IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Plummer,*
2018 BCSC 513

Date: 20180329
Docket: 27081-2
Registry: Vancouver

Between:

Regina

Respondent

And:

Scott Plummer

Appellant

And:

Police Complaint Commissioner

Intervenor

Before: The Honourable Madam Justice Watchuk

On appeal from: Orders of the Provincial Court dated March 21, 2016 and July 6, 2016 (*R. v. Plummer*, Vancouver 18393)

Reasons for Judgment

Counsel for the Respondent:	J. Patterson
Counsel for the Appellant:	M.K. Woodall
Counsel for the Intervenor:	B. Martland
Place and Dates of Trial/Hearing:	Vancouver, B.C. September 12-13, 2017
Place and Date of Judgment:	Vancouver, B.C. March 29, 2018

I. BACKGROUND AND FACTS

[1] On February 17, 2014 the appellant, Cst. Plummer, went through a red light in downtown Vancouver while driving a vehicle on duty as a City of Vancouver Police Officer. He hit a taxi and some injuries resulted from the collision. The incident was first investigated by the Collision Investigation Unit of the Vancouver Police Department. During a subsequent *Police Act* investigation, the appellant was compelled to provide a statement pursuant to s. 101 of the *Police Act,* R.S.B.C. 1996, c. 367 (the "*Police Act*").

[2] On December 4, 2014 the Police Complaint Commissioner (the "PCC") forwarded a Report to Crown Counsel (the "RTCC") pursuant to s. 111 of the *Police Act* on the basis that an offence may have been committed. The RTCC contained investigative material including the compelled statements from Cst. Plummer and the officer who was a passenger in the car at the time of the collision. The RTCC included a warning stating that neither compelled statement would be admissible in evidence in court or any other proceeding pursuant to s. 102 of the *Police Act*.

[3] On February 11, 2015 an Information was sworn charging the appellant with driving without due care and attention contrary to s. 144(1)(a) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 (the "*Motor Vehicle Act"*).

[4] Cst. Plummer brought an application alleging that his ss. 7 and 11 *Charter* rights were violated through the disclosure of the compelled statement to Crown. He sought a stay pursuant to s. 24(1) of the *Charter*. A subpoena was issued to the PCC on the basis that he had material evidence to give on the *Charter* application.

[5] On February 25, 2016 Cst. Plummer's trial took place in Provincial Court. He was found guilty of the offence of driving without due care and attention contrary to s. 144(1)(a) of the *Motor Vehicle Act*. Four civilian witnesses and Cst. Plummer's partner in the vehicle at the time of the accident testified for the Crown. The conviction was not registered, pending the abuse of process application.

[6] The PCC applied to set aside the subpoena issued to him, and that application was heard on February 26, 2016. On March 21, 2016 the learned trial judge found the *Police Act* did not provide a basis for setting aside the subpoena, and that the PCC had material evidence to give, but that public interest privilege attached to the evidence sought. The subpoena was set aside.

[7] On May 10, 2016 the trial judge heard the abuse of process application. On July 6, 2016 the trial judge found the dissemination of the compelled statement did not rise to the level of abuse of process, and dismissed the application.

[8] Cst. Plummer appeals the findings of the trial judge on abuse of process and the decision to quash the subpoena. He seeks a stay of proceedings, or alternatively a declaration that the PCC's disclosure of the statement constitutes an abuse of process.

[9] On September 6, 2017 Mr. Justice Bowden granted the PCC leave to intervene at this appeal on the basis that the PCC's interests are engaged by this appeal and its outcome, the PCC stands to be affected by the determination of issues involved the interpretation of the *Police Act*, and the PCC's perspective regarding the model of policing discipline would assist the court in resolving issues relating to the application of the *Police Act*: *R. v. Plummer*, 2017 BCSC 1579 at paras. 10-11. Justice Bowden permitted the PCC as intervenor to make oral and written submissions in relation to the subpoena issue and the issues arising from the interpretation of the *Police Act*.

II. ISSUES ON APPEAL

[10] This appeal involves two issues:

(1) whether the trial judge erred in quashing the subpoena to the PCC; and

(2) whether the state conduct in this case, the PCC's provision to the Crown of the *Police Act* statement of the appellant, amounts to an abuse of process.

A. Jurisdiction to Hear the Appeal

[11] The Crown raises a preliminary issue regarding the appropriateness of the appeal process in this case.

[12] An appeal against conviction for an offence under the *Motor Vehicle Act* is governed by ss. 101-114 of the *Offence Act*, R.S.B.C. 1996, c. 338 (the "*Offence Act")*. Specifically s. 102(1)(a) states:

> Unless otherwise provided by law,
> (a) the defendant may appeal to the appeal court
> (i) from a conviction or order made against the defendant, or
> (ii) against a sentence passed on the defendant.

[13] Section 109 of the *Offence Act* provides for the application of the *Criminal Code* provisions, ss. 683 to 689, to appeals taken under s. 102. Pursuant to those *Code* provisions, in a conviction appeal a court of appeal may allow the appeal where the verdict is unreasonable or cannot be supported by the evidence, there is an error of law, or there was a miscarriage of justice: s. 686(1)(a).

[14] The Crown submits that there is no appeal from the trial judge's decision to not grant relief, because pursuant to s. 686(1), the appellant can only appeal from a conviction. The appellant in his Notice of Appeal states he appeals against conviction, but in his submissions he states he is appealing the judge's failure to find there was an abuse of process, and the decision to quash a subpoena requiring the PCC to attend the criminal trial. The remedy sought, either a stay of proceedings or a declaration of abuse of process, is also not directly related to an appeal from his conviction, in which the usual remedy is an acquittal or a new trial.

[15] However, s. 102 of the *Offence Act* states that a defendant can appeal from a conviction or order. Are the trial judge's decisions to set aside the subpoena and that the actions of the PCC did not constitute an abuse of process, "orders" as described in s. 102?

[16] The statutory framework of appeals pursuant to the *Offence Act* was discussed in *R. v. Harrop Recycling & Appraisals Ltd.*, [1990] B.C.J. No. 2854 (S.C.) where this court found a defendant could appeal only from a conviction or a final order. The "conviction or order" terms are also used in s. 813 of the *Criminal Code*, and an analysis of that provision held that a defendant can only appeal a conviction, or an order that brings an end to the proceeding. A defendant cannot appeal an interlocutory order: *R. v. Dougan*, 2016 BCSC 1815 at para. 45; and *R. v. Watson*, 2007 BCSC 1707 at paras. 11, 14-17.

[17] In this case, while the order dismissing the application for a stay of proceedings was a final order, the same cannot be said of the order quashing the subpoena which was an interlocutory order.

[18] A guiding principle in this area of law is that the criminal process not be fragmented; thus criminal appeals generally only lie against a conviction*: R. v. Sekhon*, 2016 BCSC 1697 at paras. 7-8. The appellant fairly did not attempt to appeal the order quashing the subpoena in an interlocutory fashion, but the order quashing the subpoena did not terminate the proceedings and is not a final order.

[19] As the order dismissing the claim for *Charter* relief is a final order which ended the proceedings its appeal is permitted by s. 102(1)(a) of the *Offence Act*. An appeal would also be allowed by s. 686 because the conviction was not registered until after the *Charter* application was dismissed. That dismissal resulted in the conviction.

[20] The interlocutory order regarding the subpoena can therefore be challenged in a s. 686 appeal on the basis that it was a decision wrong on a question of law: s. 686(1)(a)(ii). As I have set out below, the interpretation of the *Police Act* provision relevant to the issue of setting aside the subpoena is a question of law. The appeal of the decision to set aside the subpoena can therefore proceed as part of the appeal of the conviction entered after the *Charter* application was dismissed.

III. STANDARD OF REVIEW

[21] The parties do not disagree on the applicable standard of review. The two decisions under appeal involve questions of mixed fact and law. In deciding the subpoena issue the trial judge set out the law and applied it to the inferences he drew from the evidence before him. On the *Charter* application, the trial judge concluded that the appellant had not discharged the burden of establishing on a balance of probabilities that the action of the PCC constituted an abuse of process. This is a question of mixed fact and law: *R. v. Nixon*, 2009 ABCA 269 at para. 13, aff'd on appeal 2011 SCC 34.

[22] Therefore, the trial judge's decisions in these respects are deserving of deference and reviewable only if he misdirected himself, make a palpable and overriding error, or the decisions are so wrong as to amount to an injustice: *R. v. Burgar*, 2016 BCCA 204 at paras. 19-22; and *R. v. Babos*, 2014 SCC 16 at para. 48.

[23] However, the trial judge's decision to quash the subpoena also contains a legal question in addition to the question of mixed fact and law related to the applicability of privilege. The interpretation of s. 53.01 of the *Police Act*, and statutory interpretation in general, is a question of law: *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at para. 33. Therefore if the trial judge made an error regarding the interpretation of s. 53.01, his interpretation is reviewable for correctness.

IV. DECISIONS OF THE TRIAL JUDGE

A. Subpoena

[24] In Reasons for Judgment dated March 21, 2016 (the "Subpoena Reasons"), the trial judge quashed the subpoena issued to the PCC by the appellant for his criminal trial. The Crown made no submissions on the PCC's application to quash the subpoena.

[25] The PCC submitted the legislation provides that he is not compellable. Second, the test of "likely to give material evidence" was not made out. The trial

judge did not accede to these two arguments. The third argument of the PCC was accepted by the trial judge; that public interest privilege applied and prevented the PCC from having to testify in the abuse of process motion.

[26] The trial judge found that section 53.01 of the *Police Act* does not provide a generalized personal immunity, but by virtue of the PCC's powers and duties he cannot be compelled to testify about "records or information" in court or in any other proceedings and in fact "must not give" such evidence, although he can "give evidence" or be compelled if the proceeding falls under the exceptions in subsection (5). This provision deals with the compellability and competence of the PCC to testify on certain matters. Therefore, the interpretation of this section of the *Police Act* turns on what is included in "records or information".

[27] The trial judge found the legislative intent of s. 51.03(4) was to restrict the dissemination of "records or information", not to protect the PCC. He stated there were a number of provisions using the term "records" and/or "information", and the provisions highlighted the overall legislative intent to monitor the dissemination of it. He found the exception allowing the PCC to testify in the context of judicial review makes it clear there is no complete bar to the PCC giving evidence, and that there is no bar on evidence coming before the court if the evidence is outside the scope of "records or information". The judge found the PCC was not being subpoenaed in order to obtain "records or information", but rather because "it is alleged that his conduct is outside the statutory authority that he has been given".

[28] The trial judge then found the PCC had material evidence to give, but that public interest privilege applied to bar the PCC from testifying about the decision to include the compelled statement in the RTCC. The subpoena to the PCC was set aside solely on the basis of public interest privilege.

B. Finding on Abuse of Process

[29] In Reasons for Judgment dated July 6, 2016, the trial judge found there was no abuse of process.

[30] The trial judge framed the issue in this application as the disclosure of a compelled statement under the terms of the *Police Act,* by a state actor. Therefore, he found that the conduct was subject to *Charter* scrutiny. On the issue of whether this was a collateral attack on the actions of an independent administrative official, he found:

> the proposition that collateral attacks on the actions of others ought not to be permitted is one that is beyond argument. The question is whether that is an accurate characterization of what is occurring in the case at bar.

The judge then characterized the circumstances as whether the actions of the state (the PCC) engaged in conduct that is offensive to societal notions of fair play and decency in the prosecution. He found this was not a collateral attack on either the Crown's charge approval process or the PCC's actions.

[31] The trial judge then engaged with statutory interpretation of the *Police Act*. He noted that the *Police Act* has been judicially described as labour relations legislation: *Florkow v. British Columbia (Police Complaints Commissioner)*, 2013 BCCA 92 at para. 2. He found the *Police Act* is intended to provide a complete regime for handling labour and discipline issues for police officers, and that it uses specific language, including the use of "evidence", "records", and "information". He noted s. 95 of the *Police Act* created a presumptive rule that the PCC not disclose information:

> 95(1) Except as otherwise provided under this Part, the police complaint commissioner may not disclose
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> (a) that an investigation has been or may be initiated under this Part, or
>
> (b) any information relating to an investigation under this Part.
>
> (2) Despite subsection (1), the police complaint commissioner may make a disclosure described in subsection (1) if she or he considers it in the public interest.

[32] The trial judge also noted that the PCC's oath pursuant to s. 49.1 highlights the importance of keeping information confidential:

> 49.1 Before beginning to exercise powers and perform duties under this Act, the police complaint commissioner and any acting police complaint commissioner must take an oath before the Clerk of the Legislative Assembly
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> (a) to faithfully and impartially exercise those powers and perform those duties, and
>
> (b) not to divulge any information received under this Act, except as permitted under this Act.

He relied on his finding in the Subpoena Reasons that the *Police Act* restricts the dissemination of "records or information" rather than protecting the PCC.

[33] With regard to the PCC's authority to refer matters to Crown pursuant to s. 111, the trial judge noted there was no time restriction on the provision and s. 111 does not expressly state what should be included in the RTCC. This provision states:

> 111. If the police complaint commissioner considers that the conduct of the member or former member under investigation may constitute an offence created under any enactment, including an enactment of Canada or another province, the police complaint commissioner may report the matter to Crown counsel.

[34] The trial judge delved into the issue of whether the RTCC should contain compelled statements or not through statutory interpretation of s. 111 of the *Police Act*. The trial judge found that s. 102, which restricts the use of compelled statements, deals only with the admissibility of those statements, not their disclosure, and that nothing in s. 111 of the *Police Act* allowed for disclosure of the compelled statement in the RTCC. Section 102 states:

> 102. A statement provided or an answer given during an investigation under this Part by a member or former member is inadmissible in evidence in court or in any other proceeding, except
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> (a) in a discipline proceeding, public hearing or review on the record concerning the conduct under investigation,
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> (b) in a prosecution for perjury in respect of sworn testimony,
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> (c) in a prosecution for an offence under this Act, or
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> (d) in an application for judicial review or an appeal from a decision with respect to that application.

> (2) Subsection (1) applies also in respect of evidence of the existence of a request to make a statement under section 101.

[35] He also found s. 95, dealing with the confidentiality of investigations was not designed to capture the disclosure of compelled statements to anyone outside the disciplinary process, even if it is in the public interest. He also found there was no case authority permitting the disclosure of compelled statements. The trial judge stated:

> I am not endorsing some broad proposition that prevents the use of compelled information. I am only concluding that, in the context of this particular statute as it was used in this particular prosecution, there was no justification for the dissemination of the compelled statement outside of its *Police Act* purposes. In doing so I am simply relying on a contextual analysis of the *Police Act*.

[36] Although he found the PCC's disclosure of the statement was not authorized by statute, the trial judge found there was no abuse of process. While the disclosure was "part of some sort of systemic pattern", there was nothing nefarious to attribute to the action. Rather, the action was a result of the PCC's interpretation of the *Police Act,* which the trial judge disagreed with. He also found the RTCC was ardent, but not enough to offend a sense of fair play or decency. The trial judge found the disclosure of the statement did not constitute a breach of the PCC's oath.

[37] As abuse of process was not made out, the trial judge did not award a remedy. He also noted there was no basis on which to conclude that the compelled statement would continue to be disseminated.

V. DISCUSSION AND CONCLUSIONS

A. Quashing the Subpoena

[38] The appellant obtained a subpoena requiring the PCC to testify in the abuse of process motion at trial. The PCC had that subpoena quashed. The appellant now argues the trial judge erred in quashing the subpoena. The Intervenor PCC maintains the position he took before the trial judge. First, the PCC submits the legislation provides that he is not compellable. Second, the test of "likely to give material evidence" was not made out. Third, and as found by the trial judge, public

interest privilege applied and prevented the PCC from having to testify in the abuse motion. The Crown supports the position taken by PCC in that the PCC is not compellable pursuant to the *Police Act*.

[39] Pursuant to s. 51.03(1) of the *Police Act*, the PCC is a "protected individual", and pursuant to subsection 2:

> no legal proceeding for damages lies or may be commenced or maintained against a protected individual because of anything done or omitted
>
> (a) in the exercise or intended exercise of a power under this Act, or
>
> (b) in the performance or intended performance of a duty under this Act.

Section 51.03(3) provides an exception if the protected individual does anything or omits anything in bad faith:

> (3) Subsection (2) does not apply to a protected individual in relation to anything done or omitted in bad faith.

[40] Section 51.03 addresses compellability:

> (4) A protected individual and anyone acting for or under the direction of the protected individual must not give, or be compelled to give, evidence in court or in any other proceedings in respect of any records or information obtained in the exercise of powers or performance of duties under this Act.
>
> (5) Despite subsection (4), a protected individual or anyone acting for or under the direction of the protected individual may give, or be compelled to give, evidence in any of the following:
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> (a) a prosecution for perjury in respect of sworn testimony;
>
> (b) a prosecution for an offence under this Act;
>
> (c) an application for judicial review of a decision made under this Act.
>
> (6) Subsections (4) and (5) apply also in respect of evidence of the existence of an investigation under Part 11, a mediation or other means of informal resolution under Part 11 or any proceeding conducted under Part 11.
>
> [emphasis added]

[41] The appellant submits the trial judge erred in quashing the subpoena for the PCC to testify, but agrees with the trial judge's interpretation of s. 51.03 of the *Police Act*. He says that s. 43(1) of the *Offence Act* provides that if a person is likely to give

material evidence in a proceeding to which the *Offence Act* applies, a subpoena may be issued. He says the trial judge found the PCC had relevant evidence to give, and that the *Police Act* does not provide the PCC with testimonial immunity. The appellant says the trial judge then erred in finding the PCC enjoyed a common law immunity from giving evidence. When the legislature has determined the scope of testimonial immunity or privilege, he says that there is no room for an additional common law immunity.

[42] The Crown submits that s. 51.03 of the *Police Act* is a full answer to the subpoena question: the PCC is not compellable to give evidence "in respect of any records and information obtained in the exercise of powers and performance of duties" under the *Police Act*, subject to a prosecution for perjury in respect of sworn testimony, a prosecution for an offence under the *Police Act*, or an application for judicial review of a decision under the *Police Act.* The Crown says the trial judge should not have considered materiality or public interest privilege as the *Police Act* is clear that the PCC cannot be compelled to testify.

[43] The PCC says he is not compellable under the *Police Act*, and that he was not likely to give material evidence, and the evidence sought was protected by public interest privilege. The PCC says that although the subpoena was quashed on the basis of public interest privilege, the much stronger basis for quashing it is pursuant to the *Police Act*. The PCC says s. 53.01(3) is a commonplace protection for statutory decision-makers, as statutory decision-makers should not be compelled to testify about why they made a decision.

[44] The PCC also provided helpful legislative and police context to the *Police Act* and the role of the PCC in overseeing police misconduct. Section 51.03 of the *Police Act* is found in Part 9 of that Act, which sets out the rules for the PCC and his role in complaint and discipline matters. The PCC says section 51.03 puts into meaningful form the independent oversight of policing and police discipline in the province.

[45] In considering the meaning of s. 51.03 through applying the principles of statutory interpretation, that the words of the Act are to be read in their entire context and their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21), the PCC is not compellable except for the exceptions in s. 51.03(5).

[46] Division 2 of the *Police Act* in which s. 51.03 is found sets out the PCC's role in police complaint and discipline matters. The role is to carry out independent oversight and monitoring of complaints and misconduct, and the administration of discipline and proceedings. The PCC is a statutory decision maker under the *Police Act.* The scheme of the *Police Act* supports the plain meaning of the provision. The PCC should not be compelled to testify in relation to carrying out his duties under the *Police Act* unless his actions are specifically challenged through a judicial review, or there is a prosecution for perjury or an offence under the *Police Act*, or where the PCC acted in bad faith.

[47] Section 51.03(4) states that the PCC is not compellable or competent to testify in court or any other proceedings in respect of "records or information obtained in the exercise of powers or performance of duties". The trial judge concluded that testifying about the PCC's conduct, and whether it was outside statutory authority or not, is *not* "records or information" and the PCC's conduct is a "topic outside the scope of the restriction created by s. 51.03(4)".

[48] Although I agree with the trial judge's decision to set aside the subpoena, I respectfully disagree with the basis for his decision and his interpretation of s. 51.03 of the *Police Act*. I find that the PCC is not compellable to give evidence in these criminal proceedings. The PCC's conduct and whether it was within his statutory authority is properly an issue for judicial review, and he is compellable in those circumstances. There is a distinction between being compelled to testify at a judicial review where the PCC's conduct is directly challenged or there is an allegation he acted outside his statutory authority, and a criminal trial where the PCC's

involvement was limited to reporting the matter to Crown pursuant to s. 111 of the *Police Act*. In the first circumstance, a judicial review, the PCC is compellable due to s. 51.03(5)(c). In the second, a criminal trial such as this, the PCC is not compellable pursuant to s. 51.03(4) because any evidence he has to give relates to "records or information" regarding the performance of his duties under the *Police Act*.

[49] The trial judge's finding that the PCC's testimony sought in this case on the issue of disclosing a compelled statement to the Crown was not in respect of "records or information obtained" is in error. To conclude that s. 51.03 did not bar the PCC from testifying regarding a police officer's compelled s. 101 statement (a statement compelled under the *Police Act* for the purpose of the *Police Act*, and provided to the PCC in the exercise of his oversight duties) because it is neither a "record", nor "information" is, with respect, untenable. It runs contrary to the plain meaning of the broad term "information" which goes beyond a specific type of document or record to include facts known to a person. The statement is also a record of the officer's account of the events. The finding of the trial judge in this regard is also contrary to the appellant's submissions that compelled police statements are both information and records for the purposes of the *Police Act*.

[50] The appellant's statement compelled pursuant to s. 101, which was then provided to Crown by the PCC is "records or information" within the meaning of s. 51.03(4). It was "obtained in the exercise of powers or performance of duties [of the PCC] under this Act". This is not an excluded proceeding listed in s. 51.03(5). In the result, the PCC cannot be compelled to give, and indeed "must not give" evidence in court or any other proceedings in respect to the statement.

[51] The overarching legislative and policy objectives of the *Police Act* and the plain reading of s. 51.03 support the non-compellability of the PCC in these circumstances. The trial judge erred when he found the PCC could testify in these proceedings based on the provisions of the *Police Act*. He erred by relying on the fact that the PCC is compellable in circumstances that are properly the matter of a

judicial review, and that the *Police Act* could not be interpreted to shield the PCC from scrutiny.

[52] Section 51.03 is a complete bar to the PCC testifying in court or in any proceeding unless it is a judicial review, a prosecution for perjury, or a prosecution for an offence under the *Police Act*. Whether or not the PCC could be compelled to testify about bad faith in the context of a legal proceeding for damages is not a question before this court.

[53] I agree with the decision of trial judge to quash the subpoena to the PCC, albeit for different reasons. As s. 53.01 is a full answer to the compellability of the PCC, it is not necessary to consider the materiality of evidence the PCC would give. I would note, however, that this is related to the incorrect framing of the issue in the court below: the PCC's action, and whether the *Police Act* should be interpreted to allow that action, are not relevant to this criminal proceeding which is not a judicial review.

B. The Abuse of Process Application

[54] The appellant says the PCC disclosed the compelled statement deliberately, and there is no reason the PCC will not do so again. He says this undermines the integrity of the police discipline process and the administration of criminal justice, and this misconduct amounts to abuse of process in the residual category where there is no threat to trial fairness.

[55] The appellant says that the PCC's disclosure of the compelled statements, and the use of those statements by the Crown, strike at the very heart of the principles, policies and procedures that govern civilian oversight of policing in British Columbia.

[56] The appellant submits that the *Police Act* embodies the Canadian middle road. Society expects police officers to account for their conduct when they may have committed misconduct, but society also expects that police officers will not lose their constitutional rights merely because they are police officers. He says it would

offend Canadians' sense of fair play and decency to require, on one hand, that police officers respect the right to silence enjoyed by everyone else in Canada; but on the other hand to deny the same right to the police officers themselves.

[57] The trial judge did not have the benefit of submissions from the PCC. On the appeal, the PCC submits that the RTCC recommended a lesser charge than was ultimately charged by the Crown and an analysis of evidence related to that lesser charge without reliance on the compelled statements, although the statements were included in the RTCC. The PCC notes the inclusion of various types of inadmissible statements in an RTCC is not unusual, and that even if they are inadmissible in court they can be provided to the Crown and disclosed to the defence. In this case, the Crown did not attempt to use the statement. The evidence at trial that proved the charge beyond a reasonable doubt was provided by witnesses to the collision.

[58] The Crown says the mere disclosure of the compelled statement to Crown is not abuse of process under the residual category. They say this is a collateral attack on the PCC's use of s. 111 or it is a novel argument without legal authority. Even if the PCC misapplied the *Police Act*, this could not prejudice the reputation of the administration of justice to constitute abuse of process. The Crown says abuse of process in the residual category must involve serious conduct and significant harm, citing *Nixon*. The Crown says that no remedy is required here even if the compelled statement was disclosed in error. As the trial judge noted, the statement "could not reasonably have had any appreciable impact on the charge approval in this case" or the case itself. A stay of proceedings is the most drastic remedy available and this is not the clearest of cases.

[59] The fundamental problem with this application is that it is not for a court in the context of a criminal proceeding to be evaluating the PCC's interpretation of the *Police Act*. The *Police Act* is an administrative statute, administered by the PCC and other decision makers under the *Police Act.* The trial judge acknowledged that this act is "specialized labour legislation". Later in his analysis the trial judge noted:

> [103] … There is nothing nefarious which can be attributed to that action [disclosing the compelled statements in the RTCC]. It stands to reason that

> the Commissioner took an interpretation of his powers under the *Act*, and proceeded on that basis. The fact that I disagree with that interpretation doesn't transform those actions into anything inconsistent with 'decency' or 'fair play'. He simply viewed the matter differently.

[60] The PCC in this context is entitled to deference to his interpretation of his home statute, as he would be on judicial review, absent a jurisdictional question. For a court to engage in statutory interpretation in this context is a collateral attack on the PCC's decision, as argued by the Crown.

[61] In this case, the trial judge should have considered the abuse of process application on the basis that the statement was disclosed, not whether s. 111 in its 'correct' interpretation allowed the PCC to disclose the statement. It is important to note that a finding of bad faith is not determinative in an abuse of process application in the residual category.

[62] The trial judge acknowledged the PCC simply viewed the interpretation of the *Police Act* differently. The trial judge inappropriately engaged with the "right" interpretation of what the PCC should disclose in an RTCC, but even in doing that he did not find the PCC engaged in any unfair conduct or that he offended his oath of office.

[63] It is inappropriate for the court below, or this court on appeal, to decide the correct interpretation of s. 111 in this context, or whether s. 111 allows the PCC to disclose compelled statements to the Crown in an RTCC. However, the PCC's interpretation of s. 111 could be challenged through the judicial review process rather than incorporated into an abuse of process application in a criminal proceeding.

[64] It is not for this court on this appeal to determine whether the PCC's interpretation of his home statute is reasonable or if there was a breach of the *Police Act* in this case. There was no need to examine or analyze further the PCC's interpretation that is, in brief, that he had discretion to disclose the compelled statement to the Crown under the public interest exception in s. 95(2) as information relating to an investigation. That exception therefore permitted disclosure under the

oath of office provision, since the information was divulged “as permitted under the Act” pursuant to s. 49.1(b). The use of a disclosed statement is governed by the use immunity in s. 102(1), which provision does not prevent disclosure.

[65] The application at trial sought a finding of abuse of process. The test for abuse of process, whether in the trial fairness category or category not threatening trial fairness, is the same: *R. v. Sekhon,* 2014 SCC 15 at para. 33. The trial judge identified the correct legal test from *R v. Babos*, 2014 SCC 16. Where abuse of process in the residual category is alleged:

1. There must be prejudice to the integrity of the justice system that “will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome”, in other words, has the state engaged in conduct that is offensive to societal notions of fair play, and would proceeding with the trial harm the integrity of the justice system? (*Babos* at para. 32, 35).
2. There must be no alternative remedy capable of redressing the prejudice, and the remedy must focus on the harm to the justice system going forward (*Babos* at para. 32, 39).
3. If there is still uncertainty about whether a stay is warranted, the court must balance whether staying the proceedings or having a trial despite the conduct better protects the integrity of the system (*Babos* at *para.* 32, 40).

[66] It is important to note that in this case the compelled statement was never published or distributed publically. It was simply included and referenced in the RTCC in which the PCC recommended a lesser charge than was ultimately laid by Crown, with a warning regarding its use. The Crown did not attempt to make use of the statement. The case was proved at trial by witnesses to the collision. The statement was only raised in court proceedings when the appellant raised the issue.

[67] I agree with the trial judge, albeit for different reasons, that there was no abuse of process. The mere possession of the compelled statement by the Crown

in this particular case does not constitute conduct that is offensive to the integrity of the justice system. This application fails at the first step. There is no need for the justice system to dissociate itself from the conduct in this case.

[68] In summary I find that there was no error in the decision of the trial judge to quash the subpoena. There was no error in the decision of the trial judge to dismiss the application seeking *Charter* relief on the basis of an abuse of process.

[69] The appeal is therefore dismissed.

"The Honourable Madam Justice Watchuk"