CANADA / JUDGMENT

R.B. v. Attalaoui

2021 BCSC 1386

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2021 BCSC 1386 R.B. v. Attalaoui

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.B. v. Attalaoui,

2021 BCSC 1386

Date: 20210715

Docket: S2013671

Registry: Vancouver

The Judicial Review Procedures Act, R.S.B.C. 1996, c. 241

In the Matter of an Application for Relief in the Nature of Certiorari

Between:

R.B.

Petitioner

And:

Khalid Attalaoui, Stephen Jones, Ryan Wray,

Attorney General of British Columbia,

Vancouver Police Department

Respondents

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

The Petitioner, appearing on his own behalf by videoconference:

R.B.

Counsel for the Respondent, Attorney General of British Columbia, appearing by videoconference:

K. Chewka

Counsel for all other Respondents, appearing by videoconference:

I.K. Dixon

Place and Dates of Hearing:

Vancouver, B.C.

June 28-29, 2021

Place and Date of Judgment:

Vancouver, B.C.

July 15, 2021

Introduction

[1] The petitioner seeks an order in the nature of certiorari, setting aside the decision by a Vancouver City Police officer on November 19, 2018 to issue a 90-day immediate roadside driving prohibition ("IRP") pursuant to the provisions of s. 215.41 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA] as a result of the petitioner's refusal to provide a breath sample.

[2] The petitioner says that the IRP was issued without the officer having reasonable grounds to suspect the petitioner's impairment as required by s. 215.41 of the MVA and that the demand he provide a breath sample was unjustified.

[3] In addition, the petitioner seeks various additional orders that would flow from the IRP being set aside.

[4] During the course of the hearing of this petition, the petitioner conceded that:

a) the reason he named Khallid Attalaoui and Ryan Wray as respondents was that he believed they had given evidence during an investigation of his complaint to the Office of the Police Complaints Commissioner ("OPCC") in support of his case;

b) "Vancouver Police Department" is not a legal entity;

c) he named the Attorney General of British Columbia improperly; and

d) only the officer who issued the IRP, Cst. Stephen Jones ("Cst. Jones"), should have been named as a respondent.

[5] Counsel for the Attorney General of British Columbia confirmed that, although her client was not properly named as a respondent to the petition in this case, the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPA] entitles it to respond to such petitions once it receives notice of them. Hence, her client is exercising its right to respond.

[6] The petitioner sought an order that his name be anonymized. The order was unopposed and was granted.

[7] Although the petitioner also sought an order that the court file be sealed, he abandoned that request during the hearing of the petition.

Background

[8] On November 19, 2018, the three individually-named respondents were on duty as police officers with the respondent, Vancouver Police Department ("VPD"). The petitioner driver's car met the description of a vehicle whose driver was being sought by the police in connection with various crimes. The petitioner's vehicle was stopped by the three police officers. The officers quickly realized that the petitioner was not the person they were looking for. However, one of the officers, Cst. Jones, suspected that the petitioner had recently consumed alcohol. He requested that the petitioner provide a sample of his breath. The petitioner refused. As a result, Cst. Jones issued the IRP.

[9] In his report to the Superintendent, Cst. Jones stated:

SUSPICION FORMED - At approximately 1837hrs, PC JONES approached the roadside in the 2800 block of Hemlock St, Vancouver BC, observing driver [R.B.] standing in handcuffs. PC JONES immediately detected a strong odour of liquor on [R.B.'s] breath and asked [R.B.] whether he had consumed alcohol prior to driving. [R.B.] stated yes, and said he was at a work function and had consumed 3 drinks, the last beer finished at approximately 1820hrs. Based on the admission and odour of liquor, PC JONES formed reasonable grounds to suspect that [R.B.] had operated Vehicle 1 with alcohol in his body and immediately read [R.B.] the ASD demand verbatim. [R.B.] stated he understood.

IDENTITY - [R.B.] refused to provide is [sic] BCDL and was resistant and verbally combative throughout the roadside investigation

ADDITIONAL EVIDENCE IN VEHICLE - PC JONES inspected the interior cabin of the vehicle, and from the driver's side window observed an open can of red wine directly below the driver seat on the mat.

At approximately 1840hrs, PC JONES held a conversation with [R.B.], post ASD demand, during which [R.B.] stated he wanted to speak with a lawyer and that he would not provide a sample of his breath or cooperate with ASD testing .

[10] The petitioner applied to the Superintendent of Motor Vehicles, pursuant to s. 215.48 of the MVA, for a review of Cst. Jones' decision to issue the IRP. In his first affidavit in support of the review, the petitioner deposed:

17. The officer's narrative mentions multiple times that I was being uncooperative and argumentative. I did not admit nor deny consuming alcohol at any point in time

The review was denied by the Superintendent.

[11] On December 21, 2018, the petitioner filed a petition in this court seeking judicial review of the Superintendent's decision ("First Petition"). Upon receipt of the First Petition, the Superintendent consented to a rehearing of the matter.

[12] In his second affidavit filed on the rehearing, the petitioner deposed:

23. The officer's narrative mentions multiple times that I was being uncooperative and argumentative. I did not say anything except asking for my lawyer multiple times, asking to be uncuffed and released, asking to be taken to the station for an evidentiary blood test and asking to speak to Sergeant Wray. I did not admit nor deny consuming alcohol at any point in time

34. My ability to drive was not affected by alcohol.

[13] The petitioner did not deny in either of his affidavits that he had consumed alcohol--only that he had not said he had.

[14] Two adjournments of the rehearing were granted at the petitioner's request to allow him to obtain documents from the VPD pursuant to a Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165 [FOIPPA] request. The rehearing was conducted on April 9, 2019 by Jennifer Quarry, a delegate of the Superintendent (the "Adjudicator").

[15] On July 31, 2019, the Adjudicator issued her decision declining to revoke the IRP and associated penalties. The decision is over 15 single-spaced pages. She found that Cst. Jones' suspicion that formed the basis of his demand for breath sample was reasonable. In doing so, she accepted the evidence of Cst. Jones over that of the petitioner:

You stated that at no point did an officer say they smelled alcohol. However, I find that the officer's not advising you that they smelled alcohol is not evidence that there was not an odour of liquor on your breath, as recorded in the evidence before me. In your affidavit, you state that your ability to drive was not impacted by alcohol, and that you neither admitted or denied consuming alcohol. Other than these broad statements, you have not provided any further context or detail as to your consumption. In contrast, Officer Jones' evidence indicates that when he approached you at 18:37 hours he engaged you in conversation and could smell an odour of liquor on your breath, he asked you if you had been drinking, you advised him that you had consumed 3 beers, and finished the last one at approximately 18:20 hours.

Ultimately, given the above reasoning, when I weigh your vague statements against Officer Jones' evidence containing idiosyncratic details surrounding his conversation and interaction with you, on balance I prefer Officer's [sic] Jones' evidence

[16] On August 6, 2019, the petitioner filed a petition seeking judicial review of the Adjudicator's decision ("Second Petition") and, inter alia, an order that the IRP be quashed.

[17] On August 20, 2019, the petitioner filed the complaint with the OPCC referred to above. He advised during the hearing of this petition that he did so as a means of obtaining evidence that Cst. Jones' report to the Superintendent regarding his having had a reasonable belief regarding the petitioner's impairment was false.

[18] The OPCC conducted an investigation of the complaint and issued its report on March 5, 2020. The investigation included interviews of each of the three officers who were involved, together with summaries of those interviews.

[19] The hearing of the Second Petition took place on September 14 and 15, 2020.

[20] On October 8, 2020, Madam Justice Adair dismissed the Second Petition: R.B. v. British Columbia (Superintendent of Motor Vehicles), 2020 BCSC 1496. She rejected the petitioner's submissions that the Adjudicator had wrongly favoured Cst. Jones' evidence:

[67] Next, the petitioner says that the Adjudicator made an unreasonable decision in assessing the evidence of the petitioner and Constable Jones, and wrongly favoured the police evidence.

[68] The petitioner says that the Adjudicator was wrong to rely on the police officer's evidence in the face of concerns the petitioner raised about errors in the Report to Superintendent and the brevity of Constable Jones' notes. He says that the importance of considering the credibility and reliability of police officer evidence in relation to the credibility and reliability of the evidence taken as a whole was emphasized in Mackenzie v. British Columbia (Superintendent of Motor Vehicles), 2017 BCSC 2392, at paras. 57-58; aff'd 2018 BCCA 354. The petitioner says that the Adjudicator was unreasonable to give no consideration to the impact of inconsistencies in the police officer's Report, and did not weigh the evidence fairly. In the petitioner's submission, the result is that the Adjudicator's reasonableness is compromised by her handling of the evidence.

[69] The Adjudicator has a broad discretion to determine the weight to be given to any document or other information provided on a review. It is part of an adjudicator's task to decide what evidence to accept or not accept. Moreover, as I also noted above, by statute, the burden of proof was on the petitioner.

[70] The Adjudicator was clearly alive to the petitioner's attack on the credibility and reliability of Constable Jones' evidence. She did not accept Constable Jones' evidence uncritically. The Adjudicator explained why she rejected the petitioner's argument based on the brevity of Constable Jones' notes. She also explained why she rejected the petitioner's argument

alleging a material error in the November 19, 2018 Report to Superintendent concerning the seizure of the petitioner's driver's licence. Her explanations are reasonable and defensible. Under the heading "Reasonable Suspicion," the Adjudicator explained how she weighed the evidence, explained where Constable Jones' evidence was consistent with that of the petitioner, explained why she preferred one version of events over another, and explained how she arrived at her conclusions. Again, her explanations are reasonable and defensible. The Decision does not suffer from the problems and lack of analysis of the evidence that Voith J. (as he then was) identified in Mackenzie. The Adjudicator approached the credibility assessment in a reasonable way.

[71] It does not follow from the petitioner's disagreement with the Adjudicator's assessment of the evidence before her that her conclusions in that respect were unreasonable. In my view, they were not. They are clearly within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law.

[21] Justice Adair also ruled at para. 62 that, because the court's role on the hearing of the petition was to consider whether the Adjudicator's decision fell within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law, the OPCC report and the information the OPCC obtained as part of its investigation (collectively, the "OPCC Documents") were not relevant. The OPCC Documents comprise the interviews of the officers, summaries of those interviews, police audio tapes of the events of November 19, 2018, and the OPCC report itself.

[22] The petitioner appealed Adair J.'s decision. He also filed this petition on December 22, 2020. He candidly admitted doing so because he had read case authorities of similar proceedings in which recipients of IRPs resulting from suspected drug impairment (as opposed to suspected alcohol impairment) had launched judicial review proceedings directly against the issuing police officer.

[23] The petitioner's appeal of Adair J.'s decision was heard by the Court of Appeal on April 28, 2021. The grounds of appeal raised by the petitioner included whether Adair J. erred in finding that the OPCC Documents were not relevant. In the alternative, he sought leave to introduce the OPCC Documents as new evidence. The Court of Appeal had before it the same 571 pages of OPCC Documents that the petitioner seeks to introduce in evidence in this proceeding.

[24] On July 5, 2021, the Court of Appeal issued its decision, indexed at R.B. v. Superintendent of Motor Vehicles, 2021 BCCA 262. The court dismissed the petitioner's application to adduce the OPCC Documents and found that it would have been "inappropriate" for the judge to have admitted the documents on judicial review (at paras. 55, 58).

[25] The court ultimately dismissed the petitioner's appeal.

Ruling on the Admissibility of the OPCC Documents

[26] At the outset of the hearing of this petition, counsel for the respondents, Mr. Dixon, challenged the admissibility of the OPCC Documents on two grounds:

a) their admissibility is statutorily precluded by s. 102 of the Police Act, R.S.B.C. 1996, c. 367; and

b) they did not form part of the record that led to Cst. Jones' decision to issue the IRP.

[27] As noted above, both Adair J. and the Court of Appeal refused admission of the OPCC documents in the Second Petition. To the extent that this proceeding is a collateral attack or an attempt to re-litigate the issues before the Adjudicator, that refusal is determinative. However, I will discuss their admissibility generally below.

[28] Section 102(1) of the Police Act provides as follows:

Use of statements made to investigating officer by members and former members

102 (1) a statement provided or an answer given during an investigation under this Part [investigation by the OPCC] by a member or former member is inadmissible in evidence in court or in any other proceeding, except

(a) in a discipline proceeding, public hearing or review on the record concerning the conduct under investigation,

(b) in a prosecution for perjury in respect of sworn testimony,

(c) in a prosecution for an offence under this Act, or

(d) in an application for judicial review or an appeal from a decision with respect to that application.

[29] The petitioner says the OPCC Documents will assist him in demonstrating that what Cst. Jones wrote in his report to the Superintendent (as required by s. 215.47(d) of the MVA) was wrong and that Cst. Jones did not, in fact, have reasonable grounds for believing the petitioner's ability to drive was impaired by alcohol such that a demand for a breath sample was justified. He submits that, because this proceeding is a "judicial review", it falls within the exception set out in s. 102(1)(d).

[30] I disagree. The OPCC is established under the Police Act to conduct investigations into the conduct of police. The interviews of the officers in question were compelled under the Police Act. The text of s. 102(1)(d) must be read in its grammatical and ordinary sense with consideration of the context of the text and the statute's purpose: Bell ExpressVu Ltd. Partnership v. Rex, 2002 SCC 42 at paras. 26, 28-30.

[31] Although on an isolated reading of s. 102(1)(d), the statute appears to refer to any judicial review, I do not find this to be determinative. As noted in AstraZeneca Canada Inc. v. Canada (Minister of Health), 2006 SCC 49:

[30] Ambiguity does not have to manifest itself in the text of s. 5(1). Rather, "one must consider the 'entire context' of a provision before one can determine if it is reasonably capable of multiple interpretations" (Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 29 (emphasis added)).

[32] I am in a similar position to that facing the court in Ted Leroy Trucking Ltd. v. British Columbia (Minister of Revenue), 2008 BCCA 285, leave to appeal ref'd [2008] S.C.C.A. No. 404. In that case, the court interpreted a tax exemption for prescribed explosive supplies used for "mineral exploration, extraction or production" as being limited to mining industry-related activities in light of the surrounding provisions. The court noted that the ambiguity was "underscored by the fact that one possible interpretation would substantially negate the specific disallowance" of an exemption in the following subsection. I find a similar ambiguity here. It is inconceivable that the Legislature intended to exclude statements given by a police officer as part of an OPCC investigation from admissibility as evidence in court proceedings generally, yet allow such statements to be admitted in any judicial review proceeding, regardless of its nature.

[33] In my view, the doctrine of associated meaning applies to resolve any ambiguity: McDiarmid Lumber Ltd. v. God's Lake First Nation, 2006 SCC 58 at paras. 30-35. In my view, the meaning of "judicial review" under s. 102(1)(d) is informed by the list of proceedings in the surrounding subsections, which share the common characteristic of being proceedings directly concerned with officer liability: Ted Leroy Trucking at paras. 22-23. I interpret s. 102(1)(d) to mean such statements may be admissible in a judicial review only of those types of proceedings listed in ss. 102(1)(a)-(c).

[34] I find that, to the extent that the OPCC Documents comprise a statement provided or an answer given during the OPCC investigation by any of the police officers involved in the November 19, 2018 events that are the subject of this petition, they are inadmissible in evidence in this proceeding.

[35] Given this finding, there is no need to consider the second issue raised by the respondents regarding the OPCC Documents not constituting part of the record that was before Cst. Jones when he made his decision to issue the IRP

Statutory Framework

[36] The relevant provisions of the MVA are as follows:

Immediate roadside driving prohibition

215.41

(4) If a peace officer has reasonable grounds to believe that a driver failed or refused, without reasonable excuse, to comply with a demand made under the Criminal Code to provide a sample of breath for analysis by means of an approved screening device, the peace officer, or another peace officer, must take those actions described in subsection (3.1) (c) and (d).

[37] Subsections (3.1)(c) and (d) authorize the officer to seize the driver's license or driving permit and serve on the driver a notice of driving prohibition. The Act continues:

Effect of driving prohibition under section 215.41

215.43

(2.1) If a person is served with a notice of driving prohibition under section 215.41 in circumstances where

(a) an approved screening device registers a fail, or

(b) the person refuses or fails to comply with a demand as described in section 215.41 (4),

the person is prohibited from driving for a period of 90 days

(3) driving prohibition under this section

(a) takes effect immediately on service of the notice of driving prohibition under section 215.41, and

(b) unless revoked under this Act, continues in effect until the end of the last day of the driving prohibition as calculated in accordance with subsection (3.1).

Duties of peace officer related to driving prohibition under section 215.41

215.47 A peace officer who serves a notice of driving prohibition on a person under section 215.41 must promptly forward to the superintendent

(a) the person's licence or permit or any document issued in another jurisdiction that allows the person to operate a motor vehicle, if the peace officer took the licence, permit or document into possession,

(b) a copy of the notice of driving prohibition,

(c) a certificate of service, in the form established by the superintendent, showing that the notice of driving prohibition was personally served on the person subject to the driving prohibition,

(d) a report, in the form established by the superintendent, sworn or solemnly affirmed by the peace officer, and

(e) in the case of a driving prohibition resulting from the analysis of a sample of breath, information relating to the calibration of the approved screening device on the basis of which the notice of driving prohibition was served.

Review of driving prohibition under section 215.41

215.48 (1) A person may, within 7 days of being served with a notice of driving prohibition under section 215.41, apply to the superintendent for a review of the driving prohibition by

(a) filing an application for review with the superintendent,

(b) paying to the superintendent the prescribed hearing fee, and

(c) if it has not been taken by the peace officer or sent to the superintendent under section 215.41, surrendering to the Insurance Corporation of British Columbia his or her licence or permit to operate a motor vehicle unless the person completes and files with the superintendent a statutory declaration stating that the licence or permit has been lost, stolen or destroyed.

(4) The filing of an application for review does not stay the driving prohibition.

Considerations on review under section 215.48

215.49 (1) In a review of a driving prohibition under section 215.48, the superintendent must consider

(a) any relevant statements and evidence submitted to the superintendent,

(b) the report of the peace officer forwarded under section 215.47 (d),

(c) a copy of the notice of driving prohibition,

(d) any other relevant documents and information forwarded to the superintendent by the peace officer who served the notice of driving prohibition or any other peace officer, including peace officers' reports that have not been sworn or solemnly affirmed,

(e) in the case of an oral hearing, any relevant evidence given or representations made at the hearing, and

(f) in the case of a second or subsequent prohibition, as described in section 215.43 (4) and (5), the person's driving record.

(2) In a review under section 215.48, no person may be cross examined.

(3) Despite subsection (1) but subject to section 215.48 (7), the superintendent may, in the superintendent's discretion, proceed with a hearing and render a decision whether or not the superintendent has received all those documents required to be forwarded to the superintendent under section 215.47.

(4) The superintendent may determine the weight to be given to any document or other information referred to in subsection (1) or (5), including any document or information that is not sworn or solemnly affirmed.

Decision of superintendent after review under section 215.48

215.5 (1) The burden of proof in a review of a driving prohibition under section 215.48 is on the person on whom the notice of driving prohibition was served.

(4) If, after considering an application for review under section 215.48, the superintendent is satisfied by the person that the person was not a driver within the meaning of section 215.41 (1) or is satisfied by the person that,

(c) in respect of a 90-day driving prohibition resulting from a failure or refusal, without reasonable excuse, to comply with a demand described in section 215.41 (4), the person did not fail or refuse or had a reasonable excuse for failing or refusing to comply with the demand,

(6) Subject to subsection (7), the decision of the superintendent and the reasons for the decision must be in writing and a copy must be sent to the applicant within 21 days of the date the notice of driving prohibition was served on the applicant under section 215.41.

(7) If the superintendent is unable to send the decision to the applicant within the 21 day period set out in subsection (6), the superintendent may extend that period for a period determined by the superintendent.

Analysis of the Merits of the Petition

[38] The thrust of the petitioner's case is that in his report to the Superintendent, Cst. Jones fabricated the grounds provided as the basis for requesting the petitioner provide a breath sample. Those grounds were that the petitioner had the smell of alcohol on his breath, had told Cst. Jones that he had recently consumed some alcohol at an office function, and that there was an open can of red wine in his vehicle. The petitioner denies having told Cst. Jones that he had recently been drinking at an office function. He denies that there was an odor of alcohol on his breath. He denies the existence of an open can of red wine in his vehicle.

[39] The petitioner conceded during his submissions that if Cst. Jones' version of the events is accurate, he would have had sufficient grounds for requesting that the petitioner provide a sample of his breath. Accordingly, the petitioner conceded that it is a matter of which of the two of them is to be believed.

[40] The evidence regarding what took place at the time the IRP was issued was set out in Adair J.'s Reasons for Judgment and it will not be repeated here.

[41] The question to be determined is whether the issuance of the IRP by Cst. Jones met the standard that was required in the circumstances. The law is clear that the standard is that of "reasonable suspicion". The officer must subjectively entertain the suspicion based upon objectively verifiable circumstances such that a "reasonable person, standing in the shoes of the investigating police officer and aware of all of the objectively verifiable evidence [would]

reasonably suspect the driver had alcohol in his or her body": Mackenzie v. British Columbia (Superintendent of Motor Vehicles), 2018 BCCA 354 at paras. 33-38. The threshold is low.

[42] I am not persuaded that Cst. Jones was mistaken or untruthful about the grounds for his suspicion. That being the case, the evidence of Cst. Jones regarding the odour of alcohol on the petitioner's breath and the petitioner's admission of recent alcohol consumption was sufficient to ground a reasonable suspicion that the petitioner had alcohol in his body and hence his demand that the petitioner provide a sample of his breath. Despite having had ample opportunity to do so, the petitioner has never denied having consumed alcohol shortly before the request was made. His evidence was obviously carefully crafted so as to avoid having to address that fundamental issue.

[43] I have no difficulty dismissing the petition on its merits.

Does the Petition Amount to a Collateral Attack?

[44] Counsel for the respondents submits that the relief sought by the petitioner amounts to a collateral attack on the decisions of the Adjudicator and of this court in the Second Petition, namely an attack on an order "made in proceedings other than those whose specific object is the reversal, variation or nullification of the order: R. v. Wilson, [1983] 2 S.C.R. 594 at 599:

In the Manitoba Court of Appeal, Monnin J.A. said:

The record of a superior court is to be treated as absolute verity so long as it stands unreversed.

I agree with that statement. It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally--and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.

[45] The rule against a collateral attack protects the integrity of the justice system by prohibiting a party from avoiding the consequences of an order issued against it by a proceeding in another forum: Garland v. Consumers' Gas Co., 2004 SCC 25 at para. 72. It prevents a party from using an "institutional detour" to attack the validity of an order by seeking a different result from a different forum: Metropolitan Toronto Condominium Corporation No. 1352 v. Newport Beach Development Inc., 2012 ONCA 850 [Newport Beach Development] at para. 88, citing British Columbia (Workers' Compensation Board) v. Figliola, 2011 SCC 52 at para. 28.

[46] In R. v. Consolidated Maybrun Mines Ltd., [1998] 1 S.C.R. 706, the Supreme Court of Canada enunciated the analytical approach to be used when considering whether a proceeding is a collateral attack on an administrative order. The focus must be on whether the Legislature intended to permit collateral attacks or intended for a party to challenge the order through other review mechanisms. In considering the intent of the Legislature, the court in Maybrun listed five non-exhaustive factors to be considered, at paras. 45-51:

1. the wording of the statute in question;
2. the purpose of the legislation;
3. the existence of a right of appeal;
4. the kind of collateral attack in light of the expertise or raison d'être of the administrative appeal tribunal; and
5. the penalty on a conviction for failing to comply with the order.

[47] As was recently stated by the Ontario Court of Appeal in York (Regional Municipality). v. Irwin, 2020 ONCA 776 [Irwin], at para. 25, " [f]or [administrative] orders, the tension animating the rule is between ensuring that the legislature's decision to assign decision-making powers to administrative bodies is not undermined and that individuals have an effective means available to them to challenge administrative orders". If parties could simply ignore established procedures for reviewing an exercise of statutory decision-making power, it would risk discrediting administrative bodies' authority and undermine their effectiveness: Irwin, at para. 26; Maybrun, at para. 42.

a) Wording of the Statute

[48] Section 215.41 of the MVA establishes a review process for driving prohibitions. The petitioner availed himself of that process. However, the crux of the petitioner's arguments is that the MVA puts the burden on drivers to prove that the IRP was unjustified, the timelines set out in the MVA for doing so are insufficient, and it is difficult for drivers to obtain the evidence needed to meet the statutory burden upon them.

[49] Sections 215.5(6) and (7) of the MVA provide for and extension of the time period by which the Superintendent is required to provide the review decision. Here, the review hearing was adjourned twice at the petitioner's request to allow him an opportunity to obtain and put before the Superintendent documents he had requested from the VPD under a FOIPPA request.

b) Purpose of the Legislation

[50] The MVA is regulatory in nature and is designed to promote public safety. The purpose of the IRP process is to establish a rapid response to someone driving while impaired, while giving a summary avenue of redress to a driver in a case where the peace officer was wrong in his judgment: Bahia v. British Columbia (Superintendent of Motor Vehicles), 2006 BCCA

511 at para. 24. The scheme balances individual liberties against the protection of the public by enforcing minimum standards of conduct and care: Wilson v. British Columbia (Superintendent of Motor Vehicles), 2015 SCC 47 at paras. 33-34.

c) The Existence of a Right of Appeal

[51] The legislation provides for a right of appeal by way of judicial review of the Superintendent's decision. The petitioner availed himself of the right of appeal, both in this court and in the Court of Appeal. However, he again argues that the legislation does not consider the necessary time it takes to satisfy the burden of proof by obtaining, as the petitioner did here, the OPCC Documents and there is no right of appeal prescribing how a driver would satisfy a burden of proof if they are unable to meet the required statutory timelines.

[52] That said, each case must turn on its own facts. Here, the petitioner had ample time to collect his materials.

[53] I note the MVA appears to confer on the Superintendent only a limited power to revoke IRPs, on essentially the following grounds under s. 215.5:

a) that the person was not a "driver" as defined in the statute;

b) that the police officer(s) fell short of the enumerated procedural requirements before issuing the IRP;

c) that the ASD results were unreliable;

d) that the person did not, in fact, fail or refuse to comply with a testing demand; or

e) that the person had a reasonable excuse for their failure or refusal to comply with a testing demand.

[54] This list does not expressly include the reasonableness of the officer's decision to demand testing in the first place. However, it appears to be included by implication under s. 215.5(4)(c) (whether the driver failed or refused a testing demand, or whether they had a valid excuse for doing so). Using that interpretation, the Adjudicator assessed the validity of Cst. Jones' demand in the review hearing.

[55] Case law supports the proposition that there may be a separate right of review where the driver was unable to challenge the validity of the initial demand via the statutory review channels: Gregory v. British Columbia (Superintendent of Motor Vehicles), 2018 BCCA 7 at para. 49. Here, the petitioner's grounds for review were already squarely before the Adjudicator. She reviewed the evidence and provided a ruling that Cst. Jones did, in fact, have a "reasonable suspicion" and that his demand was justified. The petitioner appealed that ruling all the way to the Court of Appeal, where his appeal was dismissed.

d) The Expertise or raison d'être of the Administrative Appeal Tribunal

[56] The Superintendent is well-positioned as an administrative decision-maker to review the officer's decision to issue the IRP and to determine whether the driver has discharged the onus of establishing one of the statutory grounds of review. Accordingly, where a driver seeks to challenge an officer's decision on one of the enumerated grounds for review, including as here on the basis that the demand for a breath sample was invalid, he or she must do so under the provisions of the MVA.

e) The Penalty

[57] The petitioner received a 90-day suspension of his driver's licence together with a monetary penalty. He was also required to pay fees for towing, vehicle impoundment, and the reinstatement of his driver's licence.

[58] A consideration of the foregoing factors points overwhelmingly to the conclusion that the petitioner, via this proceeding, is attempting to obtain through the back door what he was unable to obtain by way of the MVA review and appeal process. I find that this proceeding amounts to a collateral attack on the decisions made in that process.

[59] The petitioner argues that he is not attacking the decisions of the Adjudicator and Adair J. at all, but rather, he is attacking only the decision of Cst. Jones to issue the IRP. He submits that the decisions of this court in Chatchot v. Jordan, 2017 BCSC 1160, Bandi v. Gustard, 2016 BCSC 920, and Shergill v. Vancouver (City), 2017 BCSC 826 support his assertion that he is entitled to seek to quash the issuance of the IRP by way of judicial review of the officer's decision to issue it. However, each of those cases involved the issuance of a 24-hour driving prohibition issued pursuant to s. 215(3) of the MVA on the basis of suspected impairment by drugs other than alcohol. At the time those cases were decided, there was no statutory process available under the MVA for such a driver to seek a review of the prohibition. (Note: s. 215.1(1) was amended effective October 17, 2018 to provide a review process for 24-hour licence suspensions for suspected impairment by alcohol and other drugs.) A driver's only redress at that time was to seek judicial review of the officer's decision directly. There was no attempt to circumvent the statutory scheme. The cases dealt with a different statutory scheme than that involving the issuance of an IRP for refusing or failing to provide a breath sample.

[60] Regardless, the petitioner submits that his employment of the review mechanism set out in s. 215.48 of the MVA does not preclude him from taking separate proceedings by way of judicial review of Cst. Jones' decision to issue the IRP because the right to apply for a review to the Superintendent is permissive under s. 215.48 of the MVA and not exclusive of his rights. In support of that proposition, he cites Newport Beach Development at paras. 89-93.

[61] In my view, the petitioner's submissions are misconceived.

[62] Newport Beach Development involved a claim by the manager of condominium units regarding construction defects. It sought compensation under the Ontario New Home Warranty Plan Act, R.S.O. 1990, c. O.31. The claim was denied. The manager appealed to the

Licence Appeal Tribunal but the appeal was withdrawn before it was heard. The manager then commenced a civil action. The developer, Newport Beach Development, applied to strike the action as an abuse of process, arguing that the denial of the warranty claims could only be reviewed by an appeal to the Licence Appeal Tribunal. The application was denied at all levels of court on the basis that there was nothing in the Ontario New Home Warranty Act showing an intent that the Licence Appeal Tribunal was meant to be the exclusive forum for challenging claim denials. The Ontario Court of Appeal held that the warranty scheme and the language of the Act were such that an appeal to the Licence Appeal Tribunal was meant to be permissive, not the exclusive forum in which a homeowner could seek relief for an adverse decision on warrantability.

[63] In contrast, the MVA stipulates that a person is prohibited from driving immediately upon being served with an IRP for refusing or failing to comply with a demand for a breath sample: s. 215.43(2.1). The MVA provides for a process through which the issuance of the IRP can be contested. The driver may or may not elect to take advantage of that process. If he does, the IRP decision is reviewed, as happened here. If he does not, the driving prohibition stands. Presuming, as the Adjudicator did, that the review mechanism includes the power to review (and revoke) an IRP based on the validity of the testing demand and the existence of a "reasonable suspicion", the MVA appeal process is clearly meant to be exhaustive.

[64] I have considered the comments of the British Columbia Court of Appeal in Gregory to the effect that there may be circumstances in which a driver is able to seek judicial review of an officer's decision directly:

[49] If I am wrong in my analysis of [Sivia v. British Columbia (Superintendent of Motor Vehicles), 2011 BCSC 1639, aff'd 2014 BCCA 79]/Goodwin [v. British Columbia (Superintendent of Motor Vehicles), 2015 SCC 46] , and I must consider whether both the inability to cross-examine and the inability to challenge the validity of the demand under the Criminal Code together infringe s. 8, in my view these two factors in conjunction still do not amount to an infringement. For the reasons given above, I find the concerns with the inability to cross-examine are attenuated in the regulatory context, and the amendments provide sufficient means to ensure the reliability of ASD results. I would also note that it may be open to challenge the decision of a peace officer, and the validity of the Criminal Code demand under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, if such a challenge is foreclosed by the MVA: Rapton v. British Columbia (Motor Vehicles), 2011 BCCA 396 at para. 20; see also Atchison v. British Columbia (Superintendent of Motor Vehicles), 2006 BCSC 549, and Soychuk v. British Columbia (Superintendent of Motor Vehicles), 2004 BCSC 867.

[Emphasis added.]

[65] In my view, these comments are inapplicable to this proceeding for the following reasons:

a) the case involved a driver who had provided a breath sample;

b) he was challenging the constitutional validity of the IRP legislation;

c) the legislation provided for a review of the officer's decision to issue the IRP on specific grounds that differ from those available to a driver seeking to review the issuance of an IRP for refusing or failing to provide a breath sample; and

d) the decisions cited by the Court of Appeal in support of the comments involved 24-hour road-side suspensions for suspected alcohol intoxication (or longer prohibitions based on repeated 24-hour suspensions), for which there is a much more limited right of review under s. 215.3. That right of review does not include the reasonableness of the testing demand.

[66] I agree with the submissions of the respondents that this petition amounts to a collateral attack on the decisions of the Adjudicator and of this court in the Second Petition. If such an attack was permissible, any driver served with an IRP and who failed to seek a review within the required 7 days could simply file a petition seeking judicial review of the officer's decision to issue the IRP. Such a remedy could not have been the intention of the legislature.

Abuse of Process

[67] Counsel for the respondents also submits that the relief sought by the petitioner in this petition amounts to an abuse of process. They submit that the petitioner is advancing in this proceeding the same arguments regarding the officer's decision as he advanced before the Superintendent, the Adjudicator, Adair J., and the Court of Appeal. Permitting him to re-litigate those same issues would run contrary to the principles of judicial economy, consistency, finality and the integrity of the administration of justice.

[68] As noted recently in M.K. v. British Columbia (Attorney General), 2020 BCCA 261, the collateral attack doctrine and the doctrine of abuse of process are interrelated:

[36] The rule against collateral attack may be properly viewed as an application of the broad and flexible doctrine of abuse of process, which is subject to the same underlying policy objectives: Strickland v. Canada (Attorney General), 2013 FC 475 at para. 51, citing British Columbia (Workers' Compensation Board v. Figliola, 2011 SCC 52; Hunt v. The Owners, Strata Plan LMS 2556, 2018 BCCA 159 at para. 71.

[69] In Toronto (City) v. CUPE, Local 79, 2003 SCC 63 at para. 37, the Supreme Court of Canada recognized that the doctrine of abuse of process can be used to preclude re-litigation where allowing the litigation to proceed would violate these principles.

[70] Given my findings above regarding collateral attack, I agree with counsel for the respondents that this petition is an abuse of the court's process.

Unreasonable Delay in bringing the Petition

[71] Counsel for the respondents also submits that the petition ought to be dismissed on the basis that the more than two-year delay between the IRP being issued on November 19, 2018 and this proceeding being commenced on December 22, 2020 was unreasonable.

[72] In view of my findings on that the petition fails on its merits, that it is a collateral attack and that it is an abuse of process, there is no need for me to consider these additional submissions.

Conclusion

[73] The petition is dismissed.

[74] Counsel for the Attorney General of British Columbia advised that her client does not seek costs. Counsel for the remaining respondents did not address the issue.

[75] If Mr. Dixon, wishes to seek costs, he may arrange through Supreme Court Scheduling for a hearing on any morning convenient to the parties and to the Court.

"G.C. Weatherill J."

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