Appendix #1 to the BCGEU Submission to the Special Committee on Reforming the Police Act

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Casavant v. British Columbia (Labour Relations Board),* 2020 BCCA 159

Date: 20200604
Docket: CA46376

Between:

Bryce J. Casavant

Appellant
(Petitioner)

And

Labour Relations Board of British Columbia (LRB), BC Public Service Agency (PSA) and BC Government and Service Employees' Union (BCGEU)

Respondents
(Respondents)

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated August 23, 2019 (*Casavant v. British Columbia (Labour Relations Board)*, 2019 BCSC 1422, Campbell River Docket S14215).

The Appellant appearing in person:	B.J. Casavant
Counsel for the Respondent Labour Relations Board of B.C.:	J.M. O'Rourke
Counsel for the Respondent B.C. Public Service Agency:	K. Chewka
Counsel for the Respondent B.C. Government and Service Employees' Union:	J. Mistry M. Lin, Articled Student
Place and Date of Hearing:	Vancouver, British Columbia March 9, 2020
Place and Date of Judgment:	Vancouver, British Columbia June 4, 2020

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Hunter

Summary:

The appellant was dismissed from his position as a conservation officer after refusing to follow an order to euthanize two bear cubs. The union filed a grievance on his behalf under the collective agreement and an arbitrator was appointed under the Labour Relations Code. The appellant entered into a settlement agreement with the employer before the arbitration completed. Later, after coming into possession of two reports the employer prepared prior to his dismissal, the appellant applied to the Labour Relations Board to have the matter reopened, arguing the initial arbitration process was flawed. The Board dismissed his applications, and the appellant applied for judicial review. On judicial review the appellant raised a jurisdictional challenge to the Board arguing that, based on the nature of his employment as a Special Provincial Constable, all disciplinary proceedings should have proceeded in accordance with the Police Act and not the collective agreement. The judge declined to address the jurisdictional question on the basis that it had not been raised before the Board and should not be addressed for the first time on judicial review. Held: Appeal allowed in part. The judge erred in the exercise of her discretion by giving little or no weight to either the appellant's identification of the Police Act process before the Board or the nature of the jurisdictional question which involved demarcation of responsibility between administrative tribunals. The appellant's dismissal related to the performance of his constabulary duties and was governed by the Police Act. As the Board had no statutory authority to address those matters, there is no point in remitting the matter to the Board for consideration. The proceedings before the Board should be declared a nullity.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] Bryce Casavant was dismissed from his position as a conservation officer with the British Columbia Ministry of Environment (the "Ministry") after refusing to follow an order to euthanize two bear cubs. His challenge to that dismissal set in motion an ill-considered series of proceedings under the *Labour Relations Code*, R.S.B.C. 1996, c. 244 (the "*Code*") which culminated in the court below denying his application for judicial review. Mr. Casavant appeals from that decision.

Background

[2] Mr. Casavant was hired by the Ministry in 2013 as a conservation officer under the *Environmental Management Act*, S.B.C. 2003, c. 53. In that role he was also appointed under s. 9 of the *Police Act*, R.S.B.C. 1996, c. 367 as a Special Provincial Constable and represented by the BC Government and Service Employees Union (the "Union") subject to a collective agreement (the "Collective Agreement"). Mr. Casavant was assigned to the Port McNeill RCMP detachment.

[3] On July 5, 2015, the Ministry received a complaint from a citizen about a female bear and her two cubs coming onto his property and eating garbage and food from an outdoor freezer. Mr. Casavant's supervisor ordered him to euthanize the bears on the basis that they had become habituated to human food.

[4] Mr. Casavant euthanized the sow but not the cubs because he understood, from speaking with the complainant, that only the sow had been eating garbage. Mr. Casavant formed the view that killing the cubs in these circumstances would be inconsistent with Ministry policy. Instead of complying with the kill order, he took the cubs to a veterinarian who assessed them and transferred them to the North Island Recovery Centre. They were eventually released into the wild.

[5] Mr. Casavant's supervising officer filed a complaint against him for refusing to follow the order to euthanize the cubs. On July 6, the day after the incident, a formal Notice of Complaint was issued to Mr. Casavant under the Conservation Officer Service Complaints Policy alleging "the disciplinary default of neglect of duty". Mr. Casavant was suspended pending an investigation into the allegation.

[6] On August 25, after completing its investigation, the Ministry informed Mr. Casavant that they had concluded he was unsuitable for the job of conservation officer, and was being transferred to a position with the Ministry of Forests, Land, Natural Resource Operations and Rural Development — a position at the same work location and at the same pay but without the designation of Special Provincial Constable. Loss of conservation officer status is defined in the Ministry of Environment Conservation Officer Service Code of Professional Conduct as a dismissal.

[7] The Ministry set out the reasons for Mr. Casavant's dismissal in a letter as follows:

> **Transfer to New Position**
>
> During the time you have been with the CO Service, you have demonstrated an unsuitability to work as a Conservation Officer. We have come to this conclusion from your handling of the recent bear cub matter, but concerns have also been raised regarding two other recent incidents in which you refused to follow directions given to you:
>
> - In March 2015, you were told verbally and by email that you were to follow up on a live trap with a cougar, and that you were not to walk up to the trap because the cougar could respond unexpectedly and possibly break loose from the trap. You were instructed to shoot the cougar upon determining a safe shot. Despite this direction, you walked up to the trap and took a video, with commentary, of the cougar in the trap. This endangered both your safety and the safety of the Park Ranger that was with you. Further, had the cougar escaped, there was risk to the public.
> - You were told verbally and in writing that you were not cleared to do unknown risk vehicle checks on your own. Despite this, in April 2015 you disobeyed this direction and conducted an unknown risk check on your own in a remote area. The fact that a loaded firearm was subsequently found to be in the vehicle demonstrated this clearly compromised your safety, and possibly the safety of others.
>
> It is clear that you will continue to [not] follow instructions and policies in your capacity as a Conservation Officer if you disagree with them. You confirmed this in your interview with us, when you said that in the future, with the same information you would make the same decision and take the same action regarding the bear situation. That cannot be allowed. The effectiveness and safety of the operations of the Conservation Officer Service require all employees to be able to comply with instructions and policies. You have proven that you are unable to do so.
>
> It is clear that your employment relationship with the Conservation Officer Service is unsustainable. We could never trust that if you disagreed with the direction given by a supervisor, that you would follow the direction given or follow the proper procedures for escalating the matter. Therefore, we are exercising our rights under the Collective Agreement to transfer you to a new job within the Ministry of Forests, Lands and Natural Resource Operations as a Natural Resource Officer-Senior Compliance and Enforcement Specialist. The hope is that in your new position, given the different nature of the work involved, you will not suffer from the same inability to follow instructions and policies. The transfer is effective immediately, and you are subject to a six month subsequent probationary period as part of the transfer.
>
> [Emphasis added.]

[8] The Union filed a grievance on Mr. Casavant's behalf under the Collective Agreement. At the arbitration it became clear that the Ministry (represented by the respondent BC Public Service Agency) intended to go beyond the three incidents identified in the letter of dismissal to introduce evidence relating to what it described as Mr. Casavant's "consistent pattern of being unwilling or unable to follow instructions". The Union took the position that the Ministry could not raise matters that were not brought to Mr. Casavant's attention at the time disciplinary action was taken, and to which he had not had an opportunity to respond during the investigation. The arbitrator ruled the additional evidence was admissible, either in relation to insubordination or suitability. The parties refer to this ruling as the "Scope Award".

[9] The arbitration hearing proceeded no further. One week after the Scope Award, the Union entered into a settlement agreement signed by Mr. Casavant, the Union and the Ministry. As a result of the settlement, the merits of the grievance were never tested.

[10] Shortly thereafter, Mr. Casavant hired his own lawyer who made an information request under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165. As a result, Mr. Casavant obtained two reports the Ministry had caused to be prepared prior to his dismissal — reports that had not been provided to him in advance of the arbitration. The first was a report prepared by a psychologist who, although requested to perform a general workplace environment assessment, instead provided an opinion about Mr. Casavant's suitability for his position (a report for which the psychologist was eventually sanctioned by the College of Psychologists, which found the report to be unreliable and improperly obtained).

[11] The second was an investigation report prepared by an Employee Relations Specialist with the BC Public Service Agency which concluded that Mr. Casavant had failed to follow a direct order from his commanding officer to euthanize the bear cubs, but also flagged that "operational policy and procedures were not addressed and are out of scope for the purposes of this report". This latter acknowledgement was significant, in Mr. Casavant's view, because he had consistently taken the position that he had disobeyed his commanding officer's order because it was inconsistent with Ministry policies. He contended that, as a conservation officer, he had an obligation to independently assess the situation and to decline to follow an unlawful order to discharge his firearm.

[12] After obtaining the two reports, Mr. Casavant formed the view that the initial arbitration process was flawed because he had not been provided, in advance of the hearing, with the information the employer had relied on to remove him from his position. That failure to disclose was contrary to the Collective Agreement, which, as the arbitrator noted in the Scope Ruling, "essentially bars the employer from relying on any document in an employee's file that the employee was never made aware of."

[13] Mr. Casavant therefore applied to the arbitrator to set aside the Scope Ruling and the settlement agreement that followed. The Union opposed the application. The arbitrator dismissed the application, finding that the Union had control of the grievance process and that Mr. Casavant had not established exceptional circumstances to justify granting him standing to pursue matters independently. The arbitrator also found he did not have jurisdiction to hear the application because the parties had only given him jurisdiction over implementation of the settlement agreement. The parties refer to this as the "Standing Award".

[14] Mr. Casavant applied to the Labour Relations Board (the "Board") under s. 99 of the *Code* for a review of the Scope Award and the Standing Award. The Board dismissed Mr. Casavant's application for review, finding that the arbitrator's interpretation of the scope of his retained jurisdiction over the grievance and settlement to be correct, and also finding the arbitrator was right to uphold the Union's exclusive bargaining agency and its control over the grievance, including the decision not to pursue the arguments Mr. Casavant wished to advance with respect to the Ministry's failure to produce the two reports.

[15] Mr. Casavant then applied for leave and reconsideration of the review decision under s. 141 of the *Code*. The Board found no basis to interfere with its review decision, noting that a union has carriage of grievances filed under a collective agreement and may dispose of grievances as it sees fit, subject only to the employee's right to raise a breach of the duty of fair representation. The Board noted Mr. Casavant had not pursued that right, and found the review decision correctly relied on the Board's policy not to look behind settlement agreements in any event.

Judicial Review Hearing

[16] Mr. Casavant applied for judicial review of the reconsideration decision. He repeated the cornucopia of arguments made to the Board which included his submission that he had been denied the right to a fair hearing, that the Union had failed to represent him fairly, that the settlement agreement had been signed under duress, and that his mobility rights guaranteed by the *Charter* had been infringed. In addition, Mr. Casavant for the first time clearly raised a jurisdictional challenge to the Board based on the nature of his employment as a Special Provincial Constable — an office which he argued requires all disciplinary proceedings to proceed in accordance with the investigation procedures mandated by the *Police Act* and regulations thereunder, and not pursuant to the Collective Agreement and the *Code*.

[17] The judge identified the applicable standard of review as "patent unreasonableness," noting that it is a highly deferential standard. She concluded that the reconsideration decision of the Board was neither unfair nor patently unreasonable in relation to any of the many issues Mr. Casavant had raised and argued before the Board. She declined to address the jurisdictional question, relying on the general rule that a judge on judicial review should not consider matters that were not raised before the adjudicator at first instance. As a result, the judge dismissed the application for judicial review.

Issues

[18] Mr. Casavant raises two main grounds of appeal:

1. Did the judge err in relying on the common-law definition of patent unreasonableness rather than the statutory definition when applying the standard of review?
2. Did the judge err in declining to consider the jurisdictional issue on judicial review?

[19] Mr. Casavant also appeals "in the alternative" the judge's upholding of the Board's decisions on those issues she found to be properly raised on judicial review. In my view Mr. Casavant has failed to identify any errors in the judge's thorough analysis of those issues and no more need be said about this aspect of his appeal.

[20] I turn now to each of the two primary grounds of appeal.

1. Did the judge use the wrong standard of review?

[21] The parties agree that the standard of review to be applied to the Board's decision is patent unreasonableness, but Mr. Casavant says the judge erred in using the common-law definition of that term. He submits that the court was required to apply the statutory definition of "patently unreasonable" set out in s. 58(3) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

[22] Mr. Casavant relies on s. 115.1 of the *Code* which states that s. 58(1) and (2) of the *Administrative Tribunals Act* apply to the Board. Section 58 provides as follows:

> 58(1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
>
> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness
>
> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.
>
> [Emphasis added.]

[23] Mr. Casavant assumed that the definition in s. 58(3) applied to the standard of review referred to in s. 58(2). However, this Court has confirmed that the *Code* does not incorporate s. 58(3) of the *Administrative Tribunals Act*, and that the common-law definition of patent unreasonableness applies to decisions of the Board: *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association (No. 2),* 2016 BCCA 273 at paras. 46 and 52–54.

[24] It follows that the judge did not err in relying on the common-law definition of "patently unreasonable" to inform her analysis on the application for judicial review.

[25] I turn now to the central ground of appeal.

2. Did the judge err in declining to consider the jurisdictional issue on judicial review?

[26] This ground of appeal raises two issues: first, whether the judge erred in finding that Mr. Casavant had not raised the jurisdictional question before the Board; and second, whether the judge erred in refusing to exercise her discretion to consider the question on judicial review in any event.

[27] Both issues attract a deferential standard of review. The first is a finding of fact that will not be interfered with unless the judge made a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10. The second is a discretionary decision which will not be interfered with unless the judge has made an error in principle or failed to give sufficient weight to relevant considerations: *LaFontaine v. University of British Columbia*, 2018 BCCA 307 at para. 45. An appellate court may not interfere with a discretionary decision on the grounds that it would have exercised its discretion differently: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 76–77.

(a) Did Mr. Casavant raise the jurisdictional issue before the Board?

[28] The judge began by reviewing the jurisdictional argument made by Mr. Casavant at the hearing before her:

> [49] At pages 3 to 9 of his written submissions, Mr. Casavant argues that the Reconsideration Decision ought to be set aside as the "Board failed to properly assess its own jurisdiction". More specifically, in argument, Mr. Casavant submitted that as a Conservation officer, he was a Special Provincial Constable. A Special Provincial Constable, faced with an allegation that he had failed to follow orders or instructions, is entitled to have any investigation conducted by an Employer, or discipline subsequently imposed, considered under the *Police Act*, R.S.B.C. 1996, c. 367, and the *Special Provincial Constable Complaints Procedure Regulation*, B.C. Reg. 206/98.
>
> [50] Mr. Casavant submits that, pursuant to the *Police Act*, *the Public Service Act*, R.S.B.C. 1996, c. 385 does not apply to him. As a result, he submits that the Reconsideration Decision ought to be set aside because the Board (and presumably, the Arbitrator) lacked jurisdiction from the outset.
>
> [Emphasis added.]

She found Mr. Casavant had raised this argument for the first time on judicial review, saying:

> [52] Without commenting on the merits of Mr. Casavant's arguments with respect to the applicability of the *Police Act*, neither he nor the Union raised this argument when the complaint was filed against Mr. Casavant, when the Employer imposed the original suspension, or when the transfer was effected. Nor was it raised in the Union's grievances filed in respect of the discipline. Finally, it was not raised before the Arbitrator or the Board.

[29] Mr. Casavant admits he did not use the language of jurisdiction in his submissions to the Board — submissions which he prepared as a self-represented litigant — but he says he did raise the "lawfulness of the process" as an issue. The judge acknowledged this, noting at para. 62 that Mr. Casavant had written to the Board in September 2017 saying:

> I believe this information [an investigation by the College of Psychologists into a Workplace Assessment Report conducted by a psychologist on behalf of the Employer] may be significant to the Board's assessment of my request for leave for reconsideration for the following reason:
>
> I will wait for the document to make any final statements, however, it may be that this information constitutes new evidence. And it may be that this new evidence will show that the [E]mployer never followed their legislated responsibilities under the *Police Act, Special Provincial Constable Complaint Procedure Regulation*. ...
>
> [Emphasis added.]

She also noted that Mr. Casavant had in the same letter summarized the requirements of the *Special Provincial Complaint Constable Procedure Regulation*, but she found that this was the "only reference Mr. Casavant made to the *Police Act* and its regulations".

[30] However, a review of the record discloses additional references to the *Police Act* process and repeated statements to the effect that the Ministry had followed the wrong process:

- In support of his argument that the Union had not represented him fairly, Mr. Casavant attached a copy of the *Complaints Against Conservation Officers Acting as Special Provincial Constables* procedure which provides:

  > 3.0 Procedure
  >
  > 1. All complaints made against conservation officers acting in the capacity of a Special Provincial Constable or having identified themselves as such shall be handled in accordance with BC Reg. 206/98, the Special Provincial Constable Complaint Regulation attached to this procedure as Appendix 1.

- He also attached an investigation done in accordance with that procedure involving a fellow conservation officer. He described that report as an example of "what the proper investigation process should have been."
- In his submission to the Board, Mr. Casavant stated that the Ministry and the Union had "deviated from investigation policy established under statute". He referred to the Union and the Ministry directing him to take part in an investigation which was "contrary to established policy and procedures".
- He included a letter from Don Wright, Deputy Minister to the Premier and head of the Public Service, dated January 15, 2018 which expressly refers to Mr. Casavant's complaint that the investigation did not follow the regular complaints procedure.
- He attached a letter from his then lawyer responding to the Deputy Minister dated January 16, 2018 stating:

  > Further, it was not until after the settlement agreement was executed that Mr. Casavant discovered, through the Myhal Report and other means, that the investigation process applied to him completely diverged from established CO Service policy for investigating complaints against COs. Importantly, Mr. Casavant has never received or reviewed a copy of the original complaint that was made against him.
  >
  > [Emphasis added.]

- The original Notice of Complaint delivered to Mr. Casavant on July 6, 2015 alleges "disciplinary default of neglect of duty, as outlined in the Conservation Officer Service Code of Professional Conduct" and indicates there would be an investigation under the Conservation Officer Service Complaints Policy.
- A letter from Mr. Casavant's counsel to the Deputy Minister to the Premier on October 24, 2017 states:

  > Shortly after the [bear cub Incident], the Conservation Officer Service ("COS") began deviating [from] established procedures for investigating complaints made against Conservation Officers. In this case, the complaint had been initiated by Mr. Casavant' s superior, who was apparently incensed that Mr. Casavant had refused an illegal order to kill two baby black bears. Mr. Casavant was first told via email that he was suspended without pay.
  >
  > [Emphasis added.]

- On January 4, 2018, Mr. Casavant's then lawyer wrote again to the Deputy Minister responsible for the Public Service to document a meeting with him and Lori Halls, the Deputy Minister of the Public Service Agency, saying in part:

  > Ms. Halls confirmed that the established BC Conservation Officer Service complaints process – which was established pursuant to section 106 of the *Environmental Management Act* – applies to all complaints regarding Conservation Officers, including the complaint that was made internally regarding Mr. Casavant following the July 5, 2015 incident. As we noted during the meeting, this procedure was clearly not followed with respect to Mr. Casavant, and no explanation has ever been provided for why that procedure was so flagrantly disregarded in this instance.

[31] Many of the submissions above refer to the general process for dealing with complaints against conservation officers, rather than the specific process mandated by the *Police Act*. But the general complaints policy clearly provides that complaints against conservation officers *acting in their capacity as a constable* are subject to a different process mandated by the *Police Act Special Provincial Constable Complaint Procedure Regulation*.

[32] Mr. Casavant was self-represented before the Board on both the original review and the reconsideration decision. He did not emphasize or frame the *Special Provincial Constable Complaint Procedure Regulation*, B.C. Reg. 206/98 process as a foundational jurisdictional issue. Instead, he complained of an "unfair and wrong process", raising the issue as but one of a myriad of complaints which stressed non-disclosure of the two reports. However, in my respectful view, it cannot be said that Mr. Casavant did not raise the issue of his right to a distinct process governing complaints against Special Provincial Constables. Although he did not directly challenge the Board's jurisdiction, Mr. Casavant identified the correct procedure under the *Police Act* and made repeated references to the Ministry and the Union following the wrong investigation and disciplinary process.

[33] In summary on this ground of appeal, while I agree with the judge that Mr. Casavant did not squarely challenge the Board's jurisdiction to address his dismissal, in my respectful view the record does not support her conclusion (at para. 64) that Mr. Casavant had not raised the application of the *Police Act* to his circumstances prior to judicial review.

[34] I turn now to consider whether the judge erred in declining to address the jurisdictional issue on judicial review.

(b) Did the judge err in the exercise of her discretion?

[35] I begin by noting that in some cases it may indeed be appropriate for a judge, in the exercise of their discretion, to refuse to allow a party to recast an argument that has been poorly developed before the tribunal at first instance and to raise it clearly for the first time on judicial review. But in my view, and with great respect, the judge erred in the exercise of her discretion in this case because she gave insufficient weight to Mr. Casavant's identification of the alternative disciplinary process underlying the jurisdictional issue (addressed above), and gave no weight to the nature of the jurisdictional challenge he wished to raise.

[36] The first point to note about the nature of the jurisdictional challenge is that it related to the correct forum for reviewing Mr. Casavant's dismissal. Although the judge and the respondents all stressed Mr. Casavant's failure to mount a clear challenge to the jurisdiction of the arbitrator and the Board, in my view the responsibility was not his alone. The Union representing Mr. Casavant controlled the grievance process and provided legal advice. The Ministry initiated the disciplinary action under the Conservation Officer Service Code of Conduct but did not raise the jurisdictional issue when the Union filed the grievance under the Collective Agreement and initiated proceedings under the *Code*. As McLachlin J.A. observed in *Carpenter v. Vancouver Police Bd.* (1986), 9 B.C.L.R. (2d) 99, at 124–125 (C.A.) [*Carpenter No. 2*], leave to appeal to SCC ref', 20262 (May 14, 1987), the employer bears some responsibility for conducting disciplinary proceedings in the correct forum.

[37] Second, although the judge recognized that the task before a reviewing court is to ensure that the administrative decision maker acted within its jurisdiction, she did not give any weight to the prospect that the entire proceeding before the Board was a nullity: at paras. 59 and 52.

[38] In my view, the nature of the jurisdictional question raised by Mr. Casavant goes to what the Supreme Court of Canada described in *Dunsmuir v. New Brunswick*, 2008 SCC 9, as a "true question of jurisdiction or *vires*". True questions of jurisdiction arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a matter: *Dunsmuir* at para. 59; *Québec A.G. v. Guerin*, 2017 SCC 42 at para. 32. More recently, in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, citing *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 [*CHRC*] and *Alberta (Information an Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*], the Supreme Court recognized that the concept of jurisdiction in administrative law is inherently "slippery":

> [66] … This is because, in theory, any challenge to an administrative decision can be characterized as "jurisdictional" in the sense that it calls into question whether the decision maker had the authority to act as it did: see *CHRC*, at para. 38; *Alberta Teachers*, at para. 34; see similarly *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290 (2013), at p. 299. Although this Court's jurisprudence contemplates that only a much narrower class of "truly" jurisdictional questions requires correctness review, it has observed that there are no "clear markers" to distinguish such questions from other questions related to the interpretation of an administrative decision maker's enabling statute: see *CHRC*, at para. 38. Despite differing views on whether it is possible to demarcate a class of "truly" jurisdictional questions, there is general agreement that "it is often difficult to distinguish between exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute": *CHRC*, at para. 111, per Brown J., concurring.

[39] In *Vavilov*, the court did, however, stress the importance of drawing jurisdictional boundaries between two or more administrative bodies, using as an example the very jurisdictional issue raised in the present case: the absence of jurisdiction of a labour arbitrator to consider matters of police discipline and dismissal that are otherwise subject to a comprehensive legislative scheme: *Vavilov* at para. 63, citing *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14. The court in *Vavilov* noted that administrative decisions are rarely contested on this basis and continued at para. 64:

> … Where they are, however, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another. The rationale for this category of questions is simple: the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions: see *British Columbia Telephone Co.*, at para. 80, per McLachlin J. (as she then was), concurring. Members of the public must know where to turn in order to resolve a dispute. As with general questions of law of central importance to the legal system as a whole, the application of the correctness standard in these cases safeguards predictability, finality and certainty in the law of administrative decision making.
>
> [Emphasis added.]

Although this passage was written in the context of the standard of review applicable to such issues, it underscores the importance of the very type of jurisdictional question at issue in the present case.

[40] The judge relied on *Actton Transport Ltd. v. British Columbia (Employment Standards),* 2010 BCCA 272, in support of her conclusion that it is an error for a judge to determine a jurisdictional question *de novo*. In that case, however, the tribunal had determined the jurisdictional question at first instance. Actton's operations involved interprovincial and international trucking, as well as a local garbage collection business. The issue before the tribunal was whether the provincial *Employment Standards Act*, R.S.B.C. 1996, c. 113, applied to employees of the garbage collection side of the business, given that the company was in part subject to federal jurisdiction. Both the Director's delegate and the Employment Standards Tribunal decided the division of powers question in favour of the drivers. The company sought judicial review. As Donald J.A. observed at para. 5:

> … The proceedings in the Supreme Court took an unusual course. With the consent of all parties, the reviewing judge received "new evidence" and was invited to determine the jurisdictional question *de novo* in light of the augmented record …

The main question on appeal in *Actton* was whether the judge erred in adopting that approach. In my view, *Actton* provides little guidance on the manner in which judges should exercise their discretion to hear a jurisdictional question based on the existing record but not addressed by the tribunal below.

[41] Third, the judge did not consider the settled nature of the jurisdictional question Mr. Casavant wished to raise. Although in general a reviewing court will not wish to be deprived of the tribunal's views on an issue raised for the first time on review, that rationale will be less compelling when the tribunal and the courts have expressed their views on the subject in earlier decisions: *Alberta Teachers* at para. 28. I turn to a review of that jurisprudence now.

[42] In *Carpenter v. Vancouver Police Board and Stewart* (1985), 63 B.C.L.R. 310 (C.A.) [*Carpenter No. 1*], the appellant was employed as a police officer with the Vancouver City Police Board. The Police Board dismissed Mr. Carpenter based on allegations of a poor employment record, involvement in possession of stolen property, and continued association with known criminals. Rather than following the procedures set out in the *Police Act* for disciplinary action, the Board took the position that Mr. Carpenter had repudiated his contract of employment by virtue of his conduct.

[43] As in the present case, the union acting on behalf of Mr. Carpenter commenced a grievance proceeding under the collective agreement, but unlike the present case, clearly stated they were relying on the officer's right to be dealt with in accordance with the *Police Act* regulations governing discipline of officers. The union took the position that the dismissal could not stand for noncompliance with the complaint regulation. After Mr. Carpenter was acquitted of the criminal charges underpinning the complaints, he filed a petition for judicial review for an order setting aside his dismissal on the ground that the employer was bound to proceed under the *Police Act*.

[44] The case proceeded initially on a question of law alone. Lambert J.A., concurring in the result, found that the *Police Act* and *Police (Discipline) Regulation*, B.C. Reg. 330/75 are intended to provide procedural safeguards for police officers:

> [19] The *Police Act* and the *Police (Discipline) Regulation* contemplate that a process of complaint, investigation, and inquiry, with certain procedural safeguards and rights of appeal, must be followed before a decision is made to dismiss a policeman. That process was not followed in this case. Instead, the dismissal occurred as it would have occurred if only the collective agreement and the *Labour Code* had governed, with all the rights to dispute the dismissal being rights to be exercised by way of grievance and arbitration, after the dismissal occurred.

[45] In concurring reasons, Anderson J.A. noted that while a police officer is an employee, he also holds the office of police constable and "by virtue of his 'office' has, to a certain degree, a measure of independence": at paras. 50 and 52. The Court ultimately determined that the matters were governed by the *Police Act* and therefore Mr. Carpenter was entitled to judicial review of the dismissal decision.

[46] When the judicial review proceeded on the substantive question of the validity of the dismissal, the judge exercised his discretion against Mr. Carpenter on the basis that he had delayed too long in commencing review proceedings — in part because he had not directly challenged the procedure used to dismiss him — and had failed to pursue the adequate alternative remedy of an appeal to the Police Board.

[47] An appeal from that decision was allowed: *Carpenter No. 2*. Anderson J.A. writing again in concurring reasons began by "emphasizing forcefully" at para. 20 certain central matters of fact and law which I quote in part:

> (1) The conduct of the [employers] was unlawful from the outset.
>
> (2) The purported dismissal was a nullity.
>
> (3) The arbitration process was null and void from the outset and, if the arbitration had proceeded, the arbitrator must necessarily, as a matter of law, have declined jurisdiction on the ground that the only method of proceeding against Carpenter was pursuant to the regulations.
>
> (4) Both the respondents and Carpenter proceeded under a mistake of law as follows:
>
> (a) The respondents mistakenly believed that they could dismiss Carpenter on the basis of "fundamental breach" by Carpenter of his contract of employment.
>
> (b) The respondents mistakenly believed that the regulations were not applicable at all, either to the dismissal or to the arbitration process.
>
> (c) Carpenter mistakenly believed that, while he was entitled to the procedural and substantive rights afforded to him by the regulations, the matter was one for disposition, in accordance with the grievance and arbitration procedure outlined in the collective agreement.
>
> [Emphasis added.]

[48] Similarly, in *Re Victoria City Police Board and Victoria City Policemen's Union* (1980), 30 L.A.C. (2d) 79, an arbitration board ruled that it had no jurisdiction to deal with issues arising from the termination of a police officer for misconduct because the matter was governed exclusively by the *Police Act*.

[49] In *Regina Police Assn. v. Regina (City) Police Commissioners*, 2000 SCC 14 [*Shotton*], a police officer resigned rather than face disciplinary action. He later withdrew his resignation, but the chief of police refused to accept the withdrawal. The officer's union filed a grievance under the collective agreement and eventually requested arbitration. The arbitrator held that she did not have jurisdiction to decide the dispute since matters of police discipline and dismissal were governed by the Saskatchewan *Police Act, 1990*, S.S. 1990-91 c. P-15.01 and regulations, and came within the jurisdiction of the adjudicative bodies created under that legislation. The Court of Queen's Bench dismissed the union's application to quash that decision, but a majority of the Court of Appeal reversed on appeal. The Supreme Court of Canada reinstated the decision of the arbitrator. It found that the arbitrator had no jurisdiction to decide the dispute, which clearly centred on discipline. The Court stressed that it is public policy that police boards have exclusive responsibility for maintaining an efficient police force, an integral part of which is the ability to discipline members. The Court noted that the existence of an employment relationship, *per se*, does not grant an arbitrator the jurisdiction to hear or decide a dispute: at para. 24. Because the essential character of the dispute was disciplinary, the Court upheld the arbitrator's conclusion that she did not have jurisdiction to hear and decide the matter (at para. 32).

[50] The Saskatchewan Court of Appeal again addressed the jurisdictional question in *Saskatoon Board of Police Commissioners v. Saskatoon City Police Association*, 2004 SKCA 3. In that case, two probationary members of the Saskatoon police service were dismissed for disciplinary reasons as being "unsuitable" for police service. The union grieved the dismissals under the collective agreement. The employer took the position that the arbitration board had no jurisdiction to deal with the grievances because they had to be addressed under the terms of the *Police Act*. The Labor Relations Board decided the questions were arbitrable: para. 10. That decision was upheld by the judge on judicial review. The Court of Appeal reversed, finding that the Labour Board had ignored legislative intent, and said:

> [37] The decision of the arbitration board in this respect was wrong in law. The concept that a dismissal for disciplinary reasons be subject to review by a labour arbitration board is incompatible with the scheme of the Act as discussed at length in *Shotton*. The sound policy reasons for separating disciplinary matters from ordinary employer-employee relations are also set out therein. As noted above, s. 35 clearly places responsibility for discipline in the hands of the Chief of Police. Part IV of *The Police Act* sets out the only avenues of review or appeal of decisions respecting discipline. Review of any disciplinary decision by a labour arbitration board does not fit within that scheme. The Legislature intended, when enacting s. 67, to make any decisions of the Chief of Police dismissing probationary members for unsuitability not subject to review in any forum. It did not intend that The *Trade Union Act* or the collective agreement should apply in respect of matters of discipline of probationary members. There is nothing in the Act to indicate otherwise.
>
> [Emphasis added.]

[51] Although the cases above involve municipal police officers and various provincial statutes, they stand for the principle that a labour board does not have jurisdiction to deal with a police disciplinary matter governed by a distinct process.

[52] It is not disputed in the present case that conservation officers acting in their capacity as Special Provincial Constables are governed by a distinct complaint and discipline process under the *Police Act* and the *Special Provincial Constable Complaint Procedure Regulation.* But the Ministry says that the *Police Act* process does not apply in the circumstances of this case because the complaint related to Mr. Casavant's *general unsuitability* for employment, not police discipline. The Ministry contends that unsuitability is a matter governed by the Collective Agreement, or at least arguably so. The Ministry and the Board submit that, at a minimum, the question of jurisdiction should be remitted to the Board so that it can draw the line between the Collective Agreement and the *Police Act* and decide whether the issues raise police discipline or employment issues.

[53] That brings me squarely to the question of whether the jurisdictional issue should be remitted to the Board. Although that is the general rule, declining to remit a matter may be appropriate where it becomes evident "that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose": *Vavilov* at para. 142. In my view, this is such a case.

[54] The Collective Agreement does not form part of the record, so neither the Ministry nor the Union particularized their argument that the issues raised by Mr. Casavant's dismissal were governed by its terms. Mr. Casavant agrees that some aspects of the employment of Special Provincial Constables are governed by the Collective Agreement, such as hours of work, wages, and general expectations. However, he submits that all of the conduct put in issue by the Ministry related to the performance of constabulary duties. I agree with that assessment.

[55] It is the essential character of the matters raised that is determinative, not the employer's characterization of the complaints as "unsuitability for employment": *Deighton v. Vancouver Police Board* (1986), [1987] B.C.W.L.D. 278 (S.C.). In *Deighton* a probationary police constable was involved in an incident at a bar in Surrey while off duty. His employment was terminated following an internal investigation. The employer did not follow the procedures set out in the *Police (Discipline) Regulations*. Instead, the Police Board relied on an article in the collective agreement, which gave the employer the power to terminate a probationary employee on the grounds that he is unsuitable for employment as a police constable. In addressing this argument, Wood J. said:

> [8] I have no hesitation in saying that if he is guilty of the misconduct alleged, Deighton is indeed unsuitable for employment as a peace officer. That, however, is not the issue before me. The issue raised by this petition is whether or not Deighton can be dismissed from his employment in the absence of any formal hearing into the allegations of misconduct giving rise to that dismissal.

[56] Mr. Deighton's employer took the position that the dismissal was genuinely motivated by his unsuitability and not by any alleged disciplinary default. It argued that the principles enunciated in *Carpenter No. 1* only applied when disciplinary defaults were the basis for a termination. The court disagreed saying:

> [16] Similarly, in this case, it is not possible to convert Deighton's dismissal into a labour relations matter merely by characterising him as unsuitable under art. 10.5(b). The basis for that assessment was his conduct on the night of November 4, 1985. The chief constable's conclusion that he lacked self-control, discipline and judgment results from allegations of conduct which, if they were proven, would amount to disciplinary defaults. Those allegations have not been proven. Deighton has not even had a real opportunity to respond to them. However, it was only by accepting them as proven that the chief constable could reasonably draw the inferences that led to his conclusion.
>
> [Emphasis added.]

[57] In my view, the disciplinary nature of the dismissal in the present case is self-evident. The three specific incidents relied on by the employer in the letter of termination all relate to failure to follow orders. Indeed, the initial letter of complaint alleged that Mr. Casavant had committed "the disciplinary default of neglect of duty, as outlined in the Conservation Officer Service Code of Professional Conduct". The code of conduct defines the disciplinary default of neglect of duty as follows:

> 2. A conservation officer commits the disciplinary default of neglect of duty if;
>
> a. the conservation officer, without lawful excuse, fails to promptly and diligently
>
> i. obey a lawful instruction of a supervisor of the conservation officer, or
>
> ii. perform his or her duties as a conservation officer.
>
> b. the conservation officer fails to work in accordance with instructions, or leaves an area, or other place or duty without authorization or sufficient cause or, having left a place of duty with authorization or sufficient cause, fails to return promptly, or
>
> c. the conservation officer is absent from, or late for, duty without reasonable excuse.
>
> [Emphasis added.]

[58] I note further that Mr. Casavant's "defence" to his dismissal is based on the Conservation Officer Professional Code of Conduct and his obligation as a constable to exercise independent judgment. That is not a matter within the expertise of the Board.

[59] In summary on this issue, I conclude there is no point in remitting the jurisdictional question to the Board because the inevitable answer to this threshold question of law is that the Board and the arbitrator have no jurisdiction to address Mr. Casavant's dismissal under the Collective Agreement.

Conclusion

[60] Mr. Casavant seeks a declaration that the Board did not have jurisdiction over his dismissal — but the question arises as to the practical effect of that declaration given that the settlement agreement the parties entered into has governed their relationship for more than four years. This question was not addressed on appeal by any party, other than to acknowledge that the issue was "complicated".

[61] As McLachlin J.A. noted in *Carpenter No. 2*, the court must do its best with the tangled knot created by the parties in adopting a flawed procedure. In my view the best that can be done in these circumstances is to declare that the proceedings before the arbitrator and Board were a nullity, to confirm that Mr. Casavant's dismissal should have been addressed under the *Police Act*, *Special Provincial Constable Complaint Procedure Regulation*, and to leave the parties to sort out the consequences of those declarations, if any, on the settlement agreement.

Disposition

[62] I would allow the appeal in part by declaring that the arbitrator and the Board do not have jurisdiction over Mr. Casavant's dismissal and that the proceedings before them are a nullity. Mr. Casavant is entitled to his costs of the appeal and of the judicial review as against the Ministry.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Mr. Justice Hunter"

This Act is current to February 10, 2021

See the Tables of Legislative Changes for this Act's legislative history, including any changes not in force.

POLICE ACT

[RSBC 1996] CHAPTER 367

Contents

Part 1 — Definitions

Definitions

1 In this Act:

"auxiliary constable" means a constable appointed under section 8 (1);

"board" means,

(a) in relation to a municipal police department, a municipal police board,

(b) in relation to a designated policing unit, the designated board established for that designated policing unit, and

(c) in relation to a designated law enforcement unit, the designated board established for that designated law enforcement unit;

"bylaw enforcement officer" means a bylaw enforcement officer appointed under section 36;

"chief civilian director" means a chief civilian director appointed under section 38.03;

"chief constable" means the chief constable of a municipal police department;

"chief officer" means a chief officer appointed under section 4.2 (2) (c) (iv) (A) or 18.2 (1) (d) (iii) (A);

"commissioner" means the commissioner of the provincial police force;

"committee" means a local police committee established under section 31;

"designated board" means a board established under section 4.1 (7) or 18.1 (7);

"designated constable" means a constable appointed under section 4.1 (11);

"designated law enforcement unit" means a designated law enforcement unit established under section 18.1 (7);

"designated policing unit" means a designated policing unit established under section 4.1 (7);

"director" means the director of police services referred to in section 39 (1) *[director of police services]*;

"director's standards" means standards set by the director under section 40 (1) (a.1), as amended from time to time;

"enforcement officer" means an enforcement officer appointed under section 18.1 (11);

"entity" means any of the following:

(a) a municipality;

(b) a regional district;

(c) a government corporation;

(d) any other prescribed entity;

"government corporation" means government corporation as defined in the *Financial Administration Act*;

"IIO investigator" means an investigator appointed under section 38.06 (2);

"independent investigations office" means the independent investigations office established under section 38.02;

"municipal constable" means a constable appointed under section 26;

"municipal police board" means a municipal police board established under section 23;

"municipal police department" means a municipal police department established under section 26;

"officer", except in Part 7.1 and section 47 (2), means a person appointed under this Act as a provincial constable, special provincial constable, designated constable, municipal constable, special municipal constable, auxiliary constable or enforcement officer, but does not include a person who is a member of the Royal Canadian Mounted Police;

"police complaint commissioner" means the police complaint commissioner appointed under section 47 (1) or 49 (1) or (2);

"provincial constable" means a constable who is a member of the provincial police force continued under section 5, or who is appointed a constable under section 6;

"provincial police force" means the provincial police force continued under section 5;

"special municipal constable" means a constable appointed under section 35;

"special provincial constable" means a constable appointed under section 9;

"specialized service" means a policing and law enforcement service specified by regulation referred to in section 4.01 (1) (b) as a specialized service;

"specialized service agreement" means an agreement or arrangement referred to in section 4.02 (2);

"specialized service area" means the areas specified by regulation referred to in section 4.01 (1) (d) as the specialized service area within which a specialized service provider is to deliver specialized services;

"specialized service provider" means a government, government agent, municipality, entity or person specified by regulation referred to in section 4.01 (1) (a) as a specialized service provider;

"specialized support service" means a specialized service of the type referred to in section 4.02 (3) (a) (iii).

Police forces in British Columbia

1.1 The following are police forces in British Columbia:

(a) the provincial police force;

(b) a municipal police department;

(c) if prescribed by the minister as a police force, a designated policing unit;

(d) the independent investigations office.

Part 2 — The Minister

Adequate level of policing and law enforcement

2 The minister must ensure that an adequate and effective level of policing and law enforcement is maintained throughout British Columbia.

Provincial policing priorities

2.1 The minister may establish priorities, goals and objectives for policing and law enforcement in British Columbia.

Responsibilities of Provincial and municipal governments for providing policing and law enforcement services

3 (1) The government must provide policing and law enforcement services for the following:

(a) rural areas of the Province;

(b) municipalities with a population of up to 5 000 persons;

(c) municipalities with a population of more than 5 000 persons that contract

(5) [Repealed 2010-21-192.]

Offence Act

75 Section 5 of the *Offence Act* does not apply to this Act or the regulations.

Part 11 — Misconduct, Complaints, Investigations, Discipline and Proceedings

Division 1 — Interpretation

Definitions and interpretation

76 (1) In this Part:

"adjudicator" means a person appointed under section 142 to preside over a public hearing or review on the record;

"business day" means a day other than a Saturday or a holiday;

"commission counsel" means legal counsel representing the police complaint commissioner;

"complainant", subject to subsection (3), means

(a) a person who makes and registers a complaint under section 78 *[how complaints are made]*,

(b) a person on whose behalf a complaint is made under section 78, and

(c) if a complaint is made on behalf of another by an individual authorized to do so under section 78, the authorized individual,

but does not include a person whose complaint is discontinued under section 84 *[discontinuance and consolidation of complaints made by third-party complainants]*, 94 (2) *[withdrawal of complaint by complainant]* or 164 (1) (b) *[consequences if participant fails to attend mediation proceeding]*;

"conduct" includes any act or omission, and a reference to the occurrence of any conduct includes the doing of an act or the making of an omission;

"disciplinary or corrective measures" means any one or more of the measures described in section 126 (1) *[imposition of disciplinary or corrective measures]*;

"discipline authority" means the following:

(a) in relation to a complaint or an investigation under Division 3 *[Process Respecting Alleged Misconduct]* concerning the conduct of a member who is

not a chief constable or deputy chief constable,

(i) a chief constable of the municipal police department with which the member is employed, unless section 117 (9), 134 or 135 (1) applies,

(ii) if section 117 (9) *[appointment of new discipline authority if conclusion of no misconduct is incorrect]* applies, the retired judge appointed under that section,

(iii) if section 134 *[chief constable may delegate discipline authority functions]* applies, a person referred to in subsection (1) (a) or (b) of that section, or

(iv) if section 135 (1) *[power to designate another discipline authority if in public interest]* applies, a senior officer designated under that section as discipline authority by the police complaint commissioner;

(b) in relation to a complaint or an investigation under Division 3 concerning the conduct of a member who is a chief constable or deputy chief constable,

(i) the chair of the board by which the member is employed, unless section 117 (9) or 135 (2) applies,

(ii) if section 117 (9) *[appointment of new discipline authority if conclusion of no misconduct is incorrect]* applies, the retired judge appointed under that section, or

(iii) if section 135 (2) *[power to designate another discipline authority if in public interest]* applies, a retired judge appointed under that section as discipline authority by the police complaint commissioner;

(c) in relation to a complaint or an investigation under Division 3 concerning the conduct of a former member who, at the time of the conduct of concern, was not a chief constable or deputy chief constable,

(i) a chief constable of the municipal police department with which the former member was employed at the time of the conduct of concern, unless section 117 (9), 134 or 135 (1) applies,

(ii) if section 117 (9) *[appointment of new discipline authority if conclusion of no misconduct is incorrect]* applies, the retired judge appointed under that section,

(iii) if section 134 *[chief constable may delegate discipline authority functions]* applies, a person referred to in subsection (1) (a) or (b) of that section, or

(iv) if section 135 (1) *[power to designate another discipline authority if in*

public interest] applies, a senior officer designated under that section as discipline authority by the police complaint commissioner;

(d) in relation to a complaint or an investigation under Division 3 concerning the conduct of a former member who, at the time of the conduct of concern, was a chief constable or deputy chief constable,

(i) the chair of the board by which the former member was employed at the time of the conduct of concern, unless section 117 (9) or 135 (2) applies,

(ii) if section 117 (9) *[appointment of new discipline authority if conclusion of no misconduct is incorrect]* applies, the retired judge appointed under that section, or

(iii) if section 135 (2) *[power to designate another discipline authority if in public interest]* applies, a retired judge appointed under that section as discipline authority by the police complaint commissioner;

"discipline representative" means a person appointed by the discipline authority under section 121 (1) (a) *[if member's or former member's request to question witnesses is accepted]*;

"external police force", in relation to a municipal police department to which section 89 (1) *[reporting of death, serious harm and reportable injury, and mandatory external investigation in cases of death and serious harm]*, 91 (1) *[external investigation of chief constables]*, 92 (1), (2) or (3) *[external investigations when in public interest]* or 93 (1) (b) (ii) *[independent power to order investigation]* applies, means

(a) another municipal police department,

(b) the provincial police force, or

(c) a designated policing unit;

"final investigation report" means the report provided by an investigating officer under section 98 (4) or (10) (b) *[investigating officer's duty to file reports]*, but does not include a report that is rejected under section 98 (9);

"firearm" means a gun that uses, as a propellant, compressed air, explosives or gas;

"former member", in relation to a complaint or an investigation under Division 3 concerning the conduct of a person who, at the time of the conduct of concern, was a member of a municipal police department but who after that time has retired or resigned and is no longer a member of any municipal police department, means that person;

"internal discipline matter" means a matter concerning the conduct or deportment of a member that

(a) is not the subject of an admissible complaint or an investigation under Division 3 *[Process Respecting Alleged Misconduct]*, and

(b) does not directly involve or affect the public;

"investigating officer" means a constable appointed to investigate

(a) a matter under section 89 (2) *[reporting of death, serious harm and reportable injury, and mandatory external investigation in cases of death and serious harm]*,

(b) an admissible complaint under section 90 (1) (b) *[if complaint not resolved informally, investigation must be initiated]*,

(c) an admissible complaint under section 91 *[external investigation of chief constables]*,

(d) an admissible complaint under section 92 (1), (2) or (3) *[external investigations when in public interest]*, or

(e) conduct of a member under section 93 *[independent power to order investigation]*;

"member" means a municipal constable, deputy chief constable or chief constable of a municipal police department;

"misconduct" has the same meaning as in Division 2 *[Misconduct]*;

"public hearing" means a public hearing referred to in section 143 *[public hearing]*;

"public hearing counsel" means, in relation to a public hearing, legal counsel appointed by the police complaint commissioner under section 138 (7) *[determining whether to arrange public hearing or review on the record]* for the purposes of that public hearing;

"reportable injury" means any of the following:

(a) an injury caused by discharge of a firearm;

(b) an injury requiring emergency care by a medical practitioner or nurse practitioner and transfer to a hospital;

(c) an injury described by regulation under section 184 (2) (c) *[regulations under Parts 9 and 11]*;

"review on the record" means a review on the record referred to in section 141 *[review on the record]*;

"senior officer" means a member of inspector rank or higher;

"serious harm" means injury that

(a) may result in death,

(b) may cause serious disfigurement, or

(c) may cause substantial loss or impairment of mobility of the body as a whole or of the function of any limb or organ;

"supervisor" means, in relation to a member,

(a) a chief constable of the municipal police department with which the member is employed, or

(b) any other member designated by that chief constable to supervise members of the municipal police department;

"supplementary report" means the supplementary investigation report provided by an investigating officer under section 115 (2) *[if member's or former member's request for further investigation is accepted]*;

"third-party complainant" means a person who makes and registers a complaint under section 78 (1) *[how complaints are made]* who is not a person or an individual described in section 78 (1) (a) or (b).

(2) In Division 3 *[Process Respecting Alleged Misconduct]*, **"agent"**, with reference to a member or former member, means the member's or former member's trade union representative or some other individual of the member's or former member's choice, other than her or his legal counsel.

(3) In Division 3, **"complainant"** includes a representative appointed under section 87 *[appointment of representative for complainants]*.

Division 2 — Misconduct

Defining misconduct

77 (1) In this Part, **"misconduct"** means

(a) conduct that constitutes a public trust offence described in subsection (2), or

(b) conduct that constitutes

(i) an offence under section 86 *[offence to harass, coerce or intimidate anyone questioning or reporting police conduct or making complaint]* or 106 *[offence to hinder, delay, obstruct or interfere with investigating officer]*, or

(ii) a disciplinary breach of public trust described in subsection (3) of

this section.

(2) A public trust offence is an offence under an enactment of Canada, or of any province or territory in Canada, a conviction in respect of which does or would likely

(a) render a member unfit to perform her or his duties as a member, or

(b) discredit the reputation of the municipal police department with which the member is employed.

(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

(a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,

(i) intentionally or recklessly making an arrest without good and sufficient cause,

(ii) in the performance, or purported performance, of duties, intentionally or recklessly

(A) using unnecessary force on any person, or

(B) detaining or searching any person without good and sufficient cause, or

(iii) when on duty, or off duty but in uniform, using profane, abusive or insulting language to any person including, without limitation, language that tends to demean or show disrespect to the person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or economic and social status;

(b) "accessory to misconduct", which is knowingly being an accessory to any conduct set out in this subsection, including, without limitation, aiding, abetting, counselling or being an accessory after the fact;

(c) "corrupt practice", which is

(i) without lawful excuse, failing to make a prompt and true return of, or misappropriating, any money or property received in the performance of duties as a member,

(ii) agreeing or allowing to be under a pecuniary or other obligation to any person in a manner that would likely be seen to affect the member's ability to properly perform the duties of a member,

(iii) using or attempting to use one's position as a member for personal gain or other purposes unrelated to the proper performance of

BCGEU'S PROPOSED AMENDMENT TO THE
SPECIAL PROVINCIAL CONSTABLE COMPLAINT PROCEDURE REGULATION

The BCGEU respectfully proposes the following amendment to Section 8 of the *Special Provincial Constable Regulation*, B.C. Reg. 206/98 (proposed changes in boldface):

Disciplinary or corrective measures

8(1) After considering the results of the investigation, the supervisor may impose one or more of the following disciplinary or corrective measures in relation to the respondent concerned:

(a)dismissal;

(b)suspension without pay for not more than 5 scheduled working days;

(c)direction to work under close supervision;

(d)direction to undertake special training or retraining;

(e)direction to undertake professional counseling;

(f)written reprimand;

(g)verbal reprimand

8(2) If the respondent is a member of a bargaining unit established under the British Columbia *Labour Relations Code* or the British Columbia *Public Service Labour Relations Act*, any challenge to the decision of the supervisor to impose a disciplinary or corrective measure must be brought by the trade union certified as bargaining agent for that bargaining unit under that legislation and shall be governed by the terms of the legislation and collective agreement.