IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Scott v. British Columbia (The Police Complaint Commissioner),* 2017 BCSC 961

Date: 20170609
Docket: S164838
Registry: Vancouver

Between:

Jason Scott

Petitioner

And

The Police Complaint Commissioner of British Columbia and The Honourable Ian H. Pitfield

Respondents

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Petitioner:	D.G. Butcher, Q.C.
Counsel for the Respondent, The Police Commissioner of British Columbia:	D.K. Lovett, Q.C.
Place and Date of Trial/Hearing:	Vancouver, B.C. April 12, 2017
Place and Date of Judgment:	Vancouver, B.C. June 9, 2017

[1] Mr. Butcher on behalf of the petitioner requests what he characterizes as a "clarification" of my reasons indexed at 2016 BCSC 1970, which should be read along with these reasons.

[2] It has become apparent to me that confusion was created at the time of the earlier hearing. I will briefly explain part of the reason for the confusion.

[3] Part 1 of the amended petition reads as follows:

> 1. An order in the nature of *certiorari*, quashing the orders and decisions of the respondent, the Police Complaint Commissioner of British Columbia ("PCC"), dated March 22, 2016 and April 19, 2016.
> 2. Interim and permanent orders in the nature of prohibition, prohibiting the respondent, the Honourable Ian H. Pitfield ("respondent Pitfield") from proceeding with a Discipline Hearing into the conduct of the petitioner.
> 3. In the alternative, an order that the respondent Pitfield is disqualified from serving as Discipline Authority, on the basis that his reasons for decision on the s. 117 review amount to an over-extension of his statutory authority and establish a reasonable apprehension of bias.
>
> [Underlining in original.]

[4] In his written submissions at the time of the hearing of the amended petition, the petitioner had sought an order quashing the decision of March 22, 2016 of the respondent Commissioner ("PCC") in which he appointed Mr. Pitfield. It was my understanding, however, on hearing the oral submissions of Mr. Butcher at that time, that if the alternative order requested in the underlined portion of the amended petition was made, thereby disqualifying Mr. Pitfield, that order was consistent with the petitioner's application and provided the petitioner with the relief that he was requesting. Mr. Butcher now asks that I reconsider my earlier order so that it does not simply disqualify Mr. Pitfield but also quashes the March 22, 2016 decision of the PCC.

[5] Section 117(1) of the *Police Act*, R.S.B.C. 1996, c. 367 reads:

> **117** (1) If, on review of a discipline authority's decision under section 112 (4) 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.

[6] Mr. Butcher submits there was not a reasonable basis for the PCC to conclude that it was incorrect that the petitioner's impugned conduct constituted misconduct thereby giving the PCC authority to appoint a retired judge to carry out the functions described in the above subsection.

[7] A consequence of that submission, if accepted, would be that the PCC did not have authority to appoint Mr. Pitfield as the retired judge and he also had no authority to appoint another retired judge to replace Mr. Pitfield and thereby to restart the process that Mr. Pitfield was appointed to undertake.

[8] Mr. Butcher refers to the understanding of the "discipline authority" (see s. 76 of the *Act* at para. 8 of my earlier reasons) that although the petitioner was not acting in the legal execution of his duties at the time of his alleged misconduct, nevertheless he acted in good faith and had not "committed misconduct". Thereafter the PCC took the view that:

> … the Discipline Authority's decision did not properly consider the application of the Doctrine of Abuse of Process as described in *Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63*, which prevents the re-litigation of issues decided upon by the court.
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> Furthermore, I am of the view that the Discipline Authority's application of the Doctrine of Good Faith in this matter was incorrect, as he did not assess the reasonableness of Acting Sergeant Scott's beliefs as they relate to his scope of his authority. In particular, good faith cannot be claimed on the basis of an officer's unreasonable error or ignorance as to the scope their authority (*R. v. Buhay, [2003] 1 S.C.R. 631, (SCC*).

[9] The reference to "relitigation of issues decided upon by the court" is apparently a reference to the finding of Judge Rounthwaite (see my earlier reasons

at para. 13) that the petitioner was not acting in the course of his duties at the time of the alleged misconduct. Mr. Butcher submits the PCC's decision fails to take into account that the discipline authority did not seek to relitigate a decision made by a court. On the contrary he submits the discipline authority accepted the petitioner was not acting in the course of his duties.

[10] In the amended petition the petitioner submitted in part 3 at paras. 3 and 4:

> 3. The respondent PCC made a jurisdictional error, or in the alternative, was unreasonable, in deciding that there was a reasonable basis to believe that the decision of [the discipline authority] Serr was incorrect because he erred in his interpretation and application of *Toronto (City) v. C. U.P.E. Local 79* and the doctrine of good faith.
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> 4. The orders and decisions of the respondent PCC. dated March 22.2016 and April 19, 2016 were therefore incorrect, or alternatively, unreasonable.
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> [Underlining in original.]

[11] The petitioner now submits that the PCC was clearly wrong to have conflated the issues raised in the criminal prosecution of the complainant referred to in my earlier reasons, namely whether the complainant was guilty of assaulting a police officer in the lawful course of his duties, and the question of the alleged misconduct of the petitioner. Mr. Butcher submits that the *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 case has no application and the PCC ought not to have relied upon it.

[12] Mr. Butcher refers to paras. 36 and 37 of my earlier reasons, which paragraphs I will repeat:

> [36] The petitioner does not seek to challenge in subsequent administrative proceedings the acquittal of the complainant. The question before Rounthwaite P.C.J. was whether the complainant was guilty beyond a reasonable doubt of assaulting a police constable in the execution of his duty and of resisting arrest. The issue of the complainant's guilt or innocence is not the same as the issue of whether the petitioner was guilty of misconduct by abusing his authority. Provincial Court Judge Rounthwaite decided the petitioner did not have authority to enter the house of the complainant and arrest her, but made no decision that the petitioner had abused his authority within the meaning of s. 77(3) of the *Police Act*, which is reproduced at para. 7 of these reasons. “Abuse of authority” is defined for the purpose of the complaint against the petitioner as the intentional or reckless arrest of the complainant without good and sufficient cause. I do not read the phrase “without limitation”, as the retired judge apparently did, to mean that intention

> or recklessness can be ignored when considering the petitioner's conduct. In my view, the section should be read to apply to conduct which has a serious blameworthy element and not simply a mistake of legal authority alone.
>
> [37] In my opinion, the retired judge improperly conflated the issue of whether the petitioner was in the course of his lawful duties when he entered the complainant's home and arrested her, with the other issue of whether the petitioner was guilty of misconduct by abusing his authority as defined in the *Police Act*. That conflation is apparent from the retired judge's conclusion that:
>
> > It follows, therefore, that the question of whether A/S Scott abused his authority must be determined according respect for the factual findings of the trial judge. Respect for those findings of fact would result in the conclusion that A/S Scott had abused his authority.
>
> [Emphasis added.]

[13] Mr. Butcher submits that those findings ought to be applied to the decision of the PCC to appoint Mr. Pitfield because it is apparent that the PCC also conflated the issues of the petitioner's alleged misconduct and the question of whether he was in the lawful course of his duties when he arrested the complainant.

[14] Mr. Butcher submits the standard of review of the PCC's decision to appoint Mr. Pitfield, which engaged complex questions of law dealing with the relitigation of issues, was correctness and when the PCC misapplied the law no deference is owed by this Court.

[15] In *Toronto (City)* (decided in 2003 before *Dunsmuir*) at para. 15 Arbour J. for the majority wrote:

> In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Social*

> *Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 21. [Emphasis added.]

[16] In *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92, Newbury J.A., with whom the other judges agreed, wrote at para. 41:

> In my respectful view, these questions – which might very well engage the PCC's expertise – are not the questions that were raised by the petition or by this appeal. (Indeed, the second question was one that occupied much of Mr. Wood's report.) It is not for us to decide whether the investigation and FIR were properly done, or what the PCC's next step should be in light of his concerns. The issue before us is whether the PCC had the authority under s. 143(1)(b) to convene a public hearing (a) outside the 20-day time limitation specified in s. 117(3); (b) without finding there was a reasonable basis to believe the DA's decision to be "incorrect"; and (c) in the face of the "final and conclusive" language of s. 112(5). I see this not as a "polycentric" question but as an "extricable" one of jurisdiction (in the narrow sense described in *Dunsmuir* at para. 59 quoted above) to which, on the present state of the law, a standard of correctness applies. In case I am wrong, however, I will consider the issue from the standpoint of both standards of review.

[17] Ms. Lovett on behalf of the PCC accepts that while I have jurisdiction to make the "clarification" requested by the petitioner nevertheless a reasonableness standard of review applies to the decision of the PCC to appoint Mr. Pitfield and that decision was reasonable.

[18] Ms. Lovett submits a reasonableness standard is appropriate when, as here, a decision maker is interpreting his home statute. Ms. Lovett refers to *Dunsmuir v. New Brunswick*, 2008 SCC 9 in which the Court held that it is only constitutional questions, some questions of general law that are of central importance to the legal system as a whole and which are outside the expertise of the Tribunal, and "true questions of jurisdiction or *vires*" that are subject to a correctness standard.

[19] Ms. Lovett refers to *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 34 which reads:

> The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that

> definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review. [Emphasis added.]

[20] Further Ms. Lovett submits s. 117 of the *Police Act* gives a discretionary power to the PCC the exercise of which attracts deference on a judicial review application. In *Dunsmuir* at paras. 47 and 48 there is the following:

> **47** Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review 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.
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> **48** The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Mossop*, [1993] 1 S.C.R. 554 at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279 at p. 286 (quoted with

> approval in *Baker*, [1999] 2 S.C.R. 817 at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, [2003] 1 S.C.R. 247 at para. 49).

[21] Ms. Lovett submits that the *Police Act* explicitly provides that when the PCC is applying s. 117 he need have only a reasonable basis to conclude that the discipline authority's decision was incorrect.

[22] I agree with the submission of Ms. Lovett that the standard of review of the decision of the PCC that the discipline authority's decision was incorrect is reasonableness. Further I do not conclude the decision of the PCC that the decision of the discipline authority was incorrect was unreasonable. I do not view the decision of the PCC as correct but that does not demonstrate that it was unreasonable.

[23] In the result I decline to make the order requested by the petitioner quashing the decision of the PCC to appoint Mr. Pitfield.

[24] There will be no costs order in relation to this application.

"The Honourable Mr. Justice Affleck"