
CANADA / JUDGMENT

Johal v. Surrey (City)

2011 BCSC 710

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 710 Johal v. Surrey (City)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Johal v. Surrey (City),

2011 BCSC 710

Date: 20110606

Docket: S122668

Registry: New Westminster

Between:

Mohinder Singh Johal

Petitioner

And

City of Surrey and

W. Fraser MacRae, Chief Superintendent of

The Royal Canadian Mounted Police

Defendants

Before: The Honourable Madam Justice Ballance

Reasons for Judgment

Counsel for Petitioner:

P.W. Janzen

Counsel for Defendants:

P. Hildebrand

Place and Date of Hearing:

New Westminster, B.C.

August 13, 2010

- and -

Vancouver, B.C.

October 22, 2010

Place and Date of Judgment:

New Westminster, B.C.

June 6, 2011

INTRODUCTION

- [1] In this judicial review proceeding, Mohinder Johal seeks a declaration that W. Fraser MacRae, the Chief Superintendent of the Royal Canadian Mounted Police (the "Chief Constable") and the City of Surrey exceeded their jurisdiction and statutory authority in refusing to renew his chauffeur's permit. Mr. Johal also seeks two companion orders. One is in the nature of certiorari setting aside the decision of the Chief Constable's refusal to issue to him a chauffeur's permit and Surrey's dismissal of his appeal of that decision. The other - and the principal remedy sought - is in the nature of mandamus compelling the Chief Constable and the City to issue him the chauffeur's permit.

BACKGROUND

- [2] The salient backdrop is not controversial.
- [3] Mr. Johal has been a taxicab driver based in Surrey since 1990. As such, he is required to hold a chauffeur's permit which must be renewed annually. He has held a chauffeur's permit continuously from 1990 until his last renewal expired on February 28, 2009.
- [4] Under s. 36 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 (the "MVA"), the Chief Constable is delegated the authority to issue chauffeurs' permits for Surrey. Section 36(11) empowers Surrey to enact bylaws to regulate chauffeurs within the municipality and the issuance of chauffeurs' permits by the Chief Constable. In pursuance of its statutory authority, Surrey passed By-law No. 13610, the City of Surrey Vehicle for Hire Bylaw, 1999 (the "Bylaw"), which provides, in relevant part, as follows:

14. No person shall drive a licensed vehicle for hire other than a drive-self cab, drive-self truck, or driving test cab, who is not the holder of a valid and subsisting Chauffeur's Permit. This permit is to be obtained from the Surrey RCMP and the City of Surrey.
- (a) Every person applying for a Chauffeur's Permit shall make application to the Chief Constable, or his designate, who may grant or refuse to grant a permit.
- ...
- (c) In the event of a refusal to issue a Chauffeur's Permit, Section 36 of the Motor Vehicle Act applies.
- ...
- (g) No Chauffeur's Permit shall be issued under this By-law, until the applicant shall have satisfied the [Chief Constable] upon his full enquiry, that the applicant is in all respects a fit and proper person to hold such a Chauffeur's Permit.
- [5] Surrey also formulated the "Chauffeur Guideline Permit Application Screening" (the "Guidelines"). The Guidelines are intended to be applied by the Chief Constable in determining whether an applicant is a "fit and proper person to hold a chauffeur's permit" as required under the Bylaw. The Guidelines direct that an application "shall be declined" where one or more specified circumstances are present. The circumstances recited in the Guidelines include the following:
- (1) item 2 - where there are more than 5 violations on the applicant's driving record in the previous 5 years;
- (2) item 7 - where the applicant has been convicted of a Criminal Traffic Offence in the previous 5 years;
- (3) item 9 - where the applicant has been convicted of a Crime of Violence Offence in the previous 5 years;
- (4) item 11 - where the applicant has been charged with a Criminal Traffic Offence, Sex Offence, Crime of Violence Offence or Weapons Offence, the application may be resubmitted upon resolution of the outstanding charges; and
- (5) item 12 - all other charges or convictions will be reviewed on a case by case basis.
- [6] In February 2009, Mr. Johal applied for renewal of his chauffeur's permit for the year to commence February 28, 2009.
- [7] By letter dated March 8, 2009, the Surrey detachment of the RCMP informed Mr. Johal that his application had been declined (the "Initial Refusal Decision"). The reasons given were expressed in these terms:

Your application for a chauffeur permit has been declined, at this time, for the following reason(s):

Section-7 - An application will be declined if the applicant has been convicted of a criminal Traffic Offence in the previous 5 years;

Section-9 - An application will be declined if the applicant has been convicted of a Crime of Violence Offence in the previous 5 years;

07-125741 - convicted impaired driving.

3 month administrative driving prohibition

(Nov 06/07 - Feb 03/08).

06-104891 - convicted of lesser charge for assault - Peace Bond 1 year.

[8] The references to sections 7 and 9 in the Initial Refusal Decision pertain to the Guidelines.

[9] The Initial Refusal Decision further informed Mr. Johal that in February 2008 his chauffeur's permit had been approved inadvertently while he was "before the courts for impaired driving and while on probation serving a 1 year peace bond".

[10] It is common ground that key factual features underpinning the reasons in the Initial Refusal Decision explaining why Mr. Johal's permit renewal had been declined were materially incorrect. Through his counsel, Mr. Johal drew those inaccuracies to the attention of the Chief Constable by letter dated March 30, 2009. In that letter, Mr. Johal's counsel clarified that, contrary to what was stated in the Initial Refusal Decision, Mr. Johal had not been convicted of impaired driving, but rather had been found guilty of driving without due care and attention under the MVA, which is not a driving offence under the Criminal Code. Counsel's letter also corrected that Mr. Johal had not been convicted of assault or a lesser included offence, but rather had been voluntarily placed on a peace bond, which is not a Crime of Violence Offence under the Guidelines.

[11] Shortly after the Initial Refusal Decision, Mr. Johal sought reconsideration by the Chief Constable based on the corrected record. Hearing nothing in response, he exercised his statutory right pursuant to s. 36 of the MVA to appeal the Initial Refusal Decision to Surrey Council. He also consented to the release of personal information which enabled the RCMP to conduct a search of the electronic police records database.

[12] In a memorandum dated April 7, 2009, addressed to Surrey's legal services department (the "RCMP Memorandum"), the Chief Constable supplied the following additional information about Mr. Johal taken from those police records:

POLICE RECORDS

August 21, 2006 - Surrey, B.C.

Surrey RCMP responded to a report of domestic assault where Mr. Johal had kicked his wife, punched her in the head and threatened to kill her with a knife. Mr. JOHAL was charged with Assault and Uttering Threats. At the time of the incident, Mr. JOHAL was intoxicated. Mr. JOHAL was released on conditions, one of which was not to consume alcohol. This matter was eventually resolved by way of a Peace Bond and Probation for a term of one year from November 14, 2006 to November 14, 2007. As a condition of his Probation, Mr. JOHAL had to abstain from the consumption of alcohol.

October 16, 2007 - Surrey B.C.

Mr. Johal was operating a taxi cab (without any fares on board) and struck an unoccupied parked vehicle in the 13300 blk of 84 Avenue. Police attended and arrested Mr. JOHAL for Impaired and Refusal to Provide a Sample. Mr. JOHAL was also found to be in Breach of Probation. This matter was pled down by Crown Counsel to Drive without Due Care and Attention.

In both of these cases, the original circumstances remain the same, regardless of the final disposition in Court.

DRIVING RECORD

Mr. JOHAL holds a valid class 1 Drivers [sic] Licence. Below is a list of offences on his driving record.

December 14, 2004 - Red Light at an Intersection - Delta, B.C.

February 22, 2005 - Fail to Wear Seatbelt - Surrey, B.C.

October 16, 2006 - Speed in Municipality - Richmond, B.C.

October 14, 2007 - 24 Hour Prohibition due to Alcohol - Surrey, B.C.

October 14, 2007 - Drive without Due Care - Surrey, B.C. (previously mentioned).

Suspension

November 5, 2007 to February 3, 2008 - Administrative Driving Prohibition, s. 94.2 MVA.

CRIMINAL RECORD

Mr. JOHAL does not have a criminal record.

[13] The Chief Constable concluded the RCMP Memorandum by recommending that Mr. Johal's application for a chauffeur's permit "be declined as it is not in the public interest".

[14] Jane Sullivan, the City Clerk of Surrey, deposed that Surrey Council generally hears one or more appeals in respect of the denial of an application for a chauffeur's permit each month. She explained that where Surrey receives a notice of appeal of this kind, it follows a standard protocol which she described as follows:

- (1) Surrey requests the RCMP to provide a report setting out information in its possession relating to the appeal.
 - (2) The City Clerk prepares a corporate report containing relevant background information, including information provided by the RCMP, and provides it to Surrey Council and the appellant before the hearing of the appeal.
 - (3) The appeal is heard by Surrey Council in a session closed to the public. The appellant is entitled to be represented by legal counsel and has an opportunity to make submissions. A representative of the RCMP is also usually in attendance.
 - (4) After the appellant's submissions and the receipt of any information provided by the RCMP during the hearing, the appellant and RCMP representative are asked to leave the Council chamber, while Council deliberates.
 - (5) Following deliberation, the Council votes on the appeal and the appellant is advised of the outcome.
- [15] Ms. Sullivan confirmed that these procedures were adhered to in this case. More specifically, she deposed that she compiled a report dated April 8, 2009 (the "Corporate Report") in which she referred to pertinent extracts from s. 36 of the MVA and the Bylaw. The Corporate Report also summarized the contents of the Initial Refusal Decision and the subsequent RCMP Memorandum, and attached copies of those documents together with the Guidelines. Mr. Johal and his counsel, Mr. McDonald, were provided with a copy of the Corporate Report and attachments, and were given advance notice of the hearing.
- [16] On April 20, 2009 Mr. Johal and Mr. McDonald attended the hearing. Mr. McDonald provided written submissions and made oral submissions. A member of the RCMP was also present and briefly reviewed Mr. Johal's police and driving records.
- [17] Mr. McDonald's submissions focused on the fundamental factual errors contained in the Initial Refusal Decision. He reiterated the two main points previously made in his March 30 letter to the RCMP and supplemented them by addressing the contents of the RCMP Memorandum. In this connection, Mr. McDonald noted that the RCMP confirmed that Mr. Johal had not been convicted of domestic assault. He stressed that Mr. Johal had not been on probation at that time and hence, the assertion in the RCMP Memorandum that Mr. Johal was in breach of his probation due to intoxication, was plainly wrong. Mr. McDonald also criticized the RCMP Memorandum for rehashing the circumstances of the failed impaired driving charge. He further submitted that item 2 of the Guidelines did not apply because Mr. Johal does not have more than five MVA offences and, accordingly, denial on that ground was likewise baseless. In closing, Mr. McDonald urged that the factual bases of the Initial Refusal Decision continued to be flawed and that none of the so called "new" reasons, which did not inform the Initial Refusal Decision, were supported by the Guidelines.

[18] Mr. Johal was told of the outcome of the appeal by way of Surrey's cryptic letter dated April 27, 2009, as follows:

Dear Mr. Johal

Re: Appeal of Denial of Chauffeur's Permit

This letter is to confirm Council's decision in regard to your Appeal, heard at City Hall in a Closed Council meeting on Monday, April 20, 2009.

Council passed the following resolution:

"That Council upholds the RCMP decision to deny a Chauffeur's Permit to Mr. Mohinder Johal."

If you have any questions in this regard please call ...[details omitted].

[Bold in original.]

[19] Mr. Johal asserts three grounds for his application to this Court. He contends that the Chief Constable and Surrey acted without jurisdiction or in excess of it, and/or that they erred in law in finding that Mr. Johal had been convicted of either a Criminal Traffic Offence or a Crime of Violence within the meaning of the Guidelines, where there was no evidence to that effect. It was made clear during this hearing that Mr. Johal's primary assertion is that the respective decisions of the Chief Constable and Surrey were unreasonable.

[20] In the landmark decision of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [Dunsmuir], the Supreme Court of Canada endorsed a more cohesive formulation of reasonableness as the new and "simpler" test, overtaking the previous variants of reasonableness. The parties agree that the standard of review of the decision of Surrey Council in this case is reasonableness.

[21] The standard of reasonableness was explained by the Dunsmuir Court at paras. 47-49:

[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.

- [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" (*Canada (Attorney General) v. 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*, at para. 65, per L'Heureux-Dubé J.; Ryan, at para. 49).
- [49] Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D.J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.
- [22] There is no statutory obligation on Surrey to provide reasons. Prior to the Supreme Court of Canada decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*], the common law did not impose a general duty upon an administrative decision maker to provide reasons for its decision. *Baker* modified the judicial landscape and held that, in certain circumstances, an administrative tribunal was required to explain its decision as a component of the duty of fairness.
- [23] Factors to be considered in determining whether the duty of fairness includes the specific requirement of giving reasons for the decision include (i) the nature of the decision and the decision-making process used; (ii) the nature of the statutory scheme and the governing statutory provisions under which the decision maker operates; (iii) the importance of the decision to the affected individual; (iv) the legitimate expectations of the party challenging

the decision; and (v) the degree of deference accorded to the decision maker: *Baker; Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650.

- [24] In the post-Dunsmuir era, the notion of reasonableness applies not only to the outcome of the administrative decision, but also to the existence of justification, transparency and intelligibility within the decision-making process. In that sense, the standard of the sufficiency of reasons has been enhanced by Dunsmuir. The requirement to provide reasons is triggered both as an aspect of fairness and as an attribute of the reasonableness of the decision.
- [25] Surrey gave no reasons per se for its disposition of Mr. Johal's appeal; it merely informed him of the outcome by way of a single sentence to the effect that it had resolved to uphold the Initial Refusal Decision.
- [26] Section 36 of the MVA, which authorizes Mr. Johal's appeal to Surrey Council, is silent about the nature of that appeal, that is, whether it is a hearing de novo, an appeal based on the record or a hybrid model being an appeal on the record with discretion to admit additional evidence. In any case, although there was mild controversy between the parties as to the scope of the appeal, it is not necessary to decide that issue one way or the other for the purposes of resolution of this application. Relying principally on the decision of the Alberta Court of Appeal in *Re Calgary General Hospital Board and Williams* (1982), 142 D.L.R. (3d) 736, 26 Alta. L.R. (2d) 220, counsel for Surrey submits that because there was no formal record, the appeal to Surrey is in the nature of a rehearing. He contends that is effectively what occurred, in that Surrey Council received submissions from Mr. Johal's lawyer and additional information from the RCMP, which rectified all of the factual errors underlying the Initial Refusal Decision, and thus Surrey Council proceeded with the correct information at the appeal. In my view, that the factual inaccuracies founding the Initial Refusal Decision and those contained in the subsequent RCMP Memorandum had been clarified at the appeal makes it more troubling - not less - that the result of the appeal was articulated simply as the upholding of that original decision, without further explanation.
- [27] The Initial Refusal Decision was plainly founded on information that was materially incorrect. That factor, in combination with other vital factors, such as the existence of Mr. Johal's statutory right of appeal, the fact that Surrey's decision was not legislative or otherwise administrative in nature, the decision-making process afforded a high degree of participation, and an adverse decision would have a significant effect on Mr. Johal's livelihood, all point to the conclusion that Surrey Council was required to give Mr. Johal reasons.
- [28] It is neither possible nor desirable to be categorical about what may constitute adequate reasons. Adequacy will depend upon the context. There may be occasions where a simple endorsement on appeal of a subordinate decision may serve as a sufficient facsimile for written reasons. On the other hand, there are authorities which hold that a statement of

conclusion with nothing or little more than nothing, including a conclusion that continuing a permit is not in the public interest, will not do: *Johal v. Canada Revenue Agency*, 2009 FCA 276; *Canada (Citizenship and Immigration) v. Wang*, 2009 FC 1290; *Zeliony v. Red River College*, 2007 MBQB 308, 295 D.L.R. (4th) 609, 222 Man. R. (2d) 156 (Man. Q.B.); *Ahlefeld v. Border Conservation* (1983), 28 Sask. R. 213 (Q.B.).

- [29] There are also instances where reasons for a decision are apparent from the examination of the whole of the record. It is, therefore, conceivable for this Court to engage in an ex post facto reasoning based on what was before Surrey Council and determine whether its support of the original decision was reasonable. However, as cautioned by the majority of the Alberta Court of Appeal in *Macdonald v. Mineral Springs Hospital*, 2008 ABCA 273, 295 D.L.R. (4th) 609, at para. 42, there are sound policy reasons militating against embarking on such a course:

... Accepting the reasonableness of their decisions absent so much as a hint as to how they reached them would also encourage tribunals not to explain themselves. Moreover, it would engage courts in doing the very work that legislatures intended tribunals to do. This outcome would also work against the basic purpose of judicial review, which is "to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes." *Dunsmuir* at para. 28.

- [30] In my opinion, accepting an endorsement of the Initial Refusal Decision which was based on a materially faulty framework or having the Court attempt to discern from the record Surrey's reasoning to support its decision are not appropriate courses to take in this case.
- [31] Each party offered arguments as to the reasonableness of Surrey's decision. However, without the benefit of having even a bare bones explanation from Surrey as to why it upheld the Initial Refusal Decision, this Court is effectively hamstrung in its ability to meaningfully discern whether Surrey Council took alien considerations into account in arriving at its decision, or whether the decision was reasonable in the sense of falling within a range of possible acceptable outcomes which are defensible within the meaning of *Dunsmuir* and its judicial lineage.
- [32] In the circumstances, I conclude that Surrey was required to provide Mr. Johal with basic reasons explaining its decision. I do not regard the statement by Surrey that it had resolved to uphold the problematic original decision, without more, to constitute sufficient reasons. Surrey Council did not offer any explanation to Mr. Johal as to why it decided the appeal in the manner it did. Consequently, there is no ability for Mr. Johal to understand why he lost on appeal or for this Court to assess the reasonableness of Surrey Council's decision.
- [33] There are a number of remedial options at the Court's disposal, ranging from quashing the decision, to remitting it back to Surrey to give adequate reasons or for a rehearing or reconsideration or, in exceptional circumstances, making the decision: *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49. In my opinion, the fairest course is to return the matter to Surrey Council with a direction that it provide adequate reasons for its

decision. If, after reviewing those reasons, Mr. Johal wishes to proceed with his application for judicial review, I am seized of that hearing. In the meanwhile, this application is stayed.

__ "Ballance J." ____

Madam Justice Ballance

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