COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Florkow v. British Columbia (Police Complaint Commissioner),* 2013 BCCA 92

Date: 20130304
Docket: CA039680

Between:

Nicholas Florkow and Bryan London

Respondents
(Petitioners)

And

The Police Complaint Commissioner

Appellant
(Respondent)

And

British Columbia Civil Liberties Association

Intervenor

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Harris

On Appeal from the Supreme Court of British Columbia, January 26, 2012
(*Florkow v. British Columbia (Police Complaint Commissioner*),
2012 BCSC 126, Vancouver Registry, Docket Number S110293.)

Counsel for the Appellant:	J.S. Heaney R.W. Grant, Q.C.
Counsel for the Respondents:	M.K. Woodall
British Columbia Civil Liberties Association	M.A. Feder P. Morrow
Place and Date of Hearing:	Vancouver, British Columbia January 30 & 31, 2013
Place and Date of Judgment:	Vancouver, British Columbia March 4, 2013

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Harris

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This appeal involves the construction of Part XI of the *Police Act*, R.S.B.C. 1996, c. 367 as amended (the "Act"), headed "Misconduct, Complaints, Investigation, Discipline, and Proceedings." Its provisions and predecessors thereof have been the subject not only of much public debate but of studies and reports carried out by various commissioners and committees in recent years, including the commission report by Mr. Justice Wallace T. Oppal, *Closing the Gap: Policing and the Community*, released in 1994; the *Second Report of the Special Committee to Review the Police Complaint Process*, released by a committee of the Legislature in August 2002; a paper entitled *Police Act Reform, White Paper and Draft PCC Act* by Dirk Ryneveld, Q.C., released in March 2005; and the *Report on the Review of the Police Complaint Process in British Columbia*, by Josiah Wood, Q.C. (now Wood, P.C.J.), released in February 2007. It was in response to Mr. Wood's recommendations that the Act was last substantially amended and in particular, Part XI was added: see S.B.C. 2009, c. 28, which came into force on March 31, 2010.

[2] At the beginning of his submissions to this court, counsel for the Police Complaints Commissioner ("PCC") suggested that the *Police Act* is "highly specialized labour relations legislation dealing with the employment of police officers and the protection of the public by means of the disciplinary tools provided by the statute." I see no reason to disagree with this description, but the focus of this appeal is the role of the PCC under Part XI. Section 177(1) of the Act states that the PCC is "responsible for overseeing and monitoring complaints, investigations and the administration of discipline" under Part XI. The PCC thus has what is often described as a "gatekeeper" or "supervisory" role that does not involve deciding complaints on their merits, but ensuring that misconduct on the part of police is appropriately dealt with in the public interest and in accordance with the Act.

[3] The process established by Part XI for dealing with complaints of police misconduct encompasses several stages – the investigation of a complaint by an

investigating officer ("IO"); the review of the IO's final investigative report by a "discipline authority" ("DA") and, where the DA considers that the conduct of the police officer ("member") constitutes misconduct, the convening of a discipline proceeding; the review of a DA's 'no misconduct' determination by a retired judge (who becomes the DA) where the PCC considers the first DA's determination to be "incorrect"; the preparation of a disposition report by the DA following a discipline proceeding, and his or her determination of appropriate disciplinary measures; and in certain circumstances, the arranging of a "review on the record" or a public hearing by an "adjudicator" (who is also a retired judge). Where at the end of the investigative stage or at the end of a disciplinary proceeding, the decision-maker finds that the conduct complained of does not constitute misconduct, the Act generally brings the process to an end by stating that the decision is "final and conclusive" and "not open to question or review by a court of law". An exception is made at the end of the investigative stage, however, if the PCC takes certain measures within the time limitation specified in the Act: see s. 112(5).

[4] It is the provisions relating to the public hearing stage of the process, and their relationship with the "final and conclusive" provision in s. 112(5) that gives rise to the primary question raised by this appeal. In particular, we are asked to determine the meaning of s. 143(1)(b) of the Act. Section 143(1) provides.

> 143(1) Despite section 141, the police complaint commissioner must appoint an adjudicator under section 142 to conduct a public hearing under this section instead of a review on the record under section 141 if either of the following applies:
>
> (a) the police complaint commissioner determines that
>
> (i) there are sufficient grounds to arrange a public hearing or review on the record under section 138 or 139, and
>
> (ii) it is likely that evidence other than
>
> (A) the record of the disciplinary decision described in section 141 (3),
>
> (B) the service record of the member or former member concerned, and
>
> (C) submissions described in section 141 (5), (6) and (7),

> will be necessary to complete a review of the disciplinary decision on a standard of correctness and do the things described in section 141 (10);
>
> (b) in the police complaint commissioner's opinion, a public hearing of the matter under this section is required to preserve or restore public confidence in the investigation of misconduct or the administration of police discipline.

[5] The chambers judge below rejected the PCC's argument that s. 143(1)(b) endows the PCC with "plenary" authority to convene a public hearing of a complaint at any time (i.e., even after the applicable time limitation has expired) and at any stage of the complaint process. The PCC appeals that ruling. In his submission, in order to maintain public confidence in the complaint process, the PCC must have the ability to set aside a determination based on flawed information or a flawed discipline report, so that the process will not be one of, in Mr. Heaney's phrase, "garbage in/garbage out." Thus in this instance, the PCC seeks to move directly from the receipt of a DA's determination of 'no misconduct' to the ordering of a public hearing of the complaint. Counsel discounts the "final and conclusive" provision in s. 112(5) as merely a privative clause intended to indicate to courts the degree of deference to be accorded to a DA's decision on judicial review.

[6] Part XI of the Act is dense, complicated and often confusing. Its provisions are hedged round with exceptions, qualifications and limitations that are often located in other sections not in close proximity. One must frequently follow cross-references to other sections, and few provisions can be said to stand alone. It is not a model of clarity. Nevertheless, the meaning of s. 143(1)(b) must and can be resolved by reference to the longstanding principle that statutory provisions must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the Legislature]." (*Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27, at para. 21.) I turn first to that context.

The Legislative Context

[7] Even on its face, s. 143(1)(b) is not a 'stand-alone' provision: it must be read with the introductory clause preceding paras. (a) and (b). That clause refers to ss. 141 and 142. They in turn refer, *inter alia,* to ss. 137, 138, 124, 128(3) and 139, and they in turn refer to others. Indeed, it becomes apparent that one must start at the beginning of the complaint process, at a much earlier point in Part XI of the Act, and follow the 'decision tree' through to s. 143(1) in order to understand the provision in context. I will therefore summarize as briefly as possible the material sections by which a complaint may progress to a public hearing. I will omit many details not relevant to this case, such as procedures for the informal resolution of complaints, the giving of notice, the evidence that may be considered at hearings, supplementary evidence, and special provisions that apply where the "member" (i.e., the police officer whose conduct is the subject of a complaint) is a deputy chief or chief constable of a municipal police department or where the "member" has left the force.

[8] The material features of the complaint process as set out in the Act are as follows:

Investigation

Section 93(1)	If information comes to PCC's attention concerning conduct of a member that would if substantiated constitute misconduct, PCC may order an investigation by IO.
Section 78(1)	Complaint concerning "any conduct of a member that is alleged to constitute misconduct" may be made to PCC by person affected, within 12 months of the conduct (s. 79).
Section 82	PCC determines whether complaint is admissible.
Section 90	Failing resolution by mediation or other informal means under Division 4, chief constable of member's department must initiate investigation and appoint a constable of the department as IO unless PCC or chief

	constable considers external investigation is necessary in the public interest. In this event, PCC or chief constable may appoint an external or special constable as IO. (Ss. 92 (1) and (2)).
Sections 96, 97	PCC may "observe" the investigation or designate an employee to do so, require IO to inform PCC of progress, or to provide copies of information to PCC or observer, and may "provide advice" to IO or DA regarding further investigative steps.
Section 98(1), (2)	Within 30 business days from initiation of investigation, IO files report with DA and PCC and files further reports every 20 business days thereafter.
Section 98(4)	Within 10 business days of conclusion of investigation, IO files "final investigation report" ("FIR") with DA and PCC.
Section 98(9)	Within 10 business days after IO's final investigation report, DA or PCC in consultation with DA may reject report and direct further investigative steps.
Section 98(10)	IO must "promptly" comply and resubmit (another) report, which then becomes the FIR.

DA Review

Section 112(1)	Within 10 business days of receipt of FIR, DA reviews report and evidence and records referred to in it and notifies complainant, member, PCC and IO of the "next applicable steps to be taken in accordance with this section."
Section 112(3)	If DA decides member's conduct appears to constitute misconduct, DA convenes discipline proceeding unless s. 120(16) applies.
Section 112(4)	If DA decides member's conduct does not constitute misconduct, DA must include decision with reasons in notice to member, PCC and IO under s. 112(1)(c).
Section 112(5)	The DA's 'no misconduct' decision under s. 112(4): "a. is not open to question or review by a court on any ground, and

b. it is final and conclusive, unless the PCC appoints a retired judge under s. 117(1)."

Judge's Review of IO

Section 117(1)	On reviewing DA's decision that conduct does not constitute misconduct, PCC may within 20 days, if he or she considers there is a "reasonable basis to believe that the decision is incorrect", appoint a retired judge to review IO's report and "make her or his own decision on the matter".
Section 117(7)	Within 10 business days of receiving relevant report, retired judge must "conduct the review" and notify member, PCC and IO of next applicable steps.
Section 117(9)	If retired judge considers member's conduct "appears to constitute misconduct", he or she becomes DA and must convene discipline proceeding unless s. 120(16) applies.
Section 117(10)	If retired judge decides member's conduct does not constitute misconduct, he or she must notify relevant parties.
Section 117(11)	This decision: "a) is not open to question or review by a court on any ground, and b) is final and conclusive."

Discipline Proceeding

Section 118(1)	Within 40 days of receipt of FIR or notification of DA's finding of misconduct under s. 117(8), DA convenes discipline proceeding.
Section 125(1)	Within 10 business days after hearing member's evidence and submissions, DA makes finding in respect of each allegation of misconduct and records them in prescribed form, serves copy on member and PCC and invites submissions from member as to "appropriate disciplinary or corrective measures" for each allegation found to be proven.
Section 128(1)	Within 10 business days after hearing submissions under s. 125(1)(d), DA proposes disciplinary or corrective measures

	to be taken, notifies relevant parties, and provides copy of "disposition record" and entire unedited record of proceedings to PCC. DA also provides complainant with his or her findings and reasons for proposed disciplinary or corrective measures under s. 133(1).

Public Hearing or Review on Record

Section 133(5)	Within 20 business days after receipt of DA's report (see s. 136(1)), complainant or member "aggrieved" by report may file written request for public hearing or review on the record.
Section 137(1)	If PCC receives request for public hearing or review on the record under s. 133(5), and if dismissal or reduction in rank of the member was proposed by DA as a disciplinary measure, PCC must arrange public hearing.
Section 137(2)	PCC may arrange review on the record under s. 141 "instead of a public hearing" if he or she is satisfied that it is unnecessary to examine or cross-examine witnesses or receive new evidence and that a public hearing is not required "to preserve or restore public confidence in the investigation of misconduct and the administration of police discipline."
Section 138(1)	Where: (a) PCC has received request under s. 136 for public hearing and s. 137(1) does not apply, or (b) 20-day limitation period in s. 136(1) has expired and PCC acts on own initiative within 20 days of receiving request or expiry of 'request' period, PCC must arrange a public hearing or review on the record if he or she considers that: (c) there is a reasonable basis to believe that DA's findings under s. 125(1)(a) are incorrect or that DA has incorrectly applied s. 126 in proposing disciplinary or corrective measures, or (d) a public hearing or review on the record is "necessary in the public interest."

Section 138(3)	PCC's decision whether to arrange public hearing or review on record must be made "promptly", but in any case within 20 days of receipt of request under s. 138(1)(a) or expiry of limitation period in s. 138(1)(b).
Section 138(6)	If PCC determines there are insufficient grounds to arrange public hearing or review on record in respect of request under s.138(1)(a), PCC must give written reasons for that determination, which is "final and conclusive and is not open to question or review by a court on any ground."
Section 139(1)	Despite s.138(3) and (6), where PCC determined there were not sufficient grounds to order public hearing or review on record under s. 138, PCC may reconsider that decision if satisfied there is new evidence that is material to the case.
Section 133(6)	"Unless public hearing or review on record is arranged" by PCC, determination contained in disposition record is "final and conclusive and not open to question or review by a court on any ground."

[Emphasis added.]

[9] At this final stage of the process, then, the PCC may be required, or may decide on his or her own initiative under s. 138(1)(b) if the conditions described in para. (c) or (d) are met, to order either a public hearing or review or the record, in each case to be carried out by a retired judge as adjudicator. Section 143 provides for the circumstances in which a public hearing must, or may, be chosen. The PCC must appoint an adjudicator to conduct a public hearing "instead of a review on the record" if para. (a) or (b) of s. 143(1) applies. As seen above, para. (a) applies where it is likely that evidence not on the disciplinary record will be necessary to "complete a review of the disciplinary decision on a standard of correctness". The PCC does not say para. (a) applies in this instance. He relies solely on para. (b), which I repeat here for ease of reference:

> 143(1) Despite section 141, the police complaint commissioner must appoint an adjudicator under section 142 to conduct a public hearing under this section instead of a review on the record under section 141 if either of the following applies:

...

> (b) in the [PCC's] opinion, a public hearing of the matter under this section is required to preserve or restore public confidence in the investigation of misconduct or the administration of police discipline. [Emphasis added.]

[10] A public hearing is a new hearing not confined to the evidence or issues that were before the DA in the discipline proceeding: s. 143(3). The procedures to be followed at the hearing are set out in the balance of ss. 143 to 153. Under s. 154(3), an appeal on a question of law lies to the Court of Appeal with leave of a justice.

[11] In all remaining circumstances – i.e., where neither s. 143(1)(a) nor (b) is applicable – it appears the PCC appoints an adjudicator to conduct a review on the record under s. 141. That section describes the documents that form the record and prescribes the procedures applicable to such a review. (See also ss. 146-154(1) and (2), which apply to reviews on the record as well as to public hearings.)

The Case at Bar

[12] Against this legislative background, I turn next to the facts of this case. The underlying complaint arose out of an incident that occurred on the evening of January 21, 2010. Constables Florkow and London, members of the Vancouver Police Department, were responding to a call regarding a domestic assault at a house in Vancouver. The house had a rental suite in the basement and the officers confronted one tenant, Mr. Wu, thinking (mistakenly) that he was involved in the assault. Mr. Wu does not speak fluent English and neither of the officers spoke his first language, Cantonese. The officers attempted to arrest him. He resisted and sustained injuries, including a serious fracture to the orbit of his left eye. He alleges that he was punched in the eye by one of the officers; they allege that he hit his face when he fell to the ground and that he must have injured his eye at that time.

[13] Mr. Wu filed a complaint with the PCC on January 22, 2010. Three days later, the British Columbia Civil Liberties Association, the intervenor in this appeal, also filed a complaint in connection with the same incident.

[14] In February 2010, the Delta Police Department assumed responsibility for the investigation, following a direction by the PCC made under s. 92 of the Act. Sgt. Leeson of the Delta Police Department became the IO and Chief Cst. Cessford the designated DA. The complaint was classified as one of alleged abuse of authority which if proven would constitute misconduct under s. 77(3)(a).

[15] On November 2, 2010, Chief Cst. Cessford gave notice that he had determined that the evidence did not substantiate the allegation of abuse of authority on the part of Constables Florkow and London. He stated:

> I base my decision on the following reasons:
>
> - [The members] acted in the course of their duties and in good faith;
> - had reasonable grounds to believe that an assault had occurred and may still be occurring;
> - had reasonable and probable grounds to believe that Mr. Wu was the suspect in this assault, or at least an assaultive subject; and
> - used reasonable force to effect the arrest of Mr. Wu.
>
> The above-noted decision is final and conclusive, unless the Police Complaint Commissioner should disagree and appoint a retired judge as a new discipline authority pursuant to section 117 ....

[16] As noted by the petitioners in their factum, when Sgt. Leeson submitted his FIR to the DA, it was open to the PCC to reject the report and direct the IO to take any steps thought appropriate under s. 98(9). The PCC did not do so. Further, once the DA's determination had been made, the PCC could, if he had a "reasonable basis" to believe it to be "incorrect", have appointed a retired judge under s. 117(1) to review the FIR and to "make her or his own decision on the matter". Again, as the petitioners note in their factum, the PCC did not take any action within the 20-day limitation period specified by s. 117(3), nor did he allege that the DA's decision was "incorrect".

[17] Instead, the PCC acted on November 30, 2010, after the 20-day period had expired, issuing a notice of public hearing. Paragraphs 10 and 11 of the notice read as follows:

> Having reviewed the investigation and determinations to date, pursuant to section 143(1)(b) of the *Police Act*, I have determined that a public hearing in this matter is required to preserve or restore public confidence in the investigation of misconduct and the administration of police discipline. In arriving at this determination I have considered several relevant factors including but not limited to the following:
>
> (a) The complaint is serious in nature as the alleged misconduct involves a significant breach of public trust.
>
> (b) The nature and seriousness of the alleged harm to have been suffered by the person involved in this matter.
>
> (c) There is a reasonable prospect that a public hearing will assist in determining the truth.
>
> (d) There exist flaws in the investigation.
>
> It is therefore alleged that the [*sic*] Constable Florkow and Constable London committed the following disciplinary default pursuant to section 77 of the *Police Act*:
>
> (a) Abuse of Authority: contrary to section 77 of the *Police Act*, subject member [*sic*] committed the disciplinary default of abuse of authority. In the performance of duties, [and] intentionally or recklessly used unnecessary force. [Emphasis added.]

The PCC named the Honourable Bruce M. Preston, a retired judge of the Supreme Court of British Columbia, to conduct the hearing.

[18] I note that the PCC did not describe, nor did he provide affidavit evidence describing, the "flaws" he found in the investigation. During the hearing of this appeal, however, Mr. Heaney suggested that the IO had failed to ask a crucial question to the doctor who had treated Mr. Wu at the hospital. Counsel suggested this may have occurred because the IO did not have a complete or accurate translation of Mr. Wu's evidence regarding the incident or accepted hearsay evidence.

[19] On January 17, 2011, Constables Florkow and London filed a petition for judicial review in the court below, naming the PCC and Mr. Preston as respondents. The petitioners advanced three main grounds for judicial review – that since the 20-

day period referred to in s. 117(3) had expired before the PCC purported to order a public hearing, he had not had the authority to appoint an adjudicator under s. 117(1); that the PCC's decision was "patently unreasonable" because there were no "material flaws" in the investigation; and that the PCC had not had the authority to overrule the decision of the DA finding the complaint to be unsubstantiated "simply because [the PCC] disagrees with the decision of the discipline authority." The petitioners sought an order quashing the PCC's order and declaring the Notice of Public Hearing dated November 30, 2010 to be of no force or effect.

The Reasons of the Court Below

[20] The petition was heard by Mr. Justice Betton on November 24, 2011. His reasons, dated January 26, 2012 are indexed as 2012 BCSC 126.

[21] The chambers judge noted, correctly, that it was unnecessary for him to deal in depth with the specific allegations of misconduct in this case. It was sufficient, he said, to note that the allegations against the members were serious ones. I will also refrain from discussing the allegations and the factual findings of the DA, since they are not material to the issues of interpretation raised in this appeal. In doing so, I do not mean to suggest that the allegations are not serious or not of public concern.

[22] At the outset of his analysis, the chambers judge noted that individual sections of the Act are not to be read in isolation. He characterized the role of the PCC in relation to complaints as follows:

> The role of the PCC in relation to complaints can be described as that of a supervisor. The PCC does not make final decisions about whether misconduct has or has not been proven, nor does it impose disciplinary measures where misconduct is found to have occurred. Instead, it has responsibilities that include ensuring that records and evidence are preserved, that complainants and members of police in respect of whom complaints are made are informed, and that processes are followed. The PCC does not become directly involved in the investigations of complaints, but the Act does give it various tools and powers to ensure the adequacy of those investigations (examples include ss.82, 87, 92, 93, 96-99, 109 and 135). [At para. 19.]

[23] The Court then referred in general terms to the first and second stages of the complaint process I have described above, ending with ss. 112(4) and (5), which state:

> (4) If, on review of the report and the evidence and records referenced in it, the discipline authority decides that the conduct of the member or former member does not constitute misconduct, the discipline authority must include that decision, with reasons, in the notification under subsection (1) (c).
>
> (5) The discipline authority's decision under subsection (4)
>
> (a) is not open to question or review by a court on any ground, and
>
> (b) is final and conclusive, unless the police complaint commissioner appoints a retired judge under section 117 (1). [Emphasis added.]

The Court also referred to the parallel provision in s. 117(11), observing that:

> The singular tool expressly made available to the PCC in the event the PCC considers the decision of the discipline authority to be incorrect is the power to appoint a retired judge to review the reports in evidence pursuant to s. 117 of the Act. If that retired judge reaches a similar conclusion, s. 117(11) applies. Section 117(11) mirrors s. 112(5) and reads as follows:
>
> "(11) The retired judge's decision under subsection (10)
>
> (a) is not open to question or review by a court on any ground, and
>
> (b) is final and conclusive." [At para. 27.]

[24] The Court noted that the Act contemplates three "scenarios" for a review on the record or public hearing following the conclusion of a discipline proceeding – upon the request of the member or complainant under s. 133(5) (which request is subject to the 20-day limitation referred to in s. 136(1), unless extended); at the instigation of the PCC after the 20 days has elapsed, where the conditions specified in s. 138(1)(c) or (d) are met and where the PCC acts within 20 days after the expiry of the 20-day limitation specified in s. 136(1): (s. 138(3)); or at any time after the expiration of the foregoing time limitations where the PCC had previously determined there were insufficient grounds to arrange a public hearing or review on the record, and new evidence has become available that is material to the case

(s. 139). None of these scenarios, the chambers judge observed, existed on the facts of this case. (Para. 31.) This finding is not challenged on appeal.

[25] The PCC argued nevertheless that he had a "stand-alone discretionary power" to order a public hearing in this case pursuant to s. 143(1)(b), citing *Dickhout v. British Columbia (Police Complaint Commissioner)* 2011 BCSC 880. In *Dickhout,* the question before the Court was whether the PCC was required to provide reasons for ordering a public hearing purportedly under s. 143(1)(b). Evidently, a DA had been found to have created a reasonable apprehension of bias in his conduct of a disciplinary hearing. He had been removed, but his replacement had not been appointed, when the PCC ordered a public hearing, purportedly under s. 143(1)(b). No challenge was taken to the PCC's authority to act under s. 143(1)(b) at the point he did, and it appears the Court simply proceeded on the assumption the PCC was entitled to order a public hearing without a disciplinary proceeding having been completed. In the case at bar, Betton J. concluded that the Court's comments in *Dickhout* relied on by the PCC in this case had been *obiter dicta* and that it was not a decision on the specific point before him that would require him to follow it. (Para. 34.)

[26] Another argument raised by the PCC was that s. 123(3) would be meaningless unless the PCC had the "plenary" power argued for under s. 143(1)(b). Section 123(3) states:

> If at any time a public hearing is arranged by the police complaint commissioner in respect of conduct that is the subject of a discipline proceeding, the discipline authority must cancel the discipline proceeding.

The chambers judge did not accede to this argument, reasoning as follows:

> The petitioners point out that there may be scenarios of multiple complaints with some being found to be unsubstantiated and others proceeding. They say that s. 123(3) simply allows the PCC to ensure that there are not separate processes operating in respect of the same events. Further, the petitioners point to the language of s. 123(3) which does not say, "despite s. 112(5) or 117..." Given the absolute language of those sections, it argues that there is no room for the interpretation or inferences that the PCC asks the court to make. I agree with these points.

> In addition, s. 79 of the *Act* requires a complaint to be made within 12 months. As already noted, complaints may come from multiple sources. Given the timelines established by the *Act* for investigation and reporting in respect of complaints, it is certainly possible for the process in respect of one complaint to have evolved when another complaint arising out of the same incident or conduct is received. Indeed, s. 84 deals with discontinuance and consolidation of complaints made by third-party complainants. That, like the s. 123(3) mechanism, can be used to ensure that there are not parallel and potentially duplicitous proceedings. [At paras. 39-40.]

[27] Finally, the chambers judge referred to "issues beyond strict statutory interpretation" raised by the PCC. First, the PCC had contended that the petition was premature and that the members should apply for relief to the adjudicator appointed to carry out the public hearing. (Para. 42.) In this regard, the PCC relied on *Ince v. Graham* (B.C.S.C., Victoria Registry Number 11-0060, dated 21 January 2011), and in particular on the Court's description of the Act as a "comprehensive adjudication scheme". The chambers judge was of the view that the general principles referred to in *Ince* and other authorities cited by the PCC were correct, but that they did not resolve the issue before the Court. In Betton J.'s analysis:

> ... There is no need here to assess the merits of the investigation or the merit of the conclusion of the PCC regarding the public hearing. My conclusion is based on whether on the facts of this case the PCC had any discretion to initiate the public hearing.
>
> There is a significant difference between preventing an administrative body that is properly constituted from considering an issue and challenging the legislative foundation for the existence of the body itself. [At paras. 45-6.]

[28] The PCC's second policy argument was that the Court was being asked to exercise its discretion and should take into account the public interest in having a public hearing regarding Mr. Wu's complaint. In this regard, the PCC submitted in part that:

> Granting of the order will have significant disproportionate impact on the parties and a third party. The decision sought to be quashed is not a substantial one imposing sanctions on the Petitioners, but it is a procedural one that will simply subject their conduct to further process provided for under the *Police Act*. Denial of the application itself will not result in disciplinary or corrective measures being imposed on the Petitioners. All that will happen is that the *Police Act* process will unfold as the Legislature intended it to. However, if the order sought is granted, the Commissioner will be denied the ability to fulfill his express responsibilities to ensure the purposes of the

> Police Act are fulfilled and the investigation of Mr. Wu's complaint will come to an end. [At para. 47; emphasis added.]

[29] The chambers judge also rejected this argument, ruling that it was clear from ss. 112 and 117 that the DA's decision was final and conclusive and not subject to review. Again in his words:

> There are many other provisions in the *Police Act* that deal with the role of the PCC in overseeing and directing investigations. I have referred only to those provisions that have specific relevance to the issues before me. Generally, the PCC has broad powers to ensure that it is satisfied with the manner of completeness of and scope of any investigation. It has the ability to direct that a retired judge scrutinize any decision that a police agency, acting as discipline authority, makes with respect to complaints. It is logical, therefore, that that process be concluded where one or both of those discipline authorities conclude that allegations of misconduct are not substantiated. [At para. 50; emphasis added.]

In the result, the chambers judge held that the petition must succeed and that the Notice of Public Hearing issued by the PCC should be quashed.

Issues on Appeal

[30] In this court, the PCC contends that the chambers judge erred as follows:

1) in interpreting the *Police Act,* particularly ss. 112, 117, 123 and 143;
2) by failing to give to the Appellant, and to the Appellant's exercise of his discretion, the deference due to the Appellant in respect of the questions the Appellant had before him;
3) in holding that the doctrine of *stare decisis* did not require him to follow the earlier holding of Madam Justice Gropper [in *Dickhout, supra*] on the interpretation of s. 143 of the Act;
4) by misconstruing the doctrine of prematurity and in applying this doctrine to the facts; and
5) by failing to exercise judicially his discretion on judicial review and, in particular, by failing to give any weight to the public interest or the disproportionate impact of the orders the Respondents were seeking – on third parties and on the public.

In my view, issues 3) and 4) are subsidiary and largely fall away once the central question raised by the appeal is correctly framed: did the PCC have the authority or "discretion" to order a public hearing under 143(1)(b) after the DA had dismissed the

complaint under s. 112(4) and after the 20-day limitation period referred to in s. 117(3) had expired? Put another way, was it open to the PCC to order a public hearing in the circumstances and at the point in time he did, and in the face of the "final and conclusive" provision in s. 112(5)? In my respectful view, the answer to both questions is "no".

Analysis

Standard of Review

[31] I begin, as most analyses in judicial review cases still begin, with the question of standard of review. The starting point is of course *Dunsmuir v. New Brunswick* 2008 SCC 9, in which the Court collapsed the then existing variants of reasonableness review into one and adopted a "narrow" view of "jurisdiction", to which the standard of correctness applies. Bastarache and LeBel JJ. for the majority stated:

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE* [[1997] 2 S.C.R. 227]. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so. [At para. 59; emphasis added.]

[32] Bastarache and LeBel JJ. observed that the correctness standard will apply where the question at issue is one of general law that is "of central importance to the

legal system as a whole and outside the adjudicator's specialized area of expertise" or where the question involves drawing jurisdictional lines between two or more competing specialized tribunals. But this was not an exhaustive list. They continued:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case. [At para. 64.]

[33] In *Dunsmuir* itself, the majority concluded on an application of the foregoing factors that the decision of a labour adjudicator appointed by both parties under the *Public Service Labour Relations Act* to determine the reasons underlying the decision of the Province of New Brunswick to terminate Dunsmuir's employment, was reviewable on a standard of reasonableness. The Court emphasized the relative expertise of labour arbitrators in the interpretation of collective agreements – a view confirmed by the purpose of the legislation – and found that the nature of the legal question at issue was not one of central importance to the legal system and lay within the specialized expertise of the adjudicator.

[34] The PCC submits in the case at bar that unless the situation before the court is "exceptional", the interpretation by a tribunal (here, the PCC) of its own statute should be "presumed" to be a question of statutory interpretation which is subject to deference on judicial review – i.e., subject to the reasonableness standard. Counsel referred us to *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association* 2011 SCC 61, [2011] 3 S.C.R. 654, where the majority of the Court suggested that the time may have come to reconsider whether the "category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review". In the absence of argument on this point, however, the majority (*per* Rothstein J.) was content to state that:

> ... unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or

> statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review. [At para. 34.]

[35] Cromwell J. and Binnie J., writing separately, both agreed that the use of the term "jurisdiction" or "*vires*" had become a source of difficulty and misunderstanding, but that the concept was likely to remain necessary. Cromwell J. stated:

> As the Court noted in *Dunsmuir*, "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (para. 54 (citations omitted)). The fact that a provision is in the tribunal's own statute or statutes closely connected to its function with which it will have particular familiarity thus may well be an important indicator that the legislature intended to leave its interpretation to the tribunal. But there are legal questions in "home" statutes whose resolution the legislature did not intend to leave to the tribunal; indeed, it is hard to imagine where else the limits of a tribunal's delegated power are more likely to be set out. The majority of the Court in *Dunsmuir* (at para. 59) identified an example of such a question by referring to *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485. Writing for the Court, Rothstein J. identified another in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, at para. 10, stating that "[t]he issue on this appeal is jurisdictional in that it goes to whether the [Canadian International Trade Tribunal] can hear a complaint initiated by a non-Canadian supplier". In reaching this conclusion, the Court noted that this standard of review had been determined *in a satisfactory manner* by the existing jurisprudence (para. 10). Recast to side-step the language of "jurisdiction" or "*vires*", these two cases demonstrate that there are provisions in home statutes that tribunals must interpret correctly.
>
> The point is this. The proposition that provisions of a "home statute" are generally reviewable on a reasonableness standard does not trump a more thorough examination of legislative intent when a plausible argument is advanced that a tribunal must interpret a particular provision correctly. In other words, saying that such provisions in "home" statutes are "exceptional" is not an answer to a plausible argument that a particular provision falls outside the "presumption" of reasonableness review and into the "exceptional" category of correctness review. Nor does it assist in determining by what means the "presumption" may be rebutted. [At paras. 98-9; emphasis by underlining added.]

[36] Binnie J. (with Deschamps J. concurring) was also critical of the notion that whenever a tribunal is interpreting its 'home statute,' it is entitled to deference. He observed:

> ... It is not enough, it seems to me, to say that the tribunal has selected one from a number of interpretations of a particular provision that the provisions can reasonably bear, no matter how fundamentally the tribunal's legal opinion affects the rights of the parties who appear before it. On issues of procedural fairness or natural justice, for example, the courts should not defer to a tribunal's view of the extent to which its "home statute" permits it to proceed in what the courts conclude is an unfair manner. [At para. 82.]

He suggested an analysis that would defer to a tribunal's decision regarding its home statute where the decision lies within the "core function and expertise of the decision-maker" and does not raise matters of legal importance "beyond administrative aspects of the statutory scheme under review". (Para. 89.) For all other questions, he stated, the last word on questions of law should be left with the courts.

[37] We are of course bound to apply the decision of the majority insofar as it can be applied at this stage of the evolution of the Supreme Court of Canada's thinking. The petitioners in this case did not address the question of standard of review expressly, either in their oral argument or in their factum, but stated in their factum that they were:

> ... not asking this court to assess the reasonableness or correctness of the police complaint commissioner's decision to arrange a public hearing. Rather, the [petitioners] say that the police complaint commissioner did not have jurisdiction even to consider arranging a public hearing, because the proceeding under the *Police Act* had already concluded, finally and conclusively, before the police complaint commissioner purported to arrange the public hearing.

[38] We were not referred to, and I have not located, any previous authority binding on this court and dealing with the standard of review applicable to a decision under s. 143 of Act. The question is not a constitutional one and does not involve a contest between the PCC and another specialized tribunal. It is not one of "central importance to the <u>legal system as a whole</u>" – an extremely high threshold – but it does involve a statute of public importance on a point that has obvious public consequences. As stated by Josiah Wood in his report, *supra*, "freedom from police misconduct [is] one of the fundamental values that define a free and democratic society". The Legislature has obviously decided that "civilian oversight" of the police

complaints process is an important objective that will warrant the time and expense of a public hearing in some circumstances.

[39] Part XI contains privative clauses, but in this case they refer to the finality of (and therefore the deference due to) the decisions of persons (the IO, the DA and the retired judge) other than the tribunal (the PCC) whose decision is challenged on this judicial review. In fact, the PCC's function as the supervisor of the complaints process is not protected by any privative clause.

[40] This brings us to the matter of expertise. The PCC contended in his factum that the "question of arranging" a public hearing on the facts of this case was "procedural, not substantive" and that it was "complex and polycentric" and one which the PCC was best positioned to answer. In his submission:

> The question was two-fold and essentially as follows:
>
> a) was the investigation and the resulting FIR [final investigative report] sufficiently thorough, competently done and free from bias that it would not lead the discipline authority into error and would not similarly lead a s. 117 reviewing judge into error? and
>
> b) if the investigation and the resulting FIR was not sufficiently thorough, competently done and free from bias – how best can the Respondents' interest in finality be balanced with Mr. Wu's and the public's interest in the truth?

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

state of the law, a standard of correctness applies. In case I am wrong, however, I will consider the issue from the standpoint of both standards of review.

Application of Correctness Standard

[42] As we have seen, the amended Act prescribes a multi-stage winnowing process for the resolution of complaints. If no misconduct is found by the DA at the end of the investigation stage, or by the retired judge on review of the DA's decision, the finding is said to be final unless certain events occur. Where, as in this case, only the first stage was reached – i.e., a DA has determined under s. 112(4) that the impugned conduct did not constitute misconduct – s.112(5) states that that determination is "final and conclusive" and "not open to question or review by a court on any ground" unless s. 117(1) applies. Subsections 117(1) and (3) state:

> 117(1) If, on review of a discipline authority's decision under section 112(4) or 116(4) that conduct of a member or former member does not constitute misconduct, the police complaint commissioner considers that there is a reasonable basis to believe that the decision is incorrect, the police complaint commissioner may appoint a retired judge recommended under subsection (4) of this section to do the following:
>
> (a) review the investigating officer's report referred to in section 112 or 116, as the case may be, and the evidence and records referenced in that report;
>
> (b) make her or his own decision on the matter;
>
> (c) if subsection (9) of this section applies, exercise the powers and perform the duties of discipline authority in respect of the matter for the purposes of this Division.
>
> ...
>
> (3) An appointment under subsection (1) must be made within 20 business days after receiving the notification under section 112(1)(c) or 116(1)(c). [Emphasis added.]

[43] As we have also seen, the PCC did not appoint a retired judge under s. 117(1) within the 20-day period specified in s. 117(3); nor did he assert there was a reasonable basis to believe the DA's decision was "incorrect". If the PCC had so believed, he would have been obliged to appoint a retired judge to carry out a review of the FIR and the evidence and records referred to therein and to "make her or his own decision on the matter". If the retired judge then considered that the members'

conduct appeared to constitute misconduct, he or she would have become the DA and would have been required to convene a discipline proceeding under s. 117(9). Instead, the PCC in this case effectively 'leapfrogged' over both the review and disciplinary proceeding stages of the process to order a public hearing.

[44] The PCC argues that unless s. 143(1)(b) is construed as permitting him to arrange a public hearing at the end of the first (investigatory) stage of the complaints process and in the face of a 'no misconduct' finding, there is the potential for a "flawed, or even potentially corrupt", investigation to stand. As the PCC states in his factum at para. 35:

> The chambers judge has construed that Act such that, where the Appellant is of the opinion that an investigation is flawed such that the resulting FIR could only have led the discipline authority to error and is of the opinion that providing the same FIR and materials to a s. 117 reviewing judge may simply lead to that error being replicated, the Appellant is unable to arrange a public hearing under s. 143(1)(b). The initial discipline authority decision founded on the flawed investigation must stand and the Appellant has no effective remedy to a flawed, or even potentially, corrupt investigation.

and further at para 55:

> Had the Appellant pursued the other avenue open to him – a s. 117 referral of the FIR and evidence referenced therein to a retired judge – it was far from certain that this would assist in determining the truth and the Appellant may have been derelict in his performance of his duties as the section 117 process:
>
> a) limits the material put before the retired judge to the FIR and materials referenced in it – materials that, in the Appellant's opinion, were flawed by Sgt. Leeson's investigation on the mechanism of Mr. Wu's eye injury;
>
> b) would not have allowed the Appellant to share with the retired judge the appellant's views on the flaws in Sgt. Leeson's investigation; and
>
> c) is meant to be used when the Appellant has a reasonable belief that the Designated Discipline Authority's decision that there was no misconduct was *incorrect* when, more accurately, the Appellant's opinion was that the decision could have been correctly arrived at, but from a flawed report. [Emphasis by underlining added.]

[45] From this I infer that the PCC views the process prescribed by the Act as providing him with inadequate tools for 'getting at the truth', so that the various statutory restrictions, qualifications and limitations on his authority to order a public hearing should be overridden in the public interest. Consistent with this, Mr. Heaney referred us early in his argument to s. 60(4) of the *Police Act* as it stood in 2007. It allowed the PCC to initiate a public hearing at any time where he or she was of the view that it was in the public interest to do so. The PCC's position is that this should still be the case.

[46] The intervenor took a similar position: it suggested in its factum that there was nothing in the legislative history of the Act to suggest that s.117 or any other amendment was "intended to erase the PCC's discretion [in the previous legislation] to call a public hearing after the completion of an investigation. To the contrary, the legislative history strongly suggests that the Legislature intended that discretion to be retained." In this regard, both the PCC and the intervenor cited the Attorney General's answer to a question in the Legislative Assembly on October 27, 2009 as to "under what circumstances the public hearing [under s. 143] is likely to take place, as opposed to a review on the record". The then Attorney General replied in part that:

> ... The discretionary authority exists with the Police Complaint Commissioner, and the test is set out in 143(1)(b) where the commissioner comes to the view that it is necessary to preserve or restore public confidence in the investigation of misconduct.
>
> So there is discretion, but this is not restricted to the final stage in a proceeding. <u>It can actually happen in extraordinary circumstances much earlier on</u>. [Emphasis added.]

The Attorney General did not indicate what provisions he was relying on in making this suggestion.

[47] In response, counsel for the petitioners noted Professor Sullivan's observation in *Sullivan and Driedger on the Construction of Statutes* (4th ed., 2002) that "It is clear that no single participant in the legislative process can purport to speak for the legislature as a whole". (At 489, quoted with approval in *A.Y.S.A.*

Amateur Youth Soccer Association v. Canada (Revenue Agency) 2007 SCC 42 at para. 12.) Counsel also submitted that excerpts from Hansard are more likely to be of assistance to a court in identifying the objectives sought to be achieved by the legislation, than in construing detailed provisions such as s. 143(1) of the Act. I agree that the comments from Hansard are of little assistance in determining the meaning of s. 143(1)(b) in context.

[48] More importantly, the amendments made to the Act in 2010 appear to have been intended to reflect values and objectives in addition to civilian oversight of police conduct, as Mr. Woodall contended. These include the maintaining of meaningful lines of authority in the police forces, maintaining privacy around disciplinary proceedings to the extent appropriate, and the (final) resolution of complaints efficiently and inexpensively. An attempt to balance all of these objectives is evident in Mr. Wood's comments regarding the "generally unsatisfactory" nature of public hearings as a means of ensuring the integrity of the complaints process. He recommended an intermediate stage, between the FIR and a public hearing, to allow the PCC to act where he or she believes a DA's finding of 'no misconduct' is "wrong". As stated in Mr. Wood's report:

> Currently, under s. 57.1(3), a complainant, who is aggrieved by a discipline authority's decision under s. 57.1(1)(b), may file a written request for a public hearing with the police complaint commissioner who, under s. 60(3)(b), must arrange such a hearing if he determines there are grounds to believe that a public hearing is necessary in the public interest. As well, without any such request from the complainant, under s. 60(4) the police complaint commissioner may order a public hearing on his own motion, if he considers that a public hearing is necessary in the public interest. In my view, neither alternative provides an effective safeguard against the potential that the discipline authority may reach the wrong conclusion and find a public trust complaint unsubstantiated when there is a reasonable basis in the final investigation report for concluding that it should have been concluded as substantiated.
>
> To begin with, the public interest test is too high a threshold to permit rectification of error by that means in any but the most egregious of public trust defaults. Furthermore, as experience has shown, public hearings of the sort presently provided for in the *Act*, are a costly, lengthy and generally unsatisfactory means of ensuring the integrity of the complaint process. In my view, some means short of a public hearing should be available to address the situation where, in the opinion of the police complaint commissioner, the discipline authority's conclusion under s. 57.1(1)(b) is wrong. ...

> In my view, the police complaint commissioner should have such authority. Under the current statutory framework the role of the police complaint commissioner is to oversee, and not to perform, the disciplinary function in the complaint process. Thus, I do not accept the proposal of the BCCLA that the police complaint commissioner should have the power to substitute his own decision for that of the discipline authority. Instead, I recommend that s. 57.1 be amended to provide that if the police complaint commissioner believes, on reasonable grounds, that the decision of a discipline authority under s. 57.1(1)(b) is wrong, he may order that a discipline proceeding be convened before a chief or deputy chief constable of a different municipal department. In such a case, an alternate discipline authority or a senior officer of that department would be responsible for presenting the evidence at such a proceeding, and the discipline proceeding would be conducted in accordance with the recommendations I am making for amendments to s. 59. [At paras. 249-51; emphasis added.]

(Of course, the Act was ultimately amended to provide for an 'external' police investigation at an earlier stage, and to provide for a retired judge to review a DA's 'no misconduct' finding where the PCC believes it to be "incorrect".)

[49] Mr. Wood also referred to the issue of finality and to appropriate timelines in his discussion of the PCC's authority to order a public hearing. Under the Act as it stood in 2007, he observed, such hearings usually took place a year or more after the DA's disposition report. (Para. 288.) He continued:

> From the way Part IX is presently structured, a proposed disposition of a public trust complaint, whether under s. 57.1(1)(b), s. 58(5) or ss. 59(5) and (6), does not become final until a decision is made by the police complaint commissioner not to arrange for a public hearing. While both the complainant and respondent must request a public hearing within 30 days of certain triggering events, all of which are temporally close to the disposition of a public trust complaint, there is no time limit on the police complaint commissioner's decision whether to respond to such a request by ordering a public hearing, and in particular, no time limit within which he must decide on his own motion whether to make such an order. Thus, both complainant and respondent can potentially be left in an indefinite state of uncertainty until such time as the police complaint commissioner's decision in that regard is made known.
>
> During the interviews we conducted, this obvious lacuna in the *Act* was repeatedly drawn to our attention. In his draft Police Complaint Act, the police complaint commissioner has recognized this deficiency. However, he suggests that his decision whether to order a public hearing be made within 90 business days of a request for one from either the complainant or the respondent and within 120 business days when acting on his own motion.

> In my view these time limits are excessive, particularly when taking into account that a business day would not include either Saturday or Sunday. Under this proposal, both complainant and respondent could theoretically wait five-and-a-half months before the police complaint commissioner made a decision on his own motion to hold a public hearing, during which time both could be forgiven for believing that the matter had long since been finally concluded. I am of the view that it should be possible for the police complaint commissioner to make such a decision in much less time, particularly if the recommended integrated IPDMA system is adopted. Ordinarily, one would expect such a decision to be made within 30 days. But in deference to the police complaint commissioner's assessment of the current workload in his office, which is implicit in his suggested time limits, I would double that time period. In my view any decision to order either a public review or a public hearing, whether prompted by a request from either the complainant or the respondent, or made on his own motion, should be made by the police complaint commissioner within 60 days of the proposed disposition of a public trust complaint under ss. 57.1(1)(b), 58(5) and 59(5) or (6). [Paras. 299-301; emphasis added.]

(As seen above, the 60-day limitation Mr. Wood recommended was ultimately reduced to a total of 40 days in the new Part XI.)

[50] I cannot agree, then, that the legislative history of the Act suggests the Legislature intended to retain the 'stand-alone' discretion given to the PCC by s. 60(4) of the previous Act, to order a public hearing whenever he or she felt it necessary in the public interest. The new Part XI provides a much more complex and nuanced process, geared to the balancing of diverse, and sometimes conflicting, goals and realities, than the previous Part IX. Mr. Wood's recommendations were not adopted completely by the Legislature – shorter timelines were adopted, for example, and the involvement of a retired judge was brought forward – but Part XI does reflect the general tenor of his conclusions and recommendations. Most notably for purposes of this appeal was the recommendation that the ordering of a public hearing by the PCC in the face of a 'no misconduct' finding by a DA be made subject to detailed conditions and limitations not found in the previous Act.

[51] Moving to the construction, as opposed to the legislative history, of Part XI, it may already be apparent that in my view, the chambers judge was correct in his finding that s. 143(1)(b) does not create a "stand-alone discretionary power" in the

PCC to convene a public hearing in the circumstances of this case. First, I agree with counsel for the petitioners that s. 143(1) does not create the authority to arrange a public hearing. Rather, it describes the circumstances that must be considered by the PCC in deciding whether to convene either a public hearing or a review on the record – hence the phrase "instead of a review on the record under section 141" in the opening clause of s. 143.

[52] The opening words also indicate that the adjudicator is appointed "under section 142". As previously noted, s. 142 begins with the phrase "In circumstances described in section 137 or when the [PCC] determines that there are sufficient grounds to arrange a public hearing or a review on the record under section 138 or 139 ...". Section 137 applies where a member requests a public hearing or review on the record. The conditions for arranging a public hearing or review on the record under s. 138 were not met and, as Mr. Woodall notes, will never be met in this case because the limitation period established for making the request under s. 136(1) has not "expired". That is because no report under s. 133 was issued; no discipline proceeding took place; and the complaint was 'finally and conclusively' determined in accordance with s. 112(5). Last, as Mr. Woodall emphasizes, s. 143(1) states that it operates "Despite section 141". It does not say that it operates "Despite section 112(5)" or "Despite any other provision of this Act".

[53] Section 143(1) is found near the end of a process of detailed and specific steps, some of which bring the process to an end and others of which move it along. At the point at which the PCC ordered a public hearing in this case, however, the complaint had not progressed past the first stage. I see no authority, express or implied, that would permit the PCC to 'leapfrog' over the steps described in ss. 117(1), 117(9), 118(1), 125, 128, 138(1), and 138(3) – or, in terms of the modern rule of statutory construction, to take s. 143(1) (b) out of its detailed and complex statutory context.

[54] Accordingly, I conclude the chambers judge was correct in his (implicit) decision that the standard of correctness applied, and in his ruling that the PCC did

not have the authority ("jurisdiction") to direct a public hearing at the time and in the circumstances he did.

Policy Arguments and Reasonableness

[55] If I were wrong and this question was to be judged on a standard of reasonableness, I would still reach the same result. It is difficult to imagine how it could be "reasonable" for a tribunal such as the PCC to ignore the very specific and detailed provisions of the Act that apply to the investigatory and discipline proceeding stages of the complaints process. Those provisions would be meaningless if the Legislature had intended that the PCC had an overarching discretion to order a public hearing at any time.

[56] On a policy level, counsel for the PCC argued (as did the intervenor) at some length that a stand-alone or inherent authority to do so was justified in light of the potential for a "flawed" investigative report to be endorsed by an unwitting DA, or for a flawed finding of no misconduct by a DA to be endorsed by an unwitting retired judge. It was "not good enough" from the standpoint of the public interest, Mr. Heaney contended, for the PCC to have only one chance – for only 20 days – to decide if there was a reasonable basis to believe the DA's decision was incorrect. (Mr. Heaney assumed that the existence of "flaws" in the investigation would be an insufficient basis for him to form the belief that the finding is "incorrect". This point was not argued, but it may be that unless the actual decision of the DA was incorrect or "wrong", the possible existence of "flaws" in the process by which it was reached would be inconsequential.)

[57] Nor would a review on the record be sufficient in any event, counsel contended, because the retired judge might not 'pick up' on flaws that are apparent to the PCC. Only a public hearing, in which presumably the PCC can make known his or her suspicions to the adjudicator, would be sufficient to avoid a 'garbage in/garbage out' result.

[58] Again with respect, I cannot agree that the PCC's fears are reasonable, or that the PCC is powerless to avoid 'garbage in/garbage out' unless a 'stand-alone'

authority to order a public hearing is inferred. As noted earlier, the Act provides the PCC with various opportunities to ensure that the IO at the investigation stage receives proper information. Under s. 92, he or she may direct (as the PCC did in this case) that a constable in an external police force carry out the investigation; under s. 96, he or she may observe the investigation or designate an employee to do so; and under s. 97(1) he or she may:

> (a) require the investigating officer to keep the police complaint commissioner or a designated observer informed of the progress of the investigation at times in addition to those required under section 98 or more frequently than required under that section,
>
> (b) require the investigating officer to provide or copy to the police complaint commissioner or a designated observer any information or record related to the investigation, in the manner and form specified by the police complaint commissioner,
>
> (c) provide advice to the investigating officer or the discipline authority in respect of further investigative steps, and
>
> (d) subject to subsection (2), direct that further investigative steps be taken.

Under s. 98, the PCC receives reports from the IO every 20 business days and may order additional reports which include the items listed in s. 98(5). Further, the PCC may in consultation with the DA reject the IO's final investigative report and direct that a new one be prepared and direct that further investigative steps be taken: s. 98(9).

[59] I agree with Mr. Woodall that given these various opportunities for the PCC to ensure that the investigation went as it should, any 'garbage in' could and should have been avoided in this instance. If the time limitations set out in the Act for action to be taken by the PCC are too short, that matter is for the Legislature. One of the goals of the 2010 amendments, however, was to make the complaint process less time-consuming. Mr. Wood noted the dissatisfaction of both complainants and police with the lack of timeliness in the process as it existed in 2007:

> While the lack of timeliness, in the present complaint process generally, is considered elsewhere in this report, it is appropriate to note here that the surveys and the interviews conducted revealed that <u>both complainants and respondents were critical of the length of time it takes for complaints to be</u>

> resolved. For complainants, delay leads to a perception that their complaints are not taken seriously and thus will not be investigated fairly. For respondents there is a real sense of prejudice from having unresolved complaints hanging over their heads for long periods of time while they are expected to continue carrying out their duties. From the point of view of those two most important stakeholders in the process, an oversight function that adds significantly to a process that already takes too long to unfold must be viewed as completely unsatisfactory. [At para. 203; emphasis added.]

[60] As Mr. Woodall also pointed out, if s. 117(1) had been invoked – i.e., if the PCC in the 20-day limitation period considered that there was a reasonable basis to believe the DA's decision was "incorrect", the PCC would almost inevitably have made that "reasonable basis" known – even if one accepts that the retired judge appointed to carry out the review of the DA's report would not 'pick up on' the defect.

[61] In all the circumstances, it seems to me that the PCC's decision to order a public hearing was not "reasonable" in the sense that it was necessary to ensure a proper review of the complaint against Constables Florkow and London. Part XI of the *Police Act*, complicated and dense as it is, represents a concerted attempt by the Legislature, acting on the advice of many stakeholders and various commissioners, to balance the interests of the public and the interests of police officers whose conduct must be scrutinized. It seeks to accomplish civilian oversight – either by a review on the existing record or by a public hearing – in some but not all cases, and to ensure timeliness and efficiency in resolving complaints. Notably, it does this by specifying at least two prior stages of process before the "costly, lengthy and generally unsatisfactory" alternative of a public hearing may be ordered. If there are flaws or areas of potential improvement in the complaints process, there would surely be nothing wrong in the PCC's so informing the Legislature, to which he reports. The solution does not lie in the PCC's inferring some inherent jurisdiction that bypasses the very detailed provisions he is bound to oversee.

Remaining Grounds of Appeal

[62] Returning last to the third and fourth grounds of appeal raised by the PCC, I agree with the chambers judge's comments concerning *Dickhout*, *supra*, and concerning s. 123(3).

[63] With respect to the PCC's prematurity argument, it follows from my conclusion that the DA's finding in this case was final and conclusive under s. 112(5), that a "final decision" has been made. This was not the situation in *Delta (City) Police Department v. British Columbia (Police Complaint Commissioner)* 2001 BCSC 1115, on which Mr. Heaney relied. As the petitioners point out, that case was decided under Part IX of the former Act, and the application for judicial review was brought during an adjournment in a discipline proceeding, so that the DA had not yet rendered a decision. It is clearly distinguishable on this basis.

Disposition

[64] In summary, it seems clear that s. 143(1)(b), viewed in both its historical and statutory context, was not intended to be invoked by the PCC at any time or stage of the complaint process. This may be an unfortunate result in terms of this particular case, since the DA's finding will now stand in the shadow of the PCC's assertion that there were flaws in the process. More importantly, Mr. Wu may not feel his complaint has received the scrutiny it should have. On the other hand, there is some truth to the petitioners' observation in their factum that the proceedings were terminated by a series of decisions made by the PCC himself.

[65] In any event, applying either a standard of correctness or one of reasonableness, I conclude that s. 143(1)(b), read in its context and in its ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the Legislature's intention, is not a stand-alone provision that vests in the PCC the "plenary" authority he seeks.

[66] I would dismiss the appeal.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Lowry"

I Agree:

"The Honourable Mr. Justice Harris"