COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Elsner v. British Columbia (Police Complaint Commissioner),* 2018 BCCA 147

Date: 20180419
Docket: CA44393

Between:

Chief Constable Frank J. Elsner

Respondent
(Petitioner)

And

The Police Complaint Commissioner

Appellant
(Respondent)

And

Mayors Barbara Desjardins and Lisa Helps in their capacity as Internal Discipline Authority

Respondents
(Respondents)

Restriction on publication: This file is partially sealed and there is a publication ban of the names of the individuals referenced as Officer A and Officer B, pursuant to an order dated April 12, 2017, and until further order of the Court.

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated April 12, 2017 (*Elsner v. British Columbia (Police Complaint Commissioner)*, 2017 BCSC 605, Vancouver Registry Docket S162351).

Counsel for the Appellant:	D.K. Lovett, Q.C. B. Martland
Counsel for the Respondents, Barbara Desjardins and Lisa Helps:	J.M. Doyle
Counsel for the Attorney General of British Columbia:	S. Bevan
Place and Date of Hearing:	Vancouver, British Columbia March 16, 2018
Place and Date of Judgment:	Vancouver, British Columbia April 19, 2018

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Fitch

Summary:

CA sets aside chambers judge's order which quashed, in part, Police Complaint Commissioner's order for external investigation into conduct of Chief Constable of the Victoria Police Department pursuant to s. 93 of Division 3 of Part XI of the Police Act. *Conduct concerned Twitter communications between Chief Constable and spouse of an officer under his command. Conduct was originally addressed as "internal discipline matter" pursuant to Division 3 of Part XI of the Act. Chambers judge erred in applying standard of review of correctness. General rule that a tribunal's interpretation of its own statute is afforded deference was not displaced. The PCC's decision to order an external investigation after the matter had been addressed internally was based on a reasonable interpretation of s. 93. PCC's conclusion that the reputation of the administration of justice may require a more open investigation than under Division 6 of Part XI lay within the bounds of reasonableness. While further investigation would not further underlying principles of finality and judicial economy, order did not amount to abuse of process by re-litigation – or "re-investigation." Nevertheless, CA queried whether the time and expense of another investigation was warranted given Chief Constable had resigned; the alleged misconduct was mainly an exchange of "Twitter" messages; and important personal and privacy interests would suffer in an external investigation.*

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] In this appeal, the Court is asked to address once again the dense and complicated procedures set out in Part XI of the *Police Act*, R.S.B.C. 1996, c. 367 for dealing with allegations of misconduct on the part of police. As is well known, and as this court recounted in *Florkow v. British Columbia (Police Complaint Commissioner)* 2013 BCCA 92, the question of how best to address and resolve such complaints was the subject of various reports and enquiries over the 1990s and the first decade of this century. The last of these was the *Report on the Review of the Police Complaint Process in British Columbia* by Mr. Josiah Wood, Q.C. (as he then was). It was released in February 2007, and most of its recommendations were adopted when the Legislature enacted Part XI: see S.B.C. 2009, c. 28. It came into force on March 31, 2010 and has not been changed in any substantive way since then.

[2] Under Part XI, the Police Complaints Commissioner ("PCC"), who is an officer of the Legislature, has a 'gatekeeper' role aimed at "ensuring that misconduct on the part of police is appropriately dealt with in the public interest and in accordance with the *Act*". (*Florkow*, at para. 2.) Part XI creates three "streams" or processes: "public trust complaints", dealt with under Division 3; "internal discipline matters", dealt with under Division 6; and "policy or service complaints", dealt with under Division 5. Since this case does not involve a policy or service complaint, I need not describe Division 5 here.

[3] As will be explained in greater detail below, Divisions 3 and 6 are very different. Division 3 consists of over 75 complicated sections. It contemplates a series of steps to be taken by various "authorities" in

investigating, reporting on and reviewing complaints of "misconduct" – defined generally to mean "public trust offences" – on the part of police. The PCC must make decisions within the specified time limits at various stages of the process, which may or may not bring the matter to an end. If the process continues to the final stage, a full public hearing before a retired judge may be convened. Division 6, in contrast, consists of only three sections. It contemplates that an "internal discipline authority" – in this case, the chair of the municipal police board that employs the police officer (or "member") whose conduct is at issue – will act in accordance with procedures previously established by the board for internal discipline matters. The authority must provide its final decision and any recommendations to the PCC, but the Commissioner is not given any (express) authority to reject the decision or to require that it be reviewed further.

[4] In the case at bar, the conduct at issue was *not* the subject of a complaint under the *Act*; nor did it involve conduct by a police officer in carrying out police duties or interacting with the public. Instead, it involved conduct of the kind that may occur in any workplace – a flirtation between two people, both married. In this instance, the "relationship" was found not to have gone beyond some "Twitter" messages and one awkward meeting in his office when she turned up unexpectedly. Unfortunately, one party was a chief constable; the other ("Officer A") was a police officer. She was not under his command, but was the spouse of "Officer B", who *was* under the Chief Constable's command. It is this fact that arguably takes his conduct outside the realm of ordinary workplace relationships and that has made it a matter of concern to other members serving with Officer B.

Statutory Context

Definitions

[5] Before recounting the facts in detail, however, it may be useful to describe the statutory context as it relates to the two types of processes in Divisions 3 and 6 of Part XI. I note first the following definitions in s. 76 that are relevant to this appeal:

> **"internal discipline matter"** means 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, and
> (b) <u>does not directly involve or affect</u> the public;
>
> **"member"** means a municipal constable, deputy chief constable or chief constable of a municipal police department;
>
> **"misconduct"** has the same meaning as in Division 2.

Section 77(1) in Division 2 defines "misconduct" to mean:

> (a) conduct that constitutes a <u>public trust</u> offence described in subsection [77] (2), or
> (b) conduct that constitutes
> (i) an offence under section 86 or 106, or
> (ii) a disciplinary breach of public trust described in subsection [77](3).

Section 77 continues:

(2) A public trust offence is an offence under an enactment of Canada, or of any province or territory in Canada, a conviction in respect of which does or would likely

(a) render a member unfit to perform her or his duties as a member, or

(b) discredit the reputation of the municipal police department with which the member is employed.

(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

(a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,

(i) intentionally or recklessly making an arrest without good and sufficient cause,

(ii) in the performance, or purported performance, of duties, intentionally or recklessly

(A) using unnecessary force on any person, or

(B) detaining or searching any person without good and sufficient cause, or

(iii) when on duty, or off duty but in uniform, using profane, abusive or insulting language to any person including, without limitation, language that tends to demean or show disrespect to the person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or economic and social status;

. . .

(h) "discreditable conduct", which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department, including, without limitation, doing any of the following:

(i) acting in a disorderly manner that is prejudicial to the maintenance of a discipline in the municipal police department;

(ii) contravening a provision of this *Act* or a regulation, rule or guideline made under this *Act*;

(iii) without lawful excuse, failing to report to a peace officer whose duty it is to receive the report, or to a Crown counsel, any information or evidence, either for or against any prisoner or defendant, that is material to an alleged offence under an enactment of British Columbia or Canada.

[Emphasis added.]

I note that there is no allegation in this case of any "offence under an enactment of Canada" or the Province.

Public Trust Complaints Under Division 3

[6] Division 3 of Part XI, headed "Process Respecting Alleged Misconduct", deals with complaints concerning "any conduct of a member that is alleged to constitute misconduct". (My emphasis.) Such a complaint may be made directly to the PCC or to any of the persons described in s. 78(2)(b). On receipt of a complaint, the PCC must determine whether it is admissible or inadmissible under s. 82, subsection 2 of which states:

(2) A complaint or part of a complaint is admissible under this Division if

(a) the conduct alleged would, if substantiated, constitute misconduct by the member,

(b) the complaint is made within the time allowed under section 79(1) or (2), and

(c) the complaint is not frivolous or vexatious. [Emphasis added.]

[7] Conversely, a complaint is inadmissible insofar as it relates to the matters set out forth in s. 82(3):

> (3) A complaint or a part of a complaint is inadmissible under this Division insofar as it relates to any of the following:
>
> (a) the general direction and management or operation of a municipal police department;
>
> (b) the inadequacy or inappropriateness of any of the following in respect of a municipal police department:
>
> (i) its staffing or resource allocation;
>
> (ii) its training programs or resources;
>
> (iii) its standing orders or policies;
>
> (iv) its ability to respond to requests for assistance;
>
> (v) its internal procedures.

Inadmissible complaints are required to be processed by the board of the relevant police department under Division 5 of Part XI.

[8] Division 3 goes on to make detailed provision for the investigation of admissible complaints that are not resolved by mediation or other informal means under Division 4. Where the complaint concerns the conduct of a chief constable or former chief constable, the PCC must direct that the investigation be carried out by a constable of an external force appointed by a chief constable or by a special provincial constable: s. 91(1).

[9] Since no complaint was formally made in this case, s. 93 is also relevant and indeed is relied on heavily by the PCC. It provides in part:

> (1) Regardless of whether a complaint is made or registered under section 78, if at any time 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
>
> (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.
>
> (2) In making an appointment under subsection (1)(b)(iii), the minister must consider the recommendations, if any, of the police complaint commissioner.

. . .

> (9) The police complaint commissioner may provide information respecting an investigation under this section to any persons who, in the police complaint commissioner's opinion, have a direct interest in the matter.
>
> (10) In providing information under subsection (9), the police complaint commissioner may sever any information that must or may be excepted from disclosure by the head of a public body under Division 2 of Part 2 of the *Freedom of Information and Protection of Privacy Act*.

[10] The balance of Division 3 goes on to provide for the multi-stage process I have mentioned. In *Florkow*, we set out those stages at paras. 8–11, to which the reader is referred. We also summarized the process as follows:

> The process established by Part XI for dealing with complaints of police misconduct encompasses several stages – the investigation of a complaint by an investigating officer ("IO"); the review of the IO's final investigative report by a "discipline authority" ("DA") and, where the DA considers that the conduct of the police officer ("member") constitutes misconduct, the convening of a discipline proceeding; the review of a DA's 'no misconduct' determination by a retired judge (who becomes the DA) where the PCC considers the first DA's determination to be "incorrect"; the preparation of a disposition report by the DA following a discipline proceeding, and his or her determination of appropriate disciplinary measures; and in certain circumstances, the arranging of a "review on the record" or a public hearing by an "adjudicator" (who is also a retired judge). Where at the end of the investigative stage or at the end of a disciplinary proceeding, the decision-maker finds that the conduct complained of does not constitute misconduct, the Act generally brings the process to an end by stating that the decision is "final and conclusive" and "not open to question or review by a court of law". An exception is made at the end of the investigative stage, however, if the PCC takes certain measures within the time specified in the *Act*: see s. 112(5). [At para. 3.]

[11] At whatever stage the process ends, the "discipline authority" may determine and apply any of the disciplinary or corrective measures set out in s. 126(1), which range from dismissal to giving advice to the member (or former member: see s. 127). The PCC receives a copy of the authority's conclusion and reasons, and unless the PCC arranges a public hearing or review on the record, the authority's decision is "final and conclusive." (s. 133(6).)

[12] This court held in *Florkow* that the PCC did not have a 'stand-alone' or inherent discretion to order a public hearing, as the PCC had had under the previous legislation. The fact that the 20-day time limitation specified in s. 117(3) had passed without the PCC's having acted to appoint a retired judge to determine whether the conduct in question 'appeared to' constitute misconduct, meant that the PCC lacked the authority to convene a public hearing: see para. 61. The Court declined to infer the existence of an inherent jurisdiction that would permit the PCC to bypass the "very detailed provisions" of Part XI. (See also *Bentley v. Police Complaints Commissioner* 2014 BCCA 181.)

Internal Discipline Matters Under Division 6

[13] Division 6 of Part XI deals with "internal discipline matters", which s. 76 defines as follows:

> "internal discipline matter" means a matter concerning the conduct or deportment of a member that
>
> (a) is <u>not the subject of an admissible complaint or an investigation</u> under Division 3, <u>and</u>

(b) does not directly involve or affect the public. [Emphasis added.]

[14] As mentioned earlier, Division 6 is consists of only three sections. Section 174 sets out the meaning of "internal discipline authority". Where the conduct of a chief constable is at issue, the authority is "the chair of the board of the municipal police department with which the member is employed." The remaining two sections of Division 6 state:

> 175 (1) A chief constable of a municipal police department and the chair of the board of the municipal police department must establish procedures, not inconsistent with this Act, for dealing with internal discipline matters and taking disciplinary or corrective measures in respect of them.
>
> (2) The procedures established under subsection (1) take effect after
>
> (a) a copy of the procedures is filed with the police complaint commissioner, and
>
> (b) the board of the municipal police department concerned approves the procedures.
>
> (3) An internal discipline authority, the board and any arbitrator that may be appointed under the grievance procedure of the collective agreement may use, but are not restricted by,
>
> (a) Division 2 to determine standards against which the conduct or deportment of a member may be judged, and
>
> (b) section 126 to determine appropriate discipline in respect of the matter.
>
> (4) The internal discipline authority must provide the police complaint commissioner with a copy of
>
> (a) any recommendation on disciplinary or corrective measures arising from an internal discipline matter, and
>
> (b) the final decision reached by the internal discipline authority, the board or the arbitrator.
>
> (5) On request of the police complaint commissioner, an internal discipline authority must provide any additional information or records respecting an internal discipline matter that are in the possession or control of the municipal police department concerned.
>
> (6) The internal discipline authority may determine any issue respecting a member's competence or suitability to perform police duties that arises in an internal discipline matter.
>
> 176 (1) A chief constable of a municipal police department may delegate to a deputy chief constable or senior officer of the municipal police department any of her or his powers or duties as internal discipline authority in a member's case under this Division.
>
> (2) A delegation under this section must be in writing, and the chief constable making the delegation must, as soon as practicable after the delegation is made, notify the police complaint commissioner and the member concerned of that delegation.
>
> [Emphasis added.]

[15] The Internal Discipline Rules of the Victoria Police Department ("VPD") contemplate that the "discipline authority" in relation to conduct of a chief constable – the chair of the employer police board – may order an investigation if he or she becomes aware there may be "grounds to discipline or dismiss" a member. The investigation must be carried out by a person of equal or higher rank than the member.

[16] The Rules include a directive that members may use Internet access at the VPD only for business purposes, and may access social media on a computer owned by the Department, only for investigational purposes. Members are also warned that they have no reasonable expectation of privacy and that "All uses of social media must meet the ethical standards consistent with the expectations of [VPD] employees."

Factual Background

[17] Turning next to the facts of this case, I note that this court has had access to certain material that is subject to a sealing order made by the court below on October 21, 2016. The Supreme Court also imposed an interim publication ban with respect to the names of Officers A and B, which ban is still in force. (See 2016 BCSC 1914 at paras. 39–45.) In the final judgment that is the subject of this appeal, the chambers judge continued the ban with respect to the identity of Officers A and B, but left it to the PCC to decide whether information obtained from a search of the Chief Constable's Twitter account should be publicly disclosed. In the Court's words, "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." (At para. 120.)

[18] The respondents Helps and Desjardins are the mayors of Victoria and Esquimalt respectively, and are co-chairs of the combined Victoria and Esquimalt Police Board. (The board of each police department is the employer of police officers, including chief constables: see s. 26(3) of the *Act*.) In August 2015, the Mayors received information (from a source that has not been disclosed) that the Chief Constable had, in the words of the chambers judge, "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 VPD ('Officer B') serving under the petitioner." (At para. 6.) Mayor Desjardins deposed that she contacted legal counsel, Ms. McNeil, and instructed her to contact the PCC for "direction and advice". Neither of the Mayors had been involved in a matter of this kind and thus, Mayor Desjardins deposed, they were "very reliant" upon the Office of the Police Complaint Commissioner. The Mayors arranged for the delivery of copies of the Twitter messages in question to the PCC's office for review on or about August 31, 2015 in preparation for a meeting with him and his staff. Again as deposed by Mayor Desjardins, the contents, time, date and Twitter "handle" were all apparent on the face of the messages.

[19] Due to the illness of one participant, the meeting took place by telephone on the same day with the PCC and his deputy, Mr. Woods. According to Mayor Desjardins, the PCC had already read the messages; according to the deputy PCC the messages were read over the phone to him. The focus of the meeting was whether the matter should proceed as an internal discipline matter or one of breach of public trust. Evidently, the Mayors believed the former course should be taken. The PCC agreed to this alternative, subject to two conditions. Major Desjardins recalls these conditions as follows:

> 14. The PCC told us that the matter could proceed as an internal discipline matter if:
>
> > a. we first spoke to John Doe [Officer B] and determined whether he wanted to proceed with the matter as one of internal discipline or public trust. The PCC advised that if John Doe wanted to proceed with the matter as a public trust matter, it would proceed as such; otherwise, I understood the PCC agreed that the matter would proceed as an internal discipline matter;
> >
> > b. we informed the Board in general terms of the allegations and updated the Board during the course of the matter.

The PCC's recollection is somewhat more elaborate:

> 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:
>
> 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*.

[20] Although the Mayors were "extremely uncomfortable" with the idea of meeting with Officer B to solicit his views on how the matter should proceed, they did so immediately. They informed him that there was evidence the Chief Constable "could be having 'a relationship' with [Officer A]". They did not reveal the contents of the Twitter messages. Officer B was upset and said he wanted to talk to his wife. Later the same day, the Mayors met again with him. He said he had spoken with the Chief Constable about the matter and that he, Officer B, "did not want a public trust investigation. To the contrary, [Officer B] did not want any investigation at all, citing the well-being of his family." The Mayors explained that notwithstanding this reaction, an investigation had to be held and that they would advise the PCC that he, Officer B, "did not want the matter to be one of public trust. [Officer B] expressed his agreement. [Officer B] told us he wanted this matter to remain confidential so that his family's privacy was not compromised."

[21] Counsel for the Mayors passed along the information concerning Officer B's wishes and, since they believed the PCC's second pre-condition had been met, the Mayors embarked on an internal investigation under Division 6. They appointed an independent investigator who was a lawyer experienced in police matters. As noted by the chambers judge, the investigator later confirmed in her preliminary report that her mandate had been to investigate two issues:

> 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. [At para. 11.]

The Mayors also held an emergency telephone meeting of the Police Board and informed them of the allegations against the Chief Constable and the convening of the internal investigation.

[22] Some weeks later, on October 27, 2015, Mr. Ryan, the chair of the governance committee of the Board, wrote a somewhat intemperate letter to the Mayors, with a copy to the PCC. Among other things, he expressed the view that any investigative report in respect of a discipline matter involving the Chief Constable must be "promptly provided" to the Board, that the Board should meet *in camera* to "comprehensively discuss" the results of any such report, and that the final decision should be made by the Mayors "only after full consultation with the Board." (No particular section of the *Act* was cited for these

propositions, which would appear to be contrary to s. 174.) The chair sent copies of his letter to the Police Board members.

[23] Although the PCC was away on vacation, the deputy PCC wrote to counsel for the Mayors the next day, expressing the PCC's "concern" that the Police Board had not been fully informed of the matter. (It may be that he was unaware of the telephone meeting the Mayors had held with the Board when the investigation was commenced.) The letter continued:

> If the chairs maintain that there is no need to inform the full board, the PCC is going to revisit his decision. If there is no oversight provided by the board as contemplated in the legislation, then the PCC feels the public trust investigation may be required to ensure proper oversight of this very serious matter. The PCC will be back in the office on Monday next if you wished to discuss with him personally. [Emphasis added.]

After further emails between Mr. Woods and counsel for the Mayors, however, Mr. Woods advised counsel for the Mayors on October 29, 2015 that he had received word from Mr. Ryan that the issue had been "resolved".

[24] The chambers judge below inferred from the PCC's later order of December 18, 2015 that:

> ….. the Commissioner was satisfied that the two preconditions were met … [A]fter 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.
>
> [At para. 14; emphasis added.]

[25] The independent investigator proceeded to interview relevant witnesses and on November 16, 2015, provided her "preliminary report" to the Mayors. The chambers judge below summarized her findings as follows:

> 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.
>
> 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.
>
> 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. [At paras. 15–17; emphasis added.]

[26] The investigator also found in her report that the Chief Constable had finally realized there could be "serious consequences" to the "activity" and had broken off communications with Officer A and "defriended" her in late June (the month in which the direct Twitter communications had become of a personal nature.) As well, the investigator confirmed that Officer A had refused to be interviewed, but that Officer B had been interviewed. He had told the investigator he understood from both his wife and the Chief Constable that "*no inappropriate communication or contact of any sort*" had taken place between them. The investigator found that the Chief Constable had not fully informed Officer B about what had occurred.

[27] The Mayors provided the Chief Constable with a copy of the report. Subsequently they received the written submissions of counsel on his behalf. After considering same, the Mayors made their final decision. Mayor Desjardins deposed:

> 29. … As the Discipline Authority we (not the Board) decided that we would accept the findings of the independent investigator. We determined that the conduct of Chief Elsner was discreditable conduct which fell below the ethical standard expected of a police chief, was potentially damaging to John Doe and, more generally, was potentially damaging to the reputation of the VicPD and to the reputation and credibility of Chief Elsner himself as a leader of the VicPD and its disciplinary authority. We were of the view that the impugned conduct, while worthy of discipline, was at the low end of the scale and we decided, with the benefit of information from our counsel who had reviewed similar disciplinary issues, that an appropriate censure for the conduct in issue was a written letter of reprimand to be placed on the Petitioner's personnel file. [Emphasis added.]

[28] The Mayors met with the Chief Constable on the morning of December 4, 2015 to inform him of their proposed letter of discipline. He accepted the proposed discipline, although expressing "dissatisfaction" with the investigator's report. He told the Mayors he had been in touch with Officer B "with a view to repairing their relationship going forward", as a result of which advice the Mayors amended their letter of reprimand slightly to reflect that fact[1]. As far as the Mayors were concerned, this was the "final determination" of the matter.

[29] According to affidavit evidence filed on behalf of the Chief Constable, he disagreed with many of the findings and conclusions contained in the investigator's report, which he described as "fundamentally flawed," and he asserted that the Twitter exchange had been accessed illegally by persons unknown. But, since he was assured the report would not be released to the public and he wanted to "get on with my work", he says he decided to accept the Mayors' decision. He instructed his lawyer not to apply for judicial review or otherwise appeal the decision.

The PCC's Order

[30] The matter, however, was not over. On December 4, as a result of media inquiries, the PCC asked the Mayors about the status of the investigation. They told him it had been completed and that they had decided a letter of reprimand was to be placed on the Chief Constable's record. The PCC asked for all records relating to the investigation (relying on s. 175(5) of the *Act*) and a copy of the letter of reprimand.

[31] Two days later, the Chief Constable received a call from the *Vancouver Sun* asking for his comments

on the report that he was "having an affair with a member of another police department". He later met with media personnel and gave his version of the circumstances surrounding his exchange of Twitter messages with Officer A and of the results of the disciplinary investigation. He said he had spoken to Officer B, who "had wanted to know if there was an inappropriate relationship and I had assured him there had not been".

[32] On December 9, 2015, the Victoria City Police Union issued a public statement to the effect that based on the Chief Constable's conduct, which had been found to be improper, the Union had "no confidence" in his ability to lead the Department. The Union wrote to the PCC requesting "an independent Public Trust investigation into these matters."

[33] On December 18, 2015, the PCC ordered two external investigations into Chief Constable Elsner's conduct under s. 93 of the *Act* (reproduced above at para. 9). One of the investigations is irrelevant to this appeal. With respect to *this* matter, his order, which he chose to make public under s. 95(2), provides a lengthy explanation for, *inter alia*, the change from his position in October that an internal disciplinary process would be appropriate, to the position that an external inquiry was now necessary. In the text of the order, the PCC recalled, for example, the telephone meeting with the Mayors and their counsel on August 31, 2015:

> … our meeting took place by teleconference, in which some additional information was provided. <u>At this point, the available information was limited; there is no information available at that time as to the ownership, operations and privacy related to the social media account. There was no information with respect to whether the [Twitter] communications took place while [the Chief Constable was] on duty or off duty, and whether any municipal police equipment was used to facilitate the communications</u>. These considerations were relevant to determining whether this matter involved a disciplinary breach of public trust and whether it should be dealt with under the public trust process under the *Act*. [Emphasis added.]

The PCC described his role with respect to internal disciplinary proceedings as follows:

> 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, <u>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</u>. [Emphasis added.]

[34] The PCC also suggested that "best practices" had not been followed in the investigation:

> In my view, based on the information and course of action provided by counsel for the Co-Chairs at the outset, this matter involved serious allegations. It involved an obvious potential for conflicting and controversial evidence amongst the witnesses and parties. It was my expectation that, at a minimum, all interviews would be audio recorded. Instead, I learned afterward, all the witness interviews were documented by handwritten notes made by the interviewer, and constituted summaries of the evidence. Furthermore, there was no opportunity provided to the witnesses to review the summaries of their interviews and raise any issues, nor a requirement for them to sign a document attesting to the accuracy of their evidence.
>
> My review also revealed that a number of obvious investigative avenues were not explored, some of which could have provided important corroborating and/or contradictory evidence. <u>One material witness refused to cooperate with the investigation or participate in an interview. In my view, there</u>

> were procedural options available that could have been explored to obtain the cooperation of this witness. The effect of the non-participation of an important witness was to leave an evidentiary gap on one side of the ledger, with the result that the accounts of other witnesses may have achieved a greater influence than had this evidence been available in the investigative process. [Emphasis added.]

[35] As well, the PCC said it appeared the Chief Constable had not been fully compliant *during the internal investigation* with the directions of the investigator (a) not to “speak to witnesses related to the investigation” (he had apologized to some witnesses for putting them in a difficult positon); and (b) to tell Officer B *all* that had happened between the Chief Constable and Officer A (the PCC suggested the Chief Constable had provided “false information” to Officer B). Further, the PCC asserted the Chief Constable had not been completely honest in answering the investigator’s questions about what he had told Officer B. (Counsel before us likened these three allegations to charges of obstruction of justice.)

[36] Addressing his change of mind directly, the PCC stated:

> … while I appreciate that I was previously inclined to the view that the matter might be properly addressed through the internal disciplinary process, as this outline makes plain, the conditions sought for that approach were not met. Moreover, the facts of the case have changed significantly, and the information available now is different both in quantity and in character. Because section 93(1) of the *Police Act* speaks to the information that comes to my attention “at any time”, I see it as not only appropriate, but necessary that I act based on my present understanding and view of the matter. [Emphasis added.]

Elsewhere in the order, the PCC emphasized his “oversight role” and the “processes in place… intended to maintain public confidence in the investigation of misconduct and the administration of the police disciplinary process. More broadly, this office is charged with an overarching public duty of ensuring the integrity of the police disciplinary process and fostering public confidence in this process.”

[37] The order advanced *five* allegations of conduct that, the PCC stated, would constitute misconduct (as defined in the *Act*) if substantiated. They were the original ‘charges’ that had been investigated by the Mayors and the three new ‘obstruction’ charges:

> *1. Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department: That Chief Constable Elsner did engage in conduct with the spouse of a member under his command which constituted a conflict of interest and/or a breach of trust, in circumstances in which he knew, or ought to have known, would likely bring discredit to the Victoria Police Department.
>
> 2. *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department: That Chief Constable Elsner did provide misleading information to a member under his command, in circumstances in which he knew, or ought to have known, would likely bring discredit to the Victoria Police Department.
>
> *3. Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department: That Chief Constable Elsner did provide misleading information to an investigator in circumstances in which he knew, or ought to have known, would likely

> bring discredit to the Victoria Police Department.
>
> 4. *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department: That Chief Constable Elsner did contact witnesses during the course of an internal investigation, which he was the subject of, contrary to the direction of the independent investigator and in circumstances which he knew, or ought to have known, would likely bring discredit to the Victoria Police Department.
>
> 5. *Inappropriate Use of Department Equipment and/or Facilities* pursuant to section 77(3)(c)(iv) of the *Police Act*: That Chief Constable Elsner did use police equipment and/or facilities of the Victoria Police Department for purposes unrelated to his duties as a member.

[38] The PCC appointed a retired judge as the discipline authority in respect of the proposed external investigation. His order was silent as to whether the internal investigation was to be considered somehow nullified or whether Mayors' letter of reprimand was to be suspended pending the further investigation.

Judicial Review

[39] On March 14, 2016, the Chief Constable petitioned the Supreme Court of British Columbia for an order quashing the PCC's order. The petition was heard in November 2016, by which time the Chief Constable had resigned from the police force.

The Chambers Judge's Decision on Review

[40] In his reasons (indexed as 2017 BCSC 605), the chambers judge below briefly summarized the facts before him and generally outlined the three "streams" in the *Act* for the processing of complaints. After noting the definition of "internal discipline matter", he observed:

> 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. [At para. 27.]

[41] The judge noted that Mr. Elsner had sought various forms of relief in his amended petition, but had advanced a narrower list of issues through counsel at the hearing. In a footnote, he had also said he would not advance issues raised in the pleading relating to the search of his electronic records and devices or issues relating to the appointment of the external investigator. (At para. 33.) In the result, counsel for Mr. Elsner confined himself in the court below to the following assertions:

> 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.

[42] The chambers judge began his discussion of the issues by listing the information that had been available to the PCC and which formed the "record" for purposes of this judicial review. These records are listed at para. 40 of his reasons. In addition there was "the planned course of action by the Mayors to

proceed by way of internal investigation on or about September 8, 2015" and the fact that Officer B preferred this course. The judge also noted that the PCC had not been provided with the independent investigator's *preliminary* report until about December 4, 2015. (As far as I can determine, his office did not request it until then.)

[43] With respect to the PCC's jurisdiction to order an external investigation, the chambers judge observed that since the PCC's order had been made under the authority of s. 93, it was necessary to interpret that section. He noted the definitions of "misconduct" in s. 77 and "internal discipline matter" in s. 76, observing that there was no "mutual exclusivity" between the two kinds of conduct. (At para. 47.)

[44] On the topic of standard of review, the judge reviewed *Dunsmuir v. New Brunswick* 2008 SCC 9. Mr. Elsner argued that according to para. 62 of *Dunsmuir*, 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". In his submission, this court had in *Florkow* and *Bentley* identified the standard of correctness as applicable to the PCC's decision to order a hearing.

[45] The Attorney General responded that this court's decision in *Florkow* had been "overtaken by subsequent developments in the law", in particular by the Supreme Court of Canada's 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 para. 39; and *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.* 2016 SCC 47 at para. 26. In each of these cases, the Court had concluded that the matters raised were not 'true' questions of jurisdiction. The chambers judge acknowledged that this court had referred in *Florkow* to *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association* 2011 SCC 61, where Mr. Justice Cromwell had observed:

> Recast to side-step the language of "jurisdiction" or "*vires*", these two cases demonstrate that there are provisions in home statutes that tribunals must interpret correctly.
>
> The point is this. The proposition that provisions of a "home statute" are generally reviewable on a reasonableness standard does not trump a more thorough examination of legislative intent when a plausible argument is advanced that a tribunal must interpret a particular provision correctly. In other words, saying that such provisions in "home" statutes are "exceptional" is not an answer to a plausible argument that a particular provision falls outside the "presumption" of reasonableness review and into the "exceptional" category of correctness review. Nor does it assist in determining by what means the "presumption" may be rebutted. [At paras. 98–9.]

[46] The chambers judge considered himself bound by *Florkow* and *Bentley*, both of which had in his analysis concluded that the PCC's jurisdiction to order investigations after the completion of earlier investigations under the *Act*, was to be reviewed on the correctness standard. (At para. 63.) Nevertheless, he also considered whether the question before him was a "true question of jurisdiction", in which case the presumption of reasonableness imposed by the Supreme Court of Canada in cases such as *Edmonton (City)* would be rebutted. On this point, the PCC asserted that he was entitled to deference in interpreting the scope of his authority under Part XI and that his decision should therefore be reviewed on the standard of reasonableness. Mr. Elsner on the other hand characterized the question before the Court as whether the PCC had had the "authority" (a less charged word than "jurisdiction") to institute the external investigation. In

his submission, this question *was* one of true jurisdiction to be reviewed on a correctness standard.

[47] Having stated the parties' positions, the chambers judge concluded, without further discussion, that:

> 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.
>
> 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. [At paras. 70–1; emphasis added.]

[48] Under the heading "Application of the Correctness Standard" the chambers judge noted Mr. Elsner's contention that because the key allegations to be considered in the external review had already proceeded through the internal discipline process, the PCC had "no remaining jurisdiction" to order an external investigation of those allegations. As for s. 93(1) of the *Act*, the petitioner submitted that the phrase "at any time" referred to the time at which the relevant information came to the attention of the PCC. It did not, as the PCC argued, confer an "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." (At para. 74.) Counsel for the Mayors also argued that if the PCC could undertake an external investigation into matters already determined in an internal discipline review, matters that had been investigated would never be finalized and could be open to external investigation indefinitely. This would not be consistent with two of the goals of Part XI, namely finality and efficiency.

[49] For his part, the PCC contended that:

> … given the scheme and object of Part II of the *Act*, the broad wording of s. 93, and the exercise of discretion by the [PCC] that may be involved in determining what constitutes an "internal discipline matter", it is a reasonable interpretation of s. 93 that the [PCC] 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.
>
> [The PCC] 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. [At paras. 75–6; emphasis added.]

[50] Citing the "modern approach" to statutory interpretation (see *Bell ExpressVu Limited Partnership v. Rex* 2002 SCC 42 at para. 26), the chambers judge noted that in addition to allowing the investigation under Division 3 to proceed in the absence of a complaint, s. 93 "may arguably serve" as a way in which the Commissioner may exercise *ex post facto* oversight and remedial power in relation to an internal discipline process under Division 6. The judge said he was prepared to assume for purposes of argument that the PCC was "not powerless" to take further steps when "information, obtained by him via his internal discipline production powers, reviews conduct which, if substantiated, could constitute a disciplinary breach of trust." (At para. 81.)

[51] In this case, new information allegedly obtained by the PCC under s. 175(5) had legitimately raised

conduct concerns that *had not been directly investigated or dealt with by the Mayors*. In particular, although the investigator under Division 6 had commented on the allegations that Mr. Elsner had provided misleading information to her and to Officer B and had misconducted himself by contacting potential witnesses in the investigation, those allegations had not been a part of the internal discipline proceeding and therefore did not form the basis for disciplinary action under Division 6. The judge concluded that the PCC had been "entitled" to order an external investigation into Mr. Elsner's activities, "but only to the extent that the internal investigation and decision by the Mayors did not address the issues that the [PCC] has set out for the External Investigation." (At para. 84; my emphasis.)

Abuse of Process

[52] The chambers judge next turned to the petitioner's submission that even if the *Act* conferred the authority on the PCC to commence a public trust investigation in connection with a matter that had already been determined through the internal discipline process, he was estopped from doing so by promissory estoppel, issue estoppel or abuse of process. Promissory estoppel and issue estoppel were found not to be applicable; that conclusion is not challenged. Abuse of process is of course a wider doctrine and not subject to the technical constraints of finality and mutuality that apply to *res judicata* and other forms of estoppel.

[53] Counsel argued that it was in the interests of justice to apply abuse of process, given the "comprehensive nature" of the internal investigation and the Chief Constable's claim that he had been persuaded to "accept" the findings made by the Mayors on the understanding that the matter would then be concluded. (I note here that the Mayors did not, in law, require his 'consent' to the investigator's report or his 'acceptance' of their recommendation. Nevertheless, it had been open to him to seek judicial review of the Mayors' decision – a right that was not subject to any time limitation: see s. 11 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.)

[54] The chambers judge cited *Toronto (City) v. CUPE Local 79*, 2003 SCC 63 for the proposition that abuse of process may apply in the administrative law context where re-litigation (or in this case, re-investigation) is "unfair to the point [of being] contrary to the interests of justice", "oppressive or vexatious" or "violates the fundamental principles of justice underlying the community's sense of fair play and decency". (See paras. 35–58 of *Toronto (City)*.) He also quoted para. 37 of *Toronto (City)*, where the majority approved the comments of Goudge J.A. in *Canam Enterprises Inc. v. Coles* (2000) 51 O.R. (3d) 481 (C.A.) that:

> 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.* [At para. 55–6 of *Canam*; emphasis by underlining added.]

The majority in *Toronto (City)* went on to observe that abuse of process has been applied where allowing the re-litigation to proceed would violate principles such as judicial economy, consistency, finality and the

integrity of the administration of justice. (At para. 37.)

[55] The chambers judge then concluded that the doctrine applied to the *first and fifth* allegations of misconduct set out in the PCC's order. In his analysis:

> 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.
>
> 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. [At paras. 110–1; emphasis added.]

[56] In the result, the Court quashed the PCC's order dated December 18, 2015 for an external investigation, insofar as it related to the following allegations of misconduct:

> a) whether the petitioner 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 set out in para. 1(a) and if so, whether he did so while on duty.

On Appeal

[57] The PCC appeals the chambers judge's order on the following two grounds:

> 1. The Court identified and applied the wrong standard of review to the PCC's section 93 decision; and
>
> 2. The Court incorrectly applied administrative law abuse of process principles and in any event further erred in principle by failing to address the factors for and against the exercise of the Court's discretion.

[58] In the PCC's submission, the standard of review applicable to the interpretation and application of s. 93 of the *Act* is one of reasonableness rather than correctness, and s. 93 may be reasonably interpreted to "permit the PCC to independently order an external investigation whenever he receives information about conduct which, if substantiated, would constitute a disciplinary breach of trust. A disciplinary breach of trust is not, by definition, an internal discipline matter." Ms. Lovett on behalf of the PCC acknowledged that the chambers judge's application of abuse of process was entirely separate from this first ground. Thus in order to succeed in this court, the PCC must show that both basic conclusions of the chambers judge were erroneous.

[59] Mr. Elsner was not represented and did not appear at the hearing of this appeal, and neither of the respondents addressed the question of abuse of process in their factums. However, it was not suggested that the argument has been abandoned or that we should not address the PCC's second ground of appeal in the usual way.

Analysis

Preliminary Matters

[60] It is obvious that the role of the PCC under Part XI is different from that of most administrative tribunals. As we have seen, the PCC acts as a 'gatekeeper' in ensuring civilian oversight of police complaints. The PCC does not *adjudicate* complaints on their merits, although his or her view of the results of investigations undertaken under Division 3 dictates in some instances whether further investigation or review will be required. (See *Florkow* at para. 8.) The PCC's role is more executive or prosecutorial in nature – deciding whether complaints are admissible, whether investigations should be ordered, to what stage the processes should be pursued, and who should be appointed as "authorities" and "adjudicators" under the Act. It is for those appointees to address the merits of the complaints and to give their reasons therefor, which are protected by "final and binding" privative clauses in Division 3. Nevertheless, in his December order, the PCC did provide a lengthy explanation of why he had invoked s. 93 in this case.

[61] In *Ontario (Energy Board) v. Ontario Power Generation Inc.* 2015 SCC 44, the Court said this about a similar tribunal:

> The mandate of the Board, and similarly situated regulatory tribunals, sets them apart from those tribunals whose function it is to adjudicate individual conflicts between two or more parties. For tribunals tasked with this latter responsibility, "the importance of fairness, real and perceived, weighs more heavily" against tribunal standing: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 344 D.L.R. (4th) 292, at para. 42. [At para. 56.]

From this the PCC submits that where, as here, the tribunal has an investigative role, impartiality and fairness concerns are "muted" – an argument supported by the cases discussed at paras. 72–89 of *Kyle v. Stewart* 2017 BCSC 522. Nevertheless, a "general duty to be fair" still exists in situations such as this: *Nicholson v. Haldimand Norfold (Regional) Police Commissioners* [1979] 1 S.C.R. 311 at 324.

[62] The issue of the PCC's standing was not discussed by the court below, and was touched upon only briefly by counsel in their written arguments in this court. The PCC again cited *Ontario (Energy Board*), in which the Court confirmed that judges have a discretion to permit administrative tribunals to appear in court in connection with the judicial review of their decisions. In the Court's analysis:

> Several considerations argue in favour of a discretionary approach. Notably, because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. For example, a tribunal may be able to explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or to the factual and legal realities of the specialized field in which they work. Submissions of this type may be harder for other parties to present.
>
> Some cases might arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute. [At paras. 53–4.]

[63] In support of his participation, the PCC emphasizes that unless he had opposed the petition, aspects of the application for judicial review would have gone unopposed. In this case, however, the Attorney General

of the Province *also* appeared and made arguments very similar to those of the PCC on standard of review and the interpretation of s. 93. It is not clear why this was thought necessary.

[64] For their part, the Mayors adverted briefly to *Lowe v. Diebolt* 2014 BCCA 280. That case was decided against the PCC on the basis of delay, making it unnecessary for this court to reach a decision on the question of standing. The Court did note, however, that the arguments raised by the PCC had been directed at the substantive correctness of the conclusions of a retired judge under Part XI, had taken an adversarial approach to the member, and had thus raised concerns regarding the PCC's neutrality in complaint proceedings. (At para. 74.)

[65] In my view, some similar concerns regarding neutrality arise in this case. However, the Mayors did not contend that the appeal should be quashed due to lack of standing, and given the nature of the case, it is likely preferable to decide the appeal on its merits.

Standard of Review

[66] I turn, then, to the ever-present question of standard of review. The chambers judge below took the view that he was bound by this court's decisions in *Florkow* and *Bentley* to apply the standard of correctness to the question of whether the PCC had the "jurisdiction to commence a public trust investigation." (At para. 42.) On this point, the judge followed the direction given in *Dunsmuir* that:

> … the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review. [At para. 62.]

The judge also considered, at paras. 64–71, whether the question before him was a "true question of jurisdiction in its own right" and concluded that it was, with the result that the question should be reviewed "applying a correctness lens." (At para. 71.)

[67] It will be recalled that in *Florkow*, this court acknowledged that in *Alberta Teachers*, a majority of the Supreme Court of Canada had suggested that "the time may have come" to reconsider whether the "category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review". The majority went on to suggest that in 'unexceptional' situations, the interpretation by a tribunal of its own statute should be presumed to be a question of statutory interpretation subject to deference on judicial review. (At para. 34, quoted in *Florkow* at para. 34.) Accordingly, this court in *Florkow* applied *both* the correctness and reasonableness standards in ruling that the PCC could not 'leapfrog' or "override" various statutory conditions in Division 3 (including a time limitation) to order a public hearing at the time and in the circumstances he had. (See paras. 54–5.)

[68] This case is somewhat different from *Florkow*, however. The PCC was there asserting an *"inherent" authority* to direct a public hearing, rather than relying on a statutory provision. In the case at bar, the PCC relies on s. 93 (quoted above at para. 9), which on its face permits him to order an investigation "at any time

information comes to his attention that would, if substantiated, constitute misconduct", and "regardless of whether a complaint is made". While I remain of the view that the question of whether an *inherent discretion or jurisdiction* exists is clearly (if not axiomatically) one of jurisdiction, it seems just as clear that the central issue in the case at bar is one of statutory interpretation. (See *Edmonton (City)* at para. 33; *Quebec (Attorney General) v. Guerin* 2017 SCC 42 at para. 34; *Atco Gas and Pipelines Ltd.* at para. 28.) I see no reason why what is now the general rule, or presumption, that a tribunal's interpretation of its home statute is to be reviewed on a standard of reasonableness, should not apply in this case. On this point, then, I disagree respectfully with the chambers judge's conclusion to the contrary.

Reasonableness and Reasons

[69] The next question is whether s. 93, reasonably interpreted, could be invoked in respect of alleged misconduct *after* an internal investigation *into the same conduct* has been concluded. The chambers judge below, applying a standard of correctness, did not answer this question directly, but stated:

> 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.*
>
> 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.
> [At paras. 80–1; emphasis added.]

It may be that his finding of abuse of process implies that he viewed the PCC's position as unreasonable. In any event, having found that the chambers judge applied the incorrect standard, this court must determine whether the PCC's interpretation of s. 93 meets the deferential standard.

[70] I begin with the much-quoted passage from *Dunsmuir* concerning the standard of reasonableness and what underlies it:

> Tribunals have a margin of appreciation with the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> … deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. [At paras. 47–8; emphasis added.]

[71] In *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, Abella J. for the Court cited with approval an article by Professor Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997) 279. Professor Dyzenhaus had explained how reasonableness applies to the reasons of administrative tribunals as follows:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the

> court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc., then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective.
> [Quoted at para. 12 of *N.L.N.U.*; emphasis added.]

Abella J. then continued:

> This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. That was the basis for this Court's new direction in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, where Dickson J. urged restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir*'s conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions" (para. 47).
>
> Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses -- one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at s. 12:5330 and 12:5510). It is a more organic exercise -- the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> [At paras. 13–16; emphasis added.]

See also *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)* 2013 SCC 36 at paras. 52–3; and *Construction Labour Relations Association (Alberta) v. Driver Iron Inc.* 2012 SCC 65 at para. 3.

[72] More recent decisions of the Supreme Court of Canada have debated the role of reasons in articulating the decision-maker's "outcome". In *Canada (Attorney General) v. Igloo Vikski Inc.* 2016 SCC 38, Brown J. stated that the tribunal's reasoning must exhibit "justification, transparency and intelligibility within the decision-making process" and that the "substantive outcome and the reasons, considered together, must

serve the purpose of showing whether the result falls within a range of possible outcomes." (At para. 18; my emphasis.) Côté J. in dissent cautioned that an "indefensible process of reasoning cannot be saved by the mere fact that the outcome itself may be, in the end, an available one." (At para. 56.)

[73] In *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)* 2018 SCC 4, Wagner J. (as he then was) observed:

> These components of the Tribunal's reasoning formed one part of its justification for validating the band's claim under s. 14(1)(b). In my view, its decision as a whole is the appropriate frame of reference for considering "the existence of justification, transparency and intelligibility within the decision-making process": *Dunsmuir*, at para. 47. Meeting those criteria did not require the Tribunal to make an explicit finding on each constituent element or to provide all of the detail that a reviewing court would have preferred. In light of the nature of the process and the materials and submissions before it, the Tribunal's reasons adequately explain the bases of its decision that the band had made out valid grounds for a specific claim based on events in the Colony prior to Confederation. Though sparse on the issue of s. 14(2), the reasons taken as a whole, provide a reviewing court with an adequate account of why that decision was made that serves the purpose of showing whether the result falls within a range of possible outcomes. [At para. 107; emphasis added.]

[74] In *Delta Air Lines v. Lukács* 2018 SCC 2, Chief Justice McLachlin for the majority found that a decision of the Canadian Transportation Agency did not meet the standard of reasonableness. In response to the argument that the Court should "supplement" the Agency's reasons to uphold the decision as reasonable, the Chief Justice observed:

> … while a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided. Additional reasons must supplement and not supplant the analysis of the administrative body. [At para. 24; emphasis added.]

Application to this Case

[75] The Mayors' main argument in this court was not so much a challenge of the PCC's interpretation of his statutory authority as it was an attack on the reasons given by him in the December order, described at paras. 33 to 35 above. Mr. Doyle on behalf of the Mayors focussed first on the PCC's statement that, on August 31, 2015 when he spoke with the Mayors, there was "no information available … as to the ownership, operations and privacy related to the social media account", as to whether the Twitter communications took place when the Chief Constable was on or off duty, or as to whether any VPD equipment had been used to facilitate such communications. In fact, the Mayors submit, this information *was* "available". In any event, the subjects of ownership of the Twitter account and on/off duty communications were investigated and reported on by the Mayors and indeed constituted one of their two mandates. (See para. 21 above.) The investigator made the following findings on this topic in her preliminary report:

> It is the Chief's position that the direct messages are personal communications between two individuals and therefore cannot be considered work related.
>
> As previously stated, this is not a personal Twitter account but rather a Twitter account set up for him as Chief of the VPD. All communications on that Twitter account identify him as Chief of the VPD. When using the public function he is speaking on behalf of the VPD as the Chief. The Chief uses the direct messaging function for work related purposes such as communicating with the media as well as personal messaging. In either case he is identified as the Chief.

> As stated above, Section 8.4 of the policy clearly states that "All uses of social media must meet the ethical standards consistent with the expectations of Department employees." This would include both the public and the direct messaging function.
>
> This is not dissimilar from the department's policy with respect to email which is also a direct message between two individuals. Nevertheless, pursuant to the Computer Network and Electronic Information Policy AC100 Section 3.32, "Sending harassing, threatening, obscene, inappropriate, or objectionable messages via email is prohibited".
>
> I therefore conclude that the Chief improperly used the department's social media account(s). The Twitter messages in issue are clearly inappropriate, do not meet ethical standards, and are potentially damaging to the reputation of both the Chief and the department. I also find that it was inappropriate for the Chief to be engaging in the Twitter activity in question during working hours and/or from departmental devices.

[76] With respect to the PCC's statement that his office had not been entitled to require information or records from the internal discipline authority until the process was complete, the Mayors point out that s. 175(5) of Division 6 does not, on its face at least, restrict the PCC to requesting information only after the internal discipline authority has reached its final decision. (See also s. 177(5).) In any event, the PCC did not request any such information or records and was content to proceed on the basis that the Mayors would inform *the employer/police board* of the "allegations and progress of the investigation". Further, if the PCC had wanted a transcript of the interviews of witnesses to be kept or be recorded, he could also have made that a condition of his "approval" of the internal discipline process. As for the suggestion that the internal investigation was "flawed" by virtue of a failure to record all interviews, there was no evidence that this is normally done in internal investigations under Division 6.

[77] The Mayors go on to note the PCC's statement in the December order that:

> One material witness refused to cooperate with the investigation or participate in an interview. In my view, there were procedural options available that could have been explored to obtain the cooperation of this witness.

Presumably, this is a reference to Officer A, who refused to be questioned or to participate in the internal investigation. Ms. Lovett on behalf of the PCC suggested in this court that if the external investigation proceeds, the PCC expects that Officer A's commanding officer would be able to exert pressure on her to change her mind and provide information concerning the events in question. With respect, the suggestion that Officer A's supervisor should pressure an officer in this manner would seem highly objectionable, given the personal and privacy interests at stake. On the other hand, s. 101 of the *Act* might apply to her as a "member" so that an investigating officer could require her to answer questions or provide a written statement.

[78] Finally, with respect to the PCC's statement that the conditions he had imposed for the internal disciplinary process to take place were not met, and that the "facts of the case have changed significantly, and the information available now is different both in quantity and in character", Mr. Doyle on behalf of the Mayors argued again that this is simply not the case. In his submission, the only "new facts" do *not* relate to the two 'charges' that were investigated in that process; rather, the allegations relate to the Chief Constable's conduct during the investigation itself – his speaking to some other witnesses when he had been told not to,

his failure to be forthcoming in what he told Officer B and his misleading the internal investigator on that point. These allegations are the subjects of the three 'new' charges described in the PCC's December order.

[79] I share some of Mr. Doyle's skepticism concerning the rationales given by the PCC in his order for his change of position. In particular, the 'revelation' that the Twitter exchange had occurred while the Chief Constable (and presumably Officer A) were on duty and that the Chief Constable had used the social media accounts provided to him by the VPD could hardly have been unexpected. The suggestion that his use of the VPD's Twitter account 'changed the nature' of his conduct is, with respect, dubious. These issues were in any event purely secondary to the real substance of the Chief Constable's alleged misconduct (as defined.) If the only misbehaviour alleged had been that he had used the VPD's Twitter account for some personal purpose, the convening of an external investigation would be an extreme over-reaction.

[80] Bearing in mind, however, the direction given in *N.L.N.U.* that the review of reasons is an "organic exercise" and that the reasons "must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes", one can infer from the December order that the PCC was of the view from the beginning that even if he 'permitted' the matter of the Chief Constable's conduct to proceed through an internal investigation, it would still be open to the PCC to order an external investigation under s. 93. As counsel for the PCC suggested in this court, the external investigation was seen as just "the next step" in the process of civilian oversight for which the PCC is responsible.

[81] I agree that it might reasonably be expected that on occasion, what had originally seemed an internal discipline matter might turn out to be, or become, a matter that does "affect the public" (see the definition of "internal discipline matter" in s. 76) or that taken together with new allegations may be likely to bring discredit on the police department and therefore constitute "discreditable conduct" (see the definition of "public trust offence" in s. 77.) The idea of 'overlap' between matters of internal discipline and public trust complaints (a term used in the *Act* prior to the 2007 amendments) was contemplated by Mr. Wood in his *2007 Report*. He discussed a possibility that is the opposite of the case at bar – that a public trust complaint might be appropriately processed as an internal matter. At para. 323 of the report, he stated that in preparing his recommendations, he had received:

> … strong submissions … by police management whose viewpoint is that the maintenance of good discipline and efficient police services requires that chief constables have the ability, through an internal discipline process, based upon "normal labour law principles", to deal with conduct matters in which the public is not involved. The debate between these two points of view has tended to focus, at least from the union perspective, on ambiguities surrounding the definitions of both an internal discipline complaint and a public trust default found in s. 46(1). …. However, in addition to problems stemming from the actual definitions in s. 46(1), there is the underlying policy decision, reflected in paragraph (b) of the current definition of an internal discipline complaint, <u>that in certain circumstances what is properly defined as a public trust complaint may be processed under Division 6</u>. Those who hold the union's viewpoint see this as undermining the integrity of the "three stream model" reflected by Divisions 4 [Public Trust Complaints], 5 and 6 of the present *Act*.
>
> 324 I am not persuaded that the provision of s. 64(5), under which a public trust default may be processed as an internal complaint, undermine anything more than <u>an overly-rigid and simplistic theoretical model of the three types of complaints described in Part IX and the different "streams" under which they are processed.</u> …. <u>there is nothing earth shattering about the notion of a public trust default being processed under Division 6. If in fact a complaint about the conduct in question is never formally lodged … neither is there anything</u>

> untoward about a public trust complaint, which has been properly withdrawn by the complainant, being processed under Division 6 [Internal Discipline Complaints] …
>
> 325 Assuming that the recommended increased oversight powers of the police complaint commissioner are implemented, and the police complaint commissioner has no reason either to order an investigation or, if an investigation has already been completed, to order a public review or a public hearing, in either case there may still be a legitimate basis upon which management will want to review the conduct of the officer(s) in question. I see no reason why management should be deprived of the ability to do so, nor any reasons why the consent of the police complaint commissioner should be a prerequisite to such an internal review. [Emphasis added.]

[82] I also note that under the *Act* prior to the 2010 amendments, Division 4 (dealing with public trust complaints) contained s. 55(3), which stated:

> Despite any other provision of this Act, the Police Complaint Commissioner may order an investigation into the conduct of a Municipal Constable, Chief Constable or Deputy Chief Constable, whether or not a record of complaint has been lodged.

Division 6 at the time, dealing with internal discipline complaints, stated in s. 64 that:

> (5) If a municipal constable, chief constable or deputy chief constable is alleged to have committed an act or to have omitted to do an act and the act or omission would, if proved, constitute a disciplinary default, the discipline authority may deal with the allegation as a matter of internal discipline under this Division if
>
> (a) the police complaint commissioner has not, under section 54(6)(a) or (8) or 55(3), ordered an investigation into the act or omission and has not arranged a public hearing in respect of that act or omission, and
>
> (b) one or more of the following applies to the allegation:
>
> (i) the act or omissions does not constitute a public trust default;
>
> (ii) a record of complaint was not lodged under section 52 in respect of the act or omission;
>
> (iii) a record of complaint was lodged under section 52 in respect of the act or omission but the complainant has filed a notice of withdrawal under section 52.2 and the discipline authority has ceased to process the complaint under Division 4.
>
> (6) On request of the police complaint commissioner, a discipline authority must provide any additional information about an internal discipline complaint that is in the possession or control of the municipal police department to which the complaint relates.
>
> (7) If the police complaint commissioner concludes on the basis of information received that an internal discipline complaint should be dealt with as a public trust complaint, the police complaint commissioner may order a further investigation, a public hearing or both. [Emphasis added.]

At para. 327 of his *Report*, Mr. Wood suggested that given the Commissioner's authority under s. 55(3), s. 64(7) was "redundant" and could be eliminated in the legislation he was recommending. Had that recommendation not been made, this appeal might have been avoided.

[83] In my view, these circumstances, together with the plain wording of s. 93, support the PCC's interpretation of s. 93 as permitting him to order an external investigation into matters that have already been the subject of an internal discipline proceeding under Division 6. Thus I conclude this interpretation did fall within a "range of possible acceptable outcomes which are defensible" *in respect of the law*. (*Dunsmuir*, at

para. 47; my emphasis.) This conclusion is buttressed in this instance by the fact that it would be difficult for the PCC to try to keep the three 'new' charges in a compartment separate from the other two in any investigation. The five matters are interrelated and it was not unreasonable for the PCC to want to have the flexibility to have them all investigated without breaching legal boundaries.

Abuse of Process

[84] Whether the decision to order the external investigation was reasonably defensible "*in respect of the facts*" is more difficult. Since this issue overlaps to a considerable degree with the issue of whether the doctrine of abuse of process was correctly applied in this case, I propose to deal with them together.

[85] As mentioned earlier, neither of the respondents addressed abuse of process in their written or oral submissions in this court. For his part, the PCC submitted that the doctrine applies only to prevent the "re-litigation by a losing party in one adjudicative forum, of issues previously determined by a court or a quasi-judicial tribunal in an entirely different forum." (My emphasis.) His factum continued:

> Such re-litigation may result in the misuse of either the court's or the tribunal's processes *by a litigant*. In contrast, the PCC is not a "litigant" or a losing party in a court or a tribunal proceeding, the Respondent was not a litigant or a winning party in such a proceeding, and the PCC was not a party to the Mayors' decision-making. The Mayors' decision did not involve litigation or any *lis inter partes*. It was a product of an investigative, not adjudicative, process. That process was procedurally flawed and resulted in a negotiated "disciplinary" outcome based on a misguided belief that it would remain confidential and that the investigation report and letter of reprimand would be immune from any scrutiny. Finality doctrines simply have no application in this context.

[86] I cannot agree that abuse of process and its related doctrines are restricted to a purely "litigation" context involving a *lis inter partes*. In *Danyluk v. Aynsworth Technologies* 2001 SCC 44, the Court recounted that the common law rules developed to prevent abuses of the decision-making process had been extended in Canada to administrative agencies as early as the mid-1800s. (At para. 22, citing D.J. Lange, *The Doctrine of Res Judicata in Canada* (2000) at p. 94 *et seq*.) More recently, in *Toronto (City)*, Arbour J. for the Court adopted a wide view of the term "adjudicative process" that had been explained by Mr. Justice Doherty at (2001) 55 O.R. (3d) 541 (C.A.) In his words:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals 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 the various processes 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. [At para. 74; original emphasis added.]

[87] Arbour J. went on in *Toronto (City)* to note that a common justification for the application of *res judicata* is that a party should not be "twice vexed in the same cause." (At para. 50.) She suggested, however, that courts should focus on the "process" rather than on the interests of a party, and that the doctrine of abuse of process "concentrates on the integrity of the adjudicative process." (At para. 51.) In her

analysis:

> It is … apparent that from the system's point of view, re-litigation carries serious detrimental effects and should be avoided unless the circumstances dictate that re-litigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where re-litigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original results should not be binding in the new context. This was stated unequivocally by this court in [*Danyluk v. Aynsworth Technologies Inc.* 2001 SCC 44] at para. 80. [At para. 52; emphasis added.]

[88] In 2011, in *British Columbia (Workers Compensation Board) v. Figliola* 2011 SCC 52, a majority of the Court, *per* Abella J., stated that abuse of process has as its goal "the protection of the fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings", as had been explained in *Toronto (City).* Abella J. continued:

> At their heart, the foregoing doctrines exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland*, at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:
>
> - It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).
> - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).
> - The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).
> - Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).
> - Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).
>
> These are the principles which underlie s. 27(1)(f). Singly and together, they are a rebuke to the theory that access to justice means serial access to multiple forums, or that more adjudication necessarily means more justice.
>
> Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them. [At paras. 34–6; emphasis added.]

(See also *Intact Insurance Co. v. Federation Insurance Co. of Canada* 2017 ONCA 73 at paras. 28–30; and

Bajwa v. Veterinary Medical Association (British Columbia) 2011 BCCA 265 at paras. 32–40.)

[89] Last, I note *Penner v. Niagara (Regional Police Services Board)* 2013 SCC 19, in which the majority confirmed, citing *Danyluk*, that issue estoppel applies to decisions of administrative tribunals. Cromwell and Karakatsanis JJ. for the majority observed that the "residual discretion" of the doctrine:

> … requires the courts to take account the range and diversity of structures, mandates and procedures of administrative decision; however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme. As highlighted in this Court's jurisprudence, particularly since *Dunsmuir* …, legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts. However, as this Court said in *Danyluk*, at para. 67: "The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case." [At para. 31; emphasis added.]

After noting the complexity of police oversight, the Court concluded that it was neither necessary nor desirable to create a rule of public policy excluding police disciplinary hearings from the application of issue estoppel. (At para. 35.)

[90] Applying the foregoing to the facts in *Penner*, the majority ruled that the court of appeal below had "failed to focus on fairness" and in particular, had "failed to fully analyze the fairness of using the results of the [disciplinary] process to preclude the [plaintiff's] civil claims, having regard to the nature and scope of the earlier proceedings and the parties' reasonable expectations in relation to them." (At para. 49.) There was nothing in the *Police Act* that could have given rise to an expectation that the disciplinary hearing would be conclusive of the plaintiff's legal rights against the officers; nor did the different onuses of proof give rise to a reasonable expectation on the part of the officers that the result of the hearing under the *Police Act* would be determinative of the outcome of a civil action. In the result, the majority ruled that the Court of Appeal's application of issue estoppel in the case had been "fundamentally unfair".

[91] Unfortunately, we do not have the benefit of a full explanation from the chambers judge of his reasons for applying abuse of process in the case at bar. He did quote, however, the passage from *Toronto (City)*, in which it was said that abuse of process is applied "where allowing the litigation to proceed would … violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice." These principles are of course relevant to this case, although we are here dealing with a 're-investigation' rather than re-litigation, where abuse of process has more resonance. Judicial economy does resonate here, in that an investigation has already been held and the internal authority found that the Chief Constable had engaged in "discreditable" conduct. The objective of finality would obviously be served by leaving these findings intact, although here the time and expense of another investigation would not be saved given the existence of the new charges.

[92] There are also personal and privacy interests involved. One can only imagine the effects on Officers A and B and their family of an external investigation which will take place in the public eye, at least in part. On the other hand, an investigation will proceed in any event in respect of the three 'new' charges, and as already noted, it would be difficult to restrict the process to those three. Given that the matter – with

emphasis on the fact that Officer B was under the Chief Constable's command – has been publicized, the reputation of the administration of justice may require that all five charges by dealt with as part and parcel of an entire course of conduct and in a more 'transparent' manner.

[93] At the end of the day, this was a policy decision for the PCC. Obviously, it required the balancing of several nuanced and complex considerations. When the matter first came to his attention, he was willing to treat it as an internal discipline matter and to follow Officer B's preference. He now sees the five issues as engaging the public trust and warranting an external investigation. Not without some hesitation, I conclude that the Commissioner's decision lay within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law." Further, although finality and economy are obviously not served by the convening of another investigation, the circumstances do not in my opinion descend to the level of abuse of process. On this point, I again respectfully disagree with the chambers judge.

[94] I would allow the appeal. I add one thing, however. The Chief Constable resigned his post in May of 2017. I suggest with respect that the PCC might reconsider whether it is still necessary or in the public interest to spend public funds at this late date on investigating what appears to have been an entirely consensual and short-lived flirtation via Twitter involving a chief constable who is no longer employed by the VPD.

Disposition

[95] In the result, I would allow the appeal and set aside the chambers judge's order. If counsel wish to speak to the matters of the sealing order or publication bans, they may do so by written submissions. Unless counsel wish to speak to costs, I would order that the parties bear their own costs.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

I AGREE:

"The Honourable Mr. Justice Fitch"

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[1] I do not regard this change to make the letter more accurate as meaning that the Mayors and Chief Constable reached a "negotiated settlement", or that the contents of the (final) letter were "uncertain", as counsel for the PCC asserted in this court.