IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Florkow v. British Columbia (Police Complaint Commissioner),* 2012 BCSC 126

Date: 20120126
Docket: S110293
Registry: Vancouver

Between:

Nicholas Florkow and Bryan London

Petitioners

And

The Police Complaint Commissioner and The Honourable Bruce M. Preston

Respondents

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Petitioners:	M.K. Woodall
Counsel for the Police Complaint Commissioner:	J.S. Heaney
Place and Date of Trial/Hearing:	Vancouver, B.C. November 24, 2011
Place and Date of Judgment:	Vancouver, B.C. January 26, 2012

Introduction

[1] At the hearing of this petition, the petitioners, both members of the Vancouver Police Department ("VPD"), seek orders quashing a notice of public hearing issued by the Office of the Police Complaint Commissioner ("PCC") on November 30, 2010. They also seek, as an ancillary order, an order prohibiting The Honourable Bruce M. Preston from taking any steps in the capacity of adjudicator in respect of that public hearing.

[2] Whether the orders are granted depends on an interpretation of certain provisions of the *Police Act*, R.S.B.C. 1996, c. 367 (the "*Act*"). One function of the *Act* is to create the Office of the PCC and to define its powers and responsibilities. Another is to establish the definition of misconduct in relation to police members and create a process for reviewing, investigating and responding to complaints of such misconduct.

[3] Specifically, this application for judicial review challenges the authority of the PCC in the peculiar circumstances of this case to appoint an adjudicator to conduct a public hearing in respect of a complaint of misconduct by the petitioners.

[4] The respondent, The Honourable Bruce M. Preston, is a retired judge of the Supreme Court of British Columbia. He is the adjudicator selected, pursuant to s. 142 of the *Act*, to conduct the public hearing at issue. He has not participated in these proceedings.

Issue

[5] The issue raised by this petition is a very narrow one. Specifically, it is whether s. 143(1)(b) of the *Act* establishes a general discretionary authority in the PCC to initiate a public hearing.

Background

[6] On January 21, 2010, the petitioners were working as plain clothes officers with the Vancouver Police Department. They responded to a complaint of a

domestic assault at an address in Vancouver. When the petitioners arrived at the location, they became involved with the complainant, Mr. Wu Yao Wei ("Mr. Wu").

[7] Mr. Wu's first language is Cantonese. Neither of the petitioners speaks Cantonese. Mr. Wu was not, in fact, associated to the incident that brought the police to the address. Mr. Wu was arrested by the petitioners.

[8] Mr. Wu resisted the efforts of the petitioners to effect the arrest. The petitioners used force in effecting that arrest. As a result of the interaction between Mr. Wu, and the petitioners, Mr. Wu sustained injuries. Some were serious including a fracture to the orbit of his left eye.

[9] As a result of the incident, Mr. Wu filed a complaint which was received by the PCC on January 22, 2010. On January 25, 2010, the PCC received a complaint with respect to the same incident from the executive director of the B.C. Civil Liberties Association.

[10] The complaint was characterized as a breach of public trust. The investigation of the complaints was undertaken by the Delta Police Department, and on February 2, 2010, Sgt. Guy Leeson was assigned as the investigator. Chief Cst. Jim Cessford of the Delta Police Department was delegated the role of designated discipline authority. On October 18, 2010, the investigators with the Delta Police Department submitted their final investigation report to the designated discipline authority. On November 2, 2010, that discipline authority issued a notice pursuant to s. 112(1)(c) of the *Act*, concluding that the actions of the petitioners did not constitute misconduct.

[11] On November 30, 2010, the PCC issued a notice of public hearing, which is attached as Exhibit C to the affidavit of Karen Kirkpatrick. Paragraph 10 of that notice of public hearing reads 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:
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> (a) The complaint is serious in nature as the alleged misconduct involves a significant breach of public trust;
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> (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.

Law

[12] In *Dickhout v. British Columbia (Police Complaint Commissioner)*, 2011 BCSC 880, Madam Justice Gropper had an opportunity to consider the *Police Act*. There the issues that were before the court were described in para. 4 as follows:

> The issues to be determined are:
>
> 1. Whether the notice should be set aside on the basis that the commissioner failed to provide reasons for ordering the public hearing;
> 2. Whether the notice circumvents the October 29, 2010 order of Madam Justice Dickson.

[13] The court concluded that the applicable standard of review is reasonableness, noting "[t]he commissioner is interpreting his own legislation and is entitled to particular deference where he determines that a public hearing is warranted" (para. 26). In coming to that conclusion, the court said in para. 25:

> ...Section 143(1)(b) of the *Act* provides the commissioner with the exercise of discretionary power to appoint an adjudicator to conduct a public hearing, if in the commissioner's opinion a public hearing is required to preserve or restore public confidence...

Analysis

[14] As indicated above, the issue to be determined by me is a narrow one. The decision does not require that I deal in depth with the specific allegations of

misconduct. It is sufficient to note that the allegations are serious ones. There is no question that the injuries and impact of the event upon Mr. Wu have been significant.

[15] This decision, however, is one that is principally related to statutory interpretation. Accordingly, the most relevant and important facts relate to the timing of critical procedural events. This is not a decision that addresses the substance of the complaint or in any way draws any conclusions regarding the conduct of the members who are the subject of the complaint.

[16] Individual sections of the *Act* cannot be read in isolation if they are to be fully, and in my view properly, understood and interpreted.

[17] The *Act* has a number of features regarding the establishment, financing of and responsibility for police services in the province of British Columbia. As indicated above, it also governs the conduct and discipline of municipal police officers in B.C.

[18] Complaints regarding alleged police misconduct can be made by persons directly affected by or who directly witness the conduct, a person on their behalf, or by a third-party complainant. The *Act* establishes a mechanism by which those complaints are funnelled to the Office of the PCC.

[19] 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).

[20] Unless a complaint is dealt with informally (s. 157) or by mediation (s. 158), all complaints are investigated by police agencies, and it is those agencies that

make decisions as to whether or not the complaint is substantiated or not. If, however, the PCC considers that there is a reasonable basis to believe that a decision that there has been no misconduct is incorrect, the PCC has the power to appoint a retired judge recommended by the Associate Chief Justice of the Supreme Court to review the investigation report and conclusion (s.117). The police agencies or the retired judge in these capacities are referred to in the legislation as "discipline authorities".

[21] If the discipline authority concludes that the conduct appears to be misconduct, a discipline proceeding must follow within specified timelines (s.112(3)). Section 125 of the *Act* requires that the discipline authority make its decision and communicate it to the PCC and to the member. For any allegations of misconduct that are then determined to have been proven, there is a process for the imposition of discipline. When that process is complete, s. 133 requires a report to be provided to the complainant and the PCC.

[22] Section 133(5) allows either the complainant or the member to file a written request with the PCC for a public hearing or a review on the record (s. 136). A member making such a request is entitled as of right to a public hearing in certain circumstances, otherwise the determination is to whether the matter will proceed by way of public hearing or review on the record is in the discretion of the PCC (s. 137). Section 136(1) establishes a time limit for a complainant or member to request a public hearing or review on the record with some limited discretion to the PCC to extend that time limit pursuant to s. 138(3). Section 138(1) also provides the PCC with power on its own initiative to arrange a public hearing or review on the record subject to the requirement that that discretion be exercised within 20 days of the expiration of the limitation period created in s. 136(1).

[23] Each of the sections in the *Act* has a descriptive heading. For s. 138, it reads: "Determining whether to arrange public hearing or review on the record in other circumstances". Section 138(1) - (3) read as follows:

138 (1) On

(a) receiving a request under section 136 in circumstances other than those described in section 137 (1) *[circumstances when member or former member concerned is entitled to public hearing]*, or

(b) the police complaint commissioner's own initiative if the limitation period established for making the request under section 136 (1) *[time limit for requesting public hearing or review on the record]* has expired,

the police complaint commissioner must arrange a public hearing or review on the record if the police complaint commissioner

(c) considers that there is a reasonable basis to believe that

(i) the discipline authority's findings under section 125 (1) (a) *[conclusion of discipline proceeding]* are incorrect, or

(ii) the discipline authority has incorrectly applied section 126 *[imposition of disciplinary or corrective measures]* in proposing disciplinary or corrective measures under section 128 (1) *[disciplinary disposition record]*, or

(d) otherwise considers that a public hearing or review on the record is necessary in the public interest.

(2) In considering whether a public hearing or review on the record is necessary in the public interest, the police complaint commissioner must consider all relevant factors including, without limitation, the following factors:

(a) the nature and seriousness of the complaint or alleged misconduct;

(b) the nature and seriousness of harm or loss alleged to have been suffered by any person as a result of the conduct of the member or former member, including, without limitation, whether

(i) the conduct has caused, or would be likely to cause, physical, emotional or psychological harm or financial loss to a person,

(ii) the conduct has violated, or would be likely to violate, a person's dignity, privacy or other rights recognized by law, or

(iii) the conduct has undermined, or would be likely to undermine, public confidence in the police, the handling of complaints or the disciplinary process;

(c) whether there is a reasonable prospect that a public hearing or review would assist in determining the truth;

(d) whether an arguable case can be made that

(i) there was a flaw in the investigation,

(ii) the disciplinary or corrective measures proposed are inappropriate or inadequate, or

> (iii) the discipline authority's interpretation or application of this Part or any other enactment was incorrect.
>
> (3) The police complaint commissioner must make a determination as to whether to arrange a public hearing or review on the record under this section promptly after receiving the request referred to in subsection (1) or promptly after expiry of the relevant limitation period, as the case may be, but in any event, the determination must be made within 20 business days after that request is received or that limitation period has expired.

[24] Section 141 is headed: "Review on the record" and subsection (2) of that section reads as follows:

> (2) Subject to section 143 (1) *[public hearing]*, if the police complaint commissioner determines that there are sufficient grounds to arrange a public hearing or review on the record in respect of a disciplinary decision under section 138 *[determining whether to arrange public hearing or review on the record]* or 139 *[reconsideration on new evidence]*, the police complaint commissioner may appoint an adjudicator under section 142 *[appointment of adjudicator for public hearing or review on the record]* to conduct a review on the record of the disciplinary decision under this section.

[25] Section 143 is titled: "Public hearing" and subsection (1) reads as follows:

> **143** (1) Despite section 141 *[review on the record]*, 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 *[review on the record]* 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 *[determining whether to arrange public hearing or review on the record]* or 139 *[reconsideration on new evidence]*, and
>
> (ii) it is likely that evidence other than
>
> (A) the record of the disciplinary decision described in section 141 (3) *[review on the record]*,
>
> (B) the service record of the member or former member concerned, and
>
> (C) submissions described in section 141 (5), (6) and (7) *[review on the record]*,
>
> 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.

[26] Except where a complaint is dealt with informally or by way of mediation, an investigation must be conducted and a discipline authority must review the report generated by that investigation to determine if the conduct of the member who is the subject of the complaint constitutes misconduct (s. 112). Section 112(4) and (5) of the *Act* read as follows:

> (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) *[appointment of new discipline authority if conclusion of no misconduct is incorrect]*.

[27] 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.

[28] Where either the police agency, as the discipline authority, or the retired judge pursuant to s. 117, as the discipline authority, finds that the conduct of the member appears to constitute misconduct, a discipline proceeding follows.

[29] In this case, the finding of the police agency as discipline authority was that the conduct of the petitioners did not constitute misconduct. By virtue of s. 112(5), that conclusion is not open to question or review by a court on any ground and is

final and conclusive. There is no question in this case that the PCC did not appoint a retired judge pursuant to s. 117 of the *Act*. As a result, there has been no discipline proceeding in this case.

[30] Each of the scenarios envisioned by the *Act* for a review on the record or public hearing follows the conclusion of a discipline proceeding. Those scenarios include:

1. upon the request of the member or complainant (s. 133(5), 136(1) or 137);

2. at the instigation of the PCC following the expiration of the time afforded the complainant or the member to request a public hearing or review on the record as noted above but, in any event, within 20 days of the expiry of the time limit given the complainant or the member (s. 138(1)(b) and 138(3); or

3. any time after the expiry of the timelines noted above if the PCC has determined that there are insufficient grounds to arrange a public hearing or review on the record if new evidence has become available or been discovered that is substantial and material to the case or that determination (s. 139).

[31] None of those scenarios exist in the facts of this case.

[32] The PCC argues that s. 143(1)(b) of the *Act* creates a standalone discretionary power to appoint an adjudicator to conduct a public hearing. It references in support the decision in *Dickhout* referenced above. Paragraphs 25 and 34 of that decision certainly indicate a conclusion consistent with the position taken by the PCC.

[33] In *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.), Wilson J. noted at para. 4:

> ...I will only go against a judgment of another Judge of this Court if:
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> (a) Subsequent decisions have affected the validity of the impugned judgment;
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> (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
>
> (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

[34] In the *Dickhout* decision, the principal issue was the basis upon which the PCC had exercised its discretion. In the context of reviewing the legislation, Justice Gropper made the observations noted regarding s. 143(1)(b). There is no indication that any issue was raised for consideration by the court as to whether or not s. 143(1)(b) created an independent plenary authority to initiate a public hearing. With respect, it appears that Justice Gropper presumed the same, which is not surprising in the context of the issue that was before her. In these circumstances, I am not of the view that it is a decision specifically on the point before me that would compel me to follow it by application of the *Hansard Spruce Mills* reasoning.

[35] In my view, s. 138 creates potential for either a public hearing or a review on the record in certain circumstances. The language in s. 138(1) and (2) is similar in referring to both options. Similar language is used in s. 141(2) where, again, both options are referenced. It is only at s. 143(1) that the *Act* deals with the process for selection of one of those alternatives. That section essentially narrows the scope of the discretion available to the PCC in making that decision. Critical to my decision is my conclusion that this is a limited discretion; it exists only in the context of the earlier sections referred to.

[36] This interpretation is supported by the language in s. 141(2) set out above.

[37] The PCC references s. 123(3) in support of its argument that there must exist an independent ability on the part of the PCC to initiate a public hearing. That section, which is headed “Matters related to discipline proceeding”, reads as follows:

> (3) 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.

[38] The PCC argues that s. 123(3) is obviously included for a purpose. It says that if legislation is to be interpreted as the petitioners argue, it would render s. 123(3) meaningless.

[39] 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.

[40] 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.

[41] The PCC raises issues beyond strict statutory interpretation. I now turn to those.

[42] First, the PCC argues that the petition is premature; that the petitioner should apply for the relief they seek before the adjudicator appointed for purposes of the public hearing.

[43] The petition includes the assertion that “there were in fact no material flaws in the investigation”. The PCC says the petitioners must prove this but more

importantly whether there were flaws is a question for the public hearing, not for this court.

[44] The PCC relies, in part, on the decision of *Ince v. Graham* (21 January 2011), Victoria No. 11-0060 (B.C.S.C.), where this *Act* was described as a comprehensive discipline adjudication scheme.

[45] While the general principles referenced in that case and other authorities cited by the respondent PCC are accurate, they do not, in my view, resolve the issue before me. 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.

[46] There is 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.

[47] Second, the PCC says that this court is being asked to exercise its discretion, and I should take into account the public interest in having a public hearing in these matters. Paragraph 31 of the PCC's written submissions reads as follows:

> 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.

[48] It would be wrong to read into legislation a broad discretion that is contrary to the express terms of the legislation. Sections 112 and 117 are clear that the decision of the discipline authority is final and conclusive and not subject to review by any court.

[49] Reference was made by the PCC to the decision of *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, where the court noted in respect of interpretation of statute:

> ...The [words of an Act] must be interpreted "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 Parliament"...

When the *Act* is read in that fashion, it leads clearly to the interpretation of s. 143 that I have referenced above.

[50] 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.

Conclusion

[51] It is, therefore, my conclusion that the petition must succeed and the notice of public hearing be quashed. Accordingly, the Honourable Bruce M. Preston is without jurisdiction to take steps as an adjudicator under the *Act* and, for the purposes of this matter, is prohibited from doing so.

"D.A. Betton, J."
The Honourable Mr. Justice Betton