IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Elsner v. British Columbia (Police Complaint Commissioner),* 2017 BCSC 605

Date: 20170412
Docket: S162351
Registry: Vancouver

Between:

Chief Constable Frank J. Elsner

Petitioner

And

The Police Complaint Commissioner and Mayors Barbara Desjardins and Lisa Helps in their capacity as Internal Discipline Authority

Respondents

Ban on Publication of the names of Officer A and Officer B until further order of the Court

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Petitioner:	J. Winteringham, Q.C. and T. Boyar
Counsel for Respondent, the Police Complaint Commissioner:	D. Lovett, Q.C. and B. Martland
Counsel for the Respondents, B. Desjardins and L. Helps:	J.M. Doyle
Counsel for the Attorney General of British Columbia:	S. Bevan
Place and Date of Trial/Hearing:	Vancouver, B.C. November 14–16, 2016
Place and Date of Judgment:	Vancouver, B.C. April 12, 2017

I. INTRODUCTION

[1] The petitioner was appointed as the Chief Constable of the Victoria Police Department pursuant to a contract of employment and sworn in as such on December 15, 2013.

[2] The Police Complaint Commissioner ("Commissioner") is an independent officer of the Legislature appointed pursuant to s. 47 of the *Police Act*, R.S.B.C. 1996, c. 367 [*Act*]. His duties include the general responsibility for overseeing and monitoring complaints, investigations and the administration of discipline and proceedings involving members of the various police forces operating in British Columbia.

[3] Mayor Barbara Desjardins is the Mayor of Esquimalt and Mayor Lisa Helps is the Mayor of Victoria ("Mayors"). The Mayors are the co-chairs of the Victoria and Esquimalt Police Board.

[4] The hearing of the petition herein was preceded by an application for a sealing order and a publication ban respecting certain information and material filed in support of the petition. That application was partially successful pending the resolution of the petition for the reasons set out at *Elsner v. British Columbia (Police Complaint Commissioner)*, 2016 BCSC 1914 [*Application Reasons*].

[5] Pursuant to subsection 16(2) of the *JRPA*, the Attorney General of British Columbia made submissions at the hearing with respect to the interpretation of s. 93 of the *Act*.

II. BACKGROUND

[6] In August of 2015, the Mayors received information that the petitioner had exchanged Twitter messages with a police officer ("Officer A") who was employed by another police department, but who was the spouse of a member of the Victoria Police Department ("Officer B") serving under the petitioner.

[7] The Mayors consulted with the Commissioner and received his advice and direction. At the suggestion of the Commissioner, the Mayors discussed the fact that a complaint had been made concerning Twitter messages between the petitioner and Officer A, and confirmed with Officer B that he did not want the matter dealt with as a public trust investigation.

[8] The Commissioner agrees that prior to the appointment of the internal investigator he engaged in discussions with counsel for the Mayors and was advised of their intention to proceed with an internal disciplinary process. In his December 18, 2015 Order for External Investigation, the Commissioner stated:

> I acceded to the request of counsel for the Co-Chairs to allow this matter, initially, to proceed in the internal discipline process. My decision was based on the course of action proposed by counsel for the Co-Chairs, the privacy interests involved, and the requirement that two preconditions be met by the Co-Chairs. These conditions could have an impact on the information available in determining whether the matter should be dealt with through the internal process or by way of disciplinary breach of public trust. They were as follows:
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> Precondition 1 There had to be a full and continuing disclosure of the allegations and progress of the investigation to the other Victoria Police Board members.
>
> Precondition 2 There had to be disclosure of the allegations to the Member [Officer B] serving under the command of Chief Constable Elsner, and the Co-Chairs should obtain the Member's [Officer B's] informed views as to whether he wished to initiate a complaint or request a public trust investigation under the *Police Act.*

[9] Mayor Desjardins spoke with the petitioner and among other matters advised him that Officer B did not wish to pursue an investigation, that the Commissioner had agreed that the matter could proceed as an internal discipline matter, and that if the petitioner consented to the appointment of an independent investigator, the investigation could be completed faster and more efficiently.

[10] The Mayors then proceeded with an internal investigation into the Twitter messages and other conduct involving the petitioner and Officer A pursuant to Part 11 (Misconduct, Complaints, Investigations, Discipline and Proceedings), Division 6

(Internal Discipline) of the *Act*, and on September 14, 2015, appointed an independent investigator to conduct the investigation.

[11] In her preliminary report, the independent investigator confirmed that she was to investigate:

> a) whether the petitioner engaged in an inappropriate relationship with Officer A; and
>
> b) whether the petitioner improperly used the Victoria Police Department's social media account or accounts.

[12] The independent investigator conducted interviews and engaged in telephone discussions with witnesses including the petitioner.

[13] In an email dated October 28, 2015, Rollie Woods, the Deputy Police Complaint Commissioner, stated in part:

> I had an opportunity to discuss with the PCC [Commissioner] the internal investigation into the incident involving Chief Elsner that the Victoria Police Board has initiated. He is away on vacation so he directed me to inform you that he was concerned to learn that the Police Board was not fully informed of this matter. One of his conditions to agree that the matter could be handled through the internal discipline process was that the Police Board members be fully informed. If the chairs maintain that there is no need to inform the full Board, the PCC is going to revisit his decision.

[14] It is apparent that the Commissioner was satisfied that the two preconditions were met from his Order of December 18, 2015 wherein, after referring to the two preconditions as set out above, he wrote:

> The following day our office was advised by counsel for the Co-Chairs that the remaining Police Board members had been briefed, and that the affected Member did not wish an investigation. On the understanding that my two conditions had been satisfied, I supported the decision to proceed with this matter as an internal discipline matter. It was my expectation that if the investigation revealed evidence of conduct that could constitute a disciplinary breach of public trust, the Co-Chairs would raise the matter with our office.

[15] On November 16, 2015, the independent investigator produced her preliminary report to the Mayors. In her report, the independent investigator found

that the petitioner did not have a sexual relationship with Officer A, but that he did exchange “tweets” with her that were sexually charged and that the exchange constituted an inappropriate relationship.

[16] The independent investigator concluded that it was inappropriate for the petitioner to have engaged in the Twitter activity during working hours using a departmental device. She also found that the petitioner’s Twitter account was not a personal account and was subject to the Victoria Police Department’s Social Media Policy requiring its use to meet ethical standards consistent with the expectation of departmental employees. She found that the Twitter messages sent between the petitioner and Officer A were clearly inappropriate and did not meet the required ethical standards.

[17] The independent investigator also found that the petitioner’s conduct fell below the standard expected of a chief constable and was potentially damaging to the reputation of the Victoria Police Department, the petitioner’s reputation and to his credibility as a leader of the force, as well as damaging to a long-term employee of the force under his command. She concluded that the petitioner’s conduct constituted misconduct within the meaning of the *Act* and amounted to discreditable conduct within the meaning of Part 11, Division 2 (Misconduct) of the *Act*, in that it would be likely to bring discredit on the department.

[18] The Mayors rendered a final decision on the matters that the independent investigator had been assigned to investigate dated December 4, 2015. Their final decision accepted the findings and conclusions of the independent investigator. It also determined the appropriate censure for the conduct included a written letter of reprimand to be placed on the petitioner’s personnel file.

[19] The petitioner did not appeal or seek a judicial review of the decision of the Mayors.

[20] On December 18, 2015, the Commissioner commenced an external investigation of the petitioner’s conduct (“External Investigation”), pursuant to Part

11, Division 3 (Process Respecting Alleged Misconduct) of the *Act.* The External Investigation is to determine whether:

a) the petitioner committed discreditable conduct by exchanging messages with the spouse of a member under his command;

b) the petitioner provided misleading information to Officer B;

c) the petitioner provided misleading information to the independent investigator;

d) the petitioner misconducted himself by contacting potential witnesses in the internal investigation; and

e) the petitioner used Victoria Police Department property or devices to exchange the messages, and if so, whether he did so while on duty.

[21] The Commissioner appointed Chief Superintendent Sean Bourrie, the BC Deputy Criminal Operations Officer, Federal Policing of the Royal Canadian Mounted Police “E” Division, as the Chief Investigator of this External Investigation. The Order for External Investigation also appointed Superintendent Laurence Rankin and a team of investigators from the Vancouver Police Department to work under the supervision of Chief Superintendent Bourrie.

[22] Chief Superintendent Bourrie and the Vancouver Police Department team are alleged to have taken various steps in connection with the External Investigation including, without limitation, applying for and obtaining a judicial authorization to search:

(a) Chief Elsner's personal i-pad;

(b) Chief Elsner's personal e-mail account;

(c) Chief Elsner's twitter account; and

(d) Chief Elsner's work-issued i-phone and Microsoft Surface Tablet, which he had permission to use for personal and work purposes.

[23] On April 29, 2016, the Commissioner ordered a second external investigation into other aspects of the petitioner's conduct. The decision of the Commissioner to order the second external investigation is not in issue before me.

III. THE *ACT*

[24] The *Act* contains three "streams" for the processing of complaints made against police officers or former police officers:

a) public trust complaints, which fall to be investigated in accordance with Part 11, Division 3;

b) policy or service complaints, which fall to be investigated in accordance with Part 11, Division 5; and

c) internal discipline matters, which fall to be investigated in accordance with the policies and procedures established under Part 11, Division 6.

[25] Policy or service complaints are those that relate to the general direction, management or operation of a municipal police department and I do not consider that the concerns included in the internal investigator's mandate fall within that rubric.

[26] Section 76 of the *Act* defines an "internal discipline matter" as a:

> matter concerning the conduct or deportment of a member that
>
> (a) is not the subject of an admissible complaint or investigation under Division 3 *[Process Respecting Alleged Misconduct]*, and
>
> (b) does not directly involve or affect the public;

[27] Public trust complaints involve conduct which directly involves or affects members of the public and are dealt with under s. 77 of the *Act.* Arguably, Officer A could be considered as a member of the public, but the Mayors and the Commissioner all appear to have initially accepted that the matter should be dealt with as a matter of internal discipline.

[28] While the public no doubt has an interest in the conduct of all police officers, here, the concerns relating to Chief Elsner are most appropriately regarded as internal discipline matters.

[29] Section 174 of the *Act* defines "internal discipline authority" in part to mean, where the matter involves a chief constable, "the chair of the board of the municipal police department with which the member is employed".

[30] Subsection 175(1) of the *Act* requires the establishment by a chief constable and chair of the municipal police board of, "procedures, not inconsistent with this Act, for dealing with internal discipline matters and taking disciplinary or corrective measure in respect of them." Rule 7 of the Victoria Police Department's Internal Discipline Rules requires that upon completion of investigations by police officers in the same or a different department, investigation reports be made available to the discipline authority. Rules 8 and 9 respectively provide for the discipline authority to make a copy of the investigation report available to the respondent and to allow the respondent a reasonable opportunity to respond to the report if the discipline authority is considering taking steps pursuant to the report.

IV. RELIEF SOUGHT IN THE AMENDED PETITION

[31] The amended petition herein specifically pleads and relies upon the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*].

[32] In the amended petition, the petitioner advances a variety of issues and seeks the following relief:

> (a) An Order quashing the Order for External Investigation issued December 18, 2015 by the Police Complaint Commissioner (the "PCC") in OPCC File No. 2015-11048 and DA File No. 2015-1281 ("the External Investigation") (the "Order for External Investigation");
>
> (d) An Order in the nature of certiorari quashing any judicial authorizations issued in connection with the Order for External Investigation;
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> (e) A declaration pursuant to s. 52 of the *Constitution Act* 1982 that ss. 100-104 of the *Police Act* violate section 8 of the *Canadian Charter of Rights and Freedoms* and are of no force or effect to the extent they authorize any searches conducted in connection with the External Investigation;

(f) An Order for the return of any electronic devices and the destruction of any electronic records obtained in connection with those authorizations;

(g) Final and interim orders prohibiting Chief Superintendent Sean Bourrie from taking any further steps in connection with the investigation; and

(h) Final and interim orders requiring the Police Complaint Commissioner to remove from his website the Order for External Investigation and any other materials concerning the External Investigation.

V. ISSUES AND RELIEF SOUGHT ON THIS JUDICIAL REVIEW

[33] At the hearing the petitioner advanced a narrower list of issues and relief sought than was pleaded in the amended petition. In a footnote to his submissions the petitioner stated that he would not advance issues raised in the amended petition relating, "to the search of Chief Elsner's electronic records and devices and issues relating to the appointment of C/Supt. Bourrie as the external investigator."

[34] At the hearing, the petitioner confined his submissions to the following issues:

a) the Commissioner has no authority to initiate an external investigation in relation to matters that have been resolved through an internal discipline process; and

b) the Commissioner is estopped from commencing his external investigation, based on promissory or issue estoppel, or abuse of process.

[35] In the result, the petitioner seeks an order quashing in its entirety the Order for External Investigation issued December 18, 2015, as set out in the amended petition at sub-paragraph 1(a).

[36] Based on the content of the petitioner's submissions made at the hearing, I have interpreted the footnote regarding the scope of his arguments to mean that he seeks only the relief set out above at sub-paragraph 1(a). Therefore, I do not address the issues underlying the relief sought at sub-paragraphs 1(d)–(h) of the amended petition. I will, however, address orders relating to publication bans which were initially addressed in the *Application Reasons*.

VI. DISCUSSION

[37] The order that the petitioner seeks is with respect to the decision of an independent officer of the Legislature appointed by statute.

A. The Record

[38] In the usual course of events, where the provisions of the *JRPA* are invoked, the Court is obliged to consider only the record that was before the decision maker whose decision is impugned: see *Albu v. The University of British Columbia*, 2015 BCCA 41 and *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41, leave to appeal ref'd [2016] S.C.C.A. No. 116.

[39] In this case the evidentiary record upon which the impugned decision was reached is less apparent than in most cases where judicial review is sought. The parties cannot point to a filed record from which the decision was taken. In the result, I must carefully ascertain the information that was available to the Commissioner and infer that the Commissioner based his decision upon the information that was available to him when he reached his decision to order an External Investigation on December 18, 2015.

[40] I find that the following information was available to the Commissioner before he made his decision on December 18, 2015:

a) information communicated in a telephone call from the legal counsel for the Mayors to the Commissioner in late August 2015 disclosing communications between Chief Elsner and Officer B, the means by which those communications were made, and some of the circumstances in which they were made;

b) the fact that Officer A is married to Officer B, a member of the Victoria Police Department; or

c) the planned course of action by the Mayors to proceed by way of internal investigation on or about September 8, 2015, and that this was the preference of Officer B;

d) the September 14, 2015 appointment of Ms. Patricia Gallivan, Q.C. as the independent investigator;

e) a letter from the Chair of the Victoria and Esquimalt Police Board’s Governance Committee to the Mayors dated October 27, 2015;

f) a letter from the Mayors to Chief Elsner dated December 4, 2015 in which they accept the internal investigator’s findings;

g) email communications made on or around December 4–6, 2015 between Mayor Desjardins and the Deputy Police Complaint Commissioner regarding media inquiries into the status of an investigation; and

h) several documents received in response to the Commissioner’s requests made on or around December 4, 2015 for all records relating to the internal investigation, namely:

    i) a letter from the Mayors to Chief Elsner dated September 14, 2015;

    ii) a letter from the Mayors’ legal counsel to the internal investigator dated September 16, 2015 regarding the scope of her mandate;

    iii) an email from one of the Mayors to the internal investigator dated October 23, 2015 relating to a meeting with Officer B;

    iv) an email dated October 24, 2015 from one of the Mayors to the internal investigator regarding “words to Chief Elsner”;

    v) a letter from the internal investigator to the Mayors dated November 16, 2015;

    vi) an email from Chief Elsner’s legal counsel to legal counsel for the Mayors dated November 25, 2015;

    vii) email communications between the Mayors dated December 3, 2015 relating to the investigation; and

    viii) emails from Mayor Desjardins on December 3 and 4, 2015 relating to statements to the media.

[41] The Commissioner was not provided with the independent investigator's preliminary report dated November 16, 2015, until on or about December 4, 2015.

B. Jurisdiction to Conduct an External Investigation

1. Relevant Statutory Provisions

[42] In his amended petition Chief Elsner asserts that the Commissioner had no jurisdiction to commence a public trust investigation. He concedes that although there is no express authority in the *Act* to order an external investigation at the conclusion of an internal process, the absence of express authority is not determinative of the jurisdictional issue.

[43] As the External Investigation with which the petition is concerned was ordered by the Commissioner under the authority of s. 93 of the *Act*, the determination of the jurisdictional issue in this case requires the interpretation of that section which provides, in part:

> (1) Regardless of whether a complaint is made or registered under section 78, if <u>at any time</u> information comes to the attention of the police complaint commissioner concerning the conduct of a person who, at the time of the conduct, was a member of a municipal police department and that conduct would, if substantiated, constitute misconduct, the police complaint commissioner may
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> > (a) order an investigation into the conduct of the member or former member, and
> >
> > (b) direct that the investigation into the matter be conducted under this Division by any of the following as investigating officer:
> >
> > > (i) a constable of the municipal police department who has no connection with the matter and whose rank is equivalent to or higher than the rank of the member or former member whose conduct is the subject of the investigation;
> > >
> > > (ii) a constable of an external police force who is appointed for the purpose of this section by a chief constable, a chief officer or the commissioner, as the case may be, of the external police force;
> > >
> > > (iii) a special provincial constable appointed for the purpose of this section by the minister.

…

(4) A chief constable, a chief officer or the commissioner referred to in subsection (1) (b) (ii)

(a) may appoint only a constable who meets both of the following criteria:

(i) the constable has no connection with the matter being investigated under subsection (1) (b);

(ii) the constable's rank is equivalent to or higher than the rank of the member or former member whose conduct is the subject of the investigation,

(b) must notify the police complaint commissioner of the appointment, and

(c) must notify the police complaint commissioner of the reasons for any delay in initiating the investigation.

(5) On being notified under subsection (3) (a) or (b), the chief constable must, subject to section 88 (1) (b) *[duty to preserve evidence relating to complaint or report]*, notify the member or former member concerned that the police complaint commissioner has ordered an investigation under this section.

(6) On being notified under subsection (3) (c) or (d), the chair of the board must, subject to subsection (7), notify the member or former member concerned that the police complaint commissioner has ordered an investigation under this section.

[Emphasis added.]

[44] Section 93 is found in Part 11, Division 3 of the *Act*.

[45] “Misconduct” is defined in s. 77 as conduct constituting “disciplinary breach of public trust” which comprises various categories including “abuse of authority”, “corrupt practice”, “damage to police property”, and “discreditable conduct”.

[46] For ease of reference, I reproduce the definition of “internal discipline matter” set out above and defined in s. 76 as:

... a matter concerning the conduct or deportment of a member that

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

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

[47] There is no mutual exclusivity between the kind of conduct that, if substantiated, constitutes “misconduct” and the kind of conduct that may qualify for classification as an “internal discipline matter”.

[48] Although the Commissioner does not personally conduct investigations or act as a discipline authority, he has been accorded significant powers to ensure the quality of investigations and decision-making, for example under ss. 92, 96, 97, 117, and 135 of the *Act.*

[49] Subsection 177(1) of the *Act* provides that the Commissioner “is generally responsible for overseeing and monitoring complaints, investigations and the administration of discipline and proceedings under … Part [11], and ensuring that the purposes of this Part are achieved.”

2. Standard of Review

[50] The standards of review to be applied to decisions of administrative tribunals were explained by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9. At para. 47, Mr. Justice Bastarache and Mr. Justice LeBel, for the majority, described a reasonableness standard as a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness, and that certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions.

[51] When a court applies a correctness standard, as the majority in *Dunsmuir* stated at para. 50, it does not show deference to the reasoning process of the administrative decision maker. Instead, the court undertakes its own assessment and ultimately determines whether the decision maker was correct or whether it should substitute its own view.

[52] The petitioner submits that in this case, a full standard of review analysis is unnecessary, referring to the statement at para. 62 of *Dunsmuir* that courts should first decide whether the jurisprudence has already settled the applicable standard of review for a particular category of question “in a satisfactory manner”. The petitioner

says that jurisprudence has determined that this type of decision by the Commissioner, which it characterizes as the “decision to institute proceedings and take other, related steps” should be reviewed on a correctness standard. He points to two decisions of the BC Court of Appeal which both identified a standard of correctness: *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92, and *Bentley v. The Police Complaint Commissioner*, 2014 BCCA 181.

[53] In *Florkow*, a complaint was made against a number of police officers in connection with an unlawful arrest during which the complainant was injured. The Commissioner commenced an external investigation and received the external investigator’s final investigative report which concluded the evidence did not substantiate the allegation of abuse of authority against the officers.

[54] The Commissioner took no steps within the 20-day limitation period under the *Act*, but after the period expired, issued a notice of public hearing under s. 143(1)(b) of the *Act* on the basis the investigation was flawed and a public hearing would assist in determining the truth. The officers applied for judicial review of the Commissioner's decision on the basis he had no authority to order a public hearing after expiry of the 20-day limitation period. A chambers judge concluded the discipline authority's decision was final and not subject to review and no public hearing could be ordered after the 20-day limitation period.

[55] On appeal, the primary issue was whether the Commissioner had the authority to order a public hearing pursuant to s. 143(1)(b) after the discipline authority had dismissed the complaint and the 20-day limitation period had expired. The Court of Appeal considered the statutory role of the Commissioner under the *Act.* Madam Justice Newbury, for the unanimous Court, wrote:

> [2] … Section 177(1) of the Act states that the PCC [Commissioner] 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.

[56] The Court of Appeal reviewed the categories that attract correctness review, determining that the issue before it did not engage questions of constitutionality, competing jurisdictional lines between two specialized tribunals, central importance to the legal system as a whole, or the influence of a privative clause. Madam Justice Newbury then turned to the role of expertise, stating:

> [40] 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.

[57] After reviewing the Commissioner's characterization, Newbury J.A. held the standard of review was that of correctness on the following grounds:

> [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. … 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.

[58] Madam Justice Newbury later commented in applying the correctness standard in that case:

> [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 [Discipline Authority] 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.
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> [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".
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> [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.
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> [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.

[59] In *Bentley*, Madam Justice Garson, writing for a unanimous division of the Court, held that the standard of review from a decision by the Commissioner to order a further investigation after the expiry of a limitation period should be reviewed on the standard of correctness.

[60] The Attorney General contends that the appropriate standard of review of the Commissioner's decision is that of reasonableness, and that the decision in *Florkow* has been overtaken by subsequent developments in the law, in particular by the

decisions in *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45 at para. 27; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57 at paras. 39; and *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para. 26. In each of those cases, the Supreme Court of Canada concluded that the matters did not raise true questions of jurisdiction.

[61] At para. 35 of *Florkow*, Newbury J.A. referred to the concurring reasons of Mr. Justice Cromwell in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61 [*Alberta Teachers*'], where he wrote:

> [98] 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.
>
> [99] 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.
>
> [Emphasis added.]

[62] In *Edmonton (City)* at paras. 25–26, the majority found that a reasonableness standard applied on those facts, but did not narrow the definition of the exceptional category from what was set out in *Alberta Teachers'*.

[63] I consider myself bound in this case by the Court of Appeal decisions in *Florkow* and *Bentle*y. In each of those cases, the Court examined similar jurisdictional challenges to the Commissioner's authority and concluded that his jurisdiction to order investigations after the completion of the earlier investigations under the *Act* was to be reviewed using the correctness standard of review. I find that the standard of correctness must therefore be applied in the consideration of the petition before me.

3. True Question of Jurisdiction

[64] Despite my finding with respect to the applicability of the existing jurisprudence, I will consider the petitioner's alternative argument; that the issue before me is a true question of jurisdiction in its own right and so too attracts a correctness standard on that basis.

[65] If the jurisprudence has not already determined the standard of review, a presumption of reasonableness applies where the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function: see, for example, *Edmonton (City)* at paras. 22–23. This can be rebutted by one of the categories of correctness, including true questions of jurisdiction.

[66] At para. 59 of *Dunsmuir*, Bastarache and LeBel JJ. held that the standard to be applied to determinations of true questions of jurisdiction or *vires* was the second standard of correctness, but defined jurisdiction in the narrow sense of whether or not the tribunal had the authority to make the inquiry. They held that the tribunal whose decision is challenged 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.

[67] In *Alberta Teachers'* at para. 33, Mr. Justice Rothstein, writing for the majority, observed that the category of true questions of jurisdiction is narrow and

that since *Dunsmuir* the Supreme Court of Canada has not identified a single true question of jurisdiction. Rothstein J. went on to say:

> [34] … in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say 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.

[68] Relying on *Alberta Teachers'*, the Commissioner asserts that he is entitled to deference in interpreting the scope of his authority under provisions of the *Act* and contends that the standard to be applied is thus that of reasonableness. He contends that the reasonableness standard of review as opposed to the standard of correctness should be applied to his decision to order the External Investigation. The Commissioner asserts that the *Act* places him in an oversight position in relation to police disciplinary matters and with respect to which there is no reason to restrict his power to order the External Investigation.

[69] The petitioner characterizes the question in issue as whether the Commissioner has the authority to institute proceedings and take other related steps, and submits this is one of true jurisdiction.

[70] As I have noted above, the exceptional nature of true questions of jurisdiction is not in itself an absolute bar to finding that such a question exists. This characterization, while rare, is appropriate where the administrative decision maker "must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (*Dunsmuir* at para. 59). Here, the question before me is whether under the *Act*, in particular given the wording of s. 93, it was within the scope of the Commissioner's authority to issue the Order for External Investigation following the completed internal discipline process. As in *Florkow*, this question does not relate to the way in which the Commissioner should undertake his investigation;

rather, this is a matter of whether he had the authority in the first place to issue the Order for External Investigation.

[71] For these reasons, I am satisfied that the issue in this case is a true question of jurisdiction and should be reviewed applying a correctness lens.

4. Application of the Correctness Standard

[72] The petitioner contends that because the key allegations that the Commissioner proposes to have considered in the External Review were previously brought to his attention and were permitted to proceed through the internal discipline process set out in Part 11, Division 6 of the *Act*, he has no remaining jurisdiction to order an external investigation. He says that the phrase “at any time” in s. 93(1) of the *Act* refers to the time at which the relevant information comes to the attention of the Commissioner.

[73] Counsel for the Mayors submits that if the Commissioner is able to conduct an external investigation into matters determined in an internal investigation that would be the death knell for the internal investigation process, as otherwise a matter would never be finalized and could always be open to an external investigation.

[74] The Commissioner’s interpretation of the phrase “at any time” in s. 93(1) is that it provides him with express and broad authority to independently order an investigation whenever he receives information that an officer has potentially misconducted himself or herself in a matter that would constitute a disciplinary breach of trust.

[75] The Commissioner contends that given the scheme and object of Part 11 of the *Act,* the broad wording of s. 93, and the exercise of discretion by the Commissioner that may be involved in determining what constitutes an “internal discipline matter”, it is a reasonable interpretation of s. 93 that the Commissioner may use the power to order an external investigation *further to* a completed Division 6 process - for example, to address new information that has come to light about alleged misconduct or to remedy deficiencies in the prior Division 6 process.

[76] He contends that his oversight responsibilities would be rendered meaningless if he was unable to commence a public trust investigation where he is of the view that an internal investigation was somehow deficient.

[77] It is a well-established principle of statutory interpretation that words in a statute ought to be given their ordinary meaning in harmony with the goals and purposes of the legislation. The proper construction of a statute flows from reading the words of the provision in their grammatical and ordinary sense and in their entire context, harmoniously with the scheme of the statute as a whole, the purpose of the statute and the intention of Parliament or the legislature, as the case may be: *R. v. Jarvis,* 2002 SCC 73; *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42; Elmer A. Driedger, *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87; *Interpretation Act,* R.S.B.C. 1996, c. 238, s. 8.

[78] The interpretation of s. 93 is informed by the goals and objectives of the *Act* and the reasons for the establishment of the Office of the Commissioner. As noted above, s. 93 is found in Part 11, Division 3 of the *Act.* The petitioner points out that in other circumstances the *Act* confers specific authority to review a particular step, sets out the steps that may be taken, and imposes a time limit within which the steps must be taken.

[79] The Commissioner expressed his reasons for exercising his s. 93 discretion in his December 18, 2015 Order for External Investigation :

> Pursuant to the Act, the Commissioner is generally responsible for overseeing and monitoring complaints, investigations and the administration of discipline and proceedings.
>
> ...
>
> For internal discipline matters, the oversight jurisdiction of our office is confined to an *ex post facto* review of the investigation and the disciplinary process. It is an after-the-fact role, and in this respect, it may be distinguished from the way public-trust matters are handled. In the public-trust process, our office has the jurisdiction to provide active oversight of the investigation and to request any and all information as it becomes available. In contrast, in the internal discipline process, the request for the investigation report, and all additional information or records, can only be made by our office at the *conclusion* of the internal discipline process, unless voluntarily provided or disclosed by the Co-Chairs at an earlier time.

> In practical terms, the ex *post facto* review by my office is one that requires me to determine whether the matter should be addressed through the more formal public-trust process. The question is whether there is information in relation to which I should exercise my discretion to independently order an investigation into any aspect of the matter. The Act provides that if, *at any time,* our office receives information concerning the conduct of a municipal police officer – *which if proven would constitute a disciplinary breach of trust* – I may order an investigation into the conduct of the officer. The matter then falls within the jurisdiction of our office, both in terms of oversight of the investigation and any ensuing disciplinary process.

[80] In addition to allowing the Division 3 process to be set in motion in the absence of a complaint, in appropriate circumstances s. 93 may arguably serve as a mechanism for the Commissioner to exercise *ex post facto* oversight and remedial power in relation to an investigation and discipline process that has proceeded at first instance under Part 11, Division 6 of the *Act.*

[81] I am prepared to assume for the purposes of this argument that the Commissioner is not powerless to take any further steps when information, obtained by him via his internal discipline production powers, reveals conduct which, if substantiated, could constitute a disciplinary breach of trust.

[82] In this case, the new information allegedly obtained by the Commissioner under s. 175(5) of the *Act* legitimately raised various conduct concerns not directly investigated or dealt with by the Mayors. In my view, the exercise of the Commissioner's discretion to initiate an investigation into matters that were not within the mandate of the internal investigator is not constrained.

[83] Although the independent investigator considered, and indeed commented upon the allegations that the petitioner provided misleading information to the independent investigator and Officer B and misconducted himself by contacting potential witnesses in the internal investigation, that was not a part of her mandate and in my view could not properly, therefore, have formed a basis for disciplinary action.

[84] Subject to the petitioner's submissions with respect to estoppel, I find that the Commissioner is entitled to order an external investigation into the activities of the

petitioner, but only to the extent that the internal investigation and decision by the Mayors did not address the issues that the Commissioner has set out for the External Investigation.

C. Estoppel and Abuse of Process

[85] The petitioner contends that even if the *Act* confers the authority for the Commissioner to commence a public trust investigation in connection with a matter that has been determined through an internal discipline process, he is estopped from so doing in this case as a result of the doctrines of promissory estoppel, issue estoppel and abuse of process.

1. Promissory Estoppel

[86] The petitioner contends that the doctrine of promissory estoppel will apply to public authorities where the authority gives a promise or assurance which is intended to be acted upon and is acted upon in a way that changes the recipient party’s position.

[87] The petitioner does not allege that the Commissioner promised him that if he consented to the appointment of an independent investigator the matter would remain confidential and there would be no public trust investigation.

[88] At best, from the petitioner’s standpoint the Commissioner’s decision to permit an internal investigation to proceed could leave the impression that no public trust investigation would take place, but this however falls far short of an agreement that no further steps would be taken with respect to the petitioner’s conduct.

[89] The petitioner has not persuaded me that by permitting an internal investigation to take place the Commissioner effectively committed that he would not commence a public trust investigation, and thus has not satisfied the onus upon him to prove that the doctrine of promissory estoppel applies.

2. Issue Estoppel

[90] The petitioner says that issue estoppel applies to prevent the Commissioner from beginning a public trust investigation in connection with matters already resolved through an internal investigation.

[91] The Commissioner contends that because s. 93 of the *Act* expressly authorizes the Commissioner to order an independent investigation into potential misconduct on the part of the petitioner, common law principles governing issue estoppel simply have no application.

[92] The modern rule of estoppel by *res judicata* is based on two broad public policy principles: the public interest in the termination of disputes and the finality and conclusiveness of judicial decisions, and the protection of individuals from the vexatious multiplication of suits: George Spencer Bower, *The Doctrine of Res Judicata,* 2d ed. by The Right Honourable Alexander Kingcome Turner (London: Butterworths, 1969) at 10; Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *The Law of Evidence in Canada,* 4th ed. (Markham, Ont: LexisNexis Canada, 2014) at 1350 *et seq*.

[93] Issue estoppel is a species of *res judicata* and applies where, although the cause of action is different from the prior proceeding, some point or issue of fact has already been decided in the prior proceedings to preclude an unsuccessful party from re-litigating that which has already been litigated: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at paras. 1, 25.

[94] The elements that must be established for issue estoppel to apply are: (1) the same question has been decided in judicial (or quasi-judicial) proceedings; (2) the prior judicial decision is final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies (*Danyluk* at paras. 25, 33, 35). The burden is on the petitioner to establish that all three elements are satisfied.

[95] If these elements are established the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied (*Danyluk* at para. 33).

[96] As set out above, the allegations that are the subject of the External Investigation in issue are whether:

a) the petitioner had committed discreditable conduct by exchanging messages with the spouse of a member under his command;

b) the petitioner provided misleading information to Officer B;

c) the petitioner provided misleading information to the independent investigator;

d) the petitioner misconducted himself by contacting potential witnesses in the internal investigation; and

e) the petitioner used Victoria Police Department property or devices to exchange the messages, and if so, whether he did so while on duty.

[97] The Commissioner contends that at most, issue estoppel potentially has application only with respect to the first of the five allegations of disciplinary breaches of trust referred to in the Commissioner's December 18, 2015 Order for External Investigation, but even that is arguable.

[98] I reject the Commissioner’s assertion that it is only arguable that the first question has been decided. The issue that arose from that question was clearly one of the two matters that the internal investigator was directed to investigate and that she did investigate and report on. The internal investigator’s findings on this issue were adopted by the Mayors.

[99] The same is true of the fifth question. The scope of the internal investigator’s mandate also included determining whether Chief Elsner had improperly used the Victoria Police Department’s social media account or accounts. Pursuant to this

mandate, the internal investigator found that Chief Elsner accessed his Twitter account and its direct message function from departmental devices and that this sometimes occurred during working hours. The Mayors accepted this finding in their December 4, 2015 final decision. On this basis I am satisfied that the fifth allegation that is the subject of the External Investigation has already been decided.

[100] It is arguable that the decision of the Mayors was of a quasi-judicial nature. They applied a legal standard to a defined set of facts found by the internal investigator, which they accepted. Based upon the application of that standard to those facts, they imposed the disciplinary measures that they considered appropriate in the circumstances.

[101] However, with respect to the third aspect of issue estoppel, the Commissioner was neither a party to the internal disciplinary proceeding nor a privy of any of the participants to that proceeding. In the result, the elements that must be established for issue estoppel to apply have not been made out by the petitioner.

[102] I therefore conclude that the requisite elements of issue estoppel are not satisfied here.

3. Abuse of Process

[103] There remains, then, the application of the doctrine of abuse of process to be considered.

[104] The petitioner submits that the doctrine of abuse of process by re-litigation is applicable where the requirements of issue estoppel are not met and its application is in the interests of justice. In this case, the petitioner says that given the involvement of the Commissioner from the outset, the comprehensive nature of the internal investigation, and the claim that Chief Elsner was persuaded to accept the findings made by the Mayors on the basis that this would conclude the matter, the abuse of process doctrine favours a finding that the External Investigation should be quashed.

[105] The question pursuant to the abuse of process doctrine is whether it can be said in all of the circumstances that the requirement for an external investigation “is unfair to the point [of being] contrary to the interests of justice", or is “oppressive or vexatious” or one that “violates the fundamental principles of justice underlying the community’s sense of fair play and decency” as discussed in *Toronto (City) v. C.U.P.E., Local 79,* 2003 SCC 63 at paras. 35–58.

[106] In that case, the City of Toronto fired a recreational instructor after he was convicted of sexually assaulting a boy under his supervision. Notwithstanding the conviction the instructor grieved his dismissal. At the arbitration hearing of the grievance, an arbitrator ruled that the criminal conviction was admissible evidence, but that it was not conclusive as to whether the instructor had sexually assaulted the boy. The arbitrator held that the presumption raised by the criminal conviction had been rebutted by evidence from the instructor and found that he had been dismissed without just cause.

[107] A majority of the Supreme Court of Canada found that the instructor should not be permitted to re-litigate the issue decided against him in the criminal proceedings, but held that the doctrine of issue estoppel had no application in the case since the requirement of mutuality of parties had not been met. The majority also held that the doctrine of collateral attack did not apply in the case because the instructor did not seek to overturn the sexual abuse conviction itself, but rather sought to contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct.

[108] In the result, the majority turned to the doctrine of abuse of process to ascertain whether re-litigation would be detrimental to the adjudicative process. Madam Justice Arbour, for the majority, commented as follows:

> 37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. *It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.* See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> *One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.* …

> As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/ mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

[109] At para. 44, Arbour J. adopted the definition of the adjudicative process set out by Mr. Justice Doherty in the Ontario Court of Appeal decision indexed at (2001), 55 O.R. (3d) 541 (C.A.), where he said:

> [74] The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts <u>and tribunals</u> to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by <u>the various processes</u> that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.
>
> [Emphasis added.]

[110] In my view as the first and fifth allegations that are the subject of the impugned External Investigation were disposed of by the Mayors in a process that was acceded to by the Commissioner, the doctrine of abuse of process discussed in

Toronto (City), estops the Commissioner from ordering an external investigation into those allegations. I therefore quash that part of the Order for External Investigation issued December 18, 2015 by the Commissioner.

[111] I find, however, that the Commissioner is not estopped from ordering an external investigation into the remaining three allegations that are the subject of the impugned External Investigation.

D. Matters Left for Further Consideration on the Application for a Sealing Order and a Publication Ban

[112] In my earlier *Application Reasons*, I expressed some reservations about the propriety of a permanent ban on the names of Officers A and B and said that I would revisit such a ban when the petition was heard.

[113] As the conduct of Officer A has not been called into question, and the identification of Officer B would necessarily identify Officer A, I will continue the ban on the publication of their names. That ban will continue until further order of this Court upon any further application to lift that ban.

[114] I also reserved any decision on the publication of the information obtained from the search of the petitioner's Twitter account in part because the Commissioner had not yet made a determination as to whether to publicly disclose information relating to the External Investigation. Pursuant to the *Act* he has the discretion to determine if it is in the public interest to disclose such information and I held that the statutory scheme should be permitted to take its course at that point.

[115] I decline to grant an order with respect to the publication of the Twitter messages in the course of the Commissioner's External Investigation, as I have allowed that investigation to the extent set out above.

VII. SUMMARY

[116] In summary, I grant the petitioner's request to quash the Order for External Investigation, but only in part.

[117] The Commissioner has the authority to initiate the External Investigation to the extent that the issues set out in that investigation were not addressed by the internal investigation and the decision of the Mayors dated December 4, 2015.

[118] While the petitioner is not estopped from commencing the External Investigation on the bases of either promissory or issue estoppel, the abuse of process doctrine prevents the Commissioner from ordering an external investigation into these two allegations which are the subject of the External Investigation:

a) whether the petitioner had committed discreditable conduct by exchanging messages with the spouse of a member under his command; and

b) whether the petitioner used Victoria Police Department property or devices to exchange the messages, and if so, whether he did so while on duty.

[119] The Commissioner is not estopped from ordering an external investigation into the remaining three allegations that are the subject of the External Investigation, namely whether:

a) the petitioner provided misleading information to Officer B;

b) the petitioner provided misleading information to the independent investigator; and

c) the petitioner misconducted himself by contacting potential witnesses in the internal investigation.

[120] I order that the publication ban on the names of Officer A and Officer B, originally ordered in my *Application Reasons* continue until further order of this Court. I decline to grant an order with respect to a publication ban on the Twitter messages as the Commissioner is permitted to conduct the External Investigation to the extent allowed in these reasons and make what use he needs of those messages in the course of that investigation, consistent with the *Act* and the publication ban ordered herein.

"The Honourable Chief Justice Hinkson"