COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Casavant v. British Columbia (Minister of Environment and Climate Change Strategy),* 2023 BCCA 320

Date: 20230808
Docket: CA48589

Between:

Bryce J. Casavant

Appellant
(Plaintiff)

And

Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Environment and Climate Change Strategy, the Minister of Environment and Climate Change Strategy (B.C. Conservation Officer Service) and the Chief Conservation Officer

Respondents
(Respondents)

Before: The Honourable Mr. Justice Hunter
The Honourable Mr. Justice Grauer
The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated September 7, 2022 (*Casavant v. British Columbia (Minister of Environment and Climate Change Strategy)*, 2022 BCSC 1573, Vancouver Docket S211700).

Counsel for the Appellant:	A.M. Beddoes J.M. Wiebe
Counsel for the Respondents:	K. Chewka M. Salt
Place and Date of Hearing:	Vancouver, British Columbia March 17, 2023
Place and Date of Judgment:	Vancouver, British Columbia August 8, 2023

Written Reasons by:
The Honourable Mr. Justice Grauer

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

Summary:

The appellant was dismissed from his position as a conservation officer and special provincial constable after refusing to follow an order to euthanize two bear cubs. He was transferred to a position with a different ministry and remained in the BC Public Service. His union filed grievances on his behalf but before the matter completed at arbitration, it was resolved by way of a settlement agreement. The appellant then sought to reopen the matter at the Labour Relations Board. Ultimately, this Court in 2020 BCCA 159 determined that the proceedings before the arbitrator and Labour Relations Board were a nullity, as his dismissal should have been addressed under the Police Act rather than through his collective agreement. The parties were left to sort out the consequences of this Court's declarations but were unable to do so. The appellant brought a petition to the Supreme Court, seeking a declaration that his dismissal as a conservation officer and special provincial constable was unlawful and therefore void ab initio, that the settlement agreement was void and of no force and effect, and that he was entitled to all emoluments from the time he was purportedly dismissed. His petition was dismissed. On appeal, he submits that the judge erred in finding that he was a party to the settlement agreement and that it was binding on him. He also submits that the judge ignored relevant considerations and relied on irrelevant considerations in exercising her discretion to decline to grant relief.

Held: Appeal dismissed. The judge did not err in exercising her discretion to decline to grant the remedies sought on judicial review. The appellant was a party to the settlement agreement and acted in accordance with its terms. The judge did not err in finding that it was impracticable to unwind the settlement agreement to restore the parties to a position from which they had long moved on. Additionally, the judge took into account all relevant factors given the context of the case, and her balancing of those factors is entitled to deference.

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Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

[1] This appeal concerns the exercise of a judge's discretion on judicial review to deny a remedy to an applicant who has established that the underlying challenged decision was a nullity. It arises out of the appellant's employment with the B.C. Public Service as a conservation officer and special provincial constable.

[2] On July 21, 2013, the appellant, Mr. Casavant, accepted a conditional offer of employment as a conservation officer with the British Columbia Conservation Officer Service ("BCCOS"), an office within the Ministry of Environment (now the Ministry of Environment and Climate Change Strategy). After appropriate training, he was designated a member of the BCCOS on December 11, 2013. As such, he was a member of the BC Public Service and subject to a collective agreement between the BC Government and Services Employees' Union ("BCGEU") and his employer, the Government of the Province of British Columbia.

[3] On April 2, 2014, Mr. Casavant was appointed a special provincial constable, providing him with extensive law enforcement powers under the *Police Act*, RSBC 1996, c 367. As such, he was subject to the *Special Provincial Constable Complaint Procedure Regulation*, BC Reg 206/98 [the *Regulation*], made pursuant to section 74 of the *Police Act* and since amended and re-enacted by BC Reg 287/2021.

[4] On July 3, 2015, an incident occurred in the course of Mr. Casavant's employment that became the subject of media attention. The BCCOS received a complaint regarding a bear and two cubs on the complainant's property in Port Moody. The sow was eating food from the complainant's outdoor freezer. Mr. Casavant was asked by his supervisor to respond to the complaint and was instructed to euthanize the three animals. Upon attending, Mr. Casavant came to understand that the two cubs had not been eating the food, and he therefore declined to follow his supervisor's instructions. He euthanized only the sow. The cubs were transferred to a wildlife recovery centre. Mr. Casavant has always

maintained that his refusal to euthanize the cubs was an appropriate exercise of his independent judgment as a special provincial constable.

[5] His superiors did not see it that way. On the cumulative basis of this and two earlier incidents, Mr. Casavant was suspended, first without pay on July 6, 2015, and then with pay on July 8, 2015. On August 25, 2015, he was effectively dismissed from his position when the chief conservation officer, purporting to act under the BCGEU collective agreement, transferred him to a position as Natural Resource Officer–Senior Compliance and Enforcement Specialist within the Ministry of Forests, Land and Natural Resource Operations. He thus remained in the BC Public Service, earning the same salary and benefits.

[6] Mr. Casavant challenged this dismissal. The BCGEU filed grievances on his behalf under the collective agreement. An arbitrator was appointed under the *Labour Relations Code*, RSBC 1996, c 244. Before the arbitration completed, matters were resolved by way of a settlement agreement signed on February 19, 2016 by Mr. Casavant, his employer, and the union.

[7] Mr. Casavant subsequently sought to reopen the matter by way of application, which was dismissed by the Labor Relations Board. Mr. Casavant sought judicial review, leading ultimately to this Court's decision in *Casavant v British Columbia (Labor Relations Board)*, 2020 BCCA 159 [*Casavant CA*], leave to appeal to SCC ref'd, 39317 (21 January 2021), where the circumstances are discussed in detail.

[8] In *Casavant CA*, this Court concluded that Mr. Casavant's dismissal related to the performance of his constabulary duties as a special provincial constable rather than as a conservation officer, and were therefore governed by the *Police Act,* rather than his collective agreement. Accordingly, this Court declared at para 61 that (1) the proceedings before the arbitrator and the Labor Relations Board were a nullity, and (2) Mr. Casavant's dismissal should have been addressed under the *Police Act* and the *Regulation*. However, because those proceedings had been settled by an agreement that had governed the parties' relationship for some four

years at that point, this Court felt obliged to "leave the parties to sort out the consequences of those declarations, if any, on the settlement agreement". Those consequences had not been argued on the appeal.

[9] The parties were unable to sort it out. Accordingly, Mr. Casavant petitioned the Supreme Court under the *Judicial Review Procedure Act,* RSBC 1996, c 241 [*JRPA*], seeking the following orders:

- a declaration that his dismissal as a conservation officer and special provincial constable was unlawful, and therefore void *ab initio*;
- a declaration that his designation as a member of the BCCOS on December 11, 2013, remains valid, and in full force and effect;
- an order declaring the settlement agreement void and of no force or effect;
- a declaration that, since his purported dismissal as a conservation officer and special provincial constable on August 25, 2015, he has remained suspended and is entitled to all emoluments, including full pay and allowances from that date; and
- an order setting the quantum of the emoluments owed to him, including pay and allowances, from August 25, 2015, to present.

[10] In reasons for judgment indexed at 2022 BCSC 1573, the review judge dismissed the petition. While accepting that she was bound by *Casavant CA*, she "decided not to exercise [her] discretion to provide a remedy on this judicial review based on the particular and unusual circumstances that arise on this petition and the history of the parties' interactions to date" (at para 2).

[11] The primary question on this appeal is whether, in the "unusual circumstances", that was a sustainable exercise of the judge's discretion. For the reasons that follow, I conclude that it was.

2. THE GENESIS OF THE SETTLEMENT AGREEMENT

[12] As this Court determined in *Casavant CA*, the chief conservation officer's transfer of Mr. Casavant to a position as Natural Resource Officer–Senior Compliance and Enforcement Specialist in a different ministry constituted a dismissal from his position as a conservation officer and special provincial constable. Although that dismissal was disputed, the dispute, it turns out, was not addressed under the right procedure, and the procedure by which it was addressed was a nullity. But, as we have seen, long before this Court made that finding, Mr. Casavant, his employer, and his union entered into a settlement agreement resolving the challenge to his dismissal. It follows that, while the proceedings were declared a nullity in *Casavant CA*, the propriety of Mr. Casavant's actions that led to his dismissal has never been determined, whether under a flawed procedure or a proper one. Mr. Casavant now seeks to establish the impropriety of his dismissal notwithstanding his participation in the settlement agreement that resolved the flawed proceedings and the question of his employment.

[13] Consequently, an important factor in the review judge's reasoning, and on this appeal, is the effect and consequences of that settlement agreement. As noted above, that is indeed what this Court observed in *Casavant CA* would have to be the case.

[14] The settlement agreement's genesis begins with a dispute that arose in the arbitration of the grievances filed on Mr. Casavant's behalf. The employer and the union disagreed over the ability of the employer to introduce evidence that had not been brought to Mr. Casavant's attention at the time disciplinary action was taken. In a ruling described by the parties as the "Scope Award", the arbitrator ruled that the additional evidence was admissible. The settlement agreement was signed a week later, and the arbitration proceeded no further.

[15] Between February 19, 2016, when the settlement agreement was signed, and June 4, 2020, when this Court declared the arbitration proceedings a nullity in

Casavant CA, much transpired between the parties. The question is, what impact does this have on Mr. Casavant's present claim for relief?

[16] So, as the judge did below, I turn to the terms of the settlement agreement. It reads:

> **MEMORANDUM OF SETTLEMENT AND RELEASE**
>
> **Between**
>
> **THE GOVERNMENT OF THE PROVINCE OF BRITISH COLUMBIA**
>
> **(The Conservation Officer Service)**
>
> **as represented by the BC Public Service Agency**
>
> **("the Employer")**
>
> **and**
>
> **BC GOVERNMENT & SERVICE EMPLOYEES' UNION**
>
> **("the Union")**
>
> **and**
>
> **Bryce Casavant**
>
> **("the Grievor")**
>
> **(hereinafter referred to as the "Parties")**
>
> Whereas:
>
> A. The Union filed the following grievances on behalf of the Employee:
>
> …
>
> Therefore, this agreement is made between the parties without precedence or without prejudice to any current or future matters between the parties. The parties have mutually agreed to resolve the above noted Grievances as follows:
>
> 1. The Employer confirms that the following documents will no longer be on the Grievor's personnel file: the letter dated July 8, 2015 suspension pending investigation letter and the letter dated August 25, 2015 letter. No other documents related to this matter have been or will be on his personnel file. The Conservation Officer Service and any other Ministry of Environment employees will ensure that all the above noted documents will be destroyed from ministry records including the psychologist report by Keith Forshaw and other investigation materials.
>
> 2. No discipline will be issued to the Grievor regarding the issues during his employment with the Conservation Officer Service.
>
> 3. The Grievor accepts the Senior Compliance and Enforcement Officer Specialist position with the Ministry of Forests, Lands and Natural Resource

Operations (FLNRO) … He will not return to the Conservation Officer Service now.

4. The Union will withdraw the outstanding grievances of the Grievor.

5. The Grievor will withdraw all other employment-related complaints relating to his former position with the Conservation Officer Service … He agrees not to file any further complaints or grievances pertaining to matters during his employment with the Conservation Officer Service.

6. Provided the Grievor enrolls in a formal program of study in areas related to the government's priorities, he will receive the maximum eligible amount of reimbursement to upgrade his employment-related skills as an educational expense up to four years at the most. … Eligible reimbursable expenses are tuition. … The Grievor must satisfactorily complete coursework for each eligible year in order to receive the reimbursement. If he fails to do so, he must repay the COS the full amount.

…

10. The Employer will provide a letter of support and all documentation that may be necessary for the purposes of obtaining admission to an educational program. …

…

12. At no time will the Conservation Officer Service state that they would not rehire the Grievor.

13. The Conservation Officer Service will instruct their employees not to comment on the Grievor's employment record.

14. The parties hereby release one another from any liability with respect to any claims (grievances, actions, disputes, complaints, etc.), which have arisen or may arise regarding the Grievor's employment with the Conservation Officer Service including any claims or potential claims arising under the Employment Standards Act, the Labour Relations Code, the Human Rights Code, the Workers Compensation Act, other statutes or at common law. The Grievor releases both the Employer and the Union from any liability in regard to the above.

15. The terms of this agreement do not constitute an admission of legal liability or wrongdoing by any of the parties;

16. The parties agree that the terms and conditions of this agreement will remain strictly confidential and will not be disclosed to any individual except as required by law. The parties agree to limit any comments relating to this matter made to anyone, including the media, to the following statement:

a) Bryce Casavant is content with his current position with the Ministry of Forests, Lands and Natural Resource Operations and has chosen not to continue his grievances in the pursuit of a return to his previous position with the Ministry of Environment. Bryce has decided to focus his energy on attaining a PhD in furtherance of interests in environmental sustainability. The Province of British Columbia supports his decision.

> 17. The Grievor acknowledges that the terms of this Agreement have been explained to him by his Union representative and are fully understood. The Grievor further agrees that the terms of the Agreement are accepted voluntarily for the purpose of making a full and final settlement.
>
> 18. This agreement constitutes a final, enforceable and binding settlement of all of these matters.
>
> 19. Arbitrator Sullivan remains seized regarding any issues that may arise concerning the implementation of this Settlement Agreement.
>
> [Emphasis by underlining added.]

[17] The agreement is signed by Mr. Casavant, and by representatives of the BCGEU and the employer.

[18] In the years following the execution of this agreement, the parties carried out a number of its terms. Pursuant to clauses 6, 10, and 16(a), the employer supported Mr. Casavant's application for doctoral studies with Royal Roads University and paid $30,000 to fund it. Mr. Casavant ultimately obtained his doctorate in July 2020. In accordance with clause 13, the employer instructed its staff to refrain from discussing any previous dealings with Mr. Casavant, or personal opinions about him or matters related to him. It destroyed personnel records pursuant to clause 1, and refrained from taking any disciplinary action in accordance with clause 2. Pursuant to clauses 3 and 16(a), Mr. Casavant accepted his transfer to the position of Senior Compliance and Enforcement Officer Specialist with the Ministry of Forests, Lands and Natural Resource Operations, where he remained employed until he resigned from the BC Public Service effective August 20, 2019, to pursue "other opportunities to advance my skills and knowledge".

[19] Over the balance of 2016 after the execution of the agreement, all three parties alleged breaches. One of the issues raised on behalf of the employer in a complaint to the arbitrator dated September 21, 2016, was that Mr. Casavant was prohibited by clause 16 of the settlement agreement from publicly discussing the incident with the bear cubs. Mr. Casavant disagreed. When counsel for the employer took the position that outside counsel for Mr. Casavant ought not to be participating

as the matter was between the government and the union, Mr. Casavant responded to the arbitrator on September 28, 2016:

> First and foremost, I am not excluding the Union as they have been cc'd on all communications. However, I do not wish to take any action against the employer at this time; therefore, there is nothing for the Union to enforce on my behalf with respect to the settlement agreement. As well, the government has taken no labour action against me and is satisfied with my current work status. Accordingly, there is no labour issue at play in the present circumstances. I am fine if the Union wishes to remain involved and part of the process as an observer. However, the Union does not have my permission to act on my behalf with respect to the interpretation of the terms of my settlement agreement.
>
> … I have retained outside counsel to ensure my settlement agreement is not, yet again, expanded to include requirements on my part that were not previously agreed to.
>
> [Emphasis added.]

[20] On October 14, 2016, the employer withdrew its complaint "in light of discussions between the parties".

[21] In the meantime, through his outside counsel, Mr. Casavant obtained further documentation through Freedom of Information requests. This led to a series of steps that this Court described in *Casavant CA*:

> [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.

[22] Mr. Casavant then sought judicial review of the Board's reconsideration decision. His application was dismissed, leading to *Casavant CA*, and, ultimately, to this appeal.

[23] With this history in mind, I turn to the review judge's reasons for judgment.

3. THE JUDGMENT BELOW

[24] The judge set out the issues and a summary of her conclusion as follows:

> [12] The petition raises the following issues:
>
> a) Is this Court bound by the Court of Appeal's declarations?
>
> b) Is it appropriate to grant the relief sought?
>
> [13] I conclude I am bound by the decision in *Casavant BCCA*. I also conclude it is not appropriate to grant the relief sought by Mr. Casavant because of the particular circumstances the parties find themselves in, including the terms of the executed Settlement Agreement and Mr. Casavant's resignation from the BC Public Service.

[25] The respondents had submitted to the judge that *Casavant CA* was not binding on her because this Court had lacked the benefit of a complete evidentiary record when it made its decision. Not surprisingly, the judge concluded at para 20 that she was bound by the decision. That conclusion is not challenged on this appeal.

[26] The judge then turned to consider Mr. Casavant's requests for relief and whether she ought to exercise her discretion to provide a remedy, setting out the legal principles:

> [24] Even when, on the merits, an applicant establishes a case for judicial review, there is an overriding discretion on the part of the reviewing court to refuse relief: *Strickland v. Canada (Attorney General)*, 2015 SCC 37 at para. 37 [*Strickland*].
>
> [25] In *ISH Energy Ltd. v. British Columbia (Minister of Finance)*, 2017 BCCA 62 at para. 23, the Court of Appeal described the nature of this overriding discretion as follows:
>
> > 23 Thus, on an application for judicial review, it is open to a reviewing judge, in the exercise of his or her discretion, to decline to provide a remedy where the circumstances warrant. This discretion is manifest in the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, which provides in s. 2(2) that:
> >
> > > On an application for judicial review, the court <u>may</u> grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
> > >
> > > (a) relief in the nature of . . . *certiorari*;
> >
> > and in s. 8(1) that:

> If, in a proceeding referred to in section 2, the court had, before February 1, 1977, a discretion to refuse to grant relief on any ground, the court has the same discretion to refuse to grant relief on the same ground.
>
> [26] In exercising discretion, all relevant factors should be taken into account and the factors are not distilled into a checklist or statement of general rules: *Strickland* para. 45.
>
> [27] The situations where a court may decline to grant relief include, for example, circumstances where granting the remedy sought would serve no purpose or make no practical difference to the parties: *ISH* paras. 24 and 25. Such circumstances militate against granting the relief sought.
>
> [Emphasis added by the review judge.]

[27] In this regard, the judge accepted that the settlement agreement was a relevant factor that needed to be taken into account in deciding whether to exercise her discretion (at para 30). She discussed the position of Mr. Casavant, reiterated on this appeal, that, first, the settlement agreement is void and of no force and effect because the arbitration proceedings were a nullity; and second, he was not a party to the settlement agreement so that it is not binding on him even if it is not void (at paras 32–33). The respondents, on the other hand, asserted that the signatories were bound by the terms of the agreement as they had relied on the terms and performed all their obligations under it (at para 34).

[28] After reviewing the agreement, the judge concluded as follows:

> [43] When I consider all of the circumstances, I find that Mr. Casavant is a party to and bound by the Settlement Agreement. I do not find that the Settlement Agreement is a nullity or void including as against Mr. Casavant, due to the effect of the Court of Appeal's declaration, or otherwise.
>
> [44] In my view, the declarations of the Court of Appeal in *Casavant BCCA* do not necessarily require me to conclude that the Settlement Agreement is a nullity or void *ab initio*. If I am incorrect about that, I would also have declined to exercise my discretion to grant the relief sought because of the difficulties, if not impossibility, of unwinding the Settlement Agreement in the circumstances.
>
> [45] My findings are also based, among other things, on Mr. Casavant being a signatory and receiving consideration under the Settlement Agreement. For example, he received reimbursement for his educational expenses, in exchange for his full and final release of all claims related to his employment with the Conservation Officer Service.

> [46] I also find that the signatories acted on the Settlement Agreement. For example, the employer paid substantial reimbursements for Mr. Casavant's educational expenses. The employer was required to destroy records and to commit to not discipline Mr. Casavant, which could impact a consideration of the Dismissal pursuant to the *Regulation*, which Mr. Casavant agrees is not technically statute-barred.
>
> [47] For his part, Mr. Casavant continued working in the BC Public Service following the Settlement Agreement. As a continuing employee, he had the benefit of ongoing salary and benefits including the employer's contribution to the public service pension on his behalf. It was more than two years after the Settlement Agreement was signed, that Mr. Casavant gave notice of his resignation from the BC Public Service.
>
> …
>
> [50] In light of the particular and somewhat unique facts before me, I have concluded that the circumstances are such that they warrant my decision to decline to provide the remedies sought on judicial review. My decision is based, in part, on my concern that granting the remedies sought would serve no purpose or make no practical difference to the parties for reasons that include the numerous years during which the Settlement Agreement governed the parties' relationship and Mr. Casavant's eventual resignation from the BC Public Service.

[29] Accordingly, she dismissed Mr. Casavant's petition with costs.

4. ON APPEAL

4.1 Standard of review

[30] The parties agree that the judge's decision not to grant the remedies Mr. Casavant sought in his petition was an exercise of discretion, and accordingly, is entitled to deference on appeal: see, for instance, *ISH Energy Ltd v British Columbia (Finance)*, 2017 BCCA 62 at para 25; *Canadian Pacific Ltd. v Matsqui Indian Band*, [1995] 1 SCR 3, 1995 CanLII 145 at para 39. That exercise of discretion will be overturned only in the event that the appellant establishes a palpable and overriding error of fact, an error in principle, reliance on irrelevant considerations or failure to take into account relevant considerations: *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 76–77, 1992 CanLII 110; *Lafontaine v University of British Columbia*, 2018 BCCA 307 at para. 45. Extricable questions of law are subject to a correctness standard: *Housen v Nikolaisen*, 2002 SCC 33 at para 8.

4.2 The position of the appellant

[31] Mr. Casavant alleges two errors by the judge, which he states broadly.

[32] The first is that the judge erred in law in finding that he was a party to the settlement agreement and that the settlement agreement was binding on him. He maintains that if this submission is accepted, then the basis upon which the judge exercised her discretion to decline a remedy falls away. He characterizes this as an extricable question of law subject to a correctness standard.

[33] Although it was not raised below and only tangentially in his factum, Mr. Casavant relied in oral argument primarily upon the proposition that, in law, the settlement agreement was void for common mistake going to the core of the agreement. As found in *Casavant CA*, he points out, the employer had no right to transfer Mr. Casavant to a new position (which could be done only under the collective agreement), and never made a proper complaint as required under the *Police Act* procedure. Accordingly, he asserts, his dismissal and the arbitration procedure under the *Labour Relations Code* were both invalid. It follows, in his submission, that the settlement agreement's entire premise—which he describes as purporting to settle a valid process of dismissal, grievance, and arbitration—was false, rendering the settlement agreement void from the outset.

[34] The second is that in exercising her discretion, the judge ignored relevant considerations and relied on irrelevant considerations. In particular, he submits, the judge failed to consider that declining to grant relief amounts to permitting the government to dismiss a member of the Public Service outside of the mandated statutory process. Allowing such an end run, he asserts, has significant implications for the rule of law. The passage of time, he argues, is no reason to bless, in hindsight, the engagement of the employer and the union in a procedure which they had no lawful right to engage.

[35] In these circumstances, Mr. Casavant says, the settlement agreement and the steps taken under it are irrelevant. He was never lawfully dismissed and is

entitled to the relief he seeks, including full pay and allowances as a conservation officer/special provincial constable from the date of his purported dismissal to the present, without deduction for the income and allowances he in fact received. He relies in particular on a series of judgments reviewing the dismissal of a constable from the Vancouver City Police: *Carpenter v Vancouver Police Board and Stewart* (1985), 63 BCLR 310, 1985 CanLII 477 (CA) [*Carpenter #1*]; *Carpenter v Vancouver Police Board* (1986), 9 BCLR (2d) 99, 1986 CanLII 841 (CA) [*Carpenter #2*], leave to appeal to SCC ref'd, 20262 (14 May 1987); and *Carpenter v Vancouver Police Board* (1988), 33 BCLR (2d) 182, 1988 Can LII 3096 (SC) [*Carpenter #3*].

4.3 The position of the respondents

[36] The respondents maintain that the only issue is whether the review judge erred in exercising her discretion to decline to grant the relief sought. They maintain that while Mr. Casavant focuses on the history of the dispute and the validity of his dismissal, the parameters and issues have shifted considerably since then. The judge, they say, took into account all relevant considerations and exercised her discretion appropriately. Accordingly, she did not, and did not need to, address the validity of Mr. Casavant's dismissal.

[37] With respect to Mr. Casavant's primary position, that the settlement agreement is void due to common mistake, the respondents point out that this position was neither argued before the review judge nor articulated as a ground of appeal, but was raised for the first time as a brief alternative argument in the appellant's factum. It was only in oral argument that it became the primary foundation of Mr. Casavant's position. In these circumstances, the respondents contend, this Court ought not to grant leave to Mr. Casavant to raise the argument on appeal. A full evidentiary record is lacking, and it would not change the outcome. Moreover, the respondents submit, there is no mistake about what the settlement agreement was intended to do and did do: resolve the very real dispute concerning Mr. Casavant's employment.

[38] The respondents argue that the questions of whether Mr. Casavant is a party to the settlement agreement, and whether it is binding on him, are questions of mixed fact and law subject to a deferential standard of review.

[39] Moreover, the respondents argue, the judge did not ignore relevant considerations or rely on irrelevant considerations, nor did she rubberstamp an unlawful process. She properly took into account and balanced all relevant factors, and achieved a result that was fair in the unusual circumstances of this case.

5. DISCUSSION

5.1 Overview: the scope of the judge's discretion

[40] There is no doubt the judge's decision was discretionary. That discretion is statutorily recognized by section 2(2) of the *JRPA*. But given the context of judicial review, what is the proper scope of the judicial exercise of that discretion?

[41] As the Supreme Court of Canada explained in *Harelkin v University of Regina*, [1979] 2 SCR 561 at 574, 1979 CanLII 18, the principle that *certiorari* and *mandamus* are discretionary remedies by nature cannot be disputed. That discretion remains even in cases involving lack of jurisdiction and those involving an excess or abuse of jurisdiction such as a breach of natural justice. The historical remedies of *certiorari* and *mandamus* have, of course, been preserved in section 2(2)(a) of the *JRPA*.

[42] In *Strickland v Canada (Attorney General)*, 2015 SCC 37 at para 37, the Court reiterated that even if an applicant for judicial review makes out a case for review on the merits, the reviewing court has an overriding discretion to refuse relief, including declaratory relief. The Court observed at para 40 that one of the discretionary grounds for refusing to undertake judicial review is the existence of an adequate alternative—a ground not advanced in this case. The Court went on to say this:

> [43] The categories of relevant factors are not closed, as it is for courts to identify and balance the relevant factors in the context of a particular case: [*Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 SCR 3], at

> paras. 36–37, citing [*Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49], at p. 96. Assessing whether there is an adequate alternative remedy, therefore, is not a matter of following a checklist focused on the similarities and differences between the potentially available remedies. The inquiry is broader than that. The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis: [*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12] at para. 36; [*Canada (Attorney General) v. TeleZone Inc*, 2010 SCC 62] at para. 56. As Dickson C.J. put it on behalf of the Court: "Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant . . ." (*Canada (Auditor General)*, at p. 96).
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> …
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> [45] The factors to be considered in exercising this discretion cannot be reduced to a checklist or a statement of general rules. All relevant factors, considered in the context of the particular case, should be taken into account.

[43] In *Yang v Real Estate Council of British Columbia*, 2019 BCCA 43 at paras 10–12, this Court confirmed the inherently discretionary nature of applications for judicial review and declaratory relief, noting that one of the discretionary grounds for refusing to undertake judicial review is that it would serve no useful purpose. The court went on to observe:

> [37] As I have said, the grant of relief on judicial review is discretionary. This does not align well with the paradigm of a common law action for damages where, if the elements of the claim are established, compensation ought generally to follow as a matter of course: *TeleZone* at para. 56. The discretionary nature of the court's supervisory jurisdiction on judicial review reflects the fact that, unlike private law, its orientation is not directed exclusively to vindicating the rights of individuals: Donald J.M. Brown & The Honourable John M. Evans, *Judicial Review of Administrative Action in Canada,* loose-leaf (Toronto: Thomson Reuters, 2017) at 3:1100.

[44] These principles return us to Mr. Casavant's position that the judge here did not take into account all relevant factors, and erred in her consideration of those factors insofar as they concerned the settlement agreement. As the Supreme Court of Canada points out in *Strickland*, the context of the particular case is crucial.

[45] Here, the relief sought by Mr. Casavant in his petition consists primarily of declaratory relief, culminating in a declaration that since his purported dismissal as a conservation officer on August 25, 2015, he has remained suspended and is entitled to all emoluments, including full pay and allowances from that date, and an order setting the amount of those emoluments.

[46] Underlying Mr. Casavant's approach is the implicit proposition that he was, in fact, wrongfully dismissed: not only in the sense of process, but on the merits—that his employer had no proper grounds for effectively dismissing him from his position as a conservation officer and special provincial constable by transferring him to a different ministry. Consequently, he seeks relief that would put him in a position as if he should never have been disciplined or dismissed, and seeks a declaration that he should be compensated accordingly without taking into account benefits that accrued to him as a result of the settlement agreement.

[47] Mr. Casavant complains, correctly, that he has been denied an opportunity to vindicate his position that he acted appropriately. But, equally, the Province has been denied an opportunity to establish its position; in short, the merits have never been decided one way or the other. Instead, the parties resolved their differences through the settlement agreement. In the result, while Mr. Casavant was subjected to flawed proceedings through no fault of his own, both sides made compromises and accepted benefits. The judge considered this context to be of critical importance to the exercise of her discretion.

[48] In these circumstances, I now turn to the issues concerning the settlement agreement.

5.2 The settlement agreement

[49] In my view, the question of whether Mr. Casavant was a party to the settlement agreement and the related question of whether it is binding on him, do not raise extricable questions of law. Rather, they are questions of mixed law and fact. For the reasons discussed at length in *Sattva Capital Corp. v Creston Moly*

Corp, 2014 SCC 53 at paras 42–55, the judge's conclusions are accordingly entitled to deference in the absence of an error in principle or a palpable and overriding error of underlying fact. This is subject to the question of common mistake, which the judge did not consider as Mr. Casavant did not raise it before her. I turn first to the question of whether Mr. Casavant was a party.

[50] Mr. Casavant argues that, as a matter of labour law, the employee's union, not the employee, controls the grievance and arbitration process, and employees lack separate standing to seek judicial reviews of arbitral awards or to set aside settlement agreements reached between the employer and the union. Accordingly, Mr. Casavant contends, only the union and the employer could have been, and were, parties to the settlement agreement.

[51] As I see it, the conclusion Mr. Casavant advances does not necessarily follow from the general propositions he correctly cites. It depends upon what the agreement says. Here, I am satisfied that, as the judge found, Mr. Casavant was a party to the settlement agreement. Mr. Casavant has not demonstrated any palpable and overriding error or error in principle in this regard. I agree with the judge that a plain reading of the settlement agreement indicates that it was a resolution of more than just the arbitration and the underlying grievances (at para 35), and involved him directly.

[52] The agreement begins with its title, "Memorandum of Settlement and Release". It specifically states that Mr. Casavant is a party, and he signed it as a party. It refers to obligations and agreements specific to him, and provides for benefits accruing to him personally. He acknowledged that the terms were explained to him and that he fully understood them. He agreed that the terms of the agreement "are accepted voluntarily for the purpose of making a full and final settlement", and, of course, the subject of the agreement went well beyond the grievances, encompassing a release by Mr. Casavant of "any claims (grievances, actions, disputes, complaints, etc.), which have arisen or may arise regarding [Mr. Casavant's] employment with the Conservation Officer Service".

[53] That the agreement goes beyond resolution of the grievances is consistent with the fact that Mr. Casavant was expressly made a party to it, which would not have been necessary were it intended solely to resolve the grievances that the union had raised on his behalf.

[54] Mr. Casavant now contends that had he been aware when he signed the agreement of what this Court determined in *Casavant CA*—that the arbitration process out of which the settlement agreement arose was flawed and a nullity—he would never have signed it. I understand his thinking, but it again assumes that the result would have been vindication. That does not necessarily follow. Had it been become clear at the time that the process was wrong, then presumably the parties would have turned to the correct process—which may or may not have resulted in a conclusion favourable to Mr. Casavant.

[55] The reality is that the agreement resolved not merely the grievance process, but the entire matter of Mr. Casavant's employment with the Province, and the parties acted accordingly. As Mr. Casavant wrote in September 2016, he had no desire then to nullify the settlement agreement, and maintained that he had "respected the terms of the settlement agreement in all my subsequent conduct". Pursuant to its terms, Mr. Casavant and the employer agreed to pursue no claims against each other, and Mr. Casavant was funded for his educational pursuits and accepted employment in a different ministry of the province, where he remained employed at the same level, with the same income and benefits, for several years before resigning for reasons unconnected with this dispute. It is no longer practicable for the proper complaint process to be followed given the passage of time and the destruction of records.

[56] But does the settlement agreement remain binding on Mr. Casavant, or, as he argues, is it a nullity because of common mistake? I consider this to be the wrong question. This was implicitly recognized by the judge at paras 43 and 44 of her reasons when, after finding that the settlement agreement was not void as against Mr. Casavant notwithstanding *Casavant CA*, she went on to say: "If I am incorrect

about that, I would also have declined to exercise my discretion to grant the relief sought because of the difficulties, if not impossibility, of unwinding the Settlement Agreement in the circumstances."

[57] The problem thus recognized by the judge is that this was not an application to enforce the settlement agreement; in essence, it had already been executed: the parties had essentially fulfilled their respective obligations. The question, then, was whether it could practically be unwound in order to restore the parties to a position from which they had long moved on. Irrespective of whether the contract was binding, the judge found that to be impracticable. I see no error in that conclusion.

5.3 Relevant factors

[58] As we have seen, a judge exercising her discretion to decide whether to grant a judicial review remedy is obliged to consider all relevant factors given the context of the particular case. It is then for the judge to decide how to balance those factors.

[59] As just discussed, the judge did take into account the background facts, the history of the relationship between Mr. Casavant and the Province, the effect of the settlement agreement, and the dealings between the parties to that agreement after its execution. Mr. Casavant argues, however, that she was wrong to conclude that the remedy sought would serve no useful purpose or make no practical difference. He points out that the allegations have never been adjudicated on their merits, and have had a negative effect on him personally, citing his multiple attempts to return to the BCCOS. In particular, he asserts that the judge erred in failing to consider that the purported dismissal of Mr. Casavant through an unlawful process raises an important issue of public law, because, he submits, the rule of law demands that government entities cannot rely on an unlawful process to secure the dismissal of constables holding office.

[60] Mr. Casavant points to the *Carpenter* litigation in support of his position. There, the Vancouver Police Board sought to terminate the employment of Cst. Carpenter, believing that he had been in possession of stolen goods and had

consorted with a known criminal in relation to stolen property. The board purported to terminate his employment in November 1981 on the ground that this misconduct was so serious as to constitute a fundamental breach of the contract of employment. The board did not follow the appropriate process mandated by the Police (Discipline) Regulations under the *Police Act*. Carpenter's union sought to grieve this dismissal, but that grievance was stayed by agreement when criminal charges were brought.

[61] Carpenter was subsequently tried and acquitted of the criminal charges. Approximately three months after his acquittal, and 17 months after his dismissal from the police force, he sought judicial review, asking that his dismissal be set aside because the board did not follow the required procedure under the *Police Act*. The board opposed the petition on the ground that Carpenter had failed to pursue an adequate alternative remedy, and that his delay in the commencement of review proceedings had caused prejudice. In *Carpenter #2*, this Court rejected both grounds. It did not consider the delay to be unreasonable in the circumstances (at para 34), and found that no alternative adequate remedy was available to him (at para 56). In the words of Madam Justice McLachlin, then of this Court, the lower court's dismissal of Carpenter's application for judicial review left the parties in an anomalous position:

> [62] … The city can only dismiss Carpenter pursuant to the *Police Act*, but is precluded from doing so by reason of the expiry of the limitation period provided by that *Act*. At the same time, the city is precluded from proceeding under the collective agreement because the court has ruled that that procedure is inapplicable. In short, it is now impossible to have any hearing whatsoever into the validity of Carpenter's dismissal. …
>
> [63] I observe at the outset that there appears to be no entirely satisfactory way to unravel the tangled fabric which the parties and the events have woven. If the appeal is allowed, the city will be required, without a hearing on the merits, to reinstate an employee whom it contends should stand dismissed. On the other hand, if the appeal is dismissed, Carpenter will find himself effectively dismissed without the hearing prescribed by law. That said, this court must do its best to do justice between the parties on the basis of the applicable legal principles.
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> [64] The question is whether the judge erred in dismissing Carpenter's petition on the grounds of delay and the availability of an alternate remedy. In my view, he did.
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> …

> [78] In my view, the foregoing errors dictate that this appeal be allowed. I add that this result is the best that can be achieved in the anomalous circumstances of this case. It is common ground that Carpenter has not been lawfully dismissed from his employment. He should not be treated as having been lawfully dismissed from his employment. He should not be treated as having been lawfully dismissed merely because he acquiesced in a procedure chosen and pursued by the city. The city knew or ought to have known that to proceed as it did outside the police act was risky: see *Re Victoria City Police Bd. and Victoria Policemen's Union* (1980), 30 L.A.C. (2d) 79, where an arbitration board ruled that it had no jurisdiction to deal with issues arising from the termination of a police officer or misconduct, the matter being governed exclusively by the *Police Act*. Having nevertheless chosen to proceed outside the *Police Act*, the consequences of that choice must fall on the city, not on Carpenter.

[62] Like *Carpenter*, it could be said of Mr. Casavant's case that "there appears to be no entirely satisfactory way to unravel the tangled fabric which the parties and the events have woven". But while there are obvious parallels between this case and *Carpenter,* I consider the *Carpenter* litigation to be distinguishable in a number of ways. First, before *Casavant CA*, the Province did not have advance notice that its desire to discipline a member of the BCCOS could, in the particular circumstances of this case, only be dealt with through the *Regulation*. Whereas Carpenter was a police constable, and nothing else, Mr. Casavant was a conservation officer as well as a special provincial constable, and both his positions had their respective procedures for dealing with discipline and dismissal.

[63] Second, while Carpenter was fully dismissed from his position as a police constable, leaving him unemployed, Mr. Casavant's dismissal was in the form of a transfer. Consequently, he continued in the Province's employ at an equivalent level with the same salary and benefits. Moreover, it would appear from the way in which he styled himself in his resignation letter ("Senior Compliance and Enforcement Specialist, Special Provincial Constable/Natural Resource Officer, West Coast Region, Compliance and Enforcement Branch…") that he also maintained or regained an appointment as a special provincial constable although the evidence in that regard is not clear.

[64] Third, unlike Carpenter, Mr. Casavant entered into a settlement agreement with his employer from which he derived benefit and in which he released his employer from future claims.

[65] In these circumstances, I do not agree that the *Carpenter* litigation is determinative. It was for the judge to consider and balance the relevant factors before her, and these were not on all fours with those before the Court in *Carpenter*.

[66] Turning to the other factors raised by Mr. Casavant, his frustrated desire to return to the BCCOS is not something that can be remedied through this litigation in any meaningful way. While it would no doubt be helpful to him to be vindicated, unlike Carpenter, he voluntarily gave up that opportunity when he entered into the settlement agreement. Moreover, as observed above, it does not follow that granting the relief he seeks in this matter would result in vindication in any event. As this Court observed in *Yang* at para 37, as quoted above, “The discretionary nature of the court’s supervisory jurisdiction on judicial review reflects the fact that, unlike private law, its orientation is not directed exclusively to vindicating the rights of individuals”. The problem identified by the judge is that the unwinding sought by Mr. Casavant cannot now be effectively accomplished.

[67] As to the rule of law, the concerns Mr. Casavant raises would have considerable force if the parties had continued with the flawed arbitration procedure to its conclusion, leading to Mr. Casavant’s outright dismissal (more like Cst. Carpenter’s situation). Here, where the flawed process and the underlying concerns were resolved through a settlement agreement by which the parties have governed their actions for some years, I am satisfied that the rule of law was adequately recognized and upheld by this Court’s decision in *Casavant CA.* I see no error in this regard.

5.4 Conclusion

[68] As noted above, in exercising her discretion, the judge was obliged to consider all relevant factors given the context of the case. Having done so, it is not open to this Court to take a different view of the proper balance.

[69] In the "anomalous circumstances" of this case, I am unable to say that the judge considered irrelevant factors or failed to take into account relevant factors. It seems to me that she properly considered the relevant factors given the context of this case, and her balancing of those factors is entitled to deference. Mr. Casavant has established no error in principle or palpable and overriding error of fact.

6. DISPOSITION

[70] For these reasons, I would dismiss the appeal. Given that the flawed process that spawned these proceedings was no fault of Mr. Casavant, I would direct that the parties bear their own costs.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Mr. Justice Marchand"