4 - Nanaimo Cowichan*, 2010 BCCA 46, 1 B.C.L.R. (5th) 284, at para. 47, this Court found that in the case of a review panel "not determining legal questions of general importance to the legal system as a whole, but rather interpreting a regulation promulgated under their own constating statute, the standard of review … is reasonableness." This case is similar is relatively similar to *Weyerhaeuser.* I agree with the respondent that the questions under s. 57 and 168.2 of the *Act* are ones of statutory interpretation by a specialized tribunal of its own statute and that judicial precedent indicate such matters should be reviewed on a standard of reasonableness.

[50] In *Dunsmuir* at para. 55 the Supreme Court of Canada stated:

> [55] A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> — A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> — A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> — The nature of the question of law. A question of law that is of "central importance to the legal system … and outside the … specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[51] In *Dunsmuir* the court also stated:

> [47] … A court conducting a review of for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[52] In my view the ruling in issue relates to a question of statutory interpretation. However, it is neither of "central importance to the legal system" nor is it "outside the adjudicator's specialized area of expertise." On the latter issue, the *Act* specifically allows for the appointment of retired judges, individuals with experience in factual determinations and questions of statutory interpretation.

[53] The ruling therefore does not relate to a question of jurisdiction.

[54] In any event, the Police Complaint Commissioner's submission that Mr. Pitfield refused to take jurisdiction over allegations he was appointed to decide is contradicted by his March 25, 2011 Notice of Appointment in which the Police Complaint Commissioner stated: "I am appointing retired Justice Ian Pitfield,

to review this matter and arrive at a decision with respect to Count 2 based on the evidence."

[55] As a result I conclude that the decision maker is entitled to deference and a reasonableness test is to be applied. If I am incorrect that the standard of review is reasonableness then in my opinion, for the reasons that follow, the interpretation adopted by Mr. Pitfield is correct.

**Issue of Statutory Interpretation**

[56] Section 117(1) gives the Police Complaint Commissioner the authority to refer to a retired judge a decision that the complained of conduct is not substantiated. It is clear that the word "decision" is used in this section to refer only to the determination that wrongdoing was not substantiated. Section 177(1)(b) then directs the retired judge to "make his or her own decision on the matter."

[57] It is the meaning of the word "matter" as used in s. 117(1) that is at the root of the petitioner's submission.

[58] The Concise Oxford English Dictionary,11th edition, defines the word "matter" as follows:

> In law: something which is to be tried or proved in court; a case.

[59] The word "decision" as used in the *Act* includes the decision made respecting all allegations arising from a complaint. It is not defined in the *Act* nor is it used further in s. 117(1) after the unsubstantiated count referral is made. Clearly while applying generally to decisions which may include multiple counts it is restricted in s. 117(1) to the unsubstantiated counts.

[60] The petitioner does not disagree that the "discipline authority's decision" referred to in s. 177(1) is a decision that "the conduct of the member or former member does not constitute misconduct" (s. 112(4)). However, what is contentious is the petitioner's submission that the term "decision" is not used again in s. 117 suggesting a much broader mandate is then given to the retired judge.

[61] The petitioner states that this interpretation is supported by the fact that the retired judge is assigned to review the Final Investigation Report and evidence and records referenced in it (Investigation Materials) and come to his own decision on the "matter". That is, the retired judge is not directed to consider only those materials related to the specific decision or allegation. The petitioner also submits that the retired judge is directed to come to his or her own decision on the "matter" rather than the "decision" under consideration, and that "matter" is a term that is not defined and which is not expressly linked to the word "decision" as that term is used in s. 112(4).

[62] The petitioner also argues that a broader meaning to the word "matter" is suggested by the fact that the petitioner is not expressly required in s. 117(1)(a)(c) to specify a particular "decision" or allegation that the retired judge is to review. That is, in effect the word "decision" is just the trigger to the inquiry and does not inform the subsequent process.

[63] The petitioner submits that the balance of s. 117 is then to be read as having that broader meaning and points out that the retired judge under s. 117(8) is to receive a description of the "complaint" and "any conduct of concern" and that he or she is to determine "whether or not, in relation to each allegation of misconduct considered, the evidence referenced in the Final Investigation Report appears sufficient to substantiate the allegation." The petitioner notes as well that s. 117(9) states that if the retired judge considers the conduct constitutes misconduct then the retired judge because the DA in respect of the "matter".

[64] Constable Bowyer submits that the statute is clear and that the retired judge is only to act as DA upon those formerly unsubstantiated matters that are later substantiated by him or her.

[65] The nub of the issue is whether the word "matter" expands the subject matter for the retired judge's consideration to include more than just the decision respecting the unsubstantiated complaint.

[66] The "modern formulation" for construing a statute was addressed in *Yaremy v. Insurance Corporation of British Columbia,* 2010 BCCA 418 at para 44, citing Driedger as follows:

> [44] …
>
> … the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> …

[67] The Court of Appeal also noted Driedger's comment that "words should not be added or deleted and the reader should not try to fill in any gaps he thinks he sees."

[68] In *Bedwell v. McGill*, 2008 BCCA 526 at para. 31 the British Columbia Court of Appeal also confirmed that if there is no absurdity in a provision it must be given effect. Even if there is a true statutory gap that leads to a result that was not intended by the Legislature it is not for the court to fill it but rather a matter for the Legislature to address (*Gumpp v. Cooperators Life Insurance Co*., 2004 BCCA 217, para. 18).

[69] With these principles in mind I turn to the wording of the *Act* and the argument of the petitioner.

[70] The petitioner summarizes his argument on this issue in his written submission as follows:

> 50. Where a discipline authority issues a section 112 notification in which he or she substantiates some allegations and does not substantiate others – and the Petitioner has a reasonable basis to believe that one or more of the decisions not to substantiate is or are incorrect – then the language of section 117 can be understood to either expressly provide that the retired judge may review the whole "matter" or "complaint" or "concern" in the Investigative Materials, so long as he or she identifies the allegations of misconduct considered or it is so ambiguous that it presents a number of different potential courses from which the Petitioner must choose to fulfill his general responsibility for the administration of discipline and proceedings and his obligation to ensure that the purposes of Part 11 are achieved. Those options are:

a) it is neither express nor clear from section 117 whether the Petitioner is required to appoint a separate retired judge for each unsubstantiated allegation the Petitioner believes was decided incorrectly or if the Petitioner may appoint one retired judge to review all such decisions; the provision may be reasonably interpreted to require the Petitioner to appoint as many retired judges as there are "decisions" that he reasonably believes the disciplinary authority incorrectly decided;

b) to treat as a "matter" the entirety of the discipline authority's Section 112 notification and refer the entire matter to a single retired judge to make his or her own decision on the "complaint", "concern" and "allegations of misconduct considered"; or

c) to appoint one retired judge to review and make his or her own decision on any and all of the discipline authority's unsubstantiated allegations that the Petitioner reasonably believes to have been incorrectly decided.

[71] In my view the statute at s. 117 is neither unclear nor ambiguous. The wording of s. 117 leaves the appointment of a retired judge to the Police Complaint Commissioner's discretion. That is, the Police Complaint Commissioner may or may not make a s. 117 appointment after concluding that a finding of no misconduct may be incorrect. As a result the only discretion afforded to the Police Complaint Commissioner with respect to s. 117 is to appoint or not appoint a retired judge.

[72] Section 117 provides a route for the disposition of both unsubstantiated and substantiated allegations. There is no allegation that it does not. Nor is it alleged that its plain meaning leads to absurd or impossible results. It is the allegedly incorrect finding that there was no misconduct that animates and serves as the foundation for the balance of the section. In my view the word "matter" is defined by that preliminary step. That is, the Police Complaint Commissioner believes the decision is incorrect, appoints a retired judge, and the decision being reviewed is the matter before the retired judge. This is consistent with the plain wording of the *Act*. For example, s. 117(9) provides that if the retired judge considers that the conduct does constitute misconduct then he or she becomes the DA in respect of the "matter" and must convene a discipline proceeding unless a prehearing conference

applies. The wording in s. 112(3) is also to similar effect as the use of the word "matter" clearly relates to the substantiated counts that fall within the authority of the DA. Throughout the *Act* the "matter" is defined by its context.

[73] As a result I find that the Pitfield Ruling is correct and it is affirmed. The orders sought by the Police Complaint Commissioner are dismissed.

[74] In the event that I am incorrect in my interpretation of s. 117 then the issue of the breadth of the discretion of the Police Complaint Commissioner arises.

**The Police Complaint Commissioner's Discretion**

[75] The *Act* at s. 177 describes the general responsibility and functions of the Police Complaint Commissioner as follows:

> **177** (1) The police complaint commissioner is generally responsible for overseeing and monitoring complaints, investigations and the administration of discipline and proceedings under this Part, and ensuring that the purposes of this Part are achieved.
>
> …

[76] The Police Complaint Commissioner submits that s. 177(2) endows the Police Complaint Commissioner with a wide ambit of discretion. Section 177(2) states:

> **177** (2) In addition to any other duties imposed under this Part or Part 9 the police complaint commissioner must do the following:
>
> (a) establish guidelines to be followed by members or individuals referred to in section 78 (2) (b) [*how complaints are made*] or 168 (2) (b) [*making a service or policy complaint*] in receiving a complaint under Division 3 or 5;
>
> (b) establish guidelines to be followed by municipal police departments and their employees in receiving and handling an oral or written report by a member of the public or any other person that raises a question or concern about the conduct of a municipal constable, but which question or concern does not result in a complaint being made and registered under section 78 [*how complaints are made*];
>
> …

> (j) inform, advise and assist the following in respect of this Part:
>
> (i) persons who make complaints;
>
> (ii) members and former members;
>
> (iii) discipline authorities;
>
> (iv) boards;
>
> (v) adjudicators;
>
> …

[77] On September 22, 2010, the petitioner, purportedly pursuant to his s. 177(2)(j) duties to "inform, advise, and assist" discipline authorities in respect of Part 11 and his transitional guidance authority, issued an Information Bulletin #7 entitled "Section 117 Proposed Procedures", providing amongst other things that:

> … In cases where there are multiple allegations of misconduct and the Discipline Authority has delivered a mixed decision, that is, substantiated at least one allegation and not substantiate others, and, if the Commissioner has appointed a retired judge to sit initially in an adjudicative capacity, the recommended procedure is that all allegations related to that member are to be forwarded to the retired judge;
>
> Should the retired judge, … determine that the originally unsubstantiated allegation of misconduct against the member does appear to be substantiated, the retired judge will retain jurisdiction over all matters, including the previously substantiated allegation(s) by the Discipline Authority, until completion.
>
> … if the retired judge determines that the evidence does not support a finding of misconduct against the member, that decision is final and conclusive. The remaining allegation(s) that were previously substantiated by the original Discipline Authority will be returned [to] him or her for completion …

[78] Aside from whether this guideline was brought to the attention of Mr. Pitfield the determining issue is whether the Police Complaint Commissioner has the discretion to impose such procedures on a DA.

[79] While the Police Complaint Commissioner has discretion under certain provisions of the *Act* the clear wording of s. 117 binds the appointed retired judge to act as DA only upon those matters formerly unsubstantiated and then substantiated by him or her.

[80] Constable Bowyer submits that the Police Complaint Commissioner is conflating discretion with a rule-making ability. They submit that the Police Complaint Commissioner has no rule-making ability under the *Act*.

[81] Section 177 authorizes the Police Complaint Commissioner to establish certain guidelines as described in s. 177(2)(a) and (b). However, the language used in s. 177(j) is quite different. It does not empower the Police Complaint Commissioner to establish guidelines but only to inform, advise and assist. As noted by the respondent Cst. Bowyer, "The discretion afforded to the [Police Complaint Commissioner] under various provisions of the *Act* does not encompass the authority to issue mandatory rules disguised as recommendations or guidelines: ***Fahlman v. Community Living British Columbia et al***., 2007 BCCA 15 paras. 43-50".

[82] As a result I find that the Police Complaint Commissioner does not have the authority to issue mandatory rules pursuant to s. 117. In addition, to accede to the Police Complaint Commissioner's arguments would require the ignoring of the plain meaning of "inform, advise and assist." Any form of mandatory direction cannot be reconciled with such wording.

**Scheme and Objects of the *Police Act***

[83] In the alternative the Police Complaint Commissioner submits that the ordinary meaning of s. 117 is ambiguous as to whether the retired judge may decide only the DA's decision not to substantiate or may consider all allegations of misconduct. The Police Complaint Commissioner states that given the ambiguity the petitioner's interpretation should be accepted as it best accords with the purpose of the section. The Police Complaint Commissioner states its purpose is to "provide a cost-efficient, time-limited and satisfactory procedure for dealing with certain discipline authority errors." In support they refer to *Sullivan and Dreidger on the Construction of Statutes*, 4th ed. (Markham, Butterworths, 2002) at p. 219, quoting Chief Justice Duff in *McBratney v. McBratney* (1919), 59 S.C.R. 550 at 561 as follows:

> Of course, where you have rival constructions of which the language of the statute is capable you must resort to the object or principle of the statute …; and if one finds there some governing intention or governing principle expressed or plainly implied then the construction which best gives effect to the governing intention or principle ought to prevail against a construction which, though agreeing better with the literal effect of the words of the enactment runs counter to the principle and spirit of it; …

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

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

[86] The Police Complaint Commissioner submits that interpreting the *Act* as proposed by Cst. Bowyer is contrary to the purpose of the *Act*, is uneconomic and may prejudice effective police disciplinary regimes.

[87] For example, they submit that at a minimum it results in a number of deciding discipline authorities consisting of the original DA if he or she substantiated at least one allegation plus a designated DA for each of the "reversed" unsubstantiated decisions. (The latter they say could arise if there were more than one unsubstantiated allegation and a separate retired judge were appointed with respect to each unsubstantiated allegation). I note however that the appointment of a separate retired judge for each unsubstantiated allegation would only occur if the Police Complaint Commissioner exercised his discretion to make multiple appointments.

[88] At the very least, as is the situation in this instance, if the Pitfield Ruling is upheld, the original DA Chief Cst. Jones will deal with three of the allegations and Mr. Pitfield will serve as the DA for the remaining allegation. A situation the Police Complaint Commissioner states results in a multiplicity of proceedings arising from one complaint, one incident and one constable.

[89] He also submits that dealing with such mixed decisions in this way divides the complaint proceedings into at least two and potentially more proceedings presided over by two or more decision makers, each having the entire factual matrix before him or her but without the jurisdiction to deal with all of the issues to be decided. They note increased costs for the constable as well as for the police department and ultimately the public as a result of such divided hearings. This they submit "is more likely to thwart the purposes of Part 11 and the Act than to achieve them."

[90] Constable Bowyer however states that multiple allegations and mixed decisions are inherent in the s. 117 legislative choices. While such may occur the effect of the respondent's submission is also that the DA that finds that the complaint is substantiated is the one who imposes the penalty.

[91] The possibility of bifurcation, delay, and the possibility of inconsistent findings and outcomes arise from the wording of the legislation. Given the clear wording of the *Act* such possible outcomes cannot be avoided. Indeed, in this case if all three members originally involved were the subject of one complaint and investigation and the Police Complaint Commissioner had made a s. 117 appointment of any counts that were not substantiated even greater bifurcation could have occurred.

[92] Given the wording of the *Act* it is the unsubstantiated charge that is the subject of the s. 117 appointment of a retired judge. While that necessarily involves consideration of the surrounding facts in order that a retired judge can properly fulfil his or her role the "matter" that is the subject of the appointment is confined to the unsubstantiated charge. The previously substantiated charges remain with the original DA. This is consistent with the regime under the *Act* in which police departments not the Office of the Police Complaint Commissioner are primarily

responsible for the investigation of complaints and the imposition of discipline. The role of the Police Complaint Commissioner remains supervisory as the Police Complaint Commissioner's role does not include the authority to investigate nor to impose different conclusions respecting conduct or penalty than those imposed by a DA.

[93] As a result I affirm the Pitfield Ruling and dismiss the relief sought by the petitioner.

[94] If the parties are unable to agree on costs they may file written submissions. If they cannot agree on a schedule for such submissions they have liberty to apply.

"Punnett J."